The Good and Evil of Leniency and Settlement Procedures in Formative Competition Law Regimes

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Both settlement practice and leniency programs have great benefits for competition law regimes. Leniency programs have resulted in untold benefits in terms of breaking down the stability of the cartels. According to OECD, leniency programs are essential for breaking the code of silence surrounding hard-core cartel activity.[1] Settlements, in turn, promise important benefits for preserving the resources of antitrust enforcement authorities.

Despite significant benefits, settlement and leniency procedures may also result in certain drawbacks for formative competition law regimes. Below, we will first seek to lay out these concerns at a theoretical level and then take a look at the situation in Turkey as an example for both mechanisms.

Settlements

Various characteristics of settlement procedures could result in drawbacks for formative competition law regimes. First, they result in "streamlined" decisions which could prevent the development a full line of reasoned precedents. Even where a settlement decision includes discussion of the relevant legal theory and its application to the case, the fact that the decision proceeds on the basis of admissions as opposed to a discussion and evaluation of evidence may impede the development of valuable precedent as to treatment of evidence in cartel cases.

Similar arguments have already been expressed in more developed competition law regimes. For example, the EU Competition Commissioner, Margrethe Vestager, has remarked that "[i]t's very important not to make a habit out of settlements. … [Y]ou need occasion to develop [case law] and only our judges and going to court can do that."[2]

Second, settlement procedures have been subject to commentary based on due process concerns. The most visible risk in this respect is the potential for undertakings to be "bullied" into a settlement by an agency through the threat of a worse outcome (over and above the mere loss of settlement benefits such as the 10% penalty reduction in the case of EU[3]) if it chooses to undertake a full defense as opposed to a settlement.[4] This issue will be particularly problematic where an antitrust agency establishes a reputation for dealing harshly against those refusing settlement offers, in which case undertakings will be reluctant to reject settlement offers even when believing themselves to be innocent. In this respect, the ability to ensure proper procedural safeguards and internal review procedures to prevent due process abuses may be a greater challenge for formative jurisdictions where the relevant review mechanisms are relatively new.

Third, settlement procedures may lead to mistaken decisions where undertakings adopt a risk-averse approach and choose to settle even where their liability is unclear. In addition to substantive justice concerns, such cases could also harm the development of the jurisdiction's antitrust case law, potentially sending a misleading message in terms of the extent of potential liability in similar situations. As an example, Stephan explains that two-and-a-half years after the United Kingdom's Office of Fair Trading reached settlements/early resolution agreements with most of the undertakings in the *Dairy Product*s investigation, vigorous defense by the non-settling parties, Wm Morrison and Tesco, resulted in a reduction of the scope of the products included in the infringement. This allowed Wm Morrison to escape liability altogether, while the fine imposed on the settling undertakings was reduced from GBP 116 million to GBP 70 million.[5]

Turkey has not yet adopted a formal settlement procedure. An article providing for a settlement procedure has been included in the proposed Draft Competition Law; however the relevant statute has yet to be passed by the Turkish Grand National Assembly.

Nevertheless, Turkey has a "settlement-like procedure" under Article 9(3) of Law No. 4054 on the Protection of Competition. Under this procedure, the Turkish Competition Board has refrained from launching full-fledged investigations and instead limited the enforcement process to expressing its views on the anticompetitive nature of conduct in its pre-investigation decision and communicating its views as to how the infringement can be terminated to the relevant undertakings, thereby giving them a chance to comply voluntarily.[6] The Turkish Council of State deems that advisory opinions under Article 9(3) of Law No. 4054 are not final and executive but that they constitute merely informative warnings.[7]

Certain positions taken by the Board regarding Article 9(3) opinions can provide an indication of potential problems in the application of the settlement process. For example, in an early decision, the Board hinted that the failure to observe an Article 9(3) recommendation could be considered as an aggravating circumstance during the calculation of fines.[8] As a result, a formally non-binding recommendation was later interpreted in a manner which could create a very real consequence for the recipient. Furthermore, in a recent decision, the Board sent Article 9(3) recommendations to an undertaking as well as its customers for the undertaking to cease providing its "media barometer"[9] services and the customers to stop purchasing the relevant service.[10] As a result, while the Board did not go

through the formal investigation process and adopt a binding decision, it made it extremely difficult for the relevant undertaking to continue its business. The above cases demonstrate that where the authorities have unchecked discretion, even a non-binding settlement-like process may be used in potentially coercive ways and result in due process concerns.

Leniency

As noted above, leniency programs can benefit competition law regimes. One potential drawback, however, is reliance by authorities on the assertions made by leniency applicants without properly corroborating the contents of the leniency application. This could potentially lead to unjustified findings of infringements, as there have been past instances where immunity/leniency applicants have been alleged to exaggerate the evidence against the other parties to strengthen their own contribution.[11]

The Turkish competition law regime has had a functioning leniency program since the introduction of the Leniency Regulation in February 2009. Given its performance in the last six years, even if the program could be criticized in certain respects, one can argue that it has steered clear of the above trap. This is demonstrated by cases such as *3M*, where the Board ultimately refrained from finding a violation even though the file contained a leniency application.[12]

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1 OECD, POLICY BRIEF: USING LENIENCY TO FIGHT HARD CORE CARTELS (2001), *available at* www.oecd.org/daf/competition/1890449.pdf .

2 Christian Oliver & Alex Barker, *Europe Antitrust Chief Not Afraid of Starting a Fight*, FINANCIAL TIMES, Mar. 8, 2015, *available at* www.ft.com/cms/s/0/aa6d25b4-c3ff-11e4-a02e-00144feab7de.html. *See also* Roger Gamble, "*Speaking (Formally) With the Enemy" – Cartel Settlements Evolve*, 32 EUR. COMP. L. REV. 449, 451 (2011).

3 Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, 2008 O.J. (C 167) 1, ¶ 32.

4 *See* Gamble, *supra* note 2; Wouter P.J. Wils, *The Use of Settlements in Public Antitrust Enforcement: Objectives and Principles,* 31 WORLD COMP. L & ECON. REV. 335 (2008).

5 *See* Andreas Stephan, *OFT Dairy Price-Fixing Case Leaves Sour Taste for Cooperating Parties in Settlements*, 31 EUR. COMP. L. REV. 432, 434 (2010).

6 Article 9(3) of Law No. 4054 is based on Article 3(3) of Regulation 17/62 in EU law, which was later replaced by Council Regulation (EC) No 1/2003 referenced in note 3 *supra.*

7 *See* Bursa Eczacılar Odası decision, Council of State, 13th Chamber, E.2008/1686, K.2008/4778 (June 11, 2008).

8 *See* PÜİS/TABGİS, 00-35/392-219 (Sept. 18, 2000).

9 The service involves a cost benchmarking model whereby the relevant undertaking, Diye Danışmanlık Eğitim ve Medya Hizmetleri Tic. A.Ş. ("Diye"), collected information from purchasers of advertising space and provided reports of how their purchase conditions compared to the average prices for the same time slot/program. Some of the reports also included Diye's estimation of future market averages.

10 Diye, 14-51-900-410 (Dec. 12, 2014).

11 *See* Andreas Stephan, *The Direct Settlement of EC Cartel Cases*, CENTER FOR COMPETITION POLICY, at 31, http://competitionpolicy.ac.uk/documents/8158338/8264757/astephan.pdf/8e500b26-9913-4fef-9a97-0259d4f4538b.

12 3M, 12-46/1409-461 (Sept. 27, 2012).

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