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The leniency and settlement procedures in EU Competition law

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Abbreviations

AG	Advocate General
art	Article
China-EU LJ	China-EU Law Journal
CoRe	European Competition and Regulatory Law Review
ECN	European Competition Network
edn / ed(s)	edition / editor(s)
E.H.R.L.R.	European Human Rights Law Review
EU	European Union
IIC	International Review of Intellectual Property and Competition Law
J.E.C.J. and Pract.	Journal of European Competition Law & Practice
JPE	Journal of Political Economy
NCA	National Competition Authority
OECD	Organisation for Economic Co-operation and Development
OJ	Official Journal
p	Point
para	Para
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
US	United States of America

Introduction

Are leniency and settlement useful in today's competition enforcement? This is the question that the dissertation at hands tries to answer.

The dissertation is divided into two broad sections. The first one analyses leniency and settlement as they stand, interprets the legal questions which arise when the European Commission examines leniency and/or settlement applications. This section functions as a solid doctrinal background and analyses questions both of substantive and procedural nature. Simultaneously, it covers a variety of practical questions and relates the scholar analysis with Commission, as well as judicial, practice.

The second section explores the usefulness of leniency and settlement in the current stage of competition law development. As the dissertation aims to follow a strictly legal analysis, it does not aim to provide a policy suggestion but rather to illustrate how leniency and settlement can be helpful in the consumer-oriented and digital era of EU competition law.

From the outset, it is noted that leniency and settlement are provided in EU secondary legislation, and, more precisely, in Directive 773/2004 in articles 4a and 10a respectively.[1] Nevertheless, their function is mainly based on two Commission Notices; the Commission Notice on Immunity from fines and reduction of fines in cartel cases (hereinafter referred to as the Leniency Notice)[2] and the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (hereinafter referred to as the Settlement Notice) [3]. These Notices are the basic instruments to be interpreted and applied when the Commission engages in leniency or settlement procedures.

I] The leniency and settlement procedures as a "traditional" enforcement tool

This first chapter of the dissertation examines both the leniency and settlement procedure as "traditional" enforcement tools. In other words, in this part of the analysis, I focus on the initial concepts of "leniency" and "settlement" in order to point out their place in the framework of competition enforcement. The chapter is further divided into two sections: the first one analyses the substantial requirements the second one deals with the procedural aspects of both procedures.

1. Substantial Requirements

This section explores the substantial conditions for granting leniency and/or settlement award. Sub-section 1.1. presents the objectives and the scope of both procedure; sub-section 1.2. focuses on immunity requirements and sub-section 1.3. covers the reduction requirements under each Notice.

1.1. Objectives and scope

1.1.a. The objectives

It is worth noting that both the leniency and settlement procedures aim to *reward cooperation*, as it clearly stems from the respective Commission Notices.[4] A second step, which is crucial in order to fully understand the function of the two procedures, is posing the question what the aim of rewarding cooperation in each case is. On that note, while leniency aims to *detect and punish* cartels that could pass beyond the radar[5], settlement aims to *effective and timely punishment*

[1] Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [2004] OJ L 123/18, arts 4a, 10a.
[2] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C 298/17.
[3] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases [2008] OJ C C 167/1.
[4] Leniency Notice (n 2) p 1; Settlement Notice (n 3) p 1.
[5] Leniency Notice (n 2) ps 1 and 3.

reducing the resources and the time needed for the investigation of each competition cases[6]. Consequently, both procedures reward cooperation, which is nevertheless sought for different reasons.

A passage from European Commission's settlement website is useful in order to fully illustrate the conceptual difference between the two mechanisms. According to the Commission, "[t]*he difference between settlement and leniency is that settlement is a* ***procedural efficiency*** *instrument while leniency is an instrument to* ***gather evidence***."[7] In conclusion, the two mechanisms are complementary as to their aims, as leniency concerns the evidential and detection aspect of cooperation, while settlement is connected to the procedural efficiency of cooperation.

1.1.b. The scope of leniency and settlement

The Leniency Notice states that it "*sets out the framework for rewarding cooperation in the Commission investigation by undertakings which are or have been party to* ***secret cartels***". Right after clarifying the scope of leniency programmes, it goes on defining cartels as "*agreements and/or concerted practices between two or more* ***competitors*** *aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices* ***such as*** *the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors*".[8] In other words, the main characteristic of cartels is that they concern *horizontal* cooperation, while vertical cooperation is not benefited from this Notice.[9] Having defined cartels, one shall examine which cartels can be characterised as secret ones. This definition may be traced into other pieces of EU legislation, and more specifically in Directive 2019/1, where secret cartels are defined as "*cartel*[s*], the existence of which is partially or wholly* ***concealed***".[10] It is maintained that even a suspected cartel may be characterised as secret, when the competition authority is not able to perform successful unannounced inspections, as was the case in the *Bananas* Commission Decision.[11]

On the contrary, the precise anti-competitive practice, e.g. price-fixing or information exchange, is less crucial as every cartel falls into the scope of the relevant provisions. To that end, the aforementioned passage of the Leniency Notice uses the phrase "such as" which implies an indicative list of practices falling into the scope of the Notice. The Commission has issued a Q&A form where the basic categories of practices falling under the scope of Leniency Notice are described. Alongside the infringements referred to in the indicative list of the Leniency Notice, due notice shall be given to two other practices, namely the information exchange (as was the case

[6] Settlement Notice (n 3) p 1.
[7] European Commission, 'Cartel Cases Settlement Procedure' <https://competition-policy.ec.europa.eu/antitrust-and-cartels/procedures/settlement_en> accessed 20 September 2024.
[8] Leniency Notice (n 2) p 1.
[9] R. Whish and D. Bailey, *Competition Law* (9th edn, Oxford University Press 2018) 290[329].
[10] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3, art 2(1)(12). The initial Commission Proposal defined as secret the cartels "*which* [are] *not, partially or fully, known except to the participants*", Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2017] COM/2017/0142 final, art 2(9).
[11] Commission decision in Case AT. 39188, *Bananas* [2008] C(2008) 5955 final, para 485.

in the *Interest Rate Derivatives*[12] and the *Spark Plugs*[13]) and the restrictions on technical development (as was established with the *Car Emissions* Commission Decision[14]).[15]

As is the case with leniency, settlement primarily concerns undertakings which have been involved in cartels, thus breaching Article 101 TFEU.[16] The sole difference as to the scope of the two procedures lies on the fact that settlement is not restricted to secret cartels.

1.2. Immunity requirements

This sub-section focuses on Leniency Notice and presents all the requirements that an undertaking shall fulfil in order to gain immunity from any fines concerning cartels. From the outset, it is maintained that according to the Leniency Notice there is a "primary" requirement as opposed to the additional requirements. In particular, the Commission highlights that:

"(4) […] *A **decisive contribution** to the opening of an investigation or to the finding of an infringement may justify the granting of immunity from any fine to the undertaking in question, on condition that certain **additional** requirements are fulfilled.*".[17]

What point 4 of the Leniency Notice states in general is specified by point 8 of that Notice. In particular point 8 of the Leniency Notice provides that:

"*The Commission will grant immunity from any fine which would otherwise have been imposed to an undertaking disclosing its participation in an alleged cartel affecting the Community if that undertaking is the **first to submit information and evidence** which in the Commission's view will enable it to:*

*(a) carry out a **targeted inspection** in connection with the alleged cartel; **or***

*(b) find an **infringement** of Article 81 EC in connection with the alleged cartel*".[18]

Two comments shall be made before examining the essence of each of the requirements; *firstly*, requirements 8(a) and 8(b) are equivalent; as the General Court has clarified as to the 2002 Leniency Notice[19] "*the Court must also reject the argument* […] *alleging that the Commission incorrectly disregarded the distinction between point 8(a) and (b) of the 2002 Leniency Notice*"[20] and "[the undertaking] *could not derive any particular legitimate expectation from the fact that it had been granted the status of conditional immunity on the basis of point 8(b) of the 2002 Leniency Notice rather than on the basis of point 8(a) of that notice*".[21] I think that the General Court's approach remains relevant even after the adoption of the 2006 Leniency Notice. Secondly, as it is indicated by the use of the connective word "or" the two requirements are non-cumulative. In that regard, two principles are adopted by the Commission, that is the "first in the door" principle[22] and the "only one immunity per cartel" principle.[23] In other words, it is only the first undertaking fulfilling either the conditions of point 8(a) or 8(b) that will be granted full immunity. It is

[12] Commission Decision in Case AT.39861, *Yen Interest Rate Derivatives* [2013] C(2013) 8602 final; Commission Decision in Case AT.39914, *Euro Interest Rate Derivatives* [2013] C(2013) 8512 final.
[13] Commission Decision in Case AT.40113, *Spark Plugs* [2018] C(2018) 929 final.
[14] Commission Decision in Case AT.40178, *Car Emissions* [2021] C(2021) 4955 final.
[15] European Commission, 'Frequently Asked Questions (FAQs) on Leniency – Version of October 2022' <https://competition-policy.ec.europa.eu/system/files/2022-10/leniency_FAQs_2.pdf#page=12> accessed 27 September 2024, 2.
[16] Settlement Notice (n 3) p 2.
[17] Leniency Notice (n 2) p 4.
[18] ibid p 8.
[19] Commission notice on immunity from fines and reduction of fines in cartel cases [2002] OJ C 45/3.
[20] Case T-12/06 *Deltafina v Commission* [2011] ECLI:EU:T:2011:441, para 171.
[21] ibid para 199.
[22] Nicolas Petit, *Droit Européen de la Concurrence* (3rd edn, LGDJ 2020) para 1785.
[23] J. Faull and A. Nikpay, *The EU law of Competition* (3rd edn, Oxford University Press 2014) paras 8.124, 8.140.

maintained in that regard that point 11 of the Leniency Notice clearly states that "[i]*mmunity pursuant to point (8)(b) will only be granted* [if] *no undertaking had been granted conditional immunity from fines under point (8)(a) in connection with the alleged cartel*".[24]

1.2.a. Point 8(a): decisive contribution to initiating an investigation

A nice example to illustrate what point 8(a) demands stems from the *Rubber Chemicals* case where the Commission in the frame of 2002 Leniency Notice noted that "*The fact is that without the cooperation of Flexsys* [the leniency applicant]*, the rubber chemicals cartel could have remained undiscovered much longer*".[25] The 2006 Leniency Notice specifies itself the circumstances under which the Commission is enabled to carry out a targeted investigation. In particular, point 9 reads as follows:

"*For the Commission to be able to carry out a targeted inspection within the meaning of point (8)(a), the undertaking must provide the Commission with the information and evidence listed below, to the extent that this, in the Commission's view, would not jeopardize the inspections:*

(a) A ***corporate statement*** *which includes, in so far as it is known to the applicant at the time of the submission:*

— A detailed description of the alleged cartel arrangement, including for instance its aims, activities and functioning; the ***product or service*** *concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel* ***contacts****, and all relevant explanations in connection with the pieces of evidence provided in support of the application.*

— The name and address of the legal entity submitting the immunity application as well as ***the names and addresses of all the other undertakings that participate(d) in the alleged cartel****;*

— The names, positions, office locations and, where necessary, home addresses of all ***individuals*** *who, to the applicant's knowledge, are or have been involved in the alleged cartel, including those individuals which have been involved on the applicant's behalf;*

— Information on which ***other competition authorities, inside or outside the EU****, have been approached or are intended to be approached in relation to the alleged cartel; and*

(b) ***Other evidence*** *relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement*".[26]

As point 9 is clear and poses specific *positive* requirements for an immunity request to be successful, the analysis shall be focused on the *negative*; that is, under which circumstances the request for immunity will be rejected. In that sense, point 11 of Leniency Notice explains that "[i]*mmunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission had already sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel*".[27] Similarly, immunity is not available if a natural person has already provided the Commission with such information.[28] Other than that, a comparison to the 2002 Leniency Notice could be helpful. Point 8(a) of the 2002 Leniency Notice states that "[t]*he Commission will grant an undertaking immunity from any fine which would otherwise have been imposed if* […] *the undertaking is the first to submit evidence which in the Commission's view may*

[24] Leniency Notice (n 2) p 11.
[25] Commission Decision in Case AT. 38443, *Rubber chemicals* [2007] para 355.
[26] Leniency Notice (n 2) p 9.
[27] ibid p 10.
[28] Commission Decision in Case AT. 38344, *Prestressing Steel* [2010] C(2010) 4387 final, paras 105, 1073.

enable it to adopt a decision to carry out an investigation […]"[29] In other words, under the current Leniency Notice enabling the Commission to adopt a decision to carry out an investigation does not suffice but rather enabling it to adopt a decision to carry out a *targeted* investigation is needed. Thus, the Commission can indeed be benefited by "insider" information as to the evidence and information to be traced.[30] It is under this prism that point 9 of the Leniency Notice shall be read; referring to the market concerned, the contacts, the participants and their addresses in the corporate statement is essential in order for the Commission to conduct a targeted inspection.

Lastly, the Leniency Notice entails two provisions regarding time aspects of applying for immunity under point 8(a). *Firstly*, point 10 clarifies that "[i]*mmunity pursuant to point (8)(a) will not be granted if, at the time of the submission, the Commission* […] *had already carried out* [an inspection in connection with the alleged cartel]".[31] An illustrative example of this provision is given in *Flat Glass* Commission Decision where after a first unsuccessful inspection had taken place two undertakings provided information on the basis of which the Commission carried out a new inspection. The Commission denied granting them immunity since the first inspection was lawful and concerned the same cartel.[32] *Secondly*, point 8(a) is accompanied by a useful reference as to the critical time for assessing whether the requirement is met. According to that reference "*the assessment of the threshold will have to be carried out* ***ex ante****, i.e.* ***without taking into account whether a given inspection has or has not been successful or whether or not an inspection has or has not been carried out****. The assessment will be made exclusively on the basis of the type and the quality of the information submitted by the applicant*".[33]

1.2.b. Point 8(b): decisive contribution to finding an infringement

The Commission has offered guidance as to the scope and meaning of point 8(b) requirements in *Carglass*. In this case, decided under 2002 Leniency Notice, the Commission clarified that what is at stake is the value of the submitted evidence, as "[e]*vidence which merely strengthens the Commission's ability to prove the facts by* ***complementing*** *evidence already in the Commission's possession at the time of the application* ***would not satisfy the condition of point 8(b)****, as it would be tantamount to providing significant added value under points 21 and 22 of the Leniency Notice with respect to that evidence*".[34]

Meanwhile, point 11 of Leniency Notice distinguishes two cumulative conditions to be met for an immunity to be granted under 8(b) standard. In particular, it provides that "[i]*mmunity pursuant to point (8)(b) will only be granted on the cumulative conditions that the Commission* ***did not have****, at the time of the submission,* ***sufficient evidence to find an infringement*** *of Article 81 EC in connection with the alleged cartel and that* ***no undertaking had been granted conditional immunity from fines under point (8)(a)*** *in connection with the alleged cartel. In order to qualify, an undertaking must be the first to provide* ***contemporaneous, incriminating*** *evidence of the alleged cartel as well as a corporate statement containing the kind of information specified in point (9)(a), which would enable the Commission to find an infringement of Article 81 EC*".[35]

It is noted that in order for the standard under point 8(b) to be fulfilled the undertaking applying for leniency shall provide the Commission with unambiguous statements and incriminating evidence contemporaneous to the infringement as is described in point 11 and as it was ruled (in the frame of 2002 Leniency Notice) by the Commission and upheld by the General Court and the

[29] Commission notice on immunity from fines and reduction of fines in cartel cases [2002] (n 19) p. 8.
[30] Faull and Nikpay (n 23) paras 8.134-8.135.
[31] Leniency Notice (n 2) p 10.
[32] Commission Decision in Case AT. 39165, *Flat Glass* [2007] C(2007)5791 final, paras 524-525.
[33] Leniency Notice (n 2) p 8[1].
[34] Commission Decision in Case AT. 39125, *Carglass* [2008] para 717.
[35] Leniency Notice (n 2) p 11.

