

# SETTLING FOR SETTLEMENT: THE EUROPEAN COMMISSION'S NEW CARTEL SETTLEMENT PROCEDURE

## I. INTRODUCTION

Cartels, or agreements between competitors that restrain competition, have long been a problem for free-market economies. In *The Wealth of Nations*, Adam Smith observed that “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>1</sup> In Smith’s lifetime, there were no laws against such conspiracies.<sup>2</sup> Now, cartels are considered “the supreme evil of antitrust.”<sup>3</sup> Traditionally, the United States has led the way in enforcing antitrust laws.<sup>4</sup> But recently, European regulators have reinvigorated efforts against anticompetitive cartel behavior. For instance, the European Commission recently fined a group of marine hose makers \$173 million for an international conspiracy to rig bids, allocate markets, and fix prices on their products.<sup>5</sup>

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1. Adam Smith Institute, Adam Smith Quotes, <http://www.adamsmith.org/adam-smith-quotes/> (last visited Apr. 20, 2010) (quoting 4 ADAM SMITH, *THE WEALTH OF NATIONS* 145 (1776)).

2. John Steele Gordon, *Contrivances to Raise Prices*, BARRON’S, Dec. 31, 2007, [http://online.barrons.com/article/SB119889902533357267.html?mod=googlenews\\_barrons](http://online.barrons.com/article/SB119889902533357267.html?mod=googlenews_barrons).

3. Thomas O. Barnett, *Seven Steps to Better Cartel Enforcement*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 141, 141 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2007) (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)).

4. See, e.g., Donald C. Klawiter, *US Corporate Leniency After the Blockbuster Cartels: Are We Entering a New Era?*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 489 (pointing out various jurisdictions that have imitated United States antitrust policies).

5. Christine Caulfield, *EC Fines Marine Hose Makers \$173M in Cartel Probe*, LAW 360, Jan. 28, 2009, [http://competition.law360.com/print\\_article/84907](http://competition.law360.com/print_article/84907); Press Release, European Comm’n, Antitrust: Commission Fines Marine Hose Producers €131 Million for Market Sharing and Price-Fixing Cartel (Jan. 28, 2009), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/09/137&guiLanguage=de>. The marine hose case involved an agreement between five firms: Japan’s Bridgestone Corp. (fined \$76.8 million); Sweden’s Trelleborg (fined \$32.1 million); Britain’s Dunlop Oil and Marine (a unit of Germany’s Continental Group AG) (fined \$23.6 million); Italy’s Parker ITR SRL (fined \$33.5 million); and Italy’s Manuli Rubber Industries SPA (fined \$6.4 million). According to European Competition Commissioner, Neelie Kroes, this cartel lasted twenty years and “added to the prices consumers paid for their oil deliveries.” *Id.* The EC said that Bridgestone and Parker received the harshest penalties because they led the cartel. The Japanese company, Yokohama Rubber Co., also participated in the cartel, but won full immunity from fines through the Commission’s leniency program, which is discussed below. *Id.*

High profile cases, like the marine hose prosecution, reflect Europe's effort, beginning in the early 2000s, to modernize antitrust enforcement, especially by concentrating on combating cartels.<sup>6</sup> But even with competition regulation, secret agreements to illegally control prices, markets, and bids remain as problematic as ever in the European Common Market. Such conduct constitutes "the most egregious violations of competition law which injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others."<sup>7</sup>

As the European Union continues to crack down on cartel activity using serious penalties to punish and deter such behavior,<sup>8</sup> businesses in the European market<sup>9</sup> must understand and follow European competition rules in order to avoid or minimize fines resulting from a European

6. See Mario Monti, *The Modernisation of EC Antitrust Policy*, in EUROPEAN COMPETITION LAW ANNUAL 2000 3, 5 (Claus Dieter Ehlermann & Isabela Atanasiu eds., 2001).

7. Julian M. Joshua, *Leniency in U.S. and EU Cartel Cases*, 14 ANTITRUST 19, 19 (2000) (internal quotation marks omitted). To understand why cartels form, it is helpful to look to basic economic principles. Producers have an incentive to form cartels because doing so reduces competition and allows them to earn higher profits than if perfect competition existed. DAVID BESANKO & RONALD R. BRAEUTIGAM, MICROECONOMICS 433 (2d ed. 2005). Cartel behavior is harmful to the economy because it restrains the market, preventing efficient allocation of resources. Economists agree that when a market operates freely, firms will produce their most efficient level of output, *see id.* at 186 (explaining why "competition breeds efficiency"), and consumers will pay the most efficient price, *id.* at 356–57 (explaining that the efficient allocation of resources "maximizes net economic benefits"). But if producers form a cartel in a market, they will collusively determine the price and output, thereby preventing market forces from operating. *Id.* at 430. Thus, deadweight loss results, reducing total economic benefit. *Id.* Deadweight loss is "the difference between the net economic benefit that would arise if the market were perfectly competitive and the net economic benefit attained at the monopoly equilibrium." *Id.* Consumers are harmed because prices remain artificially high. *Id.* Significantly, cartels can also act as barriers to entry for other producers. *Id.* at 435.

Moreover, cartelists themselves waste resources by spending time, money, and energy to organizing, avoiding detection, and keeping others out of the group. These resources would be better spent on producing more goods and services for consumption. VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 12 (Hart Publishing 2007) (1988).

8. The role of government is especially important in the current financial crisis. The European Commission has indicated that competition enforcement will remain vigorous during the current recession. *See* European Commission, *The Contribution of Competition Policy to Economic Recovery*, <http://ec.europa.eu/competition/recovery/index.html> (last visited Apr. 21, 2010) (noting that competition rules will be enforced during the crisis to protect healthy companies).

9. Article 101 of the Consolidated Version of the Treaty on the Functioning of the European Union extends coverage of competition policy to companies whose agreements "may affect trade between Member States." Consolidated Version of the Treaty on the Functioning of the European Union art. 101, May 9, 2008, 2008 O.J. (C 115) 47, *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF> [hereinafter Consolidated Treaty].

Note that the articles on competition law were renumbered with the entry into force of the Lisbon Treaty in December 2009. Article 81 is now article 101, and article 82 is now article 102. European Commission, *Changes After the Entry Into Force of the Treaty of Lisbon*, *available at* <http://ec.europa.eu/competition/information/treaty.html> (last visited Apr. 21, 2010).

Commission investigation into their practices.<sup>10</sup> To assist firms with compliance, antitrust regulators have developed mutually beneficial leniency (or amnesty) programs. Leniency allows regulators to offer immunity to a violator of article 101 in exchange for disclosing information on the cartel and cooperating with the investigation. Leniency programs not only benefit cooperative firms, but they also promote the regulators' goal of deterring anticompetitive behavior by increasing the risk of cartel activity and by making cooperation and compliance more attractive.<sup>11</sup>

In accordance with the goal of deterrence and to expedite resolution of violations charges, in June 2008, the European Commission's antitrust section, the Directorate General of Competition ("DG Comp"), introduced a new settlement procedure for cartels.<sup>12</sup> The settlement program, offered at the DG Comp's discretion at the end of an investigation, is distinct from the leniency program. The settlement procedure provides cartel members the chance to assess adverse evidence and forgo litigation by settling their cases, in exchange for a ten percent reduction in fines otherwise imposed.<sup>13</sup> The procedure aims to free up resources and save time by providing the DG Comp with a shortened way of resolving clear violations.<sup>14</sup> DG Comp prosecutors hope to be able to open new investigations in the time they save. Overall, this goal is based on the theory that a more efficient DG Comp will reinforce deterrence and thereby promote market compliance with antitrust laws.<sup>15</sup>

But will the new settlement procedure really deter cartel formation and operation? This Note will explore the background, scope, and effectiveness of the European Commission's antitrust regulatory powers,

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10. KORAH, *supra* note 7, at 37–38. The European Commission's competence extends to "undertakings that have intentionally or negligently infringed the competition rules . . . . Ignorance of the law is no excuse . . . ." *Id.*

11. *See generally* Klawiter, *supra* note 4, at 489–92 (discussing the goals and mechanics of the U.S. leniency program).

12. Commission Regulation 622/2008, 2008 O.J. (L 171) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:171:0003:0005:en:PDF>.

