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Competition Law insight

Antitrust law and policy in a global market

Human rights in peril

Unless something is done, and that very soon, we will lose the European Court of Human Rights (ECHR) to its overwhelming caseload. The backlog of pending cases alone would take 46 years to clear.

The ECHR's burden has grown a hundredfold over the years of accession by the former communist countries. In the early 1980s, about 400 cases a year were registered. By 1997, this had risen to 4,750. Last year, it was 41,700. On 1 January 2008, 79,400 cases were pending – 19% more than were pending a year earlier.

This is unworkable. With 1,503 judgments in 2007, the court's performance is little short of heroic. In addition, it struck out 27,057 cases or ruled them inadmissible. Only intervention at European level can rescue the court from suffocation.

All parties agreed Protocol 14 in 2004. New processes to handle repetitive and plainly inadmissible cases would raise productivity by about 25%, the court's president estimates. While not enough on its own, this would make a good start.

Protocol 14, however, is in the deep freeze. Russia put it there and has no intention of taking it out just yet. The State Duma vetoed ratification on 20 December 2006. Soon afterwards, President Putin said that "our country is coming into collision with the politicisation of judicial decisions." He confirmed Russia's refusal to ratify a month ago.

Put simply, Russia has taken the ECHR hostage. The veto was clearly provoked by the court's judgments against it, of which there were 175 last year. The country is far the biggest single source of new applications to the court. At 20,296 cases, it also accounts for more than a quarter of the backlog.

Russia is no mere bystander in Strasbourg. Until just before the veto, it held the six-month chairmanship of the Committee of Ministers. Mikhail Margelov, a Russian senator, chairs the European Democrat Group in the Parliamentary Assembly, with UK Conservatives occupying three of the four supporting roles. Last-minute party manoeuvring stopped Margelov from being elected Assembly president on 22 January 2008.

The Council of Europe is pursuing conciliation. The Assembly's outgoing president "pleaded" with Russia to ratify. The secretary general was "disappointed" by the veto – an absurdly mild sentiment, although diplomatically quite fierce.

There is no indication that the Committee of Ministers is considering its powers of expulsion. Admittedly, this would leave Russia's citizens out in the cold, but that is where all European citizens will be unless the Council of Europe acts decisively.

Its soft reaction is unacceptable to the public. If the ECHR fails or drifts into irrelevance, there is no point in the Council of Europe continuing in business. It will have sacrificed the one institution in its care that has any real significance.

CLI readers are not unaffected by all this. The Lisbon treaty will enable citizens to ask the ECHR to review EU-level measures. It may not have much relevance for competition cases, where adding another layer to EU litigation would be deeply unattractive. However, the move will also make judicial review of EU legislation of general effect available to private claimants for the first time. This will not be much use if we have to wait until 2060 for judgment.

Celia Hampton

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Direct settlements

The first in a two-part article looking at the proposed introduction of a plea bargaining system into EC competition law

*by **François Souty** and **Pauline Le More****

This article looks at the main reasons for the introduction of a direct settlements system. The second part (which will be published in the March *CLI*) will examine the Commission's proposals, the French experience of plea bargaining and the extent to which the proposals are likely to meet the Commission's concerns.

On 26 October 2007, the European Commission issued a draft legislative package, designed to introduce into EC competition law a settlement procedure for cartel cases. The Commission also called for comments on the proposed provisions regarding this new legal instrument. In its "Frequently asked questions" (MEMO/07/433) accompanying the draft package, the Commission drew a distinction between negotiation and discussion. It said that the proposed settlement procedure would not involve negotiations, but would give the parties the chance "to be heard effectively" and "the opportunity to influence the Commission's objections through argument". In a separate draft notice, the Commission made it clear that it "does not negotiate the question of the existence of an infringement of Community law and the appropriate sanction" but "can reward the co-operation" laid down in the proposed settlement procedure.

The mechanism of direct settlements, also called "plea bargaining" in US law, is quite common in antitrust matters in North America. It originates from classical criminal proceedings. More recently, member states of the EU (such as France) have introduced direct settlements into their national competition proceedings.

