

1. Role of antitrust settlements

- **Out-of-court settlements as key element of an effective private enforcement system**
 - preventing unnecessary litigation and (significantly) relieving the judiciary
 - cartel members can draw a final line under overall liability
 - avoiding strains on commercial relationships
- **Objective of Art. 19 Directive**
 - to encourage consensual settlements
 - *Recital 48: '[a]chieving a once-and-for-all settlement for defendants is desirable'*
- **Directive identifies joint and several liability and right to contribution as a main obstacle to out-of-court settlements**
 - settling cartel member, in principle, continues to be jointly and severally liable for the full harm caused by the infringement (Art. 11(1))
 - victim and cartel member cannot exclude risk of contribution, when victim is enforcing the remaining claim against the other cartel members
 - risk of cartel members to be involved in lengthy contribution proceedings

2. Directive's approach to facilitating settlements

- **Art. 19 Directive ('Effects of consensual settlements')** introduces a liability and contribution privilege for the settling cartel member
 - reduction of the settling victim's claim by the '*settling cartel member's share of the harm*' (Art. 19(1))
 - remaining claim of the settling victim is, in principle, only enforceable against the non-settling cartel members (Art. 19(2) para. 1) (with default liability of the settling cartel member, (Art. 19(3)))
 - no contribution from the settling cartel member for the remaining claim (Art. 19(2) para. 2)
- **Aims to create incentives for settlements by reducing the victim's claim against the co-cartelists by the settling cartel member share in the overall damage. In turn, the settling cartel member is released from contribution claims as regards the remaining claim.**
- **Definition of '*share of the harm*' left to courts in ongoing procedures against not-settling cartel members.**

3. Appraisal and implementation

- **However, on the basis of wording only, Art. 19 Directive does not achieve an effective settlement mechanism**
 - settling cartel member's '*share of the harm*', by which the settling victim's claim is reduced, should be determined according to the rules for determining the contribution shares among cartel members (Recital 51)
 - refers to the '*relative responsibility*' pursuant to Art. 11(5), to be determined on the subsequent contribution level by '*criteria such as turnover, market share, or role in the cartel*' (Recital 37)
- **Approach does not remove existing risks:**
 - victims (and cartel members) cannot properly determine *ex ante* the contribution share/ share in the overall claim, in particular at early settlements
 - legal uncertainty as regards shares to be determined at later stage
- **Implementation need: Introduction of one objective criteria (e.g. volumes)**
 - foreseeability/ legal certainty require one objective criteria which all parties can *ex ante* assess, verify and agree on
 - best and most objective criteria in determining settling cartel member's '*share of the harm*' is purchase volumes on the basis of which victim's damage is quantified (parallel: Art. 11(5))
 - Where volumes criteria is not practicable (e.g. umbrella damages, lost profit): pro rata

Thank you for your attention!

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