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**PLEA BARGAINING/SETTLEMENT OF CARTEL CASES**

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**English/French**

## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Plea Bargaining/Settlement of Cartel Cases, held by the Competition Committee in October 2006.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur les reconnaissance préalable de culpabilité et solutions négociées dans les affaires d'entente, qui s'est tenue en octobre 2006 dans le cadre du Comité de la concurrence.

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*by the Secretariat*

- (1) *Plea agreements or negotiated settlements can be an efficient way to formally dispose of cartel cases. They can provide substantial benefits to competition authorities by allowing them to allocate their resources more efficiently and to increase enforcement activities, thus achieving greater deterrence. Plea agreements have substantial benefits for defendants as well.*

Negotiated settlements or plea agreements can be regarded as contracts in which each side agrees to give up some entitlements it would have if the case went to a full trial or through a full administrative procedure ending with a formal decision – the competition authority gives up the right to seek or impose higher penalties; the defendant gives up certain protections that a more formal process and trial would provide, as well as the possibility of an acquittal - and both sides agree on a sanction or proposed sanction.

In return, plea agreements can provide significant benefits to both sides. From the competition authority's point of view, they can bring about more efficient and expedient outcomes which save resources and time, thus allowing the competition authority to allocate its resources more efficiently. Increased enforcement activities can overall lead to greater deterrence. Plea agreements provide significant benefits for defendants as well: In addition to leading to more efficient and expedient outcomes, plea agreements give a defendant a greater sense of being involved in the disposition of a case and of being able to influence the final outcome, produce more transparent and predictable results, and provide for certainty and finality. Society can also be better off as plea agreements can help to more efficiently allocate scarce resources and maximize deterrence with existing resources.

These benefits explain why negotiated settlements tend to become the procedure of choice to resolve cartel cases without full investigation and/or trial in jurisdictions where they are available, and why this has become an area of great interest for many other competition authorities.

- (2) *Negotiated settlements will work best if a competition authority establishes a reputation of being consistent and fair in settlement negotiations, and both sides understand that they must act in good faith. Procedures governing settlements should be transparent and predictable, while also allowing for certain flexibility as the value of a party's cooperation can vary from case to case. They should also provide certainty.*

Negotiated settlements will work best if the competition authority can establish a public record of its settlement practice and a reputation of being transparent, consistent and fair in settlement negotiations. Publishing negotiated settlements, guidelines, and public speeches can contribute to these goals. In addition, both sides must understand that they must act in good faith when they seek to settle a case. This includes that defence counsel must understand not to over-sell their case when approaching a competition authority with a settlement proposal.

Rules governing settlement negotiations should be transparent and predictable. If defendants are aware of the rewards for cooperation, the risks of failing to reach a settlement, and understand the procedures that the competition authority will follow, their willingness to settle will increase. Competition

authorities with experience in settlement negotiations recognize the importance of transparent and predictable procedures and many found it beneficial to adopt clear and structured procedures which they will follow to settle cartel cases. Transparent procedures and a detailed account of the offence and discussion of the appropriateness of a proposed fine also make it more likely that a court will accept a proposed plea agreement. In addition, transparency can alleviate concerns about the effect of plea agreements on the rights of defendants.

Greater certainty can also lead to better settlements. Certainty will be increased if the defendant has the right to withdraw a guilty plea if the sanction ultimately imposed by a court or other decision maker exceeds the sanction envisaged in a plea agreement, and if the defendant can waive its right of appeal. Conversely, uncertainty and information asymmetries can interfere with settlements. To increase certainty and reduce the risk of an incorrect assessment of facts a competition authority should seek to settle a case only once it has established all the relevant facts.

- (3) *If correctly implemented against the background of a credible threat of substantial sanctions, negotiated settlements should not have negative effects on deterrence. In fact, overall deterrence could increase if settlements free up a competition authority's resources and more cartels are detected and prosecuted. There is, however, a risk that negotiated settlements primarily become a mechanism to clear an agency's docket and get rid of "difficult" cases in which case overall deterrence might be reduced.*

Settlements of cartel cases can raise concerns about effective deterrence as they result in lower fines. However, assessing the relationship between negotiated settlements and deterrence is a complex exercise and it would be very difficult to reach firm conclusions. Ideally, the sanctions in settlements should reflect only the saved costs of a trial or of adopting a formal decision plus the likelihood that a court might overturn a decision or lower fines on appeal. It could therefore be argued that over a series of many cases the effects on deterrence should be the same whether or not the competition authority uses negotiated settlements. In addition, negotiated settlements should allow a better use of a competition authority's resources and more cartels should be detected and prosecuted, thus contributing to more deterrence. However, to ensure that negotiated settlements do not undermine deterrence, a competition authority has to resist the temptation to use settlements to quickly clear its docket and get rid of "difficult" cases. Maximizing overall deterrence can be a useful benchmark which may assist competition authorities in making decisions about the complex trade-offs inherent in plea agreements.

To maintain deterrence in cartel enforcement, a competition authority must be able to extract stiff sanctions in negotiated settlements. This in turn depends on whether there is a credible threat that substantial sanctions could be imposed in a formal decision or after a trial. Countries with prosecution of individuals may have greater leverage to extract high fines despite a settlement discount because, among other things, defendants will perceive a greater risk that someone might break ranks and cooperate sooner than the rest. The need to use negotiated settlements only against the backdrop of credible, substantial sanctions also suggests that plea agreements should be used very cautiously, if at all, early in the development of a jurisdiction's anti-cartel enforcement efforts, before credible sanctions have been established and courts have been persuaded to approve or impose high fines.

- (4) *The relationship between negotiated settlements and leniency program can raise difficult questions. As long as a competition authority obtains substantial sanctions in negotiated settlements, there should be no negative effects on incentives to apply for immunity. Competition authorities have different views about the relationship between negotiated settlements and leniency policies or similar policies that reward cooperation by cartel participants that did not receive immunity. Jurisdictions with experience in negotiated settlements view the two as integrated policies. On the other hand, some authorities consider introducing negotiated settlements as a separate step in an investigation, primarily because they are concerned that negotiated settlements could undermine incentives to cooperate under their leniency programs.*

Competition authorities must consider the effects of negotiated settlements on leniency programs. If discounts in plea agreements are too generous, the differential between the first applicant seeking immunity and the first cooperating defendant that did not receive immunity might be so small that the incentive to apply for immunity is reduced. This suggests again that competition authorities must seek stiff sanctions in negotiated settlements to protect the effectiveness of their leniency policies and the incentives to be the first firm to disclose the existence of a cartel.

The discussion demonstrated that competition authorities have different views concerning the relationship between negotiated settlements and their leniency policies or similar policies that reward cooperation by cartel participants that did not receive immunity. The United States and other jurisdictions currently using negotiated settlements in cartel cases do not distinguish between their policies that reward cooperation by cartel participants who do not qualify for immunity from fines and their policies concerning negotiated settlements. Rather, the two policies are applied in an integrated approach that includes cooperation with the investigation, disclosure of additional evidence, and the admission of guilt, and in return offers the opportunity to settle on a discounted sanction. In this approach, settlement negotiations can occur throughout an investigation. The competition authority's ability to offer greater sentence discounts for earlier settlements can increase its ability to extract cooperation from the parties. Defence counsel confirmed that they view leniency and settlements as overlapping policies, and that this approach facilitates the negotiations with the authorities and brings an investigation more expeditiously to an end.

Some competition authorities that currently consider introducing negotiated settlements tend to make a distinction between their leniency policies applicable to cooperating cartel participants that did not obtain immunity and the negotiated settlement. They view their leniency policy as an incentive for cartel participants to disclose additional evidence, cooperate with an investigation, and admit guilt. On the other hand, negotiated settlements are viewed as a mechanism to dispose of the case at a later stage of the procedure. This approach appears to be motivated largely by concerns about the impact of negotiated settlements on the effectiveness of leniency programs. There is no experience yet with this approach in cartel cases.

- (5) *Concerns that plea agreements could undermine the rights of defence and subvert the system of justice and fairness, frequently raised in the context of "ordinary" criminal cases, appear less justified with respect to negotiated settlements of cartel cases.*

An extensive literature has criticized the use of plea bargaining in criminal cases, on the grounds that plea bargaining undermines the rights of defendants, such as the presumption of innocence and the right against self-incrimination. In addition, plea bargaining has been criticized for subverting the system of justice and fairness as sanctions become subject to negotiated deals and perpetrators are unjustifiably rewarded when they decide to plead guilty.

These concerns appear less relevant in negotiated settlements of cartel cases. First, defendants in cartel cases are represented by sophisticated and well-paid counsel with substantial experience. They can

make informed choices and typically can rely on greater resources than the competition authority. In addition, settlement procedures and plea agreements are in many ways a logical extension of existing practices that are widely accepted as components of effective enforcement against cartels. In the framework of leniency program, competition authorities already make some kind of contract offer by promising to impose no sanction on the first cartel participant who informs the authority about the cartel's activities. In addition, as competition authorities reward cooperation in the form of sentencing discounts, companies frequently will produce self-incriminating evidence, thus waiving rights that defendants normally have in criminal and administrative procedures, in exchange for a lower sanction. Negotiated settlements would take these practice one step further by creating a broader package that typically will include an admission of unlawful conduct, a waiver of certain rights and the assumption of cooperation obligations, in exchange for certain benefits, most importantly a reduced fine.

A jurisdiction's view of the role and nature of rights of defence will affect the scope of negotiated settlements. If a jurisdiction considers rights of defence as individual entitlements that defendants can trade and exercise by waiving them, the rights can be integrated into a settlement. In other jurisdictions, defendants might not be able to "trade" certain rights and therefore a waiver of these rights cannot be part of a plea agreement. This question will be most relevant with respect to the right of appeal.

- (6) *Negotiated settlements in cartel cases raise a number of questions about the proper role of courts, including how actively courts should review a proposed settlement without unnecessarily interfering with settlement negotiations; in particular in administrative procedures there is a question whether defendants should be able to waive their right of appeal as part of a negotiated settlement.*

In criminal and civil enforcement regimes, where courts typically have to impose sanctions and have to review and approve proposed settlements, some observers have expressed a preference for more active courts to uphold the idea that settlements are subject to judicial oversight. Courts have also insisted that they do not just rubberstamp proposed settlements. But too much interference by courts undermines the effectiveness of plea agreements because it introduces uncertainty into negotiations. Guidelines such as the U.S. Sentencing Guidelines or a more informal "dialogue" between the competition authority and courts can ensure that the authority can anticipate the courts' requirements and courts understand the way the competition authority handles settlements. These methods can minimize the number of cases in which courts feel that they have to intervene in proposed settlements.

In jurisdictions with administrative enforcement against cartels, there is an important question about whether the defendant can waive the right to appeal as part of the settlement. Arguably, the right of appeal should not be treated differently than other rights that the defendant typically may waive in the course of a cartel investigation such as the right against self incrimination. This would suggest that waivers of the right to appeal should be upheld where they are made in a transparent procedure and based on an informed judgement. But a waiver of the right of appeal would eliminate any court supervision. There can be concerns about the effects on the integrity of investigations and procedures, as the competition authority would know that it can avoid judicial review so long as it is willing to "pay off" the defendant with a favourable settlement. This question must be answered in each jurisdiction in accordance with applicable constitutional laws.

- (7) *Negotiated settlements can affect follow-on private litigation for damages. When negotiating settlements, a competition authority should seek to maximize overall deterrence from public and private enforcement.*

In jurisdiction where private follow-on action to public cartel investigations is likely and potential civil liability is large, compared to the potential benefits from settling the case with the competition

authority, concerns about private damage actions might increase the defendant's incentive to settle with the competition authority. A defendant might agree to a relatively higher fine in exchange for a settlement without admission of guilt or covering a shorter charge period, as both would reduce its exposure to private damages. Ideally, competition authorities should seek settlements that maximize overall deterrence resulting from public and private enforcement, rather than focus exclusively on the sanction they can obtain.



## SYNTHÈSE

### *du Secrétariat*

- (1) *Les transactions judiciaires ou règlements négociés peuvent constituer un moyen efficace de conclure formellement les affaires relatives aux ententes. Elles peuvent être particulièrement avantageuses pour les autorités de la concurrence en leur permettant de rationaliser l'allocation de leurs ressources et de renforcer leur activité de répression, obtenant ainsi un effet de dissuasion accru. Les transactions judiciaires sont également très avantageuses pour les défendeurs.*

Les règlements négociés ou transactions judiciaires peuvent être considérés comme des contrats dans lesquels chaque partie s'engage à renoncer à certains des droits dont elle disposerait si l'affaire passait en jugement ou donnait lieu à une procédure administrative aboutissant à une décision en bonne et due forme – l'autorité de la concurrence renonce au droit de demander ou d'imposer une peine plus sévère ; le défendeur renonce à certaines protections dont il bénéficierait dans le cadre d'un processus plus officiel et d'un procès, ainsi qu'à la possibilité d'être acquitté – et les deux camps s'accordent sur une sanction ou une proposition de sanction.

En retour, les transactions judiciaires peuvent être particulièrement avantageuses pour les deux parties. Du point de vue de l'autorité de la concurrence, elles peuvent produire des résultats plus efficaces et plus utiles synonymes de gains de temps et de ressources, permettant ainsi à l'autorité de rationaliser l'allocation de ses ressources. Le renforcement des activités de répression peut d'une manière générale renforcer l'effet de dissuasion. Les transactions judiciaires sont également très avantageuses pour les défendeurs : si elles permettent d'obtenir des résultats plus efficaces et plus appropriés, les transactions judiciaires donnent aussi au défendeur le sentiment d'être plus étroitement associé au règlement d'une affaire et de pouvoir davantage influencer sur l'issue finale, obtenir des résultats plus transparents et plus prévisibles et s'assurer que la sanction est certaine et définitive. Les transactions judiciaires peuvent aussi concourir au bien de tous puisqu'elles permettent aux deux camps d'allouer plus efficacement des ressources rares et de maximiser l'effet de dissuasion avec celles dont ils disposent.

Ces avantages expliquent que les règlements négociés soient employés en priorité pour résoudre les affaires relatives aux ententes en faisant l'économie d'une enquête et/ou d'un procès dans les États où ils ont été mis en place et qu'ils soient devenus l'un des principaux centres d'intérêt de bien d'autres autorités de la concurrence.

- (2) *Les règlements négociés produisent les meilleurs résultats lorsqu'une autorité de la concurrence acquiert la réputation d'être constante et équitable dans les négociations en vue d'un règlement, et que les deux camps comprennent qu'ils doivent agir de bonne foi. Les procédures de règlement négocié doivent être transparentes et prévisibles, tout en autorisant une certaine souplesse, puisque la valeur de la coopération d'une partie peut varier d'une affaire à l'autre. Elles doivent aussi être un gage de certitude.*

Les règlements négociés produisent les meilleurs résultats lorsque l'autorité de la concurrence peut faire connaître publiquement ses pratiques de règlement et acquérir une réputation de transparence, de constance et d'équité dans les négociations en vue d'un règlement. Publier les règlements négociés, les

lignes directrices et les interventions publiques peut concourir à la réalisation de ces objectifs. De plus, les deux camps doivent comprendre qu'ils doivent agir de bonne foi lorsqu'ils cherchent à régler une affaire. Cela implique notamment que les avocats de la défense soient conscients qu'ils ne doivent pas aller trop loin lorsqu'ils proposent un règlement à une autorité de la concurrence.

Les règles régissant les négociations en vue d'un règlement doivent être transparentes et prévisibles. Si les défendeurs connaissent les « récompenses » qu'ils peuvent attendre de leur coopération, ainsi que les risques encourus en cas de non-règlement et qu'ils comprennent les procédures qui seront suivies par l'autorité de la concurrence, ils seront davantage disposés à conclure. Les autorités de la concurrence ayant l'expérience de la transaction judiciaire savent qu'il importe de disposer de procédures transparentes et prévisibles et peuvent juger avantageux d'adopter des procédures claires et structurées applicables aux affaires d'entente. Des procédures transparentes, un compte rendu détaillé du délit et des explications sur l'adéquation de l'amende proposée auraient aussi le mérite de rendre plus probable l'acceptation par un tribunal d'une proposition de transaction judiciaire. De plus, la transparence peut atténuer les craintes relatives à l'effet de ce type de transactions sur les droits du défendeur.

Une incertitude moins grande peut aussi se traduire par des règlements plus avantageux. Ainsi, l'incertitude sera moindre si le défendeur a le droit de retirer sa reconnaissance de culpabilité lorsque la sanction imposée en définitive par un tribunal ou une autre autorité est plus lourde que celle qui était prévue dans la transaction judiciaire et si le défendeur a la faculté de renoncer au droit de faire appel. À l'inverse, l'incertitude et l'asymétrie de l'information peuvent gêner la conclusion d'un règlement négocié. Pour réduire l'incertitude et le risque d'une évaluation incorrecte des faits, l'autorité de la concurrence ne doit pas chercher à conclure une transaction avant d'avoir établi tous les faits pertinents.

(3) *Dès lors qu'ils sont correctement appliqués dans le contexte d'une menace crédible que de lourdes sanctions soient infligées, les règlements négociés ne devraient pas avoir d'effets négatifs sur la dissuasion. De fait, la dissuasion globale peut être renforcée lorsque les règlements libèrent une partie des ressources de l'autorité de la concurrence et qu'un plus grand nombre d'ententes sont détectées et font l'objet de poursuites. Il y a cependant un risque que les règlements négociés servent principalement à réduire le nombre d'affaires inscrites au rôle de l'organisme concerné et à se débarrasser des cas « difficiles », ce qui peut avoir pour effet d'atténuer la dissuasion globale.*

Le règlement négocié des affaires d'entente peut susciter des inquiétudes quant à l'efficacité de la dissuasion, car il entraîne une réduction de l'amende. Toutefois, évaluer le lien existant entre les règlements négociés et la dissuasion est une affaire complexe et il serait très difficile d'en tirer des conclusions définitives. Dans l'idéal, les sanctions prévues par le règlement négocié devraient refléter uniquement les coûts qu'aurait engendrés un procès ou l'adoption d'une décision formelle, et la probabilité qu'un tribunal annule une décision ou réduise l'amende en appel. On pourrait ainsi faire valoir que sur un grand nombre d'affaires, l'impact sur la dissuasion serait le même que l'autorité de la concurrence ait ou non recouru à un règlement négocié. De plus, les règlements négociés devraient permettre de faire un meilleur usage des ressources de l'autorité de la concurrence et un plus grand nombre de cartels devraient être détectés et faire l'objet de poursuites, amplifiant ainsi l'effet dissuasif. Cela étant, pour assurer que les règlements négociés ne nuisent pas à la dissuasion, les autorités de la concurrence doivent résister à la tentation de recourir aux transactions pour réduire rapidement le nombre d'affaires qu'elles doivent traiter et se débarrasser de cas « difficiles ». La maximisation de la dissuasion globale peut être un critère utile aux autorités de la concurrence pour prendre des décisions sur les compromis complexes inhérents à une négociation de peine.

Pour préserver l'effet dissuasif dans le domaine de la lutte contre les ententes, les autorités de la concurrence doivent être en mesure d'obtenir des sanctions sévères lors d'un règlement négocié. Cela dépend de l'existence d'une menace crédible que de lourdes sanctions soient infligées en cas de décision

formelle ou de procès. Les pays où les personnes physiques peuvent être poursuivies disposent peut-être de moyens plus efficaces d'obtenir des amendes élevées en dépit de l'octroi d'une remise car, entre autres, les défendeurs vont avoir le sentiment que le risque de voir quelqu'un faire défection et coopérer plus tôt que les autres est plus grand. La nécessité de recourir aux règlements négociés uniquement dans un contexte de sanctions crédibles et importantes tend également à montrer que les transactions judiciaires doivent être utilisées avec la plus grande circonspection, à supposer qu'elles doivent l'être, à un stade précoce de l'action d'un État contre les ententes, c'est-à-dire avant que des sanctions crédibles aient été prononcées et que les tribunaux aient été persuadés d'approuver ou d'infliger des amendes élevées.

- (4) *Le lien entre les règlements négociés et les programmes de clémence peut soulever des questions délicates. Tant que les autorités de la concurrence obtiennent des sanctions sévères dans le cadre des règlements négociés, on ne devrait pas observer d'effets négatifs sur les incitations à demander l'immunité. Les autorités de la concurrence ont des opinions différentes sur le lien existant entre les règlements négociés et les politiques de clémence, ou les politiques analogues, qui récompensent la coopération des participants à une entente qui n'ont pas bénéficié de l'immunité. Les pays ayant l'expérience des règlements négociés considèrent qu'il s'agit de politiques intégrées. Par ailleurs, certaines autorités envisagent d'introduire le règlement négocié en tant qu'étape distincte d'une enquête, principalement parce qu'elles craignent que les règlements négociés atténuent les incitations à coopérer dans le cadre de leurs programmes de clémence.*

Les autorités de la concurrence doivent prendre en compte les effets des règlements négociés sur les programmes de clémence. Si les allègements de peine consentis dans les transactions judiciaires sont trop généreux, l'écart de traitement entre la première personne qui demande l'immunité et le premier défendeur coopérant qui n'a pas bénéficié de l'immunité peut être tellement faible qu'il atténue l'incitation à solliciter l'immunité. Ainsi, les autorités de la concurrence auraient de nouveau intérêt à rechercher des sanctions rigoureuses lors d'un règlement négocié afin de veiller à l'efficacité de leurs mesures de clémence et des incitations, pour une entreprise, à être la première à révéler l'existence d'une entente.

La discussion a montré que les autorités de la concurrence ont des opinions différentes sur le lien existant entre les règlements négociés et leurs politiques de clémence ou politiques analogues récompensant la coopération des participants à une entente qui n'ont pas bénéficié de l'immunité. Les États-Unis et d'autres pays qui recourent actuellement au règlement négocié dans les affaires d'entente ne font pas de distinction, parmi leurs politiques, entre celles qui récompensent la coopération des participants à une entente qui ne réunissent pas les conditions requises pour être exemptés d'une amende et celles qui concernent les règlements négociés. Ces deux politiques sont plutôt appliquées dans le cadre d'une approche intégrée comprenant la coopération à l'enquête, la divulgation d'éléments de preuve supplémentaires et la reconnaissance de culpabilité et offrant en échange l'occasion de convenir d'une remise de peine. Dans cette approche, les règlements négociés peuvent intervenir à tous les stades d'une enquête. La capacité de l'autorité de la concurrence d'offrir une remise de peine plus importante en cas de règlement précoce peut renforcer son aptitude à obtenir la coopération des parties. Les avocats de la défense ont confirmé qu'à leur avis, les politiques de clémence et de règlement négocié se recoupent et que cette approche facilite les négociations avec les autorités et permet de clore une enquête plus rapidement.

Certaines autorités de la concurrence envisageant à l'heure actuelle d'introduire le règlement négocié ont tendance à établir une distinction entre leurs politiques de clémence qui s'appliquent aux participants à une entente qui coopèrent et qui n'ont pas obtenu l'immunité et les règlements négociés. Elles considèrent que leur politique de clémence incite les participants à une entente à apporter de nouveaux éléments de preuve, à collaborer à une enquête et à reconnaître leur culpabilité. Par ailleurs, les règlements négociés passent pour un mécanisme permettant de régler l'affaire à un stade ultérieur de la procédure. Cette approche semble être largement motivée par des craintes quant à l'impact des règlements négociés sur

l'efficacité des programmes de clémence. À ce jour, cette approche n'a jamais été appliquée aux affaires d'entente.

- (5) *Les craintes que les transactions judiciaires nuisent aux droits de la défense et ébranlent le système de justice et d'équité, fréquemment observées dans le cadre des affaires pénales « ordinaires », semblent moins justifiées en ce qui concerne le règlement négocié des affaires relatives aux ententes.*

De nombreux ouvrages ont critiqué l'utilisation de la transaction judiciaire dans les affaires pénales, au motif qu'elle nuit aux droits du défendeur, comme la présomption d'innocence ou le droit de ne pas s'incriminer soi-même. De plus, la transaction judiciaire a été accusée d'ébranler le système de justice et d'équité, puisque les sanctions font l'objet d'une transaction négociée et que les auteurs d'une infraction sont indûment récompensés lorsqu'ils décident de plaider coupable.

Ces préoccupations semblent moins pertinentes dans le cas du règlement négocié des affaires d'ententes. Premièrement, dans ces affaires, les défendeurs sont représentés par des avocats habiles, bien payés et très expérimentés. Ils peuvent prendre leurs décisions en connaissance de cause et en règle générale, ils ont davantage de moyens que l'autorité de la concurrence. De plus, les procédures de règlement et les transactions judiciaires sont à bien des égards le prolongement logique de pratiques existantes qui sont largement acceptées lorsqu'elles contribuent à lutter efficacement contre les ententes. Dans le cadre des programmes de clémence, les autorités de la concurrence font déjà, d'une certaine manière, une offre de contrat en promettant de n'infliger aucune sanction au premier participant à une entente qui les informe des activités du cartel. De plus, comme les autorités de la concurrence récompensent la coopération sous la forme d'allègements de peine, les sociétés livrent souvent des preuves qui les incriminent elles-mêmes, renonçant ainsi aux droits normalement reconnus aux défendeurs dans les procédures administratives et pénales, en échange d'une sanction moins lourde. Les transactions judiciaires accentuent ces pratiques par la création d'un ensemble de contreparties plus large qui, le plus souvent, inclura l'aveu d'une conduite illicite, la renonciation à certains droits et l'acceptation d'une obligation de coopérer en échange de certains avantages, dont le plus important est un rabais sur l'amende.

L'idée qu'un État se fait du rôle et de la nature des droits de la défense influera sur le champ d'application des règlements négociés. S'il s'agit, selon lui, de droits individuels que les défendeurs peuvent négocier et exercer en y renonçant, ils pourront être intégrés dans un accord. Dans d'autres pays, les défendeurs n'ont pas forcément le droit « d'échanger » certains droits, de telle sorte que la renonciation à ces droits ne saurait faire partie d'un accord après transaction judiciaire. Cette question s'applique tout particulièrement au droit de faire appel.

- (6) *Les règlements négociés dans les affaires d'entente soulèvent plusieurs questions quant au rôle que doivent jouer les tribunaux, et notamment dans quelle mesure ils doivent examiner un règlement proposé sans intervenir inutilement dans les négociations en vue d'un règlement ; dans les procédures administratives, notamment, la question se pose de savoir si les défendeurs doivent avoir la possibilité de renoncer à leur droit de faire appel dans le cadre d'un règlement négocié.*

Dans les procédures d'exécution pénale et civile, où les tribunaux doivent le plus souvent imposer des sanctions et examiner et approuver les règlements proposés, certains observateurs ont exprimé une préférence pour des tribunaux plus actifs de manière à défendre l'idée que les règlements sont soumis au contrôle des juges. Les tribunaux ont également insisté sur le fait qu'ils ne sont pas de simples chambres d'enregistrement qui valideraient systématiquement les propositions de règlement des affaires. Cependant, si les tribunaux se montrent trop interventionnistes, ils risquent d'amoindrir l'efficacité des transactions judiciaires parce que les négociations deviendraient incertaines. Grâce à l'instauration de directives telles que les Lignes directrices sur la détermination de la peine en vigueur aux États-Unis ou d'un « dialogue » plus formel entre l'autorité de la concurrence et les tribunaux, la première peut aller au devant des exigences des tribunaux et les seconds comprendre la manière dont elle traite les règlements négociés. De telles méthodes peuvent minimiser le nombre d'affaires pour lesquelles les tribunaux se sentiraient obligés d'intervenir dans le règlement proposé.

Dans les pays où des procédures administratives permettent de lutter contre les ententes, il faut se demander si le défendeur peut renoncer à son droit de faire appel dans le cadre du règlement négocié. On peut soutenir que le droit de faire appel ne mérite pas un traitement différent des autres droits auxquels le défendeur est généralement amené à renoncer lors d'une enquête sur une entente, comme le droit de ne pas s'incriminer soi-même. Il y aurait donc lieu de soutenir la renonciation au droit de faire appel lorsqu'elle intervient dans le cadre d'une procédure transparente et qu'elle repose sur une décision éclairée. Cette renonciation empêcherait néanmoins tout contrôle par les tribunaux. On peut s'inquiéter de ses effets sur l'intégrité des enquêtes et des procédures, puisque l'autorité de la concurrence saurait qu'elle peut se soustraire au contrôle du juge dès lors qu'elle accepte « d'acheter » le défendeur au moyen d'un règlement favorable. Il appartient à chaque État de répondre à cette interrogation selon son droit constitutionnel.

- (7) *Les règlements négociés peuvent affecter les actions civiles en dommages et intérêts qui seront intentées dans la foulée. Lorsqu'elles négocient un règlement, les autorités de la concurrence doivent chercher à maximiser l'effet dissuasif global des procédures engagées par les intervenants publics et privés.*

Dans les pays où les enquêtes publiques sur les ententes donneront probablement lieu à des procédures civiles et où la responsabilité civile est engagée pour un montant élevé par comparaison avec les avantages susceptibles de découler du règlement négocié de l'affaire avec l'autorité de la concurrence, la crainte de faire l'objet d'une action civile en dommages et intérêts peut inciter davantage le défendeur à conclure un tel règlement avec l'autorité de la concurrence. Un défendeur peut accepter de payer une amende relativement plus élevée lorsque la transaction ne prévoit pas de reconnaissance de culpabilité ou qu'elle abrège la période sur laquelle des charges sont retenues, car dans les deux cas, le risque de devoir payer des dommages et intérêts au civil serait moindre. Idéalement, les autorités de la concurrence doivent faire en sorte que les accords amiables maximisent l'effet dissuasif global des procédures engagées par les intervenants publics et privés, au lieu de se concentrer exclusivement sur la sanction qu'elles peuvent obtenir.



## BACKGROUND NOTE

### Introduction

In October 1996, Archer Daniels Midland pleaded guilty in the United States for its participation in the international lysine and citric acid cartels and agreed to pay a fine of US \$100 million.<sup>1</sup> Almost ten years after AMD's guilty plea in the United States, the European Court of Justice ("ECJ") in May 2006 issued the final judgment in proceedings following the European Commission's investigation of the lysine cartel. The ECJ rejected an appeal from a lower court judgment which had reduced AMD's fine from approximately €47.3 million to €43.9 million, but had otherwise upheld the initial Commission decision.<sup>2</sup>

It is difficult to directly compare cartel investigations in two jurisdictions, given the differences in constitutional law backgrounds, procedures and institutions. Nevertheless, this episode illustrates how differences in enforcement procedures can have a substantial impact on the duration of investigations of the same cartel, even if two authorities are equally committed to fight hard core cartels. It also illustrates that appeals from a competition authority's decisions in cartel cases frequently can prolong cases for many years and ultimately result only in a relatively modest, if any, reduction of fines without affecting the finding of liability.<sup>3</sup>

The principal reason for the differences in the time and resources required to formally end cartel investigations is the U.S. DOJ's ability to "settle" cartel cases: In a plea agreement with the government, the defendant admits an antitrust violation and agrees to cooperate with the investigation, in return for a reduced criminal fine and certain other benefits; the defendant also waives certain procedural rights, including the right to a jury trial and the right of appeal, thus avoiding more complicated procedures and the possibility of a protracted criminal trial and appeals following the DOJ's investigation. In contrast, a competition authority like the European Commission, which operates in an administrative system without a similar "settlement" option, must go through a full investigation that provides a sufficient basis for a formal decision which will almost invariably be reviewed by a court.<sup>4</sup> The competition authority must

<sup>1</sup> See United States Department of Justice, Press Release, October 15, 1996 (announcing that AMD would plead guilty and agree to pay a \$100 million fine for its role in the lysine and citric acid cartels). The proceedings against individual defendants took longer, as Michael Andreas and Terrance Wilson appealed their convictions. *U.S. v. Andreas*, 216 F.3d 645 (7<sup>th</sup> Cir. 2000).

<sup>2</sup> Case C-397/03P, *Archer Daniels Midland v. Commission*, Judgment of May 18, 2006, *affirming in part and reversing in part*, Case T-224/00, *Archer Daniels Midland v. Commission*, [2003] ECR II-2597. The citric acid cartel was not subject to the same proceedings. Most recently, the Court of First Instance essentially upheld the Commission decision concerning the citric acid cartel and confirmed the sanction imposed by the Commission in its entirety. Case T-59/02, *ADM v. Commission*, Judgment of September 27, 2006. An appeal against this judgment is possible.

<sup>3</sup> See, e.g., Cento Veljanovski, *Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission*, 27 ECLR 510, 512 (2006) (suggesting that in 30 European Commission cartel cases since 1999, the average reduction in fines on appeal was approximately 18%).

<sup>4</sup> The European Commission, as some other competition authorities, can settle cases by way of formal commitments. See, Council Regulation 1/2003, O.J. L 1/1 (2003), art. 9. Commitment decisions, however, cannot be used to impose fines and therefore would not be an appropriate measure in cartel cases.

expect that even a defendant who cooperated during the investigation with the expectation of a lower fine will have a strong incentive to bring an appeal, so long as the probable outcome of the court case justifies the costs of continued litigation.<sup>5</sup> In certain circumstances, the duration of an investigation can even raise constitutional rights issues, in particular if proceedings of excessive duration adversely affect rights of defence.<sup>6</sup>

This situation creates a strong incentive for competition authorities that currently do not or cannot settle cartel cases to develop mechanisms for a negotiated disposition of cartel cases that can accelerate their investigations, save resources and result in outcomes that deter future cartels, while protecting the rights of parties under investigation.

This background note will examine several issues that can arise when negotiated settlements are used in cartel cases. It will first provide examples of "settlement" procedures in cartel cases in selected jurisdictions, both in the context of criminal procedures as well as administrative and civil procedures. This section will highlight that there is a wide range of practices that can be used to formally dispose of cases by negotiating a settlement with the target of an investigation. The note will then discuss several issues addressed in the academic literature on plea bargaining that could also be relevant for the settlement of cartel cases. As settlement practices and legal frameworks vary widely, so do the issues that likely are of greatest concern for different jurisdictions. However, there are several issues that should be relevant across most jurisdictions, including the factors that can be incentives (or disincentives) to enter into a "contract" with the government and can impact the substance of such a contract, the relationship between plea bargaining and rights of defence, and the effects of plea bargaining on deterrence and leniency programs. The last part of the note will draw some conclusions in light of the possibility that an increasing number of competition authorities might explore ways to settle cartel cases in order to use resources more efficiently and effectively in the fight against cartels.

Throughout this text, the note will use the term "plea bargaining" as shorthand for a negotiated disposition of a cartel case. It should be acknowledged that the term might not always appropriately describe the procedures before competition authorities. Competition authorities would typically insist that they do not "bargain" with defendants in a bazaar-like, open negotiating process, but merely offer to apply more or less fixed and limited penalty discounts in exchange for an admission of facts, (typically) a guilty plea, and cooperation. However, the term "plea bargaining" has been widely used and therefore the following text will refer to it as well.<sup>7</sup>

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<sup>5</sup> Cento Veljanovski, *supra* note 3, at 512.

<sup>6</sup> *See, e.g.*, Case C-105/04P, FEG, Judgment of September 21, 2006 (Court examining whether duration of cartel investigation was consistent with reasonable time requirement in European Community law which is closely related to similar principles under the European Human Rights Convention).

<sup>7</sup> By way of further clarification, this note will use the term "leniency applicant" only for the first participant in a cartel who informs a competition authority about the cartel, and then receives total immunity. Thus, for purposes of the note, cartel participants can be leniency applicants or parties to a plea agreement, but not both.

The main points addressed in the note are as follows:

- Plea agreements in cartel cases are used primarily in jurisdictions with criminal antitrust enforcement, but similar practices exist in a few other jurisdictions with civil or administrative enforcement procedures. The policies and procedures applicable to such settlements vary widely.
- Plea agreements can be an efficient way to formally dispose of cartel cases by way of negotiated settlement. They can be regarded as contracts in which each side agrees that it will give up some entitlements it would have had if the case went to a full trial or a full administrative procedure with a formal decision, and both sides agree on a fine or at least on a reduction of a fine. They can produce substantial benefits to both sides in terms of saved resources and time, and should allow competition authorities to allocate their resources more efficiently and overall increase enforcement activities, in particular against cartels.
- Settlements will be facilitated by the use of transparent and predictable procedures, which should make the defendants aware of "rewards" for cooperation as well as of the risks in case of non-cooperation. Transparency and predictability should increase the willingness to settle and also the likelihood that the two sides will agree on the terms of a plea agreement, including a sanction. Information asymmetries and uncertainty can interfere with settlements. To reduce uncertainty and the risk of an incorrect assessment of facts in a settlement, it may generally be preferable to settle cases once the competition authority has established the relevant facts and that, in general, a competition authority does not seek to settle cases too early.
- Settlements of cartel cases can raise concerns about effective deterrence. If correctly implemented against the background of a credible threat of substantial sanctions that could result from a trial or formal decision, settlements should not affect deterrence; but there might be a temptation to use settlements to quickly clear an agency's docket and get rid of "difficult" cases, rather than to pursue the public interest in maximizing deterrence. Assessing how the trade-off between lower fines and better use of resources and other aspects of negotiated settlements can affect deterrence can be a complex exercise. Nevertheless, maximizing deterrence can be a useful benchmark which may assist competition authorities in making the trade-offs inherent in plea agreements.
- Settlements in cartel cases must also take into account the effects on leniency programs. If sanction discounts in plea agreements are too generous, the differential between the leniency applicant who receives immunity and the first cooperating defendant might be so small that incentives to apply for leniency will be undermined.
- Concerns have been expressed in the literature that plea bargaining can undermine rights of defence, such as the presumption of innocence and the right against self-incrimination. Certain jurisdictions regard these rights as entitlements that defendants can trade and exercise by waiving them; in this case, the rights can be integrated into a settlement. In other jurisdictions, defendants might not be able to "trade" certain rights and therefore a waiver of these rights cannot be part of a plea agreement. Even if certain rights cannot be waived, such as the right of appeal, settling cartel cases by way of plea agreements can still be beneficial.
- The limited experience with plea agreements in cartel enforcement suggests that competition authorities that introduce plea agreements to settle cartel cases might consider establishing a

review mechanism that would allow them to assess the effectiveness of their settlement policy, and its effects on deterrence as well as the rights of parties.

## **1. Definition and Scope of Paper**

There is no uniform definition of the concept of plea bargaining, plea agreement or settlement. One commentator defined the process broadly as a practice which may encompass the negotiation over reduction of sentence, dropping some or all of the charges or reducing the charges in return for admitting guilt, conceding certain facts, foregoing an appeal or providing cooperation in another criminal case.<sup>8</sup> This definition highlights that the scope of plea agreements can vary, depending on which kind of “bargaining chips” or entitlements each side is willing or able to offer when negotiating a settlement.

In fact, even within the same jurisdiction, plea agreements may have different forms and scope. And, as illustrated by the examples in the following section, differences become even more significant when settlement procedures in different jurisdictions and in different procedural settings are compared. The procedures can range from the more structured approach used in U.S. criminal enforcement with more comprehensive plea agreements to the more limited agreements used in some jurisdictions with administrative enforcement procedures.

Common to all these procedures is that as a result of negotiations, each side agrees that it will give up some entitlements it would have had if the case went to a full trial or a full administrative procedure with a formal decision - the right to seek higher penalties in the case of the prosecutor or competition authority; certain protections that a more formal process and trial would provide, as well as the possibility of an acquittal, in the case of the defendant – and agree on a fine or at least on a reduction of a fine (which, in either case, may have to be submitted to a court for its approval).

## **2. Examples of Settlements and Settlement Procedures in Cartel Cases**

Today, plea agreements are a standard feature primarily in jurisdictions with criminal anti-cartel enforcement, in particular the United States and Canada. Although there has been less experience with plea bargaining in jurisdictions with civil or administrative anti-cartel enforcement, similar practices exist in a few other jurisdictions, for example in Australia, France, New Zealand, and South Africa. There has also been one instance in the Netherlands in which a mechanism similar to a "settlement procedure" was used in a cartel case, although there the scope of the bargain was more narrowly defined.

The following section will highlight only a few aspects of the settlement process in selected jurisdictions which appear to be most significant for an analysis and comparison of existing practices.

### ***A. Settlements in Criminal Anti-Cartel Enforcement: United States***

The United States is the jurisdiction with the greatest experience in using plea agreements in anti-cartel enforcement. The role of plea agreements in supporting effective investigations and in increasing deterrence has been widely acknowledged: Describing a situation in which the credible threat of significant sanctions is combined with the DOJ's ability to selectively enter into plea agreements with individuals as well as corporations under investigations, commentators have referred to the dog-eat-dog environment that DOJ has created. They have acknowledged that this situation has considerably increased the government's leverage and ability to obtain co-operation by individuals and corporations, thus

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<sup>8</sup> Michael P. Scharf, *Trading Justice for Efficiency*, 2 J. Int'l Crim. Justice 1070 (2004).

strengthening the effectiveness of anti-cartel enforcement.<sup>9</sup> The following description will focus on two aspects of plea agreements in the United States which could be of more general relevance, including the emphasis on transparency and predictability; and the ability to extract significant fines even after agreeing to a discount for the defendant's cooperation and guilty plea.<sup>10</sup>

With respect to institutions and procedures, plea agreements typically involve agreements between the government and a (corporate or individual) target of an investigation in which the target admits certain facts and its guilt, agrees to cooperate with the government's investigation, and both sides agree on a recommended sentence. The plea agreement is submitted to a court which, if it approves the agreement, will impose the actual sentence. Courts retain discretion to reject a proposed agreement, although such interventions appear to be rare. In the agreement, a defendant waives a series of explicitly listed rights, including the right not to plead guilty, the right to a jury trial at which the defendant would be presumed not guilty unless the government proves every element of the offence beyond reasonable doubt, and the right to appeal. Typically, a plea agreement allows the defendant to withdraw a guilty plea if the court rejects an agreement and the proposed sanction.

**Policies:** Transparency, predictability and proportionality are key policies governing the negotiated resolution of cartel cases. The importance of these policies has repeatedly been emphasized by DOJ officials,<sup>11</sup> and outside observers have noted them as well when comparing their national practice in settling cases with those of DOJ.<sup>12</sup> A cornerstone in implementing these policies are the U.S. Sentencing Guidelines which provide federal courts a framework for sanctions for violations of certain federal crimes, including violations of the Sherman Act.<sup>13</sup> Indirectly, they also provide a framework for the government and the defendant negotiating a plea agreement, as both sides know that their recommended sentence must be consistent with the Sentencing Guidelines to be approved by the court. The Sentencing Guidelines

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<sup>9</sup> Anthony Hammond and Roy Penrose, *Proposed criminalisation of cartels in the UK* 30 (2001) (noting the importance of criminal sanctions in U.S. antitrust enforcement against cartels and explicitly acknowledging that plea bargaining is the key to the United States' successful anti-cartel program); OECD, *Cartels: Sanctions Against Individuals* 18-19 (2004). See also Scott D. Hammond, *Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations*, Presentation before the 54<sup>th</sup> Annual ABA Section of Antitrust Law Spring Meeting, March 29, 2006, at 12 (describing how cooperation by one corporation under investigation enables the DOJ to focus its resources and increase the pressure on the other corporations and individuals under investigation).

<sup>10</sup> Fuller descriptions of the use of plea agreements in cartel cases are available elsewhere. See, e.g., Gary R. Spratling, *Negotiating the Waters of International Cartel Prosecutions*, Presentation before the 13<sup>th</sup> Annual Institute on White Collar Crime (March 4, 1999); Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, Speech before the 20<sup>th</sup> Annual Institute on White Collar Crime (March 2, 2006); Scott D. Hammond, *Second-in Cooperation*, *supra* note 9. The Antitrust Modernization Commission also recently held hearings and discussions on some aspects of plea agreements in criminal anti-cartel enforcement. Relevant documents are available at [www.amc.gov](http://www.amc.gov).

<sup>11</sup> See, e.g., Gary R. Spratling, *Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders*, in 26<sup>th</sup> ANNUAL PROCEEDINGS OF THE FORDHAM CORPORATE LAW INSTITUTE 613, 616-17 (B. Hawk ed. 2000), and the presentations quoted *supra* note 10.

<sup>12</sup> Ray Finkelstein, *Notes on Penalties in Antitrust Cases: An Australian/US Comparison*, Presentation before the Australian Law Reform Commission, June 9, 2001 (noting that calculating sentences is a much more "regulated" and predictable process in the United States than in Australian practice).

<sup>13</sup> The Sentencing Guidelines are available at <http://www.ussc.gov/guidelin.htm>. Although they are considered advisory and no longer mandatory following a series of recent Supreme Court decisions, courts continue to follow them.

indicate not only ranges for sanctions, but circumstances which can justify reduced sanctions.<sup>14</sup> It would therefore appear that if the participant in a cartel under investigation considers whether to cooperate with the government and plead guilty, both the range of possible or likely sanctions and of potential benefits of cooperation are relatively clear even before negotiations begin.

Although the Sentencing Guidelines provide a detailed framework for assessing sanctions, they also appear to offer a substantial degree of flexibility to ensure that proposed sanctions are considered fair in a specific case. Rewards for cooperation are case specific and the value of cooperation can vary from case to case, depending on, for example, the number of cartel participants, timing, and the ability to produce helpful evidence.<sup>15</sup> There are various ways of reducing proposed sanctions for cooperating defendants. They include the use of a lesser volume of "affected commerce," for example by agreeing not to use new facts about cartel activities against the corporation that has provided them (which determines the basic fine range); a cooperation discount of up to 30-35%; calculating any discount from a lesser amount within the Sentencing Guidelines' range; and more favourable treatment for individuals (fewer will be carved out from plea agreements with their corporations, *i.e.*, fewer will face the risk of individual sanctions).<sup>16</sup>

**High Sanctions:** Another important feature of the U.S. practice is that even after agreeing to substantial discounts to reward cooperation, the government obtains substantial sanctions in plea agreements. They include substantial criminal fines for corporations and frequently jail time for one or more executives. This, again, appears to be in part a consequence of the Sentencing Guidelines which provide for high basic fines.

The government's ability to extract high sanctions in negotiated dispositions of cartel cases can also be explained by its strong negotiating position in light of a credible threat of substantial sanction and the effective use of a "carrot and stick" approach which includes a range of risks for non-cooperation and potential rewards for cooperation. By deciding not to settle, corporations under investigation not only give up the advantage of having the government ask the court to depart from the guidelines sanction range in light of its early cooperation and the certainty of early resolution under a binding agreement (and instead risk litigation at the end of an investigation when the government's case is the strongest). Companies might also lose the potential benefit of the Division's amnesty plus policy and in this connection the possibility of de-trebling civil damages for other offences discovered under the amnesty plus program.<sup>17</sup> The large number of (individual and corporate) targets of an investigation with potentially conflicting interests further strengthens the government's position in negotiations with each target; for example, a

<sup>14</sup> The most relevant mitigating factors related to cooperation include: timing of cooperation; significance of evidence, including thoroughness of search; information about other collusive activity, and accepting responsibility. By agreeing to cooperate with the government and plead guilty, defendants can significantly lower fines; a substantial assistance departure can lower a sanction below the minimum range envisaged in the Guidelines. The Sentencing Guidelines also include factors that can enhance sentences (*e.g.*, for the leadership in a cartel conspiracy).

<sup>15</sup> *Id.* (explaining in addition that certain factors influencing the discount a cooperating company receives may not be transparent as they will be disclosed only to the sentencing court and not the public).

<sup>16</sup> A more detailed description of these factors is provided by Scott D. Hammond, *Second-in Cooperation*, *supra* note 10.

<sup>17</sup> This description follows a submission by the American Bar Association Antitrust Section to the Antitrust Modernization Commission: ABA Section of Antitrust Law, Comment Regarding Criminal Remedies: The Alternative Fine Statute – 18 USC § 3571(d) (2006), available at [http://www.amc.gov/public\\_studies\\_fr28902/criminal\\_pdf/060630-ABA\\_Criminal\\_Remedies.pdf](http://www.amc.gov/public_studies_fr28902/criminal_pdf/060630-ABA_Criminal_Remedies.pdf). See also Antitrust Modernization Commission, Meeting of July 25 and 26, 2006, Supplemental Discussion Memorandum *re* Criminal Remedies 6-8, available at <http://www.amc.gov/pdf/meetings/CrimRemSupplMemo060720circ.pdf>.

corporation considering whether or not to cooperate risks that one or more executives would break ranks and start cooperating with the Division to reduce his/her individual risks.<sup>18</sup> In addition, the desire to keep executives out of jail, or at least to limit the number of executives which are exposed to this risk, could also be a powerful incentive for corporations to plead guilty.

### **B. Settlements in Civil Anti-cartel Enforcement: Australia**

In Australia, settlements of cartel cases occur within the framework of a civil enforcement regime. It has been reported that since the first negotiated disposition of a cartel case in 1994, settling cartel cases by way of agreements between the ACCC and the defendant has become the standard practice.<sup>19</sup> As the competition authority must go to court to obtain a fine, the procedural set-up is somewhat similar to that in the United States: In the course of the investigation, the ACCC and defendant agree on a short statement of facts and on a proposed fine which they present to the court. Courts retain discretion to accept or reject the proposed sanction. Comprehensive cooperation is required from the target of an investigation to obtain a proposed reduction in fine, including a guilty plea, providing evidence against other cartel members, prevention of repetition, and giving a full account of the cartel activity. Defendants also must agree to restitution of victims of the cartel.<sup>20</sup>

One significant difference between the Australian and the United States procedures is the absence of guidelines on sanctions, including discounts for cooperation, in Australia. While the Trade Practices Act identifies several factors that should be taken into account in determining a fine, it does not provide precise guidelines as to the amount of a penalty or the relative weight of various factors comparable to the U.S. Sentencing Guidelines.<sup>21</sup>

One commentator suggested that a highly structured approach adopted by the U.S. Sentencing Guidelines would not be welcome by courts in Australia, as it would limit the court's right to be the final judge of the penalty.<sup>22</sup> But another commentator noted that the absence of guidelines can create uncertainty in the negotiating process which in turn may affect the efficiency of the system. He opined that "If [ ] the ACCC consistently gets the penalties wrong and/or the Court is consistently overturning negotiated settlements, then the lack of certainty mitigates against doing a deal with the ACCC."<sup>23</sup>

<sup>18</sup> Another illustration for how changes in the parties' relative negotiating positions can affect the substance of plea agreements is the government's policy with respect to foreign executives. Compare Gary R. Spratling, *Negotiating the Waters*, *supra* note 10, at 13 (explaining that foreign executives may have a greater chance to avoid a prison sentence when they were pleading guilty and offered valuable cooperation on the ground that it may be difficult to obtain personal jurisdiction over them) with Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, Speech before the 20<sup>th</sup> Annual Institute on White Collar Crime (March 2, 2006) (explaining that DOJ now routinely rejects proposed no-jail plea agreements for foreign defendants as international developments have made it easier to prosecute foreign individuals who do not voluntarily submit to U.S. jurisdiction).

<sup>19</sup> See David K. Round & Leanne M. Hanna, *Curbing Corporate Collusion in Australia: The Role of Section 45A of the Trade Practices Act*, 28 *Melb. U. L. Rev.* 242, 259-60 (2005) (observing that since the 1994 *Hymix* case, fines in a large majority of cases have been determined by negotiation).

<sup>20</sup> Alan Ducret, *Courts – Their Role in Regulatory Arrangements*, Presentation before the Australian Law Reform Commission, June 9, 2001, at 3.

<sup>21</sup> Ray Finkelstein, *supra* note 12, at 3.

<sup>22</sup> *Id.*, at 4.

<sup>23</sup> Alan Ducret, *supra* note 20, at 2.

The risk of a disagreement between the ACCC and the sentencing court in the absence of more specific guidelines has been highlighted in at least one case in which a court appeared to interfere with the ACCC's attempt to grant a defendant who had provided substantial cooperation a much larger discount than another, less cooperative defendant. The ACCC had taken the view that granting more favourable treatment to the defendant who was the first to cooperate was necessary to maintain incentives for parties to cooperate even if they do not receive outright leniency. The court, however, disagreed with the proposed gradation in sanctions and instead found that for fairness reasons no single party should receive a substantially greater benefit than any other party, notwithstanding the significant differences in cooperation.<sup>24</sup> It appears that the court did not sufficiently consider that its rationale would substantially undermine the incentive to be the first to cooperate with the competition authority, as there would be no penalty from waiting and cooperating with the authority in the last moment.

One commentator concluded that a coherent, consistent and well publicised approach to the setting of penalties would be helpful to strengthen the system of negotiated penalties. While recognizing that U.S.-style Sentencing Guidelines were not necessarily appropriate for Australia, he suggested that some workable and rational approach could be developed through some form of dialogue between the courts and the enforcement agency.<sup>25</sup> Such an approach should ensure that the appropriate carrot and stick mechanism was in place to heighten the likelihood of detecting cartels, assist parties in calculating penalties, and give the defendants a better understanding of the implications of the decisions they had to make.

### ***C. Settlements in Administrative Anti-Cartel Enforcement: France, the Netherlands***

#### *France*

In 2001, France introduced a form of plea bargaining which allows for the negotiated settlement of competition cases before the Conseil de la concurrence.<sup>26</sup> According to Art. L. 464-2-III, when a defendant does not contest the charges brought against it and agrees to modify its future conduct, the *rapporteur general* before the Conseil de la concurrence can propose a reduction in fines. Although the text of the law is not completely clear on this point, case law has confirmed that in order to qualify for a settlement, the defendant must not contest not only certain facts, but also the qualification of those acts as infringement, and the defendant's responsibility. Thus, the procedure is similar to a plea bargain, even though technically it does not include the defendant's "admission" of its guilt.

The so-called *procedure de transaction* is available in all competition cases, and in at least once it has been used in a case that also involved an unlawful agreement between competitors.<sup>27</sup> The requirement of substantial commitments by the defendant concerning a modification of its future conduct, however,

<sup>24</sup> ACCC v. Ithaca Ice Works Pty Ltd, [2001] FCA 497 (2 May 2001), unreported, cited in Alan Ducret, *supra* note 20, at 4-5.

<sup>25</sup> Alan Ducret, *supra* note 20, at 6.

<sup>26</sup> This summary follows a text published by the DGCCRF, La pratique transactionnelle du Conseil de la concurrence (March 2005), available at [http://www.minefi.gouv.fr/DGCCRF/03\\_publications/actualitesccrf/pratique\\_consconcu184.htm](http://www.minefi.gouv.fr/DGCCRF/03_publications/actualitesccrf/pratique_consconcu184.htm).

<sup>27</sup> See Decision 03-D-45, September 25, 2003 (calculatrices à usage scolaire) (finding, among other anticompetitive practices, collusion between Texas Instruments and Noblet).

could raise doubts whether the procedure is well designed for cartel cases, at least the way it is currently interpreted.<sup>28</sup>

Although the *rapporteur general* "negotiates" a possible settlement with the defendant, the final decision about the fine reduction rests ultimately with the Conseil which is not bound by the rapporteur's assessment and can deviate from the recommendation in either direction. This inserts an element of uncertainty in the process, in particular because the defendant cannot condition its admission of facts and guilt on the Conseil de la concurrence's acceptance of the fine reduction proposed by the *rapporteur*. If the Conseil finds that a lesser reduction is justified than the reduction proposed by the *rapporteur*, the defendant cannot withdraw his admission.<sup>29</sup> The law provides that the statutory maximum fine can be reduced by 50%. It appears that in practice a fine reduction is proposed from the (hypothetical) fine that would have been imposed in the absence of the settlement, subject to the statutory maximum. Reductions appear to be frequently in the 50% range, although in one case the Conseil granted a reduction of 90%.<sup>30</sup>

In 2004, an appeals court reviewing the new settlement procedure clarified that entering into a settlement does not imply that the defendant would waive its right of appeal. Thus, while the defendant cannot withdraw its guilty plea if the fine imposed by the Conseil de la concurrence exceeds the fine it has negotiated with the *rapporteur general*, it can subsequently challenge the decision before a court.

#### *The Netherlands: the Construction Industry Cartels*

The Netherlands does not have a formal settlement procedure that the NMA could generally use in cartel investigations. However, the investigation of a number of large scale cartels in the construction industry which involved all major construction firms in the Netherlands<sup>31</sup> prompted the NMA to consider an alternative procedure that could help to accelerate the sanction procedure following the investigation, and avoid a process that could have tied up resources for many years. Although the procedure did not involve plea bargaining (defendants were not required to plead guilty), it did involve an agreement between the competition authority and the targets of the investigation in which both sides traded certain entitlements: the defendants agreed to give up certain procedural rights they would normally have had in administrative procedures. They had to agree to a single representative before the authority; they could not require individual access to file or individual representation during the hearing and they agreed not to individually contest the facts and legal assessment developed by the authority at the end of the investigation. In exchange for the waiver of these rights, the defendants were promised a 15% reduction of fines in light of would have been imposed in a normal procedure.<sup>32</sup>

<sup>28</sup> Decision 06-D-09, April 11, 2006 (fabrication de portes) (finding that in a cartel case the undertaking offered by a cartel participant to abstain from future price exchanges was not sufficient to meet the statutory requirement of an undertaking to change future conduct).

<sup>29</sup> Cour de cassation, arrêt 1486FS-P+B, November 22, 2005 (rejecting Texas Instrument's appeal against fine imposed by conseil de la Concurrence which granted a lesser reduction than the reduction proposed by the *rapporteur general*); available at <http://www.conseil-concurrence.fr/doc/cass03d45calculatrices.pdf>.

<sup>30</sup> Decision 04-D-65, November 30, 2004, La Poste; available at <http://www.conseil-concurrence.fr/pdf/avis/04d65.pdf> (90% reduction granted in light of La Poste's substantial, credible and verifiable undertakings to modify its future conduct).

<sup>31</sup> A short summary of the case against the construction cartels is provided in OECD, Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation 15 (2005).

<sup>32</sup> The accelerated procedure was carefully designed to respect due process principles. In particular, all companies had an alternative to the accelerated procedure by opting for the full investigation, the accelerated procedure allowed the companies to opt out and assert their full procedural rights until the oral hearing, and it was not envisaged that parties would waive their right to appeal.

The deal offered by the NMa apparently proved successful as approximately 90% of the companies under investigation opted for the accelerated procedure. And less than 10% of those which were fined under the accelerated procedure appealed the decision, thus suggesting that over 80% of companies investigated for participating in one of the construction cartels accepted the NMa's offer, even though the NMa imposed very substantial fines on many of them.

While the circumstances in this case are unique, given the large number of participants in the cartel and the public pressure on construction companies to "come clean," there are notable elements in the process described above: Had all defendants exercised their rights, the sanction procedure would have been substantially more burdensome and the adoption of final decisions would have been substantially delayed, presumably by several years. It appears that a relatively low fine discount was a substantial motivation for a large number of companies to waive certain procedural rights and allow for an expedited sanction procedure.<sup>33</sup> In addition, at least at this stage it appears that the NMa's choice not to attempt to limit the defendants' right of appeal did not have any significant negative impact on the success of the arrangement, given the low rate of appeal.

### 3. Issues Raised by Negotiated Settlements in Cartel Cases

As discussed below, a settlement in a cartel case can be characterized as a contractual exchange of entitlements between the government (prosecutor or competition authority) and the target of an investigation. The examples from a group of jurisdictions demonstrate that the scope of these contracts and the procedural set-ups within which they occur can vary widely. They include the more comprehensive, structured approach in U.S. plea agreements with a significantly reduced scope for "bargaining," the more open approach under the Australian settlement practice, and settlements that result from negotiations of a fine or a fine reduction but are not necessarily final since the defendant retains the right to contest the outcome of the settlement. The example of the Netherlands suggests that if more comprehensive and final settlements are not possible even agreements on less comprehensive exchanges of rights may be a worthwhile experiment that can result in substantial cost savings without undermining deterrence.

#### A. Settlement Agreements as Contracts

Supporters of plea bargaining have argued that plea agreements should be viewed as a contract, similar to civil out-of-court settlements.<sup>34</sup> In a negotiated resolution of a case, defendants who plead guilty sell a number of substantive and procedural rights to the prosecutor in exchange for concessions they value more highly than the rights they agree to trade. Defendants could either use or sell their rights, whatever makes them better off; and especially risk averse defendants may prefer to trade their rights as they prefer a certain but small punishment to a chancy, but large one. Prosecutors sell the possibility of higher sanctions

<sup>33</sup> Although there were probably additional reasons that prompted the firms to accept the deal offered to them such as significant public pressure to get clean and a desire to get over with a potentially distracting investigation.

<sup>34</sup> One of the classic texts supporting plea bargaining is Frank H. Easterbrook, *Criminal Procedure as Market System*, 12 J. Legal Studies 289 (1983). See also Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L. J. 1909, 1912-17 (1992) (supporting view that plea bargaining should be seen as contract in which both sides can exchange their entitlements and arguing that restricting the right to exchange entitlements would undermine their value).

Commentators agree, however, that the analogy between civil contracts and plea bargaining may be far from perfect. See, e.g., Nuno Garoupa & Frank H. Stephen, *Law and Economics of Plea-Bargaining 2* (2006); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L. J. 1969, 1974-75 (1992) (emphasizing differences between private contracts and plea bargains).

and buy time and resources, which they can use to prosecute more cases. The more costly in financial terms a trial conviction is, the more economically efficient is the plea bargain.<sup>35</sup> The whole process is welfare enhancing since it enables both sides to avoid the costs and uncertainties of a trial. Society is also better off as plea agreements can help to more efficiently allocate scarce resources and maximize deterrence with existing resources.<sup>36</sup>

The agreement on a sanction in a plea agreement should reflect the likelihood of a conviction, a probable fine that would be obtained at the end of the trial, and the expected costs of a trial. An agreement is likely when both sides substantially agree on the "price" of the offence in light of these factors. A defendant will accept a plea bargain if the fine or dollar equivalent of the punishment imposed under the plea agreement is smaller than or equal to the probability of conviction in the defendant's view times dollar equivalent of punishment imposed after trial plus cost of trial. A prosecutor will accept a guilty plea if the fine or dollar equivalent of the punishment imposed under a plea agreement is greater than the probability of conviction in the prosecutor's view times dollar equivalent of punishment imposed after trial minus the cost of holding the trial.<sup>37</sup>

From this perspective, plea bargaining is just another case of bargaining in the shadow of the trial. A plea agreement should be expected to largely reflect the outcome that would have occurred at the end of a trial or in a formal decision, minus some adjustment to reflect the saved resources.<sup>38</sup> Sentences resulting from plea agreements should therefore largely reflect levels of culpability.<sup>39</sup>

Overall, this description makes a strong case for the increased use of settlements/plea agreements in anti-cartel enforcement: both sides can be better off as negotiations can achieve results that are better aligned with the preferences of both sides than if both sides are forced to go to trial or through a full formal investigation and final decision.<sup>40</sup> Resources of both sides can be saved. The public is better off as well,

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<sup>35</sup> See, e.g., Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 Am. Econ. Rev. 749 (1983).

<sup>36</sup> Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, at 1975 (explaining basic exchange of entitlements in plea agreements).

<sup>37</sup> The costs of the prosecutor are not related to the resources required to bring a case, but the opportunity costs in the form of penalties that she could obtain in other trials with the resources used for the trial in the case at hand. Frank H. Easterbrook, *Criminal Procedure*, *supra* note 34, at 297 (explaining that a prosecutor operates with a given budget that she expects to exhaust whether or not she settles a given case).

<sup>38</sup> This would suggest that defendants prefer an early settlement because they save resources that they would have to otherwise use during a trial. But, depending on the applicable procedures, there could be opposite incentives as well: For example, if fines imposed in a decision are not subject to retroactive interest payments, parties might prefer a protracted investigation with a fine several years down the road to an immediate, although lower fine in a settlement agreement. For example, some authors have argued that the long period usually required to dispose of criminal cases by way of trial in Italy was a major incentive for parties not to enter into plea agreements. Nicola Boari & Gianluca Fiorentini, *An economic analysis of plea bargaining: the incentives of the parties in the mixed penal system*, 21 Int'l Rev. Law & Econ. 213, 229 (2001). Another factor that potentially could reduce the defendant's incentives to enter into a plea agreement are statutes of limitations that could bar some of the private follow-up actions if the defendant can delay a decision by a competition authority.

<sup>39</sup> For a discussion of this characterization of plea bargaining and plea agreements see Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Trial*, 117 Harv. L. Rev. 2463, 2465-66 (2004). Bibas, however, concludes that the assumptions underlying this characterization are not justified, and that factors specific to plea bargaining can lead to results that do not reflect the likely outcome of trials.

<sup>40</sup> See, e.g., Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, at 1975-78 (emphasizing importance of autonomy in making choices according to preferences); Gene M. Grossman & Michael L. Katz, *supra* note

because of saved resources and because, if correctly implemented, deterrent effects of anti-cartel enforcement will overall be increased.

These obvious advantages might explain why plea bargaining quickly has become the procedure of choice to resolve cases without full trial in many jurisdictions where it has been available. By some estimates, for example, as many as 90% of federal criminal cases are settled by way of plea agreement in the United States. As one commentator concluded with respect to criminal law enforcement, even if plea bargaining has weaknesses and has been much criticized, it is unlikely to be abandoned once it has been introduced.<sup>41</sup> The same phenomenon can be observed with respect to cartel enforcement, at least with respect to some jurisdictions. For example, plea agreements appear to be the standard procedure to formally end cartel cases in the United States. The above described experience in Australia points in the same direction where within a relatively short time plea agreements appear to have become the standard procedure to formally end cartel cases. Probably the same development could be expected elsewhere when settlement of cartel cases becomes an option.<sup>42</sup>

### **B. *Factors that Can Influence Negotiations of Settlements***

As suggested by the shadow of the trial concept, the ability to obtain substantial sanctions in a settlement will in the first place depend on whether the competition authority or prosecutor can negotiate while there is a credible threat that substantial sanctions likely would be imposed in a formal decision or in a trial. Depending on the enforcement procedures and institutions involved, the "shadow of the trial" might also include appeal procedures, if the defendant can expect that fines likely would be lowered on appeal. For example, if in an administrative enforcement system decisions against cartels are invariably appealed and in many cases result in a certain reduction of the fines, one would expect that if settlements were introduced, the sanctions discount would reflect the reduction in fines parties would expect to obtain on appeal.<sup>43</sup>

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35, at 749 (characterizing plea bargaining as an insurance device which can help risk averse defendants to avoid harsher sentences in trial and risk-averse society to obtain sure convictions at a greater rate, even if in connection with somehow lower sanctions).

<sup>41</sup> Albert W. Alschuler, *An Exchange of Confessions*, 142 New L. J. 937 (1992) (observing in connection with U.S. criminal cases that without significant substantial regulation, plea bargaining leads to bureaucratic work habits and underfunding that have made the retreat from the plea bargaining system increasingly difficult).

<sup>42</sup> On the other hand, where settlement procedures are available but are not much used in cartel cases, the question arises whether procedural adjustments might be advisable to make the procedure more successful. Some jurisdictions reportedly have had the same experience when they introduced plea bargaining in "ordinary" criminal cases. In Italy, for example, it has been reported that after the introduction of plea bargaining in 1989, less than 10% of cases were settled (although this figure may have changed more recently). See Nicola Boari & Gianluca Fiorentini, *supra* note 38, at 214.

<sup>43</sup> For example, Veljanovski's recent study suggested that between 1999 and 2006, the average reduction in fines obtained before the Court of First Instance was approximately 18%. This would include cases in which the defendants already had been granted a discount for their cooperation. Cento Veljanovski, *supra* note 3, at 512. One should expect that if settlements were introduced in such a situation, the sanctions discount would have to reflect the possibility to obtain such a fines reduction on appeal. This could be the outcome regardless of whether plea agreements included a waiver of the right to appeal. If the waiver was included, the anticipated fine reduction on appeal would be the price the competition authority would have to pay for the waiver. If such a waiver was not included, the settlement might reflect this reduction to eliminate the incentive for the defendants to appeal.

The characterization of settlements as a contractual exchange of entitlements that reflects likely outcomes of trials minus some cost savings, however, will not provide complete answers about the likely outcome of settlement negotiations. Other factors typically will influence negotiations and therefore the content of plea agreements;<sup>44</sup> they could even prevent the parties from reaching an agreement, or explain why settlement agreements can deviate from the normatively desirable benchmark of efficient and fair contracts that reflect the defendant's culpability and provide for sanctions that will deter future violations of the law. These factors include agency costs, uncertainty and information asymmetry, and investigations of multiple targets in which cooperation in the form of providing evidence against other targets is rewarded. The possibility of civil follow-up litigation might also affect the negotiated disposition of the government's case.

### *Agency costs*

By far the greatest concern expressed in the literature on plea bargaining is related to inadequate representation of defendants. Observers have complained that defence counsel are frequently paid on a per case basis and therefore have a huge incentive to settle cases; do not have much experience; take on too many cases; and/or are simply not highly qualified. As a result, they may settle even in cases where it would be in their client's best interest to go to trial in light of the low probability of a conviction.<sup>45</sup> But these concerns related to the situation of indigent defendants with court appointed lawyers and do not apply to the typical cartel case.<sup>46</sup>

Concerns have also been raised about principal/agency issues on the prosecutor's side, where individual interests in reaching settlements might not coincide with the public interest in optimal deterrence.<sup>47</sup> Commentators have observed that when the prosecutor's interests diverge from the public interest, prosecutors typically offer unduly lenient sentence terms.<sup>48</sup> Some commentators have also pointed out that the introduction of plea bargaining was not successful where it was implemented primarily to allow prosecutors to reduce their case load and delays in the enforcement process, rather than to improve case selection and overall levels of deterrence.<sup>49</sup> Again, many of these concerns may be much less justified in the case of competition authorities involved in cartel enforcement.<sup>50</sup> But this discussion can be a useful

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<sup>44</sup> See Bibas, *supra* note 39, at 2530.