Direct settlements can be defined as formal instruments of discussion by which the defence counsel of a firm suspected of breaching EC competition rules and the European Commission are able to reach an agreement resolving one or more charges against the firm alleging violation of article 81 of the EC treaty. On the one hand, the firm will not only refrain from contesting the charge of infringement, but it will also recognise its unlawful conduct. On the other, the European Commission will accelerate the case resolution and reduce the fines imposed on the firm.

However, the proposed settlement procedure raises serious issues in terms of competition policy. (The same is true with other US imported types of bargaining instruments – such as leniency and other deferred prosecution agreements – by which firms agree to co-operate with the government over antitrust investigations in exchange for avoiding indictment and limited punishments.) This EU Commission reform comes at a time when, in the US, there are concerns raised by the power of government and prosecutors to use some criminal procedures to fight antitrust violations. Indeed, the proposed European reform occurs in a specific context: there are calls, on the other side of the Atlantic, for expanded judicial control vis-à-vis the prosecutors' power to enforce amnesty deals concluded between firms and the government. In the United States, leniency tends to result in avoiding indictment for what is considered to be a corporate crime.

In its fight against international cartels, the Commission faces increasing difficulties, stemming from its limited resources and, paradoxically, its successful leniency programme. There is also an important but tricky balance to be struck between (on the one hand) having more effective cartel proceedings, and (on the other) safeguarding major legal principles such as equality of treatment before the law. Then there is the potential impact of transposing the US model of plea-bargaining into the European Union in the absence of a mature EU-wide private enforcement mechanism. Indeed, one may wonder whether plea-bargaining will eventually be introduced into EC competition law at an appropriate time, given that an EU-wide debate on private enforcement has only just started.

Plea bargaining is therefore a seductive idea. But in practice, it may raise concerns both in terms of procedural rights and enforcement policy.

Reasons for introducing direct settlements

By introducing direct settlements into EC competition law, the Commission aims to overcome its increasing difficulties in handling cartel cases, as well as add to its existing policy tools.

The European Commission's backlog

The Commission's backlog is the main reason why new instruments facilitating case resolution are currently being considered. In 2006, only seven final cartel decisions were adopted. At the same time, 104 companies applied for immunity and 99 companies for a reduction in fines (see the Commission's Report on Competition Policy 2006 (25 June 2007) points 7-8). Most of the decisions have been appealed to the Court of First Instance and then to the Court of Justice, so that staff members of the Commission are involved in a cartel case not only at the investigative stage, but also after the final decision has been issued. This is why a cartel proceeding can last many years before being definitively closed. For example, in the well-known vitamin cartel, two Japanese companies successfully lodged an appeal against the Commission's decision not to fine them for time limitation reasons (see the *Sumitomo Chemical and Sumika Fine Chemicals* case). Such legal action may have been aimed at limiting the

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legal basis in Europe for liability in any private damages law suit in the United States. Indeed, discovery proceedings may be used by an American federal judge in order to impose punitive damages on cartel members.

Shortening the resolution of cases is therefore vital for the proper functioning of the Commission's activity. In this context, ex officio cartel investigations have become exceptional, since a large majority of the directorate responsible for cartels is dedicated to dealing with leniency applications. As the draft legislative package makes clear in its introductory remarks, the new settlement procedure is supposed to accelerate case resolution. It is also hoped to reduce the number of infringement decisions appealed to the Court of First Instance and subsequently to the European Court of Justice.

Limits of present policy instruments and basic fundamental rights

Over the last 10 years, two kinds of alternative tools have been developed in order to detect cartel cases, as well as to accelerate the decision-making process.

▌**Leniency programme**. Influenced by the American-conceived leniency scheme, the Commission issued a first leniency programme in 2002. This was last amended in 2006. The programme continues to be very successful. It is likely to remain so, given the sharp increase in fines resulting from the sentencing guidelines issued by the Commission in June 2006, as witnessed by heavy sanctions imposed in 2007.

