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Summary of the doctoral thesis:

“Settlement procedure in cartel cases before the European Commission”

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Article 101 of the Treaty on the Functioning of the European Union (hereafter: TFEU)¹ prohibits all agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention restriction or distortion of competition within the European Union (hereafter: “EU”). Cartels are secret agreements or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, price fixing or market sharing. They are considered to be “hard core” restrictions of EU competition law. Therefore it is not surprising that the European Commission (hereafter: “EC”) established cartel enforcement as one of its priorities. Since 1996 the EC has been operating a leniency programme, i.e., a policy enabling the EC to provide immunity from fines or fine reductions in exchange for information enabling it to detect and establish the existence of a cartel. Such policy was necessary as cartels are secret practices and therefore hard to detect without assistance provided by at least some of cartel members. The leniency programme has revealed to be a success leading to more and more applications and therefore more and more pending cases.

In 2008, taken into account an increased number of leniency applications, formalism of the standard procedure and limited resources at the disposal of the EC, the former Commissionaire for Competition, Ms N. Kroes decided to adopt the EC settlement procedure. This procedure was conceived in order to enhance effective enforcement of the prohibition of cartels established under Article 101 TFEU.

The EC settlement procedure is a simplified procedure leading to the adoption of a prohibition decision with fines by the EC. It was established by the EC regulation: *“Commission Regulation (EC) No 622/2008 of 30 June 2008 amending Regulation (EC) No*

¹ Treaty on the Functioning of the European Union, OJEU C 326, 26.10.2012, pages 47 - 390.

773/2004, as regards the conduct of settlement procedures in cartel cases”² and clarified further in the EC notice: “*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*”³ (hereafter: “EC Settlement Notice”). The simplified nature of this procedure stems from three elements. First, parties are required to acknowledge the cartel and their respective liability. Second, parties accept the maximum amount of the fine the EC intends to impose on them. Third, parties waive certain of their procedural rights available to them in the standard procedure and agree on certain restrictions and obligations provided under the EC settlement procedure. Parties’ acknowledgements of the participation in the cartel and the liability for the cartel amount to a proof of thereof allowing the EC to issue a simplified decision in the case at hand. They are also a form of cooperation by the parties in the EC proceedings leading to a fine reduction.

The introduction of the EC settlement procedure raised some criticism. Some authors questioned the legal basis chosen for the EC settlement procedure and extensive discretionary powers by the EC. Moreover, it was alleged that this procedure may have negative impact on parties’ rights of defence. Taken into account parties’ rights of defence as well as a moderate fine reduction provided to companies under the EC Settlement Notice some authors doubted that the EC settlement procedure may be widely used. Therefore, they questioned the ability of this procedure to reach its objective. Moreover, some negative comments were made in relation to the impact of the EC settlement procedure on rights of third parties and especially on private enforcement.

This doctoral thesis consists of nine chapters. The introductory chapter briefly describes the EC settlement procedure and the rationale behind its adoption. Moreover, it defines research questions and basic notions used in this doctoral thesis. Chapter two enumerates actors taking part in an EC cartel proceeding. Chapter three addresses the issue of discretionary powers conferred to the EC in such a proceeding. In fact, although the EC has a large margin of discretion, it is bound by the definition of an infringement under Article 101 TFEU as clarified in the case-law. The purpose of chapter four is to explain each step of the EC settlement procedure. Moreover, it deals with hybrid cases and the situation in which the EC settlement procedure has been discontinued with regard to all parties. Chapter five analyses

² OJEU L 171, 1.7.2008, pages 3 - 5.

³ OJEU C 167, 2.7.2008, pages 1 - 6.

obligations and benefits resulting for the parties from the EC settlement procedure. It touches also upon the rights of third parties with a particular focus on private enforcement. Chapter six recalls the principle of uniform application of EU competition law by national competition authorities and national courts in light of an Article 101 TFEU prohibition decision issued by the EC. Chapter seven includes a comparison between the EC settlement procedure and other instruments, such as for instance, the EC leniency programme or the administrative settlement provided under the provisions of the Polish Code of Administrative Procedure⁴. Chapter eight contains a detailed assessment of the compatibility of the EC settlement procedure with EU primary law. This assessment provides arguments enabling to counter the criticism expressed in relation to the EC settlement procedure and argue in favour of the compatibility of the EC settlement procedure with EU primary law. First, the General Court has confirmed the possibility for the EC to grant a fine reduction for parties' cooperation under the EC settlement procedure. Second, although certain components of the EC settlement procedure (e.g., discretionary powers by the EC or parties' rights in hybrid cases) leave room for further clarification and improvement, it seems that the consensual character of the EC settlement procedure offers parties a possibility to defend their rights and interests. The increased number of settlement cases confirms this finding, which combined with procedural efficiencies resulting from this procedure helps achieve the aim for which the EC settlement procedure was established, i.e., enhancing effective cartel enforcement. Moreover, this doctoral thesis suggests assessing the impact of the EC settlement procedure on private enforcement in a global context. In fact, it is possible to argue that some features of the EC settlement procedure combined with rules established in the Directive 2014/104/EU⁵ may have a positive impact on private enforcement. Chapter nine concludes the present doctoral thesis providing a brief summary of its main findings.

⁴ Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U. 2013 poz. 267 ze zm.

⁵ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJEU, L 349, 5.12.2014, pages 1 - 19.