<sup>45</sup> See, e.g., Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L. J. 1979, 1988-89 (1992) (arguing that agency problems are most acute on defence side); Nuno Garoupa & Frank H. Stephen, *supra* note 34, Section 4.2 (discussing possible solutions to improve quality of defendant's representation). Even supporters of plea bargaining concede that inadequate legal representation can distort outcomes. See, e.g., Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, at 1973-74 (arguing that compulsory representation and inadequate remuneration interfere with sentence negotiations).

<sup>46</sup> In fact, when commentators discuss possible reforms to improve the quality of a defendant's representation, they list many measures that appear to be standard in cartel cases such as the defendant's ability to choose the most capable lawyer; adequate pay for defence counsel on a per hour basis and not based on an insufficient per-case rate; and experienced lawyers who are typically as familiar with the process involving cartel investigations and plea agreements as the competition authority staff.

<sup>47</sup> See, e.g., Stephen J. Schulhofer, *supra* note 45, at 1987-88 (summarizing arguments why prosecutors might not prioritise optimal deterrence in their decisions whether to go to trial or settle a case).

<sup>48</sup> *Id.*, at 1988.

<sup>49</sup> Nuno Garoupa & Frank H. Stephen, *supra* note 34, text accompanying note 8 (citing research indicating that the focus on reducing case load was one of the main reasons why the introduction of plea bargaining was not successful in the Italian criminal system).

<sup>50</sup> Many of the arguments in this context relate to the system of elected prosecutors who may see as their principal goal the enhancement of their political standing. Stephen J. Schulhofer, *Plea Bargaining*, *supra*

reminder that the interests of the two parties involved in negotiating a plea agreement can deviate from the public interest in maximum deterrence. The purpose of using settlements in cartel cases is increased overall deterrence, rather than moving the greatest number of cases through the system in the shortest possible time.<sup>51</sup>

### *Information asymmetries and uncertainty*

Another issue identified in the literature on plea bargaining as a possible concern is lack of information or unequal information. Commentators have pointed out that insufficient or asymmetric information can lead to inequitable and/or inefficient results and that in particular settlements which occur too early in the investigation would increase the risk of inefficient agreements.<sup>52</sup> As one commentator pointed out with respect to criminal procedures, rules may be designed to give defendants information in time for effective use in trial, but not for effective use in plea bargaining; measures should therefore be considered that would ensure that more information can be provided earlier, which would help both prosecutors and defendants to better evaluate plea bargains. One remedy would be to provide better access to information in possession of the other side earlier in the process so it can be evaluated in the negotiating process.<sup>53</sup>

This type of argument is frequently made as a measure to protect defendants.<sup>54</sup> But it may be relevant for competition authorities as well. The concern about information asymmetries would suggest that in general settlements in cartel cases should not take place until most of the evidence has been gathered and analysed.<sup>55</sup> In particular, when a company offers cooperation and seeks a settlement very early in an investigation, it will in many cases have better information about the cartel's activities and its own involvement than the competition authority. At a later stage of the investigation, the competition authority's information about the cartel will have improved, and a settlement could in many cases be more likely to reflect the defendant's culpability. Settlements at a later stage of an investigation would reduce the cost savings. But arguably they could improve outcomes. In the context of proceedings that follow the model of European Commission enforcement procedures, for example, the drafting of the statement of objections could be a point in the investigation when the competition authority would normally have a good idea of the extent of cartel activities and the strength of its case.<sup>56</sup>

In addition to the timing of settlement, sentencing benchmarks and better sharing of sentencing information could be used to reduce information asymmetries and avoid uncertainty. Indeterminacy

note 45, at 1987-88. It also has been sometimes mentioned, however, that career prosecutors would for personal and professional reasons have incentives to settle cases, rather than trying them which would be inconvenient and create risks for their careers.

<sup>51</sup> The issue of how settlements affect overall deterrence will be taken up further below.

<sup>52</sup> See, e.g., Stephanos Bibas, *supra* note 39, at 2531-32 (arguing that disparities in information can lead to results that threaten equity and fairness); Stephen J. Schulhofer, *Plea Bargaining*, *supra* note 45, at 1998; Nuno Garoupa & Frank H. Stephen, *supra* note 34, at Section 4.1 (arguing that asymmetry of information can affect efficiency in negotiated settlements).

<sup>53</sup> Stephanos Bibas, *supra* note 37, at 2532.

<sup>54</sup> Nuno Garoupa & Frank H. Stephen, *supra* note 34, at Section 4.1

<sup>55</sup> Of course there could be reasons to settle earlier in certain circumstances.

<sup>56</sup> A similar point in connection with private litigation was made during the June 2006 OECD roundtable on private enforcement. See DAF/COMP/WP3/M(2006)2/ANN2 (contribution emphasizing that private settlements typically take place at or near the end of discovery when both sides have good information about the strength of their case).

produces uncertainty, which in turn could encourage either side to take unjustified risks, be overly optimistic, or otherwise mis-estimate the likely sentence.<sup>57</sup> This could lead to bad agreements, or prevent the parties from reaching a settlement agreement.

One way to increase certainty would be the development of sentencing guidelines similar to those used in the United States. They address judges, but indirectly assist the government and the targets of an investigation to negotiate a plea agreement as they can anticipate what sentence range a judge would likely approve. Sentencing guidelines do not completely eliminate the possibility for both sides to bargain and perhaps in some cases get around the outcomes envisaged in the guidelines. For example, prosecutors can charge a defendant for a shorter period of a cartel (*i.e.*, agree to a kind of fact bargain). As one commentator has pointed out, sentencing guidelines are legal rules that work like price controls, and price controls encourage black markets.<sup>58</sup> However, even if they could be manipulated in some cases, guidelines can provide a good framework that should facilitate negotiations.<sup>59</sup>

Sentencing guidelines, of course, are not acceptable in all jurisdictions as they could be viewed as impermissible interference with judicial independence. However, this would not prevent competition authorities from developing and publicizing rules concerning fines and settlements of cartel cases, including discounts that would be considered in exchange for cooperation and guilty pleas. In those jurisdictions where competition authorities have to go to court to seek approval of a proposed settlement agreements, agency guidelines may also make it more likely that courts will accept proposed settlements.<sup>60</sup> As noted above, at least some commentators in Australia have expressed the belief that guidelines about penalties and discounts would be beneficial for the settlement of cartel cases, even if they would not replicate the U.S. Sentencing Guidelines.

There could be other examples for the effects of uncertainty on the negotiating process. For example, in the above description of plea bargaining procedures, one difference between the French and the U.S. procedures was the plaintiff's right to withdraw his guilty plea (and admissions of facts) if the decision maker rejects the sentence recommended by the plea agreement. Such a right is normally granted in U.S. plea agreements, but does not exist in the French system. If the plaintiff is not given the right of a conditional guilty plea, the proposed agreement will involve a greater risk because the decision maker might increase the negotiated fine. One would expect that the price the prosecutor or competition authority has to pay to obtain such a "riskier," more uncertain agreement would increase. This would mean that a greater discount from the base sanction would have to be offered to a defendant to induce him to plead guilty to reflect the risk that the actual sanction might exceed the bargained-for sanction. Conversely, allowing a conditional plea might have lower costs for a competition authority or prosecutor.

### *Private litigation*

Private litigation is not mentioned in the literature on plea bargaining, but could be another factor that can influence the outcome of cartel settlements. Defendants will be aware that the scope and content of their plea agreement might affect their exposure to damage awards in follow-on private litigation. Thus,

<sup>57</sup> Stephanos Bibas, *supra* note 37, at 2532-33.

<sup>58</sup> Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, at 1975 (stating that plea bargaining is to sentencing guidelines as black markets are to price control).

<sup>59</sup> Even critics of plea bargaining conclude that guidelines would be useful to achieve better outcomes. *See, e.g.*, ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 293 (3d ed. 2005) (criticising plea bargaining practice in the UK, but arguing that guidelines could reduce uncertainty which frequently disadvantages defendants).

<sup>60</sup> The potential effects of guidelines on maintaining effective deterrence is discussed *infra*, at p. 22.

negotiations with prosecutors or competition authorities might sometimes occur not only in the shadow of a criminal trial or procedure before the authority, but also in the shadow of a follow-on civil trial in which private plaintiffs will seek damages. Private litigation might affect settlement negotiations in several ways.<sup>61</sup>

For example, while in certain jurisdictions such as the United States a negotiated settlement will always include a defendant's admission of guilt that could be used as evidence in private follow-on litigation, in certain other jurisdictions the competition authority or prosecutor might not invariably insist on a guilty plea.<sup>62</sup> In these jurisdictions, where the guilty plea is "on the negotiating table," defendants are likely to resist a demand to plead guilty if they are concerned about the effects of a plea in follow-up civil litigation. Presumably, where the competition authority agrees to settle without a guilty plea, it can extract a higher fine. But that case might be the worst outcome for private litigants because they will end up without a formal decision finding liability and without a settlement admitting liability. That outcome might deprive at least some private litigants of the only realistic opportunity to bring an action against cartel members at reasonable costs. Without the evidence from a competition authority decision based on a settlement with guilty plea, they might find it too burdensome and risky to establish a full case in civil litigation. Conversely, if the competition authority insists on a guilty plea, it may have to lower the fine it can obtain in a settlement. Which solution a competition authority prefers should ideally be determined by the goal of maximizing overall deterrence. A lower fine in a plea agreement as a price to "buy" a guilty plea might be justified if the guilty plea makes civil litigation more likely and litigation can lead to fines that exceed the discount granted in the plea agreement.

In other circumstances, a defendant might prefer a plea agreement which covers a shorter period of time and agree to pay a relatively higher fine and the competition authority might agree.<sup>63</sup> This would be the defendant's preferred outcome if admitting guilt for a shorter period reduces the exposure to civil liability, and the reduced liability outweighs the higher fine in a plea agreement. Thus, private follow-on litigation could be an incentive for a plaintiff to settle a case with a relatively high fine with the competition authority. As in the previous example, a competition authority should ideally seek to determine which outcome in the settlement agreement can ultimately maximize deterrence.

### **C. *Negotiated Settlements and Rights of Defence***

For many authors in the United States and Europe,<sup>64</sup> the debate about plea bargaining should not be about contracts and measures that can ensure that parties get efficient agreements, but about whether plea bargaining is compatible with the values of a criminal justice system and undermines the rights of

<sup>61</sup> Concerns about private litigation might prompt parties to avoid settlement all together. See Germany's contribution, DAF/COMP/WP3/WD(2006)77.

<sup>62</sup> South Africa's contribution, for example, mentions that guilty pleas are not necessarily required to settle a case.

<sup>63</sup> See also DAF/COMP/WP3/M(2006)2/ANN2 (contribution emphasizing that a competition authority might agree to a plea agreement that covers a shorter period of the cartel, but require relatively high fine to compensate for the reduced charge).

<sup>64</sup> The list of critics is long. See, e.g., Stephen J. Schulhofer, *Plea Bargaining*, *supra* note 45, at 2009; Douglas D. Guidorizzi, *Should we Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 Emory L. J. 753, 768-79 (1998); Ralph Henham, *Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process*, 62 Mod. L. Rev. 515 (1999); Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, 2000 Crim. L. Rev. 895, 904; ANDREW ASHWORTH & MIKE REDMAYNE, *supra* note 59, at 285-96.

defendants.<sup>65</sup> One critic characterized plea bargaining as dominated by the desire of a bureaucracy to channel defendants as swiftly and cheaply as possible through the system which suits lazy or under-resourced prosecutors and lazy defence lawyers; there was too little judicial scrutiny of evidence, no nice debate about the technical requirements of the offence, and no scrutiny of the methods of obtaining the evidence so the earlier the plea the better.<sup>66</sup> Others have argued that negotiations are inconsistent with a criminal justice system, and that "the plea bargain convinces criminals that the majesty of the law is a fraud, and the law is like a Turkish bazaar."<sup>67</sup> Some of these concerns will be discussed below.

Frequently, authors have expressed the concern that plea bargaining institutes a trial penalty, as those who do not plead risk ending up with harsher sentences and unjustifiably reward the guilty who decide to plead guilty. However, others have rejected this concern and pointed out that there is no principled distinction between viewing the differential between a lower sanction in a plea agreement and the possibly higher sentence after a trial as a punishment for the exercise of certain rights or a reward for cooperation. As one author has argued, so long as the sanction that would be imposed after trial was considered legitimate, and the differential between the bargained-for sentence and the sentence imposed after a full trial can be explained as a logical consequence of the plea bargaining process, plea bargaining should not be viewed as coercive and would not involve a "punishment."<sup>68</sup>

Concerns that plea bargaining creates a trading place for rights where authorities no longer seek just punishment that always reflects the defendant's culpability appear less relevant in the context of anti-cartel enforcement by competition authorities. To some extent, trading of rights for a lesser or no punishment already occurs and is considered a necessary part of effective in anti-cartel enforcement. For example, competition authorities promise cartel participants, in specifically defined circumstances, that they will not be punished if they come in first and inform the competition authority about a cartel. Thus, some who are guilty will not be punished for their participation in a cartel.

Moreover, as in any investigation involving multiple defendants, rewards for cooperation can lead to sanctions that do not necessarily reflect the relative degree of culpability of each defendant. Sometime those that were the most involved in a conspiracy can offer the most evidence when they cooperate with a competition authority, not only about their own, but also the other participants' activities in a cartel. In these circumstances, rewards for cooperation can lead to "unjust" results in the sense that punishment does not reflect each cartel participant's culpability, irrespective of whether guilty pleas are part of the process.<sup>69</sup> Much of this has been accepted in anti-cartel enforcement on the ground that these methods are necessary to detect existing and deter future conspiracies.

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<sup>65</sup> Although the debate has focused on plea bargaining in criminal enforcement, some of the concerns could in principle be raised in connection with plea agreements in other enforcement systems as well, especially if they impose significant sanctions and must comply with similar standards as criminal procedures.

<sup>66</sup> Darbyshire, *supra* note 64, at 902;

<sup>67</sup> John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 Am. J. Crim. L. 215, 218 (1977).

<sup>68</sup> Frank H. Easterbrook, *Criminal Procedure*, *supra* note 34, at 311-12 (arguing that debate about whether plea agreements "punish" those who exercise their rights or reward cooperation is like asking the question whether the glass is half empty or half full).

<sup>69</sup> Bruce H. Kobayashi, *Deterrence with Multiple Defendants: an Explanation for "Unfair" Plea Bargains*, 23 Rand J. Econ. 507, 515 (1992).

Another question raised in the literature is whether negotiated settlements impermissibly lower the standard of proof below the beyond reasonable doubt standard or comparable standards applicable in criminal procedures or, where applicable, in administrative procedures.<sup>70</sup>

A practical illustration of this issue is the debate in the United States as to whether fines obtained by DOJ in plea agreements may sometimes exceed the fines that the government would obtain if the case went to trial and all elements of its case would have to be proven under a beyond reasonable doubt standard.<sup>71</sup> Under the so-called "alternative fine statute," the government can seek criminal penalties in excess of the Sherman Act's statutory maximum, based on twice the unlawful gain or damage resulting from an unlawful cartel.<sup>72</sup> Recent Supreme Court cases have clarified that in order to obtain a sanction above the Sherman Act limits, the government would have to prove the unlawful gain/loss resulting from a cartel to a jury under a criminal beyond reasonable doubt standard. Some have opined that this burden of proof may be difficult to meet in certain or perhaps many cartel cases.<sup>73</sup> Yet defendants continue to enter into plea agreements with fines above the Sherman Act limits. A number of factors have been used to explain this phenomenon.<sup>74</sup> This development shows not only that the incentives to cooperate and plead guilty are very powerful. It also raises the question whether plea agreements might sometimes enable the Government to obtain fines at a level that it could perhaps not obtain after a full trial because it might not always be able to prove all requisite elements beyond reasonable doubt.

Whether such a development raises concern primarily depends on how one approaches the rights granted to defendants in a criminal or comparable administrative procedure, and whether one considers that defendants should be able to trade these rights for certain benefits. In addition to the right to be presumed innocent unless the government can prove all elements of its case beyond reasonable doubt (or a similar standard), other rights implicated by plea agreements include the privilege against self incrimination, the

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<sup>70</sup> In plea agreements, defendants will agree to sanctions based on outcome probabilities if the case went to trial. Even if the probability of conviction is low, for example 50% or less, especially a risk averse defendant might consider a plea agreement, provided the discount offered in the agreement reflects the low probability of an adverse outcome. This arguably undermines the beyond reasonable doubt standard. For example, a beyond reasonable doubt standard could translate into a requirement that there is at least a 90% probability of the defendant's guilt. When at the end of a trial or formal decision making process the probability of guilt is below that measurement, it is automatically rounded down to 0% and the defendant is deemed innocent. But in a settlement this would not be the outcome.

<sup>71</sup> It should be emphasized that the debate is not about whether the defendants would be guilty, but only about the level of fines provided for in plea agreements.

<sup>72</sup> 18 USC § 3571(d). The statute provides: "If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process." The alternative fine statute is applied primarily with respect to corporate defendants. Scott D. Hammond, *Risks Remain High for Non-Cooperating Defendants*, at 9, fn. 51, Presentation before the ABA Section of Antitrust Spring Meeting (March 30, 2005).

<sup>73</sup> AMC, Memorandum, *supra* note 17, at 5-6 (summarizing opinions that proof beyond reasonable doubt would be difficult in most cartel cases, and also opinions to the contrary).

<sup>74</sup> *See supra*, at p. 8.

right to a fair and public hearing, and possibly the right to appeal.<sup>75</sup> Other rights could be implicated as well, dependent on the jurisdiction concerned.<sup>76</sup>

Those who argue that plea bargaining can raise serious constitutional rights issues take the position that these rights either cannot be traded because they are not personal entitlements, or can be traded only if the sentencing differential does not become so significant that it would “coerce” the defendant to agree to a waiver.<sup>77</sup> The opposing view would argue that these rights have something like an “autonomy value,” *i.e.*, waiving one's right should be recognized as one method of exercising them, and limitations on the ability to trade those rights reduce their value to the defendant.<sup>78</sup> This view is also reflected in the practice of jurisdictions that allow plea agreements.

How these rights can be affected by settlements in cartel cases depends on each jurisdiction's constitutional laws and procedural laws and regulations. In the context of cartel investigations, it could be argued that defendants routinely waive certain rights in exchange for a lesser fine. For example, reductions in fines may be granted to defendants who have provided self-incriminating evidence. They could not be required to provide such evidence because of their rights against self incrimination. By providing such evidence, they effectively waive this right in return for a lesser fine. This does not occur in the form of a formal bargain, but there is nevertheless the expectation that rights will be surrendered in exchange for a reward in form of a lesser fine.<sup>79</sup> It could be argued that since it is permissible to waive certain rights of defence, it should be permissible to waive other rights of defence as well so long as there is no coercion and the defendant can make an informed decision.

Especially in administrative enforcement systems there might be a question whether waiving the right of appeal can be part of a plea agreement. Unlike in criminal or civil anti-cartel enforcement, where plea agreements must be approved by a judge, waiving the right to appeal in administrative enforcement procedures would completely exclude any supervision of the proceedings before the administrative agency. One could argue that being able to pay for a waiver of the right to appeal would give an agency too much discretion to set its own procedural and investigatory standards.

A recent decision by the German Supreme Court highlighted these concerns.<sup>80</sup> The Supreme Court acknowledged that plea agreements, which are not regulated in German law, are in principle compatible

<sup>75</sup> These are rights examined by ANDREW ASHWORTH & MIKE REDMAYNE, *supra* note 59, at 287-292.

<sup>76</sup> Plea agreements in the U.S. also list, for example, the right to jury trial and the right to confront and cross-examine witnesses.

<sup>77</sup> *See, e.g.*, ANDREW ASHWORTH & MIKE REDMAYNE, *supra* note 59, at 287-292 (arguing that plea bargaining where it involves significant discounts of one third or more can infringe the presumption of innocence and the privilege against self incrimination). *Deweer v. Belgium*, (1980) EHRR 439 (court finding violation of Article 6 ECHR where defendant was given a choice between agreeing to a modest fine or facing lengthy criminal proceedings). A similar principle was confirmed by the German Supreme Court, in Decision GSSt 1/04, March 3, 2005 (finding that plea agreements can be permissible, but that the differential between bargained-for sentence and probable sentence after full trial must not be so excessive that defendant would be coerced to enter into a plea agreement). It is, however, not clear what standard would be applied to determine whether or not a sanction discount was so excessive that it became coercive.

<sup>78</sup> Frank H. Easterbrook, *Criminal Procedure*, *supra* note 34, at 317; Robert E. Scott & William J. Stuntz, *supra* note 34, at 1913 (arguing that denying parties the freedom to exchange their entitlements undermines their value).

<sup>79</sup> *See, e.g.*, Joined Cases T-236/01, T-239/01, T-244/01 to T-246/01, T-251/01 and T-252/01, *Tokai Carbon v. Commission*, Judgement of April 29, 2004 (Graphite Electrodes), ¶409 (CFI holding that voluntary collaboration in the form of providing self-incriminating evidence should be rewarded by fine reduction).

<sup>80</sup> Decision GSSt 1/04, March 3, 2005.

with the German rules and principles on criminal procedures. The Court found that the practice was necessary to maintain a criminal justice system with the currently available resources, and should be permitted provided certain safeguards were in place.<sup>81</sup> With respect to the right of appeal, however, the Court held that a waiver was not permissible in connection with the plea agreement. Moreover, when a plea agreement was negotiated, strict safeguards would have to be followed to ensure that a defendant's waiver of the right to appeal was not connected to these negotiations. A court could do nothing that suggested that it would expect or favour a waiver of the right to appeal. The Supreme Court reasoned that if a court knew that the judgment could not be reviewed, it would be less careful in establishing facts, the legal assessment, and the imposition of adequate sanctions. Thus, in essence the Court appeared to be concerned that when courts were able to include a waiver of the right of appeal in the plea agreement, they would know that they could "buy off" the defendant and hide any mistakes committed during the trial.

In principle, similar concerns could apply to a competition authority's investigation in an administrative system: the knowledge that it could ultimately offer a very favourable plea deal could undermine incentives to follow strict procedural standards. As one commentator explained, negotiations begin on the street, implying that even conduct in the initial investigation might be affected by the possibility to later offer the defendants a favourable plea agreement.<sup>82</sup>

Ultimately, the question whether and under what circumstances rights, including the right to appeal, can be waived in a plea agreement must be answered in accordance with the constitutional laws and other laws determining procedural rights in each jurisdiction. The standards may be different depending on the applicable procedural system and on whether the defendant is an individual or a corporation. In the examples from France and the Netherlands, described above, defendants do not waive their right to appeal, but in other jurisdictions with administrative enforcement more liberal solutions might be possible.

One could consider other mechanisms to address the concern that an enforcement agency would not have enough incentive to comply with investigatory and procedural standards if judicial oversight can be eliminated. One such mechanism would be a limit on the discount that the competition authority can grant a defendant for a guilty plea with a waiver of the right to appeal. The argument would be that if mistakes happen during the investigation of a cartel or at some other stage during the procedure that might possibly provide a defendant an opportunity to have a decision overturned on appeal, the authority should not be able to "buy off" the defendant by granting him a substantial discount. If the authority's case is too weak, it should not be able to avoid court review by entering a favourable deal and should instead either drop or litigate the case.<sup>83</sup>

In addition, even in jurisdictions where the right to appeal cannot be waived, negotiated settlements of cartel cases may still be useful and efficient. The Dutch example, although unique in terms of its procedural setting, suggests that once defendants feel that they have received a good deal, their incentive to litigate further may be very limited. Any incentive to appeal a settlement must be even more limited where a negotiated plea agreement includes a detailed account of the infringing conduct and stipulates that both parties to the agreement consider the sanction fair in light of the gravity of the infringement. In such a

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<sup>81</sup> The Court required that facts had to be clearly established to support the proposed sanction. It also had to be ensured that the sanction was just, appropriate for the offence, not too lenient, and comparable to sanctions in similar cases. The Court also emphasized that a threat of excessive penalty must not be used to force a defendant to plead guilty, and that a sanction cannot deviate from the sanction that would have been imposed in trial by more than what could be explained by the guilty plea.

<sup>82</sup> Penny Darbyshire, *supra* note 64, at 902.

<sup>83</sup> See, e.g., Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *Cardozo L. Rev.* 2295 (2006) (arguing that ban on steep discounts in plea agreements would force prosecutors to drop weak cases or to litigate them).

case, it might not be very likely that the same defendant can persuade a court on appeal that it should intervene in the parties' bargain.<sup>84</sup>

#### **D. The Effects of Settlements on Deterrence and Leniency Programs**

The sanctions differential between settlement and trial or formal decision raises the question whether plea bargaining could reduce deterrence. Determining the effects of a plea bargaining system on deterrence can be a complex exercise. A number of factors would have to be taken into account, including the sentence reduction granted in plea agreements, the ability of prosecutors or competition authorities to investigate more cartels and bring more cases, the use of plea agreements as an information-gathering device in cases involving multiple defendants, the effects of plea bargaining on leniency programs, and the effects of plea bargaining on civil litigation.

The effects of plea agreements on deterrence are ambiguous because they will primarily depend on two factors that can have opposing effects: on the one hand, lower penalties can reduce deterrence, but on the other hand plea agreements free up resources that can be used to detect and prosecute more cartels. The following simple example, designed by a commentator who supports plea bargaining, illustrates possible effects on deterrence: if the prosecutor offers a 40% discount in one trial, and uses the resources freed up because of the plea agreement to bring a second case which she also settles with a 40% discount, she has obtained 120% of the deterrence that he would have obtained had only the first case gone to trial.<sup>85</sup> Of course this example relies on a number of assumptions, and slight changes can change the results. If the discount in the plea agreements were 50%, there would be no difference between the plea agreement scenario and the trial scenario, assuming everything else remains unchanged. If, in addition, the savings of resources are somewhat less than 50% (i.e., there would be more cases that the prosecutor can bring or more cartels that the competition authority can detect and prosecute, but the number would not double) and a 50% discount was granted in the plea agreement, the example suggests that overall deterrence would be lower as a result of plea bargaining.<sup>86</sup>

Assessing the effects of plea agreements on deterrence is further complicated by the fact that cartel cases involve several defendants which can change the purpose and dynamics of settlement negotiations. In a multiple defendant scenario, plea agreements become a tool to gather information against other defendants in the same case. Thus, although a plea agreement will reduce the sanction for the one defendant concerned, and the reduction may be greater for the defendant who cooperates first, it may

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<sup>84</sup> For a similar conclusion see Wouter P.J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003*, 29 *World Competition* 345, 366 (2006) (concluding that appeals against decisions based on negotiated settlements would be much less likely to succeed). Wils also suggests that a decision closing a proceeding after a settlement would require less reasoning. While it may be correct that such a decision would not have to be as elaborate and detailed as a decision in contested proceedings, it would still appear that the competition authority should have an incentive to include a detailed description of the infringement and the defendant's participation in the infringement in a settlement, to which the defendant would have to agree, to reduce the chances of a successful appeal.

<sup>85</sup> Frank H. Easterbrook, *Criminal Procedure*, *supra* note 34, at 314.

<sup>86</sup> Other assumptions are implicit in this example. For example, it is assumed that bringing more cases with lower fines is equivalent in terms of deterrence to fewer cases with high fines; many economists, however, favour few cases with very high fines. There is also the assumption that the timing of sanction does not affect deterrence; there is a strong argument, however, that more immediate sanctions can increase individual deterrence.

increase the sum of sanctions that a competition authority can impose on all participants in a cartel as the plea agreement will require the defendant to cooperate in providing evidence against the others.<sup>87</sup>

A question particularly relevant in connection with cartel enforcement is whether plea agreements might undermine the effectiveness of leniency programs if discounts for cooperation and guilty plea are too generous. Leniency programs, which have become one of the most valuable tools in the detection and investigation of cartels, rely on the incentive of a zero penalty for the first one to report a cartel. Obviously, the greater the difference between the full amnesty scenario and all other scenarios (including the situation of cartel participants that later cooperate with the authority's investigation), the greater is the incentive to come in first and seek amnesty. In other words, the higher the sanction for the cartel members who are not the first ones to report a cartel and seek amnesty, the more effective a leniency program will be. There could be a concern that settlements could undermine this incentive. If there is a general expectation that the second cartel participant following a leniency application will receive a substantial fine reduction, more cartel members will wait while benefiting from the unlawful gains generated by the cartel rather than seek amnesty.

It would therefore be difficult to give a clear answer to the question as to how plea bargaining affect deterrence. Such concerns presumably would be less important in an enforcement system that includes the possibility of individual criminal sanctions and more important in an enforcement system that can impose only financial sanctions on corporations. It would appear that agreeing to unduly low sanctions in plea agreements just to increase the number of cases going through the system likely will undermine deterrence. This is another argument that plea agreements should be coupled with credible, high sanction that would be imposed as the result of a formal decision or full trial and that serve as the background for the negotiations of a settlement.<sup>88</sup> Moreover, guidelines on sentencing discounts might reduce the risk of unduly generous discounts and low sanctions.

#### **4. Some Tentative Conclusions Concerning the Use of Negotiated Settlements in Cartel Enforcement**

The previous discussion has shown that the settlement of cartel cases raises complex questions. In addition, there is great diversity among various jurisdictions, as differences in institutions, enforcement procedures and constitutional rights create different frameworks within which such settlements occur. Nevertheless, it appears that several issues can be identified that could be relevant across jurisdictions.

Using procedures to dispose of cartel cases by way of settlement can provide significant benefits to competition authorities. They can save resources and time, thus allowing the competition authority to allocate its resources more efficiently and overall increase enforcement activities, in particular against cartels. If used well, settlements should increase deterrence of cartels. Therefore, settlement of cartel cases has naturally become an area of great interest for competition authorities.

In many ways, settlement procedures and plea agreements are a logical extension of practices that are already in place. In the framework of leniency program, competition authorities already make some kind of contract offer by promising to impose no sanction on the first cartel participant who informs the authority about the cartel's activities. In addition, competition authorities reward cooperation in the form of sentencing discounts. In the course of cooperation, companies frequently will produce self-incriminating evidence, thus waiving rights that defendants normally have in criminal and administrative procedures. Settlements take these practice one step further by negotiating a broader package that typically will include an admission of unlawful conduct, a waiver of certain rights and the assumption of

<sup>87</sup> Bruce Kobayashi, *supra* note 69, at 515.

<sup>88</sup> Nuno Garoupa and Frank H. Stephen, *supra* note 34, text accompanying note 30.

cooperation obligations, in exchange for certain benefits, most importantly a reduced fine. Moreover, defendants in cartel cases are represented by sophisticated counsel and can make informed choices. Settlements of cartel cases by way of plea agreements therefore should raise fewer concerns than plea bargaining traditionally has raised in "normal" criminal law enforcement.

Competition authorities will be in a stronger position in settlement negotiations if they negotiate against the credible threat that they would impose or obtain substantial sanctions without a settlement, and can offer multiple benefits for cooperation and create multiple risks for non-cooperating defendants. By rewarding earlier cooperation, including the willingness to enter into plea agreements, to a greater extent than cooperation at a later point in the investigation, competition authorities can extend the race to the authority beyond the first cartel participant that seeks amnesty. Countries with prosecution of individuals may have greater leverage to extract high fines despite offering discounts for cooperation because, among other things, defendants will perceive a greater risk that someone might break ranks and cooperate sooner than the rest.

Settlements will be facilitated by the use of transparent and predictable "rules of the game." More transparent and predictable rules, in which the defendants are aware of "rewards" for cooperation as well as of the risks in case of non-cooperation, should increase the willingness to cooperate with the government's investigation and the likelihood that the two sides will agree on a sentence. Where plea agreements are subject to court approval, transparency, which would include a detailed account of the offence and discussion of the appropriateness of a proposed fine, also would make court approval more likely. In addition, transparent and predictable rules are more likely to alleviate any concerns about the effect of plea agreements on the rights of defendants.

Greater certainty will make plea agreements more valuable for both sides. For example, certainty will be increased if the defendant has the right to withdraw his guilty plea if the sanction ultimately imposed by a court exceeds the proposed sanction in the plea agreement; certainty also will be increased if the defendant can waive rights of appeals. But these features might not always be feasible in light of national procedural rules and constitutional laws. Uncertainty and the risk of an incorrect assessment of the facts, including the extent of cartel activities, would also be reduced when cases are settled once the competition authority has established most of the relevant facts and, in general, does not seek to settle cases too early.

Settlements of cartel cases can raise concerns about effective deterrence. If correctly implemented, settlements should not affect deterrence, but there might be a temptation to use settlements in the first place to quickly clear an agency's docket and get rid of "difficult" cases, rather than to pursue the public interest in maximizing deterrence. Settlements in cartel cases must also take into account the effect on leniency programs. Where discounts in plea agreements are too generous, the differential between the leniency applicant and the first cooperating defendant might be so small that it lessens the incentive to apply for leniency. This suggests that competition authorities should seek stiff sanctions in settlements. The ability to extract stiff sanctions even after a sanctions discount depends on whether there is a credible threat that substantial sanctions could be imposed in a formal decision or after a trial. This could also suggest that settlements and plea agreements should be used very cautiously, if at all, early in the development of a jurisdiction's anti-cartel enforcement efforts, before credible sanctions have been established and courts have been persuaded to approve or impose high fines.

Plea agreements always raise the question about the proper role of courts. In criminal and civil enforcement regimes, where courts typically have to approve proposed settlements, some observers have expressed a preference for more active courts to uphold principle of judicial oversight. Courts have also insisted that they do not just rubberstamp a proposed settlement. But too much interference by courts undermines the effectiveness of plea agreements because it introduces uncertainty into the negotiations. Thus, there should be some sort of "dialogue" between the competition authority and courts to ensure that

the authority can anticipate the courts' requirements and courts understand the way the competition authority handles settlements. Guidelines such as the U.S. Sentencing Guidelines can facilitate that "dialogue." Where such guidelines are not considered appropriate because they interfere with judicial independence, it may be important for the competition authority to have clear and transparent rules concerning settlements, including reductions in fines, in order to minimize the number of cases where courts feel that they have to intervene.

In countries with administrative enforcement, there is an important question as to whether the defendant can waive the right to appeal as part of the settlement and therefore exclude courts from the process entirely. On the one hand, it can be argued that the right of appeal should not be treated differently than other rights that the defendant typically may waive in plea agreements. On the other hand, plea agreements with a waiver of the right of appeal would eliminate any court supervision. There could be concerns about the effects of such a waiver on investigations and procedures, as the competition authority would know that it can avoid judicial review so long as it is willing to "pay off" the defendant. This question must be answered in each jurisdiction in accordance with applicable constitutional laws. Even if the right of appeal cannot be waived as part of the settlement, settling cartel cases by way of plea agreements would still be an attractive option. The defendant's admission of facts and its responsibility, and his agreement with the method in which sanction were assessed might substantially reduce the likelihood of successful appeals.

When private follow-on action is likely and potential civil liability is large, compared to the potential benefits from settling the case with the competition authority, the defendant's incentive to settle with the competition authority might be affected. Some defendants might be reluctant to settle at all, as they believe that their exposure to civil damages will be reduced if they can drag out the competition authority's investigation and gain additional time by appealing a decision. In other circumstances, they might have a strong preference for settlement terms that do not increase their exposure to civil damages (for example, by entering into a settlement without guilty plea), even if they would obtain a smaller reduction in sanctions. Ideally, competition authorities should seek settlements that maximize overall deterrence resulting from public and private enforcement.

The limited experience with plea agreements in cartel enforcement suggests that competition authorities that introduce plea agreements to settle cartel cases might consider establishing a review mechanism that would allow them to assess the effectiveness of their settlement policy, and its effects on deterrence as well as the rights of parties. Such a review mechanism should also include cases in which the two sides did not reach a negotiated solution.

## NOTE DE RÉFÉRENCE

### Introduction

En octobre 1996, Archer Daniels Midland a plaidé coupable aux États-Unis pour sa participation aux cartels internationaux de la lysine et de l'acide citrique et accepté de payer une amende de 100 millions USD<sup>1</sup>. Près de dix ans après la reconnaissance de culpabilité d'AMD aux États-Unis, la Cour européenne de justice (CJE) a rendu en mai 2005 un jugement définitif sur la procédure ouverte à la suite de l'enquête de la Commission européenne sur le cartel de la lysine. La CJE a rejeté un appel du jugement d'un tribunal de degré inférieur qui avait ramené l'amende d'AMD d'environ 47,3 millions EUR à 43,9 millions EUR mais confirmé par ailleurs la décision initiale de la Commission<sup>2</sup>.

Il est délicat de procéder à une comparaison directe des enquêtes de deux juridictions différentes sur un cartel en raison des dissimilitudes entre le droit constitutionnel, les procédures et les institutions en présence. Cette affaire montre néanmoins l'impact considérable que les différences entre les procédures d'application de la loi peuvent avoir sur la durée des enquêtes sur ce même cartel, même si les deux autorités sont tout aussi résolues à combattre les ententes injustifiables. Elle montre aussi que l'appel d'une décision des autorités de la concurrence lorsqu'une entente a été découverte a souvent pour effet de prolonger la procédure de plusieurs années pour, en définitive, aboutir à une réduction modeste, voire au maintien, des amendes infligées sans que la culpabilité des parties soit affectée<sup>3</sup>.

La cause principale des différences quant au temps et aux moyens nécessaires pour conclure formellement une enquête sur un cartel tient à la possibilité pour le Département de la Justice des États-Unis de « transiger » sur les délits d'entente. Le défendeur qui conclut avec l'État une transaction sur la peine qu'il encourt reconnaît avoir enfreint le droit de la concurrence et s'engage à coopérer à l'enquête en échange d'une atténuation de l'amende pénale qui lui sera infligée et de certains autres avantages ; il renonce en outre à certains droits de procédure, dont celui d'être jugé par un jury et celui de faire appel, ce qui permet de faire l'économie de procédures plus compliquées et d'une instance pénale et de recours

<sup>1</sup> Voir Département de la Justice des États-Unis, Communiqué de presse du 15 octobre 1996 (annonçant qu'AMD plaiderait coupable et accepterait de payer 100 millions USD pour le rôle qu'il avait joué dans les ententes de la lysine et de l'acide citrique). Les procédures contre les défendeurs qui étaient des personnes physiques ont pris plus de temps car Michael Andreas et Terrance Wilson ont fait appel de leur condamnation. *U.S. v. Andreas*, 216 F.3d 645 (7<sup>th</sup> Cir. 2000).

<sup>2</sup> Affaire C-397/03P, *Archer Daniels Midland c. Commission*, jugement du 18 mai 2006, *affirming in part and reversing in part (confirmant en partie et infirmant en partie)*, Affaire T-224/00, *Archer Daniels Midland c. Commission*, [2003] ECR II-2597. L'entente de l'acide citrique n'a pas été soumise à la même procédure. Dernièrement, le Tribunal de première instance a, pour l'essentiel, confirmé la décision de la Commission sur l'entente de l'acide citrique et confirmé la sanction infligée par la Commission dans sa totalité. Affaire T-59/02, *ADM c. Commission*, jugement du 27 septembre 2006. Il est possible qu'il soit fait appel de ce jugement.

<sup>3</sup> Voir par exemple Cento Veljanovski, *Penalties for Price-Fixers: An Analysis of Fines Imposed on 39 Cartels by the EU Commission*, 27 *European Competition Law Review* 510, 512 (2006) (qui suggère que dans 30 affaires d'entente dont la Commission a eu à connaître depuis 1999, la réduction moyenne de l'amende prononcée en appel est voisine de 18 %).

traînant en longueur à la suite de l'enquête du Département de la Justice. Au contraire, une autorité de la concurrence telle que la Commission européenne, qui s'inscrit dans un système administratif dans lequel cette possibilité de « transaction » n'existe pas, doit procéder à une enquête poussée pour pouvoir étayer convenablement une décision en bonne et due forme, laquelle, dans presque tous les cas, débouchera sur la saisine d'un tribunal<sup>4</sup>. L'autorité de la concurrence doit savoir qu'un défendeur, même s'il s'est montré coopératif pendant l'enquête dans l'espoir d'une amende moins élevée, aura tout intérêt à interjeter appel dès lors que l'issue probable du procès justifie le coût d'une poursuite de la procédure en justice<sup>5</sup>. Dans certaines circonstances, la durée d'une enquête peut même soulever des questions de droit constitutionnel, notamment si la durée excessive de la procédure affecte négativement les droits de la défense<sup>6</sup>.

Cette situation est une incitation puissante, pour les autorités de la concurrence qui ne règlent pas de transaction sur les ententes ou n'en ont pas le droit, à concevoir des mécanismes aptes à assurer le règlement négocié des délits d'entente et à accélérer leurs investigations, économiser des ressources et obtenir des résultats propres à dissuader les ententes futures tout en préservant les droits des parties sur lesquelles porte l'enquête.

La présente note de référence examinera plusieurs problèmes qui peuvent se poser si un délit d'entente fait l'objet d'un règlement négocié. Elle citera d'abord des exemples de procédures de « règlement négocié » sur des ententes mises au jour dans certaines juridictions au regard des procédures tant pénales qu'administratives et civiles. Cette section montrera qu'un large éventail de pratiques permet de dénouer une affaire en négociant un règlement avec le justiciable faisant l'objet de l'enquête. Cette note examinera ensuite plusieurs difficultés soulevées par les ouvrages théoriques sur la reconnaissance préalable de culpabilité et qui pourraient aussi entrer en ligne de compte pour le règlement des affaires d'entente. De même que les cadres juridiques et les pratiques en matière de règlement amiable sont très divers, de même les questions qui préoccupent le plus les différentes juridictions sont très diverses. Plusieurs d'entre elles devraient néanmoins être pertinentes dans la plupart des pays, notamment les facteurs qui peuvent inciter à (ou dissuader de) conclure un « contrat » avec l'État et influencer sur la substance d'un tel contrat, la relation entre négociation de peine et droits de la défense et l'incidence de la reconnaissance préalable de culpabilité sur l'effet de dissuasion et les programmes de clémence. La dernière partie de la présente note tirera quelques conclusions à la lumière de la possibilité qu'un nombre grandissant d'autorités de la concurrence explorent les moyens de régler les affaires d'atteinte à la concurrence à l'amiable de manière à employer leurs moyens plus efficacement et de façon plus efficiente dans la lutte contre les ententes.

Dans la totalité de ce texte, la note emploiera le terme de « transaction judiciaire » pour désigner de façon commode le règlement négocié d'une affaire d'atteinte à la concurrence. Il convient de remarquer que ce terme ne décrit pas toujours de manière appropriée les procédures ouvertes devant les autorités de la concurrence. Ces dernières soulignent le plus souvent qu'elles ne « négocient » pas avec les défendeurs comme des marchands de tapis dans le cadre d'un processus ouvert mais se bornent généralement à adoucir les sanctions dans des proportions limitées et selon un barème fixe en contrepartie de la reconnaissance des faits, de la collaboration du défendeur et, le plus souvent, d'un aveu de culpabilité. Le

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<sup>4</sup> La Commission européenne, à l'instar d'autres autorités de la concurrence, a la faculté de régler les affaires par des engagements formels. *Voir* Règlement 1/2003, O.J. L 1/1 (2003), art. 9. Cependant, les décisions sur les engagements ne peuvent être employées pour infliger des amendes et ne constitueraient donc pas une mesure appropriée dans les affaires d'entente.

<sup>5</sup> Cento Veljanovski, *supra* note 3, à 512.

<sup>6</sup> *Voir par exemple*, Affaire C-105/04P, FEG, jugement du 21 septembre 2006 (la Cour a examiné si la durée de l'enquête sur l'entente était compatible avec l'exigence d'un délai raisonnable stipulée par le droit communautaire, qui est étroitement liée aux principes similaires consacrés par la Convention européenne des droits de l'homme).

terme de « transaction judiciaire » a toutefois été très largement utilisé, de telle sorte que le texte ci-après s'y réfère aussi<sup>7</sup>.

Les principaux points abordés par la présente note sont les suivants :

- Dans les affaires d'atteinte à la concurrence, les après transactions judiciaires sont employées principalement dans les juridictions dotées de procédures civiles ou administratives d'application de la loi. Les politiques et procédures applicables à ces règlements négociés sont très diverses.
- Les transactions judiciaires peuvent être un moyen efficace de régler formellement les affaires d'entente par la négociation. Ils peuvent être regardés comme des contrats dans lesquels chaque partie s'engage à renoncer à certains des droits dont elle disposerait si l'affaire passait en jugement ou donnait lieu à une procédure administrative aboutissant à une décision en bonne et due forme et les deux côtés s'entendent sur une amende ou, à tout le moins, sur la réduction d'une amende. Ils peuvent être très avantageux pour les deux côtés car ils permettent d'économiser du temps et des moyens et ils devraient permettre aux autorités de la concurrence d'allouer leurs ressources de façon plus efficace de manière à renforcer leur activité de répression, en particulier contre les cartels.
- Les règlements négociés seront facilités par l'emploi de procédures prévisibles et transparentes, ce qui devrait faire prendre conscience aux défendeurs des « avantages » d'une attitude coopérative et des risques auxquels ils s'exposeraient en refusant de collaborer. La transparence et la prévisibilité des procédures doivent renforcer l'incitation à transiger et la probabilité que les deux camps s'entendent sur les termes d'une transaction judiciaire, y compris la sanction qui en découle. Les asymétries d'information et les incertitudes peuvent gêner la conclusion d'un règlement négocié. Il peut généralement être préférable, pour atténuer les incertitudes et les risques d'une évaluation incorrecte des faits, de régler une affaire par la négociation une fois que l'autorité de la concurrence a établi les faits pertinents et il peut être souhaitable que, en règle générale, cette autorité ne recherche pas trop précocement un règlement négocié.
- Le règlement négocié des affaires d'atteinte à la concurrence peut susciter des interrogations sur l'efficacité de la dissuasion. S'ils sont correctement appliqués dans le contexte d'une menace crédible de sanctions suffisamment lourdes qui pourraient résulter d'un procès ou d'une condamnation, les règlements négociés ne devraient pas nuire à la dissuasion. Cela étant, il peut être tentant de recourir aux transactions pour réduire rapidement le nombre d'affaires inscrites au rôle d'une agence et de se débarrasser ainsi de cas « difficiles » au lieu de défendre le bien commun en recherchant l'effet de dissuasion maximum. Il peut être délicat d'apprécier comment le compromis entre une réduction de l'amende infligée et un meilleur emploi des moyens disponibles et les autres aspects d'un règlement négocié peut affecter l'effet de dissuasion visé. Cependant, la maximisation de l'effet dissuasif peut être un critère utile aux autorités de la concurrence pour trouver les compromis inhérents à une négociation de peine.

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A titre d'explication supplémentaire, la présente note n'emploiera le terme de « défendeur demandant à bénéficier de la clémence » que pour le premier participant à une entente qui informe une autorité de la concurrence de l'existence de cette entente et se voit accorder une immunité totale. Ainsi, aux fins de la note, les participants à une entente peuvent être soit des défendeurs demandant à bénéficier de la clémence, soit des parties à une transaction judiciaire, mais pas les deux à la fois.

- Le règlement négocié des affaires d'entente doit aussi prendre en compte les effets des programmes de clémence. Si les réductions de peine accordées dans le cadre de ces transactions sont trop généreuses, l'écart entre, d'une part, celui qui demande la clémence et bénéficie d'une immunité et, de l'autre, le premier défendeur qui accepte de coopérer pourrait être tellement faible que l'incitation à solliciter la clémence pourrait s'éteindre.
- Plusieurs ouvrages sur la négociation de peine ont exprimé la crainte que les accords ainsi conclus ne sapent les droits de la défense, notamment la présomption d'innocence et le droit de ne pas s'incriminer soi-même. Certaines juridictions considèrent que les défendeurs peuvent négocier ces droits et les exercer en y renonçant ; dans ce cas, ces droits peuvent être intégrés dans un accord. Dans d'autres juridictions, les défendeurs n'ont pas forcément le droit « d'échanger » certains droits, de telle sorte que la renonciation à ces droits ne saurait faire partie d'un accord après transaction judiciaire. Même s'il est impossible de renoncer à certains droits, notamment celui de faire appel, le règlement des affaires de cartel par un accord après transaction judiciaire peut rester bénéfique.
- Le peu d'expérience dont on dispose en matière de transaction judiciaire dans le domaine de la lutte contre les ententes suggère que les autorités de la concurrence qui introduisent ces transactions pour régler des affaires d'entente pourraient envisager un mécanisme de contrôle leur permettant d'évaluer l'efficacité de leur politique de règlement et ses effets sur la dissuasion comme sur les droits des parties.

## 1. Définition et champ d'application du document

Il n'existe pas de définition universelle du concept de transaction judiciaire, de négociation de peine ou de règlement négocié. Un commentateur a défini en termes généraux le processus comme une pratique pouvant inclure la négociation sur une réduction de peine, l'abandon de tout ou partie des chefs d'accusation ou leur atténuation en contrepartie d'une reconnaissance de culpabilité, de la reconnaissance de certains faits, de la renonciation au droit de faire appel ou de la coopération du défendeur dans une autre affaire pénale<sup>8</sup>. Cette définition souligne que la portée des transactions judiciaires peut varier selon la nature des « contreparties » ou des droits que chaque partie est capable de ou disposée à offrir lors de la négociation d'un accord amiable.

En fait, au sein même d'un pays, la forme et la portée des accords après négociation de la peine peuvent varier. Comme le montrent les exemples de la section ci-après, ces disparités deviennent encore plus sensibles si l'on compare les procédures de règlement négocié en vigueur dans des pays différents et dans des cadres de procédures différents. Les procédures vont de l'approche très structurée qu'emploient les autorités des États-Unis chargées de l'application des lois pénales à des accords après transaction judiciaire assez complets, tandis que d'autres États recourent à des accords plus limités en les accompagnant de procédures administratives d'exécution.

Toutes ces procédures ont en commun le fait que, par suite des négociations, chaque côté accepte de renoncer à certains droits dont il disposerait si l'affaire faisait l'objet d'un procès ou si une procédure administrative débouchant sur une décision en bonne et due forme était engagée – pour le parquet ou l'autorité de la concurrence, c'est le droit de demander une peine plus sévère tandis que, pour le défendeur, ce sont certaines protections dont il bénéficierait dans le cadre d'un processus plus officiel et d'un procès ainsi que la possibilité d'être acquitté – et il convient d'une amende, ou au moins d'un rabais sur une amende (qui, dans les deux cas, peut être subordonnée à l'accord d'un tribunal).

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<sup>8</sup> Michael P. Scharf, *Trading Justice for Efficiency*, Volume 2, Journal of International Criminal Justice, pp. 1070 (2004).

## 2. Exemples de règlements négociés et de procédures de règlement négocié dans des affaires d'entente

Aujourd'hui, les transactions judiciaires sont communément employées, surtout dans les juridictions où les ententes sont passibles de sanctions pénales, notamment aux États-Unis et au Canada. Quoique les États où la lutte contre les ententes relève de procédures civiles ou administratives aient une expérience plus limitée de la négociation de peine, un petit nombre d'autres juridictions comme, par exemple, l'Australie, l'Afrique du Sud, la France ou la Nouvelle-Zélande, a recours à des pratiques similaires. De plus, à une occasion, les Pays-Bas recourent à un mécanisme analogue à la « procédure de règlement négocié » dans une affaire d'entente, encore que la portée de cette transaction ait été définie de façon assez restrictive.

La section ci-après ne mettra en lumière que quelques aspects du processus de règlement négocié appliqué dans quelques juridictions, aspects qui apparaissent comme les plus importants pour l'analyse et la comparaison des pratiques actuelles.

### A. Règlement négocié d'actions pénales contre les ententes : États-Unis

Les États-Unis sont l'État qui a l'expérience la plus poussée de l'emploi des transactions judiciaires dans la lutte contre les ententes. Le rôle que ces accords ont joué en renforçant l'efficacité des enquêtes et l'effet de dissuasion est largement reconnu. En décrivant une situation où la menace crédible de sanctions significatives est couplée à la possibilité pour le Département de la Justice de conclure sélectivement des transactions judiciaires avec des personnes tant physiques que morales faisant l'objet d'une enquête, les commentateurs font allusion au climat de « dog eat dog » (affrontement sans merci) que le DOJ a instauré. Ils conviennent que cette situation a considérablement amélioré la capacité de négociation de l'État et son aptitude à s'assurer la coopération des personnes physiques et morales, ce qui rend plus efficace l'action contre les ententes<sup>9</sup>. La description ci-après se focalisera sur deux aspects des transactions judiciaires aux États-Unis qui pourraient avoir une portée plus générale, notamment l'accent mis sur la transparence et la prévisibilité et sur la capacité d'imposer des amendes non négligeables même après octroi d'un rabais en échange de la coopération et de la reconnaissance de culpabilité du défendeur.<sup>10</sup>

<sup>9</sup> Anthony Hammond et Roy Penrose, *Proposed criminalisation of cartels in the UK* 30 (2001) (note l'importance des sanctions pénales dans la lutte contre les ententes aux États-Unis et reconnaît explicitement que la transaction judiciaire est la clef du succès du programme de ce pays pour la lutte contre les cartels ; OCDE, *Cartels: Sanctions Against Individuals* 18-19 (2004). Voir aussi Scott D. Hammond, *Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations*, exposé prononcé le 29 mars 2006 à l'occasion de la Réunion de printemps tenue dans le cadre de la 54<sup>e</sup> Session annuelle de la Section de l'American Bar Association pour le droit antitrust p. 12 (décrit comment la coopération d'une société faisant l'objet d'une enquête permet au Département de la Justice de cibler l'emploi de ses moyens et fait peser une pression accrue sur les autres personnes et sociétés sur lesquelles porte l'enquête).

<sup>10</sup> On peut trouver ailleurs une description plus complète de l'utilisation des transactions judiciaires dans le cadre d'une affaire d'entente. Voir par exemple Gary R. Spratling, *Negotiating the Waters of International Cartel Prosecutions*, exposé prononcé devant la 13<sup>e</sup> session annuelle de l'Institute on White Collar Crime (4 mars 1999) ; Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, allocution prononcée devant la 20<sup>e</sup> session annuelle de l'Institute on White Collar Crime (2 mars 2006) ; Scott D. Hammond, *Second-in Cooperation*, *supra* note 9. En outre, l'Antitrust Modernization Commission a récemment organisé des audiences et des débats sur certains aspects des transactions judiciaires dans des actions pénales contre des ententes. Les documents concernés sont disponibles à [www.amc.gov/about\\_commission.htm](http://www.amc.gov/about_commission.htm) et <http://www.abanet.org/cle/programs/n07wcc1.html>

En ce qui concerne les institutions et procédures, les transactions judiciaires impliquent le plus souvent un accord entre l'État et la société ou la personne qui est la cible d'une enquête et reconnaît certains faits, plaide coupable et s'engage à collaborer à l'enquête, les deux camps s'accordant sur la sanction préconisée. Le résultat de la transaction judiciaire est présenté à un tribunal qui, s'il l'approuve, prononcera la sentence. Les tribunaux demeurent libres de rejeter un projet d'accord, encore qu'ils semblent rarement faire usage de cette faculté. Dans le cadre de l'accord, le défendeur renonce à toute une série de droits expressément énumérés, y compris celui de ne pas plaider coupable, celui d'être jugé par un jury pour lequel il serait présumé innocent sauf si l'accusation prouve chaque grief sans qu'un doute raisonnable soit possible, et enfin celui de faire appel. Le plus souvent, l'accord après transaction judiciaire permet au défendeur de retirer sa reconnaissance de culpabilité si le tribunal rejette l'accord et la sanction proposée.

**Principes :** transparence, prévisibilité et proportionnalité sont les maîtres mots du règlement négocié des affaires d'entente. Les responsables du Département de la Justice (DOJ) ont souligné à maintes reprises l'importance de ces principes<sup>11</sup> et les observateurs extérieurs en ont aussi pris acte en comparant leurs pratiques nationales en matière de règlement négocié avec celles du DOJ<sup>12</sup>. Les lignes directrices sur la détermination de la peine (Sentencing Guidelines), qui donnent aux tribunaux fédéraux un barème de sanctions pour la commission de certains crimes au regard de la législation fédérale, dont les infractions à la loi Sherman (Loi antitrust), sont la pierre angulaire de l'application de ce principe<sup>13</sup>. De plus, elles fournissent indirectement à l'État et au défendeur un cadre pour la négociation d'un règlement puisque les deux côtés savent que la peine recommandée doit être cohérente avec les Lignes directrices sur la détermination de la peine pour être approuvée par le tribunal. Les Lignes directrices sur la détermination de la peine indiquent non seulement une gamme de sanctions, mais aussi les circonstances qui peuvent justifier une atténuation de la peine<sup>14</sup>. Il semblerait donc que, si un membre d'un cartel soumis à une enquête se demande s'il doit coopérer avec l'État et plaider coupable, la gamme des sanctions possibles ou probables et celle des avantages pouvant résulter de sa collaboration sont assez claires avant même que la négociation ne s'engage.

Bien que les Lignes directrices sur la détermination de la peine constituent un cadre détaillé pour la détermination des sanctions, il semble qu'elles offrent aussi une marge de manœuvre non négligeable pour que les sanctions proposées soient considérées comme justes dans une affaire donnée. Les récompenses accordées à ceux qui acceptent de coopérer sont spécifiques à l'affaire et la valeur de leur collaboration

<sup>11</sup> Voir par exemple Gary R. Spratling, *Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders*, dans les Actes annuels de la 26<sup>e</sup> session du FORDHAM CORPORATE LAW INSTITUTE pp.613, 616-17 (B. Hawk éd. 2000) et les exposés cités *supra* note 10.

<sup>12</sup> Ray Finkelstein, *Notes on Penalties in Antitrust Cases: An Australian/US Comparison*, exposé prononcé devant la Commission de réforme du droit australienne, 9 juin 2001 (dans lequel il note que le calcul de la peine est un processus beaucoup plus « réglementé » et prévisible aux États-Unis qu'en Australie).

<sup>13</sup> Les Lignes directrices sur la détermination de la peine sont disponibles à l'adresse <http://www.ussc.gov/guidelin.htm>. Bien qu'elles ne soient considérées que comme indicatives et que leur application ne soit plus obligatoire à la suite de plusieurs décisions récentes de la Cour suprême, les tribunaux continuent à les appliquer.

<sup>14</sup> Les circonstances atténuantes les plus pertinentes qui concernent la coopération sont : la date de la coopération ; l'importance des preuves, y compris l'exhaustivité de la recherche ; les informations sur d'autres activités collusives et la reconnaissance de responsabilité. En acceptant de coopérer avec l'État et de plaider coupable, les défendeurs peuvent obtenir un rabais substantiel sur leur amende ; une dérogation accordée si l'aide fournie est importante peut aboutir à une sanction inférieure à la peine plancher envisagée dans les Lignes directrices. Les Lignes directrices prennent aussi en compte des facteurs susceptibles d'aggraver la peine (par exemple le fait de diriger une association de malfaiteurs dans le cadre d'une entente).

peut varier d'un cas à l'autre en fonction, par exemple, du nombre de participants à l'entente, du calendrier et de la capacité de fournir des preuves utiles<sup>15</sup>. Il existe plusieurs moyens de réduire les sanctions proposées pour les défendeurs qui coopèrent. On peut retenir un volume plus faible pour le « commerce affecté » (lequel détermine la fourchette de base de l'amende), par exemple en acceptant, vis-à-vis de la société qui a permis leur découverte, de ne pas retenir à son encontre les faits nouveaux recueillis sur les activités de l'entente, on peut lui accorder une remise de 30 % à 35 % pour sa coopération, ou encore calculer l'éventuelle remise sur la base d'un montant assez bas s'inscrivant dans la fourchette stipulée par les Lignes directrices sur la détermination de la peine ; enfin, on peut accorder un traitement plus favorable aux personnes physiques (en limitant le nombre de ceux qui ne seront pas couverts par la transaction judiciaire avec leur entreprise, ce qui revient à limiter le nombre de personnes risquant une sanction individuelle)<sup>16</sup>.

**De lourdes sanctions :** une autre caractéristique des pratiques des États-Unis est l'obtention par l'État de sanctions lourdes même s'il a accordé des remises substantielles à ceux qui ont préalablement reconnu leur culpabilité pour récompenser leur coopération. Ces sanctions incluent des amendes pénales substantielles pour les sociétés et, souvent, une peine d'emprisonnement pour un ou plusieurs de leurs dirigeants. Il semble que ces pratiques aussi soient en partie dues aux Lignes directrices sur la détermination de la peine, qui fixent le montant de base des amendes à un niveau élevé.

La possibilité pour l'État d'imposer de lourdes sanctions lorsqu'il négocie le règlement d'une affaire d'entente s'explique aussi par la position de force dans laquelle il se trouve car la menace d'une sanction douloureuse est crédible et il manie efficacement la carotte et le bâton, faisant planer des risques divers sur le défendeur qui refuserait de coopérer et lui faisant miroiter la possibilité de récompenses dans le cas contraire. En décidant de ne pas transiger, les sociétés faisant l'objet d'une enquête ne renoncent pas seulement à deux avantages : voir le ministère public demander au tribunal de s'écarter de la sanction prévue par les Lignes directrices sur la détermination de la peine au motif de leur coopération précoce et être certaines que l'affaire sera réglée rapidement dans le cadre d'un accord contraignant (au lieu de quoi elles risqueraient l'ouverture d'un procès à l'issue de l'enquête, stade où le dossier de l'accusation est le plus solide). Elles pourraient aussi perdre le bénéfice éventuel de la politique Amnistie plus de la Division et, à ce titre, celui d'une division par trois des dommages et intérêts infligés dans le cadre d'une procédure civile pour les autres délits qui seraient découverts dans le cadre du programme « Amnistie plus »<sup>17</sup>. Le fait qu'une enquête porte sur un grand nombre de personnes et de sociétés dont les intérêts sont susceptibles de s'opposer conforte encore plus la position du parquet lorsqu'il négocie avec chacune d'entre elles ; par exemple, une société s'interrogeant sur l'opportunité de coopérer ou non court le danger qu'un ou plusieurs cadres dirigeants fassent défection et commencent à collaborer avec la Division pour réduire les risques qu'ils encourent<sup>18</sup>. De plus, le souci d'épargner la prison aux cadres dirigeants, ou au moins de limiter le

<sup>15</sup> *Id.* (explique en outre que certains facteurs influant sur la remise obtenue par une société qui accepte de coopérer ne sont pas forcément transparents parce qu'ils ne seront divulgués qu'au tribunal qui prononce la sentence et non au public).

<sup>16</sup> Une description plus détaillée de ces facteurs est donnée par Scott D. Hammond, *Second-in Cooperation*, *supra* note 10.

<sup>17</sup> Cette description fait suite à une déposition de la Section antitrust de l'American Bar Association devant l'Antitrust Modernization Commission : ABA Section of Antitrust Law, Comment Regarding Criminal Remedies: The Alternative Fine Statute – 18 USC § 3571(d) (2006), disponible à [http://www.amc.gov/public\\_studies\\_fr28902/criminal\\_pdf/060630-ABA\\_Criminal\\_Remedies.pdf](http://www.amc.gov/public_studies_fr28902/criminal_pdf/060630-ABA_Criminal_Remedies.pdf). Voir aussi Antitrust Modernization Commission, Réunion des 25 et 26 juillet 2006, Mémoire sur une étude supplémentaire à propos des recours en matière pénale pp. 6-8, disponible à l'adresse <http://www.amc.gov/pdf/meetings/CrimRemSupplMemo060720circ.pdf>.

<sup>18</sup> On trouve une autre illustration de la manière dont les changements du rapport de force entre les parties peuvent affecter la teneur d'un accord amiable à l'issue d'un marchandage judiciaire dans la politique de

nombre de ceux qui sont exposés à ce risque, pourrait aussi être, pour les sociétés, une puissante incitation à plaider coupable.

### **B. Règlement négocié d'actions civiles contre les ententes : Australie**

En Australie, les affaires d'entente sont réglées dans le cadre de procédures civiles. Il a été rapporté que, depuis le premier règlement négocié d'une affaire d'entente en 1994, le règlement de ce type d'affaires par la voie transactionnelle entre l'ACCC et le défendeur est devenu la pratique la plus usitée<sup>19</sup>. Comme l'autorité de la concurrence doit aller en justice pour obtenir une amende, l'organisation de la procédure est assez proche de celle des États-Unis. Au cours de l'enquête, l'ACCC et le défendeur s'entendent sur un bref énoncé des faits et sur le montant de l'amende proposée, qui sera soumis au tribunal. Les tribunaux restent libres d'accepter ou refuser la sanction proposée. Une coopération sans réserve est exigée de la cible d'une enquête pour qu'une réduction de l'amende soit proposée ; elle doit notamment plaider coupable, fournir des preuves contre les autres membres du cartel, empêcher que les faits ne se renouvellent et rendre pleinement compte de l'activité du cartel. De plus, le défendeur doit s'engager à indemniser les victimes de l'entente<sup>20</sup>.

L'une des principales différences entre les procédures de l'Australie et des États-Unis tient à l'absence de directives sur les sanctions, notamment les rabais accordés en Australie en échange de la coopération des accusés. Quoique le Trade Practices Act stipule que plusieurs variables doivent être prises en compte pour fixer le montant de l'amende, il ne fournit pas de directives précises sur l'importance de la sanction et sur la pondération relative des divers facteurs, contrairement aux Lignes directrices sur la détermination de la peine en vigueur aux États-Unis<sup>21</sup>.

Selon un commentateur, une approche aussi structurée que celle des Lignes directrices sur la détermination de la peine serait mal accueillie par les tribunaux australiens parce qu'elle limiterait le droit pour la Cour de se prononcer en dernier ressort sur la pénalité<sup>22</sup>. Un autre commentateur a toutefois noté que l'absence de directives est une source d'incertitude lors du processus de la négociation, laquelle peut nuire à l'efficacité du système. Il convient que « si [ ] l'ACCC se trompe toujours sur les sanctions et/ou si

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l'État vis-à-vis des cadres dirigeants étrangers. *Comparer avec* Gary R. Spratling, *Negotiating the Waters*, *supra* note 10, p. 13 (qui explique que les cadres dirigeants étrangers ont plus de chances d'échapper à une peine de prison s'ils plaident coupable et offrent une coopération précieuse au motif qu'il peut être difficile de se voir reconnaître la compétence juridique pour juger ces personnes) avec Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions*, discours prononcé devant la 20<sup>e</sup> session annuelle de l'Institute on White Collar Crime (2 mars 2006) (qui explique qu'aujourd'hui le Département de la Justice rejette systématiquement les propositions de règlement négocié pour les défendeurs étrangers qui ne comportent pas de peine de prison parce que l'évolution internationale facilite les poursuites contre les personnes physiques étrangères qui ne se soumettent pas volontairement à la compétence des États-Unis).

<sup>19</sup> Voir David K. Round & Leanne M. Hanna, *Curbing Corporate Collusion in Australia: The Role of Section 45A of the Trade Practices Act*, 28 *Melbourne University Law Review*, pp. 242, 259-60 (2005) (qui observe que, depuis l'affaire *Hymix* en 1994, les amendes ont été fixées par une négociation dans la grande majorité des cas).

<sup>20</sup> Alan Ducret, *Courts – Their Role in Regulatory Arrangements*, exposé prononcé devant la Commission de réforme du droit australienne le 9 juin 2001, p. 3.

<sup>21</sup> Ray Finkelstein, *supra* note 12, p. 3.

<sup>22</sup> *Id.*, p. 4.

la Cour invalide constamment les transactions judiciaires, l'insécurité qui en résulte jouera certainement contre la conclusion d'un accord avec l'ACCC<sup>23</sup>. »

Le risque de désaccord entre l'ACCC et le tribunal qui prononce la condamnation en l'absence de règles plus spécifiques a été mis en lumière par au moins une affaire dans laquelle le tribunal a semblé s'opposer à la volonté de l'ACCC d'accorder à un défendeur qui s'était montré très coopératif une remise nettement plus forte que celle qui avait été consentie à un autre, moins coopératif. L'ACCC avait considéré qu'il fallait accorder au défendeur qui avait été le premier à collaborer un traitement plus favorable afin de préserver l'incitation pour les parties à coopérer même si elles ne bénéficient pas d'une clémence totale. La Cour a néanmoins refusé la gradation des sanctions proposée et jugé au contraire que, pour des raisons d'équité, aucune partie ne devait recevoir un avantage sensiblement supérieur à celui des autres parties nonobstant leur degré de coopération très inégal<sup>24</sup>. Il apparaît que le tribunal n'a pas suffisamment pris en compte le fait que son raisonnement amoindrirait sensiblement l'incitation à être le premier à collaborer avec l'autorité de la concurrence puisque ceux qui attendraient le dernier moment pour ce faire ne seraient pas pénalisés.

Un commentateur en a conclu qu'une approche cohérente, constante et clairement explicitée de la fixation des sanctions contribuerait utilement à conforter le système de la négociation de peine. Tout en reconnaissant que l'adoption de Lignes directrices sur la détermination de la peine analogues à celles des États-Unis ne conviendrait pas nécessairement à l'Australie, il estime qu'on pourrait définir une démarche fiable et rationnelle au moyen d'un dialogue, sous une forme ou sous une autre, entre les tribunaux et l'autorité compétente<sup>25</sup>. Il s'agirait ainsi de mettre sur pied le nécessaire mécanisme associant la carotte et le bâton pour augmenter la probabilité de détection des ententes, aider les parties à calculer les sanctions et permettre aux défendeurs de mieux comprendre les conséquences des décisions qu'ils ont à prendre.

### **C. Règlement négocié d'actions administratives contre les ententes : France et Pays-Bas**

#### *France*

En 2001, la France a instauré une procédure s'apparentant à la négociation de peine qui autorise le règlement négocié des affaires d'atteinte à la concurrence devant le Conseil de la concurrence<sup>26</sup>. En vertu de l'Article L. 464-2-III, si un défendeur ne conteste pas les charges portées contre lui et accepte de changer de conduite à l'avenir, le *rapporteur général* devant le Conseil de la concurrence peut proposer une réduction des amendes. Quoique le texte de la loi ne soit pas parfaitement clair sur ce point, la jurisprudence a confirmé que, pour être autorisé à négocier sa peine, le défendeur doit ne pas contester non seulement certains faits, mais aussi leur qualification en tant que violations de la loi et sa propre responsabilité. Cette procédure est donc similaire à une reconnaissance préalable de culpabilité bien que, techniquement, elle n'oblige pas le défendeur à « admettre » sa culpabilité.

