CARTEL SETTLEMENTS: GENERAL FEATURES, RECENT DEVELOPMENTS IN THE EUROPEAN COMMISSION'S PRACTICES AND IMPLICATIONS FOR TURKEY

UZLAŞMA PROGRAMLARI: GENEL UNSURLARI, AB REKABET HUKUKUNDAKİ GÜNCEL GELİŞMELER VE TÜRKİYE İÇİN ÇIKARIMLAR

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Abstract

This paper aims to explain the benefits, drawbacks and main features of the settlement programs. The conditions for successful application are explained as well. In this context, the practical implementation of settlements will be examined in the light of the EU practices. The assessment of recent decisions will help to see whether stated aims of settlements are achieved or not in practice. These inferences will be helpful to analyze Turkey practices. Although there is settlement option in Turkey under leniency program, the process is complex and the awareness is low. The limited implementation regarding to reduction proves this. Thus, a clear regulation on settlement may help to reduce negative effects. While designing it, general principals of settlements and EU practices should be examined carefully.

Keywords: *Settlement, Leniency, Cartel, EU Law, Leniency Regulation*

Öz

Bu çalışma, uzlaşma programlarının faydalarını ve genel özelliklerini başarılı bir uygulamanın ön koşulları ile birlikte açıklamayı amaçlamaktadır. Bu kapsamda uzlaşma programlarının unsurları incelendikten sonra, bu özelliklerin uygulamaya ne şekilde yansıdığı AB rekabet hukukundaki güncel gelişmeler ışığında tartışılacaktır. Komisyon tarafından alınan son kararlar uzlaşma ile beklenen amaçlara ulaşılıp ulaşılmadığının analizine yardımcı olacaktır. Çalışma, bu çıkarımlardan hareketle Türk rekabet hukukunda uzlaşmanın nasıl uygulandığını

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değerlendirmeyi hedeflemektedir. Bu değerlendirme, Türkiye'de uzlaşmanın pişmanlık programı altında bir seçenek olarak var olduğunu zira ihlali kabul eden ve yönetmelikte istenen temel bilgileri sağlayarak işbirliği yükümlülüklerini yerine getiren teşebbüslerin indirimden yararlanma seçeneğinin olduğunu; ancak halihazırda sürecin karmaşık olduğunu ve sürece ilişkin farkındalığın zayıf olduğunu ortaya koymaktadır. Pişmanlık Programının kabulünden bu yana ulaşılan indirime ilişkin kısıtlı uygulama bu tespiti doğrulamaktadır. Bu nedenle uzlaşmaya yönelik açık düzenlemelerin varlığı uygulamada karşılaşılan sorunları ortadan kaldırabilecektir.

Anahtar Kelimeler: *Uzlaşma, Pişmanlık, Kartel, AB Uygulamaları, Pişmanlık Yönetmeliği*

INTRODUCTION

By raising prices and restricting supply, cartels result in limited products with high costs and in that way they harm consumers. That is why they are accepted as "the most egregious violations of competition law".[1] In this context, competition authorities around the world adopt several policies for an efficient fight against cartels. Apart from severe sanctions, they try to create incentives for cooperation.

Leniency programs are widely-used mechanisms for rewarding cartel participants in exchange for admission of liability and reporting the cartel conduct to competition authorities.[2] Competition authorities may also adopt additional policies to speed up their enforcement and make their enforcement more efficient.

Settlements are attractive options for competition authorities as they make it possible to resolve investigations at an earlier stage than ordinary procedures and thus help to save resources. Cartel participants may also benefit from settlements as they save resources and obtain fine reductions. However, there are disadvantages for both parties as well. Thus, the design of settlement is crucial for its success.

The attractiveness of settlement made it an option at the European Commission (the Commission) level in 2008. However, we had to wait two years for application of the settlements. The Commission adopted six cases until now and it seems that settlement will be an important element of the Commission's fight against cartel.

In this sense, this paper will examine the general features, the possible strengths and weaknesses of settlements with the preconditions for successful

[1] OECD (1998), "Recommendation of the Council Concerning Effective Action against Hard Core Cartels" C(98)35/FINAL, http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193&InstrumentPID=189&Lang=en&Book=False, Date Accessed: 25.08.1012.

[2] See below "Settlements and Leniency".

implementation. Afterwards, the Commission's settlement procedure and decision practice will be evaluated in the light of the criticisms that were first raised at the time of the adoption. The analysis of the Commission will help to see whether settlements may be successful in achieving their stated aims in practice. These inferences will prepare a discussion base for Turkey practices. After explaining the current situation in Turkey, this paper will seek to explore the problems of the present implementation and try to envisage how an efficient mechanism may be devised for Turkish competition law. Finally, there will be a short conclusion part.

1. CARTEL SETTLEMENTS: KEY ELEMENTS

1.1. The Concept of "Settlement"

As fighting against cartels is getting harder, adoption of efficient enforcement systems becomes more important. In this regard, many of the competition authorities around the world have adopted different mechanisms to make their struggle more effective. Among these, settlement mechanisms have many important features that make them attractive from the point of competition authorities.

The concept of settlement may be explained in comparison with the "normal-fully adversarial disposal" of cases. Settlement indicates resolving a case by competition authority via a specific procedure/policy. Under this process, some benefit is conferred to the participants in return for admission or not denying of the illegal behavior and/or offer or acceptance of remedies.[3]

Settlements are accepted as a "win-win" anti-cartel enforcement tool which provides different benefits to settling parties.[4] In this sense, settlements are especially suitable for cartel cases since cartels are difficult to detect and obtaining evidence to prove the infringement is difficult. If cartel conduct is detected, in most cases, there is no need to do any further analysis. Besides, the fines imposed on undertakings will be at the highest end of the scale. Within this framework, settlements also become an option for cartel participants to reduce their risks.[5]

[3] WILS, W.P.J. (2008), "The Use of Settlements in Public Antitrust Enforcement", 13th Annual EU Competition Law and Policy Workshop (EUI, 6-7 June 2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1135627, Date Accessed: 25.08.2012, p.2-4.
International Competition Network (2008a), "Cartel Settlements", Report to the ICN Annual Conference, April 2008, http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf, Date Accessed: 25.08.2012, p.2.

[4] International Competition Network (2008a), "Cartel Settlements", Report to the ICN Annual Conference, April 2008, http://www.internationalcompetitionnetwork.org/uploads/library/doc347.pdf, Date Accessed: 25.08.2012, p.2.

[5] LASSERRE, B. and F. ZIVY (2010), "A Principled Approach to Settlements: A Few Open Issues", Claus-Dieter Ehlermann and Mel Marquis (eds), in *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, p.149.

1.1.1. Types of Cartel Settlements

The type of settlement system depends on different factors including the type of enforcement regime, possible penalties and legal and constitutional system.[6] As generally known, cartel enforcement regimes may be criminal, civil, administrative.[7] In this context, countries with different enforcement systems have adopted different types of settlements in cartel cases. For instance, Canada, Israel and the United States (US) prosecute cartel behaviours as criminal violations. In these systems, cartel charges may be resolved by entering into plea agreements. In each jurisdiction, pleas are subject to court approval and a court imposes the defendant's sentence. The Commission, on the other hand, has an administrative enforcement regime[8] Within this scope, in the US, the settlements take the form of "plea bargaining" and aim to receive cooperation, speed up investigations and resolve cases quickly. It requires substantial and continuing cooperation and the defendant waives the right to appeal. The Commission's settlement system is, on the other hand, mainly parallel to its ordinary investigative process but it provides opportunity of a settlement reduction in return for cooperation. The cooperation is based on waiving of certain procedural rights with no need for substantial assistance that was sought under US plea bargaining.[9] Parties may still appeal against the decision.[10] France also has an administrative system and a cartel settlement allows parties to negotiate a fine reduction but it is not possible for parties to negotiate on the infringement itself. In Australia, where cartels are civil violations, cartel settlements are reached during the litigation process under the general settlement procedures regulated by the Australian legal system.[11]

1.1.2. Key Elements of Cartel Settlements

There are basic elements that can be identified by looking at the jurisdictions which have cartel settlements. When we look at key substantive elements of cartel settlements, we see that a cartel settlement -at minimum- describes the relevant cartel conduct. However, as stated above, there are differences among jurisdictions in terms of whether a settling party must accept liability and/ or accept the factual basis of the infringement. Secondly, during settlement discussions, cartel participants would like to learn the level of sanctions that

[6] Cartel Settlements 2008, p.2-3.

[7] Some countries have "hybrid" regimes where cartel is an administrative infringement as well as a criminal offence. See Cartel Settlement 2008, p.5.

[8] Cartel Settlements 2008, p.4-5.

[9] O'BRIEN, A. (2008), "Cartel Settlements in the US and EU: Similarities, Differences & Remaining Questions", 13th Annual EU Competition Workshop, http://www.justice.gov/atr/public/speeches/235598.pdf, Date Accessed: 25.08.2012, p.7.

[10] "Antitrust: Commission Adopts First Cartel Settlement Decision-Questions and Answers" (2010), MEMO/10/201, http://europa.eu/rapid/press-release_MEMO-10-201_en.htm, Date Accessed: 15.02.2013.

[11] Cartel Settlements 2008, p.4-5.

will be applied to them. The amount may be decided between parties or agreed/ recommended amount may be subject to approval of a court. Finally, cooperation and government's agreement for not to bring further charges are accepted as key substantive elements in some jurisdictions.[12]

There are also key *procedural* elements that can be identified. Settlement policies usually address how and when settlement discussion will be initiated. Procedural safeguards and rights of defense are also considered. Confidentiality of settlement agreements and the information provided is also an important issue that all jurisdictions consider. Jurisdictions also try to regulate the conditions for withdrawal from a cartel settlement or violation of settlement agreements.[13]

1.1.3. Successful Implementation of Cartel Settlements

It is understood that although it has different forms, cartel settlement is a crucial cartel enforcement tool with some of its common features to all jurisdictions. However, the successful implementation of settlement systems depends on many factors. First of all, there must be a fear of detection and prosecution. Additionally, cartel participants should be sure that there are adequate procedural safeguards in the process. Transparency and the related principles such as predictability and certainty are essential for an effective settlement system.[14] Being aware of the rewards for co-operation and the risks of failing to reach a settlement and the procedures that competition authority will follow will create incentives for settlement. Publishing guidelines and public speeches can help to achieve these goals. On the contrary, uncertainty and information asymmetries may hamper the process.[15] Thus, they may be successful when they are well-designed, when there are clear policies regarding their implementation and when they are handled carefully.[16]

Looking closely at its advantages and disadvantages, we may be able to understand specific characteristics of this type of enforcement tool.