13. Press Release, European Comm'n, Antitrust: Commission Adopts First Cartel Settlement Decision—Questions & Answers, 1–2 (May 19, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/10/201&format=HTML&aged=0&language=EN&guiLanguage=en> (explaining that the reduction is calculated as ten percent of the guideline fine).

14. Commission Regulation 622/2008, *supra* note 12, at 3.

15. *See generally* Ann O'Brien, Senior Counsel to the Deputy Assistant Attorney Gen. for Criminal Enforcement, U.S. Dep't of Justice Antitrust Div., Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions 6–7 (June 6, 2008), available at <http://www.usdoj.gov/atr/public/speeches/235598.htm> (explaining goals of cartel settlement).

especially its power to regulate cartels.<sup>16</sup> This includes a discussion of the DG Comp's regulatory toolkit, including potential fines, the amnesty program, and the settlement procedure introduced in June of 2008. The Note predicts that the new settlement procedure, which has only been successfully used once since its inception,<sup>17</sup> will not make the European Commission a more efficient regulator. Therefore, the new procedure will not achieve its goal of promoting deterrence. The Note concludes by suggesting alternate methods of achieving the DG Comp's goals.

## II. BACKGROUND: EUROPEAN COMMISSION ANTITRUST AUTHORITY AND JURISDICTION

### A. *The European Commission as an Antitrust Enforcer*

The European Commission, the law-making body of the EU,<sup>18</sup> is empowered with broad jurisdiction<sup>19</sup> by the Treaty on the Functioning of

16. The European Commission also regulates antitrust violations for abuse of dominant market position. See KORAH, *supra* note 7, at 133–212; Consolidated Treaty, *supra* note 9, art. 102 (formerly Treaty of the European Union art. 82). The most well known example of the Commission's work in this area has been its recent prosecution of Microsoft. See, e.g., Kevin J. O'Brien, *Questions About Timing of Europe's New Microsoft Inquiry*, N.Y. TIMES, Jan. 19, 2009, [http://www.nytimes.com/2009/01/20/technology/20soft.html?\\_r=1&ref=business](http://www.nytimes.com/2009/01/20/technology/20soft.html?_r=1&ref=business). However, dominant market position violations are beyond the scope of this note.

17. Press Release, European Comm'n, Antitrust: Commission Fines DRAM Producers €331 Million for Price Cartel; Reaches First Settlement in a Cartel Case (May 19, 2010), <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/10/586>.

18. When the European Economic Community was formed in 1958, it included only six Member States. KORAH, *supra* note 7, at 2. Today there are twenty-seven Member States. See Member States of the EU, [http://europa.eu/abc/european\\_countries/eu\\_members/index\\_en.htm](http://europa.eu/abc/european_countries/eu_members/index_en.htm) (last visited Apr. 21, 2010). The European Commission is the EU body that “uphold[s] the interests of the Union as a whole.” EU Institutions and Other Bodies, [http://europa.eu/institutions/index\\_en.htm](http://europa.eu/institutions/index_en.htm) (last visited Apr. 21, 2010). Each Member State appoints one member to the Commission, each of whom is required to act entirely independently of their national interests. KORAH, *supra* note 7, at 26.

19. The European Commission's broad jurisdiction is evidenced by the Court of Justice of the European Communities (“ECJ”) decision in the *Wood Pulp* case. There, the ECJ adopted the traditional territorial theory of international law, holding “that if a contract made by non[-EU] nationals outside the Common Market is implemented within [the EU], the Commission is competent [to prosecute].” KORAH, *supra* note 7, at 35.

Indeed, the *Wood Pulp* Court's “implementation theory” may have expanded the breadth of jurisdiction further than the “effects doctrine,” which traditionally limited jurisdiction to cases only where anticompetitive effects are reasonably foreseen to be immediate and substantial. *Id.*

Though the European Commission has broad jurisdiction, it is not the only regulator within the Common Market. Each member state in the EU has its own antitrust regulators and policy, but is required to enforce the Consolidated Treaty provision on cartels. See KORAH, *supra* note 7, at 243; Consolidated Treaty, *supra* note 9, art. 101. National competition authorities are charged with the duty of enforcing national competition laws, which mirror article 101 to a large extent. KORAH, *supra* note 7, at 245. In cases where there may be an effect on trade between Member States, national enforcement authorities and courts that apply national competition law to such conduct must also be

the European Union to regulate anticompetitive activity.<sup>20</sup> Specifically, article 101 of the Treaty<sup>21</sup> empowers the European Commission to bring enforcement actions against cartels that affect trade between Member States.<sup>22</sup> The DG Comp is the bureau of the European Commission that is dedicated to enforcing European competition laws,<sup>23</sup> and it is headed by a Commissioner.<sup>24</sup> It has “the authority to issue implementing regulations and decisions that establish law.”<sup>25</sup> In further accordance with article 101 of the Treaty, the DG Comp also prosecutes collusive practices considered inconsistent with the principles of the Common Market.<sup>26</sup> This includes

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consistent with article 101. *Id.* at 246. This requirement is recited in article 3 of Regulation 1/2003, which prescribes uniform application throughout the Member States. *Id.* (citing Council Regulation 1/2003, art. 3, 2003 O.J. (L 1) 1, 8 (EC)). But national authorities can lose their powers to enforce article 101 if the DG Comp decides to take up a case. *Id.* at 249. However, this only occurs when multiple Member States are affected by an infringement. *Id.* at 249–50.

20. Consolidated Treaty, *supra* note 9, arts. 101, 102. Regulation of anticompetitive activity is crucial to achieving the goal of improving living conditions and expanding the goal of a European free market economy unimpeded by national boundaries. KORAH, *supra* note 7, at 8 (explaining the benefits of an integrated Common Market). A free market system provides the advantage of encouraging firms to efficiently produce what people want to buy, such that the “consumer is king.” *Id.* at 11. As the European Market has grown and thrived, the European Community Treaty removed customs barriers and quotas. *Id.* at 3.

But it should be noted that promotion of competition is not the exclusive goal of the European Common Market. Rather, market integration has been a primary goal, and has sometimes led to reduced competition. *See id.* at 8.

21. Article 101 of the Consolidated Treaty addresses collusion that restricts competition. Article 101(1) prohibits, “as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market . . . .” Consolidated Treaty, *supra* note 9, art. 101(1); *see also* KORAH, *supra* note 7, at 4 (quoting article 81(1)). Article 101(2) provides that agreements that infringe article 101 are void, and article 101(3) provides some exceptions. KORAH, *supra* note 7, at 5. Article 101(1) agreements are the focus of this Note.

22. KORAH, *supra* note 7, at 66 (“The condition that trade between Member States be affected is easily satisfied.”).

23. European Commission—Directorate General for Competition, Mission Statement, [http://ec.europa.eu/dgs/competition/index\\_en.htm](http://ec.europa.eu/dgs/competition/index_en.htm) (last visited Apr. 21, 2010). European Commission regulations are similar to administrative regulations in the United States. RALPH H. FOLSOM, EUROPEAN UNION LAW IN A NUTSHELL 38 (5th ed. 2005).

24. FOLSOM, *supra* note 23, at 66. Commissioners are charged with a duty to the European Union, and not to their home country. *Id.* The outgoing Commissioner of the DG Comp is Dutch national Neelie Kroes (her replacement, Joaquin Almunia took office in January 2010). Commissioner Kroes has stated that: “[m]y job is about acting as a referee [of the effort to preserve the Single Market]. If we think of the European economy as a football match: I set and enforce the rules of the game, in conjunction with the other Commissioners. We make sure it is a fair match, and that there is punishment for people and companies that break the rules and spoil the game for others.” European Commissioner for Competition—Neelie Kroes—What I Do, [http://ec.europa.eu/archives/commission\\_2004-2009/kroes/whatido\\_en.html](http://ec.europa.eu/archives/commission_2004-2009/kroes/whatido_en.html) (last visited Apr. 21, 2010).