Ce dispositif, appelé *procédure de transaction*, peut être employé dans toutes les affaires de concurrence et il l'a été au moins une fois dans une affaire où un accord illégal avait été conclu entre des

<sup>23</sup> Alan Ducret, *supra* note 20, p. 2.

<sup>24</sup> ACCC v. Ithaca Ice Works Pty Ltd, [2001] FCA 497 (2 mai 2001), non divulgué et cité dans Alan Ducret, *supra* note 20, pp. 4-5.

<sup>25</sup> Alan Ducret, *supra* note 20, p. 6.

<sup>26</sup> Ce résumé s'inspire d'un texte publié par la DGCCRF, La pratique transactionnelle du Conseil de la concurrence (mars 2005) disponible à l'adresse [http://www.minefi.gouv.fr/DGCCRF/03\\_publications/actualitesccrf/pratique\\_consconcu184.htm](http://www.minefi.gouv.fr/DGCCRF/03_publications/actualitesccrf/pratique_consconcu184.htm).

concurrents<sup>27</sup>. L'obligation pour le défendeur de prendre des engagements substantiels quant à un changement de conduite à l'avenir peut cependant amener à se demander si la procédure est vraiment conçue pour les affaires d'entente, du moins si l'on se réfère à son interprétation actuelle<sup>28</sup>.

Quoique le *rapporteur général* « négocie » une éventuelle transaction avec le défendeur, c'est en définitive le Conseil de la concurrence qui a le dernier mot sur la réduction de l'amende, mais il n'est pas lié par l'évaluation du rapporteur et peut s'écarter de sa recommandation dans un sens ou dans l'autre. Cela est une source d'incertitude, notamment parce que le défendeur ne peut subordonner la reconnaissance des faits et de sa culpabilité à l'acceptation par le Conseil de la concurrence de l'amende minorée que propose le *rapporteur*. Si le Conseil trouve qu'un rabais plus faible que celui que propose le *rapporteur* est justifié, le défendeur ne peut se rétracter<sup>29</sup>. La loi dispose que l'amende maximale prévue par les textes peut être réduite de 50 %. Il apparaît que, en pratique, une réduction de l'amende est proposée par rapport à l'amende (hypothétique) qui aurait été infligée en l'absence de règlement négocié sous réserve du maximum prévu par la loi. Il semble que le rabais accordé soit souvent proche de 50 % bien que, dans un cas, le Conseil ait accordé une remise de 90 %<sup>30</sup>.

En 2004, une cour d'appel examinant la nouvelle procédure de transaction a précisé que la conclusion d'un règlement n'implique pas que le défendeur renonce à son droit de faire appel. Ainsi, le défendeur ne peut certes revenir sur sa reconnaissance de culpabilité si l'amende infligée par le Conseil de la concurrence dépasse celle qu'il a négociée avec le *rapporteur général*, mais lui est loisible de contester la décision devant un tribunal par la suite.

#### *Pays-Bas : les ententes dans le secteur du bâtiment et des travaux publics*

Les Pays-Bas n'ont pas codifié de procédure de règlement négocié à laquelle la NMa pourrait recourir de façon générale dans les enquêtes sur les ententes. Cependant, l'enquête sur une entente à grande échelle dans l'industrie du bâtiment et des travaux publics qui a impliqué toutes les grandes entreprises de la branche aux Pays-Bas<sup>31</sup> a amené la NMa à envisager une procédure alternative qui pourrait accélérer la procédure de sanction suivant les investigations et faire l'économie d'un processus immobilisant des moyens pendant de nombreuses années. Quoique cette procédure ne donne pas lieu à une reconnaissance préalable de culpabilité (il n'a pas été demandé aux défendeurs de plaider coupable), elle a bel et bien abouti à un accord entre l'autorité de la concurrence et les sociétés faisant l'objet de l'enquête, accord dans lequel les deux camps ont échangé leur renonciation à certains droits : les défendeurs renonçaient à certains

<sup>27</sup> Voir Décision 03-D-45, 25 septembre 2003 (calculatrices à usage scolaire) (qui conclut, entre autres pratiques anticoncurrentielles, à une collusion entre Texas Instruments et Noblet).

<sup>28</sup> Décision 06-D-09, 11 avril 2006 (fabrication de portes) (qui conclut que, dans une affaire d'entente, l'engagement offert par un participant à l'entente de s'abstenir d'échanger des prix à l'avenir n'est pas suffisant pour répondre à l'exigence légale d'un changement de conduite de l'entreprise à l'avenir).

<sup>29</sup> Cour de cassation, arrêt 1486FS-P+B, 22 novembre 2005 (rejetant l'appel de Texas Instrument contre une amende infligée par le conseil de la concurrence qui lui accordait une réduction inférieure à celle que proposait le *rapporteur général*); disponible à l'adresse <http://www.conseil-concurrence.fr/doc/cass03d45calculatrices.pdf>.

<sup>30</sup> Décision 04-D-65, 30 novembre 2004, La Poste; disponible à l'adresse <http://www.conseil-concurrence.fr/pdf/avis/04d65.pdf> (réduction de 90 % accordée au vu des engagements substantiels, crédibles et vérifiables de La Poste de modifier sa conduite à l'avenir).

<sup>31</sup> Un résumé succinct de la procédure engagée contre les ententes dans le bâtiment et les travaux publics figure dans OCDE, Les ententes injustifiables : Troisième rapport sur la mise en œuvre de la Recommandation de 1998 (2005) disponible à l'adresse <http://www.oecd.org/dataoecd/58/2/35863464.pdf>.

droits de procédure reconnus par les procédures administratives. Ils devaient accepter d'être représentés par une seule personne devant l'autorité de la concurrence, renonçaient à disposer d'un accès individuel au dossier et à être représentés individuellement aux audiences et s'engageaient à ne pas contester individuellement les faits et la qualification juridique retenue par l'autorité à l'issue de l'enquête. En contrepartie de la renonciation à ces droits, un rabais de 15 % sur l'amende qui aurait été infligée dans le cadre d'une procédure normale était promis aux défendeurs<sup>32</sup>.

Il semble que l'accord proposé par la NMa ait été un succès, puisque près de 90 % des sociétés visées par l'enquête ont opté pour la procédure accélérée. En outre, moins de 10 % de celles auxquelles une amende a été infligée ont fait appel, ce qui suggère que plus de 80 % des sociétés faisant l'objet d'une enquête pour participation à l'une des ententes dans le domaine du bâtiment et des travaux publics ont accepté l'offre de la NMa bien que le montant des amendes infligées à nombre d'entre elles par cette dernière ait été considérable.

Si les circonstances de cette affaire sont exceptionnelles au vu du grand nombre d'entreprises participant à l'entente et de la pression exercée par l'opinion publique pour qu'elles avouent leurs torts, ce processus est remarquable à plusieurs points de vue. Si tous les défendeurs avaient fait usage de leurs droits, la procédure de sanction aurait été beaucoup plus lourde et la sentence n'aurait été rendue qu'à une date nettement plus lointaine, probablement avec un retard de plusieurs années. Il apparaît que le rabais assez faible sur l'amende a suffi à inciter un grand nombre de sociétés à renoncer à certains droits de procédure et ouvrir ainsi la voie à une procédure de sanction rapide<sup>33</sup>. De plus, au moins à ce stade, il semble que la décision de la NMa de ne pas tenter de limiter le droit pour les défendeurs de faire appel n'ait pas nui à la réussite de l'accord puisque seul un petit nombre d'entre eux ont exercé leur droit de recours.

### **3. Questions soulevées par le règlement négocié des affaires d'entente**

Comme on le verra, un règlement dans une affaire d'entente peut être assimilé à un échange contractuel de droits entre l'État (ministère public ou autorité de la concurrence) et la cible d'une enquête. Les exemples fournis par un groupe de juridictions démontrent que la portée de ces contrats et l'organisation de la procédure dans le cadre de laquelle ils sont conclus sont très variables. Le spectre s'étend de l'approche exhaustive et structurée des États-Unis pour la négociation de peine, qui laisse une marge de manœuvre assez réduite pour le « marchandage », à la démarche plus ouverte de l'Australie dans ses pratiques de règlement négocié, en passant par des transactions résultant de négociations sur le montant d'une amende ou de sa réduction mais qui ne sont pas nécessairement définitives parce que le défendeur reste libre de contester le résultat de la transaction. Le cas des Pays-Bas suggère que, s'il n'est pas possible de conclure un accord exhaustif et définitif, un accord plus limité portant sur un échange de droits peut constituer une expérience intéressante qui peut engendrer des économies de coûts non négligeables sans nuire pour autant à l'impératif de dissuasion.

<sup>32</sup> La procédure accélérée a été conçue avec soin de manière à respecter les principes d'application régulière du droit. En particulier, toutes les sociétés avaient le choix entre la procédure accélérée et une enquête complète, la procédure accélérée étant assortie de la possibilité pour les sociétés de s'en retirer et d'affirmer leur droit à l'application de toute la procédure jusqu'à l'audience orale, et il n'était pas envisagé que les parties renoncent à leur droit de faire appel.

<sup>33</sup> Bien qu'il soit probable que d'autres raisons aussi aient incité les sociétés à accepter l'accord qui leur était proposé, notamment la vive pression de l'opinion publique, qui attendait d'elles qu'elles avouent les infractions commises, et le désir de mettre fin à une enquête qui risquait de les distraire de préoccupations plus importantes.

### A. *Les accords négociés en tant que contrats*

Selon les partisans de la transaction judiciaire, les accords après transaction judiciaire doivent être considérés comme des contrats similaires aux accords amiables dans les instances civiles<sup>34</sup>. Dans le règlement négocié d'une affaire, les défendeurs qui plaident coupable vendent au procureur certains droits substantiels et procéduraux en échange de concessions auxquelles ils attachent plus d'importance qu'aux droits auxquels ils renoncent. Les défendeurs pourraient soit faire usage de ces droits, soit les vendre puisqu'ils préfèrent une sanction légère mais certaine à une sanction plus lourde à laquelle ils ne sont pas sûrs d'échapper. De son côté, le parquet vend la possibilité de sanctions plus sévères et économise du temps et des ressources qu'il peut consacrer à un plus grand nombre d'affaires. Plus une condamnation prononcée à l'issue d'un procès est coûteuse en termes financiers, plus la transaction judiciaire est efficiente sous l'angle économique<sup>35</sup>. L'ensemble du processus concourt au bien de tous puisqu'il permet aux deux camps d'employer plus efficacement des ressources rares et de maximiser l'effet de dissuasion avec celles dont ils disposent<sup>36</sup>.

L'accord sur une sanction dans une transaction judiciaire doit tenir compte de la probabilité d'une condamnation, du montant probable de l'amende qui serait infligée à l'issue d'un procès et du coût que l'on prévoit pour ce dernier. La conclusion d'un accord est probable si les deux camps s'entendent à peu près sur le « prix » du délit au vu de ces facteurs. Le défendeur acceptera une reconnaissance préalable de culpabilité si l'amende, ou la valeur pécuniaire de la sanction reçue dans le cadre de la négociation de peine est inférieure ou égale à la probabilité de sa condamnation (telle qu'il l'estime lui-même) multipliée par la valeur pécuniaire de la sanction qui lui sera infligée à l'issue d'un procès plus le coût de ce dernier. Le parquet acceptera la reconnaissance préalable de culpabilité si le montant de l'amende ou la valeur pécuniaire de la sanction infligée dans le cadre de la négociation de peine est supérieure à la probabilité de la condamnation (telle qu'il l'estime lui-même) multipliée par la valeur pécuniaire de la sanction qui sera infligée à l'issue d'un procès moins le coût de la tenue dudit procès<sup>37</sup>.

De ce point de vue, la négociation de peine ne fait que s'ajouter aux nombreuses transactions qui se déroulent en marge du procès. On doit attendre de la négociation de peine qu'elle soit en grande partie conforme au résultat qu'aurait donné un procès ou une décision officielle après en avoir déduit l'économie

<sup>34</sup> L'un des principaux textes favorables aux transactions judiciaires est Frank H. Easterbrook, *Criminal Procedure as Market System*, 12 *Journal of Legal Studies* 289 (1983). Voir aussi Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale Law Journal* 1909, 1912-17 (1992) (qui défend le point de vue selon lequel les transactions judiciaires doivent être regardées comme un contrat dans lequel les deux côtés peuvent échanger leurs droits et toute restriction au droit d'échanger ses droits en réduirait la valeur).

Les commentateurs conviennent cependant que l'analogie entre les contrats civils et les transactions judiciaires est loin d'être parfaite. Voir par exemple Nuno Garoupa & Frank H. Stephen, *Law and Economics of Plea-Bargaining* 2 (2006) ; Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 *Yale Law Journal* 1969, 1974-75 (1992) (qui souligne les différences entre les contrats de droit privé et les transactions judiciaires).

<sup>35</sup> Voir par exemple Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 *American Economic Review* 749 (1983).

<sup>36</sup> Frank H. Easterbrook, *Plea Bargaining*, supra note 34, p. 1975 (qui explique les règles fondamentales de l'échange de droits dans le cadre d'une transaction judiciaire).

<sup>37</sup> Les coûts du ministère public ne sont pas liés aux moyens nécessaires pour intenter une action en justice, mais aux coûts d'opportunité, c'est-à-dire aux pénalités qu'il pourrait obtenir dans d'autres procès avec les moyens consacrés à celui de l'affaire dont il s'agit. Frank H. Easterbrook, *Criminal Procedure*, supra note 34, p. 297 (qui explique que le procureur dispose d'un budget donné qu'il s'attend à épuiser indépendamment du fait qu'il règle une affaire à l'amiable ou non).

de ressources qu'elle autorise<sup>38</sup>. Par conséquent, les peines résultant d'une transaction judiciaire doivent refléter en grande partie le degré de culpabilité des défendeurs<sup>39</sup>.

Dans l'ensemble, cette description plaide fortement pour un recours accru aux règlements négociés ou transactions judiciaires dans la lutte contre les ententes : ces dispositifs peuvent permettre aux deux côtés d'obtenir une issue plus favorable que dans un procès parce que les négociations peuvent aboutir à des résultats plus conformes aux préférences des uns et des autres que dans le cas où un procès ou une enquête formelle aboutissant à une décision définitive devrait être mené à son terme<sup>40</sup>. Cette solution permet aux deux côtés d'économiser leurs moyens. Le public y gagne aussi du fait des moyens économisés et aussi parce que l'effet dissuasif de l'action contre les ententes s'en trouve globalement renforcé, pour peu que ladite solution soit correctement mise en œuvre.

Ces avantages évidents expliquent peut-être que la transaction judiciaire soit employée en priorité pour résoudre les affaires en faisant l'économie d'un procès dans de nombreux États où cette procédure a été mise en place. Il ressort par exemple de certaines estimations que, aux États-Unis, 90 % des affaires relevant d'une procédure pénale au regard de la législation fédérale sont réglées par voie de transaction judiciaire. Un commentateur, évoquant les procédures pénales, juge peu probable que, malgré ses faiblesses et les nombreuses critiques, cette voie soit abandonnée une fois qu'elle a été introduite<sup>41</sup>. On peut observer le même phénomène dans l'action contre les cartels, au moins dans certaines juridictions. Ainsi, il apparaît que la transaction judiciaire soit la procédure la plus fréquemment employée pour clore une affaire d'entente aux États-Unis. L'expérience de l'Australie décrite plus haut va dans le même sens, puisqu'en assez peu de temps la négociation de peine s'est imposée comme le moyen privilégié de

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<sup>38</sup> Cela tendrait à prouver que les défendeurs préfèrent un règlement précoce parce qu'il leur permet d'économiser des moyens qu'ils devraient sinon utiliser dans le cas d'un procès. Cependant, selon les procédures applicables, il pourrait aussi exister une incitation en sens inverse. Par exemple, si les amendes infligées ne sont pas assorties d'intérêts de retard, les parties pourraient préférer une longue enquête aboutissant au paiement d'une amende dans plusieurs années au règlement immédiat d'une amende de moindre montant dans le cadre d'un règlement négocié. Par exemple, certains auteurs soulignent que le long délai généralement requis pour régler une affaire pénale par la voie d'un procès en Italie incite fortement les parties à ne pas conclure une transaction judiciaire. Nicola Boari & Gianluca Fiorentini, *An economic analysis of plea bargaining: the incentives of the parties in the mixed penal system*, 21 International Review of Law & Economics 213, 229 (2001). Un autre facteur propre à rendre moins intéressante la transaction judiciaire est l'existence d'un délai de prescription susceptible d'empêcher certaines poursuites civiles pour peu que le défendeur parvienne à retarder une décision de l'autorité de la concurrence.

<sup>39</sup> Pour un examen de cette présentation des transactions judiciaires et des règlements négociés, voir Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Trial*, 117 Harvard Law Review 2463, 2465-66 (2004). Cependant, Bibas conclut que les hypothèses sous-tendant cette présentation ne sont pas justifiées et que des paramètres spécifiques à la transaction judiciaire peuvent aboutir à des résultats qui ne reflètent pas l'issue probable d'un procès.

<sup>40</sup> Voir par exemple Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, p. 1975-78 (souligne l'importance d'un choix autonome en fonction des préférences) ; Gene M. Grossman & Michael L. Katz, *supra* note 35, p. 749 (qui assimile la transaction judiciaire à une assurance aidant les défendeurs ayant une aversion au risque à éviter une sentence plus sévère dans un procès et une société présentant aussi une aversion au risque à avoir de plus grandes chances d'obtenir une condamnation certaine même si la sanction y afférente est plus faible).

<sup>41</sup> Albert W. Alschuler, *An Exchange of Confessions*, 142 New Law Journal 937 (1992) (observe à propos des affaires pénales aux États-Unis que, en l'absence de réglementation significative, la transaction judiciaire aboutit à des habitudes de travail bureaucratiques et une insuffisance de moyens budgétaires qui font qu'il devient de plus en plus difficile de sortir de ce système).

conclure les affaires relatives aux ententes. Il est vraisemblable que la même évolution se produirait ailleurs s'il devenait possible d'y régler les affaires d'entente par la voie transactionnelle<sup>42</sup>.

### **B. Facteurs pouvant influencer la négociation d'un accord amiable**

Comme le suggère la menace d'un procès, la possibilité d'obtenir des sanctions substantielles par un règlement négocié dépend en premier lieu du fait que l'autorité de la concurrence ou le parquet puisse négocier alors même que la perspective d'un procès ou d'une décision formelle fait planer une menace crédible de sanctions sévères. Selon les procédures d'exécution et les institutions concernées, « l'ombre du procès » peut aussi être liée aux procédures d'appel dans le cas où le défendeur peut s'attendre à une réduction des amendes en appel. Par exemple, s'il est systématiquement fait appel des décisions prises contre les ententes par un système de mesures administratives et si, dans de nombreux cas, les amendes sont réduites en appel, on peut s'attendre à ce que, si un pays adopte la procédure de transaction judiciaire, le rabais sur les sanctions tienne compte de la réduction des amendes que les défendeurs s'attendraient à obtenir en appel<sup>43</sup>.

Cependant, il ne suffit pas de décrire les règlements négociés comme un échange contractuel de droits reflétant le résultat probable d'un procès moins les économies de coûts résultant d'un accord pour répondre complètement à la question de l'issue probable des négociations menant à cet accord. Le plus souvent, d'autres paramètres influenceront sur les pourparlers et, par là, sur le contenu des accords de reconnaissance préalable de culpabilité<sup>44</sup> ; ces paramètres pourraient même empêcher les parties de parvenir à un accord et ils peuvent aussi expliquer que les transactions judiciaires s'écartent des critères normatifs souhaités pour la conclusion de contrats efficaces et justes reflétant la culpabilité du défendeur et prévoyant des sanctions propres à dissuader de nouvelles violations de la loi à l'avenir. Ces facteurs sont les coûts d'agence, l'incertitude et l'asymétrie de l'information et les enquêtes sur des cibles multiples dans lesquelles on récompense la coopération consistant à apporter des preuves contre les autres cibles. Le risque que des actions ne soient intentées au civil à la suite de l'enquête peut aussi affecter le règlement négocié du dossier constitué par l'État.

#### *Coûts d'agence*

La plus grande crainte qu'expriment les ouvrages sur les transactions judiciaires concerne la représentation inadéquate des défendeurs. Plusieurs observateurs ont déploré que les avocats de la défense

<sup>42</sup> Cependant, lorsqu'il existe des procédures de règlement négocié mais qu'elles ne sont guère utilisées dans les affaires d'entente, on peut se demander si des ajustements de procédure pourraient être indiqués pour qu'elles connaissent plus de succès. On rapporte que plusieurs États s'en sont rendus compte lorsqu'ils ont ouvert la possibilité de négocier la peine dans les affaires pénales « ordinaires ». Par exemple, après que l'Italie eut instauré la transaction judiciaire en 1989, moins de 10 % des affaires ont été réglées à l'amiable (encore que ce chiffre ait pu changer récemment). Voir Nicola Boari & Gianluca Fiorentini, *supra* note 38, p. 214.

<sup>43</sup> Par exemple, l'étude récente de Veljanovski suggère que, de 1999 à 2006, la réduction moyenne des amendes infligées par le Tribunal de première instance était proche de 18 %. Ce chiffre tient compte des affaires dans lesquelles les défendeurs avaient déjà obtenu un rabais pour leur coopération. Cento Veljanovski, *supra* note 3, p. 512. Si la possibilité d'un règlement amiable était offerte dans cette situation, on pourrait s'attendre à ce que les allègements de peine reflètent la possibilité d'obtenir de telles réductions d'amendes en appel. Un tel résultat pourrait se produire indépendamment du fait que les transactions judiciaires incluent une renonciation au droit de faire appel. Si c'était le cas, la réduction de l'amende prévue en appel serait égale au prix que l'autorité de la concurrence devrait payer en contrepartie de la renonciation. Si la renonciation était exclue de la transaction, cette dernière pourrait tenir compte de cette réduction de manière à éliminer l'incitation pour le défendeur à faire appel.

<sup>44</sup> Voir Bibas, *supra* note 39, p. 2530.

soient rémunérés pour chaque affaire, de telle sorte qu'ils ont tout intérêt à la régler l'affaire ; ils se plaignent aussi de leur manque d'expérience, du nombre excessif d'affaires dont ils acceptent de se charger, voire de leur faible qualification. Ils peuvent donc transiger alors même que leur client aurait intérêt à aller jusqu'au procès en raison de la faible probabilité d'une condamnation<sup>45</sup>. Mais ces préoccupations concernent les prévenus indigents dont l'avocat est commis d'office et ne sont pas pertinentes dans la plupart des affaires d'entente<sup>46</sup>.

Il convient aussi de s'inquiéter de la confusion des rôles du côté du procureur, à la fois mandant et mandataire, qui a personnellement intérêt à conclure un arrangement alors que cela ne sert pas forcément les intérêts de la puissance publique, qui doit obtenir l'effet de dissuasion optimal<sup>47</sup>. Plusieurs commentateurs ont fait remarquer que, quand les intérêts du procureur divergent de ceux de la puissance publique, celui-ci propose généralement une sanction inutilement légère<sup>48</sup>. D'autres encore ont souligné que la transaction judiciaire ne s'est pas révélée très heureuse quand l'instauration de ce mécanisme visait principalement à offrir au parquet un moyen de réduire le nombre d'affaires dont il a la charge et de raccourcir les délais de procédure au lieu d'améliorer la sélection des affaires et de rehausser le niveau global de la dissuasion<sup>49</sup>. Là encore, une bonne part de ces craintes pourrait être beaucoup moins justifiée s'agissant des autorités de la concurrence participant à l'action contre les ententes<sup>50</sup>. Ces débats ont néanmoins le mérite de rappeler utilement que les intérêts des deux parties à la négociation d'un accord dans le cadre d'une transaction judiciaire ne coïncident pas obligatoirement avec celui de l'État, qui a besoin d'un effet dissuasif maximum. Le règlement amiable des affaires d'entente a pour but de renforcer la dissuasion globale et non de traiter le plus grand nombre possible d'affaires dans les délais les plus brefs possible<sup>51</sup>.

<sup>45</sup> Voir par exemple Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale Law Journal 1979, 1988-89 (1992) (qui fait valoir que les problèmes d'agence sont plus aigus chez le défendeur) ; Nuno Garoupa & Frank H. Stephen, *supra* note 34, Section 4.2 (qui examine les solutions envisageables pour améliorer la qualité de la représentation du défendeur). Même les partisans de la transaction judiciaire concèdent qu'une représentation juridique défaillante peut fausser les résultats. Voir par exemple Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, p. 1973-74 (qui souligne qu'une représentation obligatoire et une rémunération insuffisante faussent les négociations sur la peine).

<sup>46</sup> En fait, lorsque les commentateurs étudient les réformes envisageables pour améliorer la qualité de la représentation d'un défendeur, ils recensent de nombreuses mesures qui semblent aller de soi dans les affaires d'entente, comme la possibilité pour le défendeur de choisir l'avocat le plus capable ; une rémunération adéquate de l'avocat de la défense, payé à l'heure et non pas en fonction d'un maigre forfait par affaire ; et des avocats expérimentés qui, le plus souvent, connaissent aussi bien le processus des enquêtes sur les ententes et des transactions judiciaires que le personnel de l'autorité de la concurrence.

<sup>47</sup> Voir par exemple Stephen J. Schulhofer, *supra* note 45, p. 1987-88 (résume les raisons pour lesquelles le parquet ne fixe pas les priorités de manière optimale lorsqu'il décide de négocier le règlement d'une affaire ou de saisir les tribunaux).

<sup>48</sup> *Id.*, p. 1988.

<sup>49</sup> Nuno Garoupa & Frank H. Stephen, *supra* note 34, texte accompagnant la note 8 (qui cite des études indiquant que la priorité donnée à la réduction du nombre d'affaires à traiter est l'une des principales raisons pour lesquelles l'introduction de la transaction judiciaire dans la justice pénale italienne a été un échec).

<sup>50</sup> Dans ce contexte, beaucoup d'arguments concernent le système des procureurs élus, qui peuvent avoir pour but principal l'amélioration de leur notoriété politique. Stephen J. Schulhofer, *Plea Bargaining*, *supra* note 45, p. 1987-88. Cependant, il a parfois été souligné que, pour des motifs personnels et professionnels, les procureurs de métier sont enclins à négocier le règlement des affaires au lieu de recourir à un procès, qui ne serait pas pratique et ferait peser des risques sur leur carrière.

<sup>51</sup> La question de l'influence des règlements négociés sur la dissuasion sera discutée plus loin.

*Incertitude et asymétrie de l'information*

Les ouvrages sur la transaction judiciaire ont aussi attiré l'attention sur le manque d'informations ou sur le fait que certains disposent de plus d'informations que d'autres. Les commentateurs ont indiqué que l'insuffisance ou l'asymétrie de l'information peut aboutir à des résultats inéquitables et/ou inefficients et que, en particulier, un accord amiable intervenant à un stade trop précoce de l'enquête peut aggraver le risque d'accord inefficace<sup>52</sup>. Comme un commentateur l'a fait remarquer à propos des procédures pénales, des règles peuvent être conçues pour donner aux défendeurs des informations dans un délai suffisant pour qu'ils les exploitent efficacement au cours d'un procès mais non d'une négociation de peine ; il convient donc d'envisager des mesures afin de pouvoir fournir plus tôt une plus grande quantité d'informations, ce qui aiderait tant le parquet que les défendeurs à mieux évaluer un accord de reconnaissance préalable de culpabilité. Pour remédier à cette lacune, on pourrait procurer un accès plus aisé aux informations en possession de l'autre partie à un stade plus précoce du processus de telle sorte qu'elles puissent être évaluées au cours du processus de négociation<sup>53</sup>.

Ce genre d'argument est fréquemment invoqué comme mesure pour protéger les défendeurs<sup>54</sup>. Mais les autorités de la concurrence peuvent aussi y trouver leur compte. Les craintes relatives à l'asymétrie de l'information suggèrent que, en général, une affaire d'entente ne doit pas être réglée par la négociation avant que la majeure partie des preuves ait été collectée et analysée<sup>55</sup>. En particulier, si une société offre de coopérer et recherche un règlement négocié à un stade très précoce de l'enquête, c'est souvent qu'elle dispose de plus d'informations que l'autorité de la concurrence sur les activités du cartel et sur sa propre participation. A un stade ultérieur, l'autorité de la concurrence aura accumulé davantage d'informations sur l'entente et, bien souvent, un règlement négocié aura plus de chances de refléter le degré de culpabilité du défendeur. La conclusion d'une transaction à un stade plus tardif d'une enquête aurait pour effet de réduire les économies de coûts. Il n'est cependant pas interdit de supposer qu'elle aboutirait à un meilleur résultat. Par exemple, dans les procédures conformes au modèle des procédures d'exécution de la Commission européenne, la rédaction d'une déclaration d'objections pourrait être un stade de l'enquête où l'autorité de la concurrence aura généralement une bonne idée de l'étendue des activités du cartel et de la solidité de son dossier<sup>56</sup>.

Il est possible, en plus de la date du règlement négocié, d'étalonner les peines et de mieux partager les informations pour réduire les asymétries et éviter des incertitudes. L'indétermination est mère de l'incertitude, qui peut elle-même pousser l'un ou l'autre camp à prendre des risques indus, à faire preuve d'un optimisme excessif ou à se méprendre sur la peine probable<sup>57</sup>. Ces carences peuvent aboutir à un mauvais accord ou empêcher les parties de parvenir à un règlement négocié.

<sup>52</sup> Voir par exemple Stephanos Bibas, *supra* note 39, p. 2531-32 (qui soutient que les disparités affectant l'information peuvent aboutir à des résultats peu compatibles avec les impératifs d'équité et de justice) ; Stephen J. Schulhofer, *Plea Bargaining*, *supra* note 45, p. 1998 ; Nuno Garoupa et Frank H. Stephen, *supra* note 34, dans la Section 4.1 (qui affirme que l'asymétrie de l'information peut affecter l'efficacité d'un règlement négocié).

<sup>53</sup> Stephanos Bibas, *supra* note 37, p. 2532.

<sup>54</sup> Nuno Garoupa et Frank H. Stephen, *supra* note 34, dans la Section 4.1

<sup>55</sup> Bien entendu il pourrait exister des raisons de transiger plus tôt dans certaines circonstances.

<sup>56</sup> Un argument similaire a été défendu à propos des actions privées lors de la table ronde de juin 2006 sur les poursuites privées. Voir DAF/COMP/WP3/M(2006)2/ANN2 (contribution soulignant que les règlements négociés avec des acteurs de droit privé sont le plus souvent conclus peu avant ou à la fin de la divulgation des preuves, lorsque les deux parties disposent d'une information fiable sur la solidité de leur dossier).

<sup>57</sup> Stephanos Bibas, *supra* note 37, p. 2532-33.

Un bon moyen de réduire l'incertitude consiste à élaborer des lignes directrices sur la détermination de la peine analogues à celles qui sont en vigueur aux États-Unis. Quoique ces directives s'adressent aux juges, elles aident indirectement l'État et les cibles des enquêtes à négocier une transaction judiciaire parce qu'elles leur permettent de prévoir l'ordre de grandeur de la sanction qu'un juge pourrait approuver. Les lignes directrices sur la détermination de la peine n'éliminent pas totalement la possibilité que les deux côtés négocient voire, dans certains cas, évitent les sanctions prévues par ces directives. Par exemple, un procureur peut incriminer un défendeur pour sa participation à une entente sur une durée plus courte (c'est-à-dire qu'il conclurait un compromis en transigeant sur les faits). Comme l'a fait observer un commentateur, les lignes directrices sur la détermination de la peine sont une règle juridique fonctionnant comme le contrôle des prix, et l'on sait que ce dernier encourage le marché noir<sup>58</sup>. Cependant, même si elles peuvent être manipulées dans certains cas, les lignes directrices sur la détermination de la peine peuvent offrir un cadre propice à la négociation<sup>59</sup>.

Bien entendu, les lignes directrices sur la détermination de la peine ne sont pas acceptables dans toutes les juridictions parce qu'elles pourraient être considérées comme une atteinte intolérable à l'indépendance de la justice. Cela n'empêcherait cependant pas les autorités de la concurrence de rédiger et publier des règles sur le règlement des affaires d'entente et les amendes à infliger, y compris les rabais envisagés en échange de la coopération du défendeur et de sa reconnaissance de culpabilité. Dans les États où les autorités de la concurrence sont obligées d'intenter une action devant les tribunaux pour qu'ils approuvent une proposition de règlement négocié, l'existence de directives peut aussi rendre plus probable l'acceptation de telles propositions par les tribunaux<sup>60</sup>. Comme on l'a vu plus haut, plusieurs commentateurs australiens croient que des lignes directrices sur la détermination de la peine seraient bénéfiques pour le règlement négocié des affaires d'entente même si elles ne reproduisent pas celles qui sont en vigueur aux États-Unis.

On pourrait citer d'autres exemples pour illustrer les effets de l'incertitude sur le processus de négociation. Par exemple, il ressort de la description des procédures de transaction judiciaire ci-dessus que l'une des grandes différences entre les procédures de la France et des États-Unis est le droit pour le défendeur de revenir sur sa reconnaissance de culpabilité (et sur les faits qu'il a admis) si le juge rejette la sanction préconisée dans l'accord de reconnaissance préalable de culpabilité. Ce droit est généralement reconnu dans les accords conclus aux États-Unis, mais il n'existe pas en France. Si le défendeur n'a pas le droit de rendre sa reconnaissance de culpabilité conditionnelle, le projet d'accord l'expose à un risque accru parce que le juge peut fixer une amende plus lourde que celle qui a été négociée. On peut s'attendre à ce que le prix que le parquet ou l'autorité de la concurrence devra payer pour obtenir un tel accord, plus incertain et « risqué », soit plus élevé. En d'autres termes, une remise plus importante par rapport à la sanction de base devrait être offerte au défendeur pour l'inciter à plaider coupable de manière à tenir compte du risque que la sanction qui sera effectivement prononcée soit plus sévère que celle qui a été négociée. Inversement, la possibilité de soumettre la reconnaissance préalable de culpabilité à certaines conditions permettrait au ministère public ou à l'autorité de la concurrence d'offrir des concessions moindres.

<sup>58</sup> Frank H. Easterbrook, *Plea Bargaining*, *supra* note 34, p. 1975 (qui estime que la transaction judiciaire est aux lignes directrices sur la détermination de la peine ce que le marché noir est au contrôle des prix).

<sup>59</sup> Même les critiques de la transaction judiciaire concluent que des directives seraient utiles pour obtenir de meilleurs résultats. *Voir par exemple* ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 293 (3d ed. 2005) (qui critique la pratique de la transaction judiciaire au Royaume-Uni mais souligne que des directives pourraient réduire l'incertitude, qui désavantage fréquemment les défendeurs).

<sup>60</sup> Les effets sur le maintien d'une dissuasion efficace qui pourraient résulter de directives sont évoqués plus bas à la p. 26.

*Instances privées*

Les procès intentés par des acteurs de droit privé ne sont pas mentionnés dans les publications sur les transactions judiciaires, mais ils sont un facteur qui peut influencer fortement sur le résultat des règlements négociés sur les ententes. Les défendeurs sont conscients que la portée et la teneur de leur accord de reconnaissance préalable de culpabilité peuvent affecter le risque d'avoir à payer des dommages et intérêts aux personnes de droit privé qui leur intenteront un procès à la suite de cet accord. Ainsi, il peut parfois arriver que les tractations avec le parquet ou les autorités de la concurrence se déroulent non seulement dans l'ombre d'un procès ou d'une procédure pénale devant l'autorité, mais aussi dans celle d'une action civile dans laquelle des plaignants de réclameront à titre privé des dommages et intérêts. Les instances privées peuvent affecter les négociations en vue d'un règlement de diverses manières<sup>61</sup>.

Par exemple, si dans certains pays tels que les États-Unis un règlement négocié est toujours assorti d'une reconnaissance de culpabilité par un défendeur qui peut servir de preuve dans les procès qui seront intentés dans la foulée par des personnes à titre privé, dans d'autres pays l'autorité de la concurrence ou le ministère public n'exige pas toujours une reconnaissance de culpabilité<sup>62</sup>. Dans ces pays, où la reconnaissance de culpabilité est « sur la table de négociation », les défendeurs seront enclins à résister à cette demande de plaider coupable s'ils s'inquiètent de ses conséquences dans les actions qui seront intentées au civil. On peut supposer que, si l'autorité de la concurrence accepte de transiger sans avoir obtenu de reconnaissance de culpabilité, elle peut obtenir une amende plus élevée. Mais ce cas de figure est peut-être le pire pour les plaignants à titre privé parce qu'aucune décision officielle concluant à la culpabilité n'aura été rendue et aucun règlement négocié contenant une reconnaissance de culpabilité n'aura été rendu. Un tel résultat pourrait priver quelques-uns au moins de ces plaideurs à titre privé de la seule possibilité réaliste d'attaquer en justice les membres du cartel à un coût raisonnable. : en effet, en l'absence de preuve apportée par une décision de l'autorité de la concurrence prise sur la base d'un règlement négocié avec reconnaissance de culpabilité, ils pourraient juger trop difficile et risqué de dresser un dossier complet pour une action au civil du fait que, pour parvenir à un règlement négocié, Inversement, si l'autorité de la concurrence exige une reconnaissance de culpabilité, elle peut être amenée à réduire le montant de l'amende qu'elle pourra obtenir dans un accord amiable. Idéalement, la solution que préférera l'autorité de la concurrence devrait être dictée par le but de maximiser l'effet dissuasif global. Il peut être justifié de consentir un rabais sur l'amende dans le cadre d'une négociation de peine à titre de prix à payer pour « acheter » une reconnaissance de culpabilité si cette dernière accroît la probabilité de procédures civiles et si ces procédures sont susceptibles d'aboutir à des amendes supérieures au rabais consenti dans l'accord conclu à l'issue de la négociation de peine.

Dans d'autres circonstances, un défendeur pourra préférer un règlement négocié couvrant une période plus courte et accepter de payer une amende un peu plus élevée et l'autorité de la concurrence pourra y consentir<sup>63</sup>. Une telle issue va être celle que préfère le défendeur si la reconnaissance de culpabilité pour une période plus courte réduit le risque afférent à sa responsabilité civile et si la diminution de sa responsabilité pèse plus lourd à ses yeux que l'amende supérieure qui lui est infligée dans le cadre de l'accord de reconnaissance préalable de culpabilité. La menace de poursuites civiles pourrait donc inciter un défendeur à régler une affaire en convenant d'une amende assez élevée avec l'autorité de la

<sup>61</sup> La crainte de poursuites privées peut inciter les deux parties à s'abstenir de tout règlement négocié. *Voir* la contribution de l'Allemagne, DAF/COMP/WP3/WD(2006)77.

<sup>62</sup> A titre d'illustration, la contribution de l'Afrique du Sud indique qu'il n'est pas obligatoire de plaider coupable pour négocier le règlement d'une affaire.

<sup>63</sup> *Voir aussi* DAF/COMP/WP3/M(2006)2/ANN2 (contribution soulignant qu'une autorité de la concurrence pourrait accepter une transaction judiciaire qui couvre une période plus courte que celle de l'entente mais impose une amende relativement élevée pour compenser cette période plus courte).

concurrence. Comme on l'a vu dans l'exemple précédent, l'idéal serait que l'autorité de la concurrence négocie un règlement qui soit propre à maximiser l'effet de dissuasion.

### C. Règlements négociés et droits de la défense

De nombreux auteurs, tant aux États-Unis qu'en Europe<sup>64</sup>, pensent que la transaction judiciaire ne devrait pas se résumer à la négociation de contrats et mesures constituant un accord efficient entre les parties car il convient de s'interroger sur sa compatibilité avec les valeurs d'un système de justice pénale et de se demander s'il ne nuit pas aux droits des défendeurs<sup>65</sup>. L'un des détracteurs de la transaction judiciaire est d'avis qu'il est essentiellement motivé par le désir de l'administration de faire passer les défendeurs judiciaires au moindre coût et dans des délais aussi brefs que possible à travers un système qui convienne à des avocats peu zélés et des services du parquet tout aussi peu zélés et aux moyens insuffisants ; ce procédé fait que l'examen des preuves par la justice laisse à désirer, que le débat poussé sur les critères techniques du délit qu'on serait en droit d'attendre n'a pas lieu et que les moyens par lesquels les preuves ont été obtenues ne sont soumis à aucun contrôle : en d'autres termes, plus tôt on conclut une transaction, mieux cela vaut<sup>66</sup>. D'autres font valoir que les négociations sont incompatibles avec la justice pénale et que « la négociation de peine persuade les criminels que la majesté du droit est un mensonge et que la loi est un bazar où tout se vend<sup>67</sup>. » Plusieurs de ces reproches seront abordés ci-après.

De nombreux auteurs ont exprimé la crainte que la transaction judiciaire ne pénalise les défendeurs qui vont jusqu'au procès parce que ceux qui refusent la négociation de peine risquent de se voir infliger une peine plus sévère et qu'il récompense injustement les coupables qui acceptent de plaider coupable. Cependant, d'autres ne partagent pas cette inquiétude et soulignent qu'aucun principe ne permet d'opérer une distinction entre transaction judiciaire et procès, la différence de gravité de la sanction infligée, qui dans le premier cas est plus légère que dans le second, ne pouvant être considérée comme une punition pour l'exercice de certains droits ou une récompense pour la coopération du défendeur. Comme le dit un auteur, dès lors que la sanction qui serait infligée à l'issue d'un procès est tenue pour légitime, l'écart entre la sentence négociée et celle qui est prononcée à l'issue d'un procès en bonne et due forme peut s'expliquer comme la conséquence logique du processus de négociation de la peine et il ne doit pas être considéré comme coercitif et ne constitue pas une « punition<sup>68</sup>. »

La crainte que la transaction judiciaire ne crée un marché de droits où les autorités ne cherchent plus seulement à infliger une sanction qui reflète toujours la culpabilité du défendeur semble moins pertinente

<sup>64</sup> La liste des critiques est longue *Voir par exemple* Stephen J. Schulhofer, *Plea Bargaining*, *supra* note 45, at 2009; Douglas D. Guidorizzi, *Should we Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 *Emory Law Journal* 753, 768-79 (1998) ; Ralph Henham, *Bargain Justice or Justice Denied? Sentence Discounts and the Criminal Process*, 62 *Modern Law Review*. 515 (1999) ; Penny Darbyshire, *The Mischief of Plea Bargaining and Sentencing Rewards*, 2000 *Criminal Law Review*. 895, 904; ANDREW ASHWORTH & MIKE REDMAYNE, *supra* note 59, p. 285-96.

<sup>65</sup> Quoique le débat soit axé sur la transaction judiciaire dans la justice pénale, plusieurs craintes pourraient, en principe, s'exprimer à propos des transactions judiciaires dans les autres branches de la justice, en particulier si elles infligent des sanctions notables et doivent se conformer à des normes identiques à celle des procédures pénales.

<sup>66</sup> Darbyshire, *supra* note 64, p. 902;

<sup>67</sup> John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 *American Journal of Criminal Law* 215, 218 (1977).

<sup>68</sup> Frank H. Easterbrook, *Criminal Procedure*, *supra* note 34, p. 311-12 (qui estime que le débat sur le fait que les accords amiables « punissent » ou non ceux qui exercent leurs droits ou récompensent ceux qui coopèrent est aussi pertinent que la question de savoir si un verre est à moitié vide ou à moitié plein).

dans le domaine de la lutte des autorités de la concurrence contre les ententes. Dans une certaine mesure, l'abandon de droits en contrepartie d'une peine minorée, voire de l'absence de peine, est déjà entrée dans les faits et passe pour une arme nécessaire à l'efficacité de l'action contre les ententes. A titre d'illustration, les autorités de la concurrence promettent aux membres d'un cartel, dans certaines circonstances définies avec soin, qu'ils ne seront pas sanctionnés s'ils sont les premiers à les informer de l'existence de l'entente. En conséquence, certains coupables ne seront pas punis pour leur participation à l'entente.

Au surplus, comme dans toute enquête dans laquelle plusieurs défendeurs sont impliqués, les récompenses accordées à ceux qui acceptent de coopérer peuvent aboutir à des sanctions qui ne reflètent pas toujours le degré de culpabilité d'un défendeur par rapport aux autres. Il arrive que ceux qui ont joué le rôle le plus important dans une association de malfaiteurs soient les mieux placés pour livrer des preuves non seulement sur leurs propres activités, mais aussi sur celles des autres membres du cartel s'ils collaborent avec une autorité de la concurrence. Dans ce cas, récompenser leur collaboration peut aboutir à des résultats « injustes » en ce sens que la sanction ne reflète pas la culpabilité de chaque participant à l'entente, et ce indépendamment du fait que le processus inclue ou non une reconnaissance préalable de culpabilité<sup>69</sup>. Les autorités chargées de la lutte contre les ententes s'accommodent en grande partie de ces carences parce que ces méthodes sont nécessaires pour détecter les associations de malfaiteurs actuelles et futures.

Une autre question soulevée par les publications est de savoir si les règlements négociés abaissent la qualité des preuves au-delà du tolérable, au point que la règle de l'absence de doute raisonnable ou les normes comparables qui s'appliquent dans les procédures pénales ou, le cas échéant, administratives, ne sont plus respectées<sup>70</sup>.

Illustration pratique de cette préoccupation, les États-Unis sont le théâtre d'un débat pour savoir si les amendes obtenues par le Département de la Justice dans le cadre de la négociation de peine n'excèdent pas parfois le montant que l'État obtiendrait si l'affaire était jugée par un tribunal et si tous ses griefs devaient être prouvés selon la règle de l'absence de doute raisonnable<sup>71</sup>. En vertu de ce qu'on appelle « l'alternative fine statute » (loi sur les amendes alternatives), l'État peut rechercher des sanctions pénales allant au-delà du maximum stipulé par la loi Sherman et qui se montent à deux fois le gain illicite acquis par l'entente illicite ou deux fois le préjudice qu'elle a causé<sup>72</sup>. Plusieurs arrêts récents de la Cour suprême ont précisé

<sup>69</sup> Bruce H. Kobayashi, *Deterrence with Multiple Defendants: an Explanation for "Unfair" Plea Bargains*, 23 *Rand Journal of Economics* 507, 515 (1992).

<sup>70</sup> Dans les règlements négociés, les défendeurs accepteront des sanctions fondées sur des probabilités de résultat dans l'hypothèse où l'affaire irait jusqu'au procès. Même si la probabilité d'une condamnation est faible (par exemple 50 % voire moins), un défendeur, surtout s'il présente une aversion au risque, pourra envisager un règlement négocié à condition que l'allègement de peine qui lui est proposé reflète la faible probabilité d'un résultat qui lui serait contraire. On peut arguer que ce raisonnement affaiblit la règle selon laquelle un doute raisonnable ne doit pas être possible. Par exemple, cette règle pourrait se traduire par l'exigence qu'il existe une probabilité d'au moins 90 % que le défendeur soit reconnu coupable. Si, à l'issue d'un procès ou d'une décision formelle, la probabilité qu'il soit conclu à la culpabilité du défendeur est inférieure à cette norme, elle sera automatiquement arrondie par défaut à 0 % et le défendeur sera réputé innocent. Mais dans une transaction judiciaire, un tel résultat ne serait pas possible.

<sup>71</sup> Il convient de souligner que le débat ne porte pas sur le fait que les défendeurs seraient coupables ou non, mais uniquement sur le niveau des amendes stipulé par les règlements négociés .

<sup>72</sup> Code des États-Unis d'Amérique, Titre 18, § 3571(d). Ce texte stipule ce qui suit : « si une quelconque personne tire un gain pécuniaire du délit ou si le délit cause une perte pécuniaire à une personne autre que le défendeur, le défendeur pourra se voir infliger une amende qui n'excédera pas deux fois le montant brut du gain ou, s'il est plus élevé, deux fois le montant brut de la perte, sauf si l'amende infligée en vertu de cette sous-section aurait pour effet de compliquer ou prolonger indûment le processus de détermination de la peine. » Le texte sur une amende alternative s'applique principalement aux défendeurs qui sont des

que, pour obtenir une sanction plus lourde que le maximum stipulé par la loi Sherman, l'État doit prouver à un jury les gains illégaux ou le préjudice résultant d'une entente sans que, comme cela est la règle en matière pénale, un doute raisonnable soit possible. D'aucuns ont argué que ce critère de preuve peut être difficile à satisfaire dans certaines affaires d'entente, voire dans beaucoup d'entre elles<sup>73</sup>. Pourtant, les défendeurs continuent à négocier des règlements prévoyant une amende supérieure au plafond de la loi Sherman. Plusieurs considérations ont été avancées pour expliquer ce phénomène<sup>74</sup>. Cette évolution ne montre pas seulement que l'incitation à coopérer et plaider coupable est très forte. Elle amène aussi à se demander si les règlements résultant d'une négociation de peine permettent parfois à l'État d'obtenir des amendes supérieures au niveau qu'elles pourraient atteindre à l'issue d'un procès parce qu'il ne serait pas toujours en mesure de fournir toutes les preuves requises sans qu'un doute raisonnable soit possible.

Ce sont essentiellement la manière dont on aborde les droits reconnus au défendeur dans une instance pénale ou une procédure administrative comparable et le fait qu'on soit d'avis ou non que celui-ci doit avoir la possibilité d'échanger ces droits contre certains avantages qui décident si l'on doit s'inquiéter de cette évolution. En sus du droit d'être présumé innocent si l'État est incapable de fournir la preuve de toutes ses accusations sans qu'un doute raisonnable soit possible (ou selon une norme similaire), les transactions judiciaires mettent en jeu d'autres droits tels que celui de ne pas s'incriminer soi-même, le droit à un procès juste et public, et éventuellement celui de faire appel<sup>75</sup>. D'autres droits encore pourraient être mis en jeu selon la juridiction concernée<sup>76</sup>.

Ceux qui pensent que la transaction judiciaire peut soulever de graves questions au sujet des droits constitutionnels font valoir que soit ces droits ne peuvent être négociés parce que ce ne sont pas des droits personnels, soit ils ne peuvent l'être que si l'écart entre les sanctions ne prend pas une ampleur telle qu'il « contraigne » le défendeur à accepter d'y déroger<sup>77</sup>. Ceux qui soutiennent un avis opposé soulignent que ces droits ont une valeur que l'on pourrait qualifier de « valeur d'autonomie » (c'est-à-dire que la renonciation à un tel droit doit être considérée comme un moyen de l'exercer et que toute restriction sur la

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sociétés. Scott D. Hammond, *Risks Remain High for Non-Cooperating Defendants*, p. 9, fn. 51, exposé prononcé lors de la Session de printemps de la Section Antitrust de l'American Bar Association (30 mars 2005).

<sup>73</sup> AMC, Memorandum, *supra* note 17, p. 5-6 (résume des avis selon lesquels, dans la plupart des affaires d'entente, il serait difficile de satisfaire l'exigence d'une preuve sur laquelle un doute raisonnable ne serait pas possible, ainsi que des avis contraires).

<sup>74</sup> Voir *supra*, p. 9.

<sup>75</sup> Ces droits ont été examinés par ANDREW ASHWORTH & MIKE REDMAYNE, *supra* note 59, pp. 287-292.

<sup>76</sup> Aux États-Unis, les règlements négociés font aussi mention, par exemple, du droit d'être jugé par un jury et de celui de confronter les témoins et de les soumettre à un examen contradictoire.

<sup>77</sup> Voir par exemple ANDREW ASHWORTH & MIKE REDMAYNE, *supra* note 59, pp. 287-292 (qui soutient que, si elle aboutit à un rabais d'un tiers ou davantage, la transaction judiciaire peut porter atteinte à la présomption d'innocence et au droit de ne pas s'incriminer soi-même). *Deweer v. Belgium*, (1980) EHR 439 (la Cour a conclu à la violation de l'Article 6 de la CEDH dans le cas où le défendeur a le choix entre accepter une amende modeste ou être soumis à une longue procédure pénale). Un principe analogue a été confirmé par la Cour fédérale allemande dans la Décision GSt 1/04 du 3 mars 2005 (qui conclut qu'une transaction judiciaire peut être autorisée mais que l'écart entre la peine négociée et celle qui serait probable à l'issue d'un procès ne doit pas être si grand que le défendeur soit contraint de conclure un accord amiable dans le cadre d'une transaction judiciaire). Il n'est cependant pas précisé quel critère serait appliqué pour apprécier si un allègement de peine est excessif au point d'en devenir coercitif.

possibilité de négocier ces droits limite leur valeur pour le défendeur)<sup>78</sup>. Ce point de vue transparaît aussi dans la pratique des juridictions qui autorisent les transactions judiciaires.

La manière dont ces droits peuvent être affectés par le règlement négocié d'une affaire d'entente dépend du droit constitutionnel, du droit de la procédure et de la réglementation de chaque juridiction. S'agissant des enquêtes sur les ententes, on pourrait arguer que les défendeurs renoncent systématiquement à certains droits en échange d'une réduction du montant de l'amende. Par exemple, les défendeurs qui ont fourni des preuves contre eux-mêmes peuvent se voir accorder un rabais sur leur amende. On ne saurait les contraindre à livrer ces preuves à cause de leur droit de ne pas s'incriminer eux-mêmes. En les fournissant, ils renoncent de facto à ce droit en échange d'une amende plus faible. Un tel procédé ne peut être employé dans le cadre d'un accord formel, mais on peut néanmoins exiger des défendeurs qu'ils renoncent à certains droits en contrepartie d'une récompense, à savoir une réduction de l'amende<sup>79</sup>. On pourrait soutenir que, puisqu'il est permis de renoncer à certains droits de la défense, renoncer à d'autres droits de la défense devrait aussi l'être dès lors que cette renonciation n'est pas effectuée sous la contrainte et que le défendeur peut prendre sa décision en toute connaissance de cause.

C'est surtout dans le cadre des procédures administratives que l'on peut se demander si la renonciation au droit de faire appel peut faire partie d'une transaction judiciaire. Contrairement aux actions pénales ou civiles contre les ententes, dans lesquelles les transactions judiciaires doivent être approuvées par un juge, la renonciation au droit de faire appel d'une procédure administrative exclurait tout contrôle de la procédure par l'autorité administrative. On pourrait soutenir que le fait de pouvoir payer pour la renonciation au droit de faire appel laisserait à l'autorité une latitude excessive pour fixer ses propres normes de procédure et d'investigation.

Une décision récente de la Cour fédérale allemande a mis en relief ces inquiétudes<sup>80</sup>. La Cour a reconnu que les transactions judiciaires, qui ne sont pas réglementées en droit allemand, sont, en principe, compatibles avec les règles et principes de procédure pénale de ce pays. La Cour a jugé que cette pratique était nécessaire pour préserver un système de justice pénale avec les moyens actuellement disponibles et qu'elle devait être autorisée sous réserve de certains mécanismes de sauvegarde<sup>81</sup>. Cependant, en ce qui concerne le droit de faire appel, la Cour a considéré qu'il n'était pas possible d'y renoncer dans le cadre d'une transaction judiciaire. Au surplus, en cas de négociation d'une réduction de peine, des mécanismes de sauvegarde stricts doivent faire en sorte que la renonciation par le défendeur à son droit de faire appel soit indépendante de cette négociation. Un tribunal ne peut rien faire qui suggère qu'il s'attend à ou est favorable à une renonciation au droit de faire appel. Selon le raisonnement de la Cour suprême, si un tribunal savait que le jugement ne serait pas révisé, il pourrait consacrer moins de soin à l'établissement des faits, à leur qualification et à la détermination de sanctions appropriées. Bref, la Cour a semblé craindre

<sup>78</sup> Frank H. Easterbrook, *Criminal Procedure*, supra note 34, p. 317; Robert E. Scott & William J. Stuntz, supra note 34, p. 1913 (qui affirme que refuser aux parties la liberté d'échanger leurs droits en réduit la valeur).

<sup>79</sup> Voir par exemple Affaires jointes T-236/01, T-239/01, T-244/01 à T-246/01, T-251/01 et T-252/01, Tokai Carbon c. Commission, jugement du 29 avril 2004 (électrodes en graphite), § 409 (CFI considère qu'une collaboration volontaire sous la forme de la production de preuves contre soi-même doit être récompensée par une réduction de l'amende)

<sup>80</sup> Décision GSSSt 1/04, 3 mars 2005.

<sup>81</sup> La Cour a exigé que les faits soient clairement établis pour approuver la sanction proposée. Elle exigeait en outre qu'il soit veillé à ce que la sanction soit juste, appropriée pour le délit, pas trop clémentine et comparable aux sanctions infligées dans des cas similaires. La Cour a aussi souligné que la menace d'une sanction excessive ne doit pas être employée pour forcer un défendeur à plaider coupable et qu'une sanction ne peut s'écarter de celle qui aurait été infligée à l'issue d'un procès au-delà de ce qui serait justifié par la reconnaissance de culpabilité.

qu'avec la possibilité d'inclure une renonciation dans une transaction judiciaire, les tribunaux sachent qu'ils peuvent « acheter » le défendeur et jeter un voile pudique sur les erreurs qui auraient éventuellement été commises au cours du procès.

En principe, l'enquête de l'autorité de la concurrence pourrait susciter des craintes similaires dans un système administratif : le fait de savoir que, en définitive, elle pourrait proposer un accord très favorable à l'issue d'une transaction judiciaire, peut contrecarrer les incitations à respecter des règles de procédure strictes. Comme l'explique un commentateur, les négociations commencent dans la rue, ce qui implique que même la conduite des autorités dans l'enquête initiale pourrait être affectée par la possibilité d'offrir par la suite au défendeur une transaction judiciaire favorable<sup>82</sup>.

En dernière analyse, il faut se demander si et dans quelles circonstances des droits, y compris celui de faire appel, peuvent faire l'objet d'une renonciation dans le cadre d'une transaction judiciaire conformément au droit constitutionnel et aux autres lois qui déterminent les droits de procédure dans chaque juridiction. Les normes peuvent différer en fonction du système de procédure en vigueur et selon que le défendeur est une personne physique ou morale. Dans les exemples de la France et des Pays-Bas qui ont été décrits plus haut, les défendeurs ne renoncent pas à leur droit de faire appel, mais dans d'autres États où existent des procédures administratives, des solutions plus libérales sont sans doute possibles.

On pourrait envisager d'autres mécanismes pour apaiser la crainte qu'un organisme chargé de l'application de la loi ne soit pas suffisamment incité à respecter les normes d'enquête et de procédure s'il peut échapper au contrôle par les tribunaux. Un tel mécanisme consisterait à limiter le rabais que l'autorité de la concurrence peut accorder à un défendeur qui plaide coupable et renonce à son droit de faire appel. En effet, si des erreurs sont commises pendant l'enquête sur une entente ou à un autre stade de la procédure et si celles-ci sont susceptibles de donner au défendeur le moyen de faire casser une décision en appel, l'autorité ne devrait pas avoir la possibilité « d'acheter » le défendeur en lui accordant un rabais substantiel. Si le dossier de l'autorité n'est pas assez solide, elle ne devrait pas pouvoir se soustraire au contrôle du juge en concluant un accord favorable et elle devrait soit classer l'affaire, soit ouvrir des poursuites devant la justice<sup>83</sup>.

De plus, même dans les États où il ne peut être renoncé au droit de faire appel, le règlement négocié d'une affaire d'entente peut quand même être utile et efficient. Le cas des Pays-Bas, bien qu'il soit unique par le cadre de la procédure, suggère que, une fois que les défendeurs ont le sentiment d'avoir obtenu un bon accord, ils n'ont plus guère envie de continuer un procès. Toute incitation à faire appel d'un règlement négocié doit être encore plus limitée si celui-ci comprend un compte rendu détaillé des agissements répréhensibles et stipule que les deux parties à l'accord considèrent la sanction comme juste au vu de la gravité de l'infraction. Dans ce cas, il est peu probable que le défendeur puisse convaincre le tribunal statuant en appel qu'il doit se mêler de l'accord conclu par les parties<sup>84</sup>.

<sup>82</sup> Penny Darbyshire, *supra* note 64, p. 902.

<sup>83</sup> Voir, par exemple, Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *Cardozo Law Review* 2295 (2006) (qui fait valoir que l'interdiction de fortes remises dans les règlements négociés faisant suite à un marchandage judiciaire obligerait le parquet à abandonner les affaires dans lesquelles il ne dispose pas d'un dossier solide ou à les soumettre aux tribunaux).

<sup>84</sup> Pour une conclusion similaire, voir Wouter P.J. Wils, *Settlements of EU Antitrust Investigations: Commitment Decisions under Article 9 of Regulation No. 1/2003*, 29 *World Competition* 345, 366 (2006) (qui conclut que les appels de décisions fondées sur des règlements négociés auraient beaucoup moins de chances de succès). Wils suggère aussi qu'une décision clôturant une procédure après la conclusion d'une transaction judiciaire n'aurait pas besoin d'être motivée de façon aussi rigoureuse qu'un jugement. Il peut être exact qu'une telle décision n'ait pas besoin d'être aussi minutieuse et détaillée que dans une procédure

#### **D. Les effets des règlements négociés sur la dissuasion et les programmes de clémence**

L'écart entre les sanctions infligées à l'issue d'une transaction ou d'un procès ou en vertu d'une décision en bonne et due forme amène à se demander si la transaction judiciaire ne risque pas de nuire à l'impératif de dissuasion. Il peut être délicat de cerner les effets de la négociation de peine sur la dissuasion recherchée. Plusieurs paramètres entrent en ligne de compte, notamment la réduction de peine consentie dans le cadre de la transaction, la possibilité pour le parquet ou les autorités de la concurrence d'enquêter sur d'autres ententes et de porter plus d'affaires devant la justice, l'emploi des transactions judiciaires pour recueillir des informations dans les affaires impliquant plusieurs défendeurs, l'incidence de la transaction judiciaire sur les programmes de clémence et celle de la transaction judiciaire sur les poursuites civiles.

Les effets des transactions judiciaires sont ambigus parce qu'ils dépendent principalement de deux facteurs aux effets parfois contraires : d'un côté, les réductions de peine peuvent saper la dissuasion mais, de l'autre, ce type d'accord libère des moyens qui peuvent être consacrés à la détection et aux poursuites contre d'autres ententes. L'exemple ci-après, inventé par un commentateur favorable à la transaction judiciaire, illustre les effets des accords transactionnels sur la dissuasion : si le procureur offre un rabais de 40 % dans une affaire et emploie les moyens libérés par l'accord amiable pour enquêter sur une deuxième affaire qu'il accepte aussi de régler à l'amiable moyennant un autre rabais de 40 %, il aura obtenu 120 % de l'amende totale qu'il aurait obtenue s'il n'avait soumis que la première affaire aux tribunaux<sup>85</sup>. Cet exemple repose certes sur plusieurs hypothèses qu'il suffit de modifier légèrement pour que les résultats changent. Si le rabais accordé dans la première affaire était de 50 %, les résultats seraient identiques pour la transaction et pour le procès toutes choses égales par ailleurs. Si, de plus, l'économie de moyen est quelque peu inférieure à 50 % (en d'autres termes, le procureur pourrait déférer un plus grand nombre de dossiers à la justice ou l'autorité de la concurrence pourrait détecter et poursuivre un plus grand nombre d'ententes, mais ce nombre ne doublerait pas) et si un rabais de 50 % était consenti lorsqu'un accord amiable est conclu, cet exemple permet de penser que l'effet dissuasif global serait amoindri par la transaction judiciaire<sup>86</sup>.

L'évaluation de l'incidence des transactions après négociation de peine se complique du fait que les affaires d'entente impliquent plusieurs défendeurs qui peuvent changer la finalité et la dynamique des négociations sur un règlement amiable. Dans un scénario à défendeurs multiples, l'accord amiable qui conclut une transaction judiciaire devient un moyen de recueillir des informations contre les autres défendeurs dans la même affaire. Par conséquent, même si cet accord amiable atténue la sanction infligée à l'un des défendeurs et si le rabais accordé est souvent plus élevé pour le défendeur qui est le premier à coopérer, il peut augmenter globalement les sanctions que l'autorité de la concurrence peut infliger à l'ensemble des participants à une entente parce que l'accord amiable oblige le défendeur à coopérer en fournissant des preuves contre les autres participants<sup>87</sup>.

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contentieuse, mais il n'en demeure pas moins que, dans une transaction judiciaire qui devrait être acceptée par le défendeur, l'autorité de la concurrence devrait être incitée à inclure une description détaillée du délit et de la participation du défendeur à sa commission de manière à réduire la probabilité qu'il n'obtienne gain de cause en appel.

<sup>85</sup> Frank H. Easterbrook, *Criminal Procedure*, *supra* note 34, p. 314.

<sup>86</sup> Dans cet exemple, les autres hypothèses sont implicites. On suppose par exemple qu'infliger des amendes assez faibles dans un grand nombre d'affaires a un effet dissuasif équivalent à des amendes élevées dans un nombre d'affaires plus faible ; cependant, de nombreux économistes préfèrent qu'un petit nombre d'affaires se solde par des amendes très lourdes. On suppose aussi que le calendrier des sanctions n'affecte pas la dissuasion ; il existe cependant de fortes raisons de croire que des sanctions plus immédiates peuvent exercer un plus fort effet dissuasif sur les personnes physiques.

<sup>87</sup> Bruce Kobayashi, *supra* note 69, p. 515.

Une question particulièrement pertinente pour l'action contre les ententes est de savoir si les transactions après transaction judiciaire nuisent à l'efficacité des programmes de clémence dans le cas où les allègements de peine consentis en échange de la coopération et de la reconnaissance de culpabilité du défendeur sont trop généreux. Les programmes de clémence, qui sont devenus l'un des outils les plus utiles à la détection et aux enquêtes sur les ententes, reposent sur l'effet incitatif d'une absence totale de peine pour celui qui est le premier à dénoncer une entente. De toute évidence, plus la différence est grande entre une amnistie totale et les autres scénarios (y compris le cas où un participant à une entente collabore ensuite à l'enquête de l'autorité de la concurrence), plus l'incitation à être le premier à dénoncer une entente pour bénéficier d'une amnistie est forte. En d'autres termes, plus lourde est la sanction pour les membres de l'entente qui ne sont pas les premiers à la dénoncer et à solliciter une amnistie, plus efficace sera le programme de clémence. On pourrait craindre que les règlements négociés n'affaiblissent cette incitation. Si l'on s'attend généralement à ce que, à la suite d'une demande de clémence, le deuxième participant à une entente bénéficie d'un rabais substantiel sur son amende, les autres participants à l'entente attendront plutôt que de solliciter une amnistie parce qu'ils continueront à bénéficier des gains illicites qu'engendre l'entente.

Il est donc délicat de répondre clairement à la question de la manière dont la transaction judiciaire affecte la dissuasion. On peut penser que ces craintes seraient moins vives dans un système de répression incluant la possibilité de sanctions pénales à l'encontre des personnes physiques et, surtout, dans un système qui ne peut qu'infliger des sanctions financières aux sociétés. Il semblerait que consentir à des sanctions excessivement légères dans une transaction judiciaire dans le seul but d'augmenter le nombre d'affaires traitées risque d'affaiblir la dissuasion. C'est là un argument supplémentaire pour que les transactions judiciaires soient couplées à des sanctions lourdes et crédibles qui seraient infligées à l'issue d'une décision formelle ou d'un procès qui formerait le contexte dans lequel se déroulerait la négociation d'un règlement<sup>88</sup>. Au surplus, des directives sur les remises de peine seraient de nature à réduire le risque de sanctions trop légères et de rabais trop généreux.

#### **4. Quelques esquisses de conclusions sur l'emploi des règlements négociés dans la lutte contre les ententes**

Les développements qui précèdent montrent que le règlement des affaires d'entente soulève des questions complexes. Il faut en outre compter avec la grande diversité qui existe d'une juridiction à l'autre, les dissimilarités entre les institutions, les procédures d'exécution et les droits constitutionnels faisant que le règlement des affaires est effectué dans des cadres dissemblables. Plusieurs questions paraissent néanmoins pertinentes pour toutes les juridictions.

L'application de procédures de règlement des affaires d'entente par la voie transactionnelle peut apporter des avantages appréciables aux autorités de la concurrence. Ces procédures permettent d'économiser du temps et des moyens, ce qui offre à l'autorité de la concurrence la possibilité d'affecter ses moyens de manière plus efficace et d'intensifier globalement son action, notamment contre les ententes. A condition d'être bien employés, les règlements négociés devraient renforcer la dissuasion contre les ententes. C'est pourquoi le règlement négocié des affaires d'entente est naturellement devenu l'un des principaux centres d'intérêt des autorités de la concurrence.

A bien des égards, les procédures de règlement et les transactions judiciaires sont le prolongement logique de pratiques existantes. Dans le cadre des programmes de clémence, les autorités de la concurrence font déjà, d'une certaine manière, une offre de contrat en promettant de n'infliger aucune sanction au premier participant à une entente qui les informe des activités du cartel. De plus, les autorités de la concurrence récompensent la coopération sous la forme d'allègements de peine. Lorsqu'elles coopèrent,

<sup>88</sup> Nuno Garoupa et Frank H. Stephen, *supra* note 34, texte accompagnant la note 30.

les sociétés livrent souvent des preuves qui les incriminent elles-mêmes et renoncent ainsi aux droits normalement reconnus aux défendeurs dans les procédures administratives et pénales. Les transactions judiciaires accentuent ces pratiques par la négociation d'un ensemble de contreparties plus large qui, le plus souvent, inclura l'aveu d'une conduite illicite, la renonciation à certains droits et l'acceptation d'une obligation de coopérer en échange de certains avantages, dont le plus important est un rabais sur l'amende. De plus, les défendeurs dans les affaires d'entente sont représentés par des avocats très compétents et sont en mesure de prendre leurs décisions en toute connaissance de cause. Le règlement négocié des affaires d'entente devrait donc susciter moins de craintes que celles qu'il nourrit traditionnellement dans les poursuites pénales concernant des affaires « normales ».