1.2. Benefits and Drawbacks of the Settlements

Many competition authorities are adopting settlement mechanisms as they accelerate cartel investigations and save resources. But they can also raise concerns with regards to reduced deterrent effects, diminished role of courts, weakened defense rights[17] and unjust outcomes.[18]

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[12] Cartel Settlements 2008, p.20-23.
[13] Cartel Settlements 2008, p.26-32.
[14] Cartel Settlements 2008, p.8-9.
[15] OECD (2008a), "Plea Bargaining and Settlement of Cartel Cases", Policy Brief, http://www.oecd.org/dataoecd/56/43/41255395.pdf, Date Accessed: 26.08.2012, p.2-3.
[16] Lasserre and Zivy 2010, p.152-153.
[17] OECD 2008a, p.1.
[18] STEPHAN, A. (2009), "The Direct Settlement of EC Cartel Cases", http://ec.europa.eu/competition/cartels/

1.2.1. Benefits

1.2.1.1. Saving of Time and Resources

It is generally accepted that when there is a settlement between cartel participants and competition authorities, the resources and time that would have been used for the investigation of the case are saved. These freed resources could be allocated to resolving of other cases. Settlements, especially applied with leniency programs, are efficient means for ending cartel investigations. Solving cases efficiently and using resources for other cases help to achieve most preferred outcome for enforcement: deterrence.[19] A settlement may also help to get earlier results. It is acknowledged that if the time gap between infringement and decision is short, it may increase sanction's deterrent effects.[20]

Saving time and money is also important from the cartel participant's point of view. Encouraging an optimal allocation of resources also may be beneficial for society.[21] Finally, as settled parties are less inclined to appeal the decision, the legal costs are expected to be diminished.[22]

1.2.1.2. Cooperation

In some jurisdictions, settlements are used to gather evidence. In these systems cooperation of the cartel participant makes the investigation process faster and helps the authority with the quick resolution of the case. Cooperating cartel participants may provide competition authorities with key evidence. However, there are other jurisdictions where settlement discussions start after the authority completes some part of its investigations. In these systems settlements are not seen as a tool to gather evidence but simplify procedure.[23] In the US, early cooperation of the cartel participants creates incentives for other undertakings to cooperate. This cooperation may provide benefits to cooperating firms such as obtaining fine reductions and avoiding long sentences.[24] The Commission, on the other hand stresses that the settlement procedure is designed for procedural efficiencies.[25]

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legislation/cartels_settlements/astephan.pdf, Date Accessed: 25.08.2012, p.24.

[19] Cartel Settlements 2008, p.10.

[20] Wils 2008, p.12.

[21] OECD 2008a, p.2.

[22] ASCIONE, A. and M. MOTTA (2008), "Settlements in Cartel Cases", 13th Annual EU Competition Law and Policy Workshop (EUI, 6-7 June 2008), http://www.eui.eu/Documents/RSCAS/Research/Competition/Motta-Ascione-2008.pdf, Date Accessed: 25.08.2012, p.6.

[23] Cartel Settlements 2008, p.10.

[24] HAMMOND, S.D. (2006), "The US Model of Negotiated Plea Agreements: A Good Deal with Benefits for All", OECD Competition Committee Working Party No.3, http://www.justice.gov/atr/public/speeches/219332.pdf, Date Accessed: 25.08.2012, p.20-21; see below "Settlement and Leniency".

[25] MEMO/10/201

1.2.1.3. Finality and Certainty

Settlements provide the chance to finalize the investigation process which can be recognized as favorable from both government and cartel participants' perspectives. If settlements are based on a waiver of appeal, they provide ultimate finality for both parties. In these situations, both parties may take the advantage of reduced legal costs. Settlements may also provide certainty with respect to type of penalty or sentence that will be imposed.[26] Besides, settlements give cartel participants a sense of being involved in the resolution of the case and of being eligible to influence the final outcome.[27]

In this connection, settlements may result in benefits for both parties as well as society. However, there are number of hurdles that should be taken into account while designing a settlement procedure. Next part is dedicated to explain main problems that may arise while utilizing settlements.

1.2.2. Drawbacks

One of the most significant potential costs of settlements is that they are likely to result in lower fines. There may be challenges in terms of deterrence especially in antitrust regimes where fines are the only sanctions. In these regimes, high fines are required for deterring cartel conducts. They also secure the successful implementation of leniency programs. Apart from this, authorities may be assessed on the basis of the number of the cases they conclude. Hence there may be a pressure on the competition authority to conclude cases quickly. Together with lower fines, there may be negative effects on deterrence.[28] However, if the resources saved due to the settlement could be directed to resolving other cases, settlements would not necessarily diminish deterrence.[29]

There are other disadvantages as well. For example, settlements may also be accepted as "unfavorably" among the public and perceived as bargaining the justice.[30] It is assumed that sanctions become a matter of bargains and offenders are rewarded when they accept their offences.[31]

Another drawback of the settlements is that they make investigations shorter and there may be more reliance on information gathered via leniency. Shorter investigations make it more difficult to check the reliability of this information. Additionally, some firms may settle due to the pressure exerted by the competition

[26] Cartel Settlements 2008, p.16.
[27] OECD 2008a, p.2.
[28] Stephan 2009, p.24, 27, 29
[29] For formalization of the trade off see Ascione and Motta 2008, p.6-7.
[30] Cartel Settlements 2008, p.17
[31] OECD 2008a, p.5

authority or simply they do not want to take risks.[32] Imposing severe sanctions on the grounds of weak evidence, together with incentives created under leniency and settlement programs may result in firms' admission of liability even in cases where they are not sure whether they conducted any illegal action. These kinds of settlements may distort the deterrence and legitimacy of competition law.[33]

In this context, weakened rights of defense are also arguable. Settlements may weaken the rights of defendants in terms of the presumption of innocence and the right against self-incrimination. But there are other arguments such that cartel participants are advocated by experienced representatives. They can decide what is best for them and rely on information they have. Besides, it is not different from leniency as it is also based on rewarding the cooperation as a fine discount. On the other hand, it should also be noted that in jurisdictions with administrative enforcement regimes, waiving of the right of appeal would mean having no control over the enforcement. Thus, it is suggested that it should be approached differently from other procedural rights.[34] Existence of clear rules or guidelines, guarantee of access to file or giving enough time to parties may help to reduce negative effects on rights of defense.[35]

Apart from this, settlements may result in lesser publicity than the regular process and they may not be considered precedent in subsequent cases.[36] As explained below, there are other problems that settlements may cause in terms of leniency programs and private enforcement.

1.3. Settlements and Leniency

There are strong relations between settlements and leniency programs in some jurisdictions. It is known that cartels involve many parties and may be detected effectively with the help of information provided by cartel members. Leniency policies are adopted for finding out and destabilizing cartels and gathering evidence by means of cartel members' cooperation. Leniency programs provide incentives to guarantee this cooperation.[37]

Settlements may also be beneficial instruments for jurisdictions with strong enforcement records against cartels. These jurisdictions have successful leniency programs that facilitate detection of cartels. Accordingly, the rate of detection

[32] Stephan 2009, p.2,32,38.

[33] STEPHAN, A. (2010a), "OFT dairy price-fixing case leaves sour taste for cooperating parties in settlements", *E.C.L.R.,* No:31(11), p.2, 5. See below "Turkey Practices".

[34] OECD (2008a), p.5-6.

[35] Wils 2008, p.20-21.

[36] Cartel Settlements 2008, p.18.

[37] MEHTA, K. and M.L.T CENTELLA (2008), "EU Settlement Procedure: Public Enforcement Policy Perspective", 13th Annual EU Competition Law and Policy Workshop (EUI, 6-7 June 2008), http://www.eui.eu/Documents/RSCAS/Research/Competition/Mehta-TiernoCentella-2008.pdf, Date Accessed: 25.08.2012, p.15.

and the number of the cases to resolve may be high. However, as the competition authorities have scarce resources, early resolution of cartel cases becomes more important. [38] Settlements may also be important for cartel participants who did not take the advantage of full immunity.[39]

In practice, jurisdictions have adopted different approaches regarding the relationship between leniency and settlements: while some practices including the US consider leniency and settlement as integrated elements in a cartel investigation; other jurisdictions accept leniency and settlement policies as two distinct instruments of their cartel policies. In the first system, the two policies are applied in an integrated approach and the authority offers the settlement option with a reduced sentence to motivate cooperation, disclosure of evidence, the admission of liability, and a waiver of certain procedural rights.[40] On the other hand in the second, a successful leniency application is rewarded for providing information that makes it possible to open an investigation of a cartel conduct while settlements may be motivated by bringing efficiencies to end the procedure, rewarding cartel participants who admit liability and/or agree not to challenge the claims.[41] In this regard, leniency can be described as helping the authority to build its case whereas settlement forms part of an attempt to speed up the process. In both systems the cooperation of the parties is rewarded by the competition authority. Thus, leniency and settlement processes may be accepted different but related anti-cartel enforcement tools. When these mechanisms are used together, usually, the window for leniency applications closes before the window for settlement discussions opens. Besides, collaboration under both policies may lead to cumulative reductions in fines.[42]

Within this perspective, the relation between leniency and settlement is more delicate in jurisdictions where settlement mechanisms are in force without replacing leniency programs. If the settlement incentives are too high, cartel participants may choose to be under the scope of settlement mechanism and settlements may have negative effects on the leniency. On the other hand, if the incentives are not so high undertakings do not accept to settle. Especially, if the

[38] ICN (2008b), "Setting of Fines for Cartels in ICN Jurisdictions", Report to the 7th ICN annual Conference, http://www.internationalcompetitionnetwork.org/uploads/library/doc351.pdf39, Date Accessed: 25.08.2012, p.39.