Court of Justice in *Elevators and Escalators* case.[36] The reason why ambiguous statements and non-incriminating and non-contemporaneous evidence do not suffice is that they lack the necessary value as the Commission needs to trace corroborating evidence to find an antitrust infringement.

1.2.c. Points 12 and 13: additional Requirements

The following requirements shall be met in immunity applications under both point 8(a) and 8(b). As far as the requirements under point 12 are concerned, they have to be met even for a reduction of the fine under the Leniency Notice, while point 13 concerns solely immunity applications.

Point 12(a): genuine cooperation

In light of the preceding analysis on the relationship between leniency, settlement and co-operation it has been clarified that leniency aims to reward cooperation. Point 12 renders cooperation a necessary element in order for an undertaking to be qualified for immunity. In particular, Leniency Notice states that "*(a) The undertaking cooperates genuinely, fully, on a continuous basis and expeditiously from the time it submits its application throughout the Commission's administrative procedure. This includes:*

— providing the Commission promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it;

— remaining at the Commission's disposal to answer promptly to any request that may contribute to the establishment of the facts;

— making current (and, if possible, former) employees and directors available for interviews with the Commission;

— not destroying, falsifying or concealing relevant information or evidence relating to the alleged cartel; and

— not disclosing the fact or any of the content of its application before the Commission has issued a statement of objections in the case, unless otherwise agreed".[37]

On that note, it is highlighted that what is at stake and has to be evaluated by the Commission is whether there has been a genuine spirit of cooperation.[38] In that regard one can distinguish between a positive and a negative obligation of the undertaking applying for immunity. As to its *positive* obligation the undertaking, apart from providing all the relevant evidence it has[39], must be at the Commission' s disposal providing explanations and clarifications when needed[40] and carrying out any necessary internal investigations.[41] The envisaged concept behind the positive obligation concerns the active cooperation with the Commission; that is giving all the relevant information

[36] Case C-510/11 P *Kone and Others v Commission* [2013] ECLI:EU:C:2013:696 paras 50-52; Case T-151/07 *Kone and Others v Commission* [2011] ECR 2011 II-05313, para 100; Commission Decision in Case AT. 38823, *PO/Elevators and Escalators* [2007] C (2007) 512 final, paras 787-789.

[37] Leniency Notice (n 2) p 12.

[38] Case C-681/11 *Schenker & Co. and Others* [2013] ECLI:EU:C:2013:404 para 48; Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others v Commission* [2005] ECR I-05425 para 395; Opinion of AG Kokott in Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v Commission* [2014] ECLI:EU:C:2014:2439 p 239.

[39] Commission Decision in Case AT. 38710, *Bitumen Spain* [2007] C(2007)4441 final, para 572.

[40] Commission Decision in Case AT. 39462, *Freight forwarding* [2012] C(2012) 1959 final, para 1033.

[41] Commmission Decision in Case AT. AT.39563, *Retail Food Packaging* [2015] C(2015) 4336 final, para. 1063; Commission Decision in Case AT. AT.39437, *TV and computer monitor tubes* [2012] C(2012) 8839 final, para 1118.

without waiting for a any pertinent questions or requests by the Commission.[42] As to its *negative* obligations, the undertaking concerned shall not provide Commission with false, inaccurate or misleading information.[43]

A characteristic example which allows us to understand the essence of point 12(a) requirement comes from the *Chloroprene Rubber* case. The Commission found that Bayer, the undertaking applying for immunity, had not provided some information and evidence thus slowing down the Commission's investigation. Nevertheless, the Commission reached the conclusion that Bayer genuinely cooperated taking into account that these pieces of information and evidence were not fundamental for establishing the cartel and that, when having a precise question or request, Bayer spontaneously and accurately responded.[44] In other words, the Commission does not follow a formalistic approach, as would be the case if it had not granted Bayer full immunity because some non-critical documents were provided only after the Commission's request, but rather examines the undertaking's behaviour as a whole.

Notwithstanding the above example and its conceptual importance, a close look shall be given to *Raw Tobacco IT* where the Commission rejected *Deltafina*'s immunity application. Given that at the time of leniency application the 2002 Guidelines were in force without specifying that the duty to cooperation also covers the non-disclosure of the application, Deltafina informed the other cartel members as to its immunity application without informing the Commission as to the disclosure, thus the Commission did not grant immunity (but rather a reduction). As the Commission eloquently explained such disclosure before carrying out on-spot investigations was capable of rendering the investigations unsuccessful.[45] The decision was upheld by both the General Court and the Court of Justice,[46] and after the 2006 Leniency Notice Revision this scenario is expressly addressed. All the more, given that after the revision, the requirement of point 12(a) has to be met even for the reduction of a fine, it is only this part of the Commission Decision that does not remain valid.

Point 12(b): involvement termination

The second additional condition to be met for a full immunity to be granted dictates that "[t]*he undertaking ended its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections*".[47] Analysing this provision sets an obvious question; under which circumstances is the involvement considered to have ended? In *TV and computer monitor tubes* the Commission explained that an undertaking fulfills its obligation under point 12(b) even in the case of a subsequent anti-competitive contact by a *defiant* employee who (because of that contact) was immediately transferred to another unit unrelated to the prices which were the object of the cartel.[48] All the more, an undertaking participating in meetings with the other cartel participants but for discussions unrelated to the cartel is not in breach of its obligation enshrined in point 12(b) – in such a case the other participants' assertation that the subject of the discussions was cartel-

[42] Joined Cases C-293/13 P and C-294/13 P *Fresh Del Monte Produce v Commission and Commission* [2015] ECLI:EU:C:2015:416 paras 182-184; Case T-406/10 *Emesa-Trefilería and Industrias Galycas v Commission* [2015] ECLI:EU:T:2015:499 para 166; Commission Decision in Case AT. 39482, *Exotic Fruit* [2011] C(2011) 7273 final, para 351.
[43] Case C-301/04 P *Commission v SGL Carbon AG* [2006] ECR I-05915, para 68.
[44] Commission Decision in Case AT. 38629, *Chloroprene Rubber* [2007] C(2007) 5910 final, paras 608-617.
[45] Commission Decision in Case AT. 38281, *Raw Tobacco Italy* [2005] paras 441-442 et seq.
[46] Case C-578/11 P *Deltafina v Commission* [2014] ECLI:EU:C:2014:1742; Case T-12/06 *Deltafina v Commission* [2011] (n 20).
[47] Leniency Notice (n 2) p 12.
[48] Commission Decision in Case AT. 39437, *TV and computer monitor tubes* (n 41) para 1120.

related does not suffice for the undertaking to "lose" immunity, as was apparent in *Retail Food Packaging*.[49]

The second limb of point 12(b) concerns an exception[50]; since an abrupt withdrawal of the cartel may be an indication of the leniency application vis-à-vis the other parties, the Commission may draw a "delicate balance" and allow the immunity applicant to continue participating in the cartel as long as it does not take advantage of the information and strategies discussed in the frame of the cartel meetings.[51] While this exception is reasonable and is necessary for the proper conduct of Commission investigations, it gives rise to a practical question: once the undertaking continues its involvement in view of 12(b) exception, which will be the duration of the infringement for which it will be condemned? The Commission addressed this point in *Car battery recycling* expressly stating that "*There is no indication that the anti-competitive arrangements came to an end before the Commission's inspections in this case. On 22 June 2012, JCI applied for leniency under the Leniency Notice. JCI can therefore be considered as having ended its involvement in the infringement, except for what was reasonably necessary to preserve the integrity of the Commission's inspections316, on 22 June 2012.* ***That date should therefore be taken as the end date of the infringement for JCI***".[52]

Point 12(c): non-falsification of evidence

According to point 12(c) of the Leniency Notice "[w]*hen contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities*".[53] While there has not been any case where the falsification or conceal of evidence has been at issue, three aspects of this provision shall be mentioned; *firstly*, without this provision the protection against inaccurate information and evidence would have been reduced; *secondly*, the cooperation with other competition authorities is exempted and thus protected and *thirdly*, the provision catches scenarios similar to *Raw Tobacco IT (Deltafina)* once the harmful conduct took place before the application for immunity.

Point 13: no coercion

Point 13 of the Leniency Notice stipulates that "[a]*n undertaking which took steps to coerce other undertakings to join the cartel* ***or*** *to remain in it is not eligible for immunity from fines.* ***It may still qualify for a reduction*** *of fines if it fulfils the relevant requirements and meets all the conditions therefor*". This requirement has not reached EU administration and courts at its current form; the typical example of exclusion under point 13 has been the *Vitamins* case under which the undertakings which had the "strategic" plan to create the cartel and persuaded other undertakings to participate in it were considered either instigators or having a determining role which was sufficient under the 1996 Leniency Notice.[54] Since following the revised Leniency Notices, the exclusion on point 13 has become narrower[55], I believe that this case would not fall under the said exception.

1.3 Reduction Requirements

[49] Commission Decision in Case AT. 39563, *Retail Food Packaging* (n 41) para 1063.
[50] This exception does not apply to point 12(a). See Commission Decision in Case AT. 38281, *Raw Tobacco Italy* (n 45) para 434.
[51] Faull and Nikpay (n 23) para 8.146.
[52] Commission Decision in Case AT.40018, *Car battery recycling* [2017] C(2017) 900 final, para. 245.
[53] Leniency Notice (n 2) p 12.
[54] Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C 207/4, B.e; Commission Decision in Case AT. 37512, *Vitamins* [2001] OJ L 6/1, paras 568, 569, 744, 745.
[55] Faull and Nikpay (n 23) para 8.149[490]. Cf. Louis Vogel, European Competition Law (LawLex / Bruylant 2018) 471.

Contrary to the immunity, which is possible solely in the framework of leniency, reduction can stem either from the Leniency or the Settlement Notice. From the outset it is maintained that reduction under the Leniency Notice requires the fulfillment of points 12(a), 12(b) and 12(c) described above.

1.3.a. Partial immunity and compelling evidence

Partial immunity is regulated in the last sentence of point 26 of the Leniency Notice which reads "[i]*f the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25)* [that is not requiring corroboration] *which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence*".[56]

In order to conceptualise the "partial immunity" principle, we shall take into consideration that it faces the stalemate that an undertaking would encounter if it had to provide the Commission with (self)-incriminating evidence leading to a fine increase in order to qualify for reduction.[57] Under this scheme, the leniency applicant can provide the evidence, which will not be used for the calculation of its fine. It is worth noting that once the requirements of point 26 are met the undertaking cannot be fined for other anticompetitive contacts, which the Commission found itself, if these contacts are related to the duration or the gravity for which the undertaking has been granted partial immunity.[58]

As to the conditions set by point 26, they have been detailed in *Recyclex* by AG Pitruzzella, who has distinguished four cumulative[59] conditions:

- only the first undertaking to submit evidence to the Commission may be granted partial immunity;[60]
- as to the value of the evidence, they shall be compelling, that is evidence which alone enables the Commission to prove the relevant facts reaching the demanded standard of proof;[61]
- the submitted evidence must be related to "additional facts" further to the ones already known by the Commission. Contrary to the third condition this condition concerns "the factual […] not the evidentiary basis"[62]. By requiring the additional facts to be new and unknown to the Commission point 26 is interpreted strictly[63] and the Commission practice under the 2002 Leniency Notice (which referred to facts not known to the Commission) remains relevant.[64] The requirement of new facts was also confirmed by the Court of Justice which pointed out that "*the third paragraph of point 26 of the 2006 Leniency Notice must be interpreted as referring to cases in which a company which has taken part in a cartel provides compelling evidence to the Commission, enabling it to establish* ***new*** *facts relating to the gravity or duration of the infringement,* ***excluding*** *cases in which that*

[56] Leniency Notice (n 2) p 26.
[57] Faull and Nikpay (n 23) para 8.126; cf. Bellamy and Child, *European Union Law of Competition* (8th edn., Oxford University Press, 2018), paras 14.122 and 14.125 where reference to de facto immunity is made.
[58] Case T-267/12, *Deutsche Bahn and Others v Commission* [2016] ECLI:EU:T:2016:110, paras 389-390; Louis Vogel (n 55) 476.
[59] Opinion of AG Pitruzzella in Case C-563/19 P, *Recylex and Others v Commission* [2020] ECLI:EU:C:2020:646, p. 58.
[60] ibid p 54.
[61] ibid p 55.
[62] ibid p 56.
[63] Commission Decision in Case AT. 39610, *Power Cables* [2014] C(2014) 2139 final, para 1065.
[64] Commission Decision in Case AT. 39092, *Bathroom Fittings and Fixtures* [2010] C(2010) 4185 final, paras 1310-1312; Commission Decision in Case AT. 38695, *Sodium Chlorate* [2008] C(2008)2626 final, para 595.

company has merely provided information which strengthens the evidence relating to the existence of the infringement"[65]; and

- the additional facts envisaged in the third condition are new and pertinent to the gravity or the duration of the violation.[66]

1.3.b. Significant Added Value

Turning on the typical case of reduction under the Leniency Notice, point 24 stipulates that "[i]*n order to qualify, an undertaking must provide the Commission with evidence of the alleged infringement which represents* ***significant added value*** *with respect to the evidence already in the Commission's possession and must meet the cumulative conditions set out in points (12)(a) to (12)(c) above*".[67] Other than the point 12 obligations, reduction mainly requires evidence providing significant added value. In essence, this condition consists of five elements; (a) the undertaking shall provide (b) evidence (c) concerning the infringement (d) having added value (e) which is significant.

