Case T-180/15 *ICAP and Others v Commission*, 10 November 2017: Win-win in the cartel settlement procedure : is there a shift in the balance of power?

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1. The cartel settlement instrument

In 2008, the Commission introduced its cartel settlement instrument.[1] Up until now[2], the Commission has adopted 24 settlement decisions, and over 100 companies have taken advantage of the settlement opportunity.[3]

Settlements are aimed at simplifying and accelerating the Commission's administrative procedure and reducing the number of cases brought before the EU Courts. The companies participating in the settlement are required to admit their involvement in the infringement and waive their right to have access to the full file and their right to a hearing. The statement of objections will be substantially shorter. Finally, the parties agree to receive the statement of objections and the final decision in an agreed language of the EU, thereby saving the Commission on translation time and costs.[4] Although an appeal to the EU Courts is possible, the grounds are limited as the companies have acknowledged the fact pattern, and their role in the cartel. This enhanced efficiency enables the Commission to handle more cases with the same resources and is supposed to lead to increased deterrence.[5]

In return, the settling parties will receive a 10% reduction on their fine, in addition to any leniency discount.[6] Given the simplified nature of the procedure, they will be able to save significantly on legal costs. A quick resolution will give them a clear view on the liability they are likely to incur, and will allow them to move forward with their business more quickly. A win-win for both sides.

2. Legal and procedural context of *ICAP*

On 10 November 2017, the General Court ("GC") annulled in part the Commission's decision

1 Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No 733/2004 as regards the conduct of settlement procedures in cartel cases, OJ [2008] L 171/3; Commission Notice on the conduct of settlement procedure in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (the "Settlement Notice"), OJ [2008] C 167/1; Article 23 of Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Regulation 1/2003"), OJ [2003] L 1/1.

2 This note was finalised on 2 February 2018.

3 F. LAINA and A. BOGDANOV, 'The EU Cartel Settlement Procedure: Latest Developments', (2017) 8(5) *Journal of European Competition Law & Practice* 333-340; D. GERADIN and E. MATTIOLI, 'The Transactionalization of EU Competition Law: A Positive Development?', (2017) 8(10) *Journal of European Competition Law & Practice* 634-643.

4 Settlement Notice, Sections 2.3 to 2.4.

5 Settlement Notice, recital 1.

6 Settlement Notice, Section 2.5.

against ICAP plc, ICAP Management Services Ltd and ICAP New Zealand Ltd (together "ICAP") in the Yen interest rate derivatives ("YIRD") cartel. The decision was part of a staggered hybrid case, in which, more than one year earlier, the other cartel participants had agreed to settle with the Commission. The settlement decision was adopted on 4 December 2013, followed by a traditional prohibition and fining decision against ICAP on 4 February 2015.[7]

In its application before the GC, one of ICAP's arguments was that the Commission infringed the presumption of innocence and the principle of good administration, by extensively describing ICAP's role as a facilitator in the 2013 settlement decision. Although ICAP also raises a number of evidential and fining issues, this note focuses specifically on this plea, the position taken by the GC and the practical significance of the judgment for the settlement procedure going forward.

3. Facts

Following a number of leniency applications with respect to the Japanese YIRD sector, in 2013 the Commission initiated proceedings against five banks (UBS, RBS, Deutsche Bank, Citigroup and JPMorgan) and two brokers (RP Martin and ICAP). The Commission uncovered seven bilateral infringements which concerned discussions and exchanges of commercially sensitive information between traders of the various banks involved, on current and future JPY Libor submissions and in relation to trading positions. ICAP was identified by the Commission as a facilitator in six of the infringements, because it had disseminated misleading information and served as a communications channel between the banks.

After the first settlement meeting in October 2013, ICAP pulled out of the settlement negotiations. As a result, the Commission ended up dealing with a so-called 'staggered hybrid' procedure, with it reverting to the standard administrative procedure with respect to ICAP and following through with the settlement procedure for the other parties involved. The settlement decision was published first, followed by the prohibition decision against ICAP 14 months later.