[39] GAMBLE, R. (2011), "Speaking (formally) with the enemy – cartel settlements evolve", *E.C.L.R*, No: 32(9), p. 2.

[40] OECD (2008b), "Experience with Direct Settlements in Cartel Cases", Policy Roundtables, http://www.oecd.org/competition/cartelsandanti-competitiveagreements/44178372.pdf, Date Accessed: 26.08.2011, p.9.

[41] Gamble 2011, p.2.

[42] HOLMES, S. and P. GIRARDET (2011), "Settling Cartel Cases: Recent Developments in Europe", in *Global Legal Group: International Comparative Legal Guide to Cartels and Leniency 2011*, http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2012/1-settling-cartel-cases-recent-developments-in-europe, general chapters-1(3).

maximum cartel penalty is not at a high level, guaranteeing attractive settlement discounts apart from leniency reductions may be difficult. It is argued that these concerns may be addressed by increasing penalties, rather than trying to revise leniency programs or annulling the settlement systems. Non-monetary incentives can also be used to encourage settlements.[43] In addition, settlement and leniency discounts may be applied cumulatively for ensuring that cartel participants have the incentive to apply both programs.[44]

1.4. Settlements and Private Enforcement

As Holmes and Girardet explains, "the main focus of private enforcement is that harmed consumers may get redress for any damage suffered due to competition law infringement by suing those parties guilty of an infringement." For suing parties successfully, consumers need evidence of infringement and to show the harm. They can rely on investigation reports or decisions to demonstrate infringements.[45]

In this sense, undertakings assess the effects of settlements on private actions while deciding to enter settlement discussions. We can refer to two different effects: Settlements may make private actions more likely and speed them up as firms may be exposed to private litigation due to the settlement decision.[46] However, although competition authorities support the private actions, they may not reveal much information about the infringement in settled cases so as not to undermine settlement mechanism. As less information is made public, proving the scope of the liability may be more difficult after the settlement decision. Besides, shorter investigations may also effect private enforcements negatively.[47] However, it should be also noted that settlements may result in efficient usage of resources and these resources can be used in detection of more infringements. Thus, competition authorities may adopt more decisions which have positive effects on private actions. In this context, public and private enforcement can be accepted as complementary.[48]

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[43] Cartel Settlements 2008, p.7-8. Non-monetary incentives may be "limiting the scope of the charged conduct, securing more favorable treatment for culpable executives where individual liability is possible, and the possibility of immigration relief for cooperating foreign cartel participants", see Cartel Settlements. p.13.

[44] OECD 2008a, p.4.

[45] HOLMES, S. and P. GIRARDET (2009), "Settling Cartel Cases: Recent Developments in Europe", in *Global Legal Group: The International Comparative Legal Guide to Cartels and Leniency 2009*, p.6.

[46] Ascione and Motta 2008, p.8.

[47] Stephan 2009, p.37.

[48] DEKEYSER, K., R. BECKER and D. CALISTI (2010), "Impact of public enforcement on antitrust damages actions: Some Likely Effects of Settlements and Commitments on Private Actions for Damages", Claus-Dieter Ehlermann and Mel Marquis (eds), in *European Competition Law Annual 2008: Antitrust Settlements under EC Competition Law*, p. 684, 686.

Overall, it can be said that settlements have many benefits not only for enforcers but for the parties as well. However, the main challenge for authorities is striking a balance between creating motivation for cooperation and ensuring that penalties are kept at deterrent level.[49] "Settlement rewards" may cause enforcement losses and settlements will be demandable only if such losses are outweighed by the enforcement gains resulting from the resolution speed of cases. Leaving the use of settlements to authority's discretion, building a reputation for strong enforcement, settling cases after understanding the scope and gravity of the infringement and evaluating the settlement process periodically may help to guarantee that the enforcement outweighs the enforcement losses.[50]

Competition authorities should design their policies in the light of these principles. However, in practice designing and implementing these policies may not be easy. Looking at one of the leading jurisdictions –the Commission's practices– will help to understand possible difficulties arising from the implementation. Thus, the next part is dedicated to analyze the Commission's practices. This analysis will help as to evaluate to what degree settlements are successful in achieving their stated aims in practice and what factors should be taken into account for a successful implementation.

2. EU SETTLEMENT

2.1. Overview

As explained in the first part, specific instruments are needed for anti-cartel enforcement. Thus, the adoption of settlements at the Commission level has its place in the Commission's fight against cartels.[51] The Commission adopted its "Settlement Package" in 2008 which consists of two documents: Commission Regulation,[52] which included settlement option and "Settlement Notice",[53] which clarified the settlement procedure. Besides, explanatory documents were published.[54]

Looking at the official documents issued by the Commission it is easy to illustrate why the settlement was introduced at the Commission level. The settlement procedure aims to simplify the administrative proceedings and reduce

[49] Gamble 2011, p.5.

[50] Wils 2008, p.13-16.

[51] Mehta and Centella 2008, p.3.

[52] Commission Regulation (EC) No 622/2008 amending Regulation (EC) No 773/2004 [2008] L 171/3

[53] 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/C 167/01) [2008] C 167/1, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF, Date Accessed: 11.04.2013.

[54] DEKEYSER, K. and C. ROQUES (2010), "The European Commission's settlement procedure in cartel cases", *Antitrust Bulletin*, No:55(4), p. 825, "Antitrust: Commission introduces settlement procedure forcartels", (2008) IP/08/1056, http://europa.eu/rapid/press-release_IP-08-1056_en.htm, Date Accessed: 15.02.2013.

litigation before the courts. This is expected to free the Commission resources to resolve other cases.[55] What is more, due to the shortened investigations, fines may be imposed when the managers that were incumbent during the infringement are still in charge.[56] Thus, the new procedure would strengthen the overall efficiency of the Commission's antitrust enforcement and have a positive impact on deterrence.[57] It is also accepted as beneficial for consumers and for taxpayers as it reduces investigative costs.[58]

As explained in the part 1.1., there are different forms of settlements and it is clear that the Commission adopted its settlement mechanism as a resource-saving device. The expected benefits are related to procedural savings. Thus, the design of settlement is shaped in the light of these expectations. The brief explanation of the procedure may be a good start to understand where these savings appear mostly and how it is applied in practice.

2.2. The Settlement Procedure

To put it simply, under settlement mechanism, the Commission settles a case with cartel participants through a simplified procedure. The participants choose to accept their liability after having accessed the evidence against them and after having chance to express their views about the infringement.[59] At the Commission level, a "settlement" is a formal infringement decision which includes findings of the investigation and imposition of a fine (although reduced). They offer an option for companies for procedural efficiencies.[60] It should be noted that the Commission may decide at any time during the procedure to terminate settlement discussions if it considers that procedural efficiencies are unlikely to be achieved.[61] Under the settlement procedure, the Commission does not negotiate the existence of the infringement or sanctions but rewards the parties due to their cooperation.[62]

Settlement is possible only upon the parties' request and the Commission's finding the case appropriate for settling. The assessment regarding to whether a case is suitable for settlement is done after the Commission has completed the most of the fact-finding of the case, that is to say after completing the investigative

[55] IP/08/1056.

[56] Mehta and Centella 2008, p.5.

[57] "Antitrust: Commission Introduces Settlement Procedure for Cartels-frequently asked questions" (2008) MEMO/08/458, p.1.

[58] "Antitrust: Commission fines DRAM producers € 331 million for price cartel; reaches first settlement in a cartel case" (2008), IP/10/586. For discussions about the overall aim of the settlement procedure see MARQUIS, M. (2012), "Settling Cartel Investigations in the EU and its Member States", http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2070190, Date Accessed: 25.08.2012, p.5.

[59] MEMO/10/201, p.1.

[60] CENTELLA, M.L.T (2008), "The new settlement procedure in selected cartel cases", *Competition Policy Newsletter*, (3), p.30.

[61] Settlement Regulation, pt. 1(4), 4.

[62] Settlement Notice, pt.2, MEMO/08/458, p.1.

phase.[63]

If the Commission decides that the case is suitable for a settlement,[64] it will set a time-limit for the parties to declare in writing that they intend engaging in settlement discussions.[65] During bilateral settlement discussions[66], the Commission informs the parties about the allegations against them, reveals the evidence and discloses the fine range that they may face. Parties have the opportunity to respond to these allegations and explain their views. Once an understanding has been reached, the Commission may set a time-limit in which companies may submit their settlement submissions.[67] After this, parties are bound by their submissions as long as statement of objections does not raise different objections or the intended fine does not exceed the amount accepted by a party. Settlement submissions include acknowledgement of the parties liability for the infringement, indication of the maximum amount of the fines that parties would expect to be imposed and confirmations regarding to procedural issues.[68] If the parties' settlement submissions are compatible with the common understanding that reached during the discussions the Commission adopts a streamlined statement of objections. Upon parties' confirmation that statement of objections reflects their submission, it may be turned into a decision after consulting with Advisory Committee.[69] The final settlement decision imposes a fine with 10% reduction due to the settlement.[70]

2.3. Benefits and Drawbacks of the Settlements at the Commission Level

As explained in part 1.2. there are different advantages and disadvantages that may be derived from settlement. We can analyze them in terms of both for the Commission and the companies. The main advantage for companies for entering into settlement is obtaining a 10% reduction of the fine. But there are other advantages as well such as allowing participants to put the matter behind them more quickly, make their reputation better and get a shorter and less detailed Commission Decision.[71] Reduced legal costs are other benefits for companies.[72] Nevertheless, there are disadvantages as well and parties should weigh them before entering into settlement discussions. Although they do not waive their right

[63] Dekeyser and Roques 2010, p.826.
[64] For the relevant factors see Settlement Notice pt.5.
[65] See Settlement Notice pt.6, 9-11.
[66] See Settlement Notice pt.14-16.
[67] Settlement Notice, pt.17.
[68] Settlement Notice, pt.20-22.
[69] Settlement Notice, pt.23, 26, 28.
[70] Settlement Notice, pt.32, for a short summary of the procedure see Centella 2008, p.32-35.
[71] MEMO/10/201, p.1.
[72] BRANKIN, S.P. (2008), "All Settled: Where Are the European Commission's Settlement Proposals Post Consultation?", *Competition Law Journal*, p. 173.

of appeal, the successful appeals are less likely as parties accept their involvement and possible maximum amount of fines.[73] Companies may also be exposed to multi-jurisdictional investigations.[74] The settlement decisions establish a basis for recidivism and thus result in higher fines in future cases.[75]

The procedural savings derived from settlements can be accepted the most important advantage for the Commission. The crucial procedural economies expected through settlements are shortening statement of objections/final decisions and economizing some of the procedural steps including access to the remainder of the file and holding an oral hearing.[76] Besides, as explained above, (successful) appeals may be less likely, which means reduced legal costs in terms of the Commission.[77]

Thus, it can be said that all the Commission practice has its own features, the advantages and disadvantages of the settlements are mainly parallel to other jurisdictions since the clearest advantages are reduced costs and shortened process while the most obvious disadvantage is reduced fines.