Most cartel cases nowadays are detected through a leniency application. Cartel members themselves "refer" the case to the Commission. As a reward for their co-operation and helping to gather evidence, companies may be granted a significant reduction in fines, up to total immunity from financial penalties. These fines are likely to skyrocket soon. The firms are deemed not to contest the facts. However, such an acknowledgement of "liability" does not interfere with their right to appeal to the Court of First Instance, and then to the European Court of Justice. In practice, most cartel decisions made by the Commission are appealed to the European jurisdictions.

Therefore, the leniency programme is a very efficient tool – at least, at the investigation stage. However, it is of more limited help to the Commission in its decision-making process. It is of even less assistance after the final decision is issued. The Commission's cartel decisions are systemically challenged by firms, which expect to obtain an even greater reduction in fines than those granted through the leniency application. And paradoxically, the leniency programme contributes to the European Commission's backlog. The number of cases begun through a leniency application has rapidly increased, and this in turn has extended the actual duration of proceedings. But the leniency programme also raises also more fundamental issues, such as competition authorities' capacity to conduct negotiations without undermining effective deterrence and the incentives to denounce cartel infringements.

▌**Commitment proceedings**. As a more recent instrument, article 9 of Regulation 1/2003 allows the Commission to make commitments binding on undertakings, when such commitments meet the concerns expressed by the Commission in antitrust proceedings. Although its use is very flexible, an article 9 decision is deemed to be appropriate if and when (1) the companies under investigation are willing to offer commitments that remove the Commission's initial competition concerns, as expressed in a preliminary assessment; (2) the Commission does not intend to impose a fine; and (3) efficiency reasons justify the Commission limiting itself to making the commitments binding instead of issuing a formal prohibition decision.

The experience gathered by the European Commission is still limited, however, particularly when it comes to judicial review. In 2006, four final decisions were issued in the De Beers, FA Premier League, Repsol CPP and Cannes Extension Agreement cases. One may wonder whether behavioural remedies are satisfactory in addressing competition concerns. They undermine the deterrent effect of competition policy. They also greatly affect third parties, who are only entitled to participate for the purposes of market testing and who do not have any rights in the final decision to make the commitments binding.

The recent *Alrosa* decision by the Court of First Instance outlined the European Commission's present difficulties in dealing properly with firms' commitments without infringing basic fundamental rights. Alrosa and De Beers submitted commitments in order to address the competition concerns raised by their purchase agreement. The proceedings were closed after the Commission accepted De Beer's proposed commitments. According to the final decision, De Beers and Alrosa had to end all direct or indirect trading relations, for an indefinite period, as from 2009. The Court annulled the Commission's decision because such an absolute trade prohibition did not comply with the principle of proportionality and infringed Alrosa's right to be heard.

Existing policy instruments do not therefore fully address the current concerns raised by cartel cases. The leniency programme does not impact upon the duration of the decision-making process. Commitments are not designed for decisions of the Commission imposing fines. These limits have therefore led the Commission to investigate a new tool: direct settlements.

References

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, point 2

Case T-22/02 and 23/02, CFI, *Sumitomo Chemical and Sumika Fine Chemicals / Commission*, 6 October 2005

Commission's Notice on immunity from fines and reduction of fines in cartel cases, C 45, Official Journal 19 February 2002, pp 3-5; Commission's Notice on immunity from fines and reduction of fines in cartel cases, C 298, Official Journal 8 December 2006, p17

Commission's Guidelines on the method of setting fines imposed pursuant to article 23(2) (a) of Regulation No 1/2003, Official Journal C 210, 1 September 2006, pp 2-5

Council Regulation (EC) No 1/2003 of 16 December 2002, OJ 4 January 2003, Recital 13; European Commission, Commitment decisions, MEMO/04/217, 17 September 2004

Case COMP/38.381 De Beers Commission decision, 22 February 2006; Case COMP/38.173 FA Premier League Commission decision, 22 March 2006; Case COMP/38.348 Repsol CPP Commission decision, 12 April 2006; Case COMP/38.681 Cannes Extension Agreement Commission decision, 4 October 2006

Case T 170/06, CFI, *Alrosa Company Ltd*, 11 July 2007

Commission Decision 2006/520/EC of 22 February 2006

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HMS Bounty Hunter sets sail

Paying people for giving information to the authorities has a long and far from respectable history. Policemen are wary of cash rewards for good reasons, of which having their time wasted is the less invidious.

