Remedy and due process: how to strike the balance?

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THE DEBATE : FORMALISM vs EFFICIENCY

- Significant *increase* in recent years of "informal procedures"
- However, informal procedures are not "*new*" as such (e.g. comfort letters) and there has always been a need for "trade-off" between formalism & efficiency.

  ⇒ It would be unreasonable to *a priori* oppose to any sort of formal settlements of cases in view of their many advantages for both the enforcer and the parties.

QUESTION: How to strike the right balance between procedural efficiency and procedural safeguards?

THREE POINTS FOR DISCUSSION

- Three concerns in particular:
  - FIRST: **transparency** : understand the issues and hence avoid the risk of blind acceptation of unjustified remedies;
  - SECOND: **level playing field** : voluntary nature of the remedy and limit the risk of undue pressure by the enforcer;
  - THIRD: need for some control by a **judge** (to protect both the public interest, third parties and the settling parties).

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1. Transparency : essential that the companies first understand the issues and the concerns of the enforcer

- Difficulty to "*settle*" on any remedy if objections are not first identified clearly

- Need also to understand the facts; hence access to the file can be necessary (risk always that evidence was misread; see e.g. *Woodpulp, SIV, etc.).*

[! About the dangers of signing too easily a settlement : see e.g. UK Supreme Court, R (on the application of Gallaher Group Ltd a.o.) v CMA [2018] UKSC 25, §44: "*All those who entered ERAs were aware of the possibility that other parties would appeal and might be successful. That was a risk the respondents took… they knew what they were doing and accepted it with their eyes open*".]

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CONSEQUENCES

- Article 9 cases: This implies among others the need for a true "*preliminary assessment*" by the Commission before the remedies are negotiated
- Cartel settlements: This implies that main points of accusation are clearly spelled out beforehand. (Currently a company has to "*plead guilty*" before any Statement of Objections …)

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COUNTERARGUMENT

- *"Parties ought to know whether they are guilty"* -> but is that really so ? Is competition law always so clear ? Are the facts always so clear ?

- The lesser straightforward a case is, the greater the need for clarity on objections

- See also ECtHR, 29,04,2014, *Natsvlishvili*

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2. Level playing field : avoid undue pressure by the enforcer

- Any "*negotiation*" with the enforcer is by nature "*characterised by the fact that the State authorities act from a position of superiority*" (AG Ruiz-Jarabo Colomer in Case C-187/01, *Gözütok*, §80, who argues there is therefore a need both strict guarantees and no undue pressure).
  - Companies under pressure to avoid an infringement decision may be prone to propose unnecessary commitments. This is even more so since judicial control currently is limited

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- The greater the "*premium*" is, the greater the pressure is.

- Compatible with *Deweer* case-law of ECHR (and similar case-law in Germany and France, etc.)?

- Problem always where a fine is a stake. Thus, under Recital 13 of Regulation 1/2003 : "*commitment decisions are not appropriate in cases where the Commission intends to impose a fine*"

- General question = outside "*by object restrictions*", is a fine at all justified?

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- One easy "*fix*" : Companies currently only know the maximum fine if they settle, but not the fine if they refuse to settle, thus increasing opacity and the risk of a "*penalty*" for refusing to settle:

  - See e.g. Timab (*Animal Feed Phosphate* case) was informed during the settlement procedure that it was facing a fine ranging between 41 and 44 m euros for an alleged cartel of 26 years. It then renounced to settle as its participation in cartel was only 11 years. Ultimately, the Commission accepted that the participation was only 11 years but imposed a fine of 59,85 m euro on Timab as it had not settled (i.e. almost 25% more for an infringement of a shorter duration).

  - In my view, companies should know the real alternatives they face (If the "rebate" is supposed to be 10%, this should not be too difficult) and there should be no penalty for refusing to settle.

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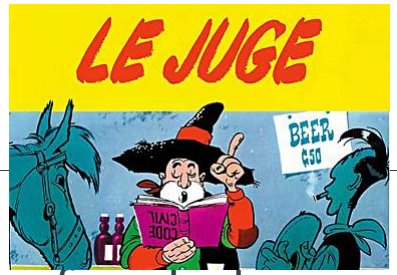
3. Involvement of a judge



- If a judge is involved, pressure is less strong to settle (less fear to be punished if fail to settle)

- In many systems where settlements exist, it is ultimately the judge who imposes the fine – at least for serious offences – E.g. :
  - In the US, the agreement is subject to judicial approval;
  - In Belgium the constitutional Court declared unconstitutional the new law on criminal "settlements" in the absence of a proper control by a judge.

- In EU law, involvement of judge is less *clear*….

- See the next presentation.

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CONCLUSION

Proper settlement procedure in cartel case, should in my view require at the very least :

- a more transparent procedure with a proper spelling out of the objections, access to the file, and possibility of reply, …. The more complex the case is, the more transparency parties will need;

- in any event, there is a need for mechanisms to avoid undue pressure on parties to settle (e.g. more clarity on fine level if no settlement is agreed; no punishment for refusing to settle);

- the EU judge should control strictly the procedure, and have the final word (both in the general interest and in the interest of the parties).

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