Although there are clear rules regarding the settlement, in practice, six cases have been settled until now. These six cases give important hints about the implementation of settlement. They illustrate how the settlement system works in practice. After explaining the basic features of the procedures followed in these cases, we may proceed to evaluate the Commission's settlement system.

2.4. EU Settlement System in Practice

2.4.1. Settlement Cases

The first decision was adopted in **DRAMs**[78] case, which clarifies the operation of settlement procedure and symbolizes a new trend in anti-cartel enforcement policy.[79] It involved 10 producers of memory chips or DRAMs (Dynamic Random Access Memory), used in computers and servers. One of the undertakings, Micron, received immunity because it reported the existence of the cartel to the Commission.[80] The parties coordinated the price levels and quotations for DRAMs through a network of contacts and sharing of secret information. They were sold to major PC or server original equipment manufacturers in the EEA.

[73] Dekeyser and Roques 2010, p. 830, MEMO/10/201, p.4.
[74] JOSHUA, J., K. HUGMARK and I. DAEMS (2009), "What's the Deal Navigating the European Commission's 2008 Settlement Notice", *The European Antitrust Review*, p.7.
[75] Marquis 2012, p.8.
[76] Mehta and Centella 2008, p.5.
[77] The advantages and disadvantages from the point of the Commission may be well understood in the light of the Commission's settlement cases which analyzed in part 2.5. below.
[78] DRAMs CASE COMP/38511 (19/05/2010)
[79] GONZALEZ, A.O. (2011), "The cartel settlement procedure in practice", *E.C.L.R.*, No: 32(4), p.3.
[80] IP/10/586.

The cartel was in operation between 1 July 1998 and 15 June 2002.[81]

In this case, the fine was reduced on different grounds: due to mitigating circumstances, the fine was reduced by 5% for Hynix, which -at least partially- avoided applying the cartel agreement by adopting competitive conduct. The fine was also reduced by 10% for Toshiba and Mitsubishi as they were not involved in all aspects of the infringement. The parties also received fine reductions under the scope of leniency. The Commission took into account both quality and timing of the leniency applications.[82] The fine totaling € 331,273,800 includes a reduction of 10% for the companies' recognition of the facts,[83] which means the reduction of the fine granted to parties for settlement was added to their leniency reward.

Animal Feed Phosphates[84] is a second settlement case which clarifies one of the most arguable areas of the Commission's settlements: hybrid cases.[85] In this case two decisions have been adopted: on the one hand, a 'streamlined' decision[86] for the undertakings that settled with the Commission, on the other hand, a decision for the Timab/CFPR, which did not continue the settlement procedure.[87]

The aim of the cartel was to share a large part of the European feed phosphates market by allocating sales quotas to cartel members and coordinating prices and sales conditions where necessary. The undertakings also coordinated restrictions with regard to production and allocated customers. The cartel lasted from 19 March 1969 (at the latest) to 10 February 2004 (at the earliest).[88]

The fine to be imposed on the settling companies and CFPR/Timab was calculated under the methodology issued by 2006 Guidelines on the method of setting fines. However, pursuant to the "Settlement Notice", a reduction was only applied to the settling companies.[89] The first undertaking received immunity and three of the parties (including CFPR/Timab) received reductions under leniency program.[90] The reduction of the fine granted for settlement was added to leniency reward and the Commission has fined a total of € 175,647,000.[91]

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[81] IP/10/586.
[82] Para. 109-110; 6 undertakings received leniency reductions; DRAMs CASE COMP/38511, see part 8.6.
[83] Summary of DRAMs, Case COMP/38.511, 2011/C 180/09, para 7-13, IP/10/586.
[84] *Animal Feed Phosphates,* Case COMP/38866 (20/07/2010)
[85] Gonzalez 2011, p.3. Hybrid cases arise where the Commission continues the settlement procedure with the parties who want to settle and recourse to ordinary procedure for those who do not settle, MEMO/10/201, p.3.
[86] *Animal Feed Phosphates*, Case COMP/38866
[87] Summary of Animal feed phosphates, Case COMP/38.866, 2011/C 111/10, para 1.
[88] 2011/C 111/10, para 8, 10, 14.
[89] 2011/C 111/10, para 20.
[90] *Animal Feed Phosphates*, Case COMP/38866, part 6.6, 2011/C 111/10, para 28.
[91] "Antitrust: European Commission fines animal feed phosphates producers" (2010), IP/10/985

In third case, ***Consumer detergents***[92], the infringement concerns heavy duty laundry detergent powders intended for machine washing and sold to consumers. Parties tried to achieve market stabilization by guaranteeing that none of them would use the environmental initiative to obtain competitive advantage over the others and that market positions would be at the same level as prior to actions taken within the environmental initiative (in particular the compaction of products). The parties were held responsible from 7 January 2002 until 8 March 2005 for the infringement.[93]

After the fines were being calculated, leniency and settlement discounts were applied.[94] The first party received full immunity while the other two obtained reductions. The reduction of the fine granted to them for settlement was added to their leniency reward.[95]

The Commission has settled a cartel investigation with four producers of cathode ray tubes **(CRT) glass**[96] used in televisions and computer screens as its fourth settlement case.[97] Parties to the infringement coordinated CRT Glass activities through anticompetitive activities which qualify as direct and indirect price coordination. Price coordination activities were supplemented by exchanging confidential and sensitive market information. Overall, the cartel lasted from 23 February 1999 until 27 December 2004. Due to mitigating circumstances, the fines for two undertakings were reduced. It was accepted that one of the parties, AGC, was involved only to a limited extent in the cartel and its fine was reduced by 15%. Schott's fine was also reduced as its involvement was limited and it cooperated effectively outside the scope of the leniency notice and beyond its legal obligation. After the fines were calculated, leniency and settlement discounts were applied.[98] The first undertaking received full immunity while the second obtained reduction.[99] The reduction of the fine granted to them for settlement was added to their leniency reward and overall, a total of € 128,736,000 in fines were applied.[100]

In fifth case, **Refrigeration compressors**,[101] ACC, Danfoss, Embraco, Panasonic and Tecumseh participated in an EEA-wide cartel relating to the

[92] *Consumer Detergents*, COMP/39579 (13/04/2011)
[93] Summary of Consumer detergents, Case COMP/39.579, 2011/C 193/06, para 4, 6, 8.
[94] 2011/C 193/06, para 11, 16, 18.
[95] *Consumer Detergents*, COMP/39579, part 8.6, 8.7.
[96] *CRT Glass*, CASE COMP/39605 (19/10/2011)
[97] "Antitrust: Commission fines producers of CRT glass € 128 million in fourth cartel settlement" (2011), IP/11/1214
[98] Summary of CRT Glass, Case COMP/39.605, 2012/C 48/07, para 6, 7, 14, 17, 18
[99] CRT Glass, CASE COMP/39605, part 8.6.
[100] IP/11/1214
[101] *Refrigeration Compressors,* CASE COMP/39600 (7/12/2011)

production and sale of household and commercial compressors which was aimed at coordinating pricing policies and keeping market shares stable so as to recover cost increases. They exchanged sensitive commercial information on capacity, production and sales trends with regard to the European market. Overall, the cartel lasted from 13 April 2004 until 9 October 2007.[102]

Due to mitigating circumstances, the fines for two undertakings were reduced. Panasonic got a reduction as its involvement in the cartel was limited. Embraco's fine was reduced due to its effective cooperation outside the scope of leniency regulation. After the fines were being calculated, leniency and settlement discounts were applied.[103] The first undertaking obtained full immunity while the rest of the parties received reductions. [104] The reduction of the fine granted to them for settlement was added to their leniency reward and the parties were fined a total of € 161,198,000.[105]

In its sixth settlement decision, **Water management**, the Commission fined two producers of water management products, used in heating, cooling and sanitation systems for breaching EU antitrust rules. For almost two years, Flamco, Reflex and Pneumatex coordinated the prices for water management products. The cartel members informed each other via bilateral contacts of the amount and date of planned price increases and exchanged sensitive market information. The Commission reduced the fines imposed by 10% as the companies concerned accepted their liability and a total fine of € 13,661,000 were imposed.[106]

2.4.2. Some General Notes about EU Settlement System: How is it applied?

In this context, we can evaluate how the Commission used settlements in its first cases. First of all, we can say that in all these cases, the procedures were quite simple. After the settlement discussions, parties introduced formal settlement submissions. Statement of objections (reflecting the parties' submissions) was notified to them and the parties confirmed whether it reflected their submissions and they remained interested in the settlement procedure. The Advisory Committee issued favorable opinions and the Commission adopted decisions.[107] However, there were differences in terms of length of discussions or the fines imposed on undertakings. Besides, in one of the cases, *Animal Feed*, ordinary procedure was followed for one party that did not settle.