25. FOLSOM, *supra* note 23, at 64–65 (explaining the Commission’s pivotal law-making role).

26. KORAH, *supra* note 7, at 3 (“Article 81 forbids, as incompatible with the Common Market, collusion between undertakings . . .”). Article 102 (formerly article 82), which forbids the “abusive

agreements which, by their object or effect, prevent, restrict, or distort competition within the Common Market.<sup>27</sup> Article 101 has been used to challenge “joint buying, joint selling, joint ventures and strategic alliances, and data exchanges” between horizontal competitors, as well as activities between vertically related suppliers, manufacturers, and franchisees or distributors.<sup>28</sup> As in the United States, these prosecutions begin with detailed investigations into a company’s behavior.<sup>29</sup>

### *B. Fines and Leniency: Sticks and Carrots of Enforcement*

One way the DG Comp enforces anti-cartel policies is by using the “stick” of heavy fines against high profile corporations.<sup>30</sup> The revenue

exploitation of a dominant position,” is the other key competition law of the EC. Conduct may violate both. *Id.* However, Article 82 is beyond the scope of this Note.

27. Consolidated Treaty, *supra* note 9, art. 101; *see also* KORAH, *supra* note 7, at 44 (quoting then Article 81(1)). Article 101(1) continues by prohibiting “in particular those [agreements] which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; [and] (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.” Consolidated Treaty, *supra* note 9, art. 101(1).

28. FOLSOM, *supra* note 23, at 302.

29. The DG Comp has authority under Regulation 1/2003 to conduct investigations of economic sectors or of individual business and trade associations. *Id.* at 304. These investigations have several steps. First, many begin with notorious “dawn raids” during which the Commission investigators gain hostile access to a business premises to search documents for signs of article 101 violations. *Id.* at 305. Second, businesses under investigation have some right to notice and hearing, but do not have access to the case file. *Id.* Failure to comply with the investigation subjects the corporation to civil penalties, but not its board of directors personally. *Id.* at 306. Third, “[b]efore deciding that a competition law breach has occurred, the Commission issues a statement of ‘objections.’” *Id.* at 309. This document must set forth all the facts that the Commission will rely on in prosecuting the case. *Id.* The parties in question then may request a hearing. *Id.* These hearings are private and the Commission only needs to disclose documents it will use and those which are needed for creating a defense. *Id.* The Commission does not make public the identities of the targets of statements of objections. *Id.* Nonetheless the information often is leaked or the parties admit that they are targets. A recent example occurred in December 2008 when ABB Ltd., Areva SA, Toshiba Corp., and Siemens AG told the press about their involvement with the Commission’s investigation into the electronic transformers manufacturers. Brendan Pierson, *EU Charges Toshiba, Siemens, ABB In Cartel Probe*, LAW 360, Dec. 11, 2008, [http://competition.law360.com/print\\_article/79882](http://competition.law360.com/print_article/79882). The final step is when the Commission renders an enforcement decision, which is made public. FOLSOM, *supra* note 23, at 310.

30. In recent decisions, the Commission has levied, and the Court has upheld, substantial fines against firms that violate antitrust law. FOLSOM, *supra* note 23, at 310–11. For example, in 2001 the DG Comp imposed a judgment of \$850 million on a cartel in the vitamins industry. *Id.* Also, “[i]n January, February and April [of 2007] the commission imposed heavy fines on the members of three large cartels: the ‘gas insulated switchgear cartel’, ‘the lift cartel’ and the ‘Dutch beer cartel’, totaling 750 million, 990 million and 273 million euros respectively” (which is more than €2 billion total). Michel Debroux & Janet L. McDavid, *EU Targets Cartels*, NAT’L L.J., June 18, 2007, at 1. More

from these fines helps offset the dues that member states in the EU regularly pay. Large fines against high-profile firms may enhance the DG Comp's reputation, but no part of the money is used to finance the institution of the DG Comp.<sup>31</sup> For this reason, from an enforcement perspective, well-publicized fines are most useful because of their deterrent effect.<sup>32</sup>

For violations of article 101, the Commission has the power to impose fines of up to ten percent of an infringing firm's prior year's turnover.<sup>33</sup> If the cartel's infringement has relatively small effects, the amount of the fine may be reduced in accordance with the doctrine of proportionality.<sup>34</sup> Conversely, aggravating factors may increase the fine. For example, firms that had long participated in a cartel and firms with previous antitrust violations are subject to a higher penalty.<sup>35</sup>

Like the United States, where regulators may impose criminal penalties for antitrust infringements,<sup>36</sup> certain European Member State national governments also provide for criminal penalties such as prison sentences

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recently, in November 2008, the Commission levied a record fine of €1.4 billion against a glassmaking cartel. See David Gow, *Glassmakers Fined Record €1.4bn for Price-Fixing by European Regulators*, GUARDIAN, Nov. 13, 2008, <http://www.guardian.co.uk/business/2008/nov/13/regulators>.

31. Press Release, European Comm'n, Competition: Revised Commission Guidelines for Setting Fines in Antitrust Cases—Frequently Asked Questions (June 28, 2006), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/256&format=HTML&aged=O&language=EN&guiLanguage=en> (explaining what happens to the proceeds from fines).

32. See FOLSOM, *supra* note 23, at 310. In fact, the goal of promoting deterrence was the main reason the Commission's fining power was enhanced in September of 2006. See Debroux & McDavid, *supra* note 30, at 1 (highlighting innovations of the "tougher" September 2006 fining guidelines).

33. KORAH, *supra* note 7, at 38. For example, in one case, *Pioneer*, the European Court of Justice "confirmed that the 10% limit may be based on the turnover of the entire group of companies, worldwide and for all products." *Id.* Also, the definition of "turnover" in corporate finance is "the ratio of annual sales to net worth, representing the extent to which a company can grow without outside capital." Yahoo Finance Glossary, <http://biz.yahoo.com/f/g/tt.html#ca> (last visited Apr. 21, 2010).

34. KORAH, *supra* note 7, at 38. Though fines are useful enforcement tools, when imposing fines, regulators have to balance effectiveness and deterrence against justice and proportionality. They must consider the economic fact that fines are not without social cost. But regulators should set high penalties to ensure that the costs outweigh the benefits. The cost of enforcement and the possibility of legal error should also be considered. See Nadia Calviño, *Public Enforcement in the EU: Deterrent Effect and Proportionality of Fines*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 317, 318.

35. The Commission recently added three elements that have the potential to increase the amount of fines: first, the Commission will determine the fine's basic amount by a percentage of the revenues generated by the cartel behavior; second, the duration of the cartel incurs penalties of up to 100% per year; and third, the basic fine against that firm can be increased by up to 100% by either the Commission or a national government for each previous Article 101 or 102 violation. Debroux & McDavid, *supra* note 30, at 2–3.

36. Interestingly, in the *Marine Hose* case, the United States Department of Justice Antitrust Division, after a joint raid with the European Commission in May 2007, has succeeded so far in securing prison sentences for nine executives involved in the conspiracies and criminal fines of five figures or more. See Caulfield, *supra* note 5.

in cartel cases.<sup>37</sup> However, unlike its American counterpart, Sherman Act section 1,<sup>38</sup> article 101 does not authorize the European Commission to impose criminal penalties.<sup>39</sup>

In conjunction with fines, another effective enforcement tool of the EC has been its leniency program.<sup>40</sup> Essentially, leniency offers the “carrot” of total immunity or reduced fines to the first cartel member to give regulators information about the cartel’s operation.<sup>41</sup> By creating a

37. See INTERNATIONAL COMPETITION NETWORK, *Cartel Settlements* 39 (2008), available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf> (demonstrating that Germany, Ireland, and the United Kingdom all allow for some criminal penalties for antitrust infringements).

38. Sherman Act, 15 U.S.C. § 1 (2006) (“Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . .”).

39. See Wouter P.J. Wils, *Is Criminalization of EU Competition Law the Answer?*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 267, 311–12 (pointing out the legal feasibility of criminal antitrust enforcement at the level of EU institutions).

There is currently an interesting debate about the relative merits of corporate fines versus prison sentences for antitrust violations. See *id.* at 291 (discussing five arguments in favor of imprisonment); see also Stephen Calkins, *Coming to Praise Criminal Antitrust Enforcement*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 343. While this debate is largely beyond the scope of this paper, prison sentences seem to be a more effective way of deterring cartel behavior because criminal penalties hold directors personally responsible for their illegal behavior. *Id.* at 344 (emphasizing that “individual liability results in greater deterrence”). Meanwhile, one possible detriment of corporate fines is that consumers, who are supposed to benefit from antitrust regulation, will end up paying the fine indirectly through higher prices. But see Massimo Motta, *On Cartel Deterrence and Fines in the European Union*, 29 EUR. COMPETITION L. REV., 209, 217 (expressing the opinion that this concern is a myth).