7 Commission Decisions of 4 December 2013 and 4 February 2015 in *Yen interest rate derivatives (YIRD)*, case AT.39861.

4. Reasoning of the GC

ICAP argued that the contested decision should be annulled on account of the references in the 2013 settlement decision to ICAP's role as a facilitator of the cartel. It claimed that those references breached the presumption of innocence and led to a breach of the principle of good administration, calling into question the Commission's objective impartiality in the subsequent procedure and the ultimate prohibition decision against it. As early as the administrative procedure, ICAP had accused the Commission of being "*less willing to hear ICAP as this would contradict the settlement decision already adopted against the other parties.*"[8]

The GC supported the argument, but ultimately did not annul the decision on that basis :

First, the GC recalls that the presumption of innocence implies that every person accused is presumed to be innocent until his guilt has been established according to law. It thus precludes any formal finding of, or allusion to the liability of an accused person in a final decision, unless that person was able to exercise its rights of defence.[9]

In that light the GC refers to a number of recitals in the settlement decision where the Commission specifies how ICAP 'facilitated' the infringements made by the settling banks, and finds them "*particularly revealing of the existence of a position adopted by the Commission*".[10] Furthermore, the GC considers that, even though references to ICAP were made only in the section setting out the facts, the Commission's position on the legal classification of ICAP's behaviour could easily be inferred from the settlement decision. This was the case in particular due to the clarification of the conditions under which the liability of an undertaking can be incurred due to facilitation, with express reference[11] to *Treuhand*[12]. As ICAP had withdrawn from the settlement procedure, it did not have the opportunity to make its view known before the adoption of the final decision and had therefore not been able to properly defend itself

8 Commission Decision of 4 February 2015 in *Yen interest rate derivatives (YIRD)*, case AT.39861, para. 64.
9 T-180/15 ICAP v Commission, 10 November 2017, ECLI:EU:T:2017:795, para. 257.
10 *Idem*, para. 258-259.
11 T-180/15 ICAP v Commission (see footnote n° 9), para. 260-261.
12 T-99/04 AC Treuhand v Commission, 8 July 2008, ECLI:EU:T:2008:256.

against a formal finding of the circumstances surrounding its ultimate liability.[13]

The GC dismissed the Commission's counter-argument that the possibility for a non-settling party to delay the adoption of a settlement decision would be contrary to the objectives of the settlement procedure, namely to ensure greater rapidity and efficiency. The GC logically concluded that, however laudable those objectives, the hierarchy of norms dictates that the settlement procedure, provided for in Regulation No 1/2003[14], should always be applied in line with the Charter of Fundamental Rights, setting out the principle of the presumption of innocence (Article 48) and the principle of good administration (Article 41).[15]

In particular in the case of staggered hybrid settlements where the Commission considers it necessary to take a view on the participation of a non-settling party in order to determine the liability of the settling parties, it should take appropriate measures to ensure that the presumption of innocence of the non-settling party is safeguarded.[16] The GC puts forward a solution: the adoption of both decisions on the same day, in line with the first hybrid settlement in *Animal Feed Phosphates*.

Nevertheless, the GC concludes that the breach of the presumption of innocence had no bearing on the legality of the contested decision, since it was adopted following a separate and independent procedure.[17]

Second, the GC considered whether the contested decision was vitiated by a lack of objective impartiality on the part of the Commission and thus in breach with the principle of good administration.

According to the GC, this issue is "*indissociable from the question whether the findings made in that decision are properly supported by the evidence adduced by the Commission*".[18] The Court finds that any objective partiality would only require the annulment of a decision if that decision would have been different in content without the irregularity.[19] With the exception of the aspects of the decision which the Court already annulled on other grounds, the Court found that the Commission had proven the infringements by ICAP to the requisite legal standard and dismissed the plea.

5. Practical significance

In our view, *ICAP* could have a substantial impact on the Commission's and the parties' incentives in the use of the settlement instrument - and ultimately the negotiation position of both.

5.1 Efficiency gains in hybrid settlements

The Commission has a wide discretion to decide whether or not to explore the settlement route.[20] If some of the parties show no interest in settling from the outset, the Commission may decide to continue the standard administrative procedure. Instead, a hybrid case is more likely to result from a withdrawal by one of the companies during the settlement discussions. This assessment is very case-specific, however, and will depend on the importance and nature of the role of the non-settling party in the infringement.