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[102] Summary of Refrigeration compressors, Case COMP/39.600, 2012/C 122/04, para 6-8.

[103] 2012/C 122/04, para 15, 18-19.

[104] *Refrigeration Compressors,* CASE COMP/39600, part 8.6.

[105] "Antitrust: Commission fines producers of refrigeration compressors € 161 million in fifth cartel settlement" (2011), IP/11/1511

[106] "Antitrust: Commission fines producers of water management products € 13 million in sixth cartel settlement", (2012), IP/12/704

[107] See summaries of the decisions cited above for procedures.

Looking at the first cases, it is argued that the Commission will usually arrange three formal meetings for settlement discussions. In the first meeting the Commission will inform the parties about the scope of the infringement and will disclose some of the key evidence. In the second meeting, the parties will have the chance to explain their views about allegations. The third meeting will be mainly about the minimum and maximum amount of the potential fine. The parties have to place an acceptable amount of maximum fine in their settlement submissions.[108]

Secondly, when we look at the duration between the start of settlement discussions and the adoption of the decision, we see that in *DRAMs* case it took approximately 14-15 months. In *Animal Feed* case, the duration was approximately 18 months, while in *Consumer Detergents* 10 months and in *CRT Glass* 15 months. In *Refrigeration Compressors* it took 13 months.[109] On the whole, it can be said that the duration of the process fluctuates. In this sense, it can be assumed that the average period for settlement cases is one year.

Thirdly, in most cases, leniency and settlement were applied together. However, the parties that did not receive leniency discounts also accepted to settle.[110] It should also be noted that only one party that did not settle appealed against the Commission decision[111]. Finally, the final settlement decisions seem to be very short. They summarize the facts briefly and do not contain much evidentiary documents.[112]

2.5. Evaluation of the Commission's Settlement System in the Light of the Recent Cases

It is apparent that the Commission adopted its first decision two years after that settlement procedure came into force. When the settlement package was first introduced, different discussions were raised about the possible efficiency of the settlement. After these six cases, it is worth looking whether these criticisms were addressed or not by these decisions and to what degree settlements have achieved their aims.

2.5.1. Straightforward or Complex Cases?

When the "Settlement Notice" was first introduced, there was a concern that the Commission would use the settlement mechanism as a case-closure device for

[108] SOLTESZ, U. and C. V. KOCKRITZ (2011), "EU cartel settlements in practice – the future of EU cartel law enforcement?", *E.C.L.R.*, No: 32(5), p.5.
[109] See short summaries of cases.
[110] Holmes and Girardet 2011, general chapters-1(3).
[111] Marquis 2012, p.8.
[112] Soltesz and Kockritz 2011, p.7.

straightforward cases.[113] However, it was argued that "the real test of the system would be the more complex cases". Settling complex cases could result in more efficiency.[114]

The first settled case, *DRAMs,* showed that settlement system may work even in large cartel cases.[115] It is accepted as a success for both the Commission and the settling parties since it illustrated that settlement system can be operated in complex cases.[116] The Commission also showed in *Animal Feed* that it would not recourse to settlement for straightforward cases only.[117]

2.5.2. Settlement Reward

When settlement procedure was drafted, "settlement reward" was not seen adequate when considered together with concessions due to settling. In this sense, it was discussed that settlement may not be attractive especially where the companies have the chance of successfully appealing against the case and where there is a risk that Commission may terminate settlement discussions.[118] It was alsoargued that parties that are not under the scope of leniency program would not be inclined to settle.[119] However, there were other opinions such that while the high amount of settlement concession could create incentives for firms to settle, it could result in less deterrent effects. So, it was assumed that if the fines are the only sanction, then the concession should be limited and the gains from saved resources and losses from lower fines should be assessed.[120]

Considering all the available information, it is understood that the 10% concession is adjusted according to the leniency rewards as the Commission does not want to affect leniency applications adversely. Also, the fact that fines should be kept at the deterrent level has also been taken into account.[121]

In practice, the first settlement cases are accepted as showing the Commission's willingness for adoption of a flexible approach. Settlement procedure might make it possible for companies to get benefits apart from 10% fine reduction. Although

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[113] Joshua, Hugmark and Daems 2009, p.3.
[114] Gamble 2011, p.3, see also Stephan 2009, p.45-46.
[115] OLSEN, G. and M. JEPHCOTT (2010), "The European Commission's Settlement Procedure", 25 *Antitrust*, p.79.
[116] "Commission Issues Its First Cartel Settlement Decision in the DRAM Case", Alert Memo, Cleary Gottlieb, Brusells May 2010, http://www.cgsh.com/files/News/57eadca7-dac8-4763-a24e-3d176348abaa/Presentation/NewsAttachment/7b1bd469-9d41-4104-93f4-405f45009936/CGSH%20Alert%20-%20First%20Cartel%20Settlement%20Decision.pdf, Date Accessed: 26.08.2012.
[117] Gonzalez 2011, p.6.
[118] Joshua, Hugmark and Daems 2009, p.2, Brankin 2008, p.178.
[119] Holmes and Girardet 2009, p.3
[120] Stephan 2009, p.43-44.
[121] Mehta and Centella 2008, p.24.

the basic parameters for the fine calculations remained and the Commission emphasized its commitment not to bargain or negotiate objections or evidence, the companies had the chance of discussing the way that these parameters would apply. These first cases showed that the parties could get some concessions regarding the amount of the fine. Although the Commission did not reduce fine on the grounds of mitigating factors in recent cases, it considered the mitigating factors in some of the settlement cases (*DRAMs, CRT Glass* and *Refrigeration Compressors*) and it was accepted as a flexibility that the Commission showed in the context of settlement.[122] The reductions under the scope of leniency were also found "unusual".[123] However, the point that the fine was discounted several times shows how discounts may dampen the deterrent effect of the fines.[124]

2.5.3. Negotiations or Effective Discussion?

It was also a matter of concern how the Commission would draw the lines between "negotiations" and "effective discussion". It was argued that the Commission should be able to assess the specific conditions of companies for creating incentives to settle.[125] Besides, it was asserted that as the Commission and the parties should come to a common understanding regarding potential fines, negotiation could not be eliminated at all.[126] "Settlement Notice" itself foresees that there will be an exchange of arguments on potential objections, liability and fines range.[127]

In practice it came out that there are three points open to negotiation in cartel settlements: determination of the fine base, percentages of the leniency discounts, the submission of the case to the public. It is argued that these points may be easier to negotiate as they have lesser publicity. It is not possible to know the Commission's explanations lying beneath, and what would have been under the full procedure.[128] There may be asymmetry between settled parties and third parties as it will not be possible to assess whether the outcome is the best one or not.[129] The Commission may have less bargaining power and "bargaining in the shadow" may have detrimental outcomes.[130]

[122] Gonzalez 2011, p.4-5.
[123] BRANKIN, S.P. (2011), "The first cases under the Commission's cartel-settlement procedure: problems solved?", *E.C.L.R.*, No:32(4), p.5.
[124] Gamble 2011, p.7.
[125] Joshua, Hugmark and Daems 2009, p.4.
[126] Stephan 2009, p.47.
[127] Holmes and Girardet 2011, general chapters-1(3); see also Overview section of the Settlement Notice.
[128] SCHINKEL, M.P. (2011), "Bargaining in the Shadow of the European Settlement for Cartels", *Antitrust Bulletin*, No: 56(2), p.462.
[129] ibid, p.475.
[130] ibid, p.463-464.

2.5.4. Leniency and Settlement

There is a clear difference between Commission's leniency program and settlement procedure. According to the Commission, leniency program is seen as an investigation tool and it is targeted at discovering cartel cases and collecting evidence. In contrast, settlement aims at simplifying the procedure leading to the adoption of a formal decision and the Settlements Notice rewards contributions to procedural efficiency.[131]

The incentives of firms to apply leniency after the settlement option were seen as crucial and the settlement concession adjusted accordingly.[132] Thus, the reduction under settlement is lower than the expected reduction under leniency. Besides, leniency will not be possible after settlement discussions start. Finally, as the reductions are applied cumulatively companies will have an incentive to apply both of these programs.[133]

As stated in part 2.4.2., the Commission applied leniency and settlement together where undertakings met the conditions of both of these programs. Thus, they are accepted as complementary enforcement tools and firms can take the advantage of both. The *Animal Feed* case also showed that withdrawal of settlement discussions does not have negative effects on leniency. Although Timab did not continue settlement procedure, it obtained leniency reduction.[134] For leniency applicants the settlement procedure made a possible 10% reduction additional to leniency discount and thus was attractive.[135] However, the settlement policy has also been attractive for parties that have not applied/been granted leniency.[136] In *CRT* Glass, two of the parties achieved immunity/fine reduction while all parties settled.[137] In *Water Management*, one of the three undertakings obtained immunity while all of them settled.[138] In the *DRAMs* although all parties settled, six of the ten parties received reductions under the leniency. The remaining four parties were the parties who received the lowest fines. It suggests that settlements may also be attractive for companies receiving the small amount of fines. The same is also true for *Animal Feed* case.[139]

2.5.5. Settlements and Private Enforcement

As we explained in the first part, settlements have different effects on private enforcement. Settlements may accelerate private actions as firms accept their

[131] MEMO/08/458, p. 2.
[132] See above "Settlement reward", part 2.5.2.
[133] MEMO/08/458, p.2, Settlement Notice pt 1, 13, 33.
[134] Gonzalez 2011, p.5.
[135] Soltesz and Kockritz 2011, p.2.
[136] See Holmes and Girardet 2011, general chapters-1(3).
[137] *CRT Glass*, CASE COMP/39605, part 8.6
[138] See IP/12/704
[139] Holmes and Girardet 2011, general chapters-1(3).

liabilities. However, settlement decisions are usually shorter and contain less information, which makes proving the liability harder. Hence, it remains to be seen how these two effects will be balanced in practice in the light of the new settled cases.[140] But, it should be noted that the Commission showed flexibility in accepting oral statements which may help to protect parties' position towards third-party claims.[141] Apart from this, as stated above, settlement decisions are shorter and contain less information.[142] For example, the *Consumer Detergents* decision does not contain findings as to the possible or likely effect of the infringing conduct.[143]