40. See Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C298) 17, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF>; see also European Commission, *Leniency* <http://ec.europa.eu/competition/cartels/leniency/leniency.html> (last visited Apr. 21, 2010).

41. European Commission, *supra* note 40. Full leniency is available to cartel members who: “[1]) inform the Commission of the . . . cartel BEFORE the Commission has undertaken an investigation[, provided the Commission does not have information already; 2) are] the FIRST to adduce decisive evidence of the cartel; [3]) immediately end its involvement in the cartel; [4]) provide the Commission with all relevant . . . evidence available to the applicant [as well as] maintain continuous and complete cooperation throughout the investigation; and [5) have not] compelled another company to take part in the cartel or acted as an instigator . . .” Joshua, *supra* note 7, at 21.

The fifth criteria is consistent with common notions of fairness: “A company could strongly persuade other firms to take part in a cartel without actually coercing them, and then turn around and ‘blow the whistle’ on these other firms, inflicting damage on them. . . . [A] leniency programme should never protect or reward such behaviour.” David Henry, *Leniency Programmes: An Anaemic Carrot for Cartels in France, Germany and the UK?*, 26 EUR. COMPETITION L. REV. 13, 23 n.59 (2005).

If full immunity from fines is not possible, in the EC a cartel member may be eligible for a reduction of fines if and to the extent that the cartel member provides information of evidence of “significant added value.” “The level of reduction declines with the order of application: between 30% and 50% for the second applicant, between 20% and 30% for the third applicant and no more than 20% for the subsequent applicants.” Debroux & McDavid, *supra* note 30, at 2.



powerful incentive for each cartel member to be disloyal, leniency increases the risk of cartel behavior thereby deterring cartel participation. The program has been quite effective.<sup>42</sup> Indeed, the program has encouraged firms to self-regulate for antitrust violations.<sup>43</sup> In a significant way, it has also allowed the DG Comp to become more efficient: the information provided by leniency applicants saves the DG Comp the trouble of conducting full investigations.<sup>44</sup>

### *C. The Directorate General of Competition: A Victim of Its Own Success*

The successful leniency program has been both a blessing and a curse for the DG Comp.<sup>45</sup> On one hand, as noted above, leniency has promoted deterrence by incentivizing individual cartel members to be disloyal and inform on fellow members. On the other hand, the attractiveness of the leniency program has caused a flood of leniency applications. In fact, these applications are overwhelming the DG Comp workforce, which

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The EC leniency program currently is distinct from leniency programs that exist in the various EU Member States. See Margaret Bloom, *Despite Its Great Success, the EC Leniency Programme Faces Great Challenges*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 543, 543. The existence of distinct leniency programs in various jurisdictions has caused difficulty for multinational firms. Companies need to file applications in each jurisdiction, and hire local experts to handle the dealing with the agencies. With a view toward resolving this difficulty, the European Commission has proposed a “one-stop shop” for leniency that would allow a leniency application in the EC to provide immunity across all Member States. See Klawiter, *supra* note 4, at 506–07; see also Neelie Kroes, *The First Hundred Days* (Apr. 7, 2005), <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205>.

42. The leniency program has attracted many applicants. As of July 12, 2006, the Commission reports receiving 167 applications since its inception in 2002. Press Release, European Comm’n, Competition: Commission Leniency Notice—Frequently Asked Questions (Dec. 7, 2006), <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/470&format=HTML&aged=0&language=EN&guiLanguage=en>.

43. An example of the leniency program in action is the fines against a cartel of banana producers in July 2007. The EC imposed fines of €60.3 million on banana importers Dole and Weichery for participating in a price-fixing cartel with Chiquita. Chiquita was granted immunity because it initially reported the cartel, which operated from 2000–2002. The investigation of the price-fixing arrangement began in April 2005 after Chiquita came forward to the EU and applied for immunity under the EU’s leniency program. Christie Smythe, *EU Fines Dole, Others \$80M for Fixing Banana Prices*, LAW 360, Oct. 15, 2008, <http://competition.law360.com/articles/72808>.

44. See Julian M. Joshua, *That Uncertain Feeling: The Commission’s 2002 Leniency Notice*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 511, 511 (“Commission officials laud the success of its leniency programme in exposing huge price fixing cartels that would otherwise have remained undetected.”).

45. John Ratliff, *Plea Bargaining in EC Anti-Cartel Enforcement—A System Change?*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 597, 598. Ratliff notes that “Commission cartel proceedings usually take years and considerable resources, even with amnesty/leniency. . . . [C]learly it is not a good result, if cases are coming in faster, creating an even greater backlog.” *Id.*

already had its hands full.<sup>46</sup> Though responsible for a large jurisdiction, the European Commission is a relatively small governmental body: in fact, “[t]here are fewer officials working for the Commission in all departments than are employed by any one of the major departments of the UK civil service.”<sup>47</sup> Moreover, within the Commission, the DG Comp is a relatively small bureau.<sup>48</sup> Therefore, there is legitimate concern that a DG Comp overburdened by leniency applications is less able to carry out its essential tasks, such as investigations into the market.<sup>49</sup>

#### *D. Direct Settlement: An Attempt at Solving Problems and Promoting Goals*

On June 30, 2008, the Commission introduced Regulation 622/2008, which provides for direct settlement.<sup>50</sup> The purpose of direct settlement is

46. Christopher M. Brown, *The Emergence of “Administrative Settlements” in EU and UK Cartel Cases*, LexisNexis Emerging Issues Analysis 3 (2008), available at 2008 Emerging Issues 2410 (LEXIS). Brown notes the discouraging ratio of leniency applicants to decisions: “the Commission itself recently reported that, by the end of 2006, 104 companies applied for immunity from financial penalty [under the Commission’s current leniency program] and a further 99 for a reduction in the fine. During that same period, the Commission issued just 7 cartel decisions affecting 41 undertakings.” *Id.*; see also Joshua, *supra* note 44, at 511 (noting “the statistics reveal that the Commission risks being overwhelmed by the sheer numbers [and] the current system is overstretched”).

Moreover, dealing with leniency applications involves time-consuming tasks: “there are applicants’ statements to be taken, ‘dawn raids’, requests for information, witness statements, Statements of Objections, hearings, confidentiality reviews, evidentiary reviews and complex fining considerations to evaluate, resulting in detailed decisions, often with hundreds of footnotes and files which often contain thousands of pages. Clearly there are also related translations and, since there are numerous defendants, much of this has to be done in multiple versions.” Ratliff, *supra* note 45, at 598; see Joshua, *supra* note 44, at 511.

47. KORAH, *supra* note 7, at 27.

48. Certain DG’s seem to have too few staff members, while others have been criticized as being overstaffed. FOLSOM, *supra* note 23, at 68. To its credit, the DG Comp has streamlined its procedures so as to deal with an average cartel case within 24–30 months. However, “[w]ith 45 case handlers working in case teams of two people . . . production capacity is at best around 10 decisions per year . . .” Olivier Guersent, *The EU Model of Administrative Enforcement Against Global Cartels: Evolving to Meet Challenges*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 213, 216.

“Although cartels are high on the [DG Comp’s] agenda, internal staffing decisions have to take account of competing priorities, notably in state aid and mergers, as well as the need to enforce non-cartel Article [101] and [102] work and to perform a number of basic functions of market surveillance, including the detection of cartels not reported through leniency or sector inquiries.” *Id.*

49. KORAH, *supra* note 7, at 27 (stating “there is not [enough] manpower for much regulation”). The lack of resources could promote anticompetitive behavior in the European Union, because insufficient risks will exist to deter such behavior: “If companies begin to think it a viable option to stay out and gamble that the Commission will not be able to build a case against it, the status of the Commission as an antitrust agency will diminish.” Joshua, *supra* note 44, at 540.