While elements (b) and (c) do not seem to need further explanations[68] the EU judicature has examined the first element in *Emesa-Trefilería*. In this case, evidence having significant added value were drawn up by the appellant (Emesa) but it was not the appellant who *provided* Commission with this evidence. Thus, Emesa could not take advantage of any reduction of the fine.[69] As far as element (d) is concerned the Leniency Notice entails the following clarification "[t]*he concept of 'added value' refers to the extent to which the evidence provided strengthens, by its very* ***nature*** *and/or its level of* ***detail****, the Commission's ability to prove the alleged cartel. In this assessment, the Commission will generally consider* ***written*** *evidence* ***originating from the period of time to which the facts pertain*** *to have a greater value than evidence subsequently established. Incriminating evidence* ***directly*** *relevant to the facts in question will generally be considered to have a greater value than that with only indirect relevance. Similarly, the degree of corroboration from other sources required for the evidence submitted to be relied upon against other undertakings involved in the case will have an impact on the value of that evidence, so that* ***compelling*** *evidence will be attributed a greater value than evidence such as statements which require corroboration if contested*".[70] In other words, four criteria are provided for as indicators of added value – the written form; the contemporaneous character; the direct relation and the compelling nature of the evidence.

What is significant is to define when the added value is significant. Given that the commission practice and the EU Court's judgments offer a variety of examples, a categorization of factors to be taken into account is useful: *firstly*, the comparator to which the significant added value has to be examined is the evidence already in the Commission's possession[71]; secondly, significant added value may be accepted when the provided evidence (i) offer details (ii) explain[72] or (iii) corroborate other evidence[73] and (iv) prove additional facts, while *thirdly*, significant added value may be

[65] Case C-563/19 P, *Recylex and Others v Commission* [2021] ECLI:EU:C:2021:428, para 37.
[66] Opinion of AG Pitruzzella in Case C-563/19 P (n 59) p 57.
[67] Leniency Notice (n 2) p 24.
[68] For a detailed analysis of these elements, Faull and Nikpay (n 23) paras 8.197, 8.198, 8.202.
[69] Case T-406/10, *Emesa-Trefilería and Industrias Galycas v Commission* (n 42) paras 182-186.
[70] Leniency Notice (n 2) p 25.
[71] Commission Decision in Case AT. 40013, *Lighting Systems* [2017] C(2017) 4100 final, para 100; Commission Decision in Case AT. 38645, *Methacrylates* [2006] C(2006) 2098 final, para 403.
[72] Commission Decision in Case AT. 38432, Professional Videotape [2007] C(2007)5469 final, para 257.
[73] Commission Decision in Case AT. 38823, *PO/Elevators and Escalators* (n 36) para 771.

denied when (i) the evidence needs corroboration or (b) the Commission simply refers to this evidence[74].[75]

As the Leniency Notice states[76] there are three reduction bands:

- the first undertaking to provide evidence representing significant added value will be granted a reduction of 30% to 50%;
- the second undertaking to provide evidence representing significant added value will be granted a reduction of 20% to 30%; and
- any subsequent undertakings to provide evidence representing significant added value will be granted a reduction of up to 20%.

The criteria for the determination of the final reduction inside the relevant band are two; the time of submission of the evidence reaching the threshold of significant added value and the added value it bears.[77] From a merely statistic perspective, the average reduction under the 2006 Leniency Settlement for the first band reaches 43%, for the second band reaches 27% and for the third band reaches 15%. The relevant data have been extracted by the Commission Decisions and are presented in Annexes A, B and C respectively.

What we shall examine is which undertaking is considered the first one to provide evidence with significant added value. In order to do so I will combine the *Freight Forwarding* case[78] with an example given by *Van Barlingen and Barennes* keeping the wording of the example and using in brackets the facts of *Freight Frowarding*:

"*Let us assume that 100 points are needed to reach the threshold of significant added value.* [DB] *makes a first submission. It is worth 70 points, taking into account the evidence the Commission already had at that moment. At this point in time,* [DB] *has not yet qualified for significant added value. One week later,* [Agility] *makes a voluntary submission of evidence. Based on the evidence the Commission already had, including the submission of undertaking A, the value of this submission is considered to* [reach 100] *points.* [… Agility] […] *is the first undertaking to qualify for significant added value, even if undertaking A was the first applicant for a reduction of fines.* [Agility] *will thus benefit from a reduction between* [of 30%]. [Since DB] *then comes back again* […] *with a second submission worth 80 points, it will have accumulated 150 points and will be the second undertaking to qualify. It will thus receive a reduction* [of 25%]".[79] The Commission thus renders clear that it is the first to submit evidence with significant added value and not the first submitting a leniency application that takes advantage of the higher reduction.

A second question related to the order of the reduction bands concerns the consequences resulting from a rejection of a reduction application meeting the significant added value standard but not fulfilling the conditions set out in point 12 of the Leniency Notice. This question has been addressed by the Court of Justice which rejected the Recyclex's argument that despite being the second undertaking to have submitted evidence with significant added value, it shall be considered the first one to have done so once the first undertaking meeting the standard was excluded for lack of cooperation. What is important from the Court's ruling is the explanation as to the rationale behind the rejection of this argument, which goes back to the aims of the Leniency Programme. In the Court's own words "*the objective pursued by the leniency programmes* [is] *to create a climate*

[74] Case T-214/06, *Imperial Chemical Industries v Commission* [2012] ECLI:EU:T:2012:275, para 197.
[75] Valentine Corah, Competition Law of the European Union (2nd ed., LexisNexis 2023) para 10.08[8][d] with further references; Faull Nikpay (n 23) para 8.204 with further references; Bellamy and Child (n 57) para 14.124 with further references.
[76] Leniency Notice (n 2) p 26.
[77] ibid.
[78] Commission Decision in Case AT. 39462, *Freight forwarding* (n 40) paras 1045-1058.
[79] Lacking access to the text of Van Barlingen and Bareness the quote comes from Faull and Nikpay (n 23) para 8.192[571].

of uncertainty within cartels in order to encourage the reporting of them to the Commission […] *In order to achieve that objective, it is necessary to encourage undertakings to* ***cooperate as quickly and effectively as possible*** *with the Commission in its investigative work. To allow a change in the ranking of undertakings which were not the quickest to cooperate because another undertaking failed to comply with the requirements set out in point 12 of the 2006 Leniency Notice would be detrimental to the objective of* ***speeding up the dismantling of cartels*** *pursued by that notice*".[80]

1.3.c. Reduction under the Settlement Notice

Turning on to the reduction under the Settlement Notice, it is highlighted that the relevant provisions and conditions are more of procedural rather than substantive character. As to the reduction requirements under the Settlement Notice, two comments shall be made.

Firstly, settlement as a whole is related to the very essence of cooperation. In that regard, case-law developed in the framework of the leniency notice illustrates that cooperation shall be rewarded with a fine reduction. In particular, such a reduction shall be granted when cooperation "*enabled the Commission to* ***establish*** *the existence of an infringement more easily and to put an end in it*".[81] I think that this case-law is also relevant under the settlement notice and it is under the prism of this standard that one shall evaluate the relevant provisions of the Settlement Notice.[82] Therefore, the substantive cornerstone of settlement lies on the acknowledgement of the infringement by the settling parties, since it is the acknowledgment that tends to the establishment of the infringement.

Secondly, the Settlement Notice provides for three instances where the settlement reward *may* be excluded. All of them share a same characteristic being instances of breaching the duty of cooperation. In particular, (a) "*the parties to the proceedings* [shall not] *coordinate* ***to distort or destroy any evidence*** *relevant to the establishment of the infringement or any part thereof or to the calculation of the applicable fine*"[83]; (b) "[t]*he parties to the proceedings* ***may not disclose*** *to any third party in any jurisdiction the contents of the discussions or of the documents which they have had access to in view of settlement, unless they have a prior explicit authorization by the Commission*"[84]; and (c) the parties may not use information forming part of the settlement submissions for purposes other than "[those] *of judicial or administrative proceedings for the application of the Community competition rules at issue in the related proceedings*"[85].

2. Procedural Aspects

In this section which closes the analysis of leniency and settlement as traditional tools, I will present and comment the basic procedural aspects of both programmes and how they co-apply in practice.

2.1. Leniency Notice

2.1.a. Identity of the applicant

A practical question as to the beneficiary of any immunity or reduction under the Leniency Notice arises when between the anti-competitive contract and the leniency application a unit transfer has taken place. For example, supposed that undertaking A has a unit B and both have participated in a cartel. Undertakings A sells unit B to undertaking C and afterwards it decides to file a leniency

[80] Case C-563/19 P, *Recylex and Others v Commission* (n 65) paras 56-57.
[81] Case C-328/05 P, *SGL Carbon v Commission* [2007] ECR I-03921, para 83; Case C-297/98 P, *SCA Holding v Commission* [2000] ECR I-10101, para 36; Case T-456/10, *Timab Industries and CFPR v Commission* [2015] ECLI:EU:T:2015:296, para 92.
[82] For instance, the Hellenic Competition Commission refers to these cases in the frame of the settlement procedure, see Hellenic Competition Decision in Case 772/2022, para 20[28].
[83] Settlement Notice (n 3) p 5.
[84] ibid p 7.
[85] ibid ps 35-36.

application. If undertaking A is granted immunity (or leniency) for a conduct it had when it constituted an economic entity with unit B, will undertaking C (as unit B holder) be benefited? The EU Courts clearly answered that such an "extension" or the leniency reward is not permitted because the critical time for assessing the leniency beneficiary is the time of the leniency application instead of the time of infringement; this solution is in compliance with the aim of the leniency programme who rewards active cooperation, given that it is only undertaking A that has cooperated with the Commission.[86]

2.1.b. Initiation of the proceedings

When an undertaking aims to submit an application for immunity it has three procedural pathways to choose:

1. to submit a *formal application* filing the relevant information and evidence as well as the corporate statement;
2. to submit the relevant information and evidence in *hypothetical* terms; or
3. to ask for a *marker* in order to gather the relevant information and evidence.

On the contrary when it aims to submit an application for reduction the only procedural pathway is the submission of the *formal application*.

As to the typical formal application, the undertaking has to submit all the evidence and information relating to the cartel, as well as the corporate statement of point 9. Corporate statements constitute a "presentation" specifically prepared for the leniency procedure before the Commission which entails information on the alleged cartel and the participation of the leniency applicant therein.[87] Under the 2006 Leniency Notice, this statement may also be given orally in order for the undertakings to avoid any consequences of the statement in the field of private enforcement.[88] The Commission has set a specific procedure of transcription of the oral statements which is characterised by the involvement of the leniency applicant as to the verification of the accuracy of the transcription in specific time-limits.[89]

The second option, that is the submission of the application in *hypothetical terms* requires the submission of a list of evidence to be later given to the Commission. In order to outweigh the lack of a corporate statement, the Commission has set two conditions for an hypothetical application to produce effects as to the fine immunity or reduction: *firstly*, it must include as a minimum information on the concerned "market" (that is the affected product or service and territory) and the duration of the cartel; on the contrary the names of the applicant and the other cartel participants is not necessary to be mentioned; *secondly*, as to the nature of the list it has to be "detailed" and descriptive as to the nature and content of the evidence; it is in that sense that copies having sensitive information removed may be submitted with the application.[90]

The last option, that is the *marker*, serves as a tool to guarantee the applicant's place in the order of applications until they are able to gather the required information and evidence. Thus, once these pieces of information and evidence are submitted, they will be considered submitted at the time of the marker instead of the actual submission date. A particular characteristic of a marker is that it is granted at the Commission's discretion; nevertheless as of 2022 the Commission typically

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[86] Case C-238/12 P, *FLSmidth v Commission* (2014) ECLI:EU:C:2014:284, para 83; Case T-384/09, *SKW Stahl-Metallurgie Holding and SKW Stahl-Metallurgie v Commission* (2014) ECLI:EU:T:2014:27, paras 237-238; Case T-161/05, *Hoechst v Commission* (2009) ECR II-03555, paras 74 et seq; Valentine Corah, *Competition Law of the European Union* (n 75) para 10.08[8][d][iv].

[87] Leniency Notice (n 2) p 31.

[88] Regulation 773/2004 (n 1), art 4a(3); Leniency Notice (n 2) ps 9^2, 32.

[89] European Commission, 'Delivering oral statements at DG Competition' <https://competition-policy.ec.europa.eu/document/download/74f7230b-a807-4865-b283-20a7e1a09b8f_en?filename=leniency_oral_statements_procedure_en.pdf> accessed 27 September 2024.

[90] Leniency Notice (n 2) p 16(b).

grants a marker once it fulfills the conditions set by the Leniency Notice;[91] that is there is information and evidence to be gathered and the applicant submits information as to "*its name and address, the parties to the alleged cartel, the affected product(s) and territory(-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct*".[92]

2.1.c. Other procedural steps and termination of the proceedings

Other than a written acknowledgement of receipt by the Commission which may be asked by the leniency applicants, the next procedural step concerns granting provisional immunity or reduction of the fine. While as far as the formal application is concerned there are not any intermediate procedural actions, this is not the case for the other two types of initiating the procedure; as far as hypothetical applications are concerned the actual disclosure of evidence corresponding to the submitted list according to the agreed timeline is necessary; as far as the marker is concerned, the leniency applicant has to "perfect" its marker following a formal and not a hypothetical application.

Once these intermediary actions have taken place, the Commission will take a provisional decision either in the affirmative or in the negative. As to a negative answer the theory distinguishes four pertinent types: (a) "rejection" decision for non-meeting the immunity or reduction requirements, as was for instance the case in *Marine Hoses*; (b) "non eligibility" letter rejecting the application as inadmissible; (c) "non-action" letter functioning as a marker until the Commission decides whether it will continue the investigation of the alleged cartel and (d) "non-processing" letter stating that the case is dealt by a national competition authority of an EU member state.[93] As to the affirmative decision, if the application concerns immunity the undertaking is granted conditional immunity[94], while if it concerns fine reduction the undertaking is informed on the Commission's intention to grant a reduction and on the relevant band of reduction.[95]

The procedure ends with the final decision as to the immunity and the reduction, which is merely related to the evaluation of the respect of the conditions set out in point 12 (and 13 as far as immunity is concerned).[96]

2.2. Settlement Notice

The Settlement Notice describes in detail the procedure to be followed specifying the provision of Article 10a of Regulation 773/2004. Given that the procedure does not raise any special interpretative difficulties, I will first analyse the main characteristics of the procedure then presenting the procedural steps of settlement as a whole.