2.5.6. Procedural Guarantees

There are different views about the effectiveness of procedural guarantees in settlement cases. Safeguards for ensuring a fair and consistent settlement procedure were found weak as the prosecutorial and judicial functions were not separated and the only supervision that is over the process is consultation with the Advisory Committee.[144] Another argument was that the possibility of terminating the process after settlement discussions may affect rights of defense under the normal procedure. Although the settlement submissions may not be used, the impressions on case team may remain and additional safeguards may be effective in these situations.[145]

In practice, it is discussed that although the access to file is more limited than ordinary process, this constraint is related with the expected procedural efficiencies. Besides, there are other guarantees such as requesting access to additional documents and being able to call hearing officer. It is accepted that parties' rights of defense remain protected under the settlement procedure with a difference that they are exercised under the bilateral discussions.[146]

2.5.7. Lack of Transparency and Certainty; "One-Sideness"

The settlement system was seen as uncertain and lacking of transparency to some degree. The main grounds for these criticisms were that Commission retains its discretion to end the process even after the settlement submissions and confirmation of submission following statement of objections. Commission could end the procedure due to the reasons other than bilateral agreements such

[140] Dekeyser and Roques 2010, p. 842.
[141] Gonzalez 2011, p.7, Soltesz and Kockritz 2011, p.7.
[142] See part 2.4.2.
[143] Holmes and Girardet 2011 general chapters-1(5.2).
[144] Stephan 2009, p.47.
[145] HOVE, K.V. and R. BURTON (2010), "Direct Settlement", Competition Law Insight, http://www.vanbaelbellis.com/en/fiches/publications/articles/?Area=166, Date Accessed: 26/08.2012, p.9.
[146] Gonzalez 2011, p.5-6. See also Hove and Burton 2010, p.9.

as not receiving procedural savings.[147] This "one-sideness" was accepted as one of the weakness of the settlement procedure. In particular, it was argued that one party's withdrawal from the procedure could damage all other parties' position. On the other hand, if the Commission settled with some (but not all) parties, there could be a risk of losing much of the procedural savings.[148]

The *Animal Feed* case therefore was an important "test" for the Commission. It is accepted that the Commission clarified that one party's withdrawal may not risk others' settlement discussions necessarily. It was also important for showing the companies that they are free to terminate settlement procedure without negative results.[149] Within this context, the first hybrid case is accepted as a useful step but there are still some uncertainties and more decisions are needed to clarify the Commission's position.[150] It is understood that the Commission will make a difference between settlement cases which start with all parties' agreement and then turn out to be a hybrid case and the other cases where one of the parties' reluctance to settle is clear even from the beginning. For the first type of cases, the Commission may continue the process as illustrated in *Animal Feed* as the Commission would already spend some of its resources and there may be savings due to the reduced number of appeals. However, the tradeoff is also accepted because the ordinary procedure is followed for one party and this may obstruct the process.[151] It should also be accepted that this tradeoff may be a serious one. In *Animal Feed* case, settling parties were provided with settlement discounts but there were loss of procedural savings as well. There were not any exact benefits for enforcement and this may be detrimental to deterrence.[152] For the second type of cases, settlements seem unlikely to be occurring.[153]

2.5.8. Fining Policy and Settlement

The limited clarity about the level of fines was also criticized. The Commission would only disclose an estimation of the fine range. Together with the Commission's discretion in calculating fines, parties would face with uncertainty as to the benefits of settlement.[154] Transparency of the calculation of fines could

[147] Holmes and Girardet 2009, p.4.
[148] Joshua, Hugmark and Daems 2009, p.4, 6.
[149] Gonzalez 2011, p.6.
[150] Brankin 2011, p.3, see also Holmes and Girardet 2011 general chapters-1(3).
[151] Interview with Dr. Alexander Italianer, Director General for Competition European Commission, theantitrustsource, (April 2011), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/apr11-fullsource.authcheckdam.pdf, Date Accessed: 26.08.2012, p.2.
[152] STEPHAN, A. (2010b), "Is the 'Hybrid' Settlement in the Animal Feed Phosphates Cartel Case Pointless?" (UEA Competition Policy Blog), http://competitionpolicy.wordpress.com/2010/08/02/is-the-%E2%80%98hybrid%E2%80%99-settlement-in-the-animal-feed-phosphates-cartel-case-pointless/, Date Accessed: 26.08.2012
[153] Interview with Italianer, p.2.
[154] Brankin 2008, p.176-177.

not only reduce appeals but also contribute to effective operation of settlement.[155]

It is argued that the concerns in relation to clarity on fines -to some extent- have been addressed. The first two cases showed that the parties were able to estimate the likely fines and they had certainty on fines to continue settlement. In this framework, it is accepted that this part of the system worked.[156] However, it should also be noted that the decision practice of Commission is limited to six cases and there are not clear explanations on the clarity of likely fines. In this sense, we need to see more Commission decisions and policy papers to analyze these issues.

2.5.9. Overall Aim: Procedural Efficiencies and Deterrence?

The Commission's main purpose of accepting the settlement procedure was obtaining procedural efficiencies and thus increasing deterrence. As explained in part 2.1., the Commission aimed to simplify proceedings and reduce the number of appeals.[157] In practice, the first two decisions were arguable in terms of shortening proceedings. The problems in *DRAMs* case were related with lengthy process whereas in the hybrid case there were two distinct procedures. Nevertheless, future cases may be resolved more easily as more experience will be obtained.[158] Supporting this view, *Consumer Detergents* case implies that the Commission is adopting its settlement decisions faster. However, it should not be forgotten that the length of investigations may vary depending on particular facts.[159] As stated in part 2.4.2., the length of the process fluctuates.

On the other side, it is clear that settled cases reduced the number of the appeals. Although decisions may be appealed on different procedural grounds, it is understood that in practice it did not occur.[160] Out of all the cases just one of the parties which did not settle appealed against the decision.[161]

The relatively low number of the settled cases was also another discussion point that can be taken together with procedural efficiency issue. However, when it is taken into account with the number of the decisions that were taken by the Commission yearly, it is understood that the frequency of settlement cases as a proportion of overall cartel cases is between 20% and 25%. Thus, the resource

[155] Stephan 2009, p.52.
[156] Brankin 2011, p.3.
[157] For stated aims see also Stephan 2009, p.39.
[158] Gonzalez 2011, p.8, Soltesz and Kockritz 2011, p.9, Hove and Burton 2010, p.8, Almunia, J. (19 May 2010) "First cartel decision under settlement procedure – Introductory remarks" SPEECH/10/247, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/247&format=HTML&aged=0&language=EN&guiLanguage=en, Date Accessed: 26.08.2012
[159] Holmes and Girardet 2011, general chapters-1(3).
[160] Soltesz and Kockritz 2011, p.8. Interview with Dr. Alexander Italianer 2011, p.2.
[161] Marquis 2012, p.8.

savings may be significant. But measuring the efficiencies is not easy as it may depend on the factors other than the number of the cases.[162]

Overall, we can say that the Commission designed its mechanism with the aim of procedural savings. Although it tried to guarantee the respect for the parties' rights, there were other problems with the design as the Commission retained its discretion and provided limited clarity about the net benefits. In the light of the first cases we can say that one of the common views about the first decisions is that the Commission is applying settlement mechanism in a more flexible and cooperative manner than it was first thought.[163] Settled undertakings obtained some benefits such as reduced fines, shorter investigation periods, less detailed decisions and chance of affecting the final outcome. The Commission also took the advantage of reduced appeals, shorter investigations, thus procedural savings. Besides, the Commission applied leniency and settlements together successfully without any negative effects on leniency. However, reduced fines also carry the risk of having negative effects on deterrence. As we explained above, the Commission applied several reductions to parties. To my way of thinking, there should be a right balance between the gains and losses. Although it is difficult to assess, the settlement should not give a way to reduced fines. Besides, there is still a risk where the hybrid cases could "ruin" the entire process. The Commission should be aware of the risks and evaluate overall the performance where possible.

Finally, decisions contain less information and parties do not appeal against the decisions, which mean lesser publicity.[164] If the settlement procedure becomes less transparent there may be more risks other than reduced fines. Although the possibility of negotiation makes settlement more attractive, the way that negations are conducted is decisive.

At this point it seems to me that although it is easy to explain the pros and cons of the settlements theoretically, it is not easy to weigh them in practice. However, theoretical analysis may be helpful when evaluating the overall success of the settlements. At Commission level, the main advantages of settlements such as reducing the costs and saving resources also have their place in the enforcement. On the other hand, the main disadvantages, that is to say reduced fines and lesser publicity also appear as risks. Thus, the principals set in the first part of this study may be helpful for increasing the overall performance of the settlement. In this context, reducing the information asymmetries, enhancing transparency and directing the enforcement gains resulting from the settlements to detection of other cartels may help to overcome disadvantages.

[162] ibid, p.6.
[163] Brankin 2011, p.5, Hove and Burton 2010, p.9.
[164] Schinkel 2011, p.467.

In the light of the abovementioned explanations, we can analyze Turkey practices to see the place of settlements in Turkish competition law and to seek what could be done for better cartel enforcement.

3. TURKEY PRACTICES

3.1. Overview

Like many competition authorities in the world, the Turkish Competition Authority (TCA), an authorized agency for enforcing the "The Act on the Protection of Competition No 4054" (Competition Act), accepts the cartels as most serious infringements of competition law and fights against the cartels. TCA tries to adopt different kinds of mechanisms so as to make its enforcement more efficient.

Interestingly, we see that there is no explicit provision in the Competition Act regarding the settlements. [165] However, there are number of cases where TCA has made discounts on fines on the ground that the cartel participants accepted their liability and cooperated with TCA.