50. Commission Regulation 622/2008, 2008 O.J. (L 171) 3. Regulation 622/2008 sets out procedures for resolving article 101 and article 102 violations. See also Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and

to alleviate the backlog of pending cases<sup>51</sup> resulting from the success of the DG Comp's leniency program. The DG Comp hopes direct settlement will not only alleviate the strain,<sup>52</sup> but also deter cartel behavior.<sup>53</sup>

Like the leniency program, direct settlement seeks to reward cartelistis that cooperate with regulators. Unlike the leniency program, settlement is available only *after* initial investigation when the DG Comp has obtained enough evidence to bring an enforcement action.<sup>54</sup> The settlement process<sup>55</sup> allows cartelistis to see the evidence against them<sup>56</sup> and to be informed of the range of potential fines.<sup>57</sup> At this point a cartelist may opt to forego defending an enforcement action and instead acknowledge liability.<sup>58</sup> In return, the DG Comp may reward the cartelist's

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Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases, 2008 O.J. (C 167) 1, 1–12 [hereinafter Conduct of Settlement Procedures Notice].

According to the Conduct of Settlement Procedures Notice, “The settlement procedure may allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission’s delivery of effective and timely punishment, while increasing overall deterrence.” *Id.* at 1.

51. Ratliff, *supra* note 45, at 598.

52. Neelie Kroes expressed concern that the Commission may not be able to deliver swift enforcement with timely punishment in her speech “The First Hundred Days” on April 7, 2005. Kroes, *supra* note 41, at 5. There, Kroes introduced the idea that became direct settlement: “we may need to look at how some form of plea bargaining procedure could bring advantages.” Ratliff, *supra* note 45, at 597 (quoting Kroes, *supra* note 41, at 5).

53. Conduct of Settlement Procedures Notice, *supra* note 50, at 1. A valid concern seems to be that the backlog of cases could inspire a sense of security amongst cartelistis. *See* Guersent, *supra* note 48, at 216. Theoretically, removing the backlog would eliminate this possible incentive to form cartels. *See id.*

54. O’Brien, *supra* note 15, at 6. So, unlike a leniency applicant, a direct settlement applicant does not offer substantial assistance intended to trigger or advance an investigation. *Id.*

The DG Comp is hopeful that direct settlement will reduce the work in the same way that plea bargaining has in the United States. KORAH, *supra* note 7, at 472.

55. Conduct of Settlement Procedures Notice, *supra* note 50; *see also* Michael Reynolds et al., Antitrust Developments: The EU Leniency Programme, 11–12 (Mar. 25, 2009), <http://www.abanet.org/antitrust/at-committees/at-ic/pdf/spring/09/reynolds.pdf>. The process of settlement takes place as follows: after the Commission has completed its investigation of a cartel, it issues a statement of objections to each party. If the Commission decides to allow settlement discussions to take place, the parties declare in writing that they will participate. Conduct of Settlement Procedures Notice, *supra* note 50. Third parties “such as complainants will not be granted access to settlement submissions.” *Id.* at 5.

56. *Id.* at 5, 2.

57. *Id.*

58. *Id.* Regulation 622/2008 contemplates that parties will submit their acknowledgments in writing. *Id.* at 2. The parties must file a formal request to settle in the form of a “settlement submission” which must contain an acknowledgment in clear and unequivocal terms of the parties’ liability for the infringement, including facts about the parties’ roles and the duration of their participation in the infringement. *Id.* at 3–4. Also the settlement submission must contain the maximum amount of the fine the parties would accept. *Id.* Finally, the settlement submission must confirm that the parties have had a sufficient opportunity to make their views known to the Commission and that they will not request another hearing. *Id.*

acknowledgement by reducing the amount of the fine otherwise imposed by ten percent.<sup>59</sup> In sum, a direct settlement allows an admitted cartelist to waive certain procedural rights<sup>60</sup> in order to save money and time.<sup>61</sup>

The DG Comp retains a large amount of discretion in deciding whether to explore the settlement procedure in cartel cases.<sup>62</sup> Indeed, the Conduct of Settlement Procedures Notice makes clear that the Commission does not negotiate the question of the existence of an infringement of Community law or the appropriate sanction amount.<sup>63</sup> At any time, the Commission may choose to discontinue settlement discussions with one or more of the parties involved.<sup>64</sup>

Interestingly, the Commission takes precautions to ensure that the choice of the settlement procedure cannot be imposed on the parties.<sup>65</sup> Parties are protected if settlement is not reached; the Commission will not use acknowledgements as evidence in any proceedings.<sup>66</sup>

### III. ANALYSIS

Since June 2008, the direct settlement procedure has been used once to resolve a cartel case involving memory chip producers.<sup>67</sup> Thus, this is largely a prospective analysis of the settlement procedure's potential to achieve the goals of efficiency and deterrence.<sup>68</sup> The discussion is guided

As for the timing of the acknowledgment, initiation of proceedings may occur no later than the date when the Commission issues a statement of objections against the parties concerned. *Id.* at 2.

59. *Id.* at 5.

60. O'Brien, *supra* note 15, at 7. The Commission's settlement procedure provides for a waiver of certain procedural rights such as access to the file, a formal hearing, and a translation. *Id.* It does not require a waiver of the right to appeal. *Id.* at 9.

61. *Id.* at 6 (noting that a goal is to resolve cartel cases quickly).

62. Factors in the determination include the likelihood of achieving procedural efficiencies and the possibility of setting a precedent. Conduct of Settlement Procedures Notice, *supra* note 50, at 2.

63. *Id.* at 1.

64. *Id.* at 2. For example, the Commission may choose to discontinue settlement, if it seems that there is a low probability of reaching a common understanding regarding the scope of the violation. If any party fails to follow the settlement procedure, or breaches its commitment, the Commission will "take note" and may also disregard the party's request to enter into the settlement procedure. *Id.* at 4. If at any point settlement breaks down, "[t]he Commission retains the right to adopt a statement of objections which does not reflect the parties' settlement submission." *Id.* at 4.

65. *Id.* at 1. The parties may call upon a Hearing Officer at any time in the process regarding any issue of due process. *Id.* at 3.

66. *Id.* at 4. "The acknowledgments provided by the parties . . . could not be used in evidence against any of the parties to the proceedings." *Id.*

67. Press Release, European Comm'n, *supra* note 17.

68. Because the settlement procedure has only been used once as of June 2008, the analysis is speculative. One helpful resource in analyzing the prospective success of the settlement program is the public forum hosted by the Commission on its website, on which practitioners expressed their concerns about the new regulation. See European Commission, Public Consultation on Cartels

by the maxim that the success of the direct settlement program depends on whether firms will find that the benefits of choosing settlement outweigh the benefits of litigation.<sup>69</sup> Like an effective leniency program, an effective cartel settlement program requires sufficient benefits and incentives for both the government and the cartel participant, or neither will commit to settlement. “However, the mere possibility of reduced sanctions usually will not be enough to induce a company to settle.”<sup>70</sup> Rather, the rewards of settlement must be transparent, predictable, and certain.<sup>71</sup>

With these considerations in mind, the following analysis predicts that the direct settlement procedure will likely fail to produce the desired result of alleviating the overwhelming stress on the DG Comp, and will not deter firms from engaging in antitrust violations.

#### A. *The Strengths of Direct Settlement*

This subsection summarizes the author’s view of two main strengths of the EC’s settlement procedure. First, several of its terms represent the Commission’s sincere effort to provide benefits to cartelists choosing a direct settlement approach. Second, it has possible long term benefits for global antitrust regulation.<sup>72</sup>

##### 1. *Settlement Has Potential Benefits to Cartel Members*

First, engaging in the direct settlement process is financially beneficial to a cartel member that is not eligible for full immunity under the leniency program.<sup>73</sup> Receiving a ten percent reduction in fines is economically sound when an adverse judgment is imminent. Further, engaging in the settlement process saves attorneys’ fees that would otherwise be spent on

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Settlements—Comments Received (Jan. 2008), [http://ec.europa.eu/competition/cartels/legislation/cartels\\_settlements/index.html](http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/index.html).

This Note also makes inferences based on a similar settlement procedure that has been available in France since 2001. INTERNATIONAL COMPETITION NETWORK, *supra* note 37, at 3. France has increasingly used this cartel settlement procedure. In 2007 the French Competition Council handed down five cartel settlements, representing twenty-four percent of all cartel decisions that year. *Id.*

69. INTERNATIONAL COMPETITION NETWORK, *supra* note 37, at 9.

70. O’Brien, *supra* note 15, at 3. In fact, members of the antitrust bar are skeptical about whether the ten percent reduction in fines offered by the EC’s settlement procedure will be enough to induce companies to entertain the idea of settlement at all. *Id.* at 8.