2.2.a. Main features of settlement proceedings

One can distinguish four fundamental characteristics of the settlement procedure as it stands; namely (a) it is not a fully adversarial procedure; (b) it is "streamlined"; (c) it does not entail negotiations and (d) it provides for Commission's discretion.

As far as its differences to the standard antitrust procedure are concerned, settlement is not *fully* adversarial.[97] According to the standard procedure, the Commission carries out the investigation, evaluates the evidence and issues a Statement of Objections against which the parties have the right to answer[98] and even asking for an oral hearing to take place[99]. That is not the case with

[91] Frequently Asked Questions (FAQs) on Leniency – Version of October 2022 (n 15).
[92] Leniency Notice (n 2) p 15.
[93] Faull and Nikpay (n 23) paras 8.160-8.163
[94] Leniency Notice (n 2) p 18.
[95] ibid p 29.
[96] ibid ps 22, 30.
[97] Wouter Wills, *EU Antitrust Enforcement* (Concurrences, 2024) 97-98.
[98] Regulation 773/2004 (n 1) art 10.
[99] ibid arts 11 et seq.

settlement; the Commission calls the parties to settle granting them access to the file and then a series of settlement discussions takes place which ultimately leads to the issue of the Statement of Objections. In other words, while the settlement procedure respects the fundamental rights of the settling parties, it is characterised by the parties' willingness to acknowledge their infringement.

The second feature of the procedure is closely related to the first one; since the procedure is not fully adversarial, it is *streamlined*. This characteristic has three aspects: as to the time the procedure rolls out faster; as to the access to the file the Commission has broad discretion to organise such an access in an effective manner and as to the decisions adopted these decisions are briefer than the ones adopted following the ordinary procedure.[100] For example in *Trucks* case the settlement decision was issued on 19.07.2016 while the standard procedure decision was issued after more than a year on 27.09.2017; the settling parties had access to the file once[101] while the non-settling party was twice granted additional access to the file[102]; the decision on the settling party counts 32 pages, while the decision addressed to the non-settling party 109 pages.

The third characteristic has been highlighted by the Commission in order to avoid any misinterpretation of the settlement policy and procedure. According to the Settlement Notice, "[…] *the Commission, as the investigative authority and the* ***guardian of the Treaty*** *empowered to adopt enforcement decisions subject to judicial control by the Community Courts, does not negotiate the question of the existence of an infringement of Community law and the appropriate sanction*".[103] It is maintained that even the reduction of the fine according to the Settlement Notice does not vary from case to case reaching a fixed 10%.

The fourth characteristic may be traced in every procedural step of settlement; as the General Court recognised in Deutsche Bahn "[i]*t is* […] *plain from the wording of [Article 10(a) of Regulation 773/2004] that the Commission is not obliged to make contact with the parties, but that it has a discretion in that regard. That reading* […] *is confirmed by recital 4 of Regulation No 622/2008, which states that the Commission has a broad margin of discretion to determine in which cases it may appropriately* ***explore*** *the parties' interest to engage in settlement discussions, as well as to* ***decide to engage*** *in such discussions* ***or discontinue*** *them* ***or to definitely settle*** *the case*".[104] It is in that vein that points 3 and 5 (on screening) and 15 (on settlement discussions), 27 (on statement of objections) and 29 (on the final decision) of the Settlement Notice shall be read. Therefore, point 5 which sets some screening criteria ("probability of reaching a common understanding, reasonable timeframe, number of parties involved, foreseeable conflicting positions on the attribution of liability, extent of contestation of the facts and procedural efficiencies"[105]) does so in a non-exhaustive manner[106], while point 29 provides for Commission's "ultimate decisional autonomy".

2.2.b. The procedural steps

The procedure described in Settlement Notice essentially consists of five procedural steps:

- the Commission calls the parties to express their interest in proceeding with the settlement procedure;
- settlement discussions between the Commission and the interested parties take place;
- the parties file their settlement submissions;

[100] Ekaterina Rousseva, *EU Antitrust Procedure* (Oxford University Press, 2020) paras 7.49-7.51.
[101] Commission Decision in Case AT. 39824, *Trucks* [2016] C(2016) 4673 final, para 39.
[102] ibid paras 372-377
[103] Settlement Notice (n 3) p 2.
[104] Case T-267/12, *Deutsche Bahn and Others v Commission* (n 58) para 417.
[105] All the factors but procedural efficiency *may* be taken into account; on the contrary procedural efficiency *will* (=definitely) be considered.
[106] Manuel Kellerbauer and others, 'Procedures to Establish The Existence of an Infringement' in Luis Ortiz Blanco (ed.), *EU Competition Procedure* (3rd edn., Oxford University Press, 2013), para 10.130.

- the Commission issues the Statement of Objections and the parties reply as to whether the Statement depicts the content of the settlement submissions;
- the settlement decision is issued.

Starting with the first step, the fact that it is the Commission which calls the parties to express their interest does not mean that the parties have to remain inert. On the contrary, they can inform the Commission that they are willing to proceed with a settlement procedure before they are called to do so. In any case, when the Commission calls the interested parties, it also sets a time-limit of at least two weeks during which the parties have to provide the Commission with a *written declaration* that they wish to proceed with the streamlined procedure without acknowledging at this stage their participation in the infringement.[107] Furthermore, the call towards the parties, if preceding the Statement of Objections, constitutes the last point in time when the initiation of the proceedings may take place.[108] In that regard, the initiation of the proceedings is critical as to the *identity* of the parties of the procedure; the Commission has to identify (well) before taking a final decision the *legal* persons which are to be fined[109] and, if more legal persons belong to the same undertaking (according to the single economic unity doctrine) they have to point out a joint representative for the effective continuation of the settlement process.[110]

Before analysing the second step, it is worth noting point 13 of the Settlement Notice, which correlates the settlement to the leniency procedure; "[t]*he Commission* ***may disregard*** *any application for immunity from fines or reduction of fines on the ground that it has been submitted after the expiry of the time-limit referred to in point 11*".[111] That is, any leniency applications made after the time period set by the Commission for the parties to express their interest in settlement may not be accepted.[112] In view of this point I think that a common procedural "map" for both leniency and settlement could be created.

Moving on the settlement discussions, they are divided into two types: the formal settlement discussions and the technical discussions.[113] In particular, the discussions start with a formal meeting where the Commission informs the parties on "*the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections*".[114] It is after that meeting that the parties have access to the file and the technical discussions take place in order for the parties and the Commission to decide whether the parties shall be granted access to other documents of the file and which is the fine range for the infringement (e.g., on which basis will the basic amount be calculated, etc.).[115] Shall the Commission and the settling parties reach a "*common understanding*", a final formal settlement meeting takes place and the Commission sets a period of no less than 15 days for the parties to file their settlement submission.[116]

Shall the parties fail to file a timely settlement submission the standard procedure will continue as to them[117]; apparently their interest in engaging in the settlement procedure does not constitute incriminating evidence.[118] If the parties introduce a settlement submission either written or oral[119], the Settlement Notice sets its essential content which in summary consists of (a) a recognition by

[107] Regulation 773/2004 (n 1) arts 10a(1), 17(3); Settlement Notice (n 3) p 11.
[108] Settlement Notice (n 3) p 11.
[109] ibid p 8.
[110] ibid p 12.
[111] ibid p 13.
[112] Manuel Kellerbauer and others in Luis Ortiz Blanco (n 106) para 10.132.
[113] Ekaterina Rousseva (n 100) paras 7.21-7.33.
[114] Settlement Notice (n 3) p 16.
[115] ibid.
[116] ibid p 17.
[117] ibid p 19.
[118] ibid p 11 *in fine*.
[119] Regulation 773/2004 (n 1) art 10a(2).

the parties of their own liability, (b) an indication as to the fine maximum and (c) a confirmation that the fundamental rights of the undertakings have been respected.[120] According to the EU legislation:

"[The submission shall contain:]

*(a) an **acknowledgement** in clear and unequivocal terms **of the parties' liability** for the infringement summarily described as regards its object, its possible implementation, the main facts, their legal qualification, including the party's role and the **duration** of their participation in the infringement in accordance with the results of the settlement discussions;*

*(b) an indication of the **maximum amount of the fine** the parties foresee to be imposed by the Commission and which the parties would accept in the framework of a settlement procedure;*

*(c) the parties' confirmation that, they have been sufficiently **informed** of the objections the Commission envisages raising against them and that they have been given sufficient opportunity to make their views known to the Commission;*

*(d) the parties' confirmation that, in view of the above, **they do not envisage requesting access to the file or requesting to be heard again in an oral hearing**, unless the Commission does not reflect their settlement submissions in the statement of objections and the decision;*

(e) the parties' agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003 in an agreed official language of the European Community".

This submission in principle may not be revoked but, given that they are conditional upon the Commission Statement of Objections, if the Statement of Objections fails to reflect the content of the settlement submissions revocation is possible.[121]

The pre-last procedural stage is the Statement of Objections which remains necessary despite the non-fully adversarial character of the procedure.[122] After the Statement of Objections is issued the settling *have to* reply in a time-limit set by the Commission and not being less than 15 days indicating whether the submission reflects their settlement submission (and thus a final settlement submission may be issued)[123] or it does not reflect the submission in which case the parties have the right of access to the fine as well as the right to be heard and the settlement submissions may not be used as incriminating evidence against them.[124] It is noted that in *Trucks* case the settlement procedure was initiated after the Statement of Objections, thus the settlement submission were conditional "*upon the **imposition** of a fine by the Commission which will not exceed the amount as specified in its settlement submission*" and a second Statement of Objections was not necessary.[125]

The last part of the procedure is the adoption of the Commission decision. This part brings out two of the main features of the procedure; *firstly*, the decision only presupposes consultation of the Advisory Committee meaning that "*no oral hearing or access to the file may be requested*" by the parties[126] and *secondly*, the decision depends on the decision autonomy of the Commission which has the power to decide that a settlement decision is not adequate and instead of issuing such a decision it may issue a new Statement of Objections, as it has done in *Smart Card Chips*[127] – it is

[120] Manuel Kellerbauer and others in Luis Ortiz Blanco (n 106) paras 10.143-10.145.
[121] Settlement Notice (n 3) ps 21, 22.
[122] ibid p 23.
[123] ibid p 26.
[124] ibid p 27.
[125] Commission Decision in Case AT. 39824, *Trucks* (n 101) para 44.
[126] Settlement Notice (n 3) p 28.
[127] Commission Decision in Case AT. 39574, *Smart Card Chips* [2014] C(2014)6250 final, paras 51-52.

well-established that in this case the liability acknowledgment is deemed withdrawn and the parties have the right to be heard and to have access to the file.[128] Once the settlement decision is adopted, it reflects that the fine reduction constitutes reward for the cooperation of the settling parties.[129]

2.3. Parallel application

The Settlement Notice clarifies the relationship between leniency and settlement. The starting point is that the two tools are different, thus the application of each tool will be evaluated autonomously. It goes without saying that benefiting from both procedures, if each one's conditions are met, is possible. As the Notice clarifies:

"*When settled cases involve also leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward*".[130]

What is more interesting is that the Settlement Notice provides for three cases when breaching an obligation in the course of the settlement procedure "*may be regarded as lack of cooperation within the meaning of* […] *the Leniency Notice*". These three cases namely are: a) the destruction of evidence establishing the infringement[131], b) the disclosure of the content of the material they had access to in the framework of the settlement procedure[132] and c) the use of information acquired in view of the access to settlement submissions for reasons unrelated to the settlement procedure.[133] Two observations shall be made, *firstly* breaching a settlement procedure obligation does not *automatically* lead to losing the leniency benefits and *secondly* the Commission points out three instances which – albeit related to settlement – specify the "lack of cooperation" provided for in the framework of leniency programmes.

2.3.a. Leniency: immunity from the fines and reduction of fines

The focal point of the sub-section is to present how the undertaking to which leniency is granted is economically benefited. One can distinguish three means of fines "relief"; that is immunity, partial immunity and reduction of fines. In particular:

- A (full) **immunity** from the fines is granted when "*an undertaking is the first to submit information and evidence*" enabling European Commission to "carry out a targeted inspection" or "find an infringement" of Article 101 TFEU.[134]
- A **partial immunity** from the fines is provided when the undertaking offers evidence which "*establish additional facts increasing the gravity or the duration of the infringement*".[135] For instance, in *Braking Systems* case where TRW, Bosch and Continental exchanged sensitive commercial information as to their policy towards some of their customers, Continental's "*value of sales to customer BMW should not be taken into account when setting the fine to be imposed*" since it was Continental that submitted compelling evidence as to the exchange of information between TRW, Bosch and Continental itself concerning their stance towards BMW.[136] Similarly, in *Spark Plugs* case, NGK submitted compelling evidence as to the duration of the infringement which extended Commission's initial evaluation and, therefore, "*the Commission did not take into account those periods when setting NGK's fine*".[137]

[128] Settlement Notice (n 3) p 29.
[129] ibid p 31.
[130] ibid p 33. See also point 1 in fine "*Provided that the cooperation offered by an undertaking qualifies under both Commission Notices, it can be* ***cumulatively rewarded*** *accordingly*".
[131] ibid p 5
[132] ibid p 7.
[133] ibid p 36.
[134] Leniency Notice, p 8.
[135] ibid p 26.
[136] Commission Decision in Case AT. 39920, *Braking Systems* [2018] C(2018) 925 final, para. 116.
[137] Commission Decision in Case AT.40113, *Spark Plugs* (n 13) para 112.

- A **reduction** of the fine is granted to any undertaking submitting evidence presenting significant added value to the evidence already gathered by the European Commission. It is maintained that the following reduction bands apply: (a) a reduction between 30% and 50% for the first undertaking to submit such evidence, (b) a reduction between 20% and 30% for the second undertaking doing so and (c) a reduction up to 20% for the subsequent (third, etc.) undertakings.

The *Thermal Systems* decision offers an illustrative example of what we have described above. In this case, four infringements were at stake:

1. price coordination concerning the supply of HVAC between DENSO, VALEO and BEHR;
2. price coordination concerning the supply of compressors between DENSO, VALEO and SANDEN;
3. customers allocation concerning the supply of e-compressors between DENSO and PANASONIC; and
4. exchange of price information (and consideration of geographic allocation) between DENSO, VALEO, SANDEN and CALSONIC.

