

THE RISE OF ALTERNATIVE ENFORCEMENT TECHNIQUES

WHAT IS LEFT TO THE COURTS?

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- In parallel with increase of powers of national judges discussed this morning = reverse phenomenon at EC level where EC competition judge is increasingly « *marginalised* » by the development of « *settlements* » which are not challengeable. This is true for:
 - Articles 81-82 cases (other than cartels): Article 9 commitment decisions;
 - Mergers: Negotiated remedies
- IDEA: a company cannot challenge in court what it has agreed to.
- See e.g. *Cementbouw* (CFI, T-282/02, 23 February 2006) a party may challenge in court a settlement to which it is a party only if it can show that it acted « *under the arbitrary constraint of the Commission* » (para. 318)

[NB: also the development of « soft law », i.e. guidelines, guidance letters, discussed before, marginalises the role of the judge.]

- AS A RESULT: Main EC litigation left today is cartel cases (and occasional Article 82 cases which have not resulted in an Article 9 decision)
- BUT: this should change with the proposed « *settlement procedure* », the result being that Court cases will probably become very rare also for most cartels in future.
- QUESTION WHICH CONFERENCE ORGANISERS ASKED ME TO ADDRESS: WHAT WILL THEN BE LEFT TO THE JUDGE? AND IS A SYSTEM MARGINALISING THE JUDGE AT ALL ACCEPTABLE?

- IN PARTICULAR, IS THERE A RISK THAT – IN THE ABSENCE OF JUDICIAL CONTROL:
 - ➔ The Commission will be exercising its powers outside a proper system of « *checks and balances* »?
 - ➔ This will lead to the creation of « *an alternative body of jurisprudence, surrounded by a cloak of mystery* »? (Ivo van Bael)
- And even more fundamentally, is such a system at all compatible with an « *Etat de Droit* » ? Indeed, the view is often taken that settlements are possible in criminal law matters only (i) for minor infringements, and (ii) provided strict procedural guarantees are respected, as well as (iii) if there is full access to a judge (see J.F. Dupré, « *La transaction en matière pénale* », Ed. Litec, Droit, 1977).

- REPLY OF THE COMMISSION: Where is the problem? The new proposed settlement system is in theory « *optional* »!
- BUT: is it really so and how can it be ensured that the pressure is not too big to sign?

➔ NEED TO KEEP RIGHT BALANCE:

- ON THE ONE HAND: In practice, « *settlement techniques* » are attractive for all (not only for the Commission, but also to some extent for companies). They have always existed, and exist in other areas than antitrust. It would be unreasonable to oppose *a priori* to any sort of settlements.
- ON THE OTHER HAND: need to put clearly the limits and ensure that the system is really voluntary, transparent, and fair, and that the judge is not entirely marginalised!

In this regard, I intend to make three points in my presentation:

- Parties should not sign settlements « blindly ». Therefore, there is in my opinion a need for some transparency and respect for procedural rights before a settlement is agreed, except possibly in the most straightforward cases. This is important as in the Community system, the Commission is the « *first judge* » in the case. A « *judge* » cannot decide properly without a minimum of procedural guarantees;
- There are moreover inherent limits to possibilities of settlements in matters of « *criminal law* »; this is not a negotiation « *among equals* ». In other words is there not a risk of some « *arm-twisting* » and how can this be avoided?;
- Given the criminal nature of fines, one may wonder whether there is not a need for some control by the judge in all cases, at least where fines are at stake and for the final decision.

FIRST: Risk that parties sign blindly settlements without knowing whether they are justified (see experience with Article 9 decisions). Being a first « *judge* » in the matter, the Commission needs to respect basic procedural guarantees (even if they are by nature somewhat « *burdensome* »!). Essential procedural rules in this regard are in particular:

- Access to file;
- Statement of objections (clear definition of the problem, the market etc.);
- Hearing;
- Reasoning of decisions; and
- Right to a judge.

PROBLEM:

There needs to be « trade off » between some procedural economies for the Commission but also sufficient procedural guarantees for the parties. Not sure that the draft notice has achieved this balance. The draft settlement notice reduces these guarantees to almost nothing.

Example of difficulties which can be encountered without paper procedural safeguards are indeed indispensable before agreeing on any settlement e.g.:

- Difficulty to « *settle* » on a « *commitment* », or on a « *remedy* », or on a « *fine* » if objections are not first identified clearly, eg if one does not know duration of infringement, affected market, etc.;
- Without access to the file, wrong conclusions may be reached (see eg for an extreme example: SIV where documents were « *manipulated* » by the Commission); the lesser the judicial control is, the greater is the risk of « *slippage* »;
- In the absence of a fair and adversarial hearing where a proper exchange of views has taken place; quick and hasty decisions lead often to wrong conclusions;
- Need to respect some procedures also to protect rights of third parties.