71. *Id.* at 3. In other words, companies will not prefer settlement unless they can predict with a high degree of certainty how they will be treated if they cooperate, and what the consequences will be if they do not. Joshua, *supra* note 44, at 512.

72. Although the procedure has strengths, it will likely fail to achieve its intended purpose. See discussion *infra*, Part III.A.2.

73. INTERNATIONAL COMPETITION NETWORK, *supra* note 37, at 2.

litigation and appeal. Settlement also cuts off the accompanying interest that would otherwise accrue on the amount of the fine during the appeal period.<sup>74</sup>

Second, the settlement regulation's confidentiality provision<sup>75</sup> protects defendant-companies from disclosure to third party plaintiffs.<sup>76</sup> The provision expressly prohibits the Commission from disseminating any writings associated with the settlement procedure. Under this express protection, cartelists may initiate settlement proceedings without fear of providing a potential third party adversary with decisive evidence of liability.<sup>77</sup>

Third, the direct settlement procedure benefits cartelists because it does not expressly require all parties to settle in order for any one of them to settle.<sup>78</sup> This way, each defendant-company may make an independent decision about its defense, provided that the DG Comp is agreeable.<sup>79</sup>

Finally, settlement accommodates the corporate culture of Europe in a way that leniency does not. In Europe, "[m]any corporate officials . . . find it very distasteful to inform on their industry colleagues."<sup>80</sup> From this perspective, corporate officials may prefer settlement to the leniency

74. See Morton Denlow, *Settlement Conference Techniques: A Judge's Opening Statement*, JUDGE'S J., Spring 2006, at 3 (highlighting the ability to "contain costs" as an advantage of settlement over litigation).

Significantly, "[w]hen appeals are lodged against Commission decisions imposing fines and penalties, payment is suspended but interest is charged and a bank guarantee for the amounts concerned must be provided." FOLSOM, *supra* note 23, at 310.

75. See, e.g., Denlow, *supra* note 74, at 3 (explaining that confidentiality is a benefit of settlement relative to litigation).

76. Third party victims of anticompetitive behavior may bring suits for damages. Though these suits are less common in Europe than in the United States, they have been on the rise within the EU. Evan Weinberger, *3rd-Party Funding Fuels European Litigation Growth*, LAW 360, Nov. 18, 2008, [http://competition.law360.com/print\\_article/77298](http://competition.law360.com/print_article/77298).

77. Though the EC has made efforts to encourage third party suits, "[m]any of the victims of antitrust infringements seem to refrain from bringing damages actions." Eddy De Smijter & Donncadh Woods, *The Commission Green Paper On Damages Actions for Breach of the EC Antitrust Rules*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 449. Therefore, even though the confidentiality provision of the settlement procedure is beneficial to cartelists, consideration of third party suits probably has little weight in a company's decision whether to settle or litigate.

78. An important drawback of this provision, however, is that the Commission must fully investigate and litigate the cases of the non-settling members. Therefore, the Commission is unlikely to achieve the efficiencies it wants unless all members agree to settle. See also discussion *infra*, Part III.B.2.

79. The DG Comp seems to suggest that settlement will not be available where some parties refuse to settle. See, e.g., Press Release, European Comm'n, *supra* note 13, at 3 (noting that if some opt not to settle then "the ordinary procedure" may apply to all parties).

80. Donald Klawiter, *Corporate Leniency in the Age of International Cartels: The American Experience*, ANTITRUST, Summer 2000, at 13, 15-16.

program to avoid the uncomfortable situation of disclosing the conduct of others in the industry. Rather, under the settlement procedure, parties only disclose details of their own conduct.

## 2. *Settlement Promotes Regulator Control and Coordination*

Another benefit of the cartel settlement procedure is that it allows the DG Comp to use its discretion in setting an optimal fine amount that avoids the untenable, yet potential, result of actually stifling competition in the name of promoting competition. Unduly high fines may cause insolvency. This could force a player to exit the market, thereby effectively decreasing competition.<sup>81</sup> The worst result would be to replace a cartel with a monopolist, so that the unlawful cartel price is replaced by a monopoly price.<sup>82</sup> The additional ten percent reduction in fines available under the settlement procedure makes this anomalous outcome less likely.<sup>83</sup>

The settlement procedure may also benefit global antitrust enforcement by facilitating international cooperation. Today, cooperation across borders, especially between the European Union and United States, is necessary to effectively combat cartels.<sup>84</sup> The Department of Justice (DOJ) has commended the EU on its new settlement procedure.<sup>85</sup> Although the DOJ strongly prefers criminal penalties for cartel violations,<sup>86</sup> it recognizes that the administrative settlement could allow for more effective cooperation between the two regulatory agencies in the future by removing procedural impediments to efficient prosecution of cartels.<sup>87</sup>

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81. *But see* Motta, *supra* note 39, at 209 (dismissing concern as a myth).

82. Though this is a very extreme and unlikely situation it is a concern for regulators. *Id.* at 220 n.31.

83. Some would argue that firms forced out by a fine are probably inefficient. To the extent such firms are forced out of the market, the overall economic effect is beneficial. “Empirical studies of productivity show that it is the process of exit of inefficient firms and growth of more efficient firms, which make up for most of the productivity gains of an economy.” *Id.* at 217 n.30.

84. *See* Scott Hammond, Deputy Assistant Attorney Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades 14–15* (Feb. 25, 2010), <http://www.justice.gov/atr/public/speeches/255515.pdf>

85. O’Brien, *supra* note 15, at 2. According to O’Brien, though some current commentators say that a U.S.-style cartel settlement system is unique to a jurisdiction with criminal enforcement and cannot work in an administrative system, the “European Commission should be commended for its initiative in recently introducing a settlement procedure.” *Id.*

86. *See* Barnett, *supra* note 3, at 144–46.

87. Unfortunately, it has been the case that “a cartel participant seeking to cooperate and quickly resolve its liability will find itself on dramatically different timelines in the U.S. and the EU.” O’Brien, *supra* note 15, at 6. “There are numerous examples of companies that have simultaneously offered to cooperate in both the U.S. and the EU but had to wait years after settling in the U.S. to learn what their

### *B. The Weaknesses of the Current Direct Settlement Procedure*

The settlement procedure likely will not achieve its purpose of promoting deterrence and efficiency. First, settlement is not attractive enough to cartel members<sup>88</sup> because the procedure lacks transparency and because it is unlikely to expedite their prosecution process. Indeed, in the microchip producer settlement, the actual process took an entire year even after all parties agreed to settle.<sup>89</sup> Second, the DG Comp will not save much time or resources by offering settlement.<sup>90</sup> Settlement will only be efficient in the unlikely event that all cartel members will uniformly agree to admit liability in exchange for a mere ten percent reduction in fines.<sup>91</sup> And if the DG Comp were to allow settlement for only select cartel members, it would nevertheless spend resources to fully litigate against the remaining firms.<sup>92</sup>

#### *1. Settlement Is Not Attractive Enough To Cartelists*

For settlement to be attractive, a cartel list must be able to assess its potential gains. Specifically, a cartel participant must be able to predict with certainty the consequences of settling or not.<sup>93</sup> “To maximize the goals of transparency, enforcers must not only provide explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies.”<sup>94</sup> But with the direct settlement program, which gives the Commission a great deal of discretion,<sup>95</sup> there is no guarantee that a firm will even be eligible. The fact

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fine would be in Europe. This problem is exacerbated by the numerous lengthy appeals of Commission decisions where, at times, the lag has been close to a decade.” *Id.*

88. Though in the author’s view, the settlement procedure’s “lack of attractiveness” is a weakness, it is important to note that making settlement too desirable could have a negative impact on leniency. As the International Cartel Network points out, “[Enforcers are concerned] that if settlement incentives are too high, cartel participants will choose to utilize available settlement systems rather than leniency programs, and settlements would result in a negative effect on the leniency program.” INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 7. This result should be avoided because, as noted above, the leniency program has been instrumental in achieving regulatory goals of deterrence and efficiency.