The Commission decided to grant full immunity to DENSO concerning infringements 1, 2 and 4 as well as to PANASONIC concerning infringement 3. In parallel, when it comes to partial immunity, VALEO submitted information on the basis of which the Commission found that the infringement 2 concerned two more customers, thus the value of the sales to these customers is not taking into consideration for the purpose of fining VALEO for infringement 2. As far as the reduction is concerned, VALEO was the first undertaking fulfilling the requirements for a reduction of the fine thus gaining a reduction of 40% for infringement 1, 45% for infringement 2 and 50% for infringement 4, while DENSO was granted for the same reason a reduction of 40% concerning infringement 3; the second undertaking fulfilling these requirements was BEHR concerning infringement 1, thus being granted a reduction of 30%, SANDEN concerning infringement 2 thus being granted a reduction of 25% and CALSONIC concerning infringement 4 thus being granted a reduction of 30%; lastly, SANDEN was the third undertaking fulfilling the pertinent requirements as to infringement 4 and was granted a 15% reduction of the fine.[138] In Table 1 below a synopsis of the imposed fines is presented:

Table 1. Fines imposition in case AT. 39960 (Thermal Systems).

Infringement	Undertaking	Type of reward	Percentage	Final Amount[139]
Infringement 1 (HVAC price coordination)	DENSO	Full immunity		0
	VALEO	Reduction (1st)	40%	18,236,000
	BEHR	Reduction (2nd)	30%	62,135,000
Infringement 2 (compressors price coordination)	DENSO	Full immunity		0
	VALEO	Partial immunity Reduction (1st)	45%	8,376,000
	SANDEN	Reduction (2nd)	25%	63,220,000
Infringement 3 (customer allocation)	PANASONIC	Full immunity		0
	DENSO	Reduction	40%	322,000

[138] Commission Decision in Case AT. 39960, *Thermal Systems* [2017] C(2017) 1456 final, paras 145-152.
[139] This amount emerges after the 10% reduction in view of the settlement of procedure.

Infringement 4 (information exchange)	DENSO	Full immunity		0
	VALEO	Reduction (1st)	50%	154,000
	CALSONIC	Reduction (2nd)	30%	1,747,000
	SANDEN	Reduction (3rd)	15%	1,385,000

2.3.b. Settlement: 10% reduction of the fine

The fine reduction in settlement is not complex, since the percentage of the reduction is fixed. More specifically, according to the Settlement Notice, the fine to be imposed will be reduced by 10% in view of the settlement. What shall be maintained is the amount out of which the 10% reduction takes place. In particular, according to point 32 of the Settlement Notice "*Should the Commission decide to reward a party for settlement in the framework of this Notice, it will reduce by 10 % the amount of the fine to be imposed* ***after the 10 % cap has been applied***". The so-called 10% is a legal maximum provided for in the Guidelines for Setting Fines:

"*32. The final amount of the fine* ***shall not****, in any event,* ***exceed 10 % of the total turnover in the preceding business year*** *of the undertaking or association of undertakings participating in the infringement, as laid down in Article 23(2) of Regulation No 1/2003.*

33. Where an infringement by an association of undertakings relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement."[140]

This mechanism guarantees that the 10% reduction of the fine will not be "virtual" as would be the case if the reduction was made before the cap application. For instance, in *Power Exchanges* case the basic amount of the fine was between 7,000,000 and 9,000,000 € for EPEX and between 3,000,000 and 5,000,000 € for NPS. Be it supposed that the fine was equal to the minimum of the aforementioned spaces (that is 7,000,000 € for EPEX and 3,000,000 € for NPS) a reduction of 10% in view of the settlement would lead to a fine of 6,300,000 € for EPEX and of 2.700.000 € for NPS. Nevertheless, even the minimum of the described spaces overpassed the 10% of the total turnover of each undertaking for the preceding business year. Thus, the Commission *firstly* amended the basic fine so as to respect the maximum set at 4,056,975 € for EPEX and at 2,587,221 € for NPS[141] and *later* reduced the fines to 3,651,000 € and 2,328,000 € respectively.[142]

2.3.c. Cumulative Application

More often than not, leniency takes place in the course of a settlement procedure. Thus, the undertakings are benefited by a double reduction of the fine. In order to fully illustrate how this double reduction appears in practice, we can indicatively use the *Maritime Car Carriers* Commission decision as an example[143]; the Commission *starts* by calculating the basic amount, *then* proceeding to an adjustment in view of mitigating circumstances (or in other cases in view of aggravating factors), *afterwards* applying the 10% cap described above (or in other cases explaining that the basic amount does not overpass the 10% cap)[144], *subsequently* reducing the amount of the fine in view of the Leniency Notice and *lastly* reducing the amount of the fine by 10% as provided for by the Settlement Notice. When reaching the conclusion as to the application

[140] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 [2006], OJ C 210/2, ps. 32-33.
[141] Commission Decision in Case AT.39952, *Power Exchanges* [2014] C(2014) 1204 final paras 86-87.
[142] ibid paras 88-89.
[143] Commission Decision in Case AT. 40009, *Maritime Car Carriers* [2018] C(2018) 983 final.
[144] It is thus maintained that the analysis of the importance of firstly applying the 10% maximum and then reducing any fines imposed on the basis of settlement also covers the fine reduction on the basis of leniency.

of the Settlement Notice, the Commission decision follows a pattern that is followed by most settlement decisions regarding leniency applicants:

"*(136) According to point 32 of the Settlement Notice, the reward for settlement results in a reduction of 10% of the amount of the fine to be imposed after the 10% of turnover cap has been applied having regard to the Guidelines on fines. Pursuant to point 33 of the Settlement Notice, when settled cases* ***also involve leniency applicants, the reduction of the fine granted to them for settlement will be added to their leniency reward****.*

(137) Consequently, the amount of the fine to be imposed ***on each party*** *should be further reduced by 10%.*"[145]

On the basis of the abovementioned, one comment shall be made: when the Commission follows the regular fine calculation method provided in Guidelines on imposing fines the leniency immunity or reduction and the settlement reduction are the last two steps of the fine calculation. Nevertheless, according to the Fine Guidelines themselves "*Although these Guidelines present the general methodology for the setting of fines, the particularities of a given case or the need to achieve deterrence in a particular case* ***may justify departing*** *from such methodology or from the limits specified in point 21*".[146] An example of such a "departure" can be traced in *Mushrooms* where an adaptation of the amount was made after the leniency reduction and before the settlement reduction in favour of Prochamp so as for the fine not to be disproportionate.[147]

II] The leniency and settlement procedures as a "modern" enforcement tool

The second chapter of the dissertation explores the dynamic nature of leniency and settlement. In essence, I explain how these two procedures address the "tension" with the private enforcement under a fundamental rights perspective, as well as to illustrate their role in the digital era. The following observations do not aim to prove that leniency and settlement are the *solutions* of the problems bur rather aim to highlight that their use may mitigate the problems in combination with other competition law tools.[148]

1. Fundamental Rights and Effective Enforcement

1.1. Fundamental Rights

An essential aspect of procedural law is to guarantee the fundamental rights of the parties to the proceedings. Leniency and settlement face – to a greater or lesser extent – the same issues of fundamental rights. From the outset, it is maintained that starting with *Roquette Frères* the Court of Justice has highlighted the importance of the case-law of the European Court of Human Rights in the field of competition law[149]; this relationship is nowadays stipulated in Article 6(3) TEU which stipulates that "[f]*undamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law*". A characteristic example of the influence exercised by the ECHR on the interpretation of fundamental rights in the EU legal order stems from the procedural guarantees in connection with the competition proceedings. As these guarantees are mainly provided for proceedings which are

[145] Commission Decision in Case AT. 40009, *Maritime Car Carriers* (n 143) paras 136-137.
[146] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (n 140) p 37.
[147] Commission Decision in Case AT. 39965, *Mushrooms* [2014] C(2014) 4227 final, paras 71-75.
[148] OECD, *International Co-operation on Competition Investigations and Proceedings: Progress in implementing the 2014 OECD Recommendation* (OECD Publishing 2022) 97-100.
[149] Case C-94/00, *Roquette Frères* [2002] ECR I-09011, para 29; Thomas Bombois, *La protection de droits fondamentaux des entreprises en droit européen répressif de la concurrence* (Larcier, 2012) 56 et seq.; Johan Callewaert, 'The European Convention on Human Rights and European Union Law: a Long Way to Harmony' [2009] E.H.R.L.R. 768, 780.

"criminal" in the sense of Article 6 ECHR, the question on whether competition proceedings are "criminal" arises. In *Whiteland Import Export* AG Pitruzzella dealt with that issue making reference to the case-law of the European Court of Human Rights and found that "[g]*iven the aim of competition law, the nature of the penalties (both preventive and punitive in effect) and their size (large financial penalties), such proceedings must, according to the European Court of Human Rights, be subject to the guarantees provided for in Article 6 ECHR*".[150]

1.1.a. Rights of defence

The right to be heard as well as the right of access to the file are protected by Article 41 of the Charter of Fundamental Rights. At the same time, they constitute expressions of the right to defense, protected in Article 48 of the Charter. As to the scope of these rights it is maintained that the right to be heard requires the hearing of the interested party *before* the decision is adopted[151]; in that regard the settlement procedure is in compliance with Article 41 since it only limits the right to be heard after the statement of objections is issued, while the opinions of the parties are addressed to the Commission through the settlement submission.[152] In the same vain, as it the case with the waiver of the right to be heard and have access to the file, engaging in leniency and settlement procedures complies with the Charter since it is *voluntary* – the undertakings concerned decide to do so in order to gain a reward without being threatened with a disproportionate fine if they follow the standard procedure holding the right to appeal.[153]

It is maintained that an important question has been posed by hybrid settlement procedures, that is procedures when some parties settle, and some other parties follow the standard procedure. In such cases, the settlement decision regularly is issued and published before the prohibition decision and entails a description of the facts which may refer to non-settling parties. In such cases, in order to avoid the violation of presumption of innocence, the Commission shall have due regard to the drafting of the settlement decision, which shall not entail any legal classification of the facts either direct or indirect.[154] If such a classification arises, e.g. for the presentation of the facts, the Commission Decision is not ipso facto annulled, but the General Court examines whether the Commission was not objective when adopting the (subsequent) prohibition decision.[155]

1.1.b. The Hearing Officer

Hearing Officers constitute key actors in antitrust procedures. EU competition procedure is characterised by a "paradox" given that the investigation authority, that is the Commission, is also the authority taking the decision as to the breach of competition law. Given that settlement, as well as leniency, clearly provide for the Commission's broad discretion as to the rolling of the procedure, Hearing Officers may operate as a means of institutional "checks and balances" during the administrative procedure.[156] Indeed, they constitute such a means since they fulfil two cumulative conditions: *firstly*, they are independent vis-à-vis the Commission[157] and *secondly*, it is their responsibility to examine whether rights of defence are being respected by the

[150] Opinion of AG Pitruzzella in Case C-308/19, *Whiteland Import Export* [2020] ECLI:EU:C:2020:639, p 89.
[151] Lock Tobias 'Article 41 CFR Right to good administration' in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (2019, Oxford University Press), para 7.
[152] Leniency Notice (n 2) p 25.
[153] Lock Tobias 'Article 48 CFR' in M. Kellerbauer, M. Klamert and J. Tomkin (eds), The EU Treaties and the Charter of Fundamental Rights: A Commentary (2019, Oxford University Press), para 4.
[154] Case C-440/19 P, *Pometon v Commission* [2021] ECLI:EU:C:2021:214, paras 57 et seq.; Ekaterina Rousseva (n 100) paras 7.63 et seq.
[155] Case T-180/15, *Icap and Others v Commission* [2017] ECLI:EU:T:2017:795, paras 253 et seq.
[156] Wouter Wils, 'The Compatibility with Fundamental Rights of the EU Antitrust Enforcement System in Which the European Commission Acts Both as Investigator and as First-Instance Decision Maker' (2014) 37 World Competition 5.
[157] Decision 2011/695/EU of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings [2011] OJ L 275/29, art 3(1).

Commission[158]. In that regard, Decision 2011/695 clearly provides that they can order the Commission to organise an additional oral hearing[159], while they also examine whether access to specific evidence shall be given, shall be given under restrictions in view of confidentiality or shall not be given at all.[160]

1.1.c. Equal Treatment

Equal treatment is enshrined in Articles 21 and 22 of the Charter of Fundamental Rights, while it also constitutes a general principle of EU law.[161] This principle demands "*comparable situations* [not to] *be treated differently and* […] *different situations [not to] be treated in the same way unless such treatment is objectively justified*".[162] The General Court's case-law has pointed three criteria on the basis of which the Commission has to assess whether two leniency applicants are in a comparable position: (a) the similarity of information given to the Commission; (b) the stage on which the information was given and (c) the conditions under which the information was given.[163] Before the entry into force of the current leniency notice, it was ruled that once the position was found to be comparable, a difference in the fine reduction on the basis of which undertaking was questioned first by the Commission is prohibited.[164] Under the current Notices, such a case seems rather hypothetical. Interestingly enough, the only successful appeal case against a settlement decision was based on an equal treatment claim which was nevertheless unrelated to the settlement procedure as such.[165]

1.1.d. Ne bis in idem

The relationship between the "ne bis in idem" principle, enshrined in Article 50 of the Charter, and leniency has been recently clarified by the Court of Justice. In *Nordzucker*, the Court ruled *firstly*, that two national competition authorities may "punish" an undertaking for the same anti-competitive conduct if it does not concern the same territory and *secondly*, that when an undertaking participates in leniency proceedings is protected by the ne bis in idem principle, even if it is solely found guilty of an anti-competitive conduct without the imposition of a fine.[166] It is highlighted that this judgment was issued alongside the *bpost* judgment which found that "*a legal person [is not precluded] from being fined for an infringement of EU competition law where, on the same facts, that person has already been the subject of a final decision following proceedings relating to an infringement of sectoral rules concerning the liberalisation of the relevant market, provided that* [the two proceedings are predictable and coordinated] *and that* ***the overall penalties imposed correspond to the seriousness of the offences committed***".[167]

While it is not clear whether this set of judgments made the ne bis in idem threshold higher[168] or lower[169], under the prism of this thesis' subject I think that emphasis shall be given to the "*overall*

[158] ibid rec 15.
[159] ibid art 6.
[160] ibid art 7.
[161] Case C-823/18 P, *Commission v GEA Group* [2020] ECLI:EU:C:2020:955 para 58; Case C-601/18 P, *Prysmian and Prysmian Cavi e Sistemi v Commission* [2020] ECLI:EU:C:2020:751 para 101.
[162] ibid.
[163] Case T-48/02 *Brouwerij Haacht v Commission* [2005] ECR II-05259, paras 108-109; Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00 JFE Engineering v Commission [2004] ECR II-02501, para 501.
[164] Joined Cases T-45/98 and T-47/98, *Krupp Thyssen Stainless v Commission* [2001] ECR II-03757, paras 245 et seq.; Bellamy and Child (n 57) para 14.132.
[165] Case T-95/15, *Printeos and Others v Commission* [2016] ECLI:EU:T:2016:722; Ekaterina Rousseva (n 100) para 7.83.
[166] Case C-151/20, *Nordzucker and Others* [2022] ECLI:EU:C:2022:203, paras 60 et seq.
[167] Case *C-117/20*, bpost [2022] ECLI:EU:C:2022:202.
[168] P. Harrison, M. Zdzieborska and B. Wise, 'Ne Bis in Idem: The Final Word?' (Kluwer Competition Law Blog, 7 April 2022) <https://competitionlawblog.kluwercompetitionlaw.com/2022/04/07/ne-bis-in-idem-the-final-word/> accessed 29 September 2024.
[169] Michael Mayr, 'Redefining the Ne Bis in Idem Principle in EU Competition Law: bpost and Nordzucker' (2022) 13 J.E.C.L. & Pract. 553.

penalties imposed" which shall represent and reward the engagement in leniency or settlement procedure. For example, supposed that an undertaking violates both competition and environmental law and the overall penalty corresponding to the infringements is equal to 200.000€. If the competition authority grants a reduction for cooperation, e.g. under the leniency notice, and imposes a fine of 50.000€ instead of 100.000€, the overall penalty shall not exceed 150.000€. This solution is compatible with the ratio of both (leniency and settlement) procedures as well as with the waiver of the rights made by the parties to these proceedings.