On appeal against *Animal Feed Phosphates* by Timab, the GC confirmed that it was possible for the Commission to apply the hybrid settlement route. However, Timab ended up with a fine exceeding by far the range that it had been provided with during the settlement discussions. The GC emphasised that, as both procedures are completely separate and independent, the Commission is not bound by the range of fines put forward in the settlement procedure. There is only one limitation: equal treatment of all participants to a cartel should be guaranteed with respect to the non-settlement specific elements of the fine calculation.[21] This position was recently confirmed by the ECJ on appeal.[22]

In the five hybrid cartel cases concluded since *Animal Feed Phosphates*, the Commission started applying a staggered approach: the settlement leg was concluded quickly, and only after that, the

13 *Idem,* para. 263.
14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ [2003] L 1/1.
15 T-180/15 ICAP v Commission (see footnote n° 9), para. 226.
16 *Idem,* para. 268.
17 *Idem*, para. 269.
18 *Idem,* para. 276.
19 *Idem,* para. 278.
20 Settlement Notice, recital 5.
21 T-465/10 Timab Industries and CFPR v Commission, 20 May 2015, ECLI:EU:T:2015:296, para. 71-74.
22 C-411/15P Timab Industries and CFPR v Commission, 12 January 2017, ECLI:EU:C:2017:11.

focus shifted to the standard administrative leg. If the standard hybrid approach of adopting the two decisions simultaneously had raised questions with respect to the efficiencies generated, the staggered approach at least maintains the efficiencies with respect to the settling parties: there is an accelerated timeframe, and the likelihood of appeals by those companies is statistically lower.[23]

> "Legality of the contested decision not affected by a breach of the presumption of innocence."

5.2 Hybrid settlements and the presumption of innocence

As discussed in Section III, the GC clarifies in *ICAP* that a staggered hybrid settlement procedure should be conducted in line with the presumption of innocence. A number of potential solutions present themselves.

More careful drafting of the settlement decision

The suggestion that careful drafting of the settlement decision should be sufficient to safeguard the principle of presumption of innocence of the non-settling party, is perhaps too easy. Although this could work in cases where a complete carve-out of the non-settling party is possible, such as in straight-forward horizontal cartels, it may prove difficult where reference to the non-settling party is necessary in order to describe the facts or the involvement of the settling parties in the infringement. In this case, the Commission had carefully limited references to ICAP in the 2013 settlement decision to the section relating to the facts. But, even a dedicated paragraph stating that "*this Decision does not establish any liability of the non-settling party for any participation in an infringement of EU competition law in this case.*"[24] did not prove to be sufficient to safeguard the presumption of innocence vis-à-vis ICAP.

Limited rights of defence

The Commission could give the non-settling party the right to comment on the settlement decision before its publication. It is unclear how this would work in practice, given that the non-settling party will not be an addressee of the decision and has pulled out of the settlement procedure precisely because it does not agree with the Commission's approach. Assuming that, post-*ICAP*, the Commission would not mention the non-settling party unless absolutely necessary, it is also difficult to imagine that the latter would be able to successfully defend itself against such mentioning.

Simultaneous adoption

The cleanest option, suggested by the Court, is the adoption of the settlement decision and the traditional prohibition decision on the same day. Although this solution provides the highest degree of legal certainty, it raises concerns with respect to the objectives of the settlement procedure. The Commission would have to put the settlement procedure on hold until it has finalised the standard administrative procedure, thereby losing significant efficiency gains.

5.3 Power shift in the settlement discussions - where is the pendulum now?

In *Timab*, the GC - and ultimately the ECJ - gave the Commission a stick in the settlement negotiations by allowing it to start with a clean slate in case of a switch back to the standard administrative procedure. The Commission is only bound by the full statement of objections sent to the non-settling party under the standard procedure following the switch, which does not set a range of fines, and is required to take into consideration new information brought to its attention during that procedure.[25] Whether the Commission or the parties put a halt to the settlement discussions is irrelevant: no element of those discussions has

23 Out of 24 settlement decisions to date, only two have been appealed so far by a settling party: Société Générale appealed the *European Interest Rate Derivatives* decision (AT.39914); Printeos/Tompla appealed the *Envelopes* decision (AT.39780). Société Générale subsequently withdrew its appeal, following which the Commission adopted an amendment decision resolving the issue at hand.