89. Press Release, European Comm’n, *supra* note 13, at 3.

90. INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 11.

91. See Regulation 1/2003, *supra* note 19.

92. See Press Release, European Comm’n, *supra* note 13, at 3.

93. See generally Joshua, *supra* note 44, at 512.

94. O’Brien, *supra* note 15, at 3.

95. “The overriding principle of the settlement procedure . . . is that parties do not have an automatic right to settle their case and the Commission will retain full discretion throughout the process.” Reynolds, *supra* note 55, at 12.



that the decision is completely in the hands of the Commission could create an environment of uncertainty and mistrust.<sup>96</sup> Such an uncertain playing field is not attractive from the cartelists' perspective since "[i]f a company expends the time and resources to seek settlement, only to be told at the end that its settlement offer will not be accepted because a co-conspirator does not wish to settle, it will not be pleased and its counsel may advise against engaging in the settlement process when representing future clients."<sup>97</sup>

Also, the settlement procedure is not likely to resolve a cartel case with enough expediency to make settlement a preferred option to litigation. This is because a party seeking to settle must wait until the end of the administrative procedure to learn how its cooperation will be rewarded.<sup>98</sup> Only then will the DG Comp know to what extent the cooperation will be rewarded and the actual fine that could be imposed.<sup>99</sup>

## 2. *Settlement Will Not Achieve Efficiencies for the DG Comp*

The DG Comp will not derive significant efficiency benefits from the settlement procedure<sup>100</sup> because even if the settlement procedure provides

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96. An example from the U.S. highlights how too much discretion in the hands of regulators can create mistrust. Stolt-Nielsen, a former member of a parcel shipping cartel, applied to the DOJ's amnesty program. Stolt-Nielsen began cooperating with the DOJ, and provided assistance that allowed the DOJ to convict other cartel participants. But instead of granting Stolt-Nielsen full immunity, the DOJ revoked the promise of full immunity. The DOJ reasoned that Stolt-Nielsen had not ceased illegal activity, and proceeded to prosecute. Stolt-Nielsen sued the DOJ for failing to uphold their end of the bargain. The DOJ lost in the district court, and the Third Circuit reversed. DANIEL S. SAVRIN & BRANDON L. BIGELOW, *THIRD CIRCUIT REVERSES DISTRICT COURT ORDER ENJOINING FILING OF SHERMAN ACT INDICTMENTS: QUESTIONS REMAIN ABOUT ANTITRUST DIVISION CORPORATE LENIENCY POLICY IN WAKE OF STOLT-NIELSEN DECISION* (2006), available at <http://www.abanet.org/antitrust/at-committees/at-crim/pdf/Stolt-Nielsen.pdf>. Commentators have noted that this episode could be harmful to the leniency program. See Donald C. Klawiter & J. Clayton Everett, *The Legacy of Stolt-Nielsen: A New Approach to the Corporate Leniency Program?*, ANTITRUST SOURCE, Dec. 2006, at 1, available at <http://www.abanet.org/antitrust/at-source/06/12/Dec06-Klawiter12=19f.pdf> (commenting that "the *Stolt* case is a fatal self-inflicted wound to the leniency program and that leniency is no longer a viable option for a company because of the inability of the Antitrust Division to keep its word and abide by its promises").

The author proposes that any possibility of similar confrontation with regulations in Europe could chill the willingness of companies to cooperate with the EC.

97. O'Brien, *supra* note 15, at 11.

98. *Id.* at 7.

99. *Id.*

100. An optimist might look to the positive French experience with settlement for the opposite prediction—that direct settlement could free up DG Comp resources and become one of the DG Comp's regularly used enforcement tools. In France, it is increasingly the case that regulators benefit from a "domino effect"—all firms involved in a cartel eventually agree to join once one of them has applied. INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 11. But in the author's view, it is less likely that the same domino effect would benefit the DG Comp. One reason is that the French system

adequate incentives for *some* cartel members to agree to settle, it seems unlikely that *all* members will choose to do so.<sup>101</sup> In fact, some may enter settlement negotiations in bad faith, merely to try “to gain an advantage by finding out what their fine might be and delaying the investigation.”<sup>102</sup> Therefore, enforcers are guaranteed the benefit of expediency only in the seemingly rare, best-case scenario—when all companies involved agree to settle the case in good faith.<sup>103</sup>

### *C. Working With Settlement: How To Make The Procedure More Useful*

There are at least three ways to mitigate the practical shortcomings of the EC’s settlement procedure. First, as noted above, a weakness of the direct settlement program seems to be that the ten percent fine reduction is unnecessarily restrictive. This may be easily remedied, and the procedure rendered more useful if, instead of a standard ten percent reduction in fines, the EC allowed parties to negotiate their penalty.<sup>104</sup> Creative, individually tailored resolutions<sup>105</sup> could make the program more desirable while still achieving the EC’s expediency goals. Customized settlements also recognize the fact that cartel participants are usually not equally culpable.<sup>106</sup> A less culpable cartel member should have the freedom to negotiate a smaller fine than the ringleader. Other terms of the settlement may also be individually negotiable. For example, in some cases, “non-monetary benefits such as . . . limiting the scope of the charged conduct,” could provide an attractive alternative to an individual cartel member.<sup>107</sup>

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provides a larger advantage than the EC’s mere ten percent reduction-in-fines incentive. For example, when the French settlement procedure was first applied in February of 2003 to resolve a cartel of water-docking companies in Marseille, of the cartel members Guigues, SNEF, and Cochery Bourdin Chausse. Guigues and SNEF benefited from the negotiated settlement procedure by each receiving a fifty percent reduction in fines. Henry, *supra* note 41, at 23 n.47.

101. See INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 11.

102. *Id.* at 17.

103. *Id.* at 11 (explaining that in the French experience, regulators benefit from settlement’s efficiencies when all cartel members agree to settle).

104. O’Brien, *supra* note 15, at 12. “The more cartel participants are able to engage in a dialogue with the Commission in the context of settlement discussion, the more likely it is that a mutually-agreeable resolution will be reached.” *Id.*

105. Denlow, *supra* note 74, at 3 (explaining that creativity is an advantage of settlement over litigation).

106. Scott D. Hammond, Former Dir. of Criminal Enforcement, U.S. Dep’t of Justice, Antitrust Div., Detecting and Deterring Cartel Activity Through an Effective Leniency Program 8 (Nov. 21–22, 2001), <http://www.usdoj.gov/atr/public/speeches/9928.htm> (noting how varying degrees of culpability help “measure[] the value of cooperation,” and factor into the DOJ’s leniency decision).

107. INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 13.

Second, as addressed above, the settlement procedure may not always be an attractive alternative to litigation. To make it more attractive, the procedure may limit settlement participants' liability in suits brought by third parties. The Commission expressly prohibits the dissemination of settlement documents to private complainants.<sup>108</sup> But this does not foreclose the possibility of third party actions entirely because the fact of settlement amounts to an admission of liability.<sup>109</sup> Although private actions have been rare in EU competition law, the Commission has recently taken initiative to promote them.<sup>110</sup> If private actions increase in the EU, European cartels will be threatened with more significant civil damages.<sup>111</sup> If participation in direct settlement allowed cartels to avoid some civil actions or liability, the program would be a more attractive option than litigation.<sup>112</sup>

Third, the Commission could make its settlement procedure more attractive if participants, in addition to fine reduction, received limited liability in follow-up proceedings by national competition authorities in Member State courts. Currently, companies sometimes face additional time-consuming and expensive suits from national governments, even after the EC has resolved their case.<sup>113</sup> The European Commission should

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108. Regulation 1/2003, *supra* note 19, at 5.

109. Press Release, European Comm'n, *supra* note 13, at 1 ("the companies choose to acknowledge their involvement in the cartel and their liability for it").

110. The major step in this effort is the Commission's working White Paper on private actions for damages in the EU. According to Commissioner Kroes, "[o]ur White Paper is presenting concrete measures to help ensure that [the right of third party victims to be compensated for losses resulting from illegal anticompetitive behavior] becomes a reality, and not just a theory." European Commission, Actions for Damages, <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html> (last visited June 21, 2008).