Lors des négociations sur un règlement, les autorités de la concurrence se trouveront dans une position plus favorable si elles font planer la menace crédible qu'elles infligeraient ou obtiendraient des sanctions substantielles en l'absence d'un accord amiable et elles peuvent offrir de multiples avantages aux défendeurs qui acceptent de coopérer et faire peser des menaces multiples sur ceux qui s'y refusent. En récompensant plus généreusement les défendeurs qui acceptent de coopérer précocement, y compris avec la volonté de négocier un règlement que ceux qui n'acceptent de coopérer qu'à un stade ultérieur de l'enquête, les autorités de la concurrence peuvent élargir la course à la négociation avec l'autorité au-delà du premier participant à l'entente qui sollicite une amnistie. Les pays où les personnes physiques peuvent être poursuivies disposent peut-être de moyens plus efficaces d'obtenir des amendes élevées bien qu'ils offrent des rabais en cas de coopération car, entre autres, les défendeurs vont y avoir le sentiment que le risque que quelqu'un fasse défection et coopère plus tôt que les autres est plus grand.

Le règlement négocié sera facilité par l'emploi de « règles du jeu » transparentes et prévisibles. L'existence de règles du jeu plus transparentes et prévisibles permettant aux défendeurs de connaître les « récompenses » qu'ils peuvent attendre de leur coopération et les risques d'un refus de coopérer devraient les pousser à collaborer avec l'enquête des autorités et accroître la probabilité que les deux parties concluent un accord sur la peine. Si les transactions judiciaires sont soumises à l'accord des tribunaux, la transparence, qui devrait inclure un compte rendu détaillé du délit et des explications sur l'adéquation de l'amende proposée, aurait aussi le mérite de rendre plus probable l'approbation du tribunal. De plus, l'existence de règles transparentes et prévisibles devrait atténuer les craintes relatives à l'effet d'une transaction judiciaire sur les droits du défendeur.

Si la sanction devient plus certaine, la transaction judiciaire sera plus précieuse pour les deux côtés. Par exemple, l'incertitude sera moindre si le défendeur a le droit de retirer sa reconnaissance de culpabilité en cas de sanction finalement plus lourde par la tribunal que celle qui avait été proposée dans la transaction judiciaire ; il en ira de même si le défendeur a la faculté de renoncer au droit de faire appel. Mais le droit constitutionnel et les règles de procédure nationales ne le permettent pas toujours. L'incertitude et le risque d'une évaluation incorrecte des faits, notamment en ce qui concerne l'étendue des activités du cartel, seront aussi atténués si le règlement des affaires intervient une fois que l'autorité de la concurrence a établi la plupart des faits pertinents et si, en général, elle ne cherche pas à conclure une transaction à un stade trop précoce.

Le règlement des affaires d'entente peut susciter des inquiétudes quant à l'efficacité de la dissuasion. S'ils sont correctement appliqués, les règlements négociés ne devraient pas affecter la dissuasion, mais on pourrait être tenté d'y recourir avant tout pour réduire le nombre d'affaires qu'une autorité doit traiter et se débarrasser des cas « difficiles » plutôt que de défendre le bien public en maximisant l'effet dissuasif de la sanction. Si les allègements de peine consentis dans les transactions judiciaires sont trop généreux, l'écart de traitement entre le défendeur qui demande à bénéficier de la clémence et le premier défendeur acceptant de coopérer peut être tellement faible qu'il émousse l'incitation à solliciter la clémence. Les autorités de la concurrence auraient donc intérêt à rechercher des sanctions rigoureuses lorsqu'elles négocient une transaction. La possibilité d'obtenir une sanction qui demeure sévère même après qu'un allègement a été

accordé dépend de l'existence d'une menace crédible que de lourdes sanctions soient infligées en cas de décision formelle ou de procès. Cela tend à montrer que les règlements négociés et transactions judiciaires doivent être utilisés avec la plus grande circonspection, à supposer qu'ils doivent l'être, à un stade précoce de l'action d'un État contre les ententes, c'est-à-dire avant que des sanctions crédibles n'aient été prononcées et que les tribunaux n'aient été persuadés d'infliger ou approuver des amendes élevées.

Les règlements négociés soulèvent toujours la question du rôle que doivent jouer les tribunaux. Dans les procédures d'exécution pénale et civile, où le règlement proposé est généralement soumis à l'accord des tribunaux, certains préfèrent des tribunaux plus actifs de manière à défendre le principe du contrôle par le juge. Les tribunaux insistent aussi sur le fait qu'ils ne sont pas de simples chambres d'enregistrement qui valideraient systématiquement les propositions de règlement des affaires. Cependant, si les tribunaux se montrent trop interventionnistes, ils risquent d'amoindrir l'efficacité des transactions judiciaires parce que les négociations deviendraient plus incertaines. Il convient donc d'instaurer un « dialogue », sous une forme ou sous une autre, entre l'autorité de la concurrence et les tribunaux pour que la première puisse aller au devant des exigences des tribunaux et que les seconds comprennent la manière dont elle traite les règlements négociés. Des directives telles que les Lignes directrices sur la détermination de la peine en vigueur aux États-Unis peuvent faciliter ce « dialogue. » Si ces directives ne sont pas considérées comme appropriées parce qu'elles font fi du principe d'indépendance de la justice, il peut importer que l'autorité de la concurrence édicte des règles claires et transparentes sur le règlement des affaires, y compris les rabais sur les amendes, afin de minimiser le nombre d'affaires dans lesquelles les tribunaux se sentiraient obligés d'intervenir.

Dans les pays où existent des procédures administratives, il faut se demander si le défendeur peut renoncer à son droit de faire appel dans le cadre du règlement négocié, ce qui exclut totalement les tribunaux du processus. D'un côté, on pourrait soutenir que le droit de faire appel ne mérite pas un traitement différent des autres droits auxquels le défendeur est généralement amené à renoncer dans une négociation de peine. De l'autre, un tel accord assorti d'une renonciation au droit de faire appel empêche tout contrôle par les tribunaux. On pourrait s'inquiéter des effets d'une telle renonciation sur les enquêtes et procédures puisque l'autorité de la concurrence saurait qu'elle peut se soustraire au contrôle du juge dès lors qu'elle accepte « d'acheter » le défendeur. Il appartient à chaque État de répondre à cette interrogation selon son propre droit constitutionnel. Même si le droit de faire appel ne peut faire l'objet d'une renonciation dans le cadre d'une transaction judiciaire, le règlement des affaires d'entente par cette voie demeure une option attrayante. Lorsque le défendeur reconnaît les faits et sa responsabilité et qu'il accepte les modalités de détermination des sanctions, il est beaucoup moins probable qu'il obtienne gain de cause en appel.

S'il est probable qu'il sera la cible de procédures civiles une fois réglé son litige avec les autorités et si sa responsabilité civile est engagée pour un montant élevé par comparaison avec les avantages susceptibles de découler du règlement négocié de l'affaire avec l'autorité de la concurrence, le défendeur sera peut-être moins incité à conclure un tel règlement avec l'autorité de la concurrence. Certains défendeurs pourraient répugner à conclure une transaction s'ils pensent pouvoir réduire le risque de devoir payer des dommages et intérêts au civil en faisant traîner l'enquête de l'autorité de la concurrence et en gagnant du temps en faisant appel d'une décision. Dans d'autres circonstances, ils préféreront sans doute un règlement négocié dont les conditions n'augmentent pas le risque d'avoir à payer de tels dommages et intérêts (par exemple en concluant un règlement sans reconnaissance de culpabilité) même si l'atténuation de la peine qu'ils obtiennent est plus faible. Idéalement, les autorités de la concurrence doivent faire en sorte que les accords amiables maximisent l'effet dissuasif global des procédures engagées par les intervenants publics et privés.

Les transactions judiciaires dans les affaires d'entente étant une pratique récente, les autorités de la concurrence qui y recourent pourraient envisager d'instituer un mécanisme de contrôle leur permettant

d'évaluer l'efficacité de leur politique en matière de règlement négocié et ses effets sur l'effet de dissuasion recherché ainsi que sur les droits des parties. Un tel mécanisme de contrôle devrait aussi s'appliquer aux affaires dans lesquelles les deux côtés n'ont pu parvenir à une solution négociée.

## AUSTRALIA

### 1. Overview of Legal Framework

Cartel conduct in Australia is proscribed under subsection 45(2) of the *Trade Practices Act* (“TPA”) which prohibits contracts, arrangements or understandings that:

- have the purpose, effect or likely effect of substantially lessening competition; or
- contain an exclusionary provision.

Unlike some other jurisdictions, the ACCC has no power to impose fines or penalty notices if it believes a breach of the law has occurred. Rather, the ACCC becomes the applicant in civil proceedings in the Federal Court of Australia, and must prove its case before the Court.

Ultimately, as only the Court can impose penalties, in order to seek penalties the options for the ACCC are to prove its case either as a result of:

- A fully contested trial; or
- A negotiated settlement with the proposed respondents/defendants, which includes submissions about the elements of the offence (markets, conduct, agreements etc) sufficient to enable the Court to conclude that cartel conduct took place.

To prove a breach of the TPA, the ACCC must demonstrate that there was an agreement between competitors and/or that *that* agreement was put into effect. Because of the seriousness of the allegations, the standard of proof required is higher than the traditional civil “balance of probabilities” standard – but lower than the usual criminal “beyond reasonable doubt” standard. The ACCC must prove its case to a *quasi-criminal* standard, where the existence of the material facts must be proved ‘clearly’, ‘unequivocally’, ‘strictly’ or ‘with certainty’.<sup>1</sup> It should be noted that the statute of limitations requires the ACCC to bring proceedings for pecuniary penalties within six years of the contravention occurring<sup>2</sup>.

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<sup>1</sup> When criminal sanctions are introduced, and it is necessary to prove matters ‘beyond reasonable doubt’, the evidentiary hurdles will be even higher. Currently, Australia’s cartel enforcement regime is a civil one, and does not include criminal (jail) sanctions. However, in February 2005, the Federal Government announced it would be legislating to introduce criminal sanctions for hard-core cartels. Further, the Government previously announced it would also substantially increase the maximum level of pecuniary penalties. The existing maximum penalties are \$500,000 for an individual and \$10 million for a corporation. Under the proposed new regime, the maximum penalties for cartel offences will be a term of imprisonment of five years and a fine of \$220,000 for individuals and a fine for corporations that is the greater of: \$10 million; or three times the value of the benefit from the cartel; or where the value cannot be determined, 10 per cent of annual turnover.

<sup>2</sup> *Trade Practices Act 1974 (Cth)*, s77

If the Courts accept that a cartel offence has occurred, the next step is for the ACCC and the other parties (either separately or jointly) to put forward submissions as to the appropriate level of penalty to be imposed.

Cartel cases can be quite complex and resource intensive where the ACCC takes action against a significant number of corporations and individuals involved in cartel activity. Bid rigging cases are a good example. In one case now before the Australian Federal Court some 17 corporations and 22 individuals are subject to proceedings for bid rigging agreements involving tenders for air conditioning contracts in Western Australia.<sup>3</sup>

In recent years, with cartel cases there has been a general increase in corporations and their advisers seeking to reach agreement with the ACCC upon penalty through settlement negotiations and joint submissions to the Court. It has advantages of predictability, which corporate clients appreciate, and it saves both the ACCC and the contravener the cost and uncertainty of contested litigation.

The justification for negotiated settlements from a law enforcement perspective is that it allows for more efficient allocation of the regulator's resources, it reduces costs and it avoids a lengthy court process for all parties, including the Court.

There are questions as to the veracity of negotiated settlements (in a civil environment), in particular whether it undermines the judicial processes, whether improper pressure is applied to defendants and invisibility of the process. In Australia's system, some of the questions are addressed through the judicial process. The Courts in Australia have reinforced the view that penalty settlements are a prudent use of resources. French, J has stated that:

*“As a general principle fair and appropriate settlements are encouraged to reduce the burden on litigation on both public and private resources. Courts are frequently asked to play their part by accepting formal undertakings or making orders by consent which prohibit parties from certain conduct or require them to do certain things. Sometimes they are asked to impose agreed pecuniary penalties. In carrying out those functions, courts are conscious, however, that the laws they apply are public laws. It is in the public interest that, in considering agreements between parties requiring orders of a court, the court does not act as a mere rubber stamp. What is proposed must always be scrutinised to determine whether undertakings or consent orders are within power and are appropriate. There is sometimes a tension between these components of the public interest”.*<sup>4</sup>

The ACCC occupies a dual role in its capacity as the competition regulator. In the adversarial system, it is the role of the ACCC in a civil matter to advocate for a contravention. However, it is also the role of the ACCC as an independent authority to operate in the public interest in pursuing justice which does include assisting the Court in determining whether or not there has been a contravention. The ACCC is also subject to the Commonwealth of Australia's Model Litigant Policy<sup>5</sup> and it conducts its litigation accordingly.

While the Australian system does not adopt the more formally structured system of plea bargaining or sentence guidelines that exist in other countries, there is on balance an emerging degree of certainty and consistency of outcome flowing from cartel cases involving a number of negotiated settlements.

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<sup>3</sup> *ACCC v Admiral Mechanical Services Pty Ltd, WAD 289 (2004)*

<sup>4</sup> *ACCC v REIWA (1999) 161 ALR 79, 80*

<sup>5</sup> *Commonwealth of Australia Legal Services Direction 2006*

## 2. Negotiated Settlements and the Courts

In the Australian context the Courts' role is essential, as no findings or penalties (civil or criminal in future) can be imposed except pursuant to a Court order. Further, Courts independently assess the material/evidence put forward by the ACCC and respondents. Although mindful of the important role the ACCC has in relation to preparing material for the Court, the Courts act independently and are able to provide effective oversight and exercise sufficient independence in relation to the penalty bargaining process.

### 2.1 Determining Penalties

In determining the level of penalties to be imposed for a contravention of the TPA, the TPA sets out certain factors that can be considered. Over time, the Courts have refined and developed a number of additional factors in support of the provisions<sup>6</sup> within the TPA. The Courts (and also the ACCC, in negotiating agreed penalty figures and submissions) apply the following factors<sup>7</sup>, generally referred to as the "French" Factors.

- The nature and extent of the contravening conduct.
- The amount of loss or damage caused.
- The circumstances in which the conduct took place.
- The size of the contravening company.
- The degree of market power it has, as evidenced by its market share and ease of entry into the market.
- The deliberateness of the conduct and the period over which it extended.
- Whether the contravention arose out of conduct of senior management or at a lower level.
- Whether the company has a corporate culture conducive to compliance with the TPA, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention.
- Whether the company has shown a disposition to cooperate with the authorities responsible for the enforcement of the TPA in relation to the contravention.

With negotiated penalties based on joint submissions, the Court determines the appropriate level of penalty. It is important to again emphasise that this decision is for the Court to make, and not for the agreement of the parties. The Court is not obliged to accept the recommendation. The Court is at liberty to question and probe the recommendation, and to impose whatever penalty it sees as appropriate.

The ACCC, through its submissions as to penalty, is conscious of the need for the material placed before the Court to sufficiently provide the Court with a level of certainty as the appropriateness of the level of penalties. A submission as to penalty will typically include the following:

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<sup>6</sup> *Trade Practices Act 1974 (Cth)*, s 76

<sup>7</sup> *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076.

- a) The formal pleadings filed by the parties;
- b) A broad outline of the alleged contraventions and relevant sections of the TPA;
- c) An Agreed Statement of the background facts, including a history of the corporate respondents, the extent of involvement of directors and other corporate personnel, the interlocutory history of the matter (if any) and the circumstances giving rise to the statement of agreed penalties;
- d) A statement of the relevant market and the way competition in that market has been injured by the conduct alleged;
- e) A statement as to the applicable principles as to penalty;
- f) A statement about the application of those penalties to the facts of the matter before the Court;
- g) A statement about the ACCC's views as to the quantum of penalty;
- h) In cases where the parties do not agree on certain matters, affidavits are filed outlining each party's submissions about the contested matters.

These submissions, sometimes in conjunction with additional material such as affidavits, form the basis upon which the Court determines a contravention of the Act – an agreed submission as to penalty contains both an agreed statement of the circumstances of the offence, both mitigating and aggravating, and the agreed position as to the appropriate quantum of penalty.

The Australian Courts have also applied the 'totality principle' in that any final penalty order should be sufficient to act as a personal and general deterrent but should not be oppressive.

## **2.2 The Appropriate Range of Penalty**

The Courts have stated that they do not merely 'rubber-stamp' agreements made by parties.<sup>8</sup>

Notwithstanding this, it has been the usual practice of the Court to give effect to the agreement of the parties as to the level of penalty, even if the Court may, in considering the matter independently, have reached a different decision as to the appropriate quantum. So long as the penalty agreed between the parties is considered by the Court to be within the appropriate range, the Court will give effect to the agreement.

The Full Court of the Federal Court also had this to say on the issue in *North West Frozen Foods Pty Ltd v ACCC* where Burchett and Kiefel JJ stated:

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<sup>8</sup> Spender J in *ACCC v Sundaze Pty Ltd* (2000) ATPR 41-736, while still approving the parties' agreement, stated that:

*Any agreement between the ACCC and a respondent as to the appropriate penalty, or appropriate range of penalties, is highly relevant to what the Court ought to impose by way of penalty, but in no way is the Court dictated to by any such agreement between the parties; nor is the penalty imposed by anybody other than the Court.*

*There is an important public policy involved. When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers of the Australian Competition and Consumer Commission to turn to other areas of the economy that await their attention. At the same time, a negotiated resolution in the instant case may be expected to include measures designed to promote, for the future, vigorous competition in the particular market concerned. These beneficial consequences would be jeopardized if corporations were to conclude that proper settlements were clouded by unpredictable risks.<sup>9</sup>*

In the ACCC's view, the Court's comment imposes a significant responsibility on the ACCC to "get it right". If the regulator does get it right, and recommends a penalty within a range considered to be appropriate by the Court, then the Court ought not to impose a different penalty. Regardless of the parties' agreement, if the Court believes the negotiated penalty is not right, then it simply will not make the order.

If respondents can negotiate with the ACCC with a degree of certainty that the negotiated outcomes will be accepted by the Court, then the efficiency of the system is substantially enhanced. If however the ACCC consistently gets the penalties wrong and/or the Court is consistently overturning negotiated settlements, then the lack of certainty mitigates against negotiating settlements with the ACCC.

### **2.3 Negotiated Settlements**

In cartel cases before the Court, the ACCC puts penalty recommendations where liability and the quantum of penalty is disputed and in negotiated settlement penalty agreements where liability is admitted and the penalty is agreed with the respondent. At times the ACCC will accept a negotiated agreement on liability but have the respondent argue penalties before the Court.

The ACCC does negotiate appropriate settlement discounts with respondents who wish to admit liability and agree on penalties. Experience has shown that the ongoing challenge is with proceedings against multiple respondents where only some of the respondents are willing to negotiate with the ACCC as to penalties. In these situations, the Court must assess the negotiated penalties, and must also hand down penalties which result from a fully contested trial with non cooperating respondents.

The ACCC, in negotiating penalties with individual respondents, needs to consider a range of factors concerning each respondent's involvement in the cartel conduct. This can be challenging in that each penalty agreement must reflect the ACCC's assessment of culpability.

There has been a concern with negotiated penalties with some commentators arguing that there needs to be meaningful scrutiny by the Court to ensure that the agreed facts are supported by the necessary evidence and the level of penalties is appropriate. Further, the issue as to whether the ACCC takes advantage of its bargaining power in relation to penalty negotiations has been raised. The penalties imposed by the Courts have reflected an appropriate acceptance of penalty discount based on cooperation and a fair assessment by the ACCC of an individual respondent's culpability.<sup>10</sup>

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<sup>9</sup> (1997) ATPR 41-546 at 43,580

<sup>10</sup> Negotiated penalties particularly with individual respondents have raised challenges for the ACCC. This is particularly the case where cooperation agreements are entered with individual respondents for reduced penalty and those respondents are required to give evidence on behalf of the ACCC against other cartel members or the corporation.

These challenges can also be exacerbated where the Court hearing an ACCC case against multiple respondents will not make earlier findings for liability of penalty involving those respondents who have

## **2.4 *Discounting of penalties and the Courts***

One particularly important aspect of disclosure of information to the Court is disclosure of information about why and how a particular penalty should be discounted to take account of a respondent's cooperation with the ACCC. Sufficient disclosure of relevant information is important to give the Court comfort that its decision on penalty is truly independent and not being manipulated.

While agreed penalty cases produce certainty of outcome, discounting of a penalty in respect of one respondent often has the effect of lowering the penalty imposed on another respondent in the same matter. This is a result of the application of the parity principle. It occurs notwithstanding that the factors relevant to the discounting of the former respondent's penalty have no relevance to the latter respondent.

The ACCC's not seeking penalty against particular respondents (or not joining them to proceedings at all) has been the subject of comment, even pointed comment at times. Nevertheless, it has not been taken into account (at least not expressly) by the Court in assessing, including discounting, the penalty to be imposed against another respondent in the same matter. This is important to the effectiveness of the cooperation and leniency policies (see discussion below).

## **2.5 *Courts consideration of agreed penalty submissions***

Court cases over time show that various judges of the Federal Court have at times differed from the ACCC in relation to the appropriate penalty to be imposed in particular cases. That in itself is not remarkable. The assessment of penalty is not a science. The best that different minds, informed of all relevant facts, can usually agree on is an appropriate range within which any penalty is defensible.

In the vast majority of cases however, the penalties proposed by the ACCC in agreement with a respondent have been accepted by the Federal Court. This suggests that the ACCC is in the main getting it right when it comes to assessing penalties.

In the clear majority of cases where the penalties have been contested, the Court has imposed a lower penalty than those proposed by the ACCC. In only one instance has the Court, in a proceeding where the penalty was contested, imposed a higher penalty than the one proposed by the ACCC (but only marginally higher).

It is also not surprising to find that, where the quantum of penalty was contested, the Court ultimately imposed a penalty at least the same as or, more often below, that submitted by the ACCC. In such cases, the ACCC would understandably submit a level of penalty at the high end of what it considered to be the appropriate range. This is to ensure that any moderating by the Court of the penalty proposed by the ACCC that is likely to occur in the face of mitigating submissions by a respondent will not result in a penalty that, from the ACCC's point of view, is inappropriately located at the low end of the range.

Agreed penalty cases produce certainty of outcome. In only one case, since the introduction of increased penalties in 1993, has a significant penalty different from that proposed been imposed.

Despite comments by some judges in particular cases that the agreed corporate penalty was on the low side, on only two occasions has the Court imposed a higher penalty and in one of those the Full Court reversed that decision.

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entered negotiated settlements with the ACCC until a fully contested trial with other respondents has been completed.

In *ACCC -v- North West Frozen Foods*<sup>11</sup>, Heerey J, a judge of the Federal Court, refused to give effect to an agreed penalty (between the ACCC and the respondent) and instead imposed a penalty approximately 30% higher than that which had been agreed between the parties (\$1.2 million compared with \$900,000). The respondent (and subsequently the ACCC) appealed the decision. Upon appeal his decision was set aside, with the Full Court<sup>12</sup> finding, in effect, that as the penalty agreement between the parties lay within the appropriate range there was no reason for the Court to impose a higher penalty, notwithstanding that it might have done so if considering the matter absent any agreement between the parties.

Comments from the Court that an agreed penalty maybe on the low side is not surprising. It is an unremarkable assumption that an agreed penalty is unlikely to be at the high end of the appropriate range, given that it is the product of negotiation.

## **2.6 The Courts comparison with other cases on penalty**

Notwithstanding the Court's warnings in the past about comparisons with other cases (eg Full Court in *North West Frozen Foods* and *McMahon Services*<sup>13</sup>) there seems to be a growing acceptance by the Courts that such comparisons, used carefully, are useful.

The Courts seem to be more inclined to make comparisons between the penalties imposed in different cases when they are assessing penalties on individuals rather than corporations. This perhaps is because factors such as capacity to pay can be assessed independently of the circumstances of the conduct in any particular case. Nevertheless there are other relevant factors such as the deliberateness and seriousness of the conduct that are fact specific, which make such comparisons of doubtful value.

## **2.7 The ACCC Cooperation Policy, the ACCC Immunity Policy and Agreed Penalties**

The ACCC's Cooperation Policy for Enforcement Matters was published in July 2002. This policy relates to the adoption of leniency in circumstances following cooperation by corporations and/or individuals. The policy states that cooperation and assistance can take a variety of forms, and in recognition of an individual and/or a corporation's cooperation the party can receive complete or partial immunity from the ACCC. Submissions may be made to the Courts for a reduction in penalty or even administrative settlement in lieu of litigation.

In practice many negotiated settlements before the Courts flow from the operation of the ACCC Cooperation Policy. The Cooperation Policy sets out for both individuals and corporations the requirements for the removal or reduction in penalties. The requirements for an individual include:

- providing evidence of a contravention,
- providing full and frank disclosure of the activity and any relevant documents or evidence,
- undertaking to cooperate with the ACCC's investigation,
- that the individual did not compel or induce any other parties to take part in the conduct and was not the ringleader.

<sup>11</sup> (1997) ATPR 41-546

<sup>12</sup> *North West Frozen Foods Pty Ltd -v- ACCC* (1996) 71 FCR 285

<sup>13</sup> *ACCC v McMahon Services Pty Ltd* (No. 1) [2004] FCA 1093

In addition to these requirements, a corporation is also required to:

- take prompt and effective action to terminate its part in any activity,
- be prepared to make restitution where appropriate,
- be prepared to take immediate steps to rectify the situation and ensure that it does not happen again,
- not to have had a prior record of TPA or related offences.

A number of agreed penalties have been a result of the ACCC's Cooperation Policy. This process has been further enhanced through the introduction of a leniency (immunity) policy. However, prior to the introduction of these policies, respondents to ACCC action did cooperate with the ACCC which resulted in agreed penalty agreements between the ACCC and respondents.<sup>14</sup>

The ACCC first published its Immunity (previously Leniency) Policy in 2003. In September 2005, a revised Immunity Policy came into effect. In short, the Immunity Policy provides automatic full immunity to the first person who self reports his or her involvement in a cartel up until the point where the ACCC has legal advice that it has enough evidence to institute proceedings. The new policy seeks to maximise incentives for cartel participants to report cartel conduct.

The ACCC has published interpretation guidelines with the Immunity Policy and explained how the policy will be interpreted and applied by the ACCC.<sup>15</sup>

The Immunity Policy is now seeing more ACCC proceedings before the Courts where on the Court documents it is clear that no case is being sought against certain cartel members.

There has been some acceptance by the Australian Courts of the principle that those who are the first to expose a cartel and assist the ACCC investigations deserve more lenient treatment. In the December 2003 *Tyco*<sup>16</sup> case, Justice Wilcox noted:

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<sup>14</sup> Such cooperation arrangements may be reached in circumstances where there are still a number of parties contesting liability and the settlement may be with a view to obtaining critical evidence, usually in the form of an available witness, that will strengthen the ACCC's case against the remaining parties. However, these negotiated settlements will usually still require the cooperating party to be subjected to a penalty from the Court, although the ACCC makes submissions to the Court that any penalty should be substantially discounted having regard to the level of cooperation provided or promised in the future. Naturally, negotiation of cooperation arrangements in these circumstances can be particularly complex.

<sup>15</sup> With the proposed introduction of criminal sanctions for cartel offences, the ACCC and the Commonwealth Director of Public Prosecutions (the DPP) will establish procedures to provide immunity from prosecution for cartel whistleblowers. Immunity will be available to individuals and corporations.

In Australia, the discretion to provide immunity from criminal proceedings is currently exercised by the DPP at the conclusion of an investigation. The exercise of this discretion is guided by the *Commonwealth's Prosecution Policy*.

It is proposed that the Prosecution Policy will be amended to enable immunity to be granted at an early stage of a cartel investigation.

<sup>16</sup> *ACCC v FFE Building Services Limited* [2003] FCA 1542

*“It is sufficient to say that, because of the existence of the leniency agreement, there can be no valid argument for parity in outcome as between Tyco and FFE. If this approach leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC’s confessional, that may not be a bad thing.”<sup>17</sup>*

An issue that the ACCC has addressed is the need to explain to the Court why penalty is being sought against one corporation/individual and not another where the reason is the Immunity Policy. This issue was also addressed by Wilcox J in the *Tyco* case:

*“ACCC has apparently decided not to seek the imposition of a penalty upon either of the other corporate respondents to this proceeding, Premier Fire Protection (NSW) Pty Ltd (‘Premier’) and MFS. I have been given no explanation for that decision. However, I understand, from evidence adduced in an interlocutory application, that Premier is no longer in business. Perhaps the same statement is true for MFS. I should not act on speculation. The proper course is for me to assume that the ACCC had good reason for its decisions in relation to those two corporations and to put aside any consideration of parity between FFE and them.”<sup>18</sup>*

In the ACCC’s view the Courts approach was appropriate. The ACCC’s believes that this approach is the proper approach for the Courts to take and that there is a public interest in offering immunity in exchange for evidence and that there should be no issue of parity flowing from that.

## **2.8 Revoking Cooperation/Leniency Agreements**

The ACCC has not had extensive experience in this area and given the recent introduction of the Immunity Policy has not to date been faced with a case for revoking full immunity with an applicant under this policy.

The ACCC has however had issues in the past (and is currently facing issues) with cooperation agreements and leniency where individuals have not in the view of the ACCC satisfactorily met the terms of cooperation.

One case was taken against the ACCC’s, predecessor, the Trade Practices Commission (TPC), in *TPC v CC (NSW) Pty Ltd and Others*<sup>19</sup> under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). That action followed a decision to withdraw immunity and institute proceedings against an individual.

In that case the TPC was held not to have been entitled to revoke immunity. That case was decided on the facts as to cooperation. It still raises questions as whether cooperation is to be determined by an objective test or whether the issue in revoking immunity is that the ACCC acts in a reasonable manner. That judgment did not address the validity of cooperation agreements or the capacity of the ACCC to void such agreements.

## **2.9 Private Action and Negotiated Settlements**

Negotiated settlements of cartel matters by the ACCC raises some difficulties for private parties either proposing or running litigation. Evidence provided in one proceeding is not usually evidence for the purpose of another.

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<sup>17</sup> Ibid at para 29

<sup>18</sup> Ibid at para 30

<sup>19</sup> (1995) ATPR 41-415

Section 82 of the TPA provides for claims for compensation by a person who has suffered loss or damage as a result of a breach of Part IV of the TPA. Under s 83, of the TPA, a finding of fact by a Court becomes prima facie evidence of that fact so that a claimant seeking compensation under s 82 can use a previous penalty hearing to assist their case. However, there is some doubt whether claimants can rely on agreed statements of facts presented to the Court by the ACCC and statements as to mutually acceptable penalties when pursuing an action under s 82. The policy behind s 83 is to allow victims of contravening conduct to take advantage of the findings of a Court without being required to prove the same facts.

This was adverted to by Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 3)*<sup>20</sup>, a case concerning an application by a non-party who may have been affected by contraventions of s 45 and 45A. The non-party sought access to the statements of agreed facts and submissions submitted jointly by the ACCC and some of the parties to an agreed penalty hearing.

In his reasons for decision in relation to the agreed penalty, Finkelstein J in *ACCC v ABB Transmission and Distribution Ltd (No 2)*<sup>21</sup> expressed concerns that ‘it is not clear that a judge who acts on formal admissions is making findings of fact’. However, in *ACCC v ABB Transmission and Distribution Ltd (No 3)*<sup>22</sup> he indicated that ‘it would have little practical utility if [the non-party] were to be denied access to the documents which founded the order’.

### **3. Plea agreements/settlements and private litigation**

The ACCC’s prime focus is on deterring, stopping and prosecuting cartels. But there seems to be a growing recognition by victims of cartels that they are entitled to seek redress. This coincides with an increased interest from private legal firms (and litigation funders) to pursue such private claims.

The ACCC has been approached by both private legal firms and litigation funders seeking whatever assistance the ACCC can offer in the development of private damages claims. The ACCC sees private proceedings as a legitimate and valuable avenue of redress. However there are limits as to what role the ACCC should play in such proceedings and what assistance it can provide.

It has also been suggested that the ACCC should actively seek findings of fact that will assist private damages claimants. The ACCC will not shy away from this in appropriate circumstances. However, there may be legitimate reasons in a particular matter for the ACCC to obtain findings that do not cover all instances of certain conduct, or indeed, not pressing for findings of fact at all. The ACCC position is that it would not wish to jeopardise the public interest of obtaining an agreed penalty or other outcome merely because this would not advance a private damages action, or would advantage certain private parties over others.

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<sup>20</sup> [2002] FCA 609

<sup>21</sup> [2002] FCA 558

<sup>22</sup> [2002] FCA 609

## CANADA

Plea and sentence discussions are an essential component of the criminal justice system. It is appropriate for Crown counsel to engage in plea and sentence discussions relating to *Competition Act* offences at an early stage in the criminal process in accordance with the guidelines articulated in the *Federal Prosecution Service Deskbook* (the "*FPS Deskbook*")<sup>1</sup>

The enforcement process in Canadian competition law is comprised of two steps. The first step, which is the investigation or inquiry, is conducted by the Competition Bureau (the "Bureau") and the Commissioner of Competition (the "Commissioner").<sup>2</sup> The second step, which is the prosecution of alleged offences, begins when the Commissioner refers a matter to the Attorney General. The Attorney General is independent of the Bureau and the Commissioner, and has the discretion to decide whether or not a prosecution is warranted. As the entity responsible for the prosecution, the Attorney General also has the sole authority to enter into plea and sentence discussions. However, in practice, there is significant cooperation between the Bureau and the Attorney General throughout the enforcement process.

### 1. The role of the Competition Bureau

While the authority to enter into plea and sentence discussions rests solely with the Attorney General, the Bureau participates in these discussions by providing support, advice and recommendations to the Attorney General.

The Bureau is responsible for briefing Crown counsel of the results of its investigation and for recommending an appropriate disposition of a matter. Bureau investigators have in-depth knowledge of the facts of any matter that is the subject of plea or settlement discussions, and are in an ideal position to provide information about a matter, and to identify mitigating or aggravating factors pertinent to plea and sentencing considerations. Those recommendations are reduced to writing and provided to the Attorney General along with a written brief indicating, in summary form, investigative steps taken, potential witnesses, and an overview of the evidence that such witnesses could provide (including documentary evidence) if the matter was to proceed to trial.

### 2. The role of the Attorney General

Crown counsel is responsible for the conduct of all plea and resolution discussions. Crown counsel must ensure that the conduct of plea and resolution discussions meets the standards set out in the *FPS Deskbook*.

Crown counsel may participate in plea and sentence discussions where:

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<sup>1</sup> <http://canada.justice.gc.ca/en/dept/pub/fps/fpd/toc.html>

<sup>2</sup> The Competition Bureau is an investigative agency which acts on behalf of, and on the request of, the Commissioner of Competition. Pursuant to section 7 of the *Competition Act*, the Commissioner is responsible for the administration and enforcement of the *Act*.

- a) the case meets the charge approval standard set out in the *FPS Deskbook* - namely that there is a reasonable prospect of conviction (sufficiency of evidence) and a prosecution is in the public interest;
- b) the accused is willing to acknowledge guilt unequivocally; and
- c) the consent of the accused to plead guilty is both voluntary and informed.

Crown counsel consults the Bureau to obtain its views as to the appropriateness of any proposed plea and sentence resolution, and considers those views in assessing whether the proposed plea and sentence is in the public interest.

### **3. The process**

All plea and sentence resolutions which are entered into prior to charges being laid are reduced to writing in a plea agreement in the approved form, which includes a statement of admitted facts signed by the accused.<sup>3</sup> These admitted facts must reveal the commission of an offence under the *Competition Act*.

Plea and sentence negotiations may include discussions about the specific charges to which the accused will plead guilty. These discussions may include reducing a charge to a lesser or included offence and withdrawing or staying other charges, but may not include proceeding with unnecessary additional charges in order to secure a negotiated plea, agreeing to a plea of guilty that is not disclosed by the evidence, or agreeing to a plea of guilty to a charge that inadequately reflects the gravity of the accused's provable conduct<sup>4</sup>.

Sentence discussions will include a recommendation by Crown counsel, or a joint recommendation with the accused, for a certain range of sentences or for a specific sentence, but may not include a promise in advance not to appeal the sentence imposed at trial. When negotiating a sentence, the Crown makes its best offer to the accused as soon as practicable, and, absent a significant change in circumstances, the offer is not repeated at later points in the process. Fines may be reduced if the accused cooperates with the Attorney General, and if the case is resolved in a timely manner.

Charges are laid by the Attorney General before the provincial court or the Federal Court, and an appearance date is set so that the accused can plead guilty. A statement of admitted facts, signed by the accused, is filed with the court at that time.

During the hearing, oral representations may be made by both Crown counsel and counsel for the accused. The court is not bound to accept the guilty plea, and will accept the plea only if satisfied that the accused admits certain facts, and that those facts constitute the commission of an offence.

If the court decides to accept the guilty plea, the court will then consider the sentence suggested by both parties. Again, the court is not bound to accept the suggested sentence; however, as a matter of practice, the court will always impose the suggested sentence unless the court finds that it is clearly unreasonable. The court will consider the appropriateness of the sentence in light of the relevant provisions of the *Criminal Code*, *Competition Act* and applicable case law.

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<sup>3</sup> A person becomes an accused when charges are laid. Throughout this document, the word "accused" is used to refer both to an accused and to a person who may become an accused.

<sup>4</sup> Unless, in exceptional circumstances, the plea is justifiable in terms of the benefit that will accrue to the administration of justice, the protection of society, or the protection of the accused.

The decisions of the court on plea and sentence are similar to other court decisions in that they have precedential value. In addition, both the conviction and the sentence may be appealed in the same manner as other criminal convictions and sentences.

A further option available for the resolution of cartel cases is the issuance, by the court, of a prohibition order pursuant to section 34 of the *Competition Act*. Prohibition orders usually form part of a sentence which is imposed after a guilty plea has been entered, and may also be issued where no charges are laid. The main purpose of a prohibition order is to enjoin or prevent someone from committing an offence or an act or thing constituting or directed toward the commission of an offence under the *Competition Act*. A prohibition order may also contain prescriptive terms requiring a person to undertake some positive steps imposed by the court, or agreed to by the Attorney General and the party. These steps will generally include such things as notifying clients of the prohibition order, instituting a competition law compliance program and an obligation to report on the requirements imposed by the prohibition order.

The use of a prohibition order, either on its own or as part of a guilty plea, provides the Bureau with alternative means to dispose of a matter, advance deterrence and where appropriate, secure restitution for consumers and makes executives more accountable for their business behavior. Three recent examples of plea and settlement agreements incorporating the use of prohibition orders illustrate the scope available for deterrence under these orders:

- a) In August 2006, the international auction house, Sotheby's, and its Canadian subsidiary, Sotheby's (Canada) Inc., were the subjects of a prohibition order issued by the Federal Court which required that Sotheby's implement compliance measures that will prevent similar future illegal activities and that Sotheby's post a notice of the Order on its web page and advise auction sellers in writing about the Court's Order. Sotheby's was also required to indemnify the Commissioner for the costs and disbursements incurred during the course of the investigation into this matter, up to an amount of \$800,000.
- b) In January 2006, in the Carbonless Paper case, terms of the prohibition order issued by the court required key employees who violated the conspiracy provisions of the *Competition Act* to either be removed from their positions in the paper merchant business, or if retained in another line of business, be demoted in terms of managerial responsibility. In addition, each of the companies involved was required to institute a competition law compliance program to ensure that all its officers, directors and employees in the paper business, are made aware of the *Competition Act* and understand the consequences to their former colleagues from this breach.
- c) In October 2004, the Bureau resolved price maintenance concerns that John Deere Limited was preventing its dealers from selling certain lawn tractors below a certain price, contrary to the price maintenance provisions of the *Competition Act*. Following a Bureau investigation, John Deere Limited agreed to the terms of a prohibition order, which included an obligation to compensate consumers.

The Federal Court of Canada, in an international cartel case, noted the meritorious public policy benefits to imposing prohibition orders with on-going reporting requirements as part of the sentences in cartel cases, given the reality of the pace of change, amalgamation, and merger in international commerce and the motivation to ensure that future officers fulfil the obligations imposed upon the entity.<sup>5</sup>

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<sup>5</sup> See *R. v. Bioproducts Incorporated* (2003), transcript of sentencing hearing, Federal Court Canada (T-1349-03).

#### **4. Conclusion**

Firms under investigation are motivated to participate in plea and sentence discussions in order to obtain a sentence which is less punitive than might otherwise be obtained through a litigated outcome and to avoid the costs of litigation. From the point of view of the Government of Canada, the main benefit is the avoidance of unnecessary litigation and its attendant costs and uncertainties. The system works well because the rules are followed consistently, so that there is predictability. Transparency, and public reporting of the settlements reached, also assists in the resolution of these matters. The Attorney General, having regard to the recommendations of the Bureau, strives to ensure proportionality across all cases, approaching similar cases in a similar manner.

## CZECH REPUBLIC

### 1. Introduction

Investigation of cartel agreements, belonging among the most serious infringements of competition rules with a negative impact both on other undertakings and on consumers, is extremely demanding, especially in case the undertakings involved are refusing to cooperate with the competition authority.

Detection, investigation and punishment of cartel agreements is in the Czech Republic regulated mainly by the Act No. 143/2001 Coll. on the protection of competition (hereinafter referred to as “APC”). This law does not provide for “Plea bargaining” as a specific institute allowing the competition authority to reduce the penalty imposed on the undertakings that took part in a cartel agreement but showed the will to remedy the otherwise harmful situation and cooperate with the competition authority. Nonetheless, other legal instruments are available as far as the reduction of the penalty is concerned depending on a degree of cooperation the suspected undertaking provides.

This contribution, after introducing briefly a standard administrative procedure in the Czech republic, discusses three specific approaches, allowing for reduction or even non-imposition of penalty to undertakings that stop the anticompetitive behaviour, namely settlement of the case before initiating the formal procedure, accepting commitments proposed by the undertakings and the reduction of fine in the appellate procedure.

### 2. Standard course of proceedings in cartel cases

Cartel agreements are investigated and decided upon by the Office for the Protection of Competition (hereinafter referred to as the “Office”), subject to the review of the courts. The standard administrative procedure in the Czech republic comprises of two stages, the first-instance proceeding, in which the decision whether there was an infringement of competition rules, followed usually by the appellate proceeding, in which the first-instance decision is reviewed by the Office itself.<sup>1</sup> This so called formal proceeding is preceded by a preliminary investigation, governed by less strict administrative rules, and therefore commonly referred to as the informal proceeding.

#### 2.1 Preliminary investigation

The purpose of this phase of the proceeding is to determine whether there is a reason to initiate a formal proceeding. If there is a suspicion that competition rules have been infringed, the Office has a legal obligation to inquire diligently all the factual and legal aspects of the particular case.

In course of the preliminary investigation, the Office contacts the undertakings suspected of breach of competition rules with the information regarding the possible infringement and requests an explanatory statement. These undertakings are usually interviewed and the concerns of the Office are discussed with them. Information is also often requested from other undertakings and competitors.

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<sup>1</sup> This second-instance decision may be further reviewed by the administrative courts.

In the end of this phase, after the primary analysis in an extent necessary for the appraisal of the matter in the sense of sufficiency of the facts indicating the infringement of competition, the Office either finds ground for initiating the proceeding or dismisses the case. This phase should usually not be longer than 2 months.

## **2.2 *First-instance proceeding***

The purpose of this phase is to find out whether the competition law was breached and to take a decision on it.

First-instance procedure begins with the notification issued by the Office in which the suspected undertaking is informed about the fact that the Office sees a possible breach of law in its conduct.

At this stage the Office already carries out a formal, more in-depth investigation. Evidence is gathered and thoroughly examined. The undertakings must submit to investigation and the Office is authorised to request that undertakings and also the bodies of public administration provide it with documents and information the Office needs for its activities.

Once the investigation is over, the Office issues the statement of objections, stating the precise information about the conduct the Office regards to be anticompetitive, concrete provisions of competition law that were in the view of the Office broken, the reasons for such an opinion and the evidence that lead the Office to that conclusion. The statement of objection gives the undertakings a chance to submit their arguments effectively and possibly propose the commitments that would remedy the infringement.

First-instance proceeding ends with one of two possible scenarios, depending on whether the infringement of competition rules had been proved or not.

In the former case the Office takes a decision declaring an infringement and forbidding the continuation of such a conduct. Furthermore, the Office may impose on the parties the duty to fulfil the specific remedies and significant fines.<sup>2</sup>

In the later one when, a cartel was not proven, the Office decides on termination of the proceeding.

## **2.3 *Appellate procedure***

The purpose of the appellate procedure is to review the factual and legal correctness of the first-instance decision. The parties may file the appeal against the decision of the Office within 15 days from the notice of that decision to the chairman of the Office.

The Chairman decides upon the appeal on the basis of a recommendation made by an appellate commission. The Chairman may either overrule the original decision in a sense of nullifying it, change it or dismiss the appeal.

The appellate procedure may take several months.

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<sup>2</sup> The fines can be imposed on undertakings of up to CZK 10,000,000 or up to 10% of the net turnover achieved in the last expired accounting period. When deciding on the amount of the fine, the Office takes into account in particular the gravity, possible recurrence and duration of the infringement of competition rules.

### 3. Current policy of the Office in the field of cartel cases

In pursuit of achieving as fast as possible the very purpose of investigating cartels, i.e. the elimination of negative effects the cartel agreements have on the market, the Office has recently introduced a new policy in handling cartel cases. In general, this new policy is more lenient towards the undertakings that are willing to cooperate with the Office and to remedy their anticompetitive conduct.

There has been a significant shift in a sense of an attempt to solve as many less grave cases of infringement as possible, especially those committed negligently, before the formal proceeding was initiated. So far the experience is very positive, as will be demonstrated later on a recent case-study.

The formal procedure also noted several changes. In course of the first-instance proceedings the Office notifies the suspected undertakings with a statement of objections, stating in detail what the Office conceives as the anticompetitive conduct and the evidence upon which it has come to this conclusion,<sup>3</sup> in order to give them a chance to submit their arguments effectively and possibly propose the commitments which would solve the problem to a mutual satisfaction, as the punishment is not the primary goal of the Office.

In case the appeal is filed but the undertakings comply with the requirements set in the original first-instance decision, the Office usually reduces the fine.

On the other hand the Office sends a clear message to the undertakings that have no will to redress their harmful conduct and repeatedly find themselves in a breach of competition rules. Severe penalties are imposed on such a violator.

### 4. Solving the problem before formal proceeding was initiated

For the sake of a speedy settlement of cartel cases the Office tries to solve the existing problem during the informal phase. However, this only happens if the infringement of the competition is less serious and also depends on the undertaking's willingness to cooperate with the Office.

#### 4.1 Case study

In 2006 the Office initiated a preliminary investigation based on an article in the newspaper concerning the practices of the company CET 21 which specializes in television broadcast, production of audio-visual products, agency and educational activities in the field of culture and also the publishing and advertising services.

This company concluded a number of contracts containing exclusionary provisions that could possibly distort competition in the market of services of television advertisement. The contractual partners of this company were bound to place certain amount of advertisement exclusively on TV NOVA, a television ran by CET 21, and even to increase the amount. If they were unable to keep the amount of advertisement they agreed with CET 21, it was considered a breach of contract and penalties were imposed on them.

CET 21 was contacted by the Office and explained the anticompetitive impact of its conduct. CET 21 proposed that it would remove the provisions in question from all contracts and submit the corrected versions to the Office in order to remedy the harmful situation.

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<sup>3</sup> Even though the Office is not obliged to do so under the Czech law, which requires only to inform the undertaking concerned what the object of the proceeding will be, and to grant him an unlimited access to file before the case is to be closed.

There was a very positive response to this intervention of the Office from the contractual partners of CET 21. The problem was remedied in a swift but effective way, without a need to carry on a lengthy administrative proceeding.

## **5. Commitments**

In course of the first-instance proceeding, the Office may issue a decision on imposition of commitments proposed by the parties to the proceeding.<sup>4</sup> Such a decision, providing the commitments proposed are sufficient for elimination of anticompetitive situation, enables ceasing the administrative procedure without the need to issue a decision stating that a prohibited agreement had been concluded or that an abuse of dominant position had been committed.

This instrument is particularly attractive to undertakings involved as the long proceeding itself and the consequent presentation of the case in media may significantly harm the good reputation and professional business image of the undertaking. It has, alike the before-said solution in the informal phase, predominantly preventive character. Undertakings should also pursue the expedited completion of the procedure since the possible declaration of an anticompetitive action by the Office's decision could be used against them in civil dispute on damages.

Once the procedure is completed, the Office may reinitiate the proceeding and issue a decision stating that a prohibited agreement had been concluded and therefore the fulfilment of the agreement is forbidden to the future, if the conditions crucial for issuing the decision have substantially changed, the undertakings in question acted in breach of the imposed measures, or the decision was issued on the basis of incorrect or incomplete documents and information submitted by the undertakings.

### **5.1 Case study**

The legal institute of commitments proposed by undertakings may be used both in cases of cartel agreements and cases of abuse of dominant position. For the purposes of this contribution the legal instrument will be demonstrated on the case of abuse of dominance by the state-owned company Forests of the Czech Republic (hereinafter referred to as "FCR"), since no decision on commitments was so far taken in cartel cases.

The administrative procedure in the case of a possible breach of the APC and the Article 82 of the EC Treaty was initiated in 2005. The FCR terminated the contractual relationship with its suppliers concerning the forestry works by declaring the Contract on Performance of Growing Activities and on Sale and Purchase of Timber invalid and required a change of commercial relations into a system based on individual orders. New contractual partners would have been selected on the basis of tender.

In the course of the proceeding the Office established that the FCR had a dominant position on the market of growing activities, exploitation activities in the forest and on the market of raw timber. It was found that the activity of FCR resulted in significant uncertainty of its business partners which fact was even strengthened by a requirement of conclusion of new contracts in short term not allowing the contractual partners to duly assess the proposed changes and to adapt to the new situation.

By this behaviour the FCR caused factual detriment to its contractual partners consisting in a temporary interruption of the forestry activities as well as non-material detriment established by the

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<sup>4</sup> The „commitments“ contained in the APC are principally identical with commitments regulated by the Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty Establishing the European Community.

uncertainty about further possibilities of cooperation with FCR all to the prejudice of the investments already implemented by the effected companies.

FCR proposed to the Office adoption of measures and commitments which could remedy the wrongful situation. The Office assessed the proposed commitments and concluded that the performance of these commitments would eliminate further possible negative impacts on FCR's contractual partners. The proposed measures were found sufficient for the protection of competition and elimination of the wrongful situation and as such accepted by the Office.

The FCR were imposed, by means of the Office's decision, the obligation to continue the former contractual relationships. Furthermore the FCR had to comply with the duty to perform the selection of all contractual partners for the above mentioned activities exclusively on the basis of transparent and non-discriminatory tenders. FCR was also imposed the duty to publish the content of those measures on its Web pages within 10 days following the date of the legal force of the decision.

In line with the APC, the Office terminated the administrative procedure. Such a decision was possible because the behaviour in question had not resulted in a substantial distortion of competition and FCR complied with the imposed remedial measures.

The expedited procedure described above allowed the fast rectification of the wrongful situation. Possible damage to other undertakings was therefore minimized. The Office's decision came into legal force in a substantially shorter period than in standard sanction proceeding concluded by fine which frequently faces an appeal by the party to the proceeding. In case of an appeal the decision remains without legal force and the party to the proceedings are not obliged to perform the imposed remedial measures.

## **6. Reduction of the fine in the appellate procedure**

The decisions of the Office declaring infringement of competition rules are usually appeald by the undertakings concerned. In that case, such a decision has no legal effects until there is a decision on the appeal. The undertakings concerned may therefore continue in their anticompetitive conduct, thus deepening the distortion of relevant markets.

In case the undertakings comply with the requirements set in the original first-instance decision even though they appealed it, the Office usually reduces the fine in order to stimulate the undertakings to abandon their anticompetitive conduct.

### **6.1 Case study**

The practical example of this legal instrument was once again taken from a recent cases of abuse of dominant position but it can be as well applied on cases of cartel agreements.

In this case a company ČSAD Liberec active on the market of services provided by a bus station of Liberec to subjects running a public bus transport refused without a justifiable reason to negotiate with the company STUDENT AGENCY running a public transport between the cities of Prague and Liberec about the access to its bus station.

In the end of the first-instance proceeding the Office declared in its decision a breach of competition law by the abuse of dominant position of ČSAD Liberec on the relevant market, prohibited the continuance of the wrongful conduct in the future and imposed a fine of 2 500 000 CZK. Furthermore the Office imposed a remedy consisting in an obligation to set the transparent rules for the use of the Liberec bus station in a way which would ensure objective and fair opportunities to use the bus station in question even

for STUDENT AGENCY and also the obligation to enable STUDENT AGENCY use the bus station itself, both within the period of 30 days.

The party to the proceeding appealed, nevertheless, it fulfilled the obligations imposed by the Office in its first-instance decision completely. The Chairman of the Office considered this fact a mitigating circumstance and changed the original decision in a way that he lowered the fine to the amount of 2 000 000 CZK.

## **7. Connection with the Leniency program**

The Leniency program has been designed for those undertakings that would like to terminate their further participation in a cartel, but so far have not dared to do so because of fear of imposition of a substantial fine. The Program consists in the application of lenient treatment to those undertakings that decide, subject to fulfilment of certain conditions, to co-operate with the Office in revealing cartel agreements.

Depending on the level of cooperation and the amount of evidence provided to the Office in order to prove reliably the existence of a prohibited agreement distorting competition the undertaking may be awarded absolute immunity from a fine or at least reduction of a fine.

The Office has received only a few requests for application of this program so far; nonetheless, in spite of generally more lenient approach towards the undertakings willing to cooperate discussed above, the number of requests have even increased lately.

## FRANCE

Depuis l'entrée en vigueur de la loi n° 2001-420 du 15 mai 2001 (dite loi NRE), le Conseil de la Concurrence peut, si l'entreprise ne conteste pas les griefs qui lui ont été notifiés et si elle prend des engagements comportementaux pour l'avenir, prononcer une sanction réduite à son égard. Il s'agit de la procédure de non contestation des griefs appelée improprement procédure de « transaction », car elle ne met pas fin aux poursuites et l'accord entre le rapporteur général et la partie matérialisé par un procès-verbal ne lie pas le Conseil qui décide en dernier ressort et peut ne pas suivre les propositions de réduction de sanction du rapporteur général.

L'introduction de cette procédure en 2001 a constitué un tournant majeur pour le Conseil de la concurrence, puisqu'elle lui a permis pour la première fois de dépasser son rôle « d'autorité répressive » et de renforcer son rôle de régulateur du marché, privilégiant ainsi, quand les circonstances le justifient, les injonctions et les mesures correctives, plutôt que les seules sanctions pécuniaires.<sup>1</sup> Le Conseil a ainsi été la première autorité indépendante en Europe à se voir dotée de cet instrument nouveau, qui lui permet de négocier les conditions de cessation de pratiques anticoncurrentielles constatées dans une notification de griefs et, qui par l'importance donnée à la non contestation des faits par le contrevenant, s'apparente à la procédure de « plea bargaining <sup>2</sup> » du droit américain.

La procédure de non contestation des griefs permet en effet le jugement accéléré d'une affaire contentieuse, après la rédaction d'une notification de griefs, et permet au Conseil, dans la limite d'un plafond de sanction réduit de moitié, d'appliquer un taux de réduction de la sanction normalement encourue par l'entreprise. Cette procédure récompense une forme de coopération de l'entreprise qui se manifeste dans la reconnaissance des faits et dans la cessation des pratiques.

L'exposé ci-dessous répond aux différentes questions adressées par le secrétariat général de l'OCDE dans ses lignes directrices et développe les problématiques spécifiques auxquelles le Conseil a été confronté dans sa pratique de la procédure de transaction.<sup>3</sup>

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<sup>1</sup> Sur ce thème, cf. le discours du Président Lasserre, « *La politique des engagements en matière de pratiques anticoncurrentielles : premiers pas et premier bilan en France* », Colloque du 19 janvier 2005

<sup>2</sup> Procédure par laquelle, dans une affaire pénale, le mis en cause et le procureur concluent un accord comportant des concessions réciproques soumis à l'approbation de la cour. Généralement, le mis en cause plaide coupable mais sur la base d'une qualification moins grave des faits ou pour une seule infraction encourageant la qualification la moins grave de celles encourues, en cas de pluralité d'infractions commises et encourt, de ce fait, une peine moins grave.

<sup>3</sup> Pour des développements plus complets, il pourra être utile de se référer à l'étude thématique du Conseil de la Concurrence : « *Les procédures alternatives et accessoires aux sanctions* », Rapport Annuel du Conseil de la Concurrence pour l'année 2005.

## 1. Dispositif juridique

### 1.1 Conditions de mise en œuvre de la procédure de non-contestation des griefs

Les conditions de mise en œuvre de la procédure de transaction sont prévues par l'article L. 464-2 du code de commerce qui prévoit en son III que « *lorsqu'un organisme ou une entreprise ne conteste pas la réalité des griefs qui lui sont notifiés et s'engage à modifier ses comportements pour l'avenir, le rapporteur général peut proposer au Conseil de la concurrence, qui entend les parties et le commissaire du Gouvernement sans établissement préalable d'un rapport, de prononcer la sanction pécuniaire prévue au I. en tenant compte de l'absence de contestation. Dans ce cas, le montant maximum de la sanction encourue est réduit de moitié* ». L'article 43 du décret du 30 avril 2002 dispose simplement que « *[l]orsque le rapporteur général propose au Conseil de la concurrence de faire application des dispositions du III de l'article L.464-2 du code de commerce, les parties et le commissaire du Gouvernement en sont informés par l'envoi d'une lettre du rapporteur général trois semaines au moins avant le jour de la séance* ».

Le déclenchement de la procédure est subordonné à deux conditions, de fond et de forme : elle implique la réunion de deux conditions relatives à l'entreprises postulante et ne peut s'enclencher que sur proposition du rapporteur général. Ainsi que le Conseil l'a rappelé dans sa décision 04-D-42 du 4 août 2004, le bénéfice de la transaction « *est soumis à la double condition que les entreprises en cause, d'une part, ne contestent pas la réalité des griefs et, d'autre part, s'engagent à modifier leur comportement pour l'avenir. Pour établir qu'une entreprise ne conteste pas la réalité des griefs notifiés, il faut que soit rapportée la preuve qu'elle ne conteste ni la réalité des pratiques notifiées, ni leur qualification au regard des dispositions du code de commerce, ni l'imputabilité de ces pratiques à la personne morale qui demande le bénéfice des dispositions de l'article L. 464-2-II* ». La réunion des ces deux conditions est d'abord vérifiée par le rapporteur général, seul à même d'ouvrir la procédure, puis par le Conseil en séance de jugement.

Ainsi, lorsque l'entreprise se voit notifier des griefs, elle peut prendre l'attache du rapporteur général pour lui faire connaître son intention de ne pas contester les griefs afin d'ouvrir la phase de négociation. Les discussions alors engagées sont relatives au principe de non contestation des griefs notifiés, à la teneur des engagements proposés par l'entreprise, ainsi qu'au taux de réfaction de l'amende proposé.

Si la négociation aboutit, elle sera consignée dans un procès-verbal signé par l'entreprise et le rapporteur général. Celui-ci contient la décision du rapporteur général de proposer, au Conseil, une transaction, la proposition de réduction de sanction du rapporteur général, formulée par une fourchette de taux, les engagements de l'entreprise, et la renonciation de l'entreprise à contester les griefs. Bien que la loi ne le demande pas, l'usage est que le rapporteur général informe les autres entreprises parties à la procédure de cette première transaction, afin qu'elles puissent éventuellement formuler une même demande.

### 1.2 Régime des sanctions applicables dans le cadre d'une procédure de transaction

La procédure de non contestation des griefs ne fait pas échapper l'entreprise à la qualification des pratiques, ni à leur sanction. Elle permet seulement de réduire de moitié les maxima de sanctions encourus, à savoir, pour les faits commis postérieurement à l'entrée en vigueur de la loi NRE, 5 % du chiffre d'affaires mondial de l'entreprise (au lieu de 10 %). Ainsi que le Conseil l'a rappelé dans sa première décision rendue en la matière, la décision 03-D-10 du 20 février 2003, la réduction de moitié s'applique au montant maximum qui peut être infligé et non à la sanction prononcée par le Conseil : « *S'agissant des sanctions, il convient de relever que l'article L.464-2 du Code de commerce qui prévoit que lorsqu'il est mis en œuvre, « le montant maximum de la sanction encourue est réduit de moitié », a pour objet de garantir aux entreprises intéressées que si le Conseil accepte les engagements qu'elles ont pris, le plafond*

*légal applicable aux sanctions qu'il édicte, est divisé par deux par rapport au régime de droit commun. Toutefois ces dispositions ne font pas obstacle à ce que, dans la limite de ce nouveau plafond, le Conseil apprécie le montant de la sanction qui aurait été encourue par chaque entreprise et y applique le taux de réfaction qu'il retient compte tenu des propositions faites par le rapporteur général ».*

Afin de calculer le montant final de la sanction, le Conseil fixe la sanction qu'il aurait prononcée en l'absence de transaction, puis applique à ce montant un taux de réfaction, le montant final ne devant pas dépasser le plafond indiqué précédemment. Le taux de réfaction est proposé par le rapporteur général en début de procédure mais ne lie pas le Conseil qui peut le modifier. Toutefois, après quelques exceptions dans les premières années de mise en œuvre de la nouvelle procédure<sup>4</sup>, l'usage s'est désormais établi de respecter les limites de la propositions du rapporteur général.

Cette interprétation du III de l'article L.464-2 du Code de commerce consistant, d'une part, à réduire de moitié le plafond de la sanction une fois les engagements souscrits et acceptés, d'autre part, à conserver toute latitude pour apprécier l'étendue de la réfaction du montant de la sanction encourue dans la limite de ce nouveau plafond, par rapport aux propositions du rapporteur général, a été confirmée par la cour d'appel de Paris dans un arrêt du 21 septembre 2004. Elle a écarté l'argument avancé par les parties qui exposaient que leur renonciation à contester les griefs était subordonnée à la réduction de sanction promise ab initio par le rapporteur général et que le non respect de ce taux de réduction promis rendait caduque la procédure. Dans un arrêt du 22 novembre 2005, la Cour de cassation a rejeté le pourvoi contre l'arrêt de la cour d'appel de Paris, jugeant que « *l'entreprise ne peut subordonner son absence de contestation et ses engagements à condition* » et qu'elle ne peut ignorer que le Conseil est « *non lié par la proposition de réduction de la sanction émise par le rapporteur général* ». Dans la majorité des cas cependant, le Conseil a prononcé le taux de réfaction proposé par le rapporteur général ou un taux plus favorable et, comme cela a été dit plus haut, le seul cas qui s'est avéré défavorable à l'entreprise est resté un cas isolé.

Enfin, il convient de rappeler que la transparence et la proportionnalité des sanctions sont garanties par l'obligation pour le Conseil de déterminer chaque sanction individuellement pour chaque entreprise et de manière motivée, en tenant compte de la gravité des faits, de l'importance du dommage à l'économie et de la situation individuelle de chaque entreprise. C'est ce qui a pu conduire le Conseil à considérer, dans une affaire d'entente verticale et horizontale (03-D-45) dans laquelle le rapporteur général avait négocié un taux de réfaction de 50%, que « *la gravité des pratiques, leur étendue et leur durée, justifient qu'un taux de réfaction moindre soit appliqué* ». Indépendamment de la prise en compte de ces éléments, il peut être relevé que la spécificité de la procédure de transaction au stade de la détermination de la sanction, vient de l'examen rigoureux par le Conseil de la crédibilité et de la substance des engagements pris par les entreprises ayant opté pour cette procédure. Cet examen a pu conduire le Conseil à considérer que « *dans certaines situations de marché, les engagements pris par une entreprise en position dominante peuvent avoir, pour le respect du jeu concurrentiel, une plus grande efficacité que les sanctions, en particulier si ces engagements, traduisent une modification substantielle des pratiques de cette entreprise et si les autorités de concurrence sont mises en mesure d'en vérifier l'application effective.* »<sup>5</sup> La substance même des engagements pris devient un élément clé de l'évaluation de la réduction de la sanction par le Conseil de la Concurrence.

A contrario, l'inexistence (ou l'impossibilité) de prendre des engagements substantiels, crédibles et vérifiables peut conduire le rapporteur général et le Conseil de la concurrence à refuser le bénéfice de la

<sup>4</sup> Décision 03-D-45 du 25 septembre 2003, relative à des pratiques mises en œuvre dans le secteur des calculatrices scolaires, confirmée par la cour d'appel de Paris dans un arrêt du 21 septembre 2004, et décision 04-D-65 du 30 novembre 2004 relative à des pratiques mises en œuvre par La Poste dans le cadre de son contrat commercial

<sup>5</sup> Décision 04-D-65, §65.

procédure de transaction. Dans une affaire récente<sup>6</sup> les parties mises en causes ont contesté devant le Conseil de la concurrence le refus du rapporteur général de poursuivre la procédure de transaction avec elles. Après avoir confirmé le bien-fondé du refus du rapporteur général, le Conseil relève « *que les engagements proposés par JH Industries ("ne plus procéder à un quelconque échange d'informations sur les prix avec ses concurrents", c'est-à-dire respecter à l'avenir le droit de la concurrence) ou pour les quatre autres sociétés (cesser toute concertation avec les membres du C5 ou les autres acteurs du marché portant sur les prix ou la répartition des clients, poursuivre la mise en place d'un système informatique permettant le calcul des prix de revient des produits et la maîtrise des coûts de fabrication, sensibiliser le personnel aux règles qui régissent le droit de la concurrence) ne revêtent pas le caractère substantiel qui, rapproché du caractère clair, complet et dépourvu d'ambiguïté de la renonciation à contester les griefs, peut justifier une proposition de réduction de la sanction.* »

Cette décision marque un certain infléchissement dans le degré d'exigence du Conseil en ce qui concerne la nature des engagements proposés pour déclencher la procédure de transaction. Cette exigence rend plus ardu l'accès à la transaction notamment pour les entreprises poursuivies pour leur participation à une entente horizontale secrète. On voit en effet assez difficilement de quels engagements « substantiels » elles pourraient se prévaloir pour l'avenir, dès lors que le comportement à modifier n'était pas un comportement public observable.

Cette position du collègue permet de penser qu'à la différence de ce qu'il a accepté dans la période de démarrage de la procédure, il sera désormais, sauf circonstances particulières, réticent à accepter une transaction dans une affaire d'entente horizontale secrète. Seule une modification de la loi, pour abandonner la condition de prise d'engagements pour l'avenir, pourrait permettre de redonner une place à la procédure de transaction dans l'examen des ententes horizontales.

### **1.3 Typologie des transactions intervenues devant le Conseil**

Depuis sa création, la procédure de transaction a été appliquée neuf fois par le Conseil, dans des situations extrêmement diverses : le Conseil n'a pas réservé le bénéfice de cette procédure à certaines pratiques puisque la transaction a été mise en œuvre pour appréhender des ententes verticales ou horizontales (échanges d'informations préalables au dépôt des offres, remise d'offres de couverture, ententes sur les prix de détail, etc...), ainsi que certains abus de position dominante simple ou collectifs.

Ces affaires présentaient néanmoins certains points communs : il s'agissait souvent d'affaires simples sur le plan factuel, pour lesquelles la pratique décisionnelle du Conseil était bien établie et où la jurisprudence du Conseil était abondante. Pour la plupart d'entre elles, les entreprises postulantes avaient, dès l'enquête, reconnu les faits<sup>7</sup>. On peut, finalement, distinguer deux types de cas de déclenchement de la procédure de transaction.

Le premier cas concerne certains comportements unilatéraux qui résultent soit de la position dominante (simple ou collective) de ces entreprises soit des modalités de leur intégration (verticale ou horizontale) et pour lesquels il peut exister des engagements structurels substantiels qui mettent fin rapidement aux comportements illicites. Ce premier cas rassemble en réalité de nombreuses situations également éligibles à la procédure d'engagements instaurée par l'ordonnance de décembre 2004 (cf. infra).

Le deuxième cas concerne toutes les situations simples, dans lesquelles il n'existe pas réellement d'engagements structurels possibles, mais où le Conseil peut souhaiter, dans un souci d'allocation optimale

<sup>6</sup> Décision 06-D-09, du 11 avril 2006, relative à des pratiques mises en œuvre dans le secteur de la fabrication de portes.

<sup>7</sup> Décisions 03-D-10 ; 04-D-30 ; 04-D-42

des ressources accélérer le traitement de l'affaire (sans pour autant recourir à la procédure simplifiée). Il pourra s'agir notamment des ententes horizontales qui n'ont pas été découvertes à la suite d'une demande de clémence (cf. infra).

Une telle typologie, clarifie le champ d'application de la procédure de transaction mais suppose néanmoins à l'avenir de ne plus subordonner le déclenchement de la transaction à des engagements, qui ne sont pas toujours utiles dans cette deuxième hypothèse.

#### **1.4 Circonstances dans lesquelles le rapporteur général peut refuser la procédure de transaction**

Le rapporteur général qui, aux termes du texte, « *peut proposer* » au Conseil de prononcer une sanction réduite à l'encontre de l'entreprise, dispose d'un large pouvoir d'appréciation dans l'exercice de la faculté de transiger et peut refuser de donner suite à la procédure.