Until now, rewards in the competition law context have come in the form of forbearance or legal security, ie more lenient treatment for those who confess, or protection of a whistleblowing employee from retribution at work.

On 29 February, the UK's Office of Fair Trading added a third – cash for information that is accurate, verifiable and useful. It will pay "incentives" of up to £100,000 for information that helps it identify a cartel and take action.

Rewards are intended for the inside informant or grass, not the competitor whose complaint against third parties results in successful enforcement action. Nor will there be any reward if the informant is in fact applying for leniency.

Informants will be given immunity from civil and criminal liability for giving the information through an authorisation under the Regulation of Investigatory Powers Act 2000. This covers breach of a confidentiality clause.

Payment is entirely in the OFT's discretion and the amount is not negotiable. While this avoids argument and unseemly haggling, a more cogent reason for doing it in this way is to meet the exigencies of the whistleblower law.

Informing the OFT allows an employee to claim the protection of the Public Interest Disclosure Act 1998 against dismissal and other discimination at work. Disclosure must be made in good faith. The burden of proving its absence lies on the employer, but it is generally felt that the employee is also burdened under the test set by the courts and expressed in an ungainly double negative.

Good faith means that the informant acted for reasons that were not predominantly unrelated to the public interest. The lure of a cash reward gives the employer an easy means of suggesting that the profit motive outweighed the informant's public spirit.

By taking total control of the payment and its amount, the OFT's scheme may help. The informant has no way of knowing whether the reward will add a little small change to his pocket or pay off his mortgage.

The amount is calculated by the OFT from the value of the information, the cost of the harm threatened by the cartel, the effort involved in getting the information and the risk taken by the informant. Information on cartels of any size is encouraged.

While all competition authorities have facilities for making complaints, of course, no others appear to advertise a cash reward for information. The Dutch NMA encourages tip-offs but it does not offer to pay for them. It is said that Korea's authority has been known to pay rewards, but it does not appear from its website to be official policy. The federal authorities in the US, home of the bounty hunter, have no such policy.

The OFT's scheme will run initially for 18 months. It may extend public awareness of competition policy, and reassure junior employees who see that their employer is up to no good. Overall, though, it gives the impression that the more orthodox sources of work that seem to keep other competition authorities busy fail to give the OFT enough to do.

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Direct settlements (2)

The second instalment in our two-part article examines the Commission's proposals, the French experience of plea bargaining and the extent to which the proposals are likely to meet the Commission's concerns

*by **François Souty** and **Pauline Le More****

The European Commission's proposals

Direct settlements are deemed to accelerate case resolution and to complement existing policy instruments. The proposed direct settlement procedure is intended to apply only to cartel cases (see the draft regulation amendment (DRA), article 1). Abuse of dominance cases are therefore excluded from its scope.

Initiation of settlement proceedings

The European Commission has a discretionary power to determine whether the settlement procedure suits the cartel case at hand. However, it is not clear how "suitable" a cartel case should be for settlement. According to the draft Commission notice (DCN) point 5, the Commission should take into account, among other things, the number of parties involved, the foreseeable conflicting positions on the attribution of liability, and the extent to which the facts are contested. In other words, only clear-cut infringements may be appropriate to reach a common appreciation by all the parties involved on its possible accelerated resolution. The companies have no duty to settle, but may initiate such proceedings in specific circumstances.

▌**Company's initiative**. A company may be interested in entering into settlement discussions after being aware of an investigation. It can indicate this interest to the European Commission at any time of the proceedings but, in any event, before the statement of objections has been issued (see DRA article 1.1). As a consequence, as soon as a statement of objections has been sent to a suspected company, the addressee is no longer entitled to benefit from a settlement procedure.