For example, the TCA initiated an investigation against Siemens Sanayi ve Ticaret A.Ş. (Siemens) and its 14 dealers in order to determine whether they realise in tenders after dealership system and the system in question has anticompetitive effects and consequences in traffic signalisation market. In Siemens decision, one of the parties was fined on the minimum base as it helped to reveal the infringement whereas other participants received fines up to 6% of their turnovers. The cooperative undertaking's defenses supported the findings of the investigation. [166] In *Yonga Levha I*[167] and *Yonga Levha II*[168] decisions the Competition Board took into account the cooperation and adjusted the fine accordingly. The cooperative firms received a fine amounting to 0,5% while other cartel participants received fines corresponding to 1% of their turnovers. In *Ytong* case one of the mitigating factors was the fact that the relevant firm did not deny the existence of the alleged cartel. The cooperative party received

[165] "Settlement" is regarded different from "commitment decisions" which do not establish an infringement or impose a fine. At the Commission level, commitment decisions bring a suspect behaviour to an end by imposing on companies the commitments offered to meet the Commission concerns. Commitment decisions render the commitments legally binding and conclude that there are no longer grounds for action by the Commission. See MEMO/08/458. In Turkey, the decisions adopted on the basis of Article 9(3) of the Competition Act can be accepted as commitment under certain conditions. For the difference between "settlement" and "commitment" see ARI, H., E. AYGUN and G. KEKEVI (2009), "Commitment and Settlement Mechanisms in Competition Law", Annual Symposium on Recent Developments in Competition Law – VII, Kayseri (in Turkish).

[166] Siemens, No. 05-13/156-54 and dated 10.03.2005, p. 84, 98-103. See also Annual Report On Competition Policy Developments In Turkey (2006), DAF/COMP(2006)7/20, http://www.rekabet.gov.tr/Resources/FaaliyetRaporlari/falRap16.pdf, Date Accessed: 14.02.2013

[167] Yonga Levha I, No. 02-53/685-278 and dated 06.09.2002

[168] Yonga Levha II, No. 03-12/135-63 and dated 25.02.2003

a fine amounting to 2% of its turnover while other two parties received fines corresponding to 3% of their turnovers.[169]

However, the decisional practice of the TCA regarding reward for accepting infringement and cooperation was criticized in the past. It was argued that TCA's practices were not as successful as those in the US or EU since the general level of fines was not so high as to guarantee the cooperation of undertakings. Besides, it was emphasized that there should be clear rules about the rewards for cooperation. The need for transparent, objective and consistent policies on leniency and settlement arrangements for efficient struggle against cartels was also asserted.[170]

Similar criticisms were also raised in one of the OECD reports. Turkey experienced a peer review and in "Review Report" it was recommended that: "TCA should amend the Competition Act to improve law enforcement capacity". In this regard, adoption of a settlement mechanism and leniency were seen as important. Settlement mechanism would make it possible to terminate process if the undertaking changes its behavior according to the Competition Board's recommendation. Thus, it would ensure efficient resolution of investigations.[171] In 2008, the awaited amendment has come into force in terms of leniency. However, there have not been any amendments regarding settlement.

Upon amendments in the Competition Act, TCA adopted two important regulations: "Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (Regulation on Fines)"[172] which aims to provide for the procedures and principles relating to setting fines and "Active Cooperation/Leniency Regulation".[173]

When we examine the Regulation on Fines, we see that the undertakings, which violate the Competition Act in terms of infringements other than cartels, can be rewarded if they admit their liability and cooperate with the TCA. In this context, according to the Regulation on Fines: "in case the undertakings or associations of undertakings that engaged in other violations admit their

[169] YTONG, No. 06-37/477-129 and dated 30.05.2006, p. 86, 88.

[170] ARI, H., G. KEKEVI and E. AYGUN (2008), "The evaluation of Turkish Competition Authority's Fining Policy for Cartel Cases", (Annual Symposium on Recent Developments in Competition Law – VI, Kayseri, 2008), (in Turkish), p.158.

[171] OECD (2005), "Competition Law and Policy in Turkey", http://www.rekabet.gov.tr/dosyalar/images/file/UluslararsiIliskiler/2.pdf, Date Accessed: 26.08.2012, p.68, 72.

[172] "Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position", Official Gazette Dated 15.09.2012, Numbered: 27142, http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik11.pdf, Date Accessed: 26.08.2012.

[173] "Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation)", Official Gazette Dated 15.09.2012, Numbered: 27142, http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik10.pdf, Date Accessed: 26.08.2012.

violations and make active cooperation, the fine shall be reduced by one sixth to one fourth."[174]

Leniency regulation also includes provisions that reward admission of liability and cooperation. According to the Article 5 of the Leniency Regulation, the undertakings which submit the information and evidence and meet the conditions stated in Article 6 of the Regulation but which are not covered by the provision related to immunity from fines shall benefit from reduction of fines. In this framework:

- the fine to be imposed to the first undertaking shall be reduced by one third to by one-half;
- the fine to be imposed to the second undertaking shall be reduced by one fourth to by one-third;
- the fines to be imposed to other undertakings shall be reduced by one sixth to by one-fourth.[175]

Thus, undertakings may get fine reduction when they accept their liability and present some basic information about cartel.[176] The Leniency Regulation does not look for significantly added value.[177] Draft Guidelines Regulation on Active Cooperation for Detecting Cartels also explain that the TCA will not seek for significantly added value and will just assess whether the parties satisfied the conditions set in article 6 and article 9 of the Leniency Regulation. In this sense, it is assumed that the reductions on fines are automatic when the relevant information is provided.[178] The fine reductions are linked with the admission of liability. In this sense, it may be accepted that these provisions mean that settlement also has its place in Turkish competition law. However, it has different features from that of the Commission's. The main difference from EU settlement procedure is that there are not any provisions regarding procedural savings. Besides, although there is a fixed reduction for all parties in EU law, the Leniency Regulation has different levels of reductions depending on the nature and timing of the cooperation. Apart from this, as the Competition Act makes it possible to impose fines on individuals, there are also provisions to impose fines on managers and employees of the undertakings.[179]

[174] Regulation on Fines, article 7(3).

[175] Leniency Regulation, article 5. For the explanations of these articles see also Draft Guidelines on Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation), http://www.rekabet.gov.tr/default.aspx?nsw=0u2UIhBl7DCpaj5ZbzQ3aQ==-H7deC+LxBI8=, Date Accessed: 15.02.2013, para. 26-28.

[176] Information and evidence in respect of the alleged cartel including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings; see Leniency Regulation, article 6.

[177] See para. 24 of Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006) C 298/17.

[178] Draft Guidelines, para. 26.

[179] KEKEVI, G. (2009), "Leniency Program: Not Quiet on the Western Front", *Competition Journal*, No: 10(4), p. 90.

The reason for not placing provisions regarding the procedural savings may be explained by the fact that in Turkish competition law, settlement is not seen as a resource-saving mechanism. It aims to reward admission of liability and thus ease the detection of cartels. Providing clear rules regarding leniency and settlement are accepted as important for having a strong enforcement. These provisions are also targeted to address the criticisms raised by international reports. Differently, the Commission aims to obtain procedural savings and direct them to detection of other cases, which in turn will increase deterrence.[180] In this sense, from my perspective the overall aims of the two systems are ensuring deterrence but the emphasis is different. The other difference between the two systems is that the cooperative undertakings do not submit their acceptance regarding possible amount of fines in Turkish "settlement" option.

It is understood that until now, TCA has received nine applications under the scope of its leniency program. In three of nine applications we see that TCA applied fine reductions to cooperative firms. As we accept fine reductions in return for admission of liability as "settlements", we will analyze these decisions. In two cases, although the cartel participants were first to cooperate they applied after the investigation decision. At the time of the submission TCA had sufficient evidence to find the violation of Article 4 of the Competition Act. Nevertheless, TCA did not look whether the evidence submitted by parties represented significant added value or not and granted fine reductions. In the third decision, the firm was second to apply and obtained fine reduction without being assessed whether its evidence represented significant added value. Thus, these three applications have similar features with settlements as they reward admission of liability with fine reduction. The brief explanations of the cases are provided below.

Gunes Ekspres Havacılık A.S. and Condor Flugdienst GmbH [181]

TCA initiated an investigation on 10.06.2010 to find out whether Gunes Ekspres Havacilik A.S. (SunExpress) and Condor Flugdienst GmbH (Condor) violated the Competition Act through agreements aimed at coordinating their flights between Germany and Turkey. TCA adopted its final decision on 27.10.2011. In its final decision, TCA found out that SunExpress and Condor set the prices through their distribution agreements and thus violated the Competition Act. The decision imposed administrative fines on Condor, while no fine was imposed on SunExpress. SunExpress was granted immunity as it revealed the existence of the agreement and met the conditions of leniency regulation. Condor was granted a fine reduction as it applied for a fine reduction under leniency program. As stated above, TCA did not seek for added value and reduced Condor's fine due to its

[180] See part 2.1.

[181] 27.10.2011 dated and numbered 11-54/1431-507.

cooperation. A total fine of TL 733,016.80 (which amounts 1,5% of Condor's turnover) was imposed on Condor.[182]

Sodas Sodyum Sanayi A.S. and Otuzbir Kimya ve San. Turk Ltd. Sti.[183]

The TCA conducted investigation in the markets for sodium sulphate powder, crystal sodium sulphate and raw salt. It was found that Otuzbir Kimya and Sodas Sodyum set the prices for sodium sulphate powder and crystal sodium sulphate and shared customers from 2005 to 2011 and violated the Competition Act. As a result of the investigation, 417,746.05 TL fine (amounting to 6% of Otuzbir Kimya's turnover) was imposed on Otuzbir Kimya while Sodas Sodyum received a fine amounting to 4.5% of its turnover. However, one third of Sodas Sodyum's fine was reduced under the scope of leniency regulation. It received 545,735.98 TL fine amounting to 3% of its turnover.[184]

MPS Metal Plastik Sanayi Cember ve Paketleme Sistemleri İmalat ve Tic. A.S. and Bekap Metal İnsaat San. ve Tic. A.S.[185]

TCA conducted investigation in the market for steel ring and it was found that MPS Metal and Bekap Metal violated the Competition Act by offering collusive bids in tenders, fixing the price of goods and/or sale conditions and TCA imposed fine on undertakings. However, half of the MPS Metal's fine was reduced under the scope of leniency regulation. It is understood that TCA did not look at additional value as explained above.[186]

3.2. Evaluation

Looking at the first cases under leniency regulation, we can say that the TCA granted fine reductions under the scope of leniency but these are limited to just three cases although it does not have a high standard for reward. It may be argued to explain such limited implementation by two reasons. First of all, in Turkish competition law, fines are the most important sanctions that can be imposed on undertakings under the scope of the Competition Act. Although they have such significance, the general level of fines is away from deterrent level.[187] Thus,

[182] http://www.rekabet.gov.tr/dosyalar/images/file/Tefhim%20Metni.pdf, Date Accessed: 26.08.2012, http://www.rekabet.gov.tr/index.php?Sayfa=sayfahtml&Id=1787&Lang=EN, Date Accessed: 26.08.2012.