24 Commission Decision of 4 December 2013 in *Yen interest rate derivatives (YIRD)*, case AT.39861. para. 5.

25 T-411/15P Timab Industries and CFPR v Commission (see footnote n° 21), para. 96.

the capacity of creating legitimate expectations for the parties. This gives the Commission a clear advantage in the settlement discussions. The only room for manoeuvre by the parties is to decide to opt out of the settlement, potentially leaving them even more exposed.

We have to assume that the Commission will take the GC's criticism on the presumption of innocence in ICAP seriously - and will want to avoid infringements of the Charter of Fundamental Rights. If that assumption is correct, then, following *ICAP*, the Commission's incentive to prevent drop-out of the settlement procedure will increase significantly, in particular when a complete carve-out of a non-settling party in the settlement decision is difficult. In those circumstances, a party walking away from settlement discussions would leave the Commission with only two options: it would have to wait and take both decisions simultaneously (the solution suggested by the GC itself), or it could take the staggered approach with the risk of infringing the presumption of innocence.

Both options risk leading to a significant loss of efficiency. In the first route, the Commission keeps the settling parties waiting until the standard administrative procedure has been concluded, losing out on the acceleration normally offered by the settlement path. The second route risks the Commission being sued for an infringement of the principle of presumption of innocence and/or the principle of good administration. Bearing in mind that the settlement procedure was originally aimed at freeing up the Commission's time to pursue other investigations, neither option is optimal.

The question is whether this increased incentive will go hand-in-hand with a shift of the balance of power to the parties subject to the investigation. After *Timab*, leaving the settlement track entailed disadvantages mainly for the parties. *ICAP* turns this into a potential threat for the Commission as well. The parties could use this newly-gained bargaining power in their discussions with the Commission relating to the facts, gravity and duration of the alleged cartel, the attribution of liability, the evidence used or other elements in the fine calculation, etc.[26]

Nevertheless, the parties need to be aware that the Commission, too, retains the right to discontinue settlement negotiations, and may prefer to use it if there is too much pushback from the parties.[27] If one or more parties do leave the settlement track, the Commission may well decide post-*ICAP* that too little efficiencies can be achieved with a hybrid treatment and that the entire case is best dealt with under the normal procedure. The DG Comp cartel settlement team has in fact expressed the view that, in some cases, reverting to the standard administrative procedure would strengthen the settlement instrument,[28] and in Smart Card Chips the Commission reverted back to the normal procedure after it concluded there was no clear progress in the discussions. Parties thus need to assess the level of pressure they want to exert, bearing in mind that the consequences of a fresh start under the standard procedure could go far beyond the mere loss of the 10% settlement reduction, as was illustrated in *Animal Feed Phosphates*.

ICAP has shown that there is much yet to be discussed in the settlement arena. The GC will get another opportunity to develop its case law in this regard in the *Steel Abrasives* and *Trucks* cases, where respectively Pometon and Scania have made similar arguments with respect to the presumption of innocence and the principle of good administration.[29] Perhaps more importantly, we look forward to the view of the ECJ as the Commission has appealed the judgment in *ICAP*.

Whether the importance of the efficiencies which the settlement procedure aims to generate is large enough to really have an impact on the negotiation positions of the parties vis-à-vis the Commission, remains to be seen, but with *ICAP* the Court has at least started to reset the balance. The question really remains how far - and in which direction - the settlement pendulum has swung.

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26 Settlement Notice, recital 16; T-411/15P Timab Industries and CFPR v Commission (see footnote n° 21).

27 The Commission made this decision in *Smart Card Chips* case (Commission Decision of 3 September 2014, case AT.39574).

28 F. LAINA and A. BOGDANOV, 'The EU Cartel Settlement Procedure: Latest Developments', (2014) 5(10) *Journal of European Competition Law & Practice* 722.

29 Application by Pometon in T-433/16, Pometon v Commission, OJ [2016] C 371/17; Application by Scania in T-799/17, Scania and others v Commission, OJ [2018] C 42/41.