▌**The European Commission's initiative.** Direct settlements are primarily supposed to be initiated by the European Commission, once convinced of the suitable character of a given case. It will write to all parties and indicate a delay for expression of interests in settling. According to DCN point 11, the companies shall give an answer within a short period of time (two weeks). Settlement discussions are formally engaged upon the written request of the parties (see DRA article 1.4 and DCN point 11).

The decision-making process

The envisaged proceedings require a written submission by the settling company, whose content should allow the issuance of a simplified statement of objections by the Commission.

▌**The settlement submission.** The company wishing to enter a plea shall provide the Commission with a written settlement submission containing (1) an acknowledgement of the parties' liability; (2) an indication of the maximum amount of the fine the parties foresee being imposed by the European Commission and which they would accept; (3) confirmation that it has been informed of the European Commission's objections in a satisfactory manner and been given sufficient opportunity to make its views known; (4) confirmation that it will request neither access to the file nor a formal oral hearing; and (5) an agreement to receive the statement of objections and final decision of the Commission in a given language of the European Community (see DCN point 20 and DRA article 1.4).

It is expected that such a document will result from bilateral discussions and remain confidential with respect not only to third parties, but also to the other companies suspected of being involved in the infringement at hand (see DCN point 7). Parties to the proceedings and their legal advisers are not permitted to disclose the content of the settlement discussions or of the documents to which they have had access. Breach of this rule may be an aggravating factor in setting a fine. In practice, however, it may be difficult to prevent the legal advisers of the parties involved from sharing in an informal way their views on their respective and ongoing bilateral discussions with the Commission.

Parties to the settlement proceedings belonging to the same group of undertakings must appoint a joint representative (see DRA article 1.4 and DCN point 12).

▌**The statement of objection**. Following discussions and its resulting submission, the company is bound by the settlement, provided that the European Commission endorses the written settlement submission in its statement of objections and does not impose a higher fine. Once the Commission has produced a statement of objections, it will ask each party to confirm clearly that the statement of objections corresponds to the contents of its submission and that it remains committed to the settlement procedure. According to DCN point 26, a minimum time limit of one week is provided.

▌**The final decision.** In taking its decision, the Commission may not depart from the "settled" objections without informing the parties concerned and adopting a new statement of objections. This should occur only exceptionally, if the benefits of the settlement procedure are to be preserved. If the Commission does not endorse a party's submission in the statement of objections, the acknowledgements provided are deemed to have been withdrawn and cannot be used against the party making them.

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Procedural settlement rules

The settlement reward can be combined cumulatively with a leniency reduction, in which case the settlement reduction will be applied after the leniency reduction. Unlike the leniency process, all parties participating in the settlement procedure will receive an equivalent reduction in fines. However, neither the DCN nor the DRA indicates the amount of fine reduction awarded to the companies.

According to community law, settling parties cannot be required to waive their rights of appeal. But the European Commission hopes that settlements will help to reduce the number of appeals lodged against cartel decisions and consequently save some of its scarce resources.

This new instrument intervenes both at the investigation and the decision-making process stages. If adopted, the draft legislation package will therefore have a great impact on European competition policy.

What can be learnt from member states: the French experience

EU law sometimes follows the experience of member states. So it can be instructive to look at national legislation that is already in place.

Plea bargaining was first applied to classical criminal proceedings, and then to antitrust matters. The French law system provides a good example of settlement procedure as applied in competition law. Under French law, it takes the form of the settlement procedure and the commitment procedure.

The French settlement procedure

In 2001, a settlement procedure was introduced in French competition law (Law Nr 2001-420 of 15 May 2001). Under article 464-2 III of the French commercial code, when a firm does not contest the statement of objections it has been notified about and promises to modify its conduct for the future, the head case officer (HCO) may propose to the Competition Council (the CC) a reduction in the fine of up to 50% . But given the separation between the instruction phase (which is supervised by the HCO) and the decision phase (which is separately determined by the board of the CC), the HCO cannot commit the CC board. As a counterpart and consequence to the firm's not contesting the matter, the case handler does not have to prepare an in-depth report on the case.