1.1.e. Incriminating evidence

A main fundamental rights concern in leniency and settlement is related to the incriminating evidence. We can distinguish two pertinent questions: *firstly*, are leniency corporate statements a type of evidence able to prove the infringement of co-cartelists and *secondly*, can the undertakings be protected from the use of self-incrimination statements in other proceedings?

As far as the first question is concerned, the Court of Justice has clarified that corporate statements may require corroboration by other documents but bear an evidential value themselves. The Court bases its approach on the fact that the undertaking applying for leniency is well aware of the fact that an inaccurate leniency application violates point 12 of Leniency Notice leading to the loss of any reward, thus it does not have any interest in falsely incriminating its competitors.[170] The same reasoning stands for statements given by the employees of a leniency applicant, since it is the applicant that bears the responsibility for the accuracy of those statements as well.[171]

Turning to the second question, it has been explained the *voluntary* nature of engaging in leniency and settlement procedures legislation is the reason why these procedures are not in breach of any undertakings' defense rights. Nevertheless, the problem arises where the self-incriminating evidence provided by the leniency and settlement applicant is used in other proceedings as the case may be. In that respect, EU legislation offers quite a broad protection of self-incriminating documents, such as leniency applications and settlement submissions, having applied the "confidentiality" principle as to these statements as stems from the relative Notices.[172] What is important is that confidentiality is dictated by the fundamental right against self-incrimination.[173] Other than that, it shall be maintained that confidentiality only concerns self-incriminating evidence; other evidence gathered is not protected; in that regard it is highlighted that the European Court of Human Rights recently ruled that the transmission of evidence between two different administrative authorities (e.g. from the environmental agency to the competition authority) does not violate the European Convention of Human Rights.[174]

1.2. Public Enforcement: ECN+ Directive

Having examined the fundamental rights which have to be respected vis-à-vis the undertakings participating in leniency and/or settlement procedures, we will examine the role of these rights in the framework of public enforcement inside and outside the European Competition Network (ECN). This section focuses on (a) the operation of the ECN system under the ECN+ Directive, (b) the confidentiality guarantees in the framework of ECN and (c) the confidentiality guarantees in the information exchange between the European Commission and competition authorities outside the ECN.

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[170] Joined Cases C-239/11 P, C-489/11 P and C-498/11 P, *Siemens v Commission* [2013] ECLI:EU:C:2013:866, para 138; Case T-655/11, *FSL and Others v Commission* [2015] ECLI:EU:T:2015:383, para 152.

[171] Case C-702/19 P, *Silver Plastics and Johannes Reifenhäuser v Commission* [2020] ECLI:EU:C:2020:857, para 53.

[172] Indicatively Settlement Notice (n 3) ps 37, 40; Leniency Notice (n 2) ps 33, 35, 40.

[173] Faull and Nikpay (n 23) para 8.217.

[174] *Janssen de Jong Groep B.V. and Others v. the Netherlands* App no. 2800/16 (ECHR, 16 May 2023); *Ships Waste Oil Collector B.V. v. the Netherlands* App no. 2799/16 (ECHR, 16 May 2023); *Burando Holding B.V. and Port Invest B.V. v. the Netherlands* App nos. 3124/16 and 3205/16 (ECHR, 16 May 2023). The first two of these cases are subject to a referral to the Grand Chamber.

1.2.a. ECN+ Directive and Leniency

With the adoption of Regulation 1/2003 the EU competition enforcement system became decentralised. It is worth noting that around 90% of antitrust decisions in the EU are taken by the National Competition Authorities (NCAs) instead of the European Commission.[175] In that framework, Directive 2019/1, referred to as the "ECN+ Directive" adopted new measures to guarantee the effectiveness of the close cooperation between the Commission and the NCAs in the ECN system.[176] While the Directive does not entail any rules concerning the harmonisation of settlement procedures, it sets harmonised rules as to leniency as was the case with the ECN Model Leniency Programme. From the perspective of this dissertation, we can distinguish three aspects of interaction between the ECN+ Directive and the national leniency programmes: *firstly*, Articles 17 to 20 of the ECN+ Directive oblige member states to *harmonise* their leniency programmes to the Leniency Notice concerning both the essential and the most important procedural requirements[177]; *secondly*, member states may have diverge rules as to some aspects of their national leniency programmes, such as catching non-secret cartels or other anticompetitive conducts[178], providing for differentiated bands of reduction or accept a marker even in the case of fine reduction; and *thirdly*, the effective cooperation between the Commission and the NCAs, where an alleged cartel affects the territory of at least three member states, is guaranteed by the summary application scheme under which once an undertaking makes a full leniency application before the Commission, it may make a summary application before the pertinent NCAs which will be later complemented if the Commission finds that it has no competence to deal with the case.[179] The third way of interaction aims to substitute the lack of a "one-stop-shop", that is the lack of a sole competent competition authority with the power to decide on the leniency application regarding all the affected territories.[180]

1.2.b. Protection of confidentiality in the ECN+ Directive

Another characteristic of the ECN+ Directive is the promotion of legal certainty concerning the consequences of leniency in other administrative or judicial proceedings. For instance, Article 23 provides for the protection of natural persons representing the leniency applicant against sanction imposed on administrative or even criminal proceedings, a question arisen in practice in view of such sanctions provided for in the national law of some member states especially for cases of bid-rigging.[181] It is in that same context that the ECN+ Directive provides in detail for the protection of confidentiality when it comes to both leniency corporate statements and settlement submissions. In that regard, Article 31 sets a nexus of rules which can be summarised as follows: *firstly*, access of the other parties to the leniency statements and to the settlement submissions is only given in order for them to exercise their right of defense, meaning that the relevant information cannot be used for other purposes and *secondly*, as far as leniency statements are concerned, the exchange of these statements between different NCAs presupposes either the agreement of the applicant or the filing of a leniency application for the same conduct at both NCAs alongside non-violation of the applicant's right to withdraw the statement. In that sense, the ECN+ Directive does not provide for the possibility of leniency settlements exchange between the NCAs on the basis of the receiving NCA committing to no further transmit these statements, contrary to the previous legal regime.[182]

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[175] Ben Van Rompuy, 'Implementation of the ECN+ Directive in 23 Member States: An Introductory Overview' (2021) 3 CoRe 210.
[176] ECN+ Directive (n 10) art 1(3), rec 2.
[177] ibid arts 17-20.
[178] ibid arts 17(1), 18(1).
[179] ECN+ Directive (n 10) art 22.
[180] P. Korycińska-Rządca and A. Mendoza-Caminade 'Harmonisation of National Leniency Programmes in the EU: Is This Mission Accomplished? Remarks on the Case of France and Poland Compared with Other EU Member States' (2022) 53 IIC 1506, 1529 et seq.
[181] ECN+ Directive (n 10) art 23, rec 64.
[182] Commission Notice on cooperation within the Network of Competition Authorities [2004] OJ C 101/43, p 41; Proposal for ECN+ Directive (n 10) art 29(4).

Lastly, it is maintained that while the exchange provisions do not cover the settlement submissions, a *teleological and historical* interpretation of Article 31 leads to the conclusion that settlement submissions are also protected; not only do the settlement submissions equally fall under the scope of non-self-incrimination right, but their protection alongside corporate statements is mentioned as one of the aims of the ECN+ Directive.[183]

1.2.c. Protection of confidentiality outside the ECN

A key concern raised recently by the OECD refers to the exchange of leniency statements between national competition authorities of different member states. The OECD has reported three legal bases under which an exchange may be allowed[184]: *firstly*, a waiver on behalf of the leniency applicant concerning either both the procedural and substantive aspects of leniency application (full waiver) or only the procedural ones (procedural waiver)[185]; *secondly*, the conclusion of a second-generation international agreement which allows for such an exchange and *third*, the adoption of "information gateway" under national law insofar as the receiving competition authority offers guarantees of no further disclosure or transmission. The EU has adopted the first solution requiring all leniency applicants to submit a full waiver of confidentiality.[186] In this regard, it shall be noted that, alongside the lack of information gateway legislation, the bilateral agreement between the EU and Switzerland clearly states that leniency and settlement material shall be exchanged between the respective competition authorities only under the consent of the leniency or settlement applicant.[187]

1.3. Private Enforcement

This section focuses on the repercussions of leniency and settlement on private enforcement and vice-versa. According to some scholars, follow-on claims constitute a deterrent for some undertakings wishing to apply for leniency or settlement. My analysis (a) starts with the legal basis of private enforcement, (b) explores how EU guarantees confidentiality of corporate statements and settlement submissions through Directive 2014/104 (the "Damages Directive") as well as in civil litigation before the US Courts (d) reaching the conclusion that the current scheme achieves a fair balance.

1.3.a. Private Enforcement and EU Primary Law

In order to illustrate the relationship between private enforcement on the one hand and leniency, settlement and confidentiality on the other, it is useful to explore their legal basis. Private enforcement is not simply the result of the EU legislator's will, but its existence is rather dictated by the direct effect of Articles 101 and 102 TFEU; according to the Court these provisions "*create **rights** for individuals which national courts must protect*".[188] On the other hand, self-incrimination is not protected outside the sphere of the "criminal" proceedings; therefore, the protection of leniency and settlement documents lies on the public interest objective of detecting cartels and having an effective administrative procedure.[189] In other words, there is not a conflict of rights but

[183] Commission Staff Working Document – Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (2017) SWD(2017) 114 final, 24, 38, 46, 62-63, 67.

[184] OECD, *The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, OECD Competition Policy Roundtable Background Note* (2023) 36.

[185] International Competition Network 'Waivers of Confidentiality in Cartel Investigations – Explanatory Note' <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf> accessed 29 September 2024.

[186] Frequently Asked Questions (FAQs) on Leniency – Version of October 2022 (n 15) 15.

[187] Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws [2014] OJ L 347/3, art 7(6-7).

[188] Case C-882/19 *Sumal* [2021] ECLI:EU:C:2021:800, paras 32 et seq.; Case C-724/17, *Skanska Industrial Solutions and Others* [2019] ECLI:EU:C:2019:204, paras 24 et seq.

[189] Opinion of AG Jääskinen in Case C-536/11, *Donau Chemie and Others* [2013] ECLI:EU:C:2013:67, ps 55-56.

rather a purpose in the public interest *restricting* a right; it is in view of this observation, that one can assess the Damages Directive.

1.3.b. Protection of Confidentiality in private enforcement

The Damages Directive entails two types of rules protecting the procedures at issue; *firstly*, protection against disclosure and *secondly*, protection against liability. The first type of protection concerns both corporate statements and settlement submissions. In particular, Article 6(6) provides for a "black list", that is it totally prohibits the disclosure of corporate statements and settlement submissions in the course of civil proceedings, while Article 7 clarifies that the court may have access to these documents only to verify that they indeed fall under the blacklist of Article 6(6).[190] As to the protection against liability, it is offered only to the undertakings to which immunity has been granted; Article 11(1) provides that such an undertakings is liable only towards "its direct or indirect purchasers or providers" unless other cartel victims cannot obtain compensation from the other infringers and Article 11(5) and (6) provide for a cap in the amount that such an undertaking may obliged to give to the co-infringers.[191]

1.3.c. Protection of Confidentiality and US Civil litigation

The main problem as to the confidentiality of leniency and settlement submissions in damages claims stems from the US practice. In particular, it has been before the US Courts that plaintiffs ask for disclosure of the leniency corporate statements and the settlement submissions made before the European Commission. To that end, the European Commission has intervened in a series of cases in favour of the non-disclosure of these documents. The legal instrument used by the Commission in the "international comity" principle.[192] This principle implies that interests of other states shall not be taken into account[193] and a number of cases has upheld Commission's argument taking into consideration that "[Commission's] *leniency program is a* ***cornerstone*** *of its cartel detection and enforcement," whose "optimal functioning requires that a party that comes forward and cooperates with the Commission does not find itself worse-off visà-vis the non-cooperating cartel members as a result of doing so*".[194] In view of this line of case-law as well as the protection afforded by the Damages Directive, I support the opinion that the disclosure "fear" is "overstated".[195]

2. Digital markets

This section focuses on the relationship between the cooperation enforcement mechanisms, that is leniency and settlement, and the challenges existing in the digital markets. The section deals with two of the main problems recognised in these markets; namely the algorithmic collusion and the killer acquisitions.

2.1. Algorithmic Collusion

[190] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L 349/1, arts 6(6), 7; Case C-57/21, *RegioJet* [2023] ECLI:EU:C:2023:6, paras 115, 57.

[191] ibid art 11.

[192] Frequently Asked Questions (FAQs) on Leniency – Version of October 2022 (n 15) 15.

[193] Dodge William 'International Comity in the Fourth Restatement' in P. Stephan and S. Cleveland (eds), *The Restatement and Beyond: The Past, Present, and Future of U.S. Foreign Relations Law* (Oxford University Press, 2020) 321.

[194] *In re Cathode Ray Tube (CRT) Antitrust Litigation*, [2014] WL 1247770; Rainer Kulms, 'Competition Law Enforcement under Informational Asymmetry' (2017) 5 China-EU LJ 209, 217 et seq.; Faull and Nikpay (n 23) paras 8.227.

[195] Valerie Demedts, The future of international competition law enforcement: an assessment of the EU's cooperation efforts (Brill 2018) 225 et seq.; Manuel Kellerbauer and others in Luis Ortiz Blanco (n 106) paras 10.158 et seq.