Ainsi, le rapporteur général peut par exemple refuser d'entrer dans la phase de négociation, en raison de la nature de l'affaire, lorsque par exemple les pratiques sont particulièrement graves et complexes. Le rapporteur général peut également refuser cette procédure à cause d'engagements insuffisants pour remédier au problème de concurrence dénoncé ou de reconnaissance ambiguë des faits ou encore si les gains en terme de durée de la procédure pour le Conseil sont inexistantes.

Toutefois, le Conseil vérifie, à la demande d'une partie, que le rapporteur général n'a pas commis d'erreur manifeste d'appréciation en refusant de donner suite à la proposition de transaction. Le Conseil a ainsi récemment<sup>8</sup> rappelé qu'il exerçait un contrôle « *au moins restreint* » sur l'usage que le rapporteur général faisait de sa faculté de transiger « *dans la mesure où cette appréciation rejaillit sur le montant de la sanction finalement décidée* ».

## **2. Evaluation de l'attractivité de la procédure de transaction**

L'analyse de l'attractivité de la transaction suppose de comparer les gains et coûts induits par le déclenchement de cette procédure pour le Conseil comme pour les entreprises en cause. Cette attractivité doit être examinée de manière intrinsèque mais également par comparaison avec les bénéfices espérés du recours à d'autres procédures poursuivant des objectifs communs et entrant ainsi « en concurrence » avec la procédure de transaction.

### **2.1 Examen de l'attractivité intrinsèque de la procédure de transaction**

Du point de vue du Conseil, la transaction présente l'avantage d'accélérer le traitement de l'affaire. Elle permet de circonscire le dossier à l'examen du dommage causé par les pratiques. Elle limite les recours contre les décisions du Conseil devant la Cour d'appel. Elle peut enfin dispenser le rapporteur de l'affaire de la rédaction d'un rapport, ce qui permet en principe d'accélérer la procédure de plusieurs mois : on passe d'une procédure contradictoire en trois temps (deux phases écrites et une phase orale) à une procédure en deux temps (une phase écrite et une phase orale). Mais ce gain de temps reste subordonné, à l'acceptation de la transaction par toutes les entreprises mises en cause et pour tous les griefs. Ce n'est que dans cette hypothèse que la procédure sera considérablement accélérée et que le gain pour les services d'instruction sera conforme à l'objectif premier assigné à cette procédure.

La procédure de non contestation des griefs permet aussi au Conseil de régler de manière plus adaptée des problèmes de concurrence là où l'efficacité de la sanction est souvent critiquée et sans avoir à

<sup>8</sup> Décision 06-D-09 du 11 avril 2006

prononcer des injonctions dont la rédaction est toujours délicate. Dans ces situations, les engagements pris dans le cadre de la transaction mettent fin rapidement et efficacement aux problèmes de concurrence.

Pour l'entreprise partie à l'entente présumée, la procédure de transaction offre une voie nouvelle de règlement du contentieux, dont l'attractivité dépend essentiellement de l'écart entre la peine qui aurait été encourue en l'absence de transaction et celle qu'elle espère obtenir en s'engageant dans la transaction. La transaction lui permet également de réduire les frais afférents au traitement de la procédure devant le Conseil. Enfin, la transaction ne suppose pas qu'elle admette les griefs notifiés, mais simplement qu'elle ne les conteste pas. En conséquence, la transaction n'a aucune incidence sur une éventuelle action civile ou pénale connexe (cf. infra). Néanmoins, il peut être observé que le gain le plus substantiel (et donc le plus incitatif), que les entreprises espèrent obtenir en optant pour la procédure de non contestation des griefs, reste incertain même après la conclusion de la transaction. En effet, le Conseil n'est pas lié par la proposition de réduction de la sanction encourue négociée par le rapporteur général.

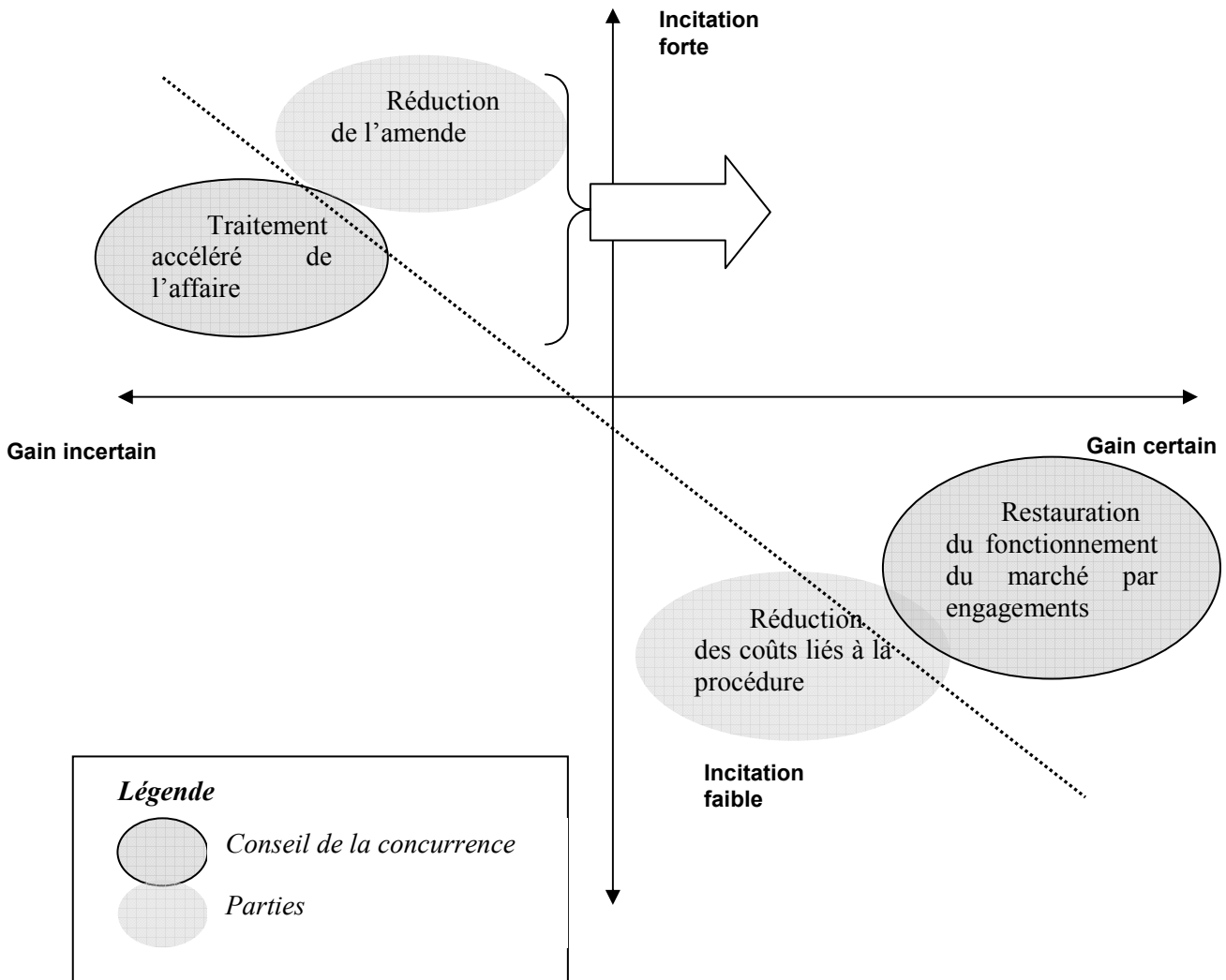
Ainsi pour le Conseil comme pour les entreprises mises en cause, le gain maximal qu'ils espèrent tirer de la procédure reste potentiel même à l'issue de la négociation. La réussite de la négociation dépendra donc, du point de vue de l'entreprise, de l'évaluation qu'elle fait de l'aptitude du rapporteur général à convaincre le Conseil de suivre la position qu'il a négociée avec l'entreprise. Du point de vue du rapporteur général, l'accélération effective de la procédure dépendra de son aptitude à convaincre toutes les entreprises en cause à accepter la procédure de transaction. Et plus le nombre d'entreprises en cause sera important plus sa tâche sera ardue. L'incertitude qui persiste tout au long de la procédure de transaction rend ainsi précaire l'équilibre de la négociation entre le rapporteur général et l'entreprise en cause. Dès lors, tout ce qui peut réduire cette incertitude renforce l'attractivité intrinsèque de la procédure de transaction.

Pour limiter dans une certaine mesure la portée des incertitudes sur le taux de réfaction de sanction, le Conseil combine parfois la procédure de non contestation des griefs avec la procédure dite « simplifiée ». Il s'agit d'une procédure rapide, sans établissement de rapport intermédiaire. L'application simultanée des deux procédures, qui vont dans le même sens de la rapidité et de l'efficacité, permet, ainsi de garantir aux entreprises, avant la séance, que le maximum de sanction pécuniaire encourue sera celui du plafond de la procédure simplifiée, à savoir 750 000 €. Le recours à la procédure simplifiée après la signature du procès-verbal de transaction présente l'avantage d'atténuer l'incertitude résultant pour l'entreprise intéressée de la liberté du Conseil de tenir compte ou non de la proposition de réfaction du rapporteur général. Elle peut donc constituer, au moment de la négociation avec le rapporteur général, un argument supplémentaire pour inciter les entreprises à recourir à la transaction.

Pour réduire encore l'incertitude relative au gain financier et renforcer l'attractivité de la procédure de transaction, il pourrait être utile à l'avenir de donner au rapporteur général, la possibilité de négocier un plafond de sanction en valeur absolue qui lierait le Conseil au stade de la détermination de la sanction. Cette évolution possible de la procédure de transaction, qui est en cours d'examen, se heurte toutefois au principe général de séparation des services d'instruction et de jugement.

Le schéma ci-après permet de résumer les atouts et les handicaps de la procédure de non contestation des griefs telle qu'elle a été appliquée jusqu'à présent. On constate que sa faiblesse principale est de ne pas associer clairement des incitations fortes et une sécurité juridique suffisante.

L'équilibre actuel de négociation entre le Conseil et les parties dans le cadre de la procédure de transaction est précaire: des travaux sont en cours pour réduire l'incertitude et renforcer l'attractivité de la procédure.



## **2.2 Examen de l'attractivité relative de la procédure de transaction. Articulation de la transaction avec les autres procédures négociées disponibles**

### **A. Transaction et procédure d'engagements**

Depuis l'ordonnance n°2004-1173 du 4 novembre 2004, le Conseil peut mettre fin aux poursuites qui sont engagées devant lui lorsque l'entreprise en cause accepte certains engagements permettant de mettre un terme aux préoccupations de concurrence identifiées. Par ses modalités et par ses effets, la procédure d'engagements semble pour les entreprises en cause nettement plus attractive que la procédure de transaction.

En effet, non seulement la procédure d'engagements permet à l'entreprise qui en bénéficie d'échapper à toute sanction pécuniaire, mais elle permet également d'échapper à toutes les conséquences induites par le prononcé au fond sur sa culpabilité et sur la qualification de ses pratiques. En effet, les décisions relatives aux engagements ne se prononcent pas sur la culpabilité des entreprises en cause : elles ne font état que de « préoccupations au regard de la concurrence ». La décision ne comporte donc pas le constat d'infraction qui pourrait être utilisé par des tiers devant les juridictions civiles. Elles ne permettent pas non plus à elles-seules de déclencher des poursuites pénales. La procédure d'engagements présente également une sécurité juridique beaucoup plus forte que la transaction puisque le Conseil est associé à la négociation dès le début de la procédure. Enfin, la procédure d'engagements n'est pas plus contraignante que la procédure de transaction puisque dans les deux cas, l'entreprise s'oblige à modifier son comportement et à mettre fin aux pratiques en cause.

Tous ces éléments permettent de comprendre le succès de la procédure d'engagements : en moins de deux ans, onze affaires ont ainsi été traitées par voie d'engagements. Durant cette période, trois affaires seulement ont bénéficié de la transaction.

La forte attractivité de la procédure d'engagement ne rend pas pour autant complètement caduque l'existence même de la procédure de transaction : l'analyse de la pratique du Conseil laisse en effet suggérer que ces procédures sont mises en œuvre dans des circonstances différentes. Néanmoins plusieurs ajustements pourraient être pris afin de mieux les articuler.

S'agissant du champ d'application de la procédure d'engagements, le code de commerce français ne précise pas dans quel type d'affaires elle peut être utilisée. En théorie elle peut donc être utilisée pour toute catégorie de pratiques susceptibles de restreindre la concurrence. Pour autant, le Conseil a clairement circonscrit les cas dans lesquels il entend faire usage de cet instrument. Il s'est notamment interdit d'utiliser cette procédure dans les cas où l'atteinte à l'ordre public économique justifie le prononcé de sanctions pécuniaires. Enfin, la mise en œuvre de la procédure d'engagement est jugée opportune dans les cas où la ligne de partage entre un comportement conforme aux usages commerciaux et un comportement anti-concurrentiel est ténue (articulation entre droits de propriété intellectuelle et concurrence, marchés en cours d'ouverture à la concurrence, distribution sur internet etc.). En revanche, la transaction a été privilégiée dans les cas « simples » où la pratique décisionnelle du Conseil était clairement établie.

Une analyse rétrospective des circonstances ayant conduit au déclenchement de ces deux procédures permet de distinguer quatre types de situations en fonction de la complexité de l'analyse concurrentielle et de la gravité des pratiques. Mais la pratique effective ne permet pas d'aboutir à une classification claire du fait des imperfections de la procédure de transaction. Néanmoins, des indications peuvent être données pour clarifier l'articulation entre ces deux procédures. A l'avenir, l'articulation pourrait dépendre d'un

paramètre principal: la possibilité d'apporter un remède unilatéral aux pratiques en cause, et d'un paramètre secondaire : le moment de la négociation.

Ainsi, dans l'hypothèse où le Conseil examine des pratiques potentiellement anti-concurrentielles et ayant un caractère unilatéral marqué (abus de dominance, abus d'un groupement d'entreprises ou restriction verticale), il pourrait accueillir une demande d'engagements, dès lors que la demande interviendrait avant la notification de griefs. Une fois la phase contentieuse ouverte, l'entreprise visée pourrait toutefois proposer une transaction avec prise d'engagements.

Dans l'hypothèse où les pratiques en cause sont des ententes horizontales qui ne permettent pour lesquelles les engagements d'une entreprise donnée ne sont pas de nature à garantir une disparition effective des pratiques, le Conseil ne pourrait plus accepter d'engagements, ni avant, ni après les griefs. On peut toutefois envisager, après une modification de la loi, que les entreprises en cause pourraient « plaider coupable » et transiger sur la sanction sans avoir à prendre des engagements.

### **B. Transaction et clémence**

Le rapporteur général s'est, à ce jour, refusé à faire droit à une demande de transaction formulée par une entreprise mise en cause dans les affaires ayant fait l'objet de demandes de clémence. Cette étanchéité des deux procédures coopératives peut se justifier.

Tout d'abord, on perçoit mal quel serait l'intérêt pour le Conseil de mettre en oeuvre la procédure de non-contestation des griefs dans un dossier de clémence. Sur le plan de la gestion du dossier et de l'accélération de la procédure, cette combinaison ne présenterait aucun intérêt puisque le rapporteur devrait, en tout état de cause, préparer un rapport écrit pour les autres parties. Par ailleurs, vis-à-vis des demandeurs de clémence, et en particulier de ceux qui auraient demandé le bénéfice d'une réduction d'amende, cette solution pourrait conduire à une situation inéquitable. En effet, pour obtenir un avis de réduction conditionnelle de l'amende encourue, le demandeur de clémence aurait dû apporter des éléments de preuve de l'infraction présumée constituant une valeur ajoutée significative par rapport aux éléments de preuve déjà en la possession du Conseil ou de l'administration. Il serait en outre soumis à un certain nombre d'obligations, dont celle de coopérer de manière permanente avec l'autorité. Accepter de récompenser une entreprise alors même qu'elle n'aurait apporté aucune contribution à l'instruction du dossier ne paraît pas justifié.

Ensuite, pour que la procédure de non-contestation des griefs puisse être mise en oeuvre, l'entreprise doit prendre un certain nombre d'engagements. Or, les infractions susceptibles de bénéficier du programme de clémence présentent en général deux caractéristiques : d'une part, il s'agit généralement des ententes les plus graves et, d'autre part, ces pratiques ont en principe cessé au moment où le Conseil adopte sa décision finale. Dans ces conditions, on voit mal quels engagements l'entreprise pourrait prendre.

### **3. Le contrôle de la transaction**

Le double contrôle du Conseil de la concurrence et de la cour d'appel sur la décision du rapporteur général encadre et limite substantiellement les pouvoirs de ce dernier. Le Conseil a ainsi rappelé dans une décision récente<sup>9</sup>, que le rapporteur général « peut », aux termes de l'article L 464-2 III, proposer au Conseil de réduire la sanction et dispose ainsi d'un large pouvoir d'appréciation dans l'exercice de sa faculté de transiger, mais que le Conseil « *exerce un contrôle au moins restreint sur l'usage qu'il fait de cette faculté, dans la mesure où cette appréciation rejaillit sur le montant de la sanction finalement*

<sup>9</sup> Décision 06-D-19 du 11 avril 2006, relative à des pratiques mises en oeuvre dans le secteur de la fabrication des portes

*décidée. C'est pourquoi il y a lieu de vérifier qu'en refusant de poursuivre la transaction qui lui était demandée, et donc de proposer une réduction de la sanction, allant de pair avec une diminution de moitié du plafond légal, le rapporteur général n'a pas commis d'erreur manifeste dans l'appréciation des circonstances de l'espèce ».*

Le Conseil n'a encore jamais considéré que le rapporteur général avait accordé ou refusé à tort le bénéfice de la procédure de transaction.

#### **4. Transaction et action civile ou pénale**

La non-contestation des griefs, n'est ni un aveu, ni une reconnaissance de culpabilité. Le recours à la procédure de transaction n'a donc que peu d'influence sur le contentieux connexe éventuel devant les juridictions civiles ou pénales.

Devant les juridictions civiles, les entreprises victimes de pratiques anticoncurrentielles ne pourraient se prévaloir de l'absence de contestation des griefs. Seule la décision du Conseil statuant sur les griefs pourrait être utilisée pour obtenir des dommages-intérêts devant le juge civil. Ainsi l'hypothèse d'une action privée qui pourrait naître à la suite de la décision du Conseil ne réduit pas l'attractivité de la procédure de transaction. Les textes ne prévoient aucune articulation spécifique entre la procédure de transaction et l'action civile. Il n'existe en particulier aucune négociation entre le Conseil de la concurrence et les victimes des pratiques anticoncurrentielles. Les actions privées en réparation de ces pratiques restent peu développées en droit français. Les travaux actuellement menés en vue de faciliter les actions en indemnité des victimes de pratiques anticoncurrentielles n'envisagent pas d'accorder une place spécifique aux victimes dans le cadre de la transaction.

De même en matière pénale, la non contestation des pratiques anticoncurrentielles ne pourrait servir de base à l'accusation pesant contre le chef d'entreprise poursuivi pour avoir pris une part déterminante aux pratiques dénoncées sur le fondement de l'article L. 420-6 du code de commerce. Seule la décision du Conseil statuant sur les griefs pourrait être utilisée pour établir certains des éléments constitutifs du délit prévu à l'article L. 420-6 du code de commerce. Dans cette dernière hypothèse, aucune passerelle n'étant prévue entre les deux procédures, l'admission d'une entreprise au bénéfice de cette procédure de non contestation des griefs ne garantit aucune atténuation de peine au chef d'entreprise éventuellement poursuivi sur le fondement de cet article.

## GERMANY

In Germany, plea bargaining, i.e. the termination of proceedings by settlement agreement, plays a predominant role in criminal proceedings. With the exception of collusive tendering, competition law violations are not prosecuted as criminal offences in Germany but merely constitute administrative offences that are prosecuted and fined by the Bundeskartellamt. Consequently, in cartel cases a settlement by agreement would have to be reached between the Bundeskartellamt and the cartel members.

### 1. Legal Framework

#### 1.1 *Plea bargaining in criminal proceedings*

So far, there is no statutory provision covering plea bargaining in Germany, neither with regard to criminal proceedings nor to Bundeskartellamt proceedings.

However, there have been three decisions by the highest courts in Germany on plea bargaining that have stated the legal limits of settlement agreements in criminal proceedings.

The first of these landmark decisions was taken by the Federal Constitutional Court in 1987.<sup>1</sup> In its decision the Federal Constitutional Court clarified that the principle of fair criminal proceedings under the rule of law did not prohibit an understanding between the court and the parties to the proceedings on the state of the proceedings and the expected outcome. However, this should not be understood in such a way that legal principles such as the judge's duty to investigate the matter and the principles of legal subsumption and penalty determination are open to discussion between the parties to the proceedings. Rather, under the principle of lawfulness there is a general obligation to investigate the material truth of the case and to base a decision on whether or not the defendant is guilty and on the respective legal consequences on the results of this investigation. For example, the judge is not allowed to accept a confession by the defendant which the latter has made because he has been promised or at least informed about the possibility of a mitigation of sentence, if evidence would require the judge to investigate further. Nor may the defendant be coerced into confessing by deceit or by a promise of advantages not provided for by law.

The second key decision on plea bargaining was taken in 1997.<sup>2</sup> In this decision the Federal Court of Justice held that despite the admissibility of a settlement agreement, a court is not allowed to ask for a waiver of the right to appeal in exchange for a possible mitigation of sentence. Under the general procedural rules a defendant may waive his right to appeal at the earliest after the pronouncement of the judgement. Consequently, the court may by no means ask the defendant to give up his possibility to have the correctness of the judgement confirmed by way of appeal before the proceedings have been concluded and the judgement has been brought to his knowledge. To conclude, before the judgement has been pronounced it is inadmissible to reach an agreement with the defendant under which he waives his right to appeal. In addition, the Federal Court of Justice clarified in its decision that under the principle of public

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<sup>1</sup> Federal Constitutional Court NJW 1987, 2662 f.

<sup>2</sup> Federal Court of Justice NJW 1998, 86 ff.

trial, the court and the parties to the proceedings may only reach an understanding during the public trial. While this does not exclude the possibility of talks between the parties in pre-trial or off-trial meetings to clarify their respective positions and the question of whether the parties are willing to negotiate, the court has to disclose the relevant subject matters and results of these discussions in the trial.

In 2005 in the third and last decision on the issue<sup>3</sup> the Federal Court of Justice largely confirmed the principles explained above. However, the decision has a significance of its own because in it the Federal Court of Justice warns that with its case law on plea bargaining it is approaching the limits of judicial development of the law and therefore urges the German legislator to adopt legislation to this effect.

On 18 May 2006 the Federal Ministry of Justice submitted a ministerial draft on plea bargaining in criminal proceedings which is to be also applicable to administrative offence proceedings. As regards plea bargaining in criminal proceedings, according to the draft the court may indicate the possibility of a maximum or minimum punishment depending, normally, on whether or not the defendant pleads guilty. However, the draft does not grant the administrative authority (i.e. the competition authority) comparable competences in pre-trial proceedings.

## **1.2 *Plea bargaining in administrative fine proceedings before the Bundeskartellamt***

The principles explained above can also largely be applied to fine proceedings before the Bundeskartellamt. In administrative fine proceedings before the Bundeskartellamt the principles under the rule of law, which in general allow for a settlement agreement but prohibit a waiver of the right to appeal, are also applicable.

However, there are also differences. For example, since proceedings before the Bundeskartellamt are administrative proceedings they are not subject to the principle of public trial. But the main difference between proceedings before the Bundeskartellamt and court proceedings lies in the fact that the Bundeskartellamt as the investigating authority also imposes the fine, whereas in criminal proceedings the investigation is conducted by the public prosecutor's office while the court decides on the punishment. Consequently, the Bundeskartellamt fulfils a double function in its proceedings, that of the investigatory authority and that of the authority imposing the punishment. This has the advantage that the Bundeskartellamt as the investigating authority is at the same time able to ensure the outcome of the proceedings and to find a settlement that is applicable to the whole sector. In the latter case the Bundeskartellamt has to consider the principle of transparent negotiations to ensure equal treatment of all parties concerned. Otherwise it would run the risk of being accused of arbitrariness.

## **2. *Practical experience and interests involved***

### **2.1 *The Bundeskartellamt's practice and experience***

In the past, especially during the 1990s, in a vast number of cases the Bundeskartellamt negotiated and imposed so-called "amicable fine decisions" with individuals and companies involved. In the more recent past this has only occurred sporadically. Instead, in more or less all cases appeals have been filed.

The „amicable fine decisions“ imposed in the past usually contained an agreement under which the individuals and companies involved confessed to the offence and “in return” were offered a reduction of the fine and sometimes also more favourable payment conditions (e.g. payment by instalments). In some cases proceedings against certain parties were even discontinued or limited to certain aspects of the offence.

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<sup>3</sup> Federal Court of Justice NJW 2005, 1440 ff.

The preconditions for such a settlement agreement were:

- a) Credibility of counsel (i.e. serious negotiations rather than a mere attempt to estimate the amount of the fine that is to be expected and to gain time);
- b) Strong evidence regarding the offence and, where a calculation of additional proceeds is required, the additional proceeds (irrespective of whether or not a confession was made);
- c) Equal treatment of all individuals and companies involved as well as transparency (in particular where a settlement was sought that is applicable to the whole sector);
- d) Where applicable a willingness on part of the Bundeskartellamt to refrain from fining members of the board of directors and the CEOs of the companies concerned;
- e) The possibility on the part of the Bundeskartellamt to impose a penalty where a party filed an appeal and thus violated the settlement agreement.

The main impediments to a settlement agreement were:

- a) The threat of claims for damages;
- b) The companies' possibility to gain extra interest. Until the 7<sup>th</sup> Amendment to the ARC no interests were charged on fines which meant that lengthy proceedings were beneficial to the companies concerned;
- c) A high probability that after an appeal to the Higher Regional Court the individuals and companies involved would be fined with a lower fine.

Generally, the initial advantage of a settlement agreement was that proceedings before the Bundeskartellamt were abbreviated. This made it possible for the Bundeskartellamt to issue a shortened notice that contained only the most relevant details of the facts of the case and of its legal assessment. Sometimes the written charges could even be shortened to the bare essentials. In addition, since appeals were not filed, there were no intermediate proceedings, no trial before the Higher Regional Court and no possible proceedings on appeals on points of law before the Federal Court of Justice.

## **2.2 *The interests of the parties concerned and the competition authority***

According to the Bundeskartellamt's experience the interests involved in settlement agreements in administrative fine proceedings can be summarized as follows:

### **a) *Contribution by the party concerned / the competition authority's interests***

The Bundeskartellamt is primarily interested in obtaining a confession from the party concerned so as to be able to reduce resource expenses in connection with its investigations. A confession by a party concerned can reduce the Bundeskartellamt's investigative expenses, particularly if it is made at a relatively early stage of the investigatory proceedings, if the facts of the case are very complex, and if the infringement has not already been proved to the satisfaction of the authority on the basis of evidence already available. Although an order to impose a fine may not be exclusively based on the evidence provided by a confession without any examination of the facts of the case, a confession generally facilitates the authority's work and reduces the length of its investigatory proceedings. The authority can base its order to impose a fine on the confession which reduces the work involved in drafting the order.

A waiver of the right to appeal, in which the Bundeskartellamt is very much interested, is unfortunately ineffective under the case-law. If the party concerned does not file an appeal against the order imposing the fine, the Bundeskartellamt will not have to spend any further resources on subsequent proceedings before the Düsseldorf Higher Regional Court and, if applicable, the Federal Court of Justice. Due to the complex nature of many fine proceedings in antitrust cases, the financial and personnel resources required for court proceedings can be substantial. If the party concerned does not file an appeal against the order imposing the fine, this has the further advantage, from the Bundeskartellamt's point of view, that he can testify before court against other parties concerned, i.e. participants in the same cartel. The unappealability of the order imposing the fine involves a so-called *ne bis in idem*. This means that after a decision has become final, the party concerned can no longer be prosecuted for an administrative offence but at the most for a criminal offence. If a criminal offence does not come into consideration, he cannot incriminate himself by testifying in proceedings against other parties concerned. He therefore has no right to withhold information. The unappealability of an order imposing a fine can therefore raise the chances of the conviction of further parties concerned, especially in those cases in which there is no detailed confession incriminating them.

Even if the reduced expense in resources is of priority for the Bundeskartellamt in plea bargaining, the decision to enter into negotiations is also based on weighing-up the risks and benefits. Other factors also to be considered in this decision are e.g. the sincerity of the negotiations. It should be ruled out that the motivation behind the negotiations is only an attempt to find out the general level of the fine or to gain time. Finally, the Bundeskartellamt might be interested in clarifying certain issues of law before court for reasons of legal certainty and thus is not interested in plea bargaining negotiations.

*b) Consideration by the authority / interests of the party concerned*

The party concerned will often hope in the first place for the least possible fine and possibly favourable conditions for paying this (in instalments). He may also be interested in the authority focusing on certain elements of the offence in its investigations and not following up other facts. Reducing or limiting the fine is as a rule also admissible from a legal perspective because the so-called post-offence conduct as a sign of understanding, regret and willingness to improve reduces the charges and justifies a milder fine.

In hardcore cartel cases, however, it has to be considered that the leniency programme's effectiveness must not be impaired by such a reduction of fines. A distinction has to be made between a confession on the one hand and cooperation under the leniency programme on the other. Although the leniency programme does not require the parties concerned to make a confession, it clearly exceeds the scope of a (mere) confession, in particular due to the extensive duties of cooperation required. Confession and cooperation under the leniency programme can thus be combined. As a confession is clearly less valuable it must result in a clearly lesser reduction of the fine.

Another aspect could be the hope of protecting individuals directly involved such as members of the board or managers in the wording of the order imposing the fine, particularly with regard to supervisory measures related to the criterion of reliability of the manager. A termination of proceedings against the individuals for reasons of opportunity can as a rule only be considered if there are further reasons which weigh in favour of terminating the proceedings.

The speeding up of proceedings as a result of a settlement agreement may be either convenient for the party concerned, or inconvenient in view of the threat of claims for damages (see also para. 3.).

### **3. Plea agreements and courts**

For the same reasons that apply to the Bundeskartellamt (proceedings that are very time-consuming and costly, complex, lengthy and resource intensive) the Higher Regional Court is also greatly interested in a settlement agreement and the withdrawal of appeals by the parties concerned. For this purpose it is the Higher Regional Court's practice in some cases to separate proceedings against one or several parties concerned, make a decision on these and suggest to the remaining parties to reach a settlement agreement on this basis.

In administrative fine proceedings a confirmation of the settlement agreement by the court is not provided for and not required because the parties concerned can appeal against the order imposing a fine at any time. The risk of the Bundeskartellamt having excessive discretionary powers can be excluded as a waiver of the right to appeal is not admissible and the parties concerned can take legal action against the Bundeskartellamt's order at any time.

### **4. Settlements and Private Litigation**

According to the Bundeskartellamt's experience the threat of possible claims for damages is the most important obstacle for cartel members to enter into negotiations for a settlement agreement. The basis of each settlement agreement is a confession by the party concerned. If the party concerned has thus admitted to having taken part in the offence, it is to be expected that he will be the first to face possible claims for damages. Moreover there is the risk of further sanctions, e.g. exclusion from public tendering procedures.

Restitution to the persons affected by the cartel should not be a mandatory precondition for a settlement agreement. However, this positive overall solution should be supported by the competition authority. Under its new guidelines on the setting of fines, published in September 2006, the Bundeskartellamt takes into account the compensation for third parties' financial losses as an extenuating circumstance in its setting of fines.



## IRELAND

### 1. Ireland's Law and Practice

Plea-bargaining is the name given to the negotiation between the State and the accused in which the accused tries to secure favourable treatment in return for a guilty plea. The accused foregoes the presumption of innocence and right to require the State to prove its case at a public trial in exchange for some element of lenient treatment which may include reduced charges. There are many possible methods by which plea discussions may be initiated, negotiations undertaken and settlements reached in cartel cases. The appropriate role for the prosecutor, defence counsel, the accused and the court varies widely among jurisdictions.

In Ireland, the Competition Act, 2002 makes hard core cartels indictable offences<sup>1</sup>. The Competition Authority is charged with investigating hard core cartels and recommending appropriate cases for prosecution on indictment to the Director of Public Prosecutions.<sup>2</sup> Under Article 30.3 of the Irish Constitution, the Director of Public Prosecutions alone may prosecute indictable offences.<sup>3</sup> Upon conviction for an indictable offence under the Competition Act, individuals may be sentenced to a maximum of five years imprisonment and fined up to €4,000,000.<sup>4</sup>

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<sup>1</sup> Section 4 of the Competition Act essentially mirrors Article 81. Section 6 (2) of the Act deals with hard core cartel offences and creates a presumption that:

[A]n agreement between competing undertakings...the purpose which is to

(a) directly or indirectly fix prices...,

(b) limit output or sales, or

(c) share markets or customers,

has as its object the prevention, restriction or distortion of competition....

Competition Act 2002, Section 6(2).

<sup>2</sup> Sections 30(b) and 31 of the Competition Act provide for Competition Authority investigations. All criminal matters prosecuted on indictment in Ireland are prosecuted by the Director of Public Prosecutions as per the Prosecution of Offences Act 1974.

<sup>3</sup> In fact, Article 30 of the Irish Constitution created the Office of the Attorney General which said office was responsible for all criminal prosecutions on indictment, but the Article allowed at 30.6 the role of Attorney General to be regulated by law. The Prosecution of Offences Act 1974, referred to at footnote 2 above, devolved the prosecutorial function of the Attorney General to the office of the Director of Public Prosecutions. Under Section 7 of the Competition Act 2002, the Authority is vested with the power to prosecute cartels as summary offences which carry lesser penalties. However, it would be rare for the Authority to choose to prosecute cartel offences under Section 7.

<sup>4</sup> Conviction on indictment may result in a maximum corporate and individual fine of €4,000,000 or 10% of the turnover, whichever is lower, during the prior financial year and in the case of an individual, imprisonment for a term not to exceed five years, or both. Section 8(1) (b), Competition Act, 2002. Conviction for a summary offence carries a lesser penalty of €3000 for firms and a term of imprisonment

## 2. Plea Bargaining In Ireland

While it is often said that plea-bargaining is prohibited in Ireland, it does not mean that every case on indictment in Ireland is presented to a jury for resolution.<sup>5</sup> Irish law recognizes that benefits to the criminal justice system can result from a plea of guilty and a guilty plea may be a factor taken into account in the mitigation of a sentence.<sup>6</sup> The methods for negotiating guilty pleas and the acceptable components of a plea agreement in Ireland are circumscribed by the Constitution, case law and practice.<sup>7</sup> In that regard, a clear distinction is made between judicial and prosecutorial plea bargaining.

### 2.1 Judicial Plea Bargaining

Judicial plea bargaining refers to discussions that take place between the prosecution, defence and the trial judge in the judge's private chambers, before trial commences or during a trial.<sup>8</sup> The purpose of these discussions is to seek an indication from the trial judge of the type of sentence that might be imposed if the accused is convicted. This type of plea bargain is conducted in private.

Judicial plea-bargaining is not practiced in Ireland and the Guidelines for Prosecutors specifically prohibit prosecutors from participating in such activities. Section 10.9 of the Prosecutor's Guidelines state:

*Prosecution counsel should in no circumstances participate in or attend any private discussion between defence counsel and a trial judge concerning the penalty which might be imposed on a defendant in the event of a plea of guilty to any or all of the counts. In the view of the Director, such a procedure, in the absence of any legislation authorizing it, is of doubtful conformity with the requirement of Article 34.1 of the Constitution of Ireland that justice should be administered in public except in such special and limited cases as may be prescribed by law. The Supreme Court, in the case of The People -v- Heeney (unreported, 5 April 2001) has expressed the view that such a procedure is undesirable and has approved its discontinuance by the Director.<sup>9</sup>*

### 2.2 Prosecutorial Plea Bargaining

Prosecutorial plea-bargaining refers to discussions between the prosecution and the defence over the charges that will be proceeded with in court. Typically the prosecution and defence agree in advance of

not to exceed 6 months and a fine of up to €3000 for an individual. Section 8(1) (a), Competition Act, 2002.

<sup>5</sup> From 2002 to 2004, over 85% of convictions were obtained following guilty pleas. 2005 Annual Report of the Office of the Director of Public Prosecutions, page 31. [[http://www.dppireland.ie/publications/reports/annual\\_report\\_2005\\_-\\_html/](http://www.dppireland.ie/publications/reports/annual_report_2005_-_html/)]

<sup>6</sup> Director of Public Prosecutions, Guidelines for Prosecutors, [2006], [Prosecutor's Guidelines or Guidelines] Chapter 10.1.

<sup>7</sup> Article 34.1 of the Irish Constitution states: Justice shall be administered in courts established by law by judges appointed in the manner provided by this Constitution, and, save in such special and limited cases as may be prescribed by law, shall be administered in public.

<sup>8</sup> See generally, Charleton, Peter, SC and McDermott, Paul Anthony, BL, The Constitutional Implications of Plea Bargaining, Bar Review, July 2000 (page 476).

<sup>9</sup> The Guidelines recognize that in exceptional circumstances where public disclosure of information might risk the life or personal safety of the defendant or other person it may be in the interests of justice for the prosecutor and defence counsel to approach the judge in chambers. In such case the prosecutor must "seek and obtain specific instruction from the Director's Office to mention the matter to the judge in chambers." Prosecutor's Guidelines Section 10.10.

trial that the accused will plea guilty to certain charges in return for more serious charges being dropped. Alternatively, the accused will agree to plead guilty to sample charges rather than face prosecution of a multiplicity of charges.

Prosecutorial plea-bargaining, as described above, also appears at first glance to be prohibited in Ireland. However, the position is not as clear cut as with judicial plea-bargaining. There are a range of discussions and areas of compromise available to the prosecutor but these are circumscribed and cannot limit the exercise of discretion by the Court as to the sentence to be imposed. Accordingly, plea discussions between the prosecutor and defence counsel will not include discussions of the level of fines to be imposed by the Court or the appropriate amount of jail time to be served in consideration for the guilty plea.

The prosecutor may accept guilty pleas on a number of sample charges in exchange for dropping the remainder of charges already proffered. For example, where the defendants have been charged with price fixing in respect of two separate products, the prosecutor may accept guilty pleas as to one set of products in exchange for dropping charges covering the second product. Alternatively, the prosecutor might accept a plea of guilty to a lesser charge rather than risk proceeding with a prosecution on a more serious charge where there are difficulties with the proofs in the case. The prosecutor also has an option of accepting a guilty plea in the lower, District Court, rather than pursuing a case on indictment.<sup>10</sup> In that instance, an accused will offer to plead guilty to the charges proffered, before an order is made by the District Court Judge to return him/her for trial on indictment in either the Circuit or Central criminal courts before a judge and jury. The benefit of this course of action, if the plea is acceptable to both the prosecutor and the District Court Judge is that penalties available to the court are limited to those available in that District Court. That court cannot normally imprison for periods longer than 6 months or fine for sums greater than €5,000.<sup>11</sup>

Typically the defence will approach the prosecution and the ensuing plea discussion usually “takes the form of the accused offering to plead guilty to fewer than all of the charges . . . or to a lesser charge or charges, with the remaining not being taken into account by the sentencing judge without proceeding to conviction.”<sup>12</sup>

The Prosecutor’s Guidelines limit the circumstances under which offers to plead guilty may be entertained. Plea agreements must be consistent with the “requirements of justice” and may not be considered unless:

- the charge or charges which the defence indicate the accused will plead guilty to are appropriate have regard to the nature of the criminal conduct or the accused and the likely outcome of the case;
- there is evidence to support the charges.<sup>13</sup>

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<sup>10</sup> Section 13, Criminal Procedure Act 1967. This is referred to as summary disposal on a plea of guilty. The District Court Judge has a reserve jurisdiction to refuse to accept a guilty plea where s/he believes the case to be too serious to be disposed of in the District Court.

<sup>11</sup> A summary offence under Section 8(a) of the Competition Act 2002 carries a maximum penalty of 6 months imprisonment and €3000.

<sup>12</sup> Guidelines, Section 10.1

<sup>13</sup> Guidelines, Section 10.3

Prosecutors may not entertain a guilty plea where the accused maintains his or her innocence or where to do so would distort the facts and result in an artificial basis for sentence.<sup>14</sup> The defendant must admit guilt to the remaining offences charged.

It is recognised that there is a “public interest in ensuring that offences are recorded as convictions.”<sup>15</sup> Where there are multiple charges arising out of the same offence, it is preferable to accept a plea to the principal offence, which allows for all the relevant facts as to the offence to be made known to the judge at sentencing.<sup>16</sup> When assessing whether a plea proposal is in the interest of justice, the prosecutor is required to take into account the totality of circumstances. In determining whether to accept the defence proposal, Section 10.6 of Guidelines requires the prosecutor to take into account all the circumstances of the case, including, where relevant:

- 1) the strength of the prosecution case;
- 2) whether the penalty that to be imposed if the charges are varied would be appropriate to the crime alleged;
- 3) the desirability of a prompt and certain resolution of the case;
- 4) the accused’s background, history and previous convictions;
- 5) the likelihood of adverse consequences to witnesses if the case is not disposed of on a plea, including the impact on a witness of having to give testimony;
- 6) the need to avoid delay in the resolution of other pending cases.
- 7) whether the accused is willing to co-operate in the investigation or prosecution of others or the extent to which the accused has already done so;
- 8) 8in the case of offences against the person and other serious offences, the views of the victim, although those views are not exclusively determinative;
- 9) the views of the investigating member of the Garda Síochána.<sup>17</sup>

Although the Director of Public Prosecutions consults with the investigating agency (in the case of competition law offences that is the Competition Authority) concerning plea proposals, the determination of whether to accept a plea proposal is within his sole discretion. In determining whether to accept an offer to plead guilty, the prosecutor must take into account all of the above factors in the exercise of

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<sup>14</sup> Section 10.4 of the Guidelines states: “A plea should not be accepted if to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence.” Section 10.7 provides that “In no circumstances should the prosecution entertain a proposal to plead guilty to a charge in respect of which the accused maintains his or her innocence.”

<sup>15</sup> Guidelines, Section 10.5

<sup>16</sup> Guidelines, Section 10.5

<sup>17</sup> The Competition Authority investigates cartel violations and makes prosecution recommendations directly to the Director of Public Prosecutions. In carry out its statutory duties, the Authority presently is assisted by two detective sergeants from An Garda Síochána, the Irish national police force, who are seconded to the Authority.

prosecutorial discretion. The decision to accept a plea must be approved by the Director of Public Prosecutions.<sup>18</sup>

### 2.3 *The Prosecutor's Role in the Sentencing Process*

Determination of an appropriate sentence to be imposed, whether after a jury verdict of guilty or acceptance of a plea from a defendant is a matter within the sole discretion of the court. In some jurisdictions plea discussions cover both the charges to which the accused will plead and the sentence the prosecutor recommends be accepted by the court.

In Ireland sentencing is strictly within the purview of the court. The prosecutor does not petition the court concerning the sentence to be imposed, and accordingly, discussions about the sentence to be imposed or its severity form no part of plea discussions between the prosecutor and the defendant's counsel.

An exception to this is at Section 160 of the Companies Act 1990 where there is an order for automatic disqualification from holding directorships in any company for a period of 5 years consequent upon conviction for an offence involving a company or some element of dishonesty or fraud. The prosecutor is entitled to apply to the court to vary this consequential disqualification. The section is silent on whether the disqualification can be varied either up or down, but it can be presumed that the purpose of the provision in the section is to allow the prosecutor to apply to the court to increase the consequential disqualification from holding any/all directorships for a period greater than the 5 years included in the section for particularly heinous offences.

Although sentencing is at the discretion of the court, defence counsel as a matter of course, always addresses the trial Judge in open court on the sentence that the Judge will hand down to the defendant. In particular, defence counsel will plead that the defendant should not spend time in prison and will make various arguments to support this plea. These arguments will include the plea of guilty itself (saving the State/Courts time and expense from conducting a trial), the age of the accused, his/her medical status, previous good character and any other factors that might serve to mitigate the severity of the sentence.

Regarding the prosecutors role in sentencing, the Prosecutor's Guidelines are quite clear as to what prosecuting counsel for the State can and cannot do. Section 8.20 of the Guidelines states:

*The prosecutor must not seek to persuade the court to impose an improper sentence nor should a sentence of a particular magnitude be advocated. However, the prosecutor may at the request of the court draw the court's attention to any relevant precedent.*

With regard to matters involving a potential custodial sentence, the Guidelines are equally explicit:

*If the court seeks the views of the Director of Public Prosecutions as to whether he considers that a custodial sentence is required, the prosecutor should not express his or her own views in relation to the matter but rather the views of the Director. If the court seeks the Director's views counsel should offer to seek instructions on the question. It should be made clear to the court that in order to give instructions in such a case the Director would require sight of all relevant*

<sup>18</sup>

Section 10.8 of the Guidelines states: "In an indictable case or in summary cases where the consent of the Director to a prosecution is required or has been specifically given any proposal to accept a plea to a lesser number of charges or to lesser charges than those preferred must always be referred to an officer of the Director of Public Prosecutions."

*material before the court, including all reports and transcripts of relevant evidence, and adequate time to give a properly considered view.*<sup>19</sup>

Nonetheless, as the Guidelines make clear, the prosecutor plays an important role in the sentencing process. Guidelines Section 8.19 states:

*Where the accused pleads guilty, it is the prosecutor's duty to ensure that the acts which are then placed before the court support each and every element of the charges laid which are necessary to provide a sufficiently comprehensive factual basis for sentencing. Where the prosecution agrees not to rely on an aggravating factor no inconsistent material should be placed before the sentencing judge.*

At the time of sentencing it is typical for the court to inquire about factual matters that may affect the choice of sentence to be imposed. Section 8.14 of the Guidelines state:

*When appearing at a hearing in relation to sentence the prosecutor has the following duties:*

- (a) to ensure that the court has before it all available evidence relevant to sentencing, whether or not that evidence is favourable to an accused person;
- (b) in particular, to ensure that the court has before it all available relevant evidence and appropriate submissions concerning the impact of the offence on its victim, in accordance with the provisions of section 5 of the Criminal Justice Act, 1993, in respect of offences to which that provision applies;
- (c) in addition, to ensure that the court has before it all relevant evidence available to the prosecution concerning the accused's circumstances, background, history, and previous convictions, if any, as well as any available evidence relevant to the circumstances in which the offence was committed which is likely to assist the court in determining the appropriate sentence;
- (d) to ensure that the court is aware of the range of sentencing options available to it;
- (e) to refer the court to any relevant authority or legislation that may assist in determining the appropriate sentence;
- (f) to assist the court to avoid making any appealable error, and to draw the court's attention to any error of fact or law which the court may make when passing sentence.

The information catalogued above is typically made available to the court at the time of sentencing through the testimony of a representative of the Competition Authority. The Competition Authority representative, under oath, testifies in open court and presents a summary of the evidence that would have been adduced had the case gone to trial. Subpart (a), above, which requires that the prosecutor inform the court of evidence favourable to the accused, suggest that the information concerning cooperation by the defendant, including acceptance of responsibility and an early plea, would be appropriate matters for the prosecutor to bring to the attention of the Court. Subpart (c) permits the prosecutor to inform the court of the entire circumstances of the accused's prior convictions. Additionally, the Section 8.16 of the Guidelines state:

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<sup>19</sup> Prosecutor's Guidelines, Section 8.21.

*Where there is a significant difference between the factual basis on which an accused pleads guilty and the case contended for by the prosecution, there is an adversarial role for the prosecution to seek to establish the facts upon which the court should base its sentence.*

The Guidelines create an affirmative responsibility for the prosecutor not to allow the defence to steer the outline of the evidence into too “rosy” a direction as to the culpability of the accused. The defence will always try to paint as positive a picture of their client as possible. The State must not allow this to go too far as it would mislead the court. Sentencing must be based on the actual offence committed.

In addition to ensuring that the court is aware of the range of sentencing options, Section 8.15 of the Guidelines notes that: “it is the prosecutor’s duty to deal with any questions of forfeiture, compensation or restitution which may arise.” The Competition Authority typically investigates hard core cartels as offences whose “object” is “restriction or distortion of competition” in violation of Sections 4 and 6(2) of the Competition Act. As a general matter the Authority does not prosecute hard core cartels as “effects” cases and consequently would not typically have nor seek to develop evidence as to individual harm that might result in awards of compensation or restitution. Individuals who are aggrieved and suffered losses as a result of the operation of the cartel may maintain private actions for injunctions and/or damages, including exemplary damages pursuant to Section 14 of the Competition Act.

Section 8(b) (i) of the Competition Act provides for a fine of the greater of €4,000,000 or 10 percent of turnover of the individual or undertaking “in the financial year prior to conviction.” The Competition Authority would expect to be questioned concerning the defendant’s prior year’s turnover by the Court at sentencing and to make representations concerning. Where such information is contested or difficult to ascertain, the prosecutor or courts might seek to obtain accurate information upon which to base a fine calculation through examination of the books or audit statements of the defendant.

Following the testimony by the representative of the Competition Authority, the defence is given an opportunity to present facts that would serve to mitigate the severity of any offence to be imposed by the court. The prosecutor retains important duties in respect of the mitigation arguments made by the defence, which include the duty to inform the court of any matter offered in mitigation which the prosecution can prove to be wrong and the duty to suggest that independent investigation be undertaken as to the bona fides of the defendant’s representations if necessary.<sup>20</sup> In limited circumstances, where the court enters a disproportionately lenient sentence, there is an opportunity for appeal by the Director of Public Prosecutions.<sup>21</sup>

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<sup>20</sup> Guidelines Section 8.17 states: “When the defence advances matters in mitigation which the prosecution can prove to be wrong, and which if accepted are likely to lead the court to proceed on a wrong basis, the prosecutor should first inform the defence that the matter advanced in mitigation is not accepted. If the defence persists it is the prosecutor’s duty to invite the court to put the defence on proof of the disputed matter and if necessary to hear prosecution evidence in rebuttal. Co-operation by convicted persons with law enforcement agencies should be appropriately acknowledged or, as the case may be, disputed at the time of sentencing.”

<sup>21</sup> Section 11.5 of the Guidelines note, in part: “Since the finding must be one of undue lenience, nothing but a substantial departure from what would be regarded as the appropriate sentence would justify the intervention of the court in order to increase the sentence: *Director of Public Prosecutions v. Byrne* (1995) 1 ILRM. There must have been an error of the principle by the sentencing court to justify altering the sentence: *Director of Public Prosecutions v. Redmond*, Court of Criminal Appeal, 21 December 2000.”

### 3. Private Litigation

Section 14 of the Competition Act provides for a private right of action for any person who is aggrieved as a consequence of any agreement, decision or concerted practice or abuse which is prohibited under section 4 or 5 of the Competition Act against an undertaking or any director, officer or manager of any undertaking, or both.<sup>22</sup> Ireland does not presently have the opportunity for class action cases, although there is a report of the Law Reform Commission proposes changes in that regard.<sup>23</sup>

### 4. Pleas and Sentences in the Home Heating Oil Case

Acting on a case referral from the Competition Authority alleging a price fixing cartel conspiracy in the sale of home heating oil in the West of Ireland, the Director of Public Prosecutions indicted twenty four individuals and undertakings between April and June 2004. The twenty-four suspects included eleven corporate undertakings, eleven corporate directors, one sole trader-undertaking<sup>24</sup> and one individual who was prosecuted for aiding and abetting the conspirators. The indictments against each of the accused in the cartel conspiracy included charges of price-fixing offences in relation to both home heating oil and kerosene.

In March 2006, Ireland became the first State in the European Union to obtain a criminal conviction for price-fixing following a jury trial. Additionally, following a plea of guilty by the cartel enforcer, the court imposed the first custodial sentence for price fixing in the European Union. As of the 2nd October 2006 the outcome for 22 of the 24 defendants prosecuted by the DPP in the home heating oil case had been determined. Overall, convictions were secured against 17 defendants and a nolle prosequi was entered against each of the remaining 5 defendants. The trial for the remaining two defendants, an undertaking and one director of the company are expected to be set for trial next year.

All of the accused in the Heating Oil Cartel were charged with two offences, price-fixing for both kerosene and gas oil, as heating oil is either one or the other of these two products. The Director of Public Prosecutions accepted guilty pleas on one count on the bill of indictment from each of the accused, whilst entering a nolle prosequi on the remaining count on the bill against each defendant. However, a plea of guilty was offered by the facilitator on both counts of the bill of indictment for aiding and abetting. The Judge in sentencing that accused recorded the conviction on one of the counts before the court whilst taking the second count on the indictment into consideration.

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<sup>22</sup> Section 14(1) states: "Any person who is aggrieved in consequence of any agreement, decision, concerted practice or abuse which is prohibited under *section 4 or 5* shall have a right of action under this subsection for relief against either or both of the following, namely :

any undertaking which is or has at any material time been a party to such an agreement, decision or concerted practice or has done any act that constituted such an abuse,

any director, manager or other officer of such an undertaking, or a person who purported to act in any such capacity, who authorized or consented to, as the case may be, the entry by the undertaking into, or the implementation by it of, the agreement, decision, the engaging by it in the concerted practice or the doing by it of the act that constituted the abuse."

Section 14(2) specifically permits the Authority to maintain a right of action under Section 14(1).

<sup>23</sup> Report on Multiparty Litigation (LCR 76-2005) (September 2005).

[<http://www.lawreform.ie/publications/reports.htm>]

<sup>24</sup> One defendant was a sole-trader using his surname as a corporate trade name without the benefit of the veil of incorporation.

The fines imposed on undertakings by the court range between €3500 and €12,500, with the typical fine being €7,500.<sup>25</sup> The lowest fine of €3,500 reflects consideration by the court of the fact that that undertaking pleaded guilty before the jury trial had taken place. Two corporate undertakings fined on the 18 May 2006 received higher fines which reflected their comparative size. Cloonan Oil Limited was fined €12,500 and Ruby Oil (Roscommon) Limited was fined €10,000.<sup>26</sup>

For individuals the outcome was more varied. Although the typical fine was €1,500, after a plea of guilty was entered, two exceptions should be noted. In one case the individual was only convicted after a jury trial and fined €3,500; in the other case although the individual pleaded guilty, he was fined €15,000 and given a six month prison sentence, suspended for 12 months. This individual was the cartel “enforcer” or “referee”.

It is interesting to note the comments of the trial judge in Galway Circuit Court in sentencing some of those convicted in the Heating Oil Cartel. Judge Raymond Groarke stated that those involved in price-fixing were stealing. He said:

*“These businessmen went into this with their eyes wide open and knew that what they were doing was criminally illegal. It was about greed and money.”*<sup>27</sup>

## 5. Conclusion

Ireland represents a jurisdiction where cartel investigations and cartel prosecutions are handled by two entirely separate organizations, the Competition Authority and the Department of Public Prosecutions. Despite the separation of duties, the two organizations have developed a strong working relationship and have attained good results in the first group of cartel prosecutions in Ireland.

<sup>25</sup> The size and turnover of the undertakings that have been sentenced have been modest. It should be noted that the Heating Oil Cartel was prosecuted under the now repealed Competition Act 1991 as amended by the Competition (Amendment) Act 1996. The maximum tariff for conviction on indictment was 2 years imprisonment and a fine of €3,800,000. Indictable cases were disposed of in the Circuit Criminal Court. This has been replaced by the 2002 Act where the maximum tariff for conviction on indictment has been raised to 5 years rendering competition offences ‘arrestable’ offences under the Criminal Law act 1997. Suspects can be arrested and detained for questioning either with or without warrant. Cases on indictment are disposed in the Central Criminal Court which is the criminal division of the High Court, a higher tier than the Circuit Court. As these were the first ever cases prosecuted on indictment there was no history successful prosecution to be looked to for guidance by the judiciary in determining sentence. These cases can be considered the starting point in criminal enforcement of cartels in Ireland.

<sup>26</sup> It should be noted that Cloonan Oil Limited was a wholly owned subsidiary of Estuary Fuel Limited (“Estuary”). Estuary Fuel Limited was convicted in Limerick District Court on the 4 October 2000 on two counts of price-fixing contrary to the same provision in the 1991 Act as amended. On that occasion the price-fixing was in relation to a vertical agreement where Estuary had agreed to sell petrol to a retailer on condition that the retailer would not sell on below a certain price. The fines on that occasion were IR£500 on each of the two counts.<sup>26</sup> Until the heating oil case, the Estuary conviction was the only criminal conviction in Ireland for a competition case.

<sup>27</sup> Pp 13, Irish Independent, dated the 11th March 2006. The article is entitled: “Oil price-fix thieves fined total of €37,000.”



## NETHERLANDS

### 1. Legal Framework

#### 1.1 *Alternative enforcement*

Plea bargaining/settlement of cartel cases involves negotiation between a competition authority and a target company involved in an investigation. Dutch law does not provide for a system of plea bargaining/settlement of cartel cases in a strict sense, meaning a negotiated *reduced* sanction in exchange for an *admission of guilt*. However, Dutch law does allow for plea bargaining/settlement of cartel cases in a wider sense, meaning a negotiated *discontinuation* of an investigation in exchange for *commitments* agreed upon by a target company.

The Netherlands Competition Authority (*NMa*) implements so-called “alternative enforcement”. Alternative enforcement refers to a situation in which the NMa decides not to issue a statement of objections on the basis of commitments offered by a target company, as the NMa no longer deems it necessary to impose sanctions. The investigation is thus terminated and no sanction is imposed. The target company does not have to plead guilty. If the NMa decides to publish a document in the context of alternative enforcement, the question is left open whether or not there was indeed an infringement.

The main reasons for the NMa to implement alternative enforcement are: (i) an efficient allocation of people and time, for both the NMa and the target company, (ii) consumers and purchasers directly profit from the termination of the infringement, (iii) preventing a period of uncertainty in the market concerned, (iv) preventing postponement of investments until the end of court proceedings, (v) eliminating the risk of court proceedings, and (vi) constructive dialogue with the target company within a short time period.

In order to prevent risks associated with alternative enforcement, the following is considered important: (i) preventing the image of a “deal-making” competition authority, (ii) ensuring equal treatment and consistency, (iii) preventing a reduction of deterrence, (iv) ensuring that the interests of all parties involved are taken into account, and (v) preventing regulatory capture.

Alternative enforcement is not based on a specific provision in the Dutch Competition Act (*CA*), but is based on the NMa’s discretionary powers relating to the enforcement of the the CA<sup>1</sup>. The NMa has wide discretion in its application of alternative enforcement. In order for the NMa to consider alternative enforcement, a list of cumulative criteria needs to be fulfilled. These criteria are:

- The infringement has been or will be terminated immediately;
- The risk of a repeated infringement is small;

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<sup>1</sup> According to the CA the NMa has to issue a statement of objections if (i) there is a reasonable presumption of an infringement, and (ii) the NMa considers it necessary to impose a sanction. Measures offered by the target company may entail that the NMa does not consider it necessary to impose a sanction. The NMa has wide discretion in this regard.

- The expected direct benefit to the consumer is larger than would be the case in a sanctions procedure;
- Alternative enforcement has sufficient preventive effect;
- Alternative enforcement does not entail significant objections from third parties;
- The more serious an infringement, the less likely it is that the NMa will consider alternative enforcement. Therefore, alternative enforcement is in principle not applied to hardcore infringements. This is, amongst others, to avoid a reduction of deterrence and ensure equal treatment and consistency.

If the target company does not act in accordance with the measures offered, the only possibility remaining to the NMa is to restart its investigation, issue a statement of objections and impose sanctions.

The decision to terminate the investigation is not published, but is often brought to the public attention via a press release.

### ***1.2 Expected amendments to the Dutch Competition Act***

The NMa supports an amendment to the CA that is now before Parliament. This amendment extends new powers to NMa and allows the competition authority to issue commitment decisions similar to Art. 9 of Council Regulation 1/2003<sup>2</sup>. The amendment is expected to be accepted by Parliament.

The power to adopt commitment decisions will allow the NMa to negotiate agreements with a target company. In exchange, the NMa will not start an investigation or abandon an investigation that is already underway, or decide against issuing a statement of objections and imposing sanctions. The target company is not required to plead guilty in order to obtain a commitment decision. Moreover, the commitment decision does not involve an assessment of whether or not there is an infringement of the CA.

The difference with alternative enforcement lies in the fact that whenever a target company does not act in accordance with the commitments, the NMa may impose sanctions for not acting in accordance with the commitments without having to issue a statement of objections.

The advantages and disadvantages of commitment decisions are similar to those prevailing in alternative enforcement. Commitment decisions will significantly improve transparency and allow the NMa to take the interests of all parties into account. This is because the intention of the NMa to issue a commitment decision will be published beforehand allowing third parties to provide comments. The commitment decision itself will also be published. Commitment decisions will also significantly enhance the enforceability of commitments negotiated with a target company.

The NMa is likely to be endowed with wide discretion in deciding whether or not to issue commitment decisions, although this discretion may be limited to a certain extent by an Explanatory Memorandum on the amendments to the CA. It is still too early to tell in what way the NMa will use this discretion.

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<sup>2</sup> 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 EC Treaty, OJ L 1/1, 4/1/2003.

The decision to issue a commitment decision is likely to be open to appeal for both the target company and third parties. The decision not to issue a commitment decision is likely to be exempt from appeal, for the target company as well as third parties.

### **1.3 *Leniency***

Dutch law involves a system of leniency. If an NMa investigation is already underway, a target company may still claim leniency and obtain a reduction in fines. However, unlike plea bargaining/settlement of cartel cases, leniency does not involve negotiation between the NMa and the target company.

### **1.4 *Reduced sanction in response to unilateral commitment***

Decisions have occurred in which the NMa imposed reduced sanctions in response to a target company offering unilateral commitments outside the leniency system<sup>3</sup>. The possibility to take unilateral commitments into account when setting fines, is based on the NMa's wide discretion to determine the level of fines. However, these situations do not involve negotiation between the NMa and the target company.

### **1.5 *Specific procedure followed in the construction sector***

In its handling of a vast number of cases in the construction industry, the NMa introduced specific procedures after receiving a large number of leniency applications in this sector. Although these do not involve an element of negotiation, as in plea bargaining/settlement, such procedures do provide an example of greater efficiency for all parties involved.

In order to deal with the large number of companies involved, as well as to take account of the general desire for the construction sector to "make a fresh start/ come clean", the NMa introduced the so-called "fast lane procedure". After receiving a statement of objections, a target company may choose to enter the regular or the fast lane procedure. A target company choosing the fast lane procedure obtains a 15% fine reduction in exchange for partly renouncing on its rights of defence.<sup>4</sup>

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<sup>3</sup> See for example, Interpay, Administrative appeal decision of the NMa of 21 December 2005, 2910-864, in which the NMa reduced the fines because of the fact that the target companies had made 10 million Euros available to a fund for the stimulation of an efficient payment system.

<sup>4</sup> The investigation into the construction sector is split up in investigations into several sub-sectors. The NMa has issued a statement of objections per sub-sector. Target companies can choose between the regular procedure and the fast lane procedure. The fast lane procedure will take place before the regular procedure. Target companies are required to fulfil two conditions when choosing the fast lane procedure. First, target companies have to relinquish their right to individual access to the file, as well as their right to provide an individual response to the statement of objections as far as its essence is concerned (i.e. (partly) disputing the facts and the assessment of those facts). Target companies only have the possibility to provide an individual response insofar as it concerns circumstances relating to the target company concerned (i.e. mainly circumstances relevant for the setting of the level of a fine). Second, target companies have to empower one and the same representative. The representative all target companies choosing for the fast lane procedure has the right to provide a common response to the statement objections and has the right to be heard. Target companies have the possibility to opt out of the fast lane procedure and choose for the regular procedure until the moment the fining decision is being prepared. The criteria for following the fast lane procedure are set out in the letter whereby the statement of objections is issued to a target company. This letter is not open for appeal. A target company may individually appeal the decision whereby a sanction is imposed. However, such appeal is also limited to circumstances relating to the target company concerned and may not concern the essence of the decision.

## **2. Policy Issues**

The following policy issues are partly based on experiences involving the Dutch system, but do not concern the Dutch system in specific. These policy issues relate to a system of plea bargaining/settlement in general.

### ***2.1 Success factors for negotiation: willingness to impose a sanction***

Alternative enforcement and the future possibility of commitment decisions have significant advantages for a target company: no sanction is imposed, no infringement is established and a target company does not have to plead guilty which reduces the risk of damage claims by third parties, and a target company avoids the costs of proceedings. However, in order for a negotiation to be successful it seems crucial that a competition authority is indeed prepared to continue the investigations and impose a sanction if the negotiations with a target company are not satisfying for the competition authority.

### ***2.2 Termination of investigation or admission of guilt and reduced sanction: the relevance of rights of defence***

An interesting aspect for further discussion seems to be what system of plea bargaining/settlement ensures the right balance between a more efficient procedure on the one hand and the rights of defence on the other hand. If a settlement is reached before a statement of objections is issued, a target company has not yet had the possibility to exercise its rights of defence. In that situation requiring an admission of guilt or imposing a reduced sanction seems less appropriate than a termination of the investigation. Alternatively, more limited rights of defence could be introduced. If, however, a settlement is reached after the hearing, a target company may already have had the possibility to exercise its rights of defence. In that situation requiring an admission of guilt or imposing a reduced sanction seems less objectionable.

### ***2.3 The risk of reduced deterrence: infringements that have the object to restrict competition and phase of investigation***

Another aspect that merits further discussion is the risk of reduced deterrence as a result of plea bargaining/settlement. There indeed seems to be such risk. Therefore, it may be worth considering to exclude or limit plea bargaining/settlement in the final phases of an infringement procedure. Another point of consideration concerns the exclusion of a plea bargaining/settlement for cartel infringements with the object of restricting competition.

### ***2.4 The risk of reduced effectiveness of the leniency system: infringements that have the object to restrict competition***

Another reason to consider excluding plea bargaining/settlement for cartel infringements with the object of restricting competition, is the risk of reduced effectiveness of the leniency programme. Under Dutch law a target company may still apply for leniency after an investigation has started and may obtain a reduction in fine. If a target company also has the possibility of plea bargaining/settlement, the target company may prefer plea bargaining/settlement over leniency because the former allows a target company to balance the commitments against the risks of continuation of the investigation before agreeing upon the commitments.

### ***2.5 Transparency, consistency and the interests of third parties***

An interesting question to discuss is to what extent the process of plea bargaining/settlement ought to be transparent. A distinction could be made between transparency of the circumstances in which plea

bargaining/settlement may be considered by a competition authority and transparency of the commitments agreed upon.

As regards the circumstances in which settlement may be considered by a competition authority, it may be argued that a competition authority should have wide discretion in order to strengthen its negotiating power and to prevent a reduction of deterrence. However, it may also be argued that the circumstances in which a competition authority is to consider settlement ought to be transparent in order to ensure consistency and proportionality.

As regards commitments agreed upon, publication seems desirable in order to ensure consistency and proportionality. The publication of a draft settlement decision seems desirable in order to take the interests of third parties into account.

### **3. Plea Agreements and Courts**

With regard to a settlement decision, it might be a point of consideration to exclude the possibility of appeal for a target company in order to ensure the efficacy of the settlement. If the settlement would be open for appeal by a target company, the main advantages of a settlement for a competition authority would seem to be eliminated. Furthermore, a target company always has the possibility to refuse the settlement and choose for the regular procedure. In an appeal of the sanction decision any objections against the settlement procedure could be brought forward. However, it may also be considered to introduce a limited appeal possibility against a settlement decision for a target company.

It seems justified that third parties should have an appeal possibility against the settlement decision. Depending on the legal system, this could be in the form of either an appeal against the settlement decision itself, or against the decision relating to a complaint that is based on the settlement decision.

As regards the decision not to settle there may be no need to allow an appeal for a target company, nor for third parties. This is because a target company could raise any objections against such a decision in its appeal of the sanction decision. Third parties may not be affected by a decision not to settle.

### **4. Plea Agreements/Settlements and Private Litigation**

The risk of private follow-on suits may indeed make a target company more reluctant to enter into a plea agreement/settlement. However, this risk does not seem to play a significant role if a settlement does not require a target company to plead guilty and does not establish an infringement.

In response to the question under what circumstances a competition authority should require a settling party to pay damages to third parties, the issue whether or not a target company could have exercised its rights of defence may be considered leading. For example, if a settlement takes place before a statement of objections is issued, it may be undesirable to require a settling party to pay damages to third parties. This may be otherwise if a settlement takes place after a target company has had a possibility to reply and to be heard. The same applies to answering the question whether the settlement could be used as evidence in private actions.

Nevertheless, it may be interesting to discuss whether a target company and third parties should have access to the file after a settlement in order to prepare for damage claims. In this regard, it may be interesting to discuss whether there should be a file relating to the investigation and a separate file relating to the settlement. In this discussion it may be relevant whether or not a legal system has the possibility for third parties to request documents from a target company via a discovery procedure.

Considering the difficulties third parties face when bringing damage claims, it may also be interesting to discuss whether the fact that a target company settles damage claims should be reason to reduce a sanction. Such a reduction could be the response to a unilateral commitment of a target company or the result of negotiations.

## NEW ZEALAND

### 1. Executive Summary

- New Zealand's Commerce Commission (*the Commission*) has in recent years adopted Leniency and Co-operation Policies with the aim of encouraging cartel participants to self-report, and to obtain their assistance in the prosecution of cartel cases.
- The policies are providing considerable assistance with the investigation and prosecution of cartels. The Commission is currently making significant headway in its pursuit of a major chemicals cartel, as a result of co-operation with key cartel participants.
- The Commission adopts the role of 'model litigant' and does not compromise claims before the Court in exchange for admissions or penalty and costs offers. The Commission's process for negotiating admissions and formulating penalty recommendations does not resemble a commercial negotiation. Rather, the Commission uses information obtained through discovery and co-operation to persuade defendants that the Commission's causes of action are sustainable, and seeks to negotiate penalty recommendations that can be submitted to the Court.
- The only sense in which the Commission 'compromises', therefore, is in agreeing to recommend to the Court that defendants' penalties should be meaningfully discounted for early admissions of liability and for their co-operation (if any) with the Commission.
- The New Zealand courts are mindful of avoiding capture of the penalty-setting process by the parties and their counsel. The Courts expressly reserve the power to depart from penalty recommendations in cartel cases; while that has occurred in Australia, it has not yet occurred in New Zealand.