111. *See, e.g.*, Motta, *supra* note 39, at 216 (including "promoting private actions for damages" among methods for increasing deterrence).

112. To enhance the perceived benefits of the settlement program, the European Commission could pass a law to limit liability against companies that participate in the direct settlement program. The U.S. Congress enhanced the attractiveness of leniency in the United States when it passed The Antitrust Criminal Penalty Enhancement and Reforms Act of 2004 ("The Act"). Scott D. Hammond, An Overview Of Recent Developments in the Antitrust Division's Criminal Enforcement Program, 11 (Jan. 10, 2005), available at <http://www.justice.gov/atr/public/speeches/207226.pdf>. The Act limited damages awardable in a private action against a company that participated in the DOJ's amnesty program that also cooperates with private plaintiffs. *Id.* Perhaps the Commission could increase the incentive to participate in the direct settlement program if settlement participants would be granted an assurance of reduced liability in third party actions.

113. For example, in 2008, the Commission found four elevator manufacturers guilty of cartel participation and levied €992.3 million. Shortly thereafter, an Austrian Court upheld a €88 million judgment against the same companies. Melissa Lipman, *Austrian Court Upholds €35M in Elevator Cartel Fines*, LAW 360, Nov. 10, 2008, [http://competition.law360.com/print\\_article/76065](http://competition.law360.com/print_article/76065). Coincidentally, the Austrian judgment marked the first use of that country's amnesty program.

consider a “one-stop-shop” approach,<sup>114</sup> allowing a firm to resolve a violation once and for all, if that firm cooperates with the DG Comp via the settlement procedure.<sup>115</sup>

*D. Beyond Settlement: How to Best Achieve the EC’s Regulatory Goals*

There are at least two ways to further advance the European Commission’s regulatory goals. First, as mentioned above, the settlement procedure will not achieve the goal of promoting deterrence by alleviating the overworked DG Comp. The direct method to countering the problem is to expand the manpower and resources of the DG Comp. Such an expansion could be financed by fines currently being derived from antitrust violations, instead of using fines to offset EU Member States’ dues.<sup>116</sup> The additional channel of funding could allow the DG Comp to hire more people thereby obviating its use of shortcut settlement procedures to try to increase productivity.<sup>117</sup>

Second, because the settlement procedure will likely not deter cartel formation and activities, the EC should consider imposing criminal penalties, especially prison sentences,<sup>118</sup> on the individuals who enter anticompetitive agreements on behalf of their employers. One challenge to imposing criminal penalties is that the practice has not traditionally been

114. As noted above, from a cartelists’ perspective the EC leniency program exists amid a myriad of as many as twenty European national regulators’ leniency programs, all requiring separate applications. Klawiter, *supra* note 4, at 506. Neelie Kroes addressed this concern in her speech *The First Hundred Days*. Kroes, *supra* note 41. There she proposed that the EC offer a “one-stop shop” system to benefit cartelists eager to resolve a violation, and to improve the desirability of the EC leniency program. *Id.* at 5.

In the author’s view, similar logistical stumbling blocks that hamper the desirability of the EC leniency program could also impede the success of the EC’s direct settlement program. France, Germany, and the United Kingdom have cartel settlement programs in operation. INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 39. Presumably, each would require a cartelist to file a separate settlement application in addition to the EC application. The author proposes that the “one-stop shop” system Kroes proposed for leniency applicants would benefit settlement applicants as well.

115. The French settlement program has been successful and useful, partly because a single authority resolves the entire leniency application. See Henry, *supra* note 41, at 21. The author proposes that the EC settlement procedure would present a real advantage if it could provide a similarly uncomplicated and speedy resolution to all claims pending against a company within the Common Market.

116. See KORAH, *supra* note 7, at 472.

117. *Id.*

118. There is no greater deterrent than the risk of imprisonment for corporate officials. See Scott Hammond, Dir. of Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom? (Mar. 8, 2001), available at <http://www.justice.gov/atr/public/speeches/7647.pdf>.

part of the European competition regulatory scheme,<sup>119</sup> and some believe such a solution would be met with some resistance.<sup>120</sup> Perhaps to smooth the transition from the current purely administrative regime, the EU could adopt a hybrid enforcement system similar to that in Brazil.<sup>121</sup> There, a cartel is treated as both an administrative infringement and a criminal offense.<sup>122</sup> This solution not only maintains the benefits derived from fines, but it also imposes criminal liability on those directly responsible for the decision to engage in the cartel behavior.<sup>123</sup> The prospect of facing criminal penalties encourages firms to commit the time and resources to self-audit for antitrust violations, a process which has promoted cooperation with regulators.<sup>124</sup> Thus the EU could promote deterrence by imposing criminal penalties for antitrust violations.<sup>125</sup>

#### IV. CONCLUSION

With the current economic crisis, consumer welfare is a crucial concern. Meanwhile however, the incentives for corporate officers to engage in anticompetitive conduct have perhaps never been greater, as they struggle to keep their corporations afloat and maintain their jobs. The

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119. Wils, *supra* note 39, at 273–74. Wils notes that “[t]o the extent that there is currently a tendency in the EU Member States, or even at the level of the EU institutions, to criminalize antitrust enforcement, this is undoubtedly inspired by US antitrust enforcement . . .” *Id.*

120. *See id.* at 286–88 (describing the tendency in some European countries towards “decriminalization”).

121. INTERNATIONAL COMPETITION NETWORK, *supra* note 37, at 5. Notably, an administrative settlement in the Brazilian system does not absolve cartel participants from criminal liability. *Id.*

122. *Id.*

123. *Panel Discussion III: Public Enforcement (Administrative and Criminal)*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS, *supra* note 3, at 221, 236 [hereinafter “Panel III”]. As a panelist points out, this approach asks the valid question, “[W]here is the real liability for this . . . ?” and imposes punishment directly on the law breaker, not on the corporation and its shareholders. *Id.*

124. In the case of the banana cartel discussed above, Chiquita was able to apply for immunity when it learned of the price-fixing arrangement by conducting its own internal investigation. Upon learning that employees had shared price information, the company put a stop to the conduct and immediately notified European authorities. Smythe, *supra* note 43.

125. Though the subject of much debate, criminal enforcement of article 101 is legally possible. Wils, *supra* note 39, at 311–12. *But see* Reynolds, *supra* note 55, at 11. For example, the EU could require each Member State to make certain antitrust violations subject to criminal penalties. Reynolds, *supra* note 55, at 11. However, some observe that the EU has a culture that is less inclined to view cartelization as morally objectionable. Indeed, according to one panelist, “In some ways [cartel behavior] is probably a way of doing business,” and that in some places cartelists enjoy “notoriety.” *Panel III*, *supra* note 123, at 243. The culture against criminalization is further emphasized by the fact that in the EU, the individual is not even criminally liable if he provides untruthful answers to authorities. *Id.* at 224. Therefore, even though it is legally possible to criminalize cartels, it may not be realistic unless steps are taken to “induce a compliance culture.” *Id.* at 243. The author proposes that the best way to achieve a compliance culture is by using the stigma of jail sentences.

Commission is right: efficient regulation and deterrence are proper goals. But the current direct settlement program is not the best way to achieve them.<sup>126</sup> Rather, the European Commission needs to allocate more resources to the DG Comp so it may effectively combat the cartel problem. The consequences could reach farther than short-term failure as the European Commission's credibility in the community of international antitrust regulators could be at stake.<sup>127</sup>

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126. As the above analysis shows, direct settlement is unlikely to succeed. However, as Korah's view of antitrust regulation implies, it is unlikely that the impact of the settlement procedure can ever be fully grasped: "[l]ike all antitrust cartel regulators, the EC DC Competition bureau faces the difficulty of never being able to completely quantify the effect of cartels or how many exists in our economies. This makes it difficult to know precisely which policies work and which do not." KORAH, *supra* note 7, at 27.

127. If, as the author predicts, the settlement procedure fails to deter cartel behavior, there is a risk that the public and courts would perceive settlements as mere shortcuts for regulators that compromise justice. INTERNATIONAL CARTEL NETWORK, *supra* note 37, at 17.

\* J.D. (2010), Washington University School of Law. To Judge Denlow and Lisa Phelan for the inspiration, and to Duane and Susan Kelley for the support.