The first competition concern as to the digital markets is related to the algorithmic collusion, that is the collusion through the use of algorithms. Hereinafter, after briefly giving a working definition of algorithms, I will explain why the leniency and settlement conditions are fulfilled in cases of algorithmic collusion and how they have been used in practice by the enforcers.

2.1.a. Definition of Algorithms

It is common ground that "algorithm" is not a notion having a universally accepted definition. A useful working definition for the needs of this dissertation should entail the following characteristics: (a) the algorithm constitutes a "computational procedure" in the sense that it consists of a "series of defined orders" and (b) the functionality of these orders is the conversion of input data to output data.[196] For instance, a digital platform who can define and apply optimal prices selecting itself market data qualifies as "algorithm" (this is the case of the so-called self-learning algorithm); at the same time, a (simpler) digital platform which can propose optimal prices if the relevant market data is given is also caught by our working definition.

The problems and challenges raised by the use of algorithms in the field of competition law cover a broad range. For the needs of exploring the role of leniency and settlement in algorithmic collussion, it is sufficient to explore the two basic scenarios of horizontal agreements through the use of algorithms.

2.1.b. Antitrust concerns – Hub and spoke

One can imagine an algorithm which serves as a "forum" through which a wholesaler or producer transmits information to the retailers and vice versa with this information constituting a collusion of the undertakings receiving the information. It is worth noting that the European Commission has expressly addressed this scenario in the Horizontal Guidelines clarifying that:

"*Certain indirect information exchanges are referred to as hub-and-spoke arrangements.* […] *An online platform can also act as a hub where it* ***facilitates, coordinates or enforces information exchanges*** *between business users of the platform, for example, to secure certain margins or price levels. Platforms may also be used to impose technical measures which prevent platform users from offering lower prices or other advantages to final customers*".[197]

Furthermore, the hub and spoke practices have an uncommon characteristic; they concern the exchange of information at the horizontal level, but the exchange of information is carried out vertically. Consequently, it has to be verified whether this practice qualifies as a cartel for the purposes of the Leniency and Settlement Notices. The EU has clarified its position informing the OECD that "[g]*iven that hub-and-spoke arrangements, although including a vertical element****, are essentially horizontal agreements*** *or concerted practices, it can be argued that* ***leniency should, in principle, be available*** *where such arrangements aim at establishing a price-fixing cartel*".[198]

2.1.c. Antitrust concerns – Collusion

Algorithms render the distinction between illegal collusion and legal parallel conduct (even more) blurred. The Court of Justice has distinguished anti-competitive concerted practices and parallel conduct using the criterion of normal market conditions. In the Court's words "[…] *a concerted practice* […] *may inter alia arise out of coordination which becomes apparent from the behaviour of the participants.* […] *Although parallel behaviour* ***may not by itself be identified with a concerted practice****, it may however amount to* ***strong evidence*** *of such a practice if it leads to*

[196] Autorité de la concurrence and Bundeskartellamt, *Algorithms and Competition* (2019) 3 et seq. with further references; Maxwell Greenhalgh, 'Keeping up with computers: a review of art.101 TFEU's prohibition of collusive princing agreements in the algorithmic age' 9 (2021) 42 E.C.L.R. 520, 521 with further references.

[197] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C 259/1, para 402.

[198] OECD, *Hub-and-spoke arrangements – Note by the European Union* [2019] DAF/COMP/WD(2019)89, para 33.

conditions of competition which do not correspond to the normal conditions of the market".[199] The standard of proof established by the Court is a high one as parallel conduct is prohibited only when there is no other explanation of the conduct but the collusion. Woodpulp II highlighted that "*parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct*".[200]

Literature focuses on the problem of distinguishing anti-competitive arrangements executed through an algorithm and algorithms that being able to act regardless of their users' intentions lead to parallel prices. For example, algorithms able to provide the optimal prices taking into consideration the market conditions may lead to parallel prices; when is this collusion anti-competitive. *Colomo* has expressed the view that despite the evidentiary difficulties in cases of parallel prices (concerning any market and not only the digital ones) undertakings may opt to accept *commitments* instead of risking a fine by the competent authorities.[201] In the same vein, I think that leniency and settlement may be equally useful tools; while settlement will function in a manner comparable to the commitments, leniency may ever go a step further as it constitutes a means of gathering evidence which aid the competition authorities understand and prove that a parallel conduct has been the result of (tacit) collusion.

2.2. Precedents

Competition authorities have used leniency and settlement in order either to detect or punish undertakings infringing Article 101 TFEU. Some of the most characteristic cases of algorithmic collusion including leniency and/or settlement are presented hereabove.

2.2.a. Eturas

"Eturas" is an online travel booking system where travel agencies can offer bookings setting the price and any discounts themselves. The administrator of the system put in place such technical modifications that capped any discounts above 3%. The Court of Justice, answering to a pertinent preliminary question pointed out that "*where the administrator of an information system* […] *sends to th[e] economic operators, via a personal electronic mailbox, a message informing them that the discounts on products sold through that system will henceforth be capped and, following the* ***dissemination of that message****, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may — if they were aware of that message — be presumed to have participated in a concerted practice*".[202] In other words, the competent authority cannot prove the unlawfulness of the algorithm unless corroborating messages exist. Although it is not clear how the Lithuanian Competition Authority traced the messages, it is maintained that the infringement was found after a travel agency applied for immunity (which was granted) providing the authority with all the necessary information as to the infringement.[203]

2.2.b. Online sales of posters and frames

The coordination as to the price of selling posters and frames in UK Amazon has been the subject-matter of this decision issued by the UK Competition and Markets Authority. The parties to the proceedings had coordinated so as "*not to undercut each other in certain specified circumstances on prices for posters and frames sold by both Parties on Amazon UK*"; all the more, they used repricing software in order to comply with their agreement/coordinated practice.[204] Interestingly,

[199] Case 48/69, *ICI v Commission* [1972] ECR 00619, paras 64-68.
[200] Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85, *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-01307, paras 71, 72, 126.
[201] Pablo Ibáñez Colomo, *The shaping of EU competition law* (Cambridge University Press 2018) 332-333.
[202] Case C-74/14, *Eturas and Others* (2016) ECLI:EU:C:2016:42.
[203] Competition Council of the Republic of Lithuania, 'A fine of more than five million litas for the prohibited agreement while selling tours Online' <https://kt.gov.lt/en/news/a-fine-of-more-than-five-million-litas-for-the-prohibited-agreement-while-selling-tours-online-2> accessed 27 September 2024
[204] Competition and Markets Authority Decision in Case 50223, *Online sales of posters and frames* (2016) para 5.17.

the investigation by the UK authority only started after an immunity application by one of the parties and was expeditiously given that the other cartelist made a settlement submission. This case shows how leniency can help to the detection of a cartel and how settlement, once the cartel has been detected, provides for a quick termination of the antitrust proceedings.

2.2.c. Ageras

Ageras is an undertaking offering a platform both to users who need accounting (or other similar) services as well as to accountants who wish to provide these services. Once a "job alert" is uploaded, the platform partners, that is the accountants, bid and try to offer an advantageous tender, as the user will be notified only for the three most advantageous offers. The anti-competitive conduct of Ageras consisted in imposing a minimum price by disallowing (through a pop-up window) any partner to offer a lower price in the bid; therefore minimum prices were fixed. In this case, although there were not any leniency applications, the Danish authority decided to fine solely Ageras instead of the partners; [205] what is interesting from the perspective of our subject, Ageras opted to file a settlement submission recognising the infringement.[206]

2.2.d Proptech

In Spain, the National Competition Authority investigated an horizontal cooperation scheme based on a multiple listing system. According to the Authority "*this system entails sharing a database so member real estate brokers and agencies can share property listings and sales on an exclusive basis. When [a] member finds a property (sale/rental) to list, it can put that property in the system, giving other members the chance to make the sale. In this case, the "finder" and the "seller" split the agreed commission for the overall brokerage service offered*".[207] What is interesting is that the addressees of the prohibition decision were both real estate brokers as well as two software companies that offered technical support for the execution of the horizontal agreement. In this case, a brokage undertaking had its fine reduced by 45% since it made a leniency application providing evidence with significant added value, especially proving that the software itself entailed fixed minimum fees.[208]

2.3 Killer Acquisitions

A main concern of competition enforcers in digital era is tackling the issue of killer acquisitions. An acquisition of a competing entity is considered a "killer acquisition" when "*an incumbent firm acquires an innovative target*" so as to avoid the competition created by the competitors' innovation gains.[209] This type of acquisitions sometimes goes under the radar as it does not meet the merger notification thresholds in view of the target company's (yet) low annual turnover. In order to address this issue, the Commission has introduced complementary *ex-ante* enforcement tools, while the *ex-post* traditional enforcement tools remain relevant for concentrations concluded without the Commission's notification.

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[205] Danish Competition and Consumers Authority, 'Danish Competition Council: Ageras has infringed competition law' <https://en.kfst.dk/nyheder/kfst/english/decisions/20200630-danish-competition-council-ageras-has-infringed-competition-law/> accessed 27 September 2024.

[206] Danish Competition and Consumers Authority, 'Digital platform pays a fine of DKK 1.275.000 for violating the Danish Competition Act' <https://en.kfst.dk/nyheder/kfst/english/judgements/20210712-digital-platform-pays-a-fine-of-dkk-1275000-for-violating-the-danish-competition-act/> accessed 27 September 2024.

[207] Comisión Nacional de los Mercados y la Competencia, 'The CNMC fines several companies EUR 1.25 million for imposing minimum commissions in the real estate brokerage market' < https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20211209_NP_Sancionador_Proptech_eng.pdf> accessed 29 September 2024.

[208] Comisión Nacional de los Mercados y la Competencia resolution in Case S/0003/20, *Proptech* (2021) 153 et seq.

[209] C. Cunningham, F. Ederer and S. Ma, 'Killer Acquisitions' (2020) 129 JPE 649; Commission Staff Working Document – Impact Assessment Report Accompanying the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) [2020] SWD(2020) 363 final, para 281.

2.3.a. Ex-ante (merger) control - Digital Markets Act (DMA)

This sub-section focuses on the means used by the Commission to avoid killer acquisition flying under the radar, that is not meeting the notification requirements set in Regulation (EC) 139/2004.[210] Having clarified the usefulness of these new tools, I will then explain how they can be complemented by the settlement and leniency procedures.

Digital Markets Act constitutes the last enforcement tools added in the Commission's toolbox. The Act provides for a new antitrust "actor", the "gatekeepers"; these are undertakings that have a substantial EU turnover, offer a core platform service used by a significant number of users and their position in the market remains solid the last three years.[211] In order for an undertaking to bear the responsibilities and obligations envisaged in the DMA it has to be designated as gatekeeper by the Commission.[212] One of the obligations imposed upon the gatekeepers is to "***inform*** *the Commission of any intended concentration* […] *where the merging entities or the target of concentration provide core platform services* […] *irrespective of whether it is notifiable* […] ***prior*** *to its implementation and* ***following*** *the conclusion of the agreement, the announcement of the public bid, or the acquisition of a controlling interest*".[213] Recital 75 clarifies the Commission's powers as to these notifications pointing out that "*the Commission should have the power to prohibit* […] *the gatekeeper from entering into a concentration*".[214]

2.3.b. Ex-ante (merger) control – Referral Procedure

The Merger Regulation provides for the discretion of the national competition authorities to refer a merger to the Commission. This mechanism, known as the "Article 22 referral mechanism" is only dependent on two conditions; *firstly*, the concentration shall affect intra-EU trade and *secondly*, the concentration shall threaten to significantly affect competition within the territory of the referring authorities' state(s).[215] This mechanism became relevant in the internal market after the Commission issued its Guidelines on the application of the referral mechanism, which provided that "*the categories of cases that will normally be appropriate for a referral under Article 22 of the Merger Regulation* ***where the merger is not notifiable in the referring Member State(s)*** *consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. This would include, for example, cases where the undertaking: (1) is a* ***start-up or recent entrant*** *with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model); (2) is an* ***important innovator*** *or is conducting potentially important research; (3) is an actual or potential* ***important competitive force***".[216] For instance, 15 national competition authorities referred to the Commission the *Qualcomm/Autotalks* merger, despite the concentration not being notifiable to any member state or the EU, as Autotalks was an innovative start-up creating competitive pressure.[217]

This mechanism was seen as a very useful "catch-all" mechanism enabling the Commission to prohibit any anti-competitive concentration. As the General Court annotated "*Article 22* […] *also pursues other objectives, in particular that of permitting effective control, as a* ***'corrective mechanism', of all concentrations which are capable of significantly impeding effective***

[210] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [2004] OJ L 24/1.
[211] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1, art 3(1-2).
[212] ibid art 3(4).
[213] ibid art 14.
[214] ibid rec 75.
[215] Council Regulation 139/2004 (n 210) art 22.
[216] Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases [2021] OJ C 113/01, p 19.
[217] Commission Decision in Case M. 11212, Qualcomm / Autotalks [2023] C(2023) 5710 final, paras 35, 147 et seq.

competition in the internal market *and falling outside the scope of the merger control rules between the European Union and the Member States because the turnover thresholds have not been exceeded*".[218] Nevertheless, Illumina filed an appeal and the Court of Justice upheld the appeal rejecting the argument that the referral mechanism constitutes a "corrective mechanism" for all potentially harmful (for the internal marker) concentrations even when it is not notifiable in any member state.[219] While outgoing Commission Executive Vice-President Vestager noted that "*the Commission will continue to accept referrals made under Article 22 of the Merger Regulation by Member States that have jurisdiction over a concentration under their national rules where the applicable legal requirements are met*"[220], it is apparent that as things stand some concentrations may still be under the radar, thus an *effective* ex-post assessment procedure is useful.

2.2.c. Ex-post (antitrust) control – Article 101 TFEU

Ex-post control of concentrations constitutes an old tool, used by the Commission between the adoption of merger control mechanisms. While this type of concentration control had disappeared, it reappeared so as to render possible the evaluation of killer acquisitions which had not been notifiable under the merger thresholds.