#### *Notes:*

- (i) Price-fixing, bid-rigging and other anti-competitive practices are not criminal offences in New Zealand. Accordingly, the term 'plea bargaining' is only used in this paper to refer to a negotiated outcome of a criminal proceeding relating to obstruction of the Commission.
- (ii) Attempts to mislead the Commission, and failure to provide all material in response to notices issued by the Commission, are criminal offences. The Commission has prosecuted cartel participants for these offences, and has 'plea-bargained' in respect of the sentences to be imposed.

### 2. Commission's cartel enforcement

The Commission is an independent public regulatory agency responsible for the enforcement of the Commerce Act 1986 (*the Act*) including, relevantly, Part II of the Act and its prohibitions against restrictive trade practices.

The Commission has in recent years increased its investigation of cartel activity, and has successfully brought civil penalty proceedings in around 16 cartel cases.

The Commission seeks to reduce the economic detriment caused by anti-competitive practices. To that end, the Commission has published a Leniency Policy and a Co-operation Policy, with the aim of maximising the Commission's prospects of uncovering cartel activity and taking effective action against cartels.<sup>1</sup>

It is the Commission's experience that these twin policies have been effective in encouraging admissions and the provision of evidence which have had a 'domino-effect' on other persons and companies engaged in the same cartel.

### **3. Leniency & Co-operation Policies**

The Commission released a Leniency Policy and companion Co-operation Policy during 2000. Like other such policies elsewhere, the purposes of the policies are to:

- Assist in the detection of anti-competitive cartel behaviour; and
- Assist in the bringing of enforcement action against cartel participants.

#### **3.1 Leniency Policy**

Under its Leniency Policy, the Commission extends immunity from suit to the first cartel participant (company or individual) to provide information to the Commission about a hitherto unknown cartel, and to co-operate fully with the Commission's investigation and prosecution of the cartel.

Immunity from Commission-initiated proceedings is not granted where the Commission is currently investigating conduct relating to the leniency application.

To date, the Commission has received 8 leniency applications, and has granted leniency in 7 instances.

#### **3.2 Co-operation Policy**

Under its Co-operation Policy, the Commission has a discretion to take a lower level of enforcement action (or none at all) against an individual or business, in exchange for information about the cartel and co-operation in pursuing the other participants. The principal respect in which this policy differs from the Leniency Policy is that it does not require the Commission to be unaware of the cartel when the applicant approaches the Commission.

The Commission requires that co-operating parties supply to it all information in their possession, including documentary and electronic evidence, in relation to the cartel. This includes information held overseas, in circumstances where the Commission may be unable to access that information but for the co-operation.

The Commission applied its Co-operation Policy effectively in its recent prosecution of the Koppers Arch wood preservative chemicals cartel. The Commission was alerted to the existence of the cartel as a

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<sup>1</sup> See the Commerce Commission's Statement of Intent 2006–2009, available online at <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/SOI%202006-07.pdf>.

result of a new-entrant's complaint. Despite initial obstructive behaviour,<sup>2</sup> one of the cartel protagonists subsequently co-operated with the Commission by providing evidence and was given immunity from prosecution under the Co-operation Policy. His affidavit evidence as to meetings, events and transactions was invaluable in satisfying other defendants that they had breached the Act, and for use in the Court proceedings to establish whether, when and where specific conduct occurred.

#### 4. Incentives for Leniency/ Co-operation

The Commission has stated its intention to prioritise its anti-cartel enforcement<sup>3</sup>. That prioritisation, plus the Commission's active pursuit of cartel enforcement in practice and prosecution of attempts to obstruct the Commission<sup>4</sup>, are enhancing the Commission's reputation for effective enforcement in this area.

The primary incentives for co-operation with the Commission by cartel participants are, in summary:

- Potential procurement of immunity from suit (or at least a reduced penalty);
- Informational advantage as to the status of the investigation and litigation;
- Increased certainty of outcome, through negotiation of admissions and recommended penalties;
- Reduced risk of adverse publicity and reputational damage; and
- Avoidance of the legal costs and personal/ institutional pressure of litigation.

The characterisation of Part II breaches as civil rather than criminal is a factor that may in practice diminish the comparative effectiveness of the Commission's leniency programme. Cartel participants face less serious consequences than their counterparts in some jurisdictions, because cartel conduct is not a criminal offence in New Zealand and there is no prospect of imprisonment<sup>5</sup>.

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<sup>2</sup> *Koppers Arch Wood Protection (NZ) Ltd v Commerce Commission* (Unreported, High Court Auckland, Williams J, 16/11/2004, CIV 2004-404-3868).

<sup>3</sup> See Annual Report 2004-2005 at 5, available online at <http://www.comcom.govt.nz>.

<sup>4</sup> *Commerce Commission v KANZ & Parish* (Unreported, District Court Manukau, Judge B A Morris, 3/6/2005, CRI 2004-092-13040 & CRN 04092506119-121); *Commerce Commission v Osmose New Zealand* (Unreported, District Court Auckland, Judge Bouchier, 23/8/2006, CRI 2006-004-8264); *Commerce Commission v Greenacre* (Unreported, District Court Auckland, Judge Bouchier, 23/8/2006, CRI 2004-004-013423).

<sup>5</sup> There is considerable literature to suggest that the threat of imprisonment is effective in deterring 'rational' offences like price-fixing, and likewise in encouraging co-operation with regulators. See, for example, T O Barnett "Seven Steps to Better Cartel Enforcement" 2 June 2006 Presentation to the 11<sup>th</sup> Annual Competition law & Policy Workshop (available online at <http://www.usdoj.gov/atr/public/speeches/216453.htm>):

*"... nothing in our enforcement arsenal has as great an effect as the threat of substantial incarceration in a United States prison - nothing is a greater deterrent and nothing is a greater incentive for a cartel member, once exposed, to cooperate in the investigation of his co-conspirators."*

## **5. Indemnity issues**

Section 80A of the Act prohibits a body corporate from indemnifying directors, servants and the like in respect of liability for payment of a pecuniary penalty for breaches of s30, and costs incurred in defending or settling a s30 case. Section 30 is the *per se* price-fixing provision.

Indemnity is not prohibited in respect of other breaches, i.e. rule of reason breaches.

The s80A prohibition can affect an individual defendant's incentives to co-operate. Such a person must bear their own legal costs and pay their own penalty in respect of *per se* breaches. Because of their potentially considerable personal exposure, the benefits to be gained by co-operating with the Commission are enhanced accordingly. The Commission sees this indemnity prohibition as a useful weapon in its armoury. The prohibition is not however well-understood by the public and it is therefore important that defendants receive the advice of competent counsel.

## **6. Assessing a co-operation proposal**

The Commission pleads those cartel breaches for which it believes that there is sufficient evidence and, of its own volition, discontinues any pleading that it considers to be flawed, for whatever reason. It follows that the Commission does not approach defendants with a view to compromising all or part of a claim. It is, of course, receptive to an indication that a defendant is willing to admit liability.

When a defendant indicates a willingness to negotiate an admission of liability and agreed penalty, the Commission's process usually incorporates the following phases. All of the communications between the Commission and the defendant take place on an expressly without prejudice basis:

### **6.1 Proposal phase**

The Commission requests from the defendant:

- a) Details of proposed admissions as to pleaded causes of action;
- b) If the defendant is an individual, the provision of a draft witness statement as to all relevant matters within that defendant's knowledge;
- c) The provision on a without prejudice basis of undiscovered documents relevant to the investigation and proceeding;
- d) Details of any circumstances relevant to the proposed penalty (e.g. financial circumstances, personal difficulties etc); and
- e) A proposed recommended penalty and penalty range, and methods of payment (e.g. time-payment terms, if proposed; security for payment by mortgage or payment into solicitor's trust account etc).

### **6.2 Assessment phase**

Commission staff and external counsel (if instructed) closely assess the proposal, including specifically:

- a) The completeness and adequacy of admissions, including the reasons for any unadmitted causes of action<sup>6</sup>;
- b) The completeness and utility of new evidence provided (documentary and affidavit); and
- c) The adequacy of the proposed penalty and costs, taking into account any proposed mitigating factors.

Commission staff negotiate as to the above with counsel for the relevant defendant. Investigators and Commission counsel consider whether there is good evidence as to pleaded breaches that are not admitted by the defendant, including evidence of which the defendant may not be aware.

Commission staff and counsel offer to meet with counsel for the defendant, to flesh out differences in view as to the above matters, and to ascertain if agreement is possible.

Commission staff and counsel prepare two draft documents that will be required if a proposal is to proceed further:

- a) A draft co-operation agreement (see below at 20-22); and
- b) A draft agreed statement of facts based on discussions with the defendant. This document is annexed to the co-operation agreement, and later to the memorandum to the Court seeking the imposition of penalties. The statement of facts contains the following:
  - (i) Relevant agreed background facts;
  - (ii) Definitions, as per the pleadings or as agreed, of the understandings entered into by the defendant in breach of the Act;
  - (iii) Particularisation of that defendant's participation in the breaches, whether personally or by means of employees/ directors;
  - (iv) Other matters relevant to penalty, such as level and timing of co-operation and admissions, relevant personal circumstances etc.

These documents are provided to the defendant for consideration and comment and to obtain the defendant's agreement to them.

The defendant may be asked to revise aspects of its proposal, with the aim of refining the proposal so that staff can recommend to the Commissioners that it should be accepted. Staff make it clear to the defendant that only the Commissioners can agree to a proposal, and that staff can only agree (at best) to recommend a proposal to Commissioners.

### **6.3 Recommendation phase**

When a proposal is as fully developed as possible, staff will present it to Commissioners in a formal meeting, together with relevant material including the draft agreement and statement of facts. Staff make a recommendation as to the acceptability or otherwise of the proposal.

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<sup>6</sup> The Commission has entered into co-operation agreements where no admissions were obtained. The negotiation process, in which the quality of the Commission's evidence is tested, may disclose that there is not sufficient evidence to proceed but that terms of assistance by that defendant can be agreed.

The Commission is free to agree a position on admissions without reaching agreement on the issue of a recommended penalty. Since the setting of a penalty is for the Court to determine, if the parties are unable to agree a recommendation then each is able to make separate submissions at a penalty hearing. A defendant is able to admit liability at any time, without consulting with the Commission. Alternately, the Commission and a defendant might agree admissions but not be able to reach agreement on penalties. Whichever occurs, the defendant must give the Court its views on penalty.

## **7. Terms of co-operation**

The Commission's co-operation agreement with a defendant typically requires that party to promptly, reliably and without compulsion by legal process:

- a) Co-operate with the Commission in a full, frank and unstinting manner in relation to its investigation and the proceedings;
- b) Provide to the Commission all information in that party's knowledge, possession or control relevant to the formation, existence, activities, operation and membership of the cartel, and the investigation;
- c) Retain and make available to the Commission relevant personal documents and records;
- d) Make himself or herself available for interviews by and discussions with the Commission, at places of mutual convenience or by telephone, email or otherwise, for the purposes of providing all information requested by the Commission or otherwise relevant to the investigation and proceedings;
- e) Provide full, frank and truthful responses to all inquiries by the Commission and agree to the questions and answers being recorded; and
- f) Appear as a witness in any proceedings initiated by the Commission in relation to the cartel or the investigation, and provide full, frank and truthful evidence as to all matters within his or her knowledge<sup>7</sup>.

The defendant is also bound to support the joint penalty recommendation (if one has been agreed) before the Court.

Other obligations require the defendant to permit information-sharing between the Commission and relevant overseas regulators (most often the Australian Competition & Consumer Commission) and to give the Commission advance warning if any third-party requests like information from the defendant.

The Commission reserves the right to re-issue the proceedings if the co-operation agreement is breached or if the defendant has materially misled the Commission.

## **8. Commission's decision-making on co-operation proposal**

In each instance, the co-operation proposal and the recommendations of staff and counsel are considered at a formal Commission meeting.

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<sup>7</sup> This obligation is expressed broadly in order that the party's evidence can be used in all cartel-related proceedings, including any criminal prosecution arising out of the investigation (as where a person of interest provides misleading information to the Commission, or fails to supply documents within their possession or control).

If the Commission decides to proceed with the proposed settlement, the Commission members are asked to delegate to a single Commission member the ability to sign the co-operation agreement. This allows there to be further negotiation of routine matters between staff and the defendant before the agreement is signed; a formal Commission meeting need not be reconvened.

This delegation can be particularly useful if last-minute issues arise or if co-operation is important to imminent steps in the proceedings. In one recent instance, a co-operation proposal was assessed and an agreement entered into by the Commission a little more than a week before the substantive hearing. The advance delegation to a single member allowed all matters to be resolved in short order.

## 9. Differences between companies & individuals

In the Commission's experience, companies and individuals can experience different incentives to co-operate. Individual defendants who are not separately represented from their companies may be less motivated to formally co-operate or may be actively thwarted by their company. Corporate defendants face considerably greater penalties than individuals (as below at 28) and may be reluctant to make early admissions, or may seek to attribute responsibility for breaches to one or two executives (so that breaches appear to be isolated events rather than institutionally encouraged behaviour). In such circumstances, defendant executives are likely to have interests that conflict with those of their employer. The Commission encourages, but cannot require, separate representation in such cases.

The penalties for cartel conduct differ as between corporates and individuals. From 2001 (when the corporate penalty doubled), the applicable maximum penalties are, for each act or omission:

*Companies: \$10,000,000 or either:*

- a) 3 times the value of the commercial gain resulting from the contravention, if the gain can be readily ascertained and the Court is satisfied that the contravention occurred in the course of producing a commercial gain; and
- b) 10% of the turnover of the company and all of its interconnected bodies corporate, if the commercial gain cannot be readily ascertained.<sup>8</sup>

*Individuals: \$500,000.<sup>9</sup>*

1. The Commission has co-operated with companies whose executives and former executives were defendants to the same proceeding. In such cases it has been the Commission's practice to agree terms of co-operation, admissions etc separately with the individuals, rather than to give them the benefits of the company's co-operation deal with the Commission.<sup>10</sup> The reasons for this vary. In one instance, it was because the company was prepared to admit the individual's wrongdoing during his directorship, but the

<sup>8</sup> S80(2B)(b) Commerce Act 1986, as amended effective 26 May 2001.

<sup>9</sup> S80(2B)(a) Commerce Act 1986.

<sup>10</sup> Nevertheless, the corporate co-operation agreement requires it to use its best endeavours to obtain the co-operation of directors, employees and contractors, and to make such persons available for interviews and discussions. The company is also obliged to encourage such persons to appear as witnesses, if required, and to provide full, frank and truthful evidence as to all matters within their knowledge. The effect is that where such persons are also defendants, separate co-operation agreements with them will be required; the company cannot compel their co-operation with the Commission, which is not assured unless the individuals separately agree to co-operate.

director was not. In other instances, it is because complex issues relating to admissions and penalty need to be resolved with each defendant.

#### 10. New Zealand courts' approach to penalty recommendations and agreed statements of fact

*Court is not a 'rubber stamp'*

The New Zealand High Court, which has exclusive first-instance jurisdiction over competition proceedings, is receptive to the Commission's recommendations as to penalty:

*"Properly negotiated settlements are in the interests of parties and the interests of the community so as to avoid Court action, potentially complex and lengthy litigation and its very substantial expense"*<sup>11</sup>

The Commission has presented agreed penalty recommendations to the High Court in a large number of Part II cases. In none of these cases has the Court imposed a penalty different from the recommended penalty.

Nor has the District Court differed from any agreed recommended criminal sentencing recommendation for s103 offences committed during a Commission investigation. There has, however, been little judicial discussion in that forum of the process of accepting a sentencing recommendation.

The High Court has, however, made it clear that it alone has jurisdiction over penalty-setting, and that it will not tolerate 'capture' of the process by counsel.

In the Commission's most recent cartel penalty decision, Williams J noted that the difficulty for the Court in setting penalties is that it is *"much less optimally informed than counsel and the parties of the detail of relevant matters"*.<sup>12</sup>

The Court referred to and was influenced by the Australian decision in *ACCC v FFE Building Services Ltd*<sup>13</sup>, in which the Court stated that "there is a danger in judges of this Court being overly influenced by the view as to penalty taken by the ACCC." The Court in that case resisted the notion that the Court would simply 'rubber stamp' a recommendation produced by the parties. The Court also cited *ACCC v Colgate Palmolive Pty Ltd*.<sup>14</sup>

*"The Court may be seen, perhaps not altogether incorrectly, to act as a 'rubber stamp' in simply approving a decision taken at an executive level by a body charged with investigating and prosecuting contraventions of the Act, but having no role in actually imposing particular sanctions for those contraventions. Negotiated settlements are an important vehicle for resolving complex matters such as those involved in the present case. It must be borne in mind, however,*

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<sup>11</sup> *Commerce Commission v Ellingham & Ors* (Unreported, HC Wellington, 27/10/2005, Gendall J, CIV 2002-485-720) at [5], see also *Commerce Commission v New Zealand Milk Corporation Ltd* [1994] 2 NZLR 730 at 737:

*"The cooperation of the defendants in acknowledging fault and bringing the matter to an early conclusion deserves full recognition and encouragement... But for that factor significantly higher penalties would have been appropriate."*

<sup>12</sup> *Koppers Arch* at [35].

<sup>13</sup> (2003) ATPR 47,798 at 47,805.

<sup>14</sup> (2002) ATPR 41-880 at [34], per Weinberg J.

*that there is a public interest in ensuring that corporations that engage in behaviour of the kind that occurred in this case are dealt with appropriately, and that proper recognition is given to the need for specific and general deterrence.”*

However, in the recent *Koppers Arch* cartel case, Williams J noted that despite these concerns, the recommendations of parties “gain additional weight” where the defendants are represented by skilled and experienced specialist counsel, “who are unlikely to advise acceptance of the Commission’s proposals if they go well beyond what is justifiable”<sup>15</sup>.

To guard against the Court’s acceptance of an aberrant recommendation, Williams J asked that counsel in future advise the Court in detail of:

- a) The process that the parties followed in order to reach their recommendations, with reference to applicable precedent and applicable facts; and of
- b) The recommended range of penalties together with their reasons for their recommendation as to the appropriate penalty within that range<sup>16</sup>.

2. The Commission has followed that process in all subsequent recommendations.

#### *Relevance of admissions and co-operation to penalty*

Two of the principal factors relevant to the penalty imposed by the High Court following a negotiated admission and penalty are:

- a) The timing of the defendant’s admission (i.e. nearness to trial); and
- b) The extent of co-operation provided by the defendant.

Many other factors are also relevant (e.g. financial resources, personal circumstances, implementation of a compliance regime etc).

As to the discount applicable to an early admission, the High Court has recognised the following discounts in recent cartel cases (by analogy to criminal sentencing principles):

- a) 25-33% penalty discount applicable where a trial was about 2 months away<sup>17</sup>; and
- b) Around 50% penalty discount applicable where there were early admissions and extensive co-operation<sup>18</sup> (i.e. where admissions of liability were made close in time to the date of issuing).

The Court’s decision, and the parties’ recommendation, as to the discount applicable to a particular admission is fact-specific and will vary according to all of the circumstances.

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<sup>15</sup> *Koppers Arch* at [36].

<sup>16</sup> *Koppers Arch* at [37].

<sup>17</sup> *Ellingham* at [14].

<sup>18</sup> *Giltrap v Commerce Commission* [2004] 1 NZLR 608 (CA), also *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd & Ors* (Unreported, HC Auckland, 6/4/2006, Williams J, CIV 2005-404-2080) at [42]-[49]

*Status of agreed statements of fact*

The Court in *Koppers Arch* expressed some concern about setting a penalty, based on the parties' recommendations, at a stage when there had not been a trial and many facts were unknown. However, the Court accepted that it could do so because – and only because - the Commission had filed an agreed statement of facts admitted by the defendant (see at 19.5(b) above). The Court carefully caveated that admissions relating to the conduct of other defendants cannot be taken as findings of fact against those defendants. The facts ultimately determined at trial “*can be confidently expected to differ to a greater or lesser degree from those appearing in the agreed statement*”<sup>19</sup>.

**11. Jurisdiction issues**

Where a co-operating defendant lives overseas and may otherwise seek to protest the jurisdiction of the New Zealand High Court to hear the matter against him or her, the Commission requires a submission to jurisdiction as a term of co-operation.

The co-operation agreement will contain agreement to the effect that the New Zealand courts have jurisdiction to determine any proceedings arising out of or in connection with the agreement, but also in relation to the matters to which the agreement relates (including the cartel investigation). This submission to jurisdiction provides the Commission with the certainty that it will not need to defend itself against a jurisdictional challenge, perhaps some significant time after such issues have been resolved against other defendants.

**12. Plea-bargaining' in obstruction cases**

The wood chemicals cartel investigation gave rise to three criminal prosecutions under s103 of the Act for acts and omissions that obstructed the Commission's investigation:

- a) *Koppers Arch* NZ and a director were convicted, respectively, of furnishing false or misleading information<sup>20</sup> and failing to comply with a statutory notice<sup>21</sup>, and were fined \$25,000 and \$8,000 respectively. Documents relevant to the Commission's investigation were concealed under a house, and others were deleted from a computer hard-drive;
- b) A director of *Osmose* NZ was convicted of attempting to deceive or knowingly mislead the Commission by way of lying in a voluntary interview<sup>22</sup>, and was fined \$7,000; and

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<sup>19</sup> *Koppers Arch* at [50]-[55].

<sup>20</sup> S103(1)(b) Commerce Act 1986:

“**103(1) [Duty of person supplying information]** No person shall –

(b) In purported compliance with [a s98] notice, furnish information, or produce a document, or give evidence, knowing it to be false or misleading...”

<sup>21</sup> S103(1)(a) Commerce Act 1986:

“**103(1) [Duty of person supplying information]** No person shall –

(a) Without reasonable excuse, refuse or fail to comply with a notice under... section 98 of this Act...”

<sup>22</sup> S103(2) Commerce Act 1986:

“**103(2) [No attempts at deceit, etc]** No person shall attempt to deceive or knowingly mislead the Commission in relation to any matter before it.”

- c) Osmose NZ was convicted of failing to comply with a notice issued by the Commission<sup>23</sup>, in that the company failed to produce relevant documents – including shared price-lists – that were held in the General Manager’s office. The company was fined \$13,000.

Each of these defendants, save for one individual, was also a defendant in the primary civil cartel proceedings. Each of those defendants sought to compromise with the Commission the civil proceedings and simultaneously to plea-bargain the criminal prosecution against them.

The Commission exercised care to conduct wholly separate discussions in respect of the civil and criminal pleas; it would be improper for the Commission to consider discontinuing civil claims in exchange for a guilty plea in a criminal case, and vice versa. Where both kinds of enforcement action are on foot at the same time, negotiations as to settlement of them proceed in tandem.

The penalties imposed in the above cases are modest in comparison to overseas penalties for analogous behaviour. They are respectable penalties given the applicable maxima<sup>24</sup>, but the Commission will be considering whether the statutory maxima should be increased so as to serve as a meaningful deterrent. The experience internationally is that cartelists frequently resort to active obstruction of investigations, and will do a cost-benefit analysis of the potential ‘costs’ of obstruction versus the ‘benefits’ gained by impeding the investigation or limiting the scope of any resulting legal action.<sup>25</sup>

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<sup>23</sup> See 21 above.

<sup>24</sup> Maximum individual penalty \$10,000, maximum corporate penalty \$30,000 (s103(4)).

<sup>25</sup> See Barnett at 7.



## UNITED KINGDOM

### Executive summary

The extent to which settlements between competition agencies and competition law infringers represent an effective means of concluding cartel cases raises complex and challenging issues for competition agencies. While the OFT remains at a relatively early stage in its thinking, this paper addresses some of the issues which it thinks will be of particular relevance to any discussion between OECD members<sup>1</sup>.

The paper focuses on the following key themes:

**(a) *Potential benefits of settlements to competition agencies and to undertakings***

The potentially significant resource savings achieved through settlement of cartel cases should enable competition agencies to focus their resources on pursuing a greater number of cases than would otherwise be possible. Settlements may therefore provide an effective means of increasing the likelihood of detection and awareness of competition law generally, thereby achieving greater compliance. Settlement of cases may also facilitate restitution or redress in appropriate cases.

Undertakings are also likely to benefit, not least because settlements will enable them to avoid going through what may be a lengthy, costly and unnecessary administrative procedure.

**(b) *The appropriateness of settlement in cartel cases: key considerations***

*Impact of settlements on leniency programmes:* The introduction of settlements is liable to have at least some adverse impact on undertakings' incentives to apply for leniency. In order to safeguard the success of any leniency programme, the design of any settlement process will need to ensure that its operation gives rise to a marginal impact only on undertakings' incentives to apply for leniency;

*Impact of settlements on maintaining effective deterrence:* Competition agencies will need to consider the extent to which settlements could undermine their goal of deterring undertakings from engaging in anti-competitive behaviour through effective public enforcement. While in some important respects settlement of cases could increase deterrence by (for example) increasing the likelihood of detection, in others the positive effects are less apparent – and may even be negative. Careful consideration of these various factors will be necessary if competition law compliance is to be maximised.

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<sup>1</sup> This paper is based on internal discussions within the OFT on various issues surrounding settlement of cartel cases which the OFT considered it would be useful to share with OECD members whose views and experience would also inform the OFT's further deliberations. It does not therefore reflect existing OFT policy or practice.

**(c) *Designing an effective settlement process: issues to consider***

The ‘design’ of any settlement process will need to be carefully considered. Issues of particular importance include:

- a) the stage in an investigation when settlement should occur;
- b) how the process of settlement should take place (including how discussions should be taken forward, the degree of flexibility, if any, which should be built into the discussion process and whether parties should be allowed more than one opportunity to settle);
- c) elements which should be common to all settlement offers;
- d) the scope for securing restitution or redress for the victims of infringements;
- e) the extent to which an agency may decide to engage in settlement discussions with certain parties only; and
- f) representation of parties in settlement discussions.

Section V of this paper sets out the OFT’s preliminary thinking on each of those issues.

**1. Introduction**

The extent to which settlements between competition agencies and competition law infringers represent an effective means of concluding cartel cases raises complex and challenging issues for competition agencies. Of the many factors which will need to be considered, perhaps the most important concern the impact which any system of settlement may have on agencies’ leniency programmes and, more generally, on the goal of achieving effective deterrence.

The OFT remains – for now – at a relatively early stage in its thinking on this issue<sup>2</sup> and welcomes the opportunity to discuss with OECD members the extent to which settlement may be an appropriate means of settling cartel cases, not least in the light of the potential benefits – in terms of effective competition enforcement - to which settlement in appropriate cases may give rise.

The OFT prefers the use of the term (direct or voluntary) “settlement” rather than the term plea bargaining. Plea bargaining is a term normally used in relation to the prosecution of criminal offences (as opposed to administrative or civil cases), where the prosecution and the defence reach an arrangement, which is then approved by the court. In the UK there is currently no such system, although its introduction is under discussion<sup>3</sup>. Further, within many administrative systems of competition law – even if they are complemented by criminal offences for some forms of infringement, as in the UK – the competition agency takes its own decisions, which are then subject to appeal, rather than the agency acting as a prosecuting authority; in such systems, no court approval would thus be required for settlements. Further, the word “bargain” suggests a degree of iterative engagement with the infringers about cases, which may

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<sup>2</sup> Ibid. note 1.

<sup>3</sup> Cf. Government Fraud Review, Final Report: published for consultation in July 2006 (see [http://www.lslo.gov.uk/fraud\\_review.htm](http://www.lslo.gov.uk/fraud_review.htm)). In the event that plea bargaining is introduced in the UK it would of course be appropriate to use the term for resolution of criminal cases while reserving “settlements” for civil cases.

give an inappropriate or misleading impression of the process to the undertakings concerned in individual cases and generally.

It should also be noted that, while the main focus of discussions about settlements has arisen in relation to cartel cases, in principle settlements could be made available in other competition cases, where both the facts and the law are broadly not in dispute. Moreover, settlements should be distinguished from non-cartel cases where a competition agency decides not to proceed, based, for instance, on administrative priority or resource grounds, or because the undertaking(s) concerned have voluntarily terminated an agreement or altered their conduct after some initial contact with the competition agency, but before a case or procedure has been formally opened.<sup>4</sup>

## **2. The potential benefits of settlements**

Settlements may represent an attractive means of settling certain cartel cases, both to competition agencies and the undertakings concerned.

### **2.1 *Benefits to competition agencies***

As regards the benefits to competition agencies, these concern principally the significant resource, delivery and, consequently, compliance benefits which could result from settlement of cases. In particular, the significant resource savings which may be achieved through settlement of cases<sup>5</sup> should enable competition agencies to focus their efforts on pursuing a greater number of cases than would otherwise be possible. While their impact on agencies' leniency programmes and the extent to which undertakings continue to be adequately deterred from engaging in anti-competitive behaviour will need to be carefully considered, settlements may provide an effective means of increasing the likelihood of detection and awareness of competition law generally, thereby achieving greater compliance.

Settlement of cases may also facilitate restitution in appropriate cases to the victims of infringements - competition agencies may be well placed during settlement discussions to encourage undertakings to retribute victims. This could be achieved, for example, by offering additional reductions (sufficient to incentivise undertakings to retribute) in financial penalties over and above those which would be offered under any settlement procedure absent restitution.

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<sup>4</sup> In this respect, note the OFT's discretionary power to accept statutory commitments to settle a case under s.31 Competition Act 1998, (which is more likely to be appropriate in non-fining cases as opposed to e.g. cartel cases). Such is the importance of deterrence that the OFT is prevented from concluding cases by way of statutory commitments where doing so would undermine deterrence.

<sup>5</sup> Resource savings could be achieved in various ways: settlement of cases may, for example, reduce the likelihood of appeal of a competition agency's decision. In the UK context, given the nature of the review (full merits) by the Competition Appeal Tribunal (the relevant appellate body) of any OFT decision, appeals often involve extensive review of documents and examination of witnesses, thereby requiring the OFT to devote significant resources to dealing with them. Bearing in mind the frequency of such appeals - which are often motivated principally by a desire on the part of appellants to obtain a reduction and/or to delay final payment of any financial penalty imposed by the OFT - settlement of certain cartel cases may, in the absence of third party appeals, go some considerable way to enabling the OFT to pursue more cases. Further benefits may also arise in the event that parties entering into settlement arrangements agree to proceed under a 'fast track' administrative procedure. This may, for example, take the form of undertakings agreeing not to exercise their rights to conduct full file reviews, to submit extensive written representations and/or to request oral hearings.

## 2.2 *Benefits to undertakings*

A common complaint from senior management in undertakings is that competition cases take too long, are too expensive and divert management time from the business. This is all the more so where, as is increasingly common, the infringement comes to light as a result of the change of ownership of a business through a corporate transaction and/or the management involved in the infringement have left the undertakings (sometimes directly due to the uncovering of the infringement).

The benefits of settlements to undertakings, their boards and management should not be underestimated either. Settlements in appropriate cases may – depending on the procedures followed – enable undertakings to understand the principal elements of the case against them at an earlier stage than is currently possible, thereby allowing them to assess the strength and likely outcome of the case if it proceeds down the usual path to a decision. In so doing this should provide undertakings with an opportunity to determine whether an early conclusion of the case by way of settlement may be appropriate and, to the extent that it is, to reduce the burden placed upon them of what may otherwise be a lengthy and costly procedure.

Undertakings may also be attracted to settlements inasmuch as they provide them with an early ‘exit route’ from an investigation, not least taking into account the positive repercussions on share prices and corporate governance that often follow from the conclusion of an investigation.

### 3. **The OFT’S experience of settlements: The Independent Schools Case**

The OFT so far has resolved one cartel investigation by way of settlement, representing one of the leading settlement cases so far achieved in Europe . Following the issue of a statement of objections, in May 2006 the OFT agreed a resolution of its investigation into an agreement between independent schools to exchange information about intended fee levels<sup>6</sup>. All fifty schools investigated agreed to the proposed resolution, which the OFT considered appropriate in the light of the particular circumstances of the case.<sup>7</sup>

Under the terms of the settlement, the schools have admitted their participation in the exchange of the information and that this amounted to an infringement of UK competition law. Each school has agreed to pay a penalty which was substantially lower than the penalty which would otherwise have been imposed. In addition, the schools have agreed to make individual payments totalling several million pounds into a trust fund for the benefit of pupils who attended the schools during the academic years in which the infringement took place. The schools also agreed to limit their representations on the OFT’s statement of objections, addressing only material factual inaccuracies.

The settlement enabled the OFT to send a clear signal, at a much earlier stage than would otherwise have been the case, that charitable bodies were subject to UK competition law, thereby promoting greater and more timely compliance. In addition, the case generated considerable publicity and hence also raised a wider awareness of the likely consequences of competition law infringement.

3. The settlement also led to a significant streamlining of the investigation: had the case not been settled, the consideration of written individual representations submitted by fifty schools would have required the input of considerable agency resources. As far as the schools themselves are concerned, they

<sup>6</sup> See OFT Press Release 88/06 dated 19 May 2006. The OFT’s final decision in the case remains pending while various procedural steps are completed and the establishment of the trust fund takes place. Under the terms of the settlement, it is due to be concluded by 31 December 2006.

<sup>7</sup> Including, for instance, the status of schools as charitable, not for profit organisations.

benefit not only from a reduction in financial penalties but also by not needing to commit further resources to engaging in a lengthy – and potentially costly - administrative procedure.

#### 4. The appropriateness of settlements of cartel cases: key considerations

While the Independent Schools case provides evidence of the significant benefits which may be derived from settlements, the particular circumstances of that case<sup>8</sup> meant that the OFT was not obliged, before agreeing the terms of the settlement, to consider the extent to which settlement of cases would be appropriate more generally.

In the UK context, the OFT considers that any answer to that question must, at the very least, take into account the following factors:

- (i) *Maintaining the effective detection of cartels through leniency programmes*: ie. the incentives on undertakings to seek full or partial immunity from financial penalties under the OFT's leniency programme whilst ensuring that unlawful conduct is subject to appropriate sanctions;
- (ii) *Maintaining the effective deterrence of cartels*: ie. ensuring that the OFT continues to effectively deter undertakings from engaging in anti-competitive behaviour through the imposition of significant financial penalties on undertakings and, in appropriate cases, fines and terms of imprisonment on individuals<sup>9</sup>. OFT powers to apply for disqualification of directors for up to 15 years for breaches of competition law also have a significant deterrent effect<sup>10</sup>.

##### 4.1 *Maintaining the effective detection of cartels through leniency programmes*

The introduction of settlements is liable to have at least some adverse impact on undertakings' incentives to apply for leniency<sup>11</sup>. In order to safeguard the success of any leniency programme, the

<sup>8</sup> See footnote 7 above.

<sup>9</sup> Section 188 of the Enterprise Act 2002 introduced into the UK a 'criminal cartel offence', which permits criminal prosecutions to be brought against individuals who have dishonestly engaged in horizontal cartel activities. An offender may receive a maximum of 5 years' imprisonment and/or an unlimited fine. The offence is not retrospective and only covers conduct post 20 June 2003. To date, there have not been any prosecutions for the cartel offence yet. The OFT is currently investigating two cases using its new criminal powers. One investigation concerns allegations of price coordination between airlines on fuel surcharges for long-haul passenger flights to and from the UK. Another investigation concerns allegations of bid-rigging activities in connection with public works contracts in the health care sector in the UK.

<sup>10</sup> The Enterprise Act gives the OFT the power to apply to court for Competition Disqualification Orders against directors of companies found to have infringed competition law. The court is obliged to consider various factors before determining whether an individual's conduct makes him/her unfit to be a director of a company (see OFT Guidance 510 "Competition Disqualification Orders"). While as yet untested before the courts, the existence and anticipated future use of such powers should send strong deterrent signals to the directors of companies contemplating engaging in cartel or other anti-competitive behaviour.

<sup>11</sup> It should be noted that there are important conceptual differences between leniency and settlements in terms of their purpose and outcome: Under *leniency*, undertakings are incentivised under the OFT's leniency programme to come forward prior to, or at an early stage of, an investigation in order to benefit from significant reductions in financial penalties which are likely to be available in the event that the OFT proceeds, upon completion of its investigation, to take enforcement action (including the imposition of a financial penalty) against them. In essence, leniency operates as a cartel detection, intelligence and evidence gathering tool, which obliges undertakings who apply successfully for leniency to provide all information, documents and evidence regarding cartel activity - including witness statements - and to

design of any settlement system will need to ensure that its operation gives rise to a marginal impact only on undertakings' incentives to apply for leniency. Taking the UK context as an example, the following section considers the possible impact of settlements on undertakings' incentives to apply for leniency and offers some tentative suggestions as to how any such impact could be minimised.

*Maintaining incentives on undertakings to apply for lenient treatment* : A successful leniency programme lies at the heart of many competition enforcement regimes, providing significant incentives to cartel members to disclose the existence of cartels to competition agencies. Competition agencies will therefore need to exercise caution before introducing changes to their regimes which may impact on the operation of leniency programmes and, more particularly, on the incentives which they offer to undertakings to 'come clean'.

As a general proposition, it would appear that the introduction of settlements, necessitating the imposition of lower financial penalties than would otherwise have been the case, is liable to have at least some negative impact on undertakings' incentives to apply for leniency - the extent of such impact being largely dependent upon the size of the reduction in financial penalties offered under settlement arrangements.

*Assessing the potential impact of settlements on incentives to apply for leniency in the UK*: The operation of the OFT's leniency programme has been instrumental in enabling the OFT to uncover and successfully proceed against significant cartel activity in the UK. Under the OFT's leniency programme undertakings benefit from:

- a) Full immunity from financial penalties where they inform the OFT of the existence of a cartel before an investigation has commenced ("Type A leniency applicants");
- b) Up to 100% immunity from financial penalties where they are the first to come forward after a cartel investigation has commenced ("Type B leniency applicants"); and
- c) Reductions in financial penalties of up to 50% where they provide evidence of cartel activity to the OFT when they are not the first to come forward ("Type C leniency applicants").

While much would depend on the typical extent of reductions in financial penalties offered under settlement arrangements, in the UK context at least it would seem that the incentives to apply for leniency on undertakings who would stand to benefit from a reduction in penalty of no more than 50% ("Type C leniency") are more likely to be reduced through the introduction of settlement arrangements than those whose penalty reductions would invariably be much greater (namely "Type A" or "Type B" leniency). For example, having assessed the likelihood of the OFT uncovering evidence of infringement against it during the course of an investigation, undertakings standing to benefit from "Type C" leniency may conclude that it is preferable not to apply for leniency in the expectation that a significant reduction in financial penalty would be available under a settlement arrangement in the event that the OFT was in a position to proceed against it.

*Minimising the impact of settlements on leniency regimes*: Safeguards may, therefore, be necessary to ensure that undertakings do not decide to forego applying for leniency in the expectation that they are

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maintain continuous and complete co-operation throughout the course of an OFT investigation. *Settlement* of cases, on the other hand, has little if anything to do with cartel detection, intelligence and evidence gathering but is rather directed to an early and final resolution to a case. Accordingly, settlement is more appropriate to take place at or near the completion of an investigation, when the competition agency has sufficient information before it to appreciate the full potential nature and scope of its objections and to determine, on a provisional basis, the level of any appropriate financial penalty which should be imposed.

likely to obtain a significant reduction in financial penalty under a settlement arrangement at or near the completion of any OFT investigation. Such safeguards could include:

- a) *Exercise of discretion on a case by case basis to determine whether settlement is available ('creating uncertainty')*: Settlement may work best where undertakings are unable to predict with any degree of certainty whether early settlement of a case would be possible. Under such a system, the competition agency would maintain a wide discretion to 'pick and choose' cases in respect of which settlement may be offered. By denying undertakings any per se right to a settlement (which would need to be backed up in practice by the preparedness of the competition agency to impose substantial financial penalties in a sufficient proportion of cartel cases), their incentives to apply for leniency may be reduced only marginally.
- b) *Offering significantly greater reductions in financial penalties under leniency arrangements than under settlement arrangements*: The impact of settlements on incentives to apply for leniency will be reduced to the extent that competition agencies offer significantly greater 'rewards' (in the form of reductions in financial penalties) to successful leniency applicants than to undertakings with whom settlements are agreed<sup>12</sup>.

#### 4.2 *Maintaining effective deterrence*

In addition to assessing the impact of settlements on their leniency programmes, competition agencies will also need to consider the extent to which settlements could undermine their goal of deterring undertakings from engaging in anti-competitive behaviour through effective public enforcement. While in some respects it could be argued that settlement of cases would increase deterrence (by, for example, increasing the likelihood of detection, thereby promoting compliance), in others the positive effects are less apparent - and may even be negative.

*Factors underpinning effective deterrence*: Alongside an effective leniency programme, achieving effective deterrence is a cornerstone of any modern competition enforcement regime. Competition authorities can never pursue every infringement case and have to prioritise their casework and allocate their resources accordingly. Whilst cartel cases have a high priority and most cases where the evidence is strong can and should be pursued, there are necessary limits – limits which can be extended through the use of settlements, thereby enabling competition agencies to devote their limited resources to pursuing more cases. In order to remain effective, competition agencies rely on the cases they take forward and, in particular, the financial penalties they impose to send strong 'deterrent signals' to undertakings throughout their respective economies. The importance of achieving deterrence in the UK is reflected in its strong sanctioning powers, which enable it (among other things) to impose financial penalties on undertakings of up to 10% of their worldwide turnover as well as the availability of criminal and other sanctions in appropriate cases.

Achieving effective deterrence relies on competition agencies achieving the following objectives:

- a) Establishing a track record of strong and consistent enforcement through the imposition of significant financial penalties;
- b) Increasing the likelihood of undertakings being caught (thereby dissuading undertakings from engaging in anti-competitive behaviour); and

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<sup>12</sup> This presumes of course that reductions in financial penalties under both leniency and settlement arrangements can be obtained by the same undertaking.

- c) Increasing awareness of the consequences of competition law infringement through effective advocacy.

*Assessing the impact of settlements on deterrence:* In so far as leniency is concerned, competition agencies are prepared to accept reductions in financial penalties taking into account the significant benefits which result in terms of cartel detection (leading to an overall increase in deterrence). As regards the impact of reductions in financial penalties imposed under settlements, however, the advantages are less clear. Indeed, absent a proven track record of strong and consistent enforcement<sup>13</sup>, it is arguable that any reduction in financial penalty under the terms of a settlement is likely, in isolation, to impact negatively on deterrence.

That said, to the extent that settlements lead to significant resource savings for competition agencies, the effect on deterrence in this respect may be beneficial as agencies find themselves in a position to pursue more cases. It could, for example, be argued that increasing the number of overall cartel cases, both those that are settled and those that are contested (at least to the point of going through a full procedure), could, in and of itself, have a significant impact on promoting compliance, as the likelihood of undertakings being investigated is increased. Settlements may also provide important ‘signalling effects’ by generating publicity and advocacy opportunities, both with the business community as well as with those involved (for example) in corporate governance.

Assessing the extent to which the negative impact of any reductions in financial penalties on deterrence would be offset by other factors may not be an easy balancing task. In recognition of this difficulty (and as noted previously), it may be preferable for competition agencies to seek to resolve this dilemma through exercising a wide discretion to determine whether settlement should be considered in any given case. Introducing such an element of uncertainty into the settlement process may go some way to ensuring that undertakings remain effectively deterred from engaging in cartel activity.

## **5. Designing an effective settlement process: issues to consider**

To the extent that competition agencies consider settlement of cartel cases appropriate, consideration will also need to be given to the process of settlement. The following section explores a number of (although by no means all) relevant issues in this respect.

### **5.1 Settlements: timing**

It may be appropriate to seek to settle cartel cases only at or near the conclusion of an investigation, or at least once the competition agency is in possession of sufficient evidence to be reasonably confident of being able to establish an infringement of competition law by the undertaking(s) in question. This suggests that any settlement discussions should take place at or around the time a statement of objections is prepared and ready to be issued. In support of this, it could be argued that the risk of misjudging outcomes is increased where offers to settle are made in circumstances where the competition agency has not fully satisfied itself - on the basis of the evidence available - that an infringement of competition law has taken place. It may also lead to allegations that an agency has failed to follow due process by applying inappropriate pressure on the undertakings concerned.

<sup>13</sup>

In this respect the situation in the US (a mature competition regime) provides an interesting comparator. There, sanctions are commonly both of a criminal and civil nature, resulting in the imposition of financial penalties and custodial measures on undertakings and individuals respectively. Individuals convicted of criminal competition law violations face a real prospect of being sentenced to a significant term of imprisonment – perhaps the best deterrent of all. This undoubtedly provides the necessary backdrop against which many cartel cases can be plea-bargained in the US without any undue impact on deterrence.

On the other hand, it could be argued that undertakings would be unlikely to agree to a settlement (involving as it would the payment of a penalty), if they did not consider that the competition agency would, in time, be able to establish an infringement to the requisite standard of proof. Accordingly, the prospect of settlement at an earlier stage in an investigation in appropriate cases should not be discounted.

## 5.2 *Settlements: Process*

*Discussions with parties:* Assuming that the settlement process is launched around the time that a statement of objections (whether in full, draft or skeleton form) is prepared and ready to be issued, discussions could take place with those undertakings which have indicated a desire to explore the possibility of settlement. Following the conclusion of discussions with all interested parties, the competition agency would need to consider whether it would be appropriate to make a settlement offer to the undertakings concerned.

*Building flexibility into the discussion process:* It is relevant here to consider the extent to which flexibility should be built into settlement discussions, in circumstances where parties wish to challenge certain aspects of the statement of objections or the proposed penalty prior to accepting the settlement. Assuming that is appropriate, settlement talks may lead the competition agency to modify the contents of any settlement offer. By the same token, however, it may be open to competition agencies to indicate at least some of the areas that it might wish to pursue further (for example, in terms of scope and duration) if the case were to proceed without settlement.

*Offering parties more than one opportunity to settle:* Consideration should also be given to whether settlement should be a “one-shot” process, or whether there may be circumstances when it would be appropriate for competition agencies to offer parties further opportunities to settle later in the administrative process. To the extent that due process is observed, greater reductions in financial penalties could be offered to parties wishing to settle early, thereby incentivising them to do so. It should also be possible for competition agencies to withdraw the benefit of the settlement procedure in the event of prevarication by the parties as to their position, or where they are unduly protracting discussions.

## 5.3 *Elements common to all settlement offers*

There could be many permutations to settlements in practice. That said, if a settlement system is to achieve its purpose, it is likely that, as a minimum, any settlement offer made by the competition agency should require the undertaking to admit to its participation in the illegal cartel (including an obligation not to make any public statement that contradicts or undermines that admission), including an admission as to scope and duration of the infringement. In return for such an admission, the competition agency would offer to impose a financial penalty which is lower than that which would be imposed were the undertaking not to accept the offer<sup>14</sup>.

Although this need not necessarily be an essential requirement in any settlement procedure, undertakings may also agree to waive certain of their procedural rights relating to the further course of the proceedings, thereby securing for themselves additional reductions in financial penalties.

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<sup>14</sup> Determining the appropriate extent of any reduction in financial penalties necessary to incentivise undertakings to agree to settle is a complex issue. Relevant factors could include the undertaking’s assessment of the likelihood of the agency making an infringement finding (and whether this would be upheld on appeal), the prospect of third party damages actions in the event that a settlement is/is not agreed and the direct and indirect cost savings resulting from early settlement. Competition agencies will also need to consider (among other things) the likely cost of continuing with the full administrative procedure and any impact which the settlement may have on the number and range of other cases that it will be able to pursue.

Other elements could include a requirement that the parties agree to implement bespoke competition compliance programmes, and to ensure that compliance is covered as part of their internal audit and control systems. In this respect, compliance programmes ought to be subject to appropriate corporate governance arrangements, including, in the case of public companies, the involvement of non-executives and/or any audit committee. It may also be appropriate to require the parties to make public statements acknowledging their part in the infringement (including giving undertakings not to engage in similar behaviour in future).

#### **5.4 *The scope for securing restitution or redress for the victims of infringements***

Where it is clear that final consumers or customers have suffered loss as a result of a cartel, competition agencies should consider whether any settlement should include a restitution or redress mechanism and, if so, what form it should take.

Restitution or redress may be appropriate where, for example, an identifiable class of victims can be ascertained and, so as not to undermine private enforcement, where such victims are unlikely themselves to initiate private actions before the courts. One way for competition agencies to encourage parties to make restitution in such cases may be to offer a further reduction in the financial penalty in addition to that which would have been offered in return for settlement absent restitution or redress.

To the extent that this does not unduly tie up agency resources or distract the agency from its main function, securing restitution for victims during settlement discussions in other cases may also be appropriate – in particular where undertakings signal a willingness during settlement discussions to retribute victims in return for a further reduction in financial penalties. In the wider context, building restitution or redress mechanisms into settlements may provide an effective means of encouraging victims of competition law infringement to initiate their own actions before the courts, thereby promoting private enforcement.

#### **5.5 *Settlements with some or all of the parties***

The question arises as to whether competition agencies should agree to settle with certain parties in cases where others do not wish to do so. Although this outcome may significantly reduce the extent of any resource savings achieved by the agency, there may be merit in agencies agreeing to settle with certain parties only. Similar considerations will apply where a competition agency prefers, for the purposes of achieving deterrence, to settle with only a sub-set of parties (those, for example, whose participation in a cartel was marginal in terms of scope, duration, activities or benefits).

The question also arises as to whether a settlement should ever be made with a recidivist. To have an outright rule against this might be counter-productive in terms of the ability to resolve cases; on the other hand, recidivists should not be able to benefit from successive settlements. One way forward may be to structure the benefits of settlement so that they are reduced for recidivists and to increase financial penalties for recidivists who breach the terms of previous settlements. The latter may be appropriate where, for example, an undertaking has not complied with an obligation to introduce an effective compliance programme and corporate governance systems.

#### **5.6 *Representation of the parties***

While cartel cases have been pursued in an increasingly adversarial style, such an approach is not likely to be appropriate for those cases that are capable of being settled. Clearly, the parties have to have effective legal representation of their interests. However, an adversarial style of discussion may inhibit settlement, as experience in commercial disputes has demonstrated, where companies increasingly adopt mediation and other alternative dispute resolution techniques.

A key aspect of representation in successful settlement discussions (both for the competition agency and for the undertakings) may be the direct and active involvement of senior management (and in the case of a subsidiary, of the parent company's management) as well as, indeed, of a main board director. This should ensure that the issues and risks, as well as the importance of competition law compliance, are fully understood within the executive and governance structures of the undertaking.



## UNITED STATES

### 1. Introduction

The Antitrust Division's success in cracking cartels is largely attributed to its ability to obtain the cooperation of cartel insiders. The Division secures the cooperation of corporate participants in two ways. It offers the promise of leniency or full immunity to the first company to report a criminal antitrust violation and to meet the conditions of the Division's Corporate Leniency Program.<sup>1</sup> A company that self-reports and qualifies under the leniency program avoids a criminal conviction, pays no criminal fine, and keeps its cooperating executives out of jail. A company that loses the race for full immunity faces dire consequences. However, the Division can still offer that company and its executives substantial benefits in return for timely cooperation. In the United States, negotiated plea agreements are used to obtain that cooperation in exchange for a lesser sentence. The vast majority of the Division's major international investigations have involved the cooperation of a corporate leniency applicant and, over the last twenty years, over 90 percent of the corporate defendants charged with an antitrust offence have entered into plea agreements with the Division where they admitted guilt and cooperated with the Division's criminal investigations.

In recent years, corporate leniency programs have been adopted by competition authorities from around the world. The programs share the common goal of deterring and detecting cartel offences by inducing self-reporting and cooperation through the promise of lenient treatment. Competition authorities understand that transparency and predictability in the application of a leniency program are essential to encouraging companies to self-report and, therefore, have amended and refined their leniency programs to maximize this certainty. This consensus has led to a developing global convergence among leniency programs – convergence of transparency that allows a potential leniency applicant to predict with precision, in each jurisdiction where it is considering reporting, both the benefits that are available if it is the first company to report, and whether it is eligible to receive those benefits. The end result is that participants in international cartels are making informed decisions to simultaneously apply for full immunity in multiple jurisdictions where they face the prospect of severe sanctions. In turn, antitrust enforcers in multiple jurisdictions are obtaining the cooperation of insiders, cooperating with one another, and coordinating their investigative strategy against the remaining conspirators. Most importantly, cartel activity is being halted, those responsible are being held accountable, and victims are being compensated.

The global convergence in leniency programs dissipates, however, when the topic turns to how to treat companies and their executives who lose the race for full immunity but are still in a position to offer timely and valuable cooperation. Every jurisdiction reserves full immunity benefits to only the first company to come forward and cooperate, and virtually every jurisdiction offers reduced sanctions for those who come forward afterwards and advance the investigation with their cooperation. However, there is wide divergence in terms of how this is done and the degree of transparency in the process that is provided by the enforcement authority.

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<sup>1</sup> The Antitrust Division's Corporate Leniency Policy (1993) is available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

Some jurisdictions have expanded leniency programs that cover full immunity for the first-in company, as well as sentencing reductions for companies that follow the immunity applicant and provide assistance to the investigation. These expanded leniency programs vary in terms of the degree of transparency they provide to a prospective co-operator to predict the benefits that it will receive in return for the applicant's full cooperation. They typically provide guidance in terms of a percentage fine reduction or discount that a co-operator will receive in return for its cooperation. Some programs use a fixed percentage discount – such as a promised 50 percent fine reduction for the second company to obtain leniency – and other programs state the discount in terms of a fixed range of discounts – such as a 30 to 50 percent reduction for the second-in company. The level of transparency that these programs afford will depend not only on whether the fine reduction is expressed as a fixed figure or range, but also on the certainty with which the company can predict the *starting point* for the fine reduction. Put another way, presenting clear guidelines on how fines are calculated is at least as important, and may be more important, to promoting transparency than is advising companies on the precise percentage discount they will receive in return for their cooperation.

In the United States and a number of other jurisdictions, the benefits of the leniency program are only available to the first company to come forward and be accepted into the program. In these jurisdictions, however, companies and individuals that do not qualify for full immunity but offer timely and valuable cooperation can still obtain significant sentencing benefits, including a substantial reduction in fines and more favourable treatment for culpable executives. Sentencing discounts for these co-operators are handled outside of the Division's Corporate Leniency Program. In the United States, the benefits are conferred through the negotiation of plea agreements whereby the defendant is obligated to plead guilty and provide full and continuing cooperation. In exchange, the government commits to making a specific sentencing recommendation to the court which, as discussed below, the courts are very likely to follow. Therefore, in most cases, the defendant knows what the government's sentencing recommendation will be and what the sentencing court is very likely to impose at the time the defendant enters into a plea agreement with the Division. Since the Division negotiates, signs, and publicly files plea agreements throughout the course of its investigations, most corporate defendants do not have to wait until their cooperation is complete, or until the investigation is over, before they learn the value that the government places on their cooperation.

The term "plea bargaining" sometimes carries a negative connotation, because it implies that prosecutors are bargaining away justice by securing guilty pleas that allow defendants to plead guilty to lesser offences. The Division's experience of using negotiated plea agreements in cartel cases has very few, if any, detractors, however. Doing so benefits the government, cooperating defendants, the judicial system, the victims, and the public at large by encouraging early cooperation and acceptance of responsibility by cartel members through the promise of a transparent, proportional, expedited, certain and final plea disposition.

This paper is intended to provide guidance on the U.S. system of negotiated plea agreements and also explain the essential role that these agreements play in the Division's cartel enforcement program. The paper will first discuss the role of transparent policies and penalties in encouraging early cooperation. Second, it will discuss Department of Justice policies related to the selection of charges and sentencing. Third, it will discuss some of the core principles behind the U.S. system of negotiating plea agreements, including a discussion of key federal rules that govern plea agreement procedures as well as the role of federal courts in deciding whether to accept a plea agreement and sentence a defendant pursuant to its terms. Fourth, the paper will explain the standard provisions found in the Division's model plea agreements that are attached to this paper. Finally, the paper will conclude by discussing the many advantages of the U.S. system of negotiated plea agreements, illustrating how plea agreements are a good deal with benefits for all.

## 2. Tradition of Transparency

The Division has a tradition of maximizing transparency and predictability throughout its cartel enforcement program. Examples of this include: transparent standards for opening criminal antitrust investigations; transparent standards for deciding whether to file criminal antitrust charges; transparent prosecutorial priorities; transparent application of the Division's Corporate Leniency Policy; transparent policies relating to the negotiation of plea agreements; and transparent policies on the application of the antitrust Sentencing Guidelines.<sup>2</sup> Transparency is not only critical to fostering confidence among the defense bar and the business community that the Division provides proportional and equitable treatment of antitrust offenders, but it is also essential to securing cooperation from culpable parties.

Prospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation. Therefore, a party must be able to predict, with a high degree of certainty, how it will be treated if it cooperates, and what the consequences will be if it does not. This requires that an antitrust offender be able to predict:

- what the likely sentence will be if convicted at trial with no acceptance of responsibility and no credit for cooperation;
- how the party can qualify for full immunity by being the first to report the conduct and meet the other conditions of either the Division's Corporate Leniency or Individual Leniency Programs; and
- what benefits are available to a party that loses the race for leniency but still offers to provide timely and valuable cooperation pursuant to a plea agreement.

To maximize the goals of transparency, authorities must not only provide explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies. The Division has continuously sought to provide such guidance with respect to admission into the Division's leniency program<sup>3</sup> as well as in the negotiation of plea agreements. Because plea agreements in international cartel prosecutions generate a number of complex issues that are not raised in domestic cases, the Division has issued several papers on this topic.

For example, in 1999, the Division published a paper entitled *Negotiating the Waters of International Cartel Prosecutions: Antitrust Division Policies Relating to Plea Agreements in International Cases*.<sup>4</sup> As the title suggests, this seminal speech set forth the Division's policy on a number of novel issues that arose when the Division first began detecting and successfully prosecuting international cartels aimed at the U.S. market. For each issue, the paper provided the Division's policy and rationale, and, where appropriate, sample model plea agreement language, case history, and practical considerations relating to the issue. Most of the Division policies announced in the "Negotiating the Waters" speech are still in effect today, but there have been some significant changes, particularly with respect to the prosecution of individuals.

<sup>2</sup> See Gary R. Spratling, *Transparency in Enforcement Maximizes Cooperation from Antitrust Offenders* (hereinafter "Transparency in Enforcement"), Presented Before The Fordham Corporate Law Institute 26<sup>th</sup> Annual Conference on International Antitrust Law & Policy (October 15, 1999), available at <http://www.usdoj.gov/atr/public/speeches/3952.htm>.

<sup>3</sup> See Leniency Policy Speeches, available at <http://www.usdoj.gov/atr/public/criminal.htm>.

<sup>4</sup> Gary R. Spratling, *Negotiating The Waters Of International Cartel Prosecutions: Antitrust Division Policies Relating To Plea Agreements In International Cases* (hereinafter "Negotiating the Waters"), Speech Before the ABA Criminal Justice Section Thirteenth Annual National Institute on White Collar Crime (March 4, 1999) available at <http://www.usdoj.gov/atr/public/speeches/2275.htm>.

In March 2006, the Division issued a paper titled *Charting New Waters in International Cartel Prosecutions*<sup>5</sup> which gave guidance on how the Division's enforcement policies with respect to individuals has evolved since 1999, such as the elimination of the "no jail deal" in plea agreements with foreign national defendants,<sup>6</sup> and the evolution of the Division's policy of "carving out" certain culpable executives from the nonprosecution protection language found in corporate plea agreements.<sup>7</sup> Also in March 2006, the Division issued a paper entitled *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations* that provided transparency as to the potential rewards and incentives available for a company that is second in the door to offer its cooperation, and the factors the Division will consider when determining the credit it will receive.<sup>8</sup>

Although the Division has strived to help companies predict in advance how they will be treated if they offer to cooperate pursuant to a plea agreement, maximizing transparency is more difficult with plea agreements than in the corporate leniency context where the rewards are fixed. The rewards for second-in companies are not uniform, because the value of a second-in corporation can vary dramatically from case to case. The value to the government of a company's cooperation varies because what the defendant brings to the table (e.g., credible witnesses, compelling documents, previously undisclosed information), and what the government can already prove, is not a constant and varies from case to case. So, while a second-in company's cooperation typically will significantly advance an investigation, there are times when the cooperation is either cumulative or no longer needed.

For example, second-in cooperation likely would more significantly advance an investigation of a five-firm conspiracy than a two-firm conspiracy. Second-in cooperation could come at the outset of an investigation when the Division is still developing key evidence against others, or after significant evidence has already been provided through a leniency applicant or a successful covert investigation, complete with consensual monitoring and coordinated search warrants. The second-in company's cooperation could include self-reporting on previously unidentified cartels warranting "Amnesty-Plus" credit, or be limited to conduct already detected. The second-in company could offer its cooperation immediately after learning of the existence of the investigation, or only after it receives a target letter or after it has been indicted. If the Division were to establish an absolute, fixed discount for second-in cooperation without consideration of these types of variables, then the need for proportionality would be sacrificed for increased transparency.

### 3. Department of Justice Policies on Selection of Charges and Sentencing

The U.S. Department of Justice's Principles of Federal Prosecution lays out the considerations prosecutors must weigh in determining whether it would be appropriate to enter into a plea agreement. Department prosecutors are instructed to weigh all relevant considerations, including:

- The defendant's willingness to cooperate in the investigation or prosecution of others;

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<sup>5</sup> Scott D. Hammond, *Charting New Waters in International Cartel Prosecutions* (hereinafter "Charting New Waters"), Speech Before the ABA Criminal Justice Section's Twentieth Annual National Institute on White Collar Crime (Mar. 2, 2006) available at <http://www.usdoj.gov/atr/public/speeches/214861.htm>.

<sup>6</sup> See *Charting New Waters*, at § II (F).

<sup>7</sup> See *Charting New Waters*, at § II (G).

<sup>8</sup> For a detailed discussion of the benefits available to early co-operators, see Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations* (hereinafter "Measuring the Value of Second-In Cooperation"), Address Before the 54th Annual Spring Meeting of the ABA Section of Antitrust Law (March 29, 2006), available at <http://www.usdoj.gov/atr/public/speeches/215514.pdf>.

- The defendant's history with respect to criminal activity;
- The nature and seriousness of the offence or offences charged;
- The defendant's remorse or contrition and his/her/its willingness to assume responsibility for his/her/its conduct;
- The desirability of prompt and certain disposition of the case;
- The likelihood of obtaining a conviction at trial;
- The probable effect on witnesses;
- The probable sentence or other consequences if the defendant is convicted;
- The public interest in having the case tried rather than disposed of by a guilty plea;
- The expense of trial and appeal;
- The need to avoid delay in the disposition of other pending cases; and
- The effect upon the victim's right to restitution.<sup>9</sup>

These factors do not create rights for defendants, but rather provide general guidance to prosecutors in deciding whether to enter a plea agreement with a defendant rather than seek a conviction at trial.<sup>10</sup>

Department of Justice policies related to charging decisions and sentencing recommendations ensure that plea agreements entered into by federal prosecutors do not bargain away justice and result in transparent, proportional and just dispositions. Department of Justice policies require that federal prosecutors charge and pursue the most serious, readily provable offence or offences supported by the facts of the case.<sup>11</sup> Department policies are essentially the same with respect to the resolution of cases through plea agreements, providing that prosecutors should seek a plea to the most serious, readily provable offence charged.<sup>12</sup>

Department policies explicitly prohibit filing charges to exert leverage to induce a plea or dismissing charges in exchange for a plea to lesser charges; a practice commonly referred to as “charge bargaining.”<sup>13</sup> However, charges, or contemplated charges, may be dismissed or declined under certain circumstances, such as: (1) when the applicable Guidelines range from which a sentence may be imposed would be unaffected; (2) when a prosecutor has a good-faith doubt as to the government's ability to readily prove a

<sup>9</sup> See Principles of Federal Prosecution, U.S. Attorney’s Manual § 9-27.420, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.420](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.420)

<sup>10</sup> *Id.* at § 9-27.150.

<sup>11</sup> See Memo from Attorney General John Ashcroft to All Federal Prosecutors, Memo Regarding Policy On Charging Of Criminal Defendants (September 22, 2003) (hereinafter “September 22, 2003 Ashcroft Memo”), at § (I) (A), available at, [http://www.usdoj.gov/opa/pr/2003/September/03\\_ag\\_516.htm](http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm).

<sup>12</sup> See Principles of Federal Prosecution, U.S. Attorney’s Manual §§ 9-27.400 and 9-27.430(A) (1), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm).

<sup>13</sup> See September 22, 2003 Ashcroft Memo at § I (A) and § II(C).

charge for legal or evidentiary reasons; or (3) under certain exceptional and rare circumstances, such as caseload considerations, with approval of the appropriate Department management.<sup>14</sup>

Before accepting a plea agreement in lieu of taking a case to trial, Department prosecutors are required to evaluate the probable sentence a defendant would face if convicted of all counts for which the defendant could be charged, versus the sentence imposed pursuant to a plea agreement. Department of Justice policies require that any sentence recommended by the government must honestly reflect the totality and seriousness of the defendant's conduct and be fully consistent with the U.S. Sentencing Guidelines and applicable statutes and with the readily provable facts about the defendant's history and conduct.<sup>15</sup> This "honesty in sentencing" policy also requires that Department prosecutors not stand silent while a defendant argues for the application of a sentencing factor that the prosecutor does not believe is supported by law or facts.<sup>16</sup> This policy is consistent with the Congressionally mandated purpose of the U.S. Sentencing Commission to "provide certainty and fairness in meeting the purposes of sentencing [and] avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct."<sup>17</sup>

#### **4. Plea Agreement Basics**

##### **4.1 Admission of Guilt**

In order to enter into a plea agreement with the Division, a defendant must be willing to plead guilty to the charged conduct at arraignment and make a factual admission of guilty. In the vast majority of Division cases, a plea agreement is negotiated prior to indictment and the defendant will waive indictment by a grand jury and plead guilty to an information that will be filed with the court by the Division prior to the court's acceptance of the plea agreement. Unlike civil settlements, which can be resolved without an admission of wrongdoing, the Division will not enter into a plea agreement to resolve a criminal matter if the defendant refuses to admit to participation in the charged conduct.<sup>18</sup>

##### **4.2 Rights and Safeguards**

Division plea agreements contain an enumeration of the rights and procedural safeguards afforded the defendant. These rights include: the right to be charged by indictment; the right to plead not guilty; the right to a trial by jury (where the defendant can cross-examine witnesses); the right against self-incrimination; and the right to appeal a conviction and sentence. Plea agreements advise the defendant of

<sup>14</sup> For a full list of exceptions to the charging of the most serious, readily provable offence, some of which are inapplicable to criminal antitrust cases, *see* September 22, 2003 Ashcroft Memo at § I(B).

<sup>15</sup> *See* Memo from Attorney General John Ashcroft to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing Recommendations and Sentencing Appeals (July 28, 2003) (hereinafter "July 28, 2003 Ashcroft Memo"), at § II (B), *available at* [http://www.nacdl.org/public.nsf/legislation/ci\\_03\\_32/\\$FILE/AG\\_Guidance\\_Stcg\\_Recs.pdf](http://www.nacdl.org/public.nsf/legislation/ci_03_32/$FILE/AG_Guidance_Stcg_Recs.pdf), and September 22, 2003 Ashcroft Memo.

<sup>16</sup> July 28, 2003 Ashcroft Memo at § II (A) (2).

<sup>17</sup> 28 U.S.C. § 991(b) (1) (B).

<sup>18</sup> While F.R.C.P. 11(a) provides that with court's permission a defendant may plead *nolo contendere* (no contest) without admitting guilt, the Division will not accept plea agreements where the defendant is not prepared to admit guilt and the Division will strongly oppose defendant's request to the court to enter a *nolo* plea without a plea agreement. F.R.C.P. 11(a) also provides for conditional pleas (which require government consent and are extremely rare) and pleas of guilty to an indictment (with or without a plea agreement).

these rights and then require the defendant to waive certain rights. At the plea hearing, the court will establish that the defendant understands these rights and has waived them knowingly, voluntarily, and with the advice of counsel before accepting the plea agreement.

#### **4.3 Role of Court**

Courts are specifically prohibited from participating in plea discussions.<sup>19</sup> A signed plea agreement will be submitted to the court for consideration.<sup>20</sup> The court's role in the plea agreement process is to accept or reject a plea agreement once it has been agreed to by the parties, and if accepted, to impose sentence.

Federal Rule of Criminal Procedure ("F.R.C.P.") 11(c)(2) requires that the parties must disclose the plea agreement in open court, unless the court finds good cause and allows the parties to disclose the plea agreement *in camera*, to the judge only. The Division will disclose the plea agreement in open court except in limited circumstance, such as where disclosure will jeopardize the integrity of a covert investigation. Publicly filed plea agreements also provide transparency to the bar and business world by disclosing the terms of those agreements. For example, if corporate defendants were regularly allowed to enter into secret deals with the government, investors, members of the public, and the victims of the charged crime would naturally question the fairness and transparency of the sentence imposed. Practically, it is also important to publicly file plea agreements because they create momentum in investigations and may spur others to accept responsibility and plead guilty.