Although this procedure is designed to accelerate case resolution before the CC, it does not formally prevent the company from appealing, particularly when the fines proposed by the HCO do not correspond to the fines imposed by the CC in its final decision. This was what happened in one of the earliest cases dealing with the enforcement of settlement proceeding, the *School Calculators* decision (Competition Council Decision 03-D-45 of 25 September 2003). This case illustrates not only the lack of legal security of this type of plea bargaining, but also the ambiguity of not contesting the charges brought by the CC against it. Before the CC, and then before the subsequent courts, Texas Instruments and Carrefour Hypermarkets did not contest their infringements of competition law, but argued about the seriousness of the offence and its limited effect on the economy. The intended purpose of the settlement procedure – alleviating the administrative burden of in-depth investigation and accelerating case resolution – may fail in this context.

The French commitment procedure

More recently, in 2004, the commitment procedure was introduced (Order no 2004-1173 of 4 November 2004). Under article L-464-2-I of the French Commercial Code, a firm subject to an investigation or a complaint may propose to the CC that it will modify its alleged anticompetitive practices in future. As a counterpart, the CC will agree not to issue any infringement decision against the firm making that commitment. The commitment procedure shall neither be excluded for hardcore cartels nor shall it be applied prior the commencement of formal proceedings. However, the CC has discretionary power to decide whether or not the commitment proceeding is appropriate for a particular case. The CC's decision may be subject to appeal, even by a complainant. Interestingly, the Paris Court of Appeal made clear in the *Canal 9 v GIE Les Indépendants* (2006) case that complainants are entitled to contest the commitments, which may produce legal effects on their personal situation. In addition, the CC's commitment decision does not establish any infringement of anticompetitive practices. Therefore, the CC's decision may not be used as a basis to prove any violation of French competition law. Such type of decision may affect private enforcement. Therefore, some commentators wonder whether this type of settlement undermines public interest by diminishing the exemplarity of sanction.

As regard to the French experience, cases are not necessarily resolved faster, since companies have a fundamental right to appeal according to constitutional law. And indeed, waiving the right to appeal may infringe constitutional law of numerous member states of the European Union. Both instruments do not also guarantee transparency and predictability of fines imposed.

What are the main issues raised by direct settlement?

By reviewing the Commission's proposals and the French experience, one may wonder whether the European Commission's present concerns will be addressed in an appropriate manner through direct settlement.

Equality before the law

The potential impact of direct settlement upon the fundamental principle of equality before the law is twofold: it concerns both the parties involved in the cartel cases and third parties.

▌**Rights of the party involved in the cartel cases**. From the firms' perspective, the parties' rights (and notably, access to files) are affected by direct settlement. And the main incentive for entering into plea consists in the predictable reward. However, such an amount is not expressly and clearly set out. One may wonder why a firm would accept direct settlement only for cost-saving reasons, in the absence of predictability and transparency of fines policy. From the Commission's perspective, the case resolution purpose may fail, since the right of appeal cannot be undermined for constitutional reasons. Therefore, as the existing alternative tools (leniency

and commitments) as well as the French experience show, awarding reward and accelerating case handling may not be sufficient to prevent firms from appealing before the European jurisdictions.

▌**Rights of third parties**. The complainants and other third parties are fully excluded from the whole proposed direct settlements proceedings. They are not entitled to have access to any documents, subject to bilateral discussions (see DCN point 7). Unlike the commitment proceedings, no opinion-delivering capacity of interested third parties is provided, especially where the plea bargain applicant has been the initiator of the cartel or is a major player that pursues a strategy to minimise the consequence of its driving role. This lack of transparency may prevent third parties from complaining about any suspicion of infringements.

Plea bargaining and other enforcement tools

More importantly, direct settlement must be considered in relation to leniency programmes and development of private actions.

▌**Leniency programme: from US to EU.** The experience gathered with leniency negotiation is also meaningful in the direct settlement negotiation context. Competition authorities may also want to limit damages recovery by victims in order to protect their leniency programmes. As the French CC observed in its 21 September 2006 opinion: "Incentives for leniency application should not be undermined by the development of private actions, and in particular class actions".