In order for leniency and settlement to be helpful as far as killer acquisitions are concerned, it is to be established that these acquisitions are caught by Article 101 TFEU. The Court of Justice has clarified in *Phillip Morris* that while an acquisition does not constitute an anti-competitive conduct itself, it may clear the way for collusion if the commercial conduct of the target company is determined by the acquiring undertaking.[221] Most recently, the Court has made a step further explaining the different scope of merger and antitrust control; in *Austria Asphalt* it noted that while "concentrations" as defined in article 3 of the Merger Regulation[222] cannot be examined under article 101 TFEU, any similar actions not constituting "concentrations" are to be dealt as agreements or concerted practices under Article 101 TFEU.[223]

In practice, using Article 101 to catch non-notifiable mergers has been scarcely used with a recent example being a decision of the French Competition Authority finding no violation of competition rules.[224] An interesting case-study that may arise in the future is the *Microsoft/Inflection* merger. This case arose after a referral of seven member states to the Commission under article 22 of the Merger Regulation; the case closed earlier in September 2024 in compliance with the *Illumina/Grail* judgment of the Court, since the concentration was not notifiable in any member state. As to the facts of the case Microsoft hired Inflection's co-founders and most of its employees in order to advance Copilot and acquired Inflection's intellectual property licenses.[225] Although the Commission took the preliminary view that these facts amounted to "concentration"[226], we shall not preclude the scenario of an ex-post control under the prism of Article 101 TFEU, if Inflection terminates the competitive pressure it exercises in the market. In such a scenario,

[218] Case T-227/21, *Illumina v Commission* [2022] ECLI:EU:T:2022:447, para 177.
[219] Case C-611/22 P, *Illumina v Commission* [2024] ECLI:EU:C:2024:677, para 201.
[220] European Commission, 'Statement by Executive Vice-President Margrethe Vestager on today's Court of Justice judgment on the Illumina/GRAIL merger jurisdiction decisions' <https://ec.europa.eu/commission/presscorner/detail/en/statement_24_4525> accessed 28 September 2024.
[221] Joined cases 142 and 156/84, *BAT and Reynolds v Commission* [1987] ECR 04487, paras 37-38.
[222] Council Regulation 139/2004 (n 210), art 3 which does not make a notional distinction between notifiable and non-notifiable concentrations.
[223] Case C-248/16, *Austria Asphalt* [2017] ECLI:EU:C:2017:643, paras 32-33.
[224] Autorité de la Concurrence Decision in Case 24-D-05 *relative à des pratiques mises en œuvre dans le secteur de l'équarrissage* [2024].
[225] European Commission, 'Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft' <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727> accessed 28 September 2024.
[226] ibid.

leniency and settlement may be deemed useful, in particular for Inflection but for Microsoft as well.

2.2.d. Ex-post (antitrust) control – Article 102 TFEU

Assessing killer acquisitions under Article 102 TFEU does not present the same difficulties as assessing them under Article 101 TFEU. Advocate General Emiliou clearly indicated that "*a so-called killer acquisition* […] *offers a paradigmatic example of a 'by object' abuse of dominant position*".[227] After that opinion, a key judgment on the question of ex post evaluation of concentrations was issued; in *Towercast* the Court of Justice found that national competition authorities were not precluded from finding that a concentration non notifiable at EU or national level constitutes an abuse of dominance according to Article 102 TFEU.[228] With this judgment, the Court of Justice transferred its traditional *Continental Can* approach[229] in the field of digital markets and killer acquisitions reaffirming that the concentration *itself* may be examined under Article 102. As far as leniency and settlement are concerned, we have stated that they only cover cartels, thus their role under Article 102 TFEU seems irrelevant; nevertheless, Commission practice has created a cooperation mechanism, which rewards cooperation in cases of vertical restraints and abuse of dominance.

2.2.e. Cooperation mechanism

During the last years, the Commission has applied in a series of cases concerning vertical restraints and/or abuse of dominance the so-called "cooperation procedure". Annex D presents all the cases and the reductions given under this procedure since 2016, when the European Commission issued a decision concerning an infringement of Article 102 TFEU by ARA for refusal to grant market access. The most important feature of the decision is that, for the first time, a reduction of a fine for cooperation was granted in a non-cartel case.[230] As the Commission noted:

"*With its Cooperation Submission, ARA* ***acknowledged the infringement*** *as set out in this Decision as well as the* ***need for a structural remedy****, which it accordingly proposed. The proposed structural remedy further ensures that the legal gap as to the legal obligation to grant shared use is removed. The acknowledgment and the accompanying waiver also allowed for* ***administrative efficiencies****. In the light of the above, the amount of the fine to be imposed on ARA should be reduced by 30%*".[231]

The next piece of the puzzle was rewarding cooperation in vertical infringements. In 2018, the European Commission issued four prohibition decisions concerning online resale price maintenance (RPM) imposed by electronic manufacturers. Taking for example *Philips* commission decision, a 40% reduction of the fine was accepted in recognition of Philip's cooperation with the European Commission.[232] More precisely:

"*Philips has cooperated with the Commission* ***beyond its legal obligation to do so*** *by:*

(i) providing ***additional evidence*** *representing significant added value with respect to the evidence already in the Commission's possession as that evidence strengthened to a large extent the Commission's ability to prove the infringement;*

[227] Opinion of AG Emiliou in Joined Cases C-611/22 P and C-625/22 P, *Illumina v Commission* [2024] ECLI:EU:C:2024:264, para 230.
[228] Case C-449/21, *Towercast* [2023] ECLI:EU:C:2023:207.
[229] Case 6/72, *Europemballage Corporation and Continental Can Company v Commission* [1973] ECR 00215, paras 25-26.
[230] A fine reduction for cooperation was first used in Commission Decision in Case AT. 38823, *PO/Elevators and Escalators* (n 36), where the cartel participants had been advantaged by both a reduction for co-operation under the Leniency Notice and a reduction for further co-operation outside the scope of the Notice.
[231] Commission Decision in Case AT.39759, *ARA Foreclosure* [2016], para 162.
[232] Commission Decision in Case AT.40181, *Philips* [2018] C(2018) 4797 final, para 97.

(ii) ***acknowledging the infringement*** *of Article 101 of the Treaty in relation to the conduct; and*

(iii) ***waiving certain procedural rights, resulting in administrative efficiencies***"[233].

What these decisions show is the Commission's willingness to reward cooperation in order to gather additional evidence and gain administrative efficiencies even outside the scope of the leniency and settlement programmes. It is evident that the aims of the cooperation mechanism are similar to the aims of settlement as described above. At the same time, the evidential aspect of the cooperation mechanism is closer to leniency's ration, meaning that the cooperation mechanism lies between leniency and settlement.

The usefulness of this mechanism in the digital era can be seen in the *Video Games* Commission Decision. This case concerned vertical restrictions of cross-border sales with the use of a geo-blocking algorithm. While all cooperating parties had a fine reduction of 10%, Capcom's fine reduction reached 15%, since it was the only infringer who "*submitted a Corporate Statement, including evidence and explanations concerning the geo-blocking practices, which strengthened the Commission's ability to prove the infringement. In particular, the Corporate Statement included* […] ***details of how the system of geo-blocking via Steam keys worked, thereby facilitating the Commission's understanding of the types of restrictions concerned***".[234] On the contrary, no relevant case has arisen as far as the abuse of dominance is concerned.

Conclusions

Though the analysis of leniency and settlement under their traditional and their modern role, the main doctrinal and practical questions which are related to these procedures have been presented in detail. It is clear that this thesis evaluates positively both procedures and asserts that they can be of significant importance in today's competition landscape.

As to the "traditional" aspect, the main conclusions of this thesis are the following:

- the main component of both leniency and settlement is the emphasis on rewarding cooperation either for tracing competition infringements or for following an efficient procedure; any interpretative and practical problem shall be solved under this perspective;
- as far as leniency is concerned, emphasis shall be placed on the specific character of the aid provided to the Commission whose aim is to carry out targeted inspections and procedures;
- as far as leniency is concerned, emphasis shall be given to the relationship between the Commission's discretion and the efficiency gains that this procedure offers;
- in following Annexes A to C, a detailed table presents all the reduction percentages offered under the 2006 Leniency Notice.

As to the "modern" aspects, the main conclusions of this dissertation may be summarised as follows:

- both procedures comply with the fundamental rights of the undertakings concerned; given that the two procedures pose similar legal questions and function in a similar way, guarantees or balances achieved in the framework of one of them could be applied also in the framework of the other;
- when it comes to confidentiality EU legislation offers a variety of guarantees in favour of the leniency and the settlement applicant; especially, as far as private enforcement is concerned, the balance achieved is evaluated as successful and any amendment shall take

[233] ibid para 98.
[234] Commission Decision in Case AT.40424, *Capcom* [2021] C(2021) 72 final, para 165.

into consideration that Articles 101 and 102 TFEU create *rights* which cannot be totally overturned by a purposed in the public interest;

- although leniency and settlement, as well as cooperation, cannot resolve the policy problems in the digital markets, their use constitutes an efficient tool that the competition authorities have the experience to apply in cases affecting competition in the digital market.

In view of the above considerations, one shall not overlook the relationship between "traditional" and "modern"; the usefulness of leniency and settlement lies on their solid basis and their use in the long-term. When a case like *Microsoft/Inflection* arises, turning back to successful and well-tried procedures applying the experience gained by their use constitutes a useful choice.

Annex A: First band leniency Reduction

Case Number	Case Name	Reduction
AT. 39881	Occupant Safety System	50%
		50%
		46%
		50%
AT. 39563	Retail Food Packaging	45%
		45%
		50%
		50%
AT. 39960	Thermal Systems	40%
		45%
		50%
AT. 40481	Occupants Safety System II	50%
		30%
		50%
		30%
AT. 40113	Spark Plugs	42%
AT. 40299	Closure Systems	40%
		35%
AT. 40127	Canned Vegetables	50%
AT. 40410	Ethylene	45%
AT. 39920	Braking Systems	35%
		30%
AT. 39824	Trucks	40%
AT. 39904	Rechargeable Batteries	50%
AT. 40547	Styrene Monomer	40%
AT. 39914	Euro Interest Rate Derivatives	50%
AT. 39922	Bearings	40%
AT. 40013	Lighting Systems	35%

Case Number	Case Name	Reduction
AT. 40009	Maritime Car Carriers	50%
AT. 40098	Blocktrains	45%
AT. 39780	Envelopes	50%
AT. 40760	Hand Grenades	50%
AT. 39965	Mushrooms	50%
AT. 40055	Parking Heaters	45%
AT. 40330	Rail Cargo	45%
AT. 39924	Swiss Franc Interest Rate Derivatives	40%
AT. 39579	Consumer Detergents	50%
AT. 39861	Yen Interest Rate Derivatives	40%
		35%
		35%
		30%
AT. 40028	Alternators and Starters	30%
AT. 39748	Automotive Wire Harnesses	40%
		40%
		50%
		45%
		40%
AT. 40018	Car Battery Recycling	50%
AT. 40135	FOREX	50%
		50%
		50%
AT. 39574	Smart card chips	30%
AT. 40522	Metal Packaging	50%
AT. 39801	Polyurethane Foam	50%
AT. 39165	Flat Glass	50%
AT. 40136	Capacitors	35%

Case Number	Case Name	Reduction
AT. 39462	Freight Forwarding	35%
		30%
		50%
		50%
AT. 39406	Marine Hoses	30%
AT. 40178	Car Emmissions	45%
AT. 39437	TV and computer monitor tubes	40%
AT. 40324	European Governments Bonds (EGB)	45%
	Total Average	*43%*

Annex B: Second band leniency reduction

Case Number	Case Name	Reduction
AT. 39881	Occupant Safety System	30%
		28%
AT. 39563	Retail Food Packaging	30%
		30%
AT. 39960	Thermal Systems	30%
		25%
		30%
AT. 40113	Spark Plugs	28%
AT. 40127	Canned Vegetables	30%
AT. 40410	Ethylene	30%
AT. 39920	Braking Systems	20%
AT. 39824	Trucks	30%
AT. 39904	Rechargeable Batteries	20%
AT. 40547	Styrene Monomer	30%
AT. 39914	Euro Interest Rate Derivatives	30%
AT. 39922	Bearings	30%
AT. 40013	Lighting Systems	20%
AT. 40098	Blocktrains	30%
AT. 40009	Maritime Car Carriers	25%
AT. 39780	Envelopes	25%
AT. 39965	Mushrooms	30%
AT. 40330	Rail Cargo	30%
AT. 39579	Consumer Detergents	25%
AT. 39861	Yen Interest Rate Derivatives	25%
		25%
AT. 40028	Alternators and Starters	28%
AT. 39748	Automotive Wire Harnesses	30%
		30%
		20%
AT. 40018	Car Battery Recycling	30%
AT. 40135	FOREX	30%
		25%
		30%
AT. 40136	Capacitors	30%
AT. 39462	Freight Forwarding	25%
		20%
		25%
AT. 39437	TV and computer monitor tubes	30%
	Total Average:	*27%*

Annex C: Third band leniency reduction

Case Number	Case Name	Reduction
AT. 39563	Retail Food Packaging	20%
		20%
		10%
AT. 39960	Thermal Systems	15%
AT. 40127	Canned Vegetables	15%
AT. 40410	Ethylene	20%
AT. 39824	Trucks	10%
AT. 40547	Styrene Monomer	20%
		10%
AT. 39914	Euro Interest Rate Derivatives	5%
AT. 39922	Bearings	20%
		20%
AT. 40009	Maritime Car Carriers	20%
AT. 39780	Envelopes	10%
AT. 40135	FOREX	20%
		15%
		10%
AT. 40136	Capacitors	15%
		15%
AT. 39462	Freight Forwarding	5%
AT. 39437	TV and computer monitor tubes	10%
	Total average:	*15%*

Annex D: Cooperation reduction

Case Number	Case Name	Type	Reduction
AT. 40134	AB InBev Beer Trade Restrictions	Abuse of dominance	15%
AT. 39759	ARA foreclosure	Abuse of dominance (refusal to supply)	30%
AT. 40632	Mondelez trade restrictions	Abuse of dominance and vertical (sales restriction)	15%
AT. 40049	MasterCard inter-regional MIF monitoring	Decision of an association of undertakings	10%
AT. 40528	Melia (Holiday Pricing)	Vertical (customers discrimination)	35%
AT. 40413	Focus Home - Video Games	Vertical (geo-blocking)	10%
AT. 40414	Koch Media - Video Games	Vertical (geo-blocking)	10%
AT. 40420	Zenimax - Video Games	Vertical (geo-blocking)	10%
AT. 40424	Capcom - Video Games	Vertical (geo-blocking)	15%
AT.40422	Bandai Namco - Video Games	Vertical (geo-blocking)	10%
AT. 40428	Guess	Vertical (multiple practices)	50%
AT. 40181	Philips	Vertical (RPM)	40%
AT. 40182	Pioneer	Vertical (RPM)	50%
AT. 40465	Asus	Vertical (RPM)	40%
AT. 40469	Denon & Marantz	Vertical (RPM)	40%
AT. 40432	Character merchandise	Vertical (sales restriction)	40%
AT. 40433	Film merchandise	Vertical (sales restriction)	30%
AT. 40436	Ancillary Sports Merchandise	Vertical (sales restriction)	40%
		Total Average:	*27%*

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