#### **4.4 Contract Principles**

A plea agreement is a legal document memorializing the negotiated disposition of criminal charges between the prosecutor and the defendant. In compliance with Department policy, plea agreements entered into with the Division must be in writing.<sup>21</sup> Written agreements help to avoid misunderstandings between the parties as to the terms of the agreement, and also fully apprise the court of the terms of the agreement the parties have reached. Courts often consider contract principles when analyzing plea agreements.<sup>22</sup>

#### **4.5 Confidentiality of Plea Negotiations**

Plea negotiations are generally considered confidential. Pursuant to F.R.C.P. 11(f) and Federal Rule of Evidence ("F.R.E.") 410, statements made by the defendant or the defendant's counsel in the course of plea negotiations are generally not admissible at trial if the negotiations break down. However, if a defendant enters into a plea agreement and then breaches the agreement by, for example, failing to fully cooperate, then documents, statements, information, testimony, or evidence provided by the defendant or defendant's counsel or a corporate defendant's employees, may be used against the defendant notwithstanding F.R.E. 410. An explicit waiver allowing the use of this evidence in the event of the defendant's breach is contained in Division plea agreements.<sup>23</sup>

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<sup>19</sup> See F.R.C.P. 11(c) (1).

<sup>20</sup> See F.R.C.P. 11(c) (3).

<sup>21</sup> See September 22, 2003 Ashcroft Memo at § II (A). Note, however, that in rare instances where exigencies require that plea agreements not be in writing, the terms of the agreement must be formally stated on the court record.

<sup>22</sup> For a review of case law see *Guilty Pleas*, 91 Geo. L.J. 362, n.1239 (2003).

<sup>23</sup> See 20 of the attached individual model plea agreement and ¶ 23 of corporate model plea agreements.

F.R.E. 410 provides two exceptions to its general rule of inadmissibility at trial of statements made in connection with a guilty plea. A statement made by a defendant in the course of failed plea discussions is admissible if: (1) another statement made in the course of the same plea discussions is introduced into evidence and the statement in fairness ought to be considered contemporaneously with it;<sup>24</sup> or (2) in a criminal proceeding for perjury or false statement, if the statement was made by the defendant under oath, on the record and in the presence of counsel.

#### 4.6 *Types of Plea Agreements*

There are two types of plea agreements that the Division typically enters into with defendants charged with Sherman Act offences, commonly referred to as type “B” agreements and type “C” agreements. There are certain central principles specific to each type of agreement.

##### 4.6.1 *F.R.C.P. 11(c) (1) (B) Agreements*

F.R.C.P. 11(c)(1)(B) provides for a type of plea agreement, known as a “B” agreement, where an attorney for the government may recommend, or agree not to oppose, that a particular sentence or sentencing range is appropriate, or that a particular provision of the Sentencing Guidelines does or does not apply. “B” agreements may also make recommendations as to specific sentencing factors, as well as to whether restitution or probation are appropriate. A defendant may join the government in its recommendation but is not required to do so under the Federal Rules.

The key provision that makes a plea agreement a “B” agreement is that it is *not* binding upon the court. “B” agreements are binding upon the defendant, however, so long as the attorney for the government makes a sentencing recommendation consistent with the recommended sentence contained in the plea agreement. In other words, a defendant cannot withdraw a guilty plea even if the court imposes a sentence other than the recommended sentence contained in a “B” agreement.<sup>25</sup>

##### 4.6.2 *F.R.C.P. 11(c) (1) (C) Agreements*

F.R.C.P. 11(c) (1) (C) provides for a type of plea agreement, commonly referred to as a “C” agreement, specifying that the government and the defendant jointly agree that a specific sentence or sentencing range is appropriate. Like a “B” agreement, a “C” agreement can contain an agreement as to whether a specific sentencing factor applies, as well as to whether restitution or probation are appropriate. The defining feature of a “C” agreement is that if the court accepts the plea agreement the joint sentencing recommendation of the parties is *binding* upon the court, and the court may not deviate from it in sentencing the defendant. In order to accept a “C” agreement, a court must find that the recommended sentence and the other terms of the plea agreement serve the interests of justice. The court may request a presentence report from the Probation Office or additional information from the parties to the agreement before deciding whether to accept the plea agreement.

The Division has achieved a near perfect track record in persuading courts to accept negotiated “C” agreements.<sup>26</sup> Thus, when a defendant enters into a “C” agreement with the Division, the defendant can

<sup>24</sup> This exception is consistent with the so-called “rule of completeness” contained in Federal Rule of Evidence 106.

<sup>25</sup> See 11 of attached corporate and individual model plea agreements.

<sup>26</sup> In the past decade, the Division has filed hundreds of “C” agreements in federal courts and there has only been one instance in which a judge declined to accept the recommended sentence contained in a “C” agreement entered into by the Division. The plea agreement in that case called for a \$29 million fine for a cooperating corporate defendant. The court rejected the recommended sentence because it found the

have confidence that the Division will be a strong advocate for the negotiated disposition and that the court is highly likely to go along with the recommendation of the parties. This high degree of certainty is particularly attractive to foreign corporate and individual defendants who might be leery of pleading guilty, providing cooperation, and submitting to the jurisdiction of U.S. courts without the surety that “C” agreements provide.

While extremely rare in the Division’s experience, if the court does not accept the recommended sentence contained in a “C” agreement, the agreement is rendered void<sup>27</sup> and the defendant is free to withdraw its/his plea of guilty.<sup>28</sup> If the court rejects the “C” agreement, neither the defendant nor the government will be prejudiced by the failed attempt to reach a plea resolution. F.R.C.P 11(f) and F.R.E. 410 provide that no statements made in the course of plea negotiations may be used against the defendant. Division plea agreements provide that if the court does not accept the plea agreement and the defendant chooses to withdraw the plea of guilty, that the statute of limitations period will be tolled for the period between the signing of the plea agreement and withdrawal of the plea (or 60 days, whichever is greater) to protect the government’s interests.<sup>29</sup> Moreover, in the event that a court does not accept the terms of a “C” agreement,<sup>30</sup> the Division will restrict its ability to take action to arrest, serve with process or detain foreign national defendants residing abroad for three days after the withdrawal of a guilty plea.

#### 4.7 *Withdrawal from a Plea Agreement*

Most Division plea agreements are signed shortly before the filing of charges, so withdrawal from a plea agreement prior to the filing of charges has not been an issue in Division cases. However, if a defendant has stated an intention to plead guilty, but the court has not yet accepted the plea of guilty, a defendant may withdraw the plea of guilty for any reason.<sup>31</sup> Once charges are filed and the defendant enters a plea of guilty to those charges, a defendant may only withdraw a plea of guilty before the court imposes sentence if the defendant can show a “fair and just reason for requesting the withdrawal.”<sup>32</sup> After the court imposes sentence, the defendant may not withdraw a plea of guilty, except if the court does not accept the recommended sentence contained in a “C” plea agreement and the agreement is rendered void.<sup>33</sup>

#### 4.8 *Initiating Plea Negotiations*

Plea negotiations can take place at any time during the course of a criminal investigation, but usually begin pre-indictment, after prospective defendants become aware that they are subjects or targets of the investigation. While the Division will entertain plea proposals both before and after indictment, most are entered pre-indictment where early cooperation holds an array of benefits for defendants. Either the

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proposed fine reduction for the defendant's cooperation excessive. The parties then submitted a revised "C" agreement recommending a fine range of \$29 to \$32.5 million, and the head of the Antitrust Division, the Assistant Attorney General, personally appeared before the court to urge the Court to sentence the defendant to the low end of the recommended fine range. The court accepted the plea agreement and imposed a \$32.5 million fine. *See* *Negotiating the Waters*, at § VI (A), and final SDC plea agreement available at <http://www.usdoj.gov/atr/cases/f3800/3869.htm>.

<sup>27</sup> See 11(a) of attached corporate and individual model plea agreements.

<sup>28</sup> See 11(b) of attached corporate and individual model plea agreements.

<sup>29</sup> *Id*

<sup>30</sup> *Id.*

<sup>31</sup> Fed. Rule Crim. P. 11(d) (1).

<sup>32</sup> Fed. Rule Crim. P. 11(d) (2).

<sup>33</sup> Fed. Rule Crim. P. 11(e).

government or the defendant can initiate plea negotiations, which, at the Division, are predominantly handled at the staff level.<sup>34</sup> The Division negotiates, signs, and publicly files plea agreements throughout the course of its investigation. Therefore, for the most part, defendants do not have to wait until their cooperation is complete or until the investigation is over before they are advised as to the value that the government places on their cooperation.

While the following list is certainly not exhaustive, plea negotiations in cartel cases will focus on the following key issues:<sup>35</sup>

- **Who will have to plead guilty?** For corporate defendants, what specific entity will be charged. Wherever possible, the Division will prosecute the most culpable corporate entity involved in the conspiracy.<sup>36</sup>
- **What will be the violations for which the defendant must admit guilt?** In addition to a criminal antitrust charge, has the defendant committed any collateral offences, including mail fraud, wire fraud, obstruction, money laundering, bribery or tax offences, that may be charged.
- **What will be the scope of the antitrust charge?** The scope of the alleged conspiratorial conduct to be charged including the nature of the anticompetitive conduct (e.g. bid rigging, price fixing and/or market allocation), the products or services covered by the conspiratorial agreement, and the duration and geographic scope of the conspiracy.
- **What cooperation will the defendant provide?** A detailed proffer of the cooperation that the defendant is prepared to offer.
- **Who will be covered by the nonprosecution and cooperation provisions of the plea agreement?** For corporations, the corporate entities and employees subject to the cooperation and nonprosecution provisions of the plea agreement as well as those entities or individuals specifically “carved out” or excluded from these provisions.<sup>37</sup> The cooperation requirements imposed upon the defendant, including the production of documents and witnesses, wherever located.<sup>38</sup>
- **What will be the sentencing recommendations of the parties?** The recommended sentence, including the fine for corporations and the period of incarceration and fine for individuals, taking into account the defendant’s Sentencing Guidelines calculations and any substantial assistance reduction. When the sentencing will take place will also be discussed.

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<sup>34</sup> Recommendations to enter into plea agreements on certain terms are made by the staff, with their office chief’s recommendation, to the Deputy Assistant Attorney General for Criminal Enforcement. All plea agreements must be approved by the Assistant Attorney General for Antitrust.

<sup>35</sup> For a discussion of plea negotiations generally, and issues to be discussed at the initial meeting with the Antitrust Division, see ABA Section of Antitrust Law, *Criminal Antitrust Litigation Manual*, at 77-86 (2d ed. 2006).

<sup>36</sup> See Negotiating the Waters at § VI (B).

<sup>37</sup> See Negotiating the Waters at § II (A); Charting New Waters at § II (G).

<sup>38</sup> See Negotiating the Waters at § II (B).

## 5. Standard Provisions from the Division's Model Plea Agreements

In an effort to achieve maximum transparency, proportionality and efficiency, the Division has developed standard model corporate and individual plea agreements for Sherman Act offences. Annotated versions of these model agreements are attached.<sup>39</sup> These models are intended to be a general guide to the standard provisions contained in a plea agreement for an antitrust offence, although they may be modified to comply with local practice where necessary. The models will also be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division's model plea agreements are available at <http://www.usdoj.gov/atr/public/criminal.htm>. What follows is a discussion of the standard provisions found in the Division's Sherman Act plea agreement with endnotes cross referencing the relevant paragraphs in the model agreements.

### 5.1 Rights of Defendant

The "Rights of Defendant" section of the Division's corporate and individual plea agreements<sup>40</sup> sets forth the procedural protections and rights a defendant foregoes by pleading guilty. The language generally tracks the checklist set forth in F.R.C.P. 11(b) (1) that a court must inform the defendant of, and determine that the defendant understands, prior to accepting a defendant's plea of guilty.

### 5.2 Agreement to Plead Guilty and Waive Certain Rights

Division plea agreements require the defendant to plead guilty to criminal charges and make a factual admission of guilt to the court.<sup>41</sup> The defendant must also explicitly waive the rights enumerated in the "Rights of Defendant" section of the plea agreement.<sup>42</sup> Defendants must acknowledge that these waivers are made knowingly and voluntarily. Foreign defendants also must waive any jurisdictional defenses available.

Plea agreements will also contain an appellate waiver.<sup>43</sup> Unless local practice or, in rare instances, case-specific facts require modification, the Division's standard waiver requires that the defendant agree to waive any direct appeal or collateral attack challenging the sentence imposed if that sentence is consistent with or below the recommended sentence contained in the plea agreement. This waiver allows the defendant to appeal a sentence imposed by the court only if that sentence is above that recommended in the plea agreement.<sup>44</sup> The plea agreement provides that the government maintains the appeal rights afforded under 18 U.S.C. § 3742, allowing appeal under certain conditions, such as where the court imposed a sentence in violation of law; incorrectly applied the Sentencing Guidelines; or, in the case of a type "C" plea agreement, imposed a sentence below the recommended sentence set forth in the agreement.<sup>45</sup>

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<sup>39</sup> These Models provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

<sup>40</sup> See 1 of attached corporate and individual model plea agreements.

<sup>41</sup> See 3 of attached corporate and individual model plea agreements.

<sup>42</sup> See 2 of attached corporate and individual model plea agreements.

<sup>43</sup> *Id.*

<sup>44</sup> This waiver should theoretically only ever apply to type "B" plea agreements, because if a court accepts a type "C" agreement it must impose a sentence consistent with the recommended sentence.

<sup>45</sup> 18 U.S.C. § 3742(b) and (c).

### 5.3 *The Factual Basis Required To Support a Guilty Plea*

A factual basis is included in Division plea agreements unless inconsistent with local practice.<sup>46</sup> The purpose of this section of the plea agreement is to provide the court with a sufficient factual basis to support the plea, as required by F.R.C.P. 11(b) (2). Practitioners will observe that the factual detail typically found in a Division plea agreement and criminal information is noticeably less than that contained in the charging documents used by many other competition authorities. One reason for that is because, as noted above, the Division will file plea agreements with cooperating defendants throughout the course of an investigation. Therefore, in order to protect the integrity of the ongoing investigation, the Division must often limit the degree of detail in the factual statement. A collateral consequence of this practice is that pleading defendants do not have every aspect of their participation in a cartel recounted in specific detail as would be the case if the matter were litigated at a public trial.

Under the decision in *United States v. Booker*,<sup>47</sup> the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore, facts that would support Guidelines enhancements need not be included in the factual basis section of plea agreements. But, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than the statutory maximum, the plea agreement will address the gain or loss issue.<sup>48</sup>

### 5.4 *Possible Maximum Sentence*

The plea agreement will enumerate the statutory maximum penalty that may be imposed against the defendant upon conviction of each charged offence.<sup>49</sup> The statutory maximum will include the highest possible fine, probation and restitution that may be imposed for each offence charged, the special assessment for each count, and the maximum term of imprisonment for individuals.

### 5.5 *Sentencing Guidelines*

Plea agreements will address which edition of the U.S. Sentencing Guidelines applies, noting any *ex post facto* issues.<sup>50</sup> While it is the norm to apply the Guidelines Manual in effect at sentencing, note that under U.S.S.G. § 1B1.11 (b) (1) if that version of the Manual would violate the *ex post facto* clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offence was committed shall be used, except where this practice contravenes existing case law.<sup>51</sup> The amended Antitrust Guideline, U.S.S.G. § 2R1.1 increased the applicable Guidelines range and became effective on November 1, 2005. It will apply to defendants who engage in conspiratorial conduct that continued until on or after that date, except where applicable case law requires otherwise.

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<sup>46</sup> See 4 of attached corporate and individual model plea agreements.

<sup>47</sup> 125 S. Ct. 738 (2005).

<sup>48</sup> For a discussion of the implications of the *Booker* decision on the Division's charging and plea agreement practice, see Scott D. Hammond, Antitrust Sentencing in the Post-Booker Era: Risks Remain High for Non-Cooperating Defendants (hereinafter "Antitrust Sentencing in the Post-Booker Era"), Speech Before the ABA Section of Antitrust Law Spring Meeting (Mar. 30, 2005), available at <http://www.usdoj.gov/atr/public/speeches/208354.htm>.

<sup>49</sup> See 5 and 6 of attached corporate and individual model plea agreements.

<sup>50</sup> See 7 of attached corporate and individual model plea agreements.

<sup>51</sup> See e.g., *United States v. DeMaree*, 459 F.3d 791 (7<sup>th</sup> Cir. 2006) (holding that the *ex post facto* clause does not apply to the now advisory Guidelines).

Plea agreements will contain an acknowledgment by the defendant that the Sentencing Guidelines are advisory and not mandatory, but that the court must consider them and will make the Guidelines determination by a preponderance of the evidence.<sup>52</sup>

## 5.6 *Limitations on Use of Self-incriminating Information*

Division plea agreements for Sherman Act offences commonly contain a provision<sup>53</sup> stating that self-incriminating information provided by the defendant pursuant to the plea agreement will not be used to increase the volume of affected commerce attributable to the defendant or the applicable Guidelines range, except under certain circumstances provided for in U.S.S.G. § 1B1.8(b).<sup>54</sup> The Division is not required to restrict the use of self-incriminating information in calculating a defendant's applicable Guidelines fine range. However, the Division's practice is to agree to do so in plea agreements with early co-operators as an additional incentive for companies to cooperate fully.<sup>55</sup> In addition, while the Sentencing Commission is clear that a court may rely on the information provided by a defendant pursuant to §1B1.8 as a basis for refusing to give the defendant a downward departure for substantial assistance,<sup>56</sup> the Division has routinely recommended that companies qualifying for §1B1.8 credit also receive downward departures, and no court has refused to accept the Division's recommendation to grant a downward departure on this basis. This generous concession by the Division has resulted in drastically reduced fines for numerous early cooperating corporate defendants.

## 5.7 *Sentencing Agreement*

### 5.7.1 *The Recommended Sentence*

Division plea agreements lay out the recommended sentence, either of the government or the joint recommendation of the parties.<sup>57</sup> The recommended sentence must include all agreed-upon or recommended aspects of the agreement between the government and the defendant. The recommended sentence in Division plea agreements typically includes the proposed fine and any restitution to be paid, as well as the term of incarceration for individuals. If the parties agree that the recommended fine needs to be paid in instalments because of the defendant's inability to pay the entire amount immediately, the plea agreement will include the instalment schedule and any interest terms.<sup>58</sup> The payment of a special assessment<sup>59</sup> and any recommendation on a term of probation<sup>60</sup> or expedited sentencing<sup>61</sup> for corporations,

<sup>52</sup> See 7 of attached corporate and individual model plea agreements.

<sup>53</sup> *Id.*

<sup>54</sup> U.S.S.G. § 1B1.8 (b) provides that the government may use information: (1) known to the government prior to entering the plea/cooperation agreement; (2) concerning the existence of prior convictions and sentences; (3) in a prosecution for perjury of giving a false statement; (4) if there is a breach of the plea/cooperation agreement by the defendant; or (5) in determining whether, or to what extent, a downward departure is warranted for substantial assistance. See optional part of ¶ 7 of attached corporate and individual model plea agreements.

<sup>55</sup> See Measuring the Value of Second-In Cooperation at § II (a).

<sup>56</sup> See U.S.S.G. § 1B1.8 (b) (5) and Application Note 1.

<sup>57</sup> See 8 of attached corporate and individual model plea agreements.

<sup>58</sup> See 8(a) of attached corporate and individual model plea agreements.

<sup>59</sup> See 8(b) of attached corporate model plea agreement and ¶ 8(c) of the individual model plea agreement.

<sup>60</sup> See 8(c) of attached corporate model plea agreement.

<sup>61</sup> See 8(d) of attached corporate model plea agreement.

or requests by individual defendants to be placed in a specific correctional facility,<sup>62</sup> will also be addressed in the plea agreement.

### 5.7.2 *When a Fine in Excess of the Statutory Maximum is Sought*

The statutory maximum fine for a Sherman Act offence committed on or after June 22, 2004 is \$100 million for a corporation and \$1 million for an individual.<sup>63</sup> If pecuniary gain is derived from the offence, or if the offence results in pecuniary loss to someone other than the defendant, then the defendant may be fined up to twice the gross gain or loss, whichever is greater.<sup>64</sup> If the plea agreement contains a recommended sentence above the statutory maximum, then it will include a statement that had the case gone to trial, the government would have presented evidence to prove that the gain or loss resulting from the charged offence is sufficient to justify the recommended fine pursuant to 18 U.S.C. § 3571(d).<sup>65</sup> Division plea agreements will also contain a waiver stating that the defendant will not contest the gain or loss calculation for purposes of the plea and sentencing.<sup>66</sup> The statement of gain or loss and the explicit waiver were added after the Supreme Court's ruling in *Booker* requiring that facts that authorize a sentence above the statutory maximum must either be proved to a jury beyond a reasonable doubt or admitted by the defendant.<sup>67</sup> The Division will not engage in plea negotiations with a company that desires to litigate gain or loss in the midst of an investigation. Companies interested in litigating the gain or loss will have that opportunity once the investigation is complete. Of course, by that time, the defendant will have lost the opportunity to obtain any credit for timely cooperation.<sup>68</sup>

### 5.7.3 *Substantial Assistance Departures*

The government must recommend a Guidelines sentence unless a downward departure as provided for in the Guidelines is warranted. After the Supreme Court's decision in *Booker*, courts will treat Guidelines as advisory but Department of Justice prosecutors will continue to recommend Guidelines sentences. The primary way a defendant can earn the Division's recommendation of a downward departure resulting in a below-Guidelines sentence is by providing substantial assistance to the Division's investigation and prosecution of criminal offences.<sup>69</sup> The Sentencing Guidelines specifically provide that upon the motion of the government, the court may depart from the Guidelines based on the defendant's substantial assistance to the investigation or prosecution of another person<sup>70</sup> who has committed an offence.<sup>71</sup>

<sup>62</sup> See 8 of attached corporate model plea agreement.

<sup>63</sup> Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 215, 118 Stat. 665, 668 (2004).

<sup>64</sup> 18 U.S.C. § 3571(d).

<sup>65</sup> See 8(b) of attached individual model plea agreement and ¶ 8(e) of the corporate model plea agreement.

<sup>66</sup> *Id.*

<sup>67</sup> See Antitrust Sentencing in the Post-Booker Era at § IV.

<sup>68</sup> *Id.*

<sup>69</sup> If the court finds that the defendant has an inability to pay a Guidelines fine, the defendant's fine may also fall below the Guidelines fine range pursuant U.S.S.C. § 8C3.3 (for organizations) or U.S.S.C. § 5E1.2(e) (for individuals). See alternative ¶ 9 of the attached corporate and individual model plea agreement.

<sup>70</sup> Corporations cannot receive substantial assistance departures for cooperating against its own employees or agents who were responsible for the offence which the organization is being sentenced. See U.S.S.G. §§ 5K1.1, application n.1.

<sup>71</sup> U.S.S.G. §§ 5K1.1 (individuals) and 8C4.1 (corporations).

Early cooperation from cartel members is absolutely critical to the detection and prosecution of cartel conduct, and the Division seeks to favourably reward – and thus encourage – such cooperation. Where the ultimate prize of full immunity is no longer available, second-in or early co-operators can still obtain substantial discounts below their Guidelines fine and incarceration ranges. The amount of the substantial assistance departure, commonly referred to as the “cooperation discount”, that the Division will recommend to the sentencing court is within the discretion of the Division. The Division will consider a number of factors primarily focusing on the timeliness and value of the cooperation the defendant can provide.<sup>72</sup> The Division’s Amnesty-Plus Policy also affords defendants the ability to receive a substantial cooperation discount for discovering and reporting an antitrust violation to the Division that is unrelated to the conduct to which the defendant is pleading guilty. A company receiving Amnesty-Plus credit not only receives the benefits of full immunity for the newly reported conduct, if it meets the requirements of the Corporate Leniency Program for the newly reported conduct, but also receives a substantial additional discount in its fine for its participation in the charged conspiracy.<sup>73</sup>

The agreement to make a motion for a substantial assistance departure, and any conditions placed on the promise to make such a recommendation, will be included in Division plea agreements.<sup>74</sup> Most Division plea agreements providing for a substantial assistance departure recommend a specific reduced fine or jail term (or both). Some Division plea agreements, primarily in type “B” agreements entered into with individuals, contain an unspecified or “freefall” departure wherein both the Division and defendant are free to argue for the amount of departure each deems appropriate.<sup>75</sup> The Division, however, will only agree to a freefall departure that maintains the Division’s ability to argue for jail time and will not agree to stand silent while the defendant argues for no jail time.<sup>76</sup>

#### 5.7.4 Expedited Sentencing for Foreign-Based Defendants

The Division will agree to expedite the sentencing process for foreign-based defendants who have agreed to submit to U.S. jurisdiction and have pled guilty to antitrust charges in the United States. Specifically, in judicial districts where the practice is permissible, the Division generally will not oppose a request for expedited sentencing made by a foreign-based defendant who is pleading guilty pursuant to a Rule 11(e) (1) (C) plea agreement. The Division’s model language allows a foreign-based defendant to combine arraignment, taking of the plea, and sentencing into a single proceeding as a matter of convenience to the defendant.<sup>77</sup> The provision is appropriate in “C” agreements where the court’s discretion on sentencing is limited once it accepts the plea agreement. But the “C” agreement will not be voided if the court denies the defendant’s request for expedited sentencing.

### 5.8 Defendant’s Cooperation

The defendant’s cooperation is the primary benefit that the Division receives from entering into a plea agreement. Therefore, a commitment by the defendant to provide full, continuing, and complete

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<sup>72</sup> For a discussion of the factors considered in determining the size of the cooperation discount, *see generally* Measuring the Value of Second-In Cooperation at § II (B).

<sup>73</sup> *See Id.* at § II (E).

<sup>74</sup> *See* 9 of attached corporate and individual model plea agreements.

<sup>75</sup> *See* n.30 of attached individual model plea agreement.

<sup>76</sup> *See* Charting New Waters at § II (F).

<sup>77</sup> *See* 8(d) of the attached corporate model plea agreement

cooperation is virtually always required in Division plea agreements.<sup>78</sup> As discussed above, the amount of the substantial assistance reduction in the fine or period of incarceration below the Guidelines range that the government will recommend is directly tied to the timeliness and quality of the cooperation that the defendant is able and willing to provide.

The specific types of cooperation that a defendant is required to provide to the government is specified in the plea agreement, including providing the government with all non-privileged documents and information, wherever located, in the possession, custody, or control of the defendant and appearing for interviews, grand jury appearances and trials.<sup>79</sup> For corporate defendants, the defendant and any related entities covered under the plea agreement must also use their “best efforts” to secure the cooperation of current, and sometimes also former, corporate employees covered under the plea agreement, including making employees (even foreign-located employees), available at the defendant’s expense for interviews and testimony. Corporate employees covered under the plea agreement are also bound to cooperate with the government. If a covered employee fails to comply with his cooperation obligations, the government’s agreement not to prosecute that person will be rendered void and the government will be free to prosecute the non-cooperating employee<sup>80</sup> and the government may use information provided by that individual against that person in a criminal trial.<sup>81</sup> In rare situations, the government’s nonprosecution promise with the company may be specifically tied to the full cooperation of certain executives where the company’s cooperation is essentially meaningless without the full cooperation of those executives.<sup>82</sup>

It is important to note that the cooperation requirements contained in a plea agreement are ongoing obligations and the plea agreement may be voided by the government, as discussed below, for failure to comply with the cooperation obligations contained in the plea agreement even after acceptance of the plea and imposition of sentencing, so long as the investigation that gave rise to the defendant’s charge or a federal investigation, litigation or proceeding arising or resulting from the investigation is still pending.<sup>83</sup>

### **5.9 Government’s Agreement Not to Bring Further Criminal Charges**

Division plea agreements typically include a promise not to bring further criminal charges against a defendant for certain criminal acts committed prior to the date the plea agreement was signed.<sup>84</sup> In corporate plea agreements, the non-prosecution promise may extend to related corporate entities<sup>85</sup> and/or to certain cooperating employees. The non-prosecution protection is always conditioned on the completion of other events, such as the court’s acceptance of the guilty plea and the imposition of the recommended sentence. The scope of the nonprosecution terms of the plea agreement is fact-specific and is negotiated to provide the defendants with the needed assurances that they will not be subjected to further prosecution for the crimes the defendant is pleading guilty to and about which the defendant is providing cooperation to

<sup>78</sup> In limited, rare instances where a defendant wishes to plead guilty but will not or cannot provide meaningful cooperation, the Division will enter into a plea agreement with a defendant that does not require the defendant’s cooperation. However, these types of agreements are more akin to sentencing agreements than plea/cooperation agreements.

<sup>79</sup> See 12 of attached individual model plea agreement and ¶ 14 of the corporate model plea agreement.

<sup>80</sup> See 17(c) of the attached corporate model plea agreement.

<sup>81</sup> See 17(e) of the attached corporate model plea agreement.

<sup>82</sup> See optional 14(b) of the attached corporate model plea agreement. For a discussion of this policy, see *Negotiating The Waters* at § II (E).

<sup>83</sup> See 12 of attached individual model plea agreement and ¶ 14 of the corporate model plea agreement.

<sup>84</sup> See 13 of attached individual model plea agreement and ¶ 16 of the corporate model plea agreement.

<sup>85</sup> See 14, 16 and n.29 of the attached corporate model plea agreement.

the government, while at the same time ensuring that the Division is not inadvertently immunizing defendants for crimes it is not aware of or for which it is not the proper prosecuting authority. Violations of federal tax, securities law or crimes of violence are specifically exempted from the nonprosecution terms of the plea agreement.<sup>86</sup>

### **5.10 Carve Outs**

The Division routinely “carves out” certain individuals from the nonprosecution protections afforded to employees in corporate plea agreements. The carved-out individuals may include culpable employees, employees who refuse to cooperate with the Division's investigation, or employees against whom the Division is still developing evidence.<sup>87</sup> The Division will insist that carved-out individuals obtain separate counsel from the corporation and will only conduct plea negotiations directly with the individual's counsel.

The Division has recently released two policy statements addressing issues related to carve outs, including: (1) the elimination of the no-jail deal for cooperating foreign nationals;<sup>88</sup> (2) the Division's practice of routinely excluding multiple individuals from the non-prosecution coverage of corporate plea agreements;<sup>89</sup> (3) the opportunity for early cooperating companies to minimize the number of individual employees carved out of the nonprosecution protections of a corporate plea agreement;<sup>90</sup> and (4) the possibility of more favourable deals for those executives carved out of plea agreements entered into with early cooperating corporations because these executives, like their employers, are in a position to offer valuable and timely cooperation.<sup>91</sup>

### **5.11 Safe Passage for Foreign Nationals**

When the Division enters into plea agreements that require foreign nationals to travel to the United States for interviews or testimony in order to fulfil cooperation requirements under the plea agreement, the Division will agree not to take any action to arrest, detain or serve the individual with process or prevent the individual from departing, unless that individual commits perjury, contempt, obstructs justice or makes a false statement.<sup>92</sup>

### **5.12 Immigration Relief for Cooperating Defendants**

The Immigration and Naturalization Service (“INS”), and now its successor, the Immigration and Customs Enforcement (“ICE”) of the Department of Homeland Security (“DHS”), considers Sherman Act offences to be crimes of moral turpitude. As a result, a foreign national convicted of an antitrust offence is subject to deportation and exclusion from the United States, whether for personal or business travel. In March 1996, the Division entered into a Memorandum of Understanding (“MOU”) with the INS (now implemented by ICE as INS's successor) that establishes a protocol whereby the Division will advise cooperating aliens whether they will be granted a waiver of inadmissibility for the antitrust offence they

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<sup>86</sup> See 16 of the attached corporate model plea agreement.

<sup>87</sup> See Charting New Waters at § II(G)

<sup>88</sup> See Charting New Waters at § II(F)

<sup>89</sup> See Charting New Waters at § II(G)

<sup>90</sup> See Measuring the Value of Second-In Cooperation at § II (D).

<sup>91</sup> *Id.*

<sup>92</sup> See 14 of the attached individual model plea agreement and ¶ 18 of the corporate model plea agreement.

are prepared to admit to before they enter into a plea agreement.<sup>93</sup> Prior to the MOU, the Division was unable to guarantee that a criminal conviction would not result in an alien's deportation and permanent exclusion from the United States. Cooperating foreign nationals granted immigration relief pursuant to the MOU now receive written assurances in their plea agreements that their convictions will not be used by the ICE, DHS or the State Department as a basis to deport or exclude them from the United States after they have served their sentence.<sup>94</sup>

### **5.13 Debarment and Other Administrative Actions**

The Division cannot immunize the cooperating defendant from debarment proceedings or any administrative action that may be taken by another federal or state agency based upon the defendant's conviction. Division plea agreements, however, regularly contain a provision stating that, if requested, the Division will advise the appropriate officials of any government agency considering administrative action of the fact, manner, and extent of the cooperation of the defendant. While this provision cannot guarantee the outcome of any administrative action by another agency, it provides assurances that the Division will advocate on defendant's behalf, wherever possible, such as when debarment from future government projects is contemplated.

### **5.14 Representation by Counsel**

Division plea agreements contain a general statement wherein the defendant acknowledges that all legal and factual aspects of the case and plea agreement have been reviewed with an attorney, and that the defendant is satisfied with that attorney's legal representation in the matter, and the defendant's decision to enter the plea agreement is made knowingly and voluntarily.<sup>95</sup>

### **5.15 Voluntary Plea**

Division plea agreements contain a statement that the defendant's decision to enter the plea agreement and to plead guilty was freely and voluntarily made.<sup>96</sup> Plea agreements also state that the Division has made no promises as to whether the Court will accept or reject the recommendations contained in the plea agreement.<sup>97</sup>

### **5.16 Violation of the Plea Agreement**

A pleading defendant who does not comply with the cooperation requirements or other provisions of the plea agreement will have its/his plea agreement voided with serious ramifications. Division plea agreements provide that upon notice from the Division that the defendant, or any related entity, has failed to provide full and truthful cooperation, or has otherwise violated the plea agreement, the Division may void the plea agreement and the defendant will be subject to prosecution for the offence it previously plead guilty to, and for any federal crime of which the government is aware.<sup>98</sup> If the plea agreement is voided,

<sup>93</sup> See Memorandum of Understanding Between the Antitrust Division United States Department of Justice and The Immigration and Naturalization Service United States Department of Justice (Mar. 15, 1996), available at <http://www.usdoj.gov/atr/public/criminal/9951.htm>; see also *Negotiating the Waters* at § IV(B), for a discussion of the INS MOU.

<sup>94</sup> See optional 15 of the attached individual model plea agreement.

<sup>95</sup> See 17 of the attached individual model plea agreement and ¶ 20 of the corporate model plea agreement.

<sup>96</sup> See 18 of the attached individual model plea agreement and ¶ 21 of the corporate model plea agreement.

<sup>97</sup> *Id.*

<sup>98</sup> See 19 of the attached individual model plea agreement and ¶ 22 of the corporate model plea agreement.

the model language provides that statements, information, testimony, or evidence provided by the defendants to the United States may be used against the defendant in any prosecution and the defendant waives the right to challenge the use of such evidence.<sup>99</sup> In addition, the statute of limitations is tolled for the period between the date of the signing of the plea agreement and six months after the date that the Division gives notice of its intent to void the plea agreement.

Also, for individual defendants located abroad, the language on voiding the agreement will include a provision that the factual basis contained in the plea agreement provides a sufficient basis for any possible future extradition request made by the United States, and that the defendant agrees not to oppose such extradition request.<sup>100</sup>

### **5.17 *Entirety of the Agreement***

Division plea agreements contain a statement that the written plea agreement constitutes the entire agreement between the Division and the defendant, and it cannot be modified, except in writing.<sup>101</sup> Corporate plea agreements must also reference and attach a resolution of the company's board of directors authorizing the signatory to enter into the plea agreement on behalf of the defendant company.<sup>102</sup>

## **6. Benefits of Plea Agreements**

Plea Agreements are mutually beneficial to the prosecuting agency and the defendants. In addition, the ability of plea agreements to resolve a defendant's criminal exposure provides benefits to the bar, business community and judicial system.

### **6.1 *Benefit #1: Transparency***

As discussed in Part II of this paper, transparency in the plea negotiation process is not only essential to securing cooperation from culpable parties, but also it is critical to fostering public confidence that there is proportional and equitable treatment of antitrust offenders. Publicly filed plea agreements in prior cases - available on the Division's website - provide a starting place for companies and individuals weighing cooperation to assess how others similarly situated were sentenced and to predict, with some degree of confidence, the possible rewards they could receive for early cooperation.<sup>103</sup> Transparency is also important to the prosecuting agency's credibility among the business community and the bar. Plea agreements provide a written, publicly available record of the prosecuting agency's policies and positions that the business community and the bar can point to in counselling their employees and clients. By developing and making public model language, such as that contained in the attached model plea agreements, prosecuting agencies place cooperating parties on notice of the terms and obligations that will bind the parties if they enter into a plea agreement.

### **6.2 *Benefit #2: Proportionality***

The Division ensures that its sentencing recommendation for a defendant is proportionate, not only with respect to recommendations made as to other members of the cartel, but also to similarly-situated defendants in other cartels prosecuted by the Division. In making its sentencing recommendations, the

<sup>99</sup> See 20 of the attached individual model plea agreement and ¶ 23 of the corporate model plea agreement.

<sup>100</sup> See 21 of the attached individual model plea agreement.

<sup>101</sup> See 22 of the attached individual model plea agreement and ¶ 24 of the corporate model plea agreement.

<sup>102</sup> See 25 of the attached corporate model plea agreement.

<sup>103</sup> Publicly filed plea agreements available at <http://www.usdoj.gov/atr/cases.html>.

Division will give great weight to the timeliness of the cooperation, the quality of the cooperation, and the culpability of the putative defendant *relative* to other members of the same cartel. During plea negotiations, at the request of counsel for a putative defendant, the Division will discuss proportionality of the defendant's treatment compared to that of other members of the cartel. While courts decide the defendant's sentence, Division prosecutors will attempt to ensure that the defendant receives a proportionate sentence by adhering to any agreed-upon disposition with the defendant – despite any inclination of the court to impose a higher sentence.

### **6.3      *Benefit #3: Certainty***

When antitrust defendants enter into plea negotiations with the Division, they are often looking for certainty about the type of sentence they will receive by the court. To that end, both the government and the antitrust defendants are often able to agree to many, if not all, of the material terms of the defendant's sentence *prior* to sentencing. Indeed, in some cases, the parties may reach an agreement on a jointly recommended sentence. Once the defendant has entered into a plea agreement, the defendant can approach sentencing with a degree of certainty as to what sentence the prosecutor will recommend to the court. Type "C" plea agreements provide the highest degree of certainty because the court can only impose a sentence consistent with the agreement's recommended sentence once it accepts the plea agreement. With type "B" plea agreements, the defendant at least knows with certainty what sentence the government will recommend to the court and remains free to appeal a sentence imposed by the court that is above the recommended sentence.

The certainty that comes with the Division plea agreement carries wide-ranging benefits. For instance, corporate executives covered by a corporate plea agreement are also provided with the certainty that if they fully cooperate they will not be prosecuted for the conduct to which their employer pled guilty. Likewise, customers, banks, shareholders, and other financial partners of the pleading corporation can rely on the certainty provided by a corporate plea agreement that the corporation has resolved its criminal liability and has put its legal troubles with the government behind it. And as previously discussed, foreign nationals pleading guilty and receiving immigration relief receive pre-adjudicated certainty as to their post-conviction immigration status.

### **6.4      *Benefit #4: Expediency***

When a defendant enters into plea agreements, Division criminal investigations are expedited to the benefit of both parties – the Division's ability to secure early cooperation through plea agreements inevitably hastens the pace of the investigation, and defendants' ability to resolve their criminal liability by plea agreements leads to more swift imposition of sentences that amply reward the defendants for their early cooperation. If our justice system did not provide an opportunity to resolve criminal charges through plea agreements, Division investigations and prosecutions would be substantially prolonged. Similarly, a defendant's opportunity to resolve criminal charges would be stretched out for years, as would a victim's ability to obtain damages, while the government completed its investigation and prepared the case for trial.

Moreover, the longer that a prosecution is delayed after the conduct ceases, the less of a deterrent effect the prosecution will have. Negotiated settlements provided for in plea agreements, especially when working in conjunction with an effective leniency program, are a fast and efficient means for uncovering and prosecuting cartel activity. The benefits do not end with the investigation resolved through plea agreements – not only are resources freed to investigate other cartels, but the swift prosecution of more cases leads to an increased fear of detection, resulting in future self-reporting and ultimately increased deterrence.

### **6.5 Benefit #5: Finality**

Every defendant desires finality. A protracted criminal investigation and prosecution that has no apparent end in sight is the worst nightmare of both companies and individuals alike. Plea agreements provide the opportunity for both the defendant and the prosecutor to arrive at a final and definitive resolution of the matter. The Division saves precious resources by not having to incur the time, labour and expense of litigating a trial; the court and public are spared the time and expense of a trial; and the defendant moves one giant step closer to putting the conduct to rest without having to face the expense and media attention of a public trial.

### **6.6 Benefit #6: Cooperation**

As discussed throughout this paper, the primary benefit that the prosecuting agency and the defendant receive through plea agreements is derived from the defendant's commitment to continuing cooperation with the government's investigation. For both parties, the rewards are significant when the defendant decides to break ranks with the other cartel members and becomes a cooperating witness for the government.

For the Division, the early cooperation of a pleading defendant, pursuant to a plea agreement, often leads to the swift prosecution of other cartel members. After the first company or individual pleads guilty, there is tremendous momentum gained in an investigation. Other cartel members, knowing that one of their own has cracked and can provide information inculcating them, frequently race to the door to begin plea negotiations with Division staff. If the Division is required to indict any holdouts, then the cooperating defendant and its employees, along with any leniency applicant, become key witnesses in providing the insider evidence that is critical to securing a conviction.

For early cooperating companies, a variety of important benefits may be sought depending on the value of its cooperation, including: (1) reducing the scope of the charged conduct or the affected commerce used to calculate a company's Guidelines fine range; (2) limiting the scope of conduct charged against the company or the amount of commerce attributed to the company; (3) obtaining a substantial cooperation discount; (4) securing more favourable treatment for culpable executives; and (5) possibly qualifying for Amnesty Plus or affirmative amnesty consideration.<sup>104</sup> For individual defendants, the benefits of early cooperation are quite simple – the opportunity to avoid a lengthy jail sentence.

Finally, cooperation provided pursuant to a plea agreement can often lead to the detection of other previously unidentified cartels relating to different products or in different geographic markets. As discussed in Section V(G)(3) above, through the Division's Amnesty-Plus Policy, the ability to tell the Division about an additional cartel can lead to a substantial sentencing benefit as to the first offence and complete immunity for the newly reported conduct. Amnesty Plus is a win-win situation for the defendant, and the Division and has become an increasingly important cartel-detection and case-generation tool for the Division.

## **7. Conclusion**

The U.S. system of negotiated plea agreements, along with the Division's Corporate Leniency Policy, continues to play a vital role in cracking cartels and swiftly advancing the Division's investigation and prosecution of cartel members. As this paper has demonstrated, plea agreements provide enormous benefits to the government, cooperating defendants, the courts, the victims, and the public at large by persuading cartel members -- though the promise of transparent, proportional, expedited, certain, and final

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<sup>104</sup>

*Id.*

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plea dispositions -- to cooperate early and accept responsibility for their criminal conduct. Put simply, negotiated plea agreements are a good deal with benefits for all.



## **PLEA AGREEMENT<sup>1</sup>**

The United States of America and [John R. Doe] (“defendant”) hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B *OR* C) of the Federal Rules of Criminal Procedure (“Fed. R. Crim. P.”):

### **RIGHTS OF DEFENDANT**

The defendant understands his rights:

- (a) to be represented by an attorney;
- (b) to be charged by Indictment;
- (c) as a citizen and resident of [COUNTRY], to decline to accept

service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against him in the United States District Court for the [XXXX] District of [XXXX];]

- (d) to plead not guilty to any criminal charge brought against him;

- (e) to have a trial by jury, at which he would be presumed not

guilty of the charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for him to be found guilty;

- (f) to confront and cross-examine witnesses against him and to

subpoena witnesses in his defense at trial;

- (g) not to be compelled to incriminate himself;

- (h) to appeal his conviction, if he is found guilty; and

- (I) to appeal the imposition of sentence against him.

### **AGREEMENT TO PLEAD GUILTY**

### **AND WAIVE CERTAIN RIGHTS**

The defendant knowingly and voluntarily waives the rights set out in Paragraph

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<sup>1</sup> This document contains the typical terms used in plea agreements entered into with the Antitrust Division of the Department of Justice for a Sherman Act offense. The local practice of the U.S. Attorney’s Office in the district where the plea agreement is filed will be adhered to wherever necessary. Brackets denote either optional language or case-specific factual information. The models will be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division’s model plea agreements are available at <http://www.usdoj.gov/atr/public/criminal.htm>.

This Model provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

1(b)-(h) above[, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against him in the United States District Court for the [XXXXXX] District of [XXXXXX]]. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742 or a motion under 28 U.S.C. § 2241 or 2255, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence<sup>2</sup> in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b)[*for C agreements only, also insert “-c)”*].<sup>3</sup> Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a [one]-count Information[ in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXX]. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by [DESCRIPTION OF CHARGE AS SET OUT IN THE CHARGING PARAGRAPH OF THE INFORMATION] sold in [the United States and elsewhere] [TIME FRAME FROM CHARGING PARAGRAPH OF THE INFORMATION] in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

The defendant, pursuant to the terms of this Plea Agreement, will

plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below. [The United States agrees that at the arraignment, it will stipulate to the release of the defendant on his personal recognizance, pursuant to 18 U.S.C. § 3142, pending the sentencing hearing in this case.<sup>4</sup>]

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<sup>2</sup> If the plea agreement contains a substantial assistance departure with no specific recommendation as to the amount of the departure in the plea agreement, whether there is a waiver of appeal of sentence may depend on the specific situation involved and local practice.

<sup>3</sup> Due to certain Bar rulings in Ohio, Tennessee, and North Carolina regarding waiver of claims of ineffective assistance of counsel or prosecutorial misconduct, plea agreements filed in those states or by attorneys licensed in those states will also contain language such as “Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies he may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct” or comparable language used in the relevant district. Such plea agreements may also include following stipulation: “The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.”

<sup>4</sup> The Antitrust Division will follow local practice regarding the release of the defendant on his own recognizance. Personal recognizance bonds may be appropriate in some cases.

**FACTUAL BASIS FOR OFFENSE CHARGED**<sup>5</sup>

Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:<sup>6</sup>

(a) For purposes of this Plea Agreement, the “relevant period” is

that period [TIME PERIOD FROM CHARGING PARAGRAPH OF INFORMATION]. During the relevant period, the defendant was [POSITION] of [CORPORATE EMPLOYER], an entity organized and existing under the laws of [STATE *OR if foreign*-- COUNTRY] and with its principal place of business in [CITY, STATE *OR if foreign* -- CITY, COUNTRY]. During the relevant period, [CORPORATE EMPLOYER] was a [producer] of [PRODUCT] and was engaged in the sale of [PRODUCT] in [the United States and elsewhere]. [SHORT PRODUCT DESCRIPTION.] [During the relevant period, [CORPORATE EMPLOYER]’s sales of [PRODUCT] to U.S. customers totaled at least \$[AFFECTED SALES VOLUME THAT WILL BE USED TO CALCULATE ADVISORY GUIDELINES FINE AND IMPRISONMENT RANGES].]

(b) During the relevant period, the defendant participated in a conspiracy with other persons and entities engaged in the [manufacture and sale] of [PRODUCT], the primary purpose of which was to [DESCRIPTION

OF THE CHARGE] sold in [the United States and elsewhere]. In

furtherance of the conspiracy, the defendant engaged in conversations and

attended meetings with representatives of other major [PRODUCT] [producing] firms. During such meetings and conversations, agreements were reached to [DESCRIPTION OF THE CHARGE] to be sold in [the United States and elsewhere]. [The defendant was an [organizer or leader/manager or supervisor] in the conspiracy[, which involved at least five participants/was extensive].] [The defendant significantly facilitated the [commission/concealment] of the conspiracy by his abuse of his position of trust.] [During the investigation of the conspiracy, the defendant [willfully obstructed or impeded/attempted to obstruct or impede] the investigation.]

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<sup>5</sup> A factual basis section has generally been included in Division plea agreements; however, it may be omitted if its inclusion would be inconsistent with local practice. Under the decision in *United States v. Booker*, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore, facts that would support Guidelines enhancements may, but are not required to, be included in the factual basis section of Division plea agreements. Such language is included in this factual basis section as optional language. However, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than \$350,000 for a pre-June 22, 2004 Sherman Act conspiracy or above \$1 million for a post-June 22, 2004 Sherman Act conspiracy, the plea agreement should address gain or loss as is done in Paragraph 8(b). For a discussion of the implications of *Booker* on Division charging and plea agreement practice, see Speech by Scott D. Hammond Before the ABA Section of Antitrust Law Spring Meeting, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants (Mar. 30, 2005), available at <http://www.usdoj.gov/atr/public/speeches/208354.htm>.

<sup>6</sup> The amount of detail contained in Paragraphs 4(a) and (b) will normally track the detail in the Information.

(c) [Description of relevant interstate and foreign commerce. Common

*description is as follows* -- During the relevant period, [PRODUCT] sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of [PRODUCT], as well as payments for [PRODUCT], traveled in interstate [and foreign ]commerce.] The business activities of [CORPORATE EMPLOYER] and co-conspirators in connection with the [production and sale] of [PRODUCT] affected by this conspiracy were within the flow of, and substantially affected, interstate [and foreign ]trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within

the [XXXXX] District of [XXXXX], [XXXX] Division. [*Description of relevant venue. Common descriptions are as follows*-- [The conspiratorial meetings and conversations described above took place in [the United States and elsewhere], and at least one of these meetings [which was attended by the defendant] occurred in this District.] *OR* [[PRODUCT] affected by this conspiracy was sold by one or more of the conspirators to customers in this District.]]

### POSSIBLE MAXIMUM SENTENCE

5. The defendant understands that the statutory maximum penalty which may be

imposed against him upon conviction for a violation of Section One of the Sherman Antitrust Act is:

(a) a term of imprisonment for [three (3)]<sup>7</sup> years (15 U.S.C. § 1);

(b) a fine in an amount equal to the greatest of (1) [\$350,000],<sup>8</sup>

(2) twice the gross pecuniary gain the conspirators derived from the crime, or (3) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (15 U.S.C. § 1; 18 U.S.C. § 3571(b) and (d)); and

(c) a term of supervised release of [one (1)]<sup>9</sup> year following any term of

imprisonment. If the defendant violates any condition of supervised release,

the defendant could be imprisoned for [the entire term of supervised release]<sup>10</sup>

(18 U.S.C. § 3559(a)[(5)]<sup>11</sup>; 18 U.S.C. § 3583(b)[(3)]<sup>12</sup> and (e)(3); and United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”) §5D1.2(a)[(3)]<sup>13</sup>).

<sup>7</sup> If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum jail term would be 10 years.

<sup>8</sup> If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum fine under Sherman Act would be \$1 million rather than \$350,000.

<sup>9</sup> Note if the defendant is pleading guilty to an antitrust conspiracy that continued on or after June 22, 2004 such that the maximum jail term is 10 years, the offense will become a Class C felony under 18 U.S.C. § 3559(a)(3) and will carry a maximum term of supervised release of 3 years under 18 U.S.C. § 3583(b)(2) and U.S.S.G. §5D1.2(a)(2).

<sup>10</sup> For antitrust offenses committed on or after June 22, 2004, applicable language is “up to two (2) years”.

6. In addition, the defendant understands that:

(a) pursuant to U.S.S.G. §5E1.1, the Court may order<sup>14</sup> him to pay

restitution to the victims of the offense; and

(b) pursuant to 18 U.S.C. § 3013(a)(2)(A), the Court is required to order the defendant to pay a \$100.00 special assessment upon conviction for the charged crime.

### **SENTENCING GUIDELINES<sup>15</sup>**

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,<sup>16</sup> along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). [Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).]<sup>17</sup>

### **SENTENCING AGREEMENT**

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B OR C), [*if a B agreement--the*

United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose] OR [*if a C agreement-- the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose,*] a sentence [within the applicable Guidelines range]<sup>18</sup> requiring the defendant to pay to the United States a criminal fine of \$[XXXXX][,

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<sup>11</sup> Cite 3559(a)(3) for antitrust offenses committed on or after June 22, 2004.

<sup>12</sup> Cite 3583(b)(2) for antitrust offenses committed on or after June 22, 2004.

<sup>13</sup> Cite 5D1.2(a)(2) for antitrust offenses committed on or after June 22, 2004.

<sup>14</sup> In an antitrust case against an individual, restitution may be ordered under 18 U.S.C. § 3583(d) as a condition of supervised release or under 18 U.S.C. § 3663(a)(3) to the extent agreed to by the parties in a plea agreement. If restitution is sought under one of these sections, the restitution amount should be included in the recommended sentence contained in Paragraph 8. In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.

<sup>15</sup> Guidelines calculations may be included in the Plea Agreement.

<sup>16</sup> While it is the norm to apply the Guidelines Manual in effect at sentencing, note that under U.S.S.G. §1B1.11(b)(1) if that version of the Manual would violate the ex post facto clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offense was committed shall be used, except where this practice contravenes existing case law. See e.g., United States v. DeMaree, 459 F.3d 791 (7<sup>th</sup> Cir. 2006) (holding that the ex post facto clause does not apply to the now advisory Guidelines).

<sup>17</sup> A U.S.S.G. §1B1.8 provision is optional, but it is commonly included in Division plea agreements.

<sup>18</sup> This optional language is not applicable in cases involving substantial assistance downward departures or the inability to pay a Guidelines fine.

pursuant to 18 U.S.C. § 3571(d)<sup>19</sup>,] [payable in full before the fifteenth (15<sup>th</sup>) day after the date of judgment] *OR* [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] *OR* [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) *OR* § 3612(h)]<sup>20</sup>; [a period of incarceration of XXXX months/years;]<sup>21</sup> [and no period of supervised release]<sup>22</sup> [and restitution of \$XXX pursuant to 18 U.S.C. § [3583(d)/3663(a)(3)/ *OR* 3663A(c)(1)(A)(ii)]<sup>23</sup> [payable in full before [DATE]] *OR* [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] *OR* [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) *OR* § 3612(h)]] (“the recommended sentence”)<sup>24</sup>. [The United States will not object to the defendant’s request that the Court make a recommendation to the Bureau of Prisons that the Bureau of Prisons designate that the defendant be assigned to a Federal Minimum Security Camp (if possible at [CITY], [STATE]) to serve his sentence of imprisonment and that the defendant be released following the imposition of sentence to allow him to self-surrender to the assigned correctional facility on a specified date on or after [MONTH DAY, YEAR].]<sup>25</sup> The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying

<sup>19</sup> Section 3571 is only referenced if relying on twice the gain or loss maximum to arrive at recommended fine greater than the Sherman Act maximum.

<sup>20</sup> The time for payment should be specified using one of these options. For an installment schedule to be imposed on an individual defendant, there must be a finding that installment payments are “in the interest of justice” under 18 U.S.C. § 3572(d)(1); for example, if a lump sum payment would have an unduly severe impact on the defendant or his dependents. See U.S.S.G. §5E1.2(f). If the defendant requests, and the staff agrees, that the fine may be paid in installments, a paragraph such as Paragraph 8(a) setting forth the recommended installment schedule should also be included. Note that if any fine or restitution greater than \$2,500 is not paid in full before the 15<sup>th</sup> day after the date of judgment, the payment of interest is required pursuant to 18 U.S.C. § 3612(f)(1) unless the defendant does not have the ability to pay interest, in which case, the Division may recommend that interest be waived pursuant to either 18 U.S.C. § 3612(f)(3)(A) or § 3612(h).

<sup>21</sup> The Antitrust Division will not agree to a “no jail” sentence for an individual defendant and the Division’s practice is not to remain silent if a defendant argues for no jail at sentencing. The Division seeks to prosecute and obtain jail time for some or all of the culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant. See Speech by Scott D. Hammond Before the ABA Criminal Justice Section’s Twentieth Annual National Institute on White Collar Crime, Charting New Waters in International Cartel Prosecutions (March 2, 2006), available at <http://www.usdoj.gov/atr/public/speeches/214861.htm>.

<sup>22</sup> The Division usually does not seek supervised release when the defendant is a foreign national and will return to his country after completing the jail sentence.

<sup>23</sup> See footnote 14 above. It is extremely rare to have restitution included as part of a plea agreement in an antitrust case, especially one with an individual defendant, as civil suits are normally filed by victims to recover damages. See U.S.S.G. §5E1.1 and optional Paragraph 13 in the corporate Plea Agreement.

<sup>24</sup> The recommended sentence is not required to be a specific number of months or years of incarceration or a specific dollar amount for the fine; the Plea Agreement may recommend a sentence within a certain Guidelines range.

<sup>25</sup> This sentence regarding the place of incarceration applies only when the defendant requests, and the Division agrees with, such a provision. The Court’s or Bureau of Prison’s refusal to grant such a request will not void the Plea Agreement, and thus, if such a request is included in the Plea Agreement, language such as “Neither party may withdraw from this Plea Agreement, however, based on the type or location of the correctional facility to which the defendant is assigned to serve his sentence” should be added to the end of Paragraph 11(a).

a departure pursuant to U.S.S.G. §5K2.0.<sup>26</sup> The parties agree not to seek or support any sentence outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that [the recommended sentence] set forth in this Plea Agreement is reasonable.

[(a) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) [and U.S.S.G. §5E1.2(f)], that the fine be paid in the following installments: within [XX] days of imposition of sentence — \$[XXXX] [(plus any accrued interest)]; at ninety (90) days after the imposition of sentence-- \$[XXXX] [(plus any accrued interest)]; at one hundred and eighty (180) days after the imposition of sentence -- \$[XXXX] [(plus any accrued interest)]; at two hundred and seventy (270) days after imposition of sentence -- \$[XXXX] [(plus any accrued interest)]; and at the one-year anniversary of the imposition of sentence— \$[XXXX] [(plus any accrued interest)]; provided, however, that the defendant shall have the option at any time before the one-year anniversary of prepaying the remaining balance [(plus any accrued interest) then owing on the fine].]<sup>27</sup>

[(b)<sup>28</sup> The United States contends that had this case gone to trial, the United

States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify a fine of [INSERT RECOMMENDED FINE], pursuant to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives his rights to contest this calculation.]

(c) The defendant understands that the Court will order him to pay

a \$100 special assessment pursuant to 18 U.S.C. § 3013(a)(2)(A) in addition to any fine imposed.

9.<sup>29</sup> [The United States and the defendant agree that the applicable

Guidelines [fine and incarceration] range[s] exceed the [fine and term of imprisonment] contained in the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 12 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §5K1.1, for a downward departure from the Guidelines [fine and incarceration] range(s) in this case and will request that the Court impose the [fine and term of imprisonment]<sup>30</sup> contained in the recommended sentence set out in Paragraph 8 of this

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<sup>26</sup> This language refers to the inapplicability of U.S.S.G. §5K2.0 “out of the heartland” departures, while the next sentence allows for a substantial assistance or inability to pay departure or a Guidelines adjustment that is set forth in the Plea Agreement.

<sup>27</sup> The length of the installment schedule, payment intervals, and installment amounts will depend on the facts of the case. Note that U.S.S.G. §5E1.2(f) and 18 U.S.C. § 3561(c)(1) provide that the length of the installment schedule for individual defendants generally should not exceed twelve months and shall not exceed five years.

<sup>28</sup> Only insert this subparagraph if a fine greater than the Sherman Act maximum is being sought pursuant to 18 U.S.C. § 3571(d).

<sup>29</sup> If the recommended sentence for either the fine or incarceration is below the applicable Guidelines range, insert one of the listed explanatory paragraphs, either an agreement to make a downward departure for substantial assistance or an inability to pay determination.

<sup>30</sup> Most Division substantial assistance agreements contain a recommendation for a specific reduced fine and jail sentence. However, it is not uncommon for Division plea agreements, especially agreements with individuals, to contain a recommendation for a “freefall departure,” in which both the Division and

Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the [PRODUCT] industry.] *OR*

[The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. The United States and the defendant further agree that the recommended fine set out in Paragraph 8 above is appropriate, pursuant to U.S.S.G. §5E1.2(e)[and 18 U.S.C. § 3572(b)]<sup>31</sup>, due to the inability of the defendant to pay a fine greater than that recommended.]

10. Subject to the ongoing, full, and truthful cooperation of the defendant

described in Paragraph 12 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation [and his commitment to prospective cooperation] with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct. [To enable the Court to have the benefit of all relevant sentencing information, the United States may request, and the defendant will not oppose, that sentencing be postponed until his cooperation is complete.]

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defendant are free to argue for the appropriate amount of a departure. Because there is no agreed-upon departure amount, a freefall agreement is more common in B agreements and cases where sentencing is deferred until the defendant's cooperation is complete. The typical freefall B agreement language is as follows: "If the United States determines that the defendant has provided substantial assistance in any investigations or prosecutions, and has otherwise fully complied with all of the terms of this Plea Agreement, it will file a motion, pursuant to USSG §5K1.1, advising the sentencing judge of all relevant facts pertaining to that determination and requesting the Court to sentence the defendant in light of the factors set forth in USSG §5K1.1(a)(1)-(5). The defendant acknowledges that the decision whether he has provided substantial assistance in any investigations or prosecutions and has otherwise complied with the terms of this Plea Agreement is within the sole discretion of the United States. It is understood that, should the United States determine that the defendant has not provided substantial assistance in any investigations or prosecutions, or should the United States determine that the defendant has violated any provision of this Plea Agreement, such a determination will release the United States from any obligation to file a motion pursuant to USSG §5K1.1, but will not entitle the defendant to withdraw his guilty plea once it has been entered. The defendant further understands that, whether or not the United States files a motion pursuant to USSG §5K1.1, the sentence to be imposed on him remains within the sole discretion of the sentencing judge." A separate paragraph usually precedes the freefall paragraph and provides as follows to ensure that the U.S. has the ability to recommend any specific sentence: "The defendant understands that the sentence to be imposed on him is within the sole discretion of the sentencing judge. The United States cannot and does not make any promises or representations as to what sentence he will receive, and is free to recommend any specific sentence to the Court. However, the United States will inform the Probation Office and the Court of (a) this Agreement; (b) the nature and extent of the defendant's activities with respect to this case and all other activities of the defendant which the United States deems relevant to sentencing; and (c) the nature and extent of the defendant's cooperation with the United States. In so doing, the United States may use any information it deems relevant, including information provided by the defendant both prior and subsequent to the signing of this Agreement. The United States reserves the right to make any statement to the Court or the Probation Office concerning the nature of the criminal violation charged in the attached Information, the participation of the defendant therein, and any other facts or circumstances that it deems relevant. The United States also reserves the right to comment on or to correct any representation made by or on behalf of the defendant, and to supply any other information that the Court may require."

<sup>31</sup> Insert "and 18 U.S.C. § 3572(b)" if restitution will be ordered pursuant to 18 U.S.C. § 3583(d), 3663(a)(3), or in a fraud case 3663A(c)(1)(A)(ii) and a Guidelines fine would impair the ability of the defendant to make restitution.

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence<sup>32</sup> provided for in Paragraph 8 of this Plea Agreement. [*If a B agreement*--The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose a sentence consistent with the recommendation<sup>33</sup> contained in this Agreement, he nevertheless has no right to withdraw his plea of guilty.]

[*Insert (a) and (b) only for C agreements*--(a)If the Court does not accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below, shall be rendered void. [Neither party may withdraw from this Plea Agreement, however, based on the type or location of the correctional facility to which the defendant is assigned to serve his sentence.]<sup>34</sup>

(b) If the Court does not accept the recommended sentence, the

defendant will be free to withdraw his guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws his plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if he withdraws his guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any Relevant Offense, as defined in Paragraph 13 below, will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew his guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater. [*For foreign national defendants residing abroad*--For a period of three (3) consecutive days following such a withdrawal of the guilty plea under this subparagraph, the United States shall take no action, based upon either a Relevant Offense or any actual or alleged violation of the Plea Agreement, to revoke the defendant's release on his personal recognizance, to subject the defendant to service of process, arrest, or detention, or to prevent the defendant from departing the United States.]]

### **DEFENDANT'S COOPERATION**

12. The defendant will cooperate fully and truthfully with the United

States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT]<sup>35</sup>, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding"). The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

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<sup>32</sup> If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence" here, it is more appropriate to refer to "either party's sentencing recommendation."

<sup>33</sup> If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommendation" here, it is more appropriate to refer to "either party's sentencing recommendation."

<sup>34</sup> Insert this sentence if Paragraph 8 of the Plea Agreement includes a request by the defendant for a certain prison facility.

<sup>35</sup> If the investigation involves a domestic conspiracy, this description in the cooperation provision will normally be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA] . . . ." The nonprosecution provision will be similarly limited.

(a) producing [in the United States and at other mutually agreed-

upon locations] all non-privileged<sup>36</sup> documents, including claimed personal documents, and other materials, wherever located,<sup>37</sup> in the possession, custody, or control of the defendant, requested by attorneys and agents of the United States;

(b) making himself available for interviews [in the United States

and at other mutually agreed-upon locations], not at the expense of

the United States, upon the request of attorneys and agents of the United States;

(c) responding fully and truthfully to all inquiries of the United

States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(d) otherwise voluntarily providing the United States with any

non-privileged<sup>38</sup> material or information, not requested in (a) - (c) of this paragraph, that he may have that is related to any Federal Proceeding; and

(e) when called upon to do so by the United States in connection

with any Federal Proceeding, testifying in grand jury, trial, and other

judicial proceedings[ in the United States], fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401 - 402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*).

### **GOVERNMENT'S AGREEMENT**

13. Subject to the full, truthful, and continuing cooperation of the

<sup>36</sup> The term "non-privileged" should be included except in rare situations where a claim of privilege could be asserted over key information, the production of which is a critical part of the defendant's cooperation. As required by the Deputy Attorney General review directive, staff must obtain prior permission from the Antitrust Division's DAAG for Criminal Enforcement before requesting any waiver of the attorney-client privilege as a condition of cooperation pursuant to a plea agreement, amnesty, or in any other setting. See McCallum Memo, Criminal Resource Manual at 163, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00163.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm).

<sup>37</sup> The defendant's obligation to produce responsive documents in his possession, custody, or control wherever located applies to plea agreements in both domestic and international cases. See Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases, Speech by Gary R. Spratling, Before ABA Criminal Justice Section 13<sup>th</sup> Annual National Institute on White Collar Crime at § II(B), p.4 - 5 (March 4, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2275.htm>, (hereinafter "Negotiating The Waters") for a discussion of the defendant's obligation in international cases to produce documents wherever located.

<sup>38</sup> See Footnote 36 above.

defendant, as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, the United States will not bring further criminal charges against the defendant for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]<sup>39</sup> ("Relevant Offense"). The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

[14.<sup>40</sup> The United States agrees that when the defendant travels to the

United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject the defendant to arrest, detention, or service of process, or to prevent the defendant from departing the United States. This paragraph does not apply to the defendant's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503 *et seq.*), or contempt (18 U.S.C. §§ 401 - 402) in connection with any testimony or information provided or requested in any Federal Proceeding.]

[15.<sup>41</sup> (a) Subject to the full and continuing cooperation of the defendant,

as described in Paragraph 12 of this Plea Agreement, and upon the Court's acceptance of the defendant's guilty plea and imposition of sentence in this case, the United States agrees not to seek to remove the defendant from the United States under Sections 238 and 240 of the Immigration and Nationality Act, 8 U.S.C. §§ 1228 and 1229a, based upon the defendant's guilty plea and conviction in this case, should the defendant apply for or obtain admission to the United States as a nonimmigrant (hereinafter referred to as the "agreement not to seek to remove the defendant"). The agreement not to seek to remove the defendant is the equivalent of an agreement not to exclude the defendant from admission to the United States as a nonimmigrant or to deport the defendant from the United States. (Immigration and Nationality Act, § 240(e)(2), 8 U.S.C. § 1229a(e)(2)).

(b) The Antitrust Division of the United States Department of

Justice has consulted with United States Immigration and Customs Enforcement ("ICE") on behalf of the United States Department of Homeland Security ("DHS"). ICE, on behalf of DHS and in consultation with the United States Department of State, has agreed to the inclusion in this Plea Agreement of this agreement not to seek to remove the defendant. The Secretary of DHS has delegated to ICE the authority to enter this agreement on behalf of DHS.

(c) So that the defendant will be able to obtain any nonimmigrant

visa that he may need to travel to the United States, DHS and the Visa Office, United States Department of State, have concurred in the granting of a nonimmigrant waiver of the defendant's

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<sup>39</sup> If the investigation involves a domestic conspiracy, the nonprosecution provision normally will be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]."

<sup>40</sup> Insert Paragraphs 14 and 15 if defendant is a foreign national. See "Negotiating The Waters" at § II(G), p. 8-9 for a discussion of Division policy regarding the safe passage provision in Paragraph 14.

<sup>41</sup> See "Negotiating The Waters at § IV(B), p. 14-17 for a discussion of the Division's policy regarding immigration relief. Note this language has been updated since the time of "Negotiating the Waters" due to creation of the Department of Homeland Security.

inadmissibility. This waiver will remain in effect so long as this agreement not to seek to remove the defendant remains in effect. While the waiver remains in effect, the Department of State will not deny the defendant's application for a nonimmigrant visa on the basis of the defendant's guilty plea and conviction in this case, and DHS will not deny his application for admission as a nonimmigrant on the basis of his guilty plea and conviction in this case.

(d) This agreement not to seek to remove the defendant will remain

in effect so long as the defendant:

(I) acts and has acted consistently with his cooperation

obligations under this Plea Agreement;

(ii) is not convicted of any felony under the laws of the United

States or any state, other than the conviction resulting from the defendant's guilty plea under this Plea Agreement or any conviction under the laws of any state resulting from conduct constituting an offense subject to this Plea Agreement; and

(iii) does not engage in any other conduct that would warrant

his removal from the United States under the Immigration and Nationality Act.

The defendant understands that should the Antitrust Division become aware that the defendant has violated any of these conditions, the Antitrust Division will notify DHS. DHS will then determine, in consultation with the Antitrust Division, whether to rescind this agreement not to seek to remove the defendant.