- But here: the draft settlement notice considers a « premium » not so much in order to « *reward some procedural efficiencies* » but for effectively « giving up almost all procedural rights ».
- The system envisaged by the Commission is significantly less transparent than other systems, e.g. the French system (which requires prior statement of objections, prior access to the file, access to the judge, etc.)
- Difficult to see above how the system could work except in the most straightforward cases where issues about definition of market, of infringement, of duration, of interpretation of the law, of access to the file etc. do not arise. What guarantee is there that the system will only be used for such cases?

SECOND: Is there a need to build in sufficient guarantees in the system to avoid risk of undue « arm twisting » by the authority? (eg: Are Microsoft's « *pricing principles* » freely negotiated if they are given under the threat of huge daily penalties? Are they not negotiated « *with a gun on the head* »?). How is it possible to really « *negotiate* » and « *settle* » if the parties are not « equals »? See in this regard eg:

- Case-law of the ECtHR (eg. *Deweer* judgment of 27.02.1980)
- Case-law of the German BGH
- Case-law of the French Conseil Constitutionnel, etc.

WHAT SORT OF GUARANTEES DO WE NEED?

IN CASU:

- Companies will know the maximum fine if they settle, but not the fine if they refuse to settle (many uncertainties as to amount of fine in current guidelines; risks in addition of daily penalties (see Microsoft, etc.). Unless absolute clarity exists on the real alternatives a company faces, the system is difficult to accept.
- Companies negotiate with an administration which by definition has many means to « *punish* » a party it if it does not accept the desired position.

THIRD: Given the criminal nature of fines, is there not a need for an intervention of the judge at least for the final decision? Is a settlement system at all admissible in a procedure where the authority is both prosecutor and judge?

True, in theory:

- The Commission recognises that some control *a posteriori* by a judge should always be possible (see para 36 of draft notice on settlements according to which decisions are "*subject to judicial review*" under EC Articles 229-230)
- The ECJ also recognises the need for some « *marginal control* » *a posteriori* (judgments in *Cementbouw* and *Alrosa*)

But, in practice:

- How should the addressee of a decision challenge such a decision with which it has agreed? (unless it can show that it acted under « *duress* » - see *Cementbouw* judgment)
- How should third parties who did not benefit from the « *premium for giving up all procedural rights* » challenge the premium received by their competitor? (there is no « *equality in illegality* »)
- Only third parties directly and individually affected by a commitment (see *Alrosa, Kali&Salz*) can challenge it, which is extremely rare, and never the case for the new settlements in cartel cases.

IN CONCLUSION:

- No control by the ECJ: Neither the parties who settled nor those who refused to settle can challenge the decision.
- No control by national judges either: Decision is binding on national judges in national cases, *inter alia* in damage actions (see *Foto Frost, Masterfoods*, Article 16(1) of Regulation 1/2003)

ERGO:

- The role of the judge is therefore in reality purely hypothetical. There is no judicial control anymore by any judge, either at EC level or at national level.

- **TO BE NOTED:** The EC system differs from that applied in countries having a settlement system for competition cases (US, France or Germany) where the power to impose a fine is ultimately always given to a judge (or at least to a party independent from the prosecutor) and not to the administration.
- Thus, in these systems at least, judges are *automatically involved*. This guarantees some sort of control over the action of the administration, which is important not only to control the regularity of the procedure followed, but also to ensure that higher public interests are respected.
- Moreover, in such a « judicial system », pressure is arguably less strong to « settle » (a company may indeed otherwise reasonably fear to be « *punished* » by the administration with which « *negotiations* » are conducted if it fails to « *settle* »; but this fear is unjustified where it is a judge who imposes the fine in case there is no « *settlement* », and not the administration).

CONCLUSION

- In my view: a proper settlement procedure in cartel cases, even if acceptable, should require at the very least :
 - a more transparent procedure respecting some basic rights of parties (access to the file, Statement of Objections, hearing, ...). The more complex the case is, the more rights parties will need in this regard;
 - in any event, there is a need for more clarity on fine level if no settlement is agreed;
 - ideally, we need a clear separation of prosecutorial and decisional powers (one does not « *negotiate with one's judge* »). The Community judge should control strictly the procedure (see *Alrosa* judgment), and have the final word.
- The objective pursued does not justify all the means used!