[183] 03.05.2012 dated and numbered 12-24/711-199. As the reasoned decision has not been finalized yet, references have been made based on the announcements.

[184] http://www.rekabet.gov.tr/dosyalar/images/file/Basin/karar.pdf, Date Accessed: 26.08.2012; http://www.rekabet.gov.tr/index.php?Sayfa=sayfahtml&Id=1980&Lang=EN, Date Accessed: 26.08.2012.

[185] 30.10.2012 dated and numbered 12-52/1479-508. As the reasoned decision has not been finalized yet, references have been made to announcements.

[186] http://www.rekabet.gov.tr/default.aspx?nsw=sLwJqE8Qet1o1DBQDswzFg==-H7deC+LxBI8=

[187] For the criticisms of fining policy see Ari, Kekevi and Aygun 2008, p.150-157. It should be noted that according to article 57 of the Competition Act, everyone who is injured can bring a damages action. Anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to the Competition Act, or abuses his dominant position in a particular market for goods or services, is obliged to

undertakings do not have necessary incentives to apply for both immunity and fine discounts.

Secondly, as leniency and settlement are regulated in the same Regulation and without using the term "settlement", the awareness with regard to settlement is quite low. Undertakings may not recognize that if they accept their liability and provide some basic information they may obtain reductions. Thus, a separate regulation may increase the awareness while protecting the rights of undertakings. In current practice, there is not a formal policy explaining how the firms will be treated under settlement and how they can exercise their rights efficiently. Although the current rules may -partially- satisfy the substantial requirements, it is complicated and does not give chance to weigh advantages and disadvantages clearly. Undertakings can not foresee the possible fines as there are different applications.

It is generally accepted that, in practice most cartel cases are solved through settlement. What makes difference is whether there is a formal proceeding or not. Setting the appropriate path and the "ideal" form is not an easy task.[188] However, it is sure that the settlement procedure should provide transparent rules, conditions and safeguards.[189] Safeguards in settlement and leniency systems are important as the possibility of severe sanctions and the race for leniency and additional incentives created by settlement may exert pressure on companies to accept their liability even where they are not sure of the infringement of law.[190] As illustrated in the UK's dairy case the firms that are cooperating at the early stage of investigations may be in disadvantageous positions compared to the firms that do not settle.[191] In 2007 and 2008, the OFT concluded early resolution agreements with some of the parties who accepted liability for infringement with regard to liquid milk, value butter and UK produced cheese. However, after receiving new evidence, the OFT has concluded that the evidence it had before was insufficient to support an infringement finding with regard to liquid milk (2002) and value butter (2003). Thus, some of the parties' agreed fines were reduced and one party was no more subject to investigation.[192] In this case the OFT reduced the scope of the case as two parties fight against the case and this process revealed that the evidence was weak in terms of some of the allegations. If the two parties did not

compensate for any damages of the injured. If the damage has resulted from the behaviour of more than one people, they are responsible for the damage jointly. In this sense, private enforcement has its place in Turkish competition law. However, it has a very limited application. So, monetary fines are still the most important sanctions that deter cartel participants.

[188] Gamble 2011, p.8.

[189] Mehta and Centella 2008, p.6.

[190] Stephan 2010a, p.5.

[191] ibid, p.2.

[192] Press releases 45/10 "OFT update on Dairy investigation" (30 April 2010)

fight and agreed to settle, the fine imposed on them would be much higher.[193] Unlike the EU, The OFT did not adopt a formal proceeding. It takes a case-by-case approach and does not make deductions due to public settlement.[194]

However, having a formal procedure may help to overcome the drawbacks of the settlements if it is carefully designed and applied. In this context, having a separate regulation in Turkish competition law will not only increase awareness but also provide additional safeguards. The undertakings may be informed about the possible fines that will be applied to them. Thus, the Commission procedure should be examined and similar safeguards should be adopted where possible in Turkey. Besides, the Commission's practices show that settlement has many dimensions that should be taken into account. First and foremost, procedural savings may be achieved at the risk of reduced fines. Unless these savings are directed to other enforcement efforts, it may undermine deterrence. Showing the flexibility so as to make settlement more attractive may result in high concessions. As there will be less publicity, evaluating the overall success may not be so easy. That puts it clearly why settlements should be designed and applied cautiously in Turkey. In this respect, the amendment in the Competition Act with a direct reference to settlement will make the legitimate base for settlements. Within this context, a provision may be placed regarding a waiver of appeal. In this way, it can be ensured that if parties settle with the TCA, they may not appeal the decision.[195] By that way, the ultimate aims of settlements may be achieved as waiving of the right of appeal which would allow both obtaining finality and saving additional resources.[196]

After this change, a regulation similar to leniency and fines may be adopted with these general principals in mind. In these regulations, possible procedural elements of the settlements may be designed. Thus, the initiation of settlement discussions, confidentiality issues, withdrawal from settlement discussions or violation of the process may be explained.[197] Waiving of appeal may have clear benefits in terms of diminished legal costs and TCA should utilize these benefits in resolution of other cases. Moreover, it should not be forgotten that as much transparency as possible should be provided regarding the settlement process.

[193] Stephan 2010a, p.3-4.
[194] Holmes and Girardet 2011, general chapter-1(4.1).
[195] Arı, Aygun and Kekevi 2009, p.282
[196] It may be argued that waiving of appeal may raise other problems in terms of weakened rights of defense. However, this kind of discussion may be a topic for another study. Besides, it is understood that under Taxation Procedure Law, parties can not appeal against the decision after they settle. Thus, waiving of appeal upon settling has its place in other branches of law. Therefore, these models may be examined carefully and similar options may be accepted in terms of competition law settlements.
[197] See Cartel Settlement 2008, p.26.

Finally, it is also argued that cartel settlements should be used carefully especially in the development period of any jurisdiction's anti-cartel practices. Severe sanctions should be established and courts should be persuaded to approve or impose high fines before settlements have a widespread usage.[198] It should not be forgotten that without the fear of high sanctions, undertakings will not have incentives to apply for leniency and settlement, which in turn will reduce the possibility of detection.

CONCLUSION

Since fighting against cartel is one of the most important and difficult tasks of competition authorities, adoption of efficient enforcement systems becomes more important. Settlements are at the centre of cartel enforcement due to their many advantages. By speeding up the investigations, they help to resolve cases in shorter periods and save time and resources. They are also a good option for undertakings that are late for leniency race. However, they may result in reduced deterrence due to settlement concessions and thus hamper the fight against the cartels. Besides, undertakings' right of defenses may be affected adversely if they are not protected. In this context, the successful implementation of settlements depends on many things including transparency and predictability.

To understand the operation of settlements in practice, the Commission practices may be taken as a reference. Settlement package is adopted for making the enforcement more efficient and increasing deterrence. However, the first decision under the settlement procedure came two years after the adoption. When we assess what these first cases tell, we see that the Commission applied its settlement policy in a flexible way so as to create incentives to settle. Although the firms and the Commission obtained many benefits, there are risks as well such as reduced fines and shorter decisions. One of the most obvious benefits for the Commission is that parties are not inclined to appeal against the decisions. If these savings can be directed to prosecution of other cases, the stated aims of settlements will be achieved. Otherwise, reduced fines will have negative effects on overall enforcement.

In the light of the abovementioned explanations, Turkey practices may be evaluated. It is interesting to note that there is no explicit provision in the Competition Act in terms of settlement. After the amendment of the Competition Act in 2008, leniency had its legal basis in the Competition Act. TCA adopted its leniency program and accepted clear rules with regard to leniency. It is understood that TCA does not seek added value of the evidence submitted by parties and rewards companies when they accept their liability and provide basic information.

[198] OECD 2008a, p.3-4.

In this regard it can be accepted that firms may "settle" with TCA, which means settlement is an option under the Competition Act. However, it appears that it has different characteristics compared to the Commission's procedure. Rather than achieving procedural efficiencies, it is based on rewarding the admission of liability for detecting cartels easily. Yet, overall they have the same aim: ensuring deterrence. It should also be noted that, in Turkish competition law, there is not any separate regulation and the procedure for settlement is not clear as it is in the EU. As there is not separate regulation, the awareness is low and the number of cases in which firms get fine reductions is not so high. Thus, amending the Competition Act and adopting a separate legislation may help to raise awareness and set clear policies regarding settlements. A provision may be placed regarding a waiver of appeal and this may help to obtain the expected benefits. A formal proceeding will also help to protect the right of defenses. In this regard, the procedural safeguards similar to those of the Commission's system may be placed in this proceeding. However, the Commission's cases show how challenging it may be to apply settlement in practice. Although there are clear rules, it is not easy to implement these rules since settlement promises different advantages to each side. TCA should adopt clear policies regarding the implementation and should reduce the information asymmetries. Firms should be able to assess the advantages and disadvantages of the settlement.

Finally, as the general level of fines is not high in Turkey, settlements should be used carefully. TCA should be able to impose severe fines so as to deter cartels. These severe sanctions will in turn create incentives to cooperate. The efficient enforcement system should be designed to cover all these principles in mind.

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