In the US, the *Stolt-Nielsen* case (548 US 2006) underlined that immunity negotiations may also lead to worrisome imbalance if not unfair results for some applicants, as the antitrust process does not follow exact science rules. Lastly, on 30 November 2007, referring to a company's amnesty agreement with the US Department of Justice (DoJ) which was revoked in 2004, Judge Bruce Kauffman of the US District Court in Philadelphia reported that "the [antitrust] division has no reasonable basis upon which to void or revoke the agreement because it has not demonstrated any breach by Stolt-Nielsen or the individual defendants".

On 25 December 2007, the DOJ announced that it would not appeal against the decision by the US district court to dismiss the indictment brought against the parcel tanker company and two of its executives in September last year.

Suspicion about government's tactics to maximise law enforcement is witnessed nowadays in the US Congress: a legislative reform was introduced in January 2007 to prevent the DoJ from compelling firms to turn over information in principle protected by attorney-client privilege in exchange for leniency. Known as the Draft Attorney-Client Privilege Protection Act, the bill passed without opposition the judiciary committees of both Houses. It aims to preserve the attorney-client privilege and attorney work product protections available to a company or organisation as well as to safeguard the constitutional rights and other legal protections available to employees of such an organisation. It does so by placing strong practical and clearly defined limits on a federal agency's power to coerce or pressure an organisation to waive its legitimate legal protections or to act against the interests of its employees during the course of an investigation.

Back to the EU, this leniency context should be taken into consideration while initiating "discussions" with the interested companies through direct settlements. The settling company is supposed to reach an agreement with the Commission. More importantly, such discussions may lead at the same time to leniency discussions. Both instruments may very well be used in a cumulative manner. Indeed, "in cases settled with leniency applicants, the reduction of the fine granted to them will be the sum of the leniency reward and the settlement reward" (see DCN point 32). It means that total immunity may be theoretically granted, should the applicant be, for example, granted a 50% fine reduction for its co-operation during the investigation and 50% during the fines discussions in the decision-making process. It also means that the settlement procedure should be excluded in a case where the company would benefit from a total immunity of fines according to the leniency programme. Therefore, the firm may prefer to apply for leniency rather than to submit a settlement. The former presents a more predictable advantage. In addition, as it was noted earlier for the US, the law enforcers may be tempted to extend their bargaining power by requesting firms to hand over or waive access to privileged documents.

▌**Private enforcement**. The final decision resulting from settlement is expected to be less detailed and descriptive on the infringements. It may therefore affect the subsequent actions of third parties before national jurisdictions in order to recover damages. Nowadays, very few actions have been successful, even in clear-cut cartel case with formal and classical final decisions issued by the Commission. In the vitamins cartel, the victims did not succeed in France in recovering compensation damages on the passing-on defence basis (see *Arkopharma v La Roche* 11 May 2006). In England, the claimants in private actions against members of the same cartel equally failed to be awarded – this time – exemplary damages (see *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* 19 October 200). While launching the debate, the European Commission was aware of the link between this kind of direct settlement and civil litigation where plaintiffs seek damages. However, this link is not addressed by the draft legislation package.

In conclusion

Direct settlement may constitute an effective settlement tool for both the European Commission and companies. It already plays a great role in the United States, mitigated by the growing pressures to strengthen the involvement of courts and judges in the procedures through a strengthened control of "deferred prosecution agreements", in which firms agree to co-operate with the government in exchange for protection against indictment for corporate crime or maximum penalties. Furthermore, in Europe, there is still a need to develop private enforcement mechanisms along with administrative tools that need more judicial review. Therefore, one may wonder whether plea bargaining would not undermine public enforcement of EC competition law and would not even ultimately cost the overall efficiency of the European Commission's antitrust enforcement. In any case, the courts – both at the national and EU level – should be more actively involved in the debates of this ambitious antitrust reform, not to mention the member states' and the European parliaments.