(e) The defendant agrees to notify the Assistant Attorney General

of the Antitrust Division should the defendant be convicted of any other felony under the laws of the United States or of any state.

(f) Should the United States rescind this agreement not to seek to

remove the defendant because of the defendant's violation of a condition of this Plea Agreement, the defendant irrevocably waives his right to contest his removal from the United States under the Immigration and Nationality Act on the basis of his guilty plea and conviction in this case, but retains his right to notice of removal proceedings.]

[16. The defendant understands that he may be subject to administrative

action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact, manner, and extent of the cooperation of the defendant as a matter for that agency to consider before determining what administrative action, if any, to take.]<sup>42</sup>

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<sup>42</sup> Optional paragraph where administrative actions are a possibility.

**REPRESENTATION BY COUNSEL**

17. The defendant has reviewed all legal and factual aspects of this case

with his attorney and is fully satisfied with his attorney's legal representation. The defendant has thoroughly reviewed this Plea Agreement with his attorney and has received satisfactory explanations from his attorney concerning each paragraph of this Plea Agreement and alternatives available to the defendant other than entering into this Plea Agreement. After conferring with his attorney and considering all available alternatives, the defendant has made a knowing and voluntary decision to enter into this Plea Agreement.

**VOLUNTARY PLEA**

18. The defendant's decision to enter into this Plea Agreement and

to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

**VIOLATION OF PLEA AGREEMENT**

19. The defendant agrees that, should the United States determine in good

faith, during the period that any Federal Proceeding is pending, that the defendant has failed to provide full and truthful cooperation, as described in Paragraph 12 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify the defendant or his counsel in writing by personal or overnight delivery or facsimile transmission and may also notify his counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph), and the defendant shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant agrees that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant for any Relevant Offense, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

20. The defendant understands and agrees that in any further prosecution

of him resulting from the release of the United States from its obligations under this Plea Agreement based on the defendant's violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by him to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against him in any such further prosecution. In addition, the defendant unconditionally waives his right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

[21.<sup>43</sup> The defendant agrees to and adopts as his own the factual

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<sup>43</sup> Insert Paragraph 21 if defendant is a foreign national. If it is not the standard practice in the filing district to have the factual basis included in the Plea Agreement, the factual basis may be attached to the Plea

statement contained in Paragraph 4 above. In the event that the defendant breaches the Plea Agreement, the defendant agrees that the Plea Agreement, including the factual statement contained in Paragraph 4 above, provides a sufficient basis for any possible future extradition request that may be made for his return to the United States to face charges either in the Information referenced in Paragraph 2 of this Plea Agreement or in any related indictment. The defendant further agrees not to oppose or contest any request for extradition by the United States to face charges either in the Information referenced in Paragraph 2 of this Plea Agreement or in any related indictment.]

**ENTIRETY OF AGREEMENT**

22. This Plea Agreement constitutes the entire agreement between the

United States and the defendant concerning the disposition of the criminal charge[s] in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

23. The undersigned attorneys for the United States have been authorized

by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

[24. A facsimile signature shall be deemed an original signature for the

purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.]

DATED: Respectfully submitted,

BY: BY:

[JOHN R. DOE]

[STAFF]

Defendant

\_\_\_\_\_  
[NAME OF COUNSEL] Attorneys

Counsel for [John R. Doe] U.S. Department of Justice

Antitrust Division

[STREET ADDRESS]

[CITY, STATE, ZIP CODE]

Tel: [(XXX) XXX-XXXX]

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Agreement. See "Negotiating The Waters" at § IV(C), p. 17-18 for a discussion of Division policy regarding extradition of foreign nationals.

ANNEX 2

**Model Annotated Corporate Plea Agreement**

**Last Updated October 11, 2006**

UNITED STATES DISTRICT COURT

[XXXXXXX] DISTRICT OF [XXXXXXXXXX]

UNITED STATES OF AMERICA	)	Criminal No. [XXXX]
	)	
	)	Filed:
v.	)	
	)	Violation:
[GLOBAL PRODUCTS, INC.],	)	
	)	
Defendant.	)	
	)	

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## PLEA AGREEMENT<sup>1</sup>

+The United States of America and [Global Products, Inc.] (“defendant”), a corporation organized and existing under the laws of [STATE *OR if foreign*--COUNTRY], hereby enter into the following Plea Agreement pursuant to Rule 11(c)(1)(B *OR C*) of the Federal Rules of Criminal Procedure (“Fed. R. Crim. P.”):

### RIGHTS OF DEFENDANT

1. The defendant understands its rights:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

[(c) as a corporation organized and existing under the laws of [COUNTRY], to decline to accept service of the Summons in this case, and to contest the jurisdiction of the United States to prosecute this case against it in the United States District Court for the [XXXX] District of [XXXX];]

(d) to plead not guilty to any criminal charge brought against it;

(e) to have a trial by jury, at which it would be presumed not guilty of the

charge and the United States would have to prove every essential element of the charged offense beyond a reasonable doubt for it to be found guilty;

(f) to confront and cross-examine witnesses against it and to subpoena witnesses in its defense at trial;

(g) to appeal its conviction if it is found guilty; and

(h) to appeal the imposition of sentence against it.

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<sup>1</sup> This document contains the typical terms used in plea agreements entered into with the Antitrust Division of the Department of Justice for a Sherman Act offense. The local practice of the U.S. Attorney’s Office in the district where the plea agreement is filed will be adhered to wherever necessary. Brackets denote either optional language or case-specific factual information. The models will be updated periodically by the Division to comply with changing laws, statutes or policies. The most recent versions of the Division’s model plea agreements are available at <http://www.usdoj.gov/atr/public/criminal.htm>.

This Model provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. No limitations are hereby placed on otherwise lawful investigative and litigative prerogatives of the Department of Justice.

**AGREEMENT TO PLEAD GUILTY**  
**AND WAIVE CERTAIN RIGHTS**

2. The defendant knowingly and voluntarily waives the rights set out in Paragraph 1(b)-(g) above[, including all jurisdictional defenses to the prosecution of this case, and agrees voluntarily to consent to the jurisdiction of the United States to prosecute this case against it in the United States District Court for the [XXXXX] District of [XXXX]. The defendant also knowingly and voluntarily waives the right to file any appeal, any collateral attack, or any other writ or motion, including but not limited to an appeal under 18 U.S.C. § 3742, that challenges the sentence imposed by the Court if that sentence is consistent with or below the recommended sentence<sup>2</sup> in Paragraph 8 of this Plea Agreement, regardless of how the sentence is determined by the Court. This agreement does not affect the rights or obligations of the United States as set forth in 18 U.S.C. § 3742(b) [*for C agreements only, also insert “-(c)”*].<sup>3</sup> Pursuant to Fed. R. Crim. P. 7(b), the defendant will waive indictment and plead guilty at arraignment to a [one]-count Information [in the form attached] to be filed in the United States District Court for the [XXXXXX] District of [XXXXXX]. The Information will charge the defendant with participating in a conspiracy to suppress and eliminate competition by [DESCRIPTION OF CHARGE AS SET OUT IN THE CHARGING PARAGRAPH OF THE INFORMATION] sold in [the United States and elsewhere], [TIME FRAME], in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

3. The defendant, pursuant to the terms of this Plea Agreement, will plead guilty to the criminal charge described in Paragraph 2 above and will make a factual admission of guilt to the Court in accordance with Fed. R. Crim. P. 11, as set forth in Paragraph 4 below.

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<sup>2</sup> If the plea agreement contains a substantial assistance departure with no specific recommendation as to the amount of the departure in the plea agreement, whether there is a waiver of appeal of sentence may depend on the specific situation involved and local practice.

<sup>3</sup> Due to certain Bar rulings in Ohio, Tennessee, and North Carolina regarding waiver of claims of ineffective assistance of counsel or prosecutorial misconduct, plea agreements filed in those states or by attorneys licensed in those states will also contain language such as “Nothing in this paragraph, however, shall act as a bar to the defendant perfecting any legal remedies it may otherwise have on appeal or collateral attack respecting claims of ineffective assistance of counsel or prosecutorial misconduct” or comparable language used in the relevant district. Such plea agreements may also include following stipulation: “The defendant agrees that there is currently no known evidence of ineffective assistance of counsel or prosecutorial misconduct.”

**FACTUAL BASIS FOR OFFENSE CHARGED<sup>4</sup>**

4. Had this case gone to trial, the United States would have presented evidence sufficient to prove the following facts:<sup>5</sup>

(a) For purposes of this Plea Agreement, the “relevant period” is that period [TIME PERIOD FROM CHARGING PARAGRAPH OF INFORMATION]. During the relevant period, the defendant was a corporation organized and existing under the laws of [STATE *OR if foreign*--COUNTRY]. The defendant has its principal place of business in [CITY, STATE *OR if foreign*--CITY, COUNTRY]. During the relevant period, the defendant was a [producer] of [PRODUCT], was engaged in the sale of [PRODUCT] in [the United States and elsewhere][, and employed X or more individuals]. [SHORT PRODUCT DESCRIPTION]. [During the relevant period, the defendant’s sales of [PRODUCT] to U.S. customers totaled at least \$ [AFFECTED SALES VOLUME THAT WILL BE USED TO CALCULATE ADVISORY GUIDELINES RANGE].]

(b) During the relevant period, the defendant, through its [RELEVANT ACTORS, e.g. officers and employees], [including high-level personnel of the defendant,] participated in a conspiracy among major [PRODUCT] [producers], the primary purpose of which was to [DESCRIPTION OF THE CHARGE] sold in [the United States and elsewhere]. In furtherance of the conspiracy, the defendant, through its [RELEVANT ACTORS], engaged in discussions and attended meetings with representatives of other major [PRODUCT] [producers]. During these discussions and meetings, agreements were reached to [DESCRIPTION OF THE CHARGE] to be sold in [the United States and elsewhere]. [*In a bid-rigging case where defendant submitted comp bid(s), may insert –* The largest contract on which the defendant submitted a complementary bid in connection with the conspiracy was in the amount of \$[XXX].]

(c) [Description of relevant interstate and foreign commerce. Common description is as follows --

During the relevant period, [PRODUCT] sold by one or more of the conspirator firms, and equipment and supplies necessary to the production and distribution of [PRODUCT], as well as payments for [PRODUCT], traveled in interstate [and foreign ]commerce.] The business activities of the defendant and its co-conspirators in connection with the [production and sale] of [PRODUCT] affected by this conspiracy were within the flow of, and substantially affected, interstate [and foreign ]trade and commerce.

(d) Acts in furtherance of this conspiracy were carried out within the [XXXXX] District of [XXXXX], [XXXXX] Division. [*Description of relevant venue. Common descriptions are as follows --*

<sup>4</sup> A factual basis section has generally been included in Division plea agreements; however, it may be omitted if its inclusion would be inconsistent with local practice. Under the decision in *United States v. Booker*, 543 U.S. 220 (2005), the government is not required to allege facts supporting Guidelines enhancements in an indictment nor prove them beyond a reasonable doubt. Therefore facts that would support Guidelines enhancements may, but are not required to, be included in the factual basis section of Division plea agreements. Such language is included in this factual basis section as optional language. However, facts that authorize a higher statutory maximum must be proved to a jury beyond a reasonable doubt or admitted by the defendant. Thus, if 18 U.S.C. § 3571(d) is used to obtain a fine greater than \$10 million for a pre-June 22, 2004 Sherman Act conspiracy or above \$100 million for a post-June 22, 2004 Sherman Act conspiracy, the plea agreement should address gain or loss as is done in Paragraph 8(e). For a discussion of the implications of *Booker* on Division charging and plea agreement practice, see Speech by Scott D. Hammond Before the ABA Section of Antitrust Law Spring Meeting, Antitrust Sentencing in the Post-*Booker* Era: Risks Remain High for Non-Cooperating Defendants (Mar. 30, 2005), available at <http://www.usdoj.gov/atr/public/speeches/208354.htm>.

<sup>5</sup> The amount of detail contained in Paragraphs 4(a) and (b) will normally track the detail in the Information.

[The conspiratorial meetings and discussions described above took place in [the United States and elsewhere], and at least one of these meetings [which was attended by a representative of the defendant] occurred in this District.] *OR* [[PRODUCT] affected by this conspiracy was sold by one or more of the conspirators to customers in this District.]]

### **POSSIBLE MAXIMUM SENTENCE**

5. The defendant understands that the statutory maximum penalty which may be imposed against it upon conviction for a violation of Section One of the Sherman Antitrust Act is a fine in an amount equal to the greatest of:

(a) \$[10]<sup>6</sup> million (15 U.S.C. § 1);

(b) twice the gross pecuniary gain the conspirators derived from the crime (18 U.S.C. § 3571(c) and (d)); or

(c) twice the gross pecuniary loss caused to the victims of the crime by the conspirators (18 U.S.C. § 3571(c) and (d)).

6. In addition, the defendant understands that:

(a) pursuant to 18 U.S.C. § 3561(c)(1), the Court may impose a term of probation of at least one year, but not more than five years;

(b) pursuant to §8B1.1 of the United States Sentencing Guidelines (“U.S.S.G.,” “Sentencing Guidelines,” or “Guidelines”), 18 U.S.C. § 3563(b)(2) or 3663(a)(3), the Court may order<sup>7</sup> it to pay restitution to the victims of the offense; and

(c) pursuant to 18 U.S.C. § 3013(a)(2)(B), the Court is required to order the defendant to pay a \$400 special assessment upon conviction for the charged crime.

### **SENTENCING GUIDELINES<sup>8</sup>**

7. The defendant understands that the Sentencing Guidelines are advisory, not mandatory, but that the Court must consider the Guidelines in effect on the day of sentencing,<sup>9</sup> along with the other factors set forth in 18 U.S.C. § 3553(a), in determining and imposing sentence. The defendant understands that the

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<sup>6</sup> If the conspiracy continued on or after the June 22, 2004 enactment of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, maximum corporate fine under Sherman Act would be \$100 million.

<sup>7</sup> In corporate antitrust cases, restitution may be ordered under 18 U.S.C. § 3563(b)(2) as a condition of probation or under 18 U.S.C. § 3663(a)(3) to the extent agreed to by the parties in a plea agreement. If restitution is sought under one of these sections, the restitution amount should be included in the recommended sentence contained in Paragraph 8. In most Sherman Act criminal cases, restitution is not sought or ordered because civil causes of action will be filed to recover damages.

<sup>8</sup> Guidelines calculations may also be included in the Plea Agreement.

<sup>9</sup> While it is the norm to apply the Guidelines Manual in effect at sentencing, note that under U.S.S.G. §1B1.11(b)(1) if that version of the Manual would violate the ex post facto clause of the Constitution by resulting in greater punishment, the Manual in effect on the date the offense was committed shall be used, except where this practice contravenes existing case law. See e.g., *United States v. DeMaree*, 459 F.3d 791 (7<sup>th</sup> Cir. 2006) (holding that the ex post facto clause does not apply to the now advisory Guidelines).

Guidelines determinations will be made by the Court by a preponderance of the evidence standard. The defendant understands that although the Court is not ultimately bound to impose a sentence within the applicable Guidelines range, its sentence must be reasonable based upon consideration of all relevant sentencing factors set forth in 18 U.S.C. § 3553(a). [Pursuant to U.S.S.G. §1B1.8, the United States agrees that self-incriminating information that the defendant provides to the United States pursuant to this Plea Agreement will not be used to increase the volume of affected commerce attributable to the defendant or in determining the defendant's applicable Guidelines range, except to the extent provided in U.S.S.G. §1B1.8(b).]<sup>10</sup>

### **SENTENCING AGREEMENT**

8. Pursuant to Fed. R. Crim. P. 11(c)(1)(B OR C), [*if a B agreement--* the United States agrees that it will recommend, as the appropriate disposition of this case, that the Court impose] OR [*if a C agreement--* the United States and the defendant agree that the appropriate disposition of this case is, and agree to recommend jointly that the Court impose,] a sentence [within the applicable Guidelines range]<sup>11</sup> requiring the defendant to pay to the United States a criminal fine of \$[XX] million<sup>12</sup>, pursuant to 18 U.S.C. § 3571(d),<sup>13</sup> [payable in full before the fifteenth (15th) day after the date of judgment] OR [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] OR [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) OR § 3612(h)]<sup>14</sup>, [and restitution of \$XXX pursuant to 18 U.S.C. § [3563(b)(2)/3663(a)(3)/ OR 3663A(c)(1)(A)(ii)]<sup>15</sup> [payable in full before [DATE]] OR [payable in installments as set forth below [with interest accruing under 18 U.S.C. § 3612(f)(1)-(2)] OR [without interest pursuant to 18 U.S.C. § 3612(f)(3)(A) OR § 3612(h)]] (“the recommended sentence”). The parties agree that there exists no aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the U.S. Sentencing Commission in formulating the Sentencing Guidelines justifying a departure pursuant to U.S.S.G. §5K2.0.<sup>16</sup> The parties agree not to seek or support any sentence

<sup>10</sup> A U.S.S.G. §1B1.8 provision is optional, but it is commonly included in Division plea agreements.

<sup>11</sup> This optional language is not applicable in cases involving substantial assistance downward departures or the inability to pay a Guidelines fine.

<sup>12</sup> The recommended fine for corporations is usually a specific dollar amount, but a plea agreement may recommend a sentence within a certain Guidelines range.

<sup>13</sup> Section 3571 is only referenced if relying on twice the gain or loss maximum to arrive at a recommended fine above the Sherman Act maximum.

<sup>14</sup> The time for payment of the fine should be specified using one of these options. If the defendant requests, and the staff agrees, that the fine be paid in installments, payable over a period not exceeding five years, the plea agreement should also include a paragraph such as Paragraph 8(a) setting forth the recommended installment schedule. For an installment schedule to be imposed, there must be a finding that installment payments are “in the interest of justice” under 18 U.S.C. § 3572(d)(1); for example, if the organization is financially unable to make immediate payment or if such payment would be unduly burdensome. See U.S.S.G. §8C3.2(b). Note that if any fine is not paid in full before the 15th day after the date of judgment, the payment of interest is required on any fine or restitution of more than \$2,500 pursuant to 18 U.S.C. § 3612(f)(1) unless the defendant does not have the ability to pay interest, in which case the Division may recommend that interest be waived pursuant to either 18 U.S.C. § 3612(f)(3)(A) or § 3612(h).

<sup>15</sup> See footnote 7 above. It is extremely rare to have restitution included as part of a plea agreement in a Sherman Act case, as civil suits are normally filed by victims to recover damages. See U.S.S.G. §8B1.1 and optional Paragraph 13.

<sup>16</sup> This language refers to the inapplicability of U.S.S.G. §5K2.0 “out of the heartland” departures, while the next sentence allows for a substantial assistance or inability to pay departure or a Guidelines adjustment that is set forth in the Plea Agreement.

outside of the Guidelines range nor any Guidelines adjustment for any reason that is not set forth in this Plea Agreement. The parties further agree that the recommended sentence set forth in this Plea Agreement is reasonable.

[(a) The United States and the defendant agree to recommend, in the interest of justice pursuant to 18 U.S.C. § 3572(d)(1) [and U.S.S.G. §8C3.2(b)], that the fine be paid in the following installments: within thirty (30) days of imposition of sentence -- \$[XX] million [(plus any accrued interest)]; at the one-year anniversary of imposition of sentence (“anniversary”) -- \$[XX] million [(plus any accrued interest)]; at the two-year anniversary -- \$[XX] million [(plus any accrued interest)]; at the three-year anniversary -- \$[XX] million [(plus any accrued interest)]; at the four-year anniversary -- \$[XX] million [(plus any accrued interest)]; and at the five-year anniversary -- \$[XX] million [(plus any accrued interest)]; provided, however, that the defendant shall have the option at any time before the five-year anniversary of prepaying the remaining balance [(plus any accrued interest)] then owing on the fine.]<sup>17</sup>

(b) The defendant understands that the Court will order it to pay a \$400 special assessment, pursuant to 18 U.S.C. § 3013(a)(2)(B), in addition to any fine imposed.

[(c) Both parties will recommend that no term of probation be

imposed, but the defendant understands that the Court’s denial of this request will not void this Plea Agreement.]<sup>18</sup>

[(d) The United States and the defendant jointly submit that this Plea Agreement, together with the record that will be created by the United States and the defendant at the plea and sentencing hearings, and the further disclosure described in Paragraph 10, will provide sufficient information concerning the defendant, the crime charged in this case, and the defendant’s role in the crime to enable the meaningful exercise of sentencing authority by the Court under 18 U.S.C. § 3553. The United States and defendant agree to request jointly that the Court accept the defendant’s guilty plea and impose sentence on an expedited schedule as early as the date of arraignment, based upon the record provided by the defendant and the United States, under the provisions of Fed. R. Crim. P. 32(c)(1)(A)(ii), U.S.S.G. §6A1.1, and [Rule XXX] of the Criminal Local Rules. The Court’s denial of the request to impose sentence on an expedited schedule will not void this Plea Agreement.]<sup>19</sup>

[(e)<sup>20</sup> The United States contends that had this case gone to trial, the United

States would have presented evidence to prove that the gain derived from or the loss resulting from the charged offense is sufficient to justify the recommended sentence set forth in this paragraph, pursuant

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<sup>17</sup> The length of the installment schedule, payment intervals, and installment amounts will depend on the facts of the case, but the Division’s policy is, and the Guidelines recommend, that the length of the schedule may not exceed five years. See U.S.S.G. §8C3.2, n.1.

<sup>18</sup> This optional subparagraph may be included unless probation is specifically called for under U.S.S.G. §8D1.1 or 18 U.S.C. §§ 3553(a) and 3562(a) (e.g. to ensure payment of restitution, to ensure payment of fine if paid in installments, to protect against future crime by defendant, recidivism within last 5 years by company or high-level personnel, etc.) or if the local district practice is to require probation whenever the fine is paid in installments.

<sup>19</sup> Paragraph 8(d) applies only when the parties want to expedite sentencing. In jurisdictions where the practice is permissible, the Division generally will agree to a request for expedited sentencing made by a foreign-based corporation which is pleading guilty pursuant to a C agreement.

<sup>20</sup> Only insert this subparagraph if a fine greater than the Sherman Act maximum is being sought pursuant to 18 U.S.C. § 3571(d).

to 18 U.S.C. § 3571(d). For purposes of this plea and sentencing only, the defendant waives its rights to contest this calculation.]

9.<sup>21</sup> [The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. Subject to the full and continuing cooperation of the defendant, as described in Paragraph 14 of this Plea Agreement, and prior to sentencing in this case, the United States agrees that it will make a motion, pursuant to U.S.S.G. §8C4.1, for a downward departure from the Guidelines fine range and will request that the Court impose the recommended sentence set out in Paragraph 8 of this Plea Agreement because of the defendant's substantial assistance in the government's investigation and prosecutions of violations of federal criminal law in the [PRODUCT] industry.] *OR*

[The United States and the defendant agree that the applicable Guidelines fine range exceeds the fine contained in the recommended sentence set out in Paragraph 8 above. The United States and the defendant further agree that the recommended fine is appropriate, pursuant to [U.S.S.G. §8C3.3(a) [and 18 U.S.C. § 3572(b)]<sup>22</sup>, due to the inability of the defendant to pay a fine greater than that recommended without impairing its ability to make restitution to victims] *OR* [U.S.S.G. §8C3.3(b), due to the inability of the defendant to pay a fine greater than that recommended without substantially jeopardizing its continued viability].<sup>23</sup>

10. Subject to the ongoing, full, and truthful cooperation of the defendant described in Paragraph 14 of this Plea Agreement, and before sentencing in the case, the United States will fully advise the Court and the Probation Office of the fact, manner, and extent of the defendant's cooperation [and its commitment to prospective cooperation] with the United States' investigation and prosecutions, all material facts relating to the defendant's involvement in the charged offense, and all other relevant conduct.

11. The United States and the defendant understand that the Court retains complete discretion to accept or reject the recommended sentence<sup>24</sup> provided for in Paragraph 8 of this Plea Agreement. [*If a B agreement* --- The defendant understands that, as provided in Fed. R. Crim. P. 11(c)(3)(B), if the Court does not impose the recommended sentence<sup>25</sup> contained in this Agreement, it nevertheless has no right to withdraw its plea of guilty.]

[Insert (a) and (b) only for C agreements-- (a) If the Court does not

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<sup>21</sup> If the recommended fine is below the applicable Guidelines range, insert one of the listed explanatory paragraphs, either an agreement to make a downward departure for substantial assistance or an inability to pay determination.

<sup>22</sup> Insert 18 U.S.C. § 3572(b) if restitution will be ordered pursuant to 18 U.S.C. § 3563(b)(2), 3663(a)(3), or in a fraud case 3663A(c)(1)(A)(ii) and a Guidelines fine would impair the ability of the defendant to make restitution.

<sup>23</sup> Normally only one of these inability to pay provisions would be used, and in most cases it will be the second provision.

<sup>24</sup> If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence" here, it is more appropriate to refer to "either party's sentencing recommendation."

<sup>25</sup> If each party is making a different sentencing recommendation such that there is no agreed-upon recommended sentence, then instead of referring to "the recommended sentence" here, it is more appropriate to refer to "either party's sentencing recommendation."

accept the recommended sentence, the United States and the defendant agree that this Plea Agreement, except for Paragraph 11(b) below, shall be rendered void.

(b) If the Court does not accept the recommended sentence,

the defendant will be free to withdraw its guilty plea (Fed. R. Crim. P. 11(c)(5) and (d)). If the defendant withdraws its plea of guilty, this Plea Agreement, the guilty plea, and any statement made in the course of any proceedings under Fed. R. Crim. P. 11 regarding the guilty plea or this Plea Agreement or made in the course of plea discussions with an attorney for the government shall not be admissible against the defendant in any criminal or civil proceeding, except as otherwise provided in Fed. R. Evid. 410. In addition, the defendant agrees that, if it withdraws its guilty plea pursuant to this subparagraph of the Plea Agreement, the statute of limitations period for any offense referred to in Paragraph 16 of this Plea Agreement will be tolled for the period between the date of the signing of the Plea Agreement and the date the defendant withdrew its guilty plea or for a period of sixty (60) days after the date of the signing of the Plea Agreement, whichever period is greater.]

12.<sup>26</sup> [The defendant shall give notice of its conviction and sentence to

victims of the offense as specified in the presentence report. The form of the notice shall be approved by the U.S. Probation Officer and the Court. The defendant shall bear the costs associated with the mailing of the notice.]

[The defendant shall publicize at its expense in [the Wall Street Journal] and in [the New York Times] in prominent, one-quarter page advertisements within ten days of the date of conviction the nature of the offense committed by the defendant in this case, the fact of conviction, the sentence imposed in this case, and the steps that will be taken to prevent the recurrence of similar offenses.]

[13. In light of the availability of civil causes of actions, which potentially provide for a recovery of a multiple of actual damages, the United States agrees that it will not seek a restitution order for the offense charged in the Information.<sup>27</sup>]

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<sup>26</sup> The optional notices in Paragraph 12 have been ordered previously in Division cases where it was agreed that defendant provide notice to victims or public notice of the offense.

<sup>27</sup> If civil actions have been filed, this language should be modified to reflect the filing of these suits; the staff may want to cite those filed cases in this paragraph and state “In light of the civil cases filed, which potentially provide . . . .”

## DEFENDANT'S COOPERATION <sup>28</sup>

14. The defendant [and its [LIST TYPES OF OTHER RELATED CORPORATE ENTITIES]<sup>29</sup> [(collectively, "related entities") --- *only use if more than one type of related entity is listed*]] will cooperate fully and truthfully with the United States in the prosecution of this case, the conduct of the current federal investigation of violations of federal antitrust and related criminal laws involving the [manufacture or sale] of [PRODUCT]<sup>30</sup>, any other federal investigation resulting therefrom, and any litigation or other proceedings arising or resulting from any such investigation to which the United States is a party ("Federal Proceeding").<sup>31</sup> The ongoing, full, and truthful cooperation of the defendant shall include, but not be limited to:

(a) producing to the United States all non-privileged<sup>32</sup> documents, information, and other materials, wherever located,<sup>33</sup> in the possession, custody, or control of the defendant [or any of its [related entities]], requested by the United States in connection with any Federal Proceeding;

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<sup>28</sup> The entities and employees covered in the cooperation terms in Paragraphs 14 and 15 must be co-extensive with the nonprosecution terms of Paragraphs 16 and 17(a). For instance, if the named defendant and certain related entities (e.g., subsidiaries) are receiving nonprosecution protection (i.e., transactional immunity) under Paragraph 16, then the same entities must be required to provide ongoing cooperation under Paragraph 14 of the Plea Agreement. Likewise, the class of individuals (i.e., the directors, officers, and employees of the defendant and its related entities) receiving nonprosecution protection under Paragraph 17(a) must be required to provide ongoing cooperation under Paragraphs 14(b), 14(c), and 15.

<sup>29</sup> Related entities such as subsidiaries of the named corporate defendant may be covered by the Plea Agreement if those entities can and will provide ongoing cooperation to the staff in its investigation. Often the covered subsidiaries are limited to those that "are engaged in the sale or production" of the product at issue. While past Division plea included "affiliates" in the definition of related entities, the Division's current practice is not to include such a broad term in the Plea Agreement. If the defendant seeks to have certain affiliates included, those affiliates should be specifically named.

<sup>30</sup> If the investigation involves a domestic conspiracy, this description will be limited in the cooperation provision normally to "the [manufacture or sale] of [PRODUCT] in [geographic area] . . . ."

<sup>31</sup> The term "Federal Proceeding" identifies the federal investigations and litigation in which the corporate defendant and its employees must cooperate in order to receive the Plea Agreement's protections. Paragraph 14 defines how the corporate defendant must cooperate in any Federal Proceeding. Paragraph 15(a)-(f) defines how the directors, officers, and employees of the corporate defendant must cooperate in any Federal Proceeding.

<sup>32</sup> The term "non-privileged" should be included except in rare situations where a claim of privilege could be asserted over key information, the production of which is a critical part of the defendant's cooperation. As required by the Deputy Attorney General review directive, staff must obtain prior permission from the Antitrust Division's DAAG for Criminal Enforcement before requesting any waiver of the attorney-client privilege as a condition of cooperation pursuant to a plea agreement, amnesty, or in any other setting. See McCallum Memo, Criminal Resource Manual at 163, available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00163.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm).

<sup>33</sup> The defendant's obligation to produce responsive documents in its possession, custody, or control wherever located applies to plea agreements in both domestic and international cases. See Negotiating The Waters Of International Cartel Prosecutions -- Antitrust Division Policies Relating To Plea Agreements In International Cases, Speech by Gary R. Spratling, Before ABA Criminal Justice Section 13<sup>th</sup> Annual National Institute on White Collar Crime at § II(B), p.4 - 5 (March 4, 1999), available at <http://www.usdoj.gov/atr/public/speeches/2275.htm>, (hereinafter "Negotiating The Waters") for a discussion of the defendant's obligation in international cases to produce documents wherever located.

[(b) securing the ongoing, full, and truthful cooperation, as defined

in Paragraph 15 of this Plea Agreement, of [NAMED INDIVIDUALS], including making such persons available in the United States and at other mutually agreed-upon locations, at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding;]<sup>34</sup> and

(c) using its best efforts<sup>35</sup> to secure the ongoing, full, and truthful

cooperation, as defined in Paragraph 15 of this Plea Agreement, of the current [and former]<sup>36</sup> directors, officers, and employees of the defendant [or any of its [related entities]]], in addition to those specified in subparagraph (b) above,] as may be requested by the United States,[but excluding [Samuel T. Jones], [John R. Doe], and [Robert P. Smith],]<sup>37</sup> including making these persons available [in the United States and at other mutually agreed-upon locations], at the defendant's expense, for interviews and the provision of testimony in grand jury, trial, and other judicial proceedings in connection with any Federal Proceeding.

15. The ongoing, full, and truthful cooperation of each person described in [either] Paragraph 14(b) [or 14(c)] above will be subject to the procedures and protections of this paragraph, and shall include, but not be limited to:

(a) producing [in the United States and at other mutually agreed-upon locations] all non-privileged<sup>38</sup> documents, including claimed personal documents, and other materials, wherever located, requested by attorneys and agents of the United States;

(b) making himself or herself available for interviews [in the United States and at other mutually agreed-upon locations], not at the expense of the United States, upon the request of attorneys and agents of the United States;

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<sup>34</sup> This provision has been used infrequently where the defendant's cooperation is based on the cooperation of certain key foreign-based executives and the company's cooperation is essentially meaningless without the Division having access to the specified individuals. See "Negotiating The Waters" at § II(E), p. 6-7.

<sup>35</sup> See "Negotiating The Waters" at § II(F), p. 7-8 for a discussion of what constitutes best efforts.

<sup>36</sup> If the nonprosecution terms of Paragraph 17(a) cover former executives, then the cooperation terms of Paragraphs 14(c) and 15 must also cover former employees. Before nonprosecution protections of the corporate plea agreement will be extended to former employees, company counsel must make a commitment that the company can assist in securing the cooperation of key former employees, e.g., that the former employees will be made available for interviews. If a former employee is now employed at a competitor and is a subject or target of the investigation, the employee will be excluded from Paragraphs 14(c) and 17(a).

<sup>37</sup> The Division seeks to prosecute culpable individuals from all corporate conspirators, domestic and foreign, except the amnesty applicant, and thus, will carve culpable individuals out of the corporate plea agreement. Companies that offer early cooperation may have fewer carved-out executives than latecomers. See Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech by Scott D. Hammond, Before 54th Annual American Bar Association Section of Antitrust Law Spring Meeting at § II(D)(March 29, 2006), available at <http://www.usdoj.gov/atr/public/speeches/215514.htm>. Employees refusing to cooperate may also be carved out of the Plea Agreement's coverage. The carved-out individuals will be excluded from both the corporate cooperation requirements of Paragraph 14(c) and the nonprosecution coverage of Paragraph 17(a).

<sup>38</sup> See footnote 32.

(c) responding fully and truthfully to all inquiries of the United States in connection with any Federal Proceeding, without falsely implicating any person or intentionally withholding any information, subject to the penalties of making false statements (18 U.S.C. § 1001) and obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(d) otherwise voluntarily providing the United States with any non-privileged<sup>39</sup> material or information not requested in (a) - (c) of this paragraph that he or she may have that is related to any Federal Proceeding;

(e) when called upon to do so by the United States in connection with any Federal Proceeding, testifying in grand jury, trial, and other judicial proceedings[ in the United States] fully, truthfully, and under oath, subject to the penalties of perjury (18 U.S.C. § 1621), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), contempt (18 U.S.C. §§ 401-402), and obstruction of justice (18 U.S.C. § 1503 *et seq.*); and

(f) agreeing that, if the agreement not to prosecute him or

her in this Plea Agreement is rendered void under Paragraph 17(c), the statute of limitations period for any Relevant Offense as defined in Paragraph 17(a) will be tolled as to him or her for the period between the date of the signing of this Plea Agreement and six (6) months after the date that the United States gave notice of its intent to void its obligations to that person under the Plea Agreement.<sup>40</sup>

#### **GOVERNMENT'S AGREEMENT**

16. Upon acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence, and subject to the cooperation requirements of Paragraph 14 of this Plea Agreement, the United States agrees that it will not bring further criminal charges against the defendant [or any of its [related entities]] for any act or offense committed before the date of this Plea Agreement that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]<sup>41</sup>. The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence.

17. The United States agrees to the following:

(a) Upon the Court's acceptance of the guilty plea called for by this Plea Agreement and the imposition of the recommended sentence and subject to the exceptions noted in Paragraph 17(c), the United States will not bring criminal charges against any current [or former] director, officer, or employee of the defendant [or its [related entities]] for any act or offense committed before the date of this Plea Agreement and while that person was acting as a director, officer, or employee of the defendant [or its [related entities]] that was undertaken in furtherance of an antitrust conspiracy involving the [manufacture or sale] of [PRODUCT]<sup>42</sup> ("Relevant Offense")[, except that the protections granted in this paragraph shall not apply to [Samuel T. Jones], [John R. Doe], or [Robert P. Smith]]];

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<sup>39</sup> See footnote 32.

<sup>40</sup> Cooperating individuals will have to sign a separate letter tolling the statute of limitations with respect to them before they can receive the nonprosecution protections of the corporate plea agreement.

<sup>41</sup> If the investigation involves a domestic conspiracy, the nonprosecution provisions will normally be limited to "the [manufacture or sale] of [PRODUCT] in [GEOGRAPHIC AREA]."

<sup>42</sup> See footnote 41.

(b) Should the United States determine that any current or former director, officer, or employee of the defendant [or its [related entities]] may have information relevant to any Federal Proceeding, the United States may request that person's cooperation under the terms of this Plea Agreement by written request delivered to counsel for the individual (with a copy to the undersigned counsel for the defendant) or, if the individual is not known by the United States to be represented, to the undersigned counsel for the defendant;

(c) If any person requested to provide cooperation under Paragraph 17(b) fails to comply with his or her obligations under Paragraph 15, then the terms of this Plea Agreement as they pertain to that person, and the agreement not to prosecute that person granted in this Plea Agreement, shall be rendered void;

(d) Except as provided in Paragraph 17(e), information provided by a person described in Paragraph 17(b) to the United States under the terms of this Plea Agreement pertaining to any Relevant Offense, or any information directly or indirectly derived from that information, may not be used against that person in a criminal case, except in a prosecution for perjury (18 U.S.C. § 1621), making a false statement or declaration (18 U.S.C. §§ 1001, 1623), or obstruction of justice (18 U.S.C. § 1503 *et seq.*);

(e) If any person who provides information to the United States under this Plea Agreement fails to comply fully with his or her obligations under Paragraph 15 of this Plea Agreement, the agreement in Paragraph 17(d) not to use that information or any information directly or indirectly derived from it against that person in a criminal case shall be rendered void;

(f) The nonprosecution terms of this paragraph do not apply to civil matters of any kind, to any violation of the federal tax or securities laws, or to any crime of violence; and

(g) Documents provided under Paragraphs 14(a) and 15(a) shall be deemed responsive to outstanding grand jury subpoenas issued to the defendant [or any of its [related entities]].<sup>43</sup>

[18.<sup>44</sup> The United States agrees that when any person travels to the United States for interviews, grand jury appearances, or court appearances pursuant to this Plea Agreement, or for meetings with counsel in preparation therefor, the United States will take no action, based upon any Relevant Offense, to subject such person to arrest, detention, or service of process, or to prevent such person from departing the United States. This paragraph does not apply to an individual's commission of perjury (18 U.S.C. § 1621), making false statements (18 U.S.C. § 1001), making false statements or declarations in grand jury or court proceedings (18 U.S.C. § 1623), obstruction of justice (18 U.S.C. § 1503 *et seq.*), or contempt (18 U.S.C. §§ 401-402) in connection with any testimony or information provided or requested in any Federal Proceeding.]

[19. The defendant understands that it may be subject to administrative action by federal or state agencies other than the United States Department of Justice, Antitrust Division, based upon the conviction resulting from this Plea Agreement, and that this Plea Agreement in no way controls whatever action, if any, other agencies may take. However, the United States agrees that, if requested, it will advise the appropriate officials of any governmental agency considering such administrative action of the fact,

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<sup>43</sup> For a discussion of Division policy on this issue, see "Negotiating The Waters" at § II(C), p. 5-6.

<sup>44</sup> Paragraph 18 may be inserted if the defendant has foreign-located officers, directors, or employees. See "Negotiating The Waters" at § II(G), p. 8-9 for a discussion of Division policy regarding this safe passage provision.

manner, and extent of the cooperation of the defendant [and its [related entities]] as a matter for that agency to consider before determining what administrative action, if any, to take.]<sup>45</sup>

### **REPRESENTATION BY COUNSEL**

20. The defendant has been represented by counsel and is fully satisfied that its attorneys have provided competent legal representation. The defendant has thoroughly reviewed this Plea Agreement and acknowledges that counsel has advised it of the nature of the charge, any possible defenses to the charge, and the nature and range of possible sentences.

### **VOLUNTARY PLEA**

21. The defendant's decision to enter into this Plea Agreement and to tender a plea of guilty is freely and voluntarily made and is not the result of force, threats, assurances, promises, or representations other than the representations contained in this Plea Agreement. The United States has made no promises or representations to the defendant as to whether the Court will accept or reject the recommendations contained within this Plea Agreement.

### **VIOLATION OF PLEA AGREEMENT**

22. The defendant agrees that, should the United States determine in good faith, during the period that any Federal Proceeding is pending, that the defendant [or any of its [related entities]] have failed to provide full and truthful cooperation, as described in Paragraph 14 of this Plea Agreement, or has otherwise violated any provision of this Plea Agreement, the United States will notify counsel for the defendant in writing by personal or overnight delivery or facsimile transmission and may also notify counsel by telephone of its intention to void any of its obligations under this Plea Agreement (except its obligations under this paragraph),<sup>46</sup> and the defendant [and its [related entities]] shall be subject to prosecution for any federal crime of which the United States has knowledge including, but not limited to, the substantive offenses relating to the investigation resulting in this Plea Agreement. The defendant [and its [related entities]] agree that, in the event that the United States is released from its obligations under this Plea Agreement and brings criminal charges against the defendant [or its [related entities]] for any offense referred to in Paragraph 16 of this Plea Agreement, the statute of limitations period for such offense will be tolled for the period between the date of the signing of this Plea Agreement and six (6) months after the date the United States gave notice of its intent to void its obligations under this Plea Agreement.

23. The defendant understands and agrees that in any further prosecution

of it [or its [related entities]] resulting from the release of the United States from its obligations under this Plea Agreement, because of the defendant's [or its [related entities']] violation of the Plea Agreement, any documents, statements, information, testimony, or evidence provided by it[, its [related entities],] or [current or former directors, officers, or employees of it [or its [related entities]]]<sup>47</sup> to attorneys or agents of the United States, federal grand juries, or courts, and any leads derived therefrom, may be used against it [or its [related entities]] in any such further prosecution. In addition, the defendant unconditionally waives

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<sup>45</sup> Optional paragraph where administrative actions are a possibility.

<sup>46</sup> See "Negotiating The Waters" at § II(H), p. 9 for a discussion of Division policy regarding voiding the Plea Agreement.

<sup>47</sup> This language should be consistent with the individuals covered in the nonprosecution and cooperation paragraphs.

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its right to challenge the use of such evidence in any such further prosecution, notwithstanding the protections of Fed. R. Evid. 410.

**ENTIRETY OF AGREEMENT**

24. This Plea Agreement constitutes the entire agreement between the

United States and the defendant concerning the disposition of the criminal charge[s] in this case. This Plea Agreement cannot be modified except in writing, signed by the United States and the defendant.

25. The undersigned is authorized to enter this Plea Agreement on behalf of the defendant as evidenced by the Resolution of the Board of Directors of the defendant attached to, and incorporated by reference in, this Plea Agreement.

26. The undersigned attorneys for the United States have been authorized

by the Attorney General of the United States to enter this Plea Agreement on behalf of the United States.

[27. A facsimile signature shall be deemed an original signature for the purpose of executing this Plea Agreement. Multiple signature pages are authorized for the purpose of executing this Plea Agreement.]

DATED: \_\_\_\_\_

Respectfully submitted,

BY: \_\_\_\_\_

BY: \_\_\_\_\_

[CORPORATE REPRESENTATIVE]<sup>48</sup>

[STAFF]

[Title]

[Global Products, Inc.]

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<sup>48</sup> Most courts will not accept a corporate plea agreement that is executed by counsel for the company. An authorized corporate officer, not the company attorney, must normally sign the Plea Agreement and the Resolution of the Board of Directors, which is attached to the Plea Agreement, should grant that officer the power to enter into the agreement on behalf of the company.

Attorneys

U.S. Department of Justice

Antitrust Division

[STREET ADDRESS]

[CITY, STATE, ZIP CODE]

Tel.: [(XXX) XXX-XXXX]

BY: \_\_\_\_\_

[NAME OF CORPORATE COUNSEL]

Counsel for [Global Products, Inc.]

## INDONESIA

Cartel<sup>1</sup> is a combination of producers or sellers that join together to control a product's production or price or association of forms with common interests, seeking to prevent extreme or unfair competition, allocate or sharing markets. Cartel was created through an agreement made by some competing business actors with the intention of influencing prices by fixing price, or dividing marketing territory or allocating the market, or arranging production and or marketing of certain goods and or services. Cartel was made in order to eliminate competition amongst them. By the reduction of competition amongst them, the conduct appears like monopolist, and in general monopolist will earn maximum profit from the consumer.

Experiences of competition institutions in the worldwide have proved that cartel is the worst agreement due to such agreement can cause loss reaching billions of dollar every year, not only for consumer but also economy of a country. Cartel does not recognize border of country, since cartel made by business actors in the specified country could also impact on their own domestic market, but it has impact on the market in other country.

All business actors can make cartel operating in the same line of business in the same market or cartel made by some business actors existing in the dominant position in the said market that it can affect the market if combined. In the market for which the producer in the small amount with specific products and has an inelastic demand, cartel will be greater in the market for which the producer in the great amount which produce general products and has elastic demand.

Similar to Business Competition Law in other countries, Indonesian Business Competition Law also regulates regarding the prohibition of cartel<sup>2</sup>. Principally, this article regulates that two or more business actors who are having mutual competition that they are not allowed entering into agreement to influence price by way of regulating production and or goods and or service marketing. This prohibition will not directly apply, as it must be prior seen on the impact thereof, whether the said agreement can result in monopolistic practice and or unfair business competition or not. It becomes distinctive in regulating cartel in Indonesia compared to other countries. In other countries, prohibition of cartel is enforced as per se illegal, but according to of Business Competition Law in Indonesia, cartel is regulated on the basis of rule of reason.

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<sup>1</sup> *Bryan A.Garner, Black's Law Dictionary, seventh edition, West Group, United States of America, 199, Page 206.*

<sup>2</sup> *Ibid, Article 11: "business actors shall be prohibited from entering into agreements with their competing business actors, with the intention of influencing prices by arranging production and or marketing or certain goods and or services, which may result in monopolistic practices and or unfair business competition.*

## **1. Legal Framework and Policy Issues**

### ***1.1 KPPU's authority in handling cartel case***

The Commission for the Supervision of Business Competition (KPPU) represents an independent authority established to supervise the implementation of Law Number 5 of 1999 (Law No.5/1999) concerning Prohibition of Monopolistic Practice and Unfair Business Competition.<sup>3</sup> Cartel is one of forms of agreement violating against Law No.5/1999. Therefore, KPPU is the competent agency to handle cartel cases in Indonesia.

### ***1.2 Provisions on cartel prohibition in Law No.5/1999***

In Law No.5/1999, there are some articles regulating on prohibition of cartel namely Articles 5, 6, 7, 8, 9 and 11. Cartel as form of prohibited agreement in Law No.5/1999 is distinguished to some forms to wit cartels of price, territory and production and marketing. Prohibition on cartel price are regulated in Article 5, 6, 7 and 8. Prohibition on territorial cartel is regulated in Article 9, while production and marketing cartel is regulated in Article 11 Law No.5/1999.

### ***1.3 Cartel cases handled by KPPU***

KPPU has handled some cartel cases, and most of them are related to price fixing. Towards those cases, some cases proved guilty, not guilty, or not continued to the advance examination phase due to the absence of cartel indication. Some cartel cases proved guilty are subject to administration sanction in terms of cancellation of the relevant cartel agreement. Below are some cartel cases once handled by KPPU as follows:

1. 2002, cartel case of production and marketing for Day Old Chick (DOC);
2. 2003, cartel case of the relevant price fixing with line cargo of Jakarta-Pontianak;
3. 2003, cartel case of price fixing and the related territory division with line cargo of Surabaya-Makassar;
4. 2003, cartel case of price fixing for City Bus of Patas AC in DKI Jakarta;
5. 2004, cartel case of production and marketing conducted by sugar importer;
6. 2005, cartel case of the related price fixing with supply of inspection service for imported sugar;
7. 2005, cartel case of the related price fixing with salt trading to North Sumatera;
8. 2005, cartel case of the related price fixing and regional division with distribution of Gresik Cement;
9. 2006, cartel case of price fixing and territorial division conducted by Indonesia Concrete Asphalt Association.

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<sup>3</sup> Article 30 UU No.5/1999

#### **1.4 Legal base and application for plea agreement in KPPU practice**

In KPPU, plea agreement is known as term of consent decree or changes of conduct. While legal basis used to implement the plea agreement is Commission Regulation Number 1 of 2006 regarding Procedures for Case Handling in KPPU (Commission Regulation No. 1/2006).<sup>4</sup> The said plea agreement not only can be applied in the cartel case, but also can be applied in other business competition cases.

The plea agreement can be implemented upon the course of Preliminary Examination. The commission can stipulate that it is not necessary to conduct Advance Examination, although any assumption of violation, if the Reported Party stated ready to carry out plea agreement. Implementation of plea agreement is made at most 60 (sixty) days and can be renewed in accordance with Commission Stipulation.<sup>5</sup>

Furthermore, the Commission monitor towards the implementation of stipulation on plea agreement by forming Monitoring Team of Stipulation Implementation.<sup>6</sup> The Monitoring of Stipulation Implementation is made to evaluate the implementation of plea agreement. The said Monitoring results are arranged in the form of Report on Stipulation Implementation.<sup>7</sup> In case of Commission evaluates that the Reported Party has implemented Commission Stipulation, the Commission stipulates to terminate monitoring on stipulation implementation and not to continue to the Advance Examination.<sup>8</sup> In case of Commission evaluates that the Reported Party is not to conduct Commission Stipulation, the Commission stipulates to terminate Monitoring of Stipulation Implementation and stipulates to conduct Advance Examination.<sup>9</sup>

#### **1.5 Determinant factor of success on plea agreement**

The main items determining success on this conduct change are evidences that can show involvement of Reported Party in an agreement prohibited by Law No. 5/1999. Before entering into the phase of Preliminary Examination, in the procedure for case based on the Commission Regulation No. 1/2006, there are some activities called as research and clarification of report and monitoring of business actor. When the case is stipulated accessed to the phase of Preliminary Examination, evidences that can show violation conducted by the Reported Party has been summarized in a document called as the Report on Allegation of Violation. The Report on Allegation of Violation contains data and information at least:<sup>10</sup>

1. Identity of business actor alleged to make violation;
2. Agreement and/or activity alleged violated;
3. Method of agreement and/or business activity carried out or impact on agreement and/or business towards competition, general interest, consumer and/or loss arising as a result of violation;

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<sup>4</sup> Article 37 through 41 Commission Regulation No. 1/2006.

<sup>5</sup> Article 37, Commission Regulation No. 1/2006.

<sup>6</sup> Article 38, Commission Regulation No; 1/2006.

<sup>7</sup> Article 39, Commission Regulation No; 1/2006.

<sup>8</sup> Article 40 Commission Regulation No. I/2006.

<sup>9</sup> Article 41 Commission Regulation No. I/2006.

<sup>10</sup> Article 19 Commission Regulation No.1/2006.

4. Provisions on Law alleged violated; and
5. Recommendation should or not be conducted Preliminary Examination.

#### ***1.6 Incentive provided towards the Reported Party carrying out plea agreement***

By any availability of comprehensive allegation of violation, Reported Party is expected to admit his/her violation. Incentive provided by Commission Regulation No. 1/2006 is if they admit guilty and want to carry out change of conduct, the case will not be continued to the phase of Advance Examination. Profit that will be obtained by the Reported Party by carrying out change of conduct is to set free them from the examination process until the decision making made by KPPU. The said process takes long time (+ 120 working days), spends cost and influences business activity carried out by the said business actor.

#### ***1.7 Issue to enter into agreement on change of conduct***

The main issue encountered in entering into agreement on change of conduct with the Reported Party is that the latter is not ready to recognize the violation. In order to enter into agreement on change of conduct, the Reported Party must recognize violation towards Law Number 5 of 1999. The factor causing the absence of his/her (Reported Party) to recognize is the mistake and lack of his/her understanding towards benefit of system of this change of conduct. They prefer to take the whole process of examination until the end namely until KPPU issues the decision.

#### ***1.8 Imposition on compensation and penalty towards the Reported Party that has carried out the plea agreement***

Pursuant to Commission Regulation No. 1/2006, KPPU can stipulate the Reported Party to carry out plea agreement among others by canceling agreement and paying any loss resulting from the violation.

Pursuant to Law No. 5/1999 KPPU is authorized to stipulate compensation payment and impose on the penalty.<sup>11</sup> The authority of KPPU in stipulating compensation is not yet formally regulated, while in passing the limited penalty, minimum Rp. 1.000.000.000,- (one billion rupiah) and maximum Rp. 25.000.000.000,- (twenty five billion rupiah). Further regulation regarding the said compensation and penalty is still in preparation.

Therefore, there is no penalty calculation mechanism for the Reported Party carrying out the plea agreement and there is no reduction mechanism towards penalty that should be passed nor objection or appeal one towards the penalty.

#### ***1.9 The benefit of plea agreement***

The plea agreement is beneficial to create efficiency and effectiveness in handling the case in KPPU. In view of KPPU, Commission and Secretariat Staff of KPPU may save energy, so that it can examine other cases. If a case has found its settlement through mechanism on plea agreement, fair business competition condition can be reached in a relatively brief compared to if all processes of examination are made until the issuance of decision. In addition, mechanism on plea agreement decreases risk of objection towards decision of KPPU so submitted by the Reported Party feeling not guilty to the District Court and thereafter cassation proposal to the Supreme Court. Of course, process of objection takes sufficient time. Through mechanism on plea agreement, process to handle the case can be quickly settled. By the creation of fair business competition, social prosperity in a whole can be materialized.

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<sup>11</sup> Article 47, items f and g Law No. 5/1999.

### **1.10 *Sample Case***

In view of cartel cases handled by KPPU as stated above, the latest case to wit cartel of price fixing and territorial division made by Indonesia Concrete Asphalt Association can be served as sample to handle cartel case using mechanism plea agreement or plea bargaining or plea settlement or change of conduct. In the said case, in the Preliminary Examination, the Reported Party is ready to cancel agreement of price fixing and agreement of territorial division. KPPU stipulates for not to continue examination to the phase of Advance Examination and carry out monitoring towards the implementation of such agreement cancellation. In the said stipulation, KPPU will not impose sanction or penalty on the Reported Party, but KPPU confirms that if within 30 (thirty) days, the Reported Party does not carry out the plea agreement, KPPU will directly stipulate Advance Examination towards the case. Plea agreement mechanism will be just tried by KPPU in cartel case of price fixing and territorial division made by Indonesia Concrete Asphalt Association. In this case, KPPU does not have experience in other cases in which the incentive to reduce sanction or penalty towards the Reported Party carrying out change of conduct. It is expected that such mechanism can run and develop effectively in handling further cases.

### **1.11 *Plea agreement and leniency program***

In connection with the leniency program, plea agreement mechanism is expected to reduce the parties taking profit by requesting custody or amnesty towards the violation. However, such matter cannot yet be proved, as KPPU has not yet leniency program.

## **2. *Plea Agreement and Courts***

### **2.1 *Role of court in handling cartel case***

In the system of business competition laws in Indonesia, KPPU represents case settlement institution of business competition. Decision of KPPU is the Decision equal to that of First Instance Court, the Reported Party can file an objection to the District Court playing the role as the Appeal Court. The District Court will then examine the said objection case based on the Decision of KPPU or cancel the decision of KPPU. Therefore, KPPU will directly handle cartel case, and indirectly by the Court in case of any objection.

### **2.2 *Controversy of mechanism on change of conduct and authority of KPPU***

Business actor or public in general do not know much about plea agreement in Indonesia. In plain view, this mechanism shows the great authority for KPPU, KPPU can terminate a case of business competition and has had sufficient evidence to decide the Reported Party guilty, if the Reported Party is ready to carry out change of conduct. Controversy taking place whether KPPU can negotiate the violation in such an easy way. This arises worry that the business actor will feel safe to violate, as long as KPPU does not know the same. If KPPU knows the violation made by the business actor, the latter can carry out change of conduct as easy as possible with the advantage to get reduction of sanction and penalty. In response to this matter, KPPU is of the opinion that legal spirit of business competition is not punish business actors, but to change their unfair conduct thereby creating fair and conducive business atmosphere for the business circle.

### **2.3 *Mechanism difference of plea agreement/settlement in criminal law and civil law procedures***

In the Indonesia criminal law procedure, known as the term of amnesty, abolition and leniency which basically mechanism of sanctions reduction. However, such matter can take place if the guilty party (punished) has conducted his/her punishment, then the relevant party requests to be granted the said laws reduction. In the other hand, the civil law of procedure known as the term of peace in which when the

hearing opens, the judge always recommends the parties to have peace. If the conflicting parties agree to have peace, they can make negotiation by the aid of third party through mediation procedures to attain settlement having mutually beneficial to both parties.

### **3. Plea Agreements/Settlements and Private Litigation**

In connection with the law of civil procedure or private litigation, there is mechanism to request for compensation from the suffered party. The latter can propose suits of compensation to the Court through law of civil procedure. If the suffered party files compensation through KPPU, KPPU can stipulate the said compensation in plea agreement/settlement. But, KPPU is still in process to prepare regulation regarding the said compensation mechanism to date. Therefore, KPPU cannot yet response whether KPPU can request the Reported Party to give compensation to the Reporting Party or whether KPPU can cooperate with the Reporting Party in executing the suits of civil to the Court. KPPU cannot yet response whether plea agreement/settlement can be used as the exhibit in the civil suit and whether the risk in the said law of civil procedure can hamper business actor to enter into plea agreement/settlement.

## SOUTH AFRICA

### 1. Introduction

This paper sets out the experiences of the South African Competition Commission (“the CCSA”) and the manner in which it has settled and currently settles alleged contraventions of South African competition laws. We deal with the issues from a broad perspective which sets out our general approach to all settlements rather than focusing exclusively on cartels.

### 2. Legal Framework

The CCSA is one of three bodies established by the Act and is responsible for the investigation, control and evaluation of restrictive practices which include so-called cartel behaviour. In contrast, the Competition Tribunal (“the Tribunal”) is responsible to adjudicate such matters while the Competition Appeal Court (“the CAC”) hears appeals and reviews of decisions of the Tribunal (and also on occasion of the CCSA). The Tribunal is not an ordinary court but is an independent and impartial tribunal dealing with the proceedings which are civil in nature. Although the Act empowers the Tribunal to impose administrative penalties, these are not criminal sanctions.<sup>1</sup> Any settlements reached are therefore civil settlements.

The CCSA and Tribunal are creatures of statute and operate within the parameters determined by the Competition Act 89 of 1998 (“the Act”). They therefore have no jurisdictional powers beyond those granted either expressly or impliedly by the Act.

The Act expressly creates a mechanism for the settlement of alleged prohibited practices without the necessity of a trial. In terms of section 2(1) of the Act the CCSA is responsible to negotiate and conclude consent orders, while section 49D of the Act provides that the Tribunal may confirm an agreement (“consent agreement”) between a respondent and the CCSA as a consent order without hearing any evidence.

The CCSA has also resolved complaints without invoking the consent order procedure in section 49D of the Act on a number of occasions<sup>2</sup>. These took the form of a non-referral or withdrawal of a complaint referral upon receiving appropriate undertakings from the respondents concerned. This approach was followed by the CCSA during the first few years of its existence when it held the view that the consent order procedure required a respondent to admit the contravention. The CCSA has since changed its position and accepts that an admission of guilt is not a prerequisite for the granting of consent orders.

The CCSA’s power to settle without resorting to the consent order procedures was previously challenged by the complainants in the case against Novartis SA (Pty) Ltd and others. The complainants

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<sup>1</sup> This point was decided in the matter of the Competition CCSA vs Federal Mogul Aftermarket Southern Africa (Pty) Ltd and three others, Tribunal case number 08/CR/Mar01

<sup>2</sup> These include important cases against GlaxoSmithKline SA (Pty) Ltd, Boeringer Ingelheim (Pty) Ltd and Novartis SA (Pty) Ltd and Others.

brought an application in the CAC, to review and set aside the CCSA's settlement, but this was withdrawn after the complainants and respondents settled the matter *inter partes*. The question whether the Commission has an implied power to settle outside the parameters of section 49D has not yet been decided by either the Tribunal or the CAC.<sup>3</sup>

While the CCSA still considers that it has an implied power to settle matters without resorting to section 49D it has a strong preference for using this procedure and will therefore generally insist on proceeding by way of a consent order application. This is borne out by the fact that the Competition CCSA has, since its inception on 01 September 1999, concluded thirty agreements, twenty eight of which have been confirmed as consent orders by the Tribunal while decisions in respect of two applications are still pending.<sup>4</sup> In contrast only six complaints have been settled through a process of obtaining undertakings without resorting to the consent order procedures.

The types of cases which have been settled are varied. Of the settled complaint cases, eleven have been in respect of cartel investigations, eleven in respect of restrictive vertical practices, in particular minimum resale price maintenance and seven in respect of an abuse of dominance. The CCSA has also settled six cases of alleged implementations of mergers by firms without the approval of the relevant competition authority.

The following four categories of cases have been of particular interest.

**2.1 CCSA vs South African Medical Association ("SAMA") – 23/CR/Apr04, CCSA vs Hospital Association of South Africa ("HASA") – 24/CR/Apr04, CCSA vs The Board of Healthcare Funders of Southern Africa ("BHF") – 07/CRFeb05**

During a study of the healthcare industry, it came to the CCSA's attention, that SAMA, HASA and the BHF were each determining, recommending and publishing benchmark tariffs for medical services to their respective members on an annual basis.

SAMA is an association of medical practitioners whose membership at the relevant time accounted for 42,87% of all medical practitioners registered with the Health Professions Council of South Africa ("HPCSA"). HASA is an association of private hospitals which, at the relevant time, represented 95% of all private hospitals in South Africa. The BHF is a voluntary association of medical aid schemes which represented 80% of all medical aid schemes registered with the Council for Medical Schemes ("CMS"). In terms of the Act, an agreement between or concerted practice by firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if it involves directly or indirectly fixing a purchase or selling price or any other trading condition.

The CCSA investigated the matter and referred three separate complaints to the Tribunal. After the referrals, each of the associations entered into negotiations with the CCSA to settle the complaints and agreements were concluded which the Tribunal later confirmed as consent orders. SAMA and HASA admitted the contraventions, agreed to cease the publication of recommended tariffs to their members and duly paid administrative penalties in the sum of R900 000 and R4 500 000 respectively.

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<sup>3</sup> In the GlaxoSmithKline SA (Pty) Ltd case, Tribunal case number 79/CR/Nov04, which is discussed later in this paper, the Tribunal stated that "*There is a question mark over the validity of concluding a settlement of a complaint that had already been referred to the Tribunal without then referring the settlement agreement to the Tribunal.*"

<sup>4</sup> One of these is the matter of the CCSA vs South African Airways (Pty) Ltd, Tribunal case number 83/CR/Oct04 which is discussed on page 6.

The BHF did not admit the contravention but agreed to pay an administrative penalty of R500 000 which was accepted by the CCSA. The BHF was further concerned that the discontinuing of the tariff would have an adverse effect on its members and the healthcare industry as a whole. The CCSA concluded that it was to the public benefit, in order to facilitate complex negotiations between medical schemes and medical service providers and to enable consumers to have access to objective information concerning the likely cost of such services, that reference prices should be permitted. It was therefore agreed that the Council for Medical Schemes would engage with the Department of Health to determine a suitable tariff which would ensure that the prices for services were related to the costs of providing such services. The Department of Health recently published a draft tariff for public comment. The CCSA's contribution in this process was to promote transparency regarding the determination of pricing that is related to the costs of the service providers.

**2.2 *CCSA and Hazel Tau and others vs GlaxoSmithKline South Africa (Pty) Ltd and others, (together referred to as "GSK"), Boehringer Ingelheim (Pty) Ltd, Ingelheim Pharmaceuticals (Pty) Ltd, Boehringer Ingelheim GmbH and related companies (together referred to as "BI");***

Hazel Tau and ten other complainants lodged a complaint with the CCSA against GSK and BI. A further complaint against GSK was also lodged by the Aids Healthcare Foundation ("AHF"). It was alleged that GSK and BI were abusing their dominance by charging excessive prices for patented anti-retroviral medicines ("ARV's") to the detriment of users of ARV's in South Africa.

Upon investigating the matter, the CCSA concluded that the respondents had contravened the Act by charging an excessive price, refusing to give competitors access to an essential facility (i.e. secondary licences to their patents) when it was economically feasible to do so and by engaging in exclusionary conduct, the anti-competitive effect of which outweighed any technological, efficiency or other pro-competitive gains. The respondents denied that they had contravened the Act but agreed to settle the matter by entering into agreements in terms of which they did not admit guilt or pay any penalty but undertook to grant voluntary licences to other drug manufacturers.<sup>5</sup>

These agreements were not confirmed as consent orders as at that time the CCSA was of the view that it was not competent for such an order to be made in the absence of an admission of guilt by the respondents. This resulted in the Aids Healthcare Foundation ("the AHF"), which was not a party to the agreement between the CCSA and GSK, pursuing the matter in the Tribunal in its own right. In a move to bring the AHF complaint referral to an end, GSK applied to have the consent agreement confirmed as a consent order. The application was initially opposed by the AHF but it later withdrew its opposition. The Tribunal however held that it could not confirm the agreement as a consent order as the CCSA no longer had title to prosecute the complaint when the application was brought. While the question of whether or not a respondent was required to admit guilt for purposes of a consent order was not decided, the Tribunal indicated that had it been vested with jurisdiction it would have seen no bar to granting the consent agreement. GSK subsequently appealed this decision and the CAC's judgement in the matter is still pending.

Importantly, in this matter the CCSA achieved through the settlement what it would have hoped to obtain by prosecuting the matter, that is, the issuing of licences to third parties enabling the manufacturing of generic ARV's. This had the effect of significantly increasing competition in the market which drastically reduced the cost of ARV's to the benefit of consumers.

**2.3 *CCSA vs Toyota South Africa Motor (Pty) Ltd ("Toyota"), CCSA vs Nissan South Africa (Pty) Ltd ("Nissan"), CCSA vs Daimler Chrysler South Africa (Pty) Ltd ("DCSA"), CCSA vs***

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<sup>5</sup> GSK undertook to issue four voluntary licenses and BI three.

***Volkswagen South Africa (“VWSA”) and VWSA Dealers, CCSA vs Citroen South Africa (Pty) Ltd (“Citroen”), CCSA vs BMW South Africa (“BMW”), CCSA vs General Motors South Africa (Pty) Ltd (“GMSA”), CCSA vs Ford Motor Company of Southern Africa (Pty) Ltd (“FMC”) and CCSA vs Subaru South Africa (Pty) Ltd (“Subaru”).***

Following the receipt of a complaint, the CCSA commenced an investigation into the alleged imposition of minimum resale prices on certain models of its vehicles by Toyota on its dealers. After gathering evidence of the contravention the CCSA decided to refer the matter to the Tribunal for determination. However, prior to the referral Toyota approached the CCSA and indicated its willingness to settle the matter. A settlement agreement was concluded in terms of which Toyota *inter alia* agreed to pay an administrative penalty of R12 million, to cease the practice of imposing minimum resale prices and to institute a compliance programme to ensure compliance with the provisions of the Act. The CCSA also engaged with Toyota regarding its co-operation in relation to another investigation which was being conducted into the automobile industry and required Toyota to agree to full and ongoing co-operation in relation to that investigation. Notwithstanding that Toyota did not admit to any contravention of the Act, the Tribunal confirmed the consent agreement.

After concluding its investigation against Toyota (but before the conclusion of the agreement with Toyota), the Commissioner initiated an investigation against the National Association of Automobile Manufacturers (“NAAMSA”) and certain manufacturers and/or importers and distributors of new motor vehicles in South Africa as well as their respective dealers and dealer associations. The CCSA’s investigation encompassed allegations that the manufacturers, importers and/or dealers had fixed prices and/or trading conditions, had entered into agreements that imposed restrictions having the effect of substantially preventing or lessening competition, that manufacturers had imposed minimum resale prices on their dealers, alternatively that manufacturers and dealers had agreed on minimum resale prices and that dominant manufacturers had charged excessive prices for vehicles to the detriment of consumers.

Soon after the CCSA published its findings the various manufacturers and dealers implicated approached the CCSA and indicated a willingness to settle the matters. Following negotiations the CCSA settled the matters on the basis that five of the manufacturers, namely BMW, VWSA, DCSA, GMSA and Citroen had imposed minimum resale prices on their dealers and that the franchise dealers of VWSA and Subaru had fixed the selling prices of vehicles. In terms of the agreements the CCSA obtained administrative penalties totalling R51 650 000 (fifty one million six hundred and fifty thousand rand). The respondents were also all obliged to implement compliance programs. Each of the administrative penalties was arrived at by applying the formula developed by the Tribunal in the SAA matter.<sup>6</sup> None of the respondents admitted that it had contravened the Act.

**2.4 *CCSA vs The Airlines Association of Southern Africa (“AASA”) and certain of its members i.e. South African Airways (Pty) Ltd (“SAA”), South African Airlink (Pty) Ltd (“SA Airlink”), South African Express (Pty) Ltd (“SA Express”) and Comair (Pty) Ltd (“Comair”), CCSA vs SAA and Deutsche Lufthansa AG (“Lufthansa”), and CCSA and Comair (Pty) Ltd (“Comair”) vs South African Airways (Pty) Ltd (“SAA”)***

The CCSA initiated a complaint against AASA, SAA, SA Airlink, SA Express and Comair after receiving information that the airlines had contravened the Act by agreeing to the simultaneous introduction of an identical fuel surcharge on tickets for domestic flights. Following the initiation of the investigation, Comair admitted its involvement in the collusive practice and agreed to assist the CCSA

<sup>6</sup> The Competition CCSA vs South African Airways (Pty) Ltd, Tribunal case number 18/CR/Mar01 which is discussed on page 9. Prior to this decision the CCSA had not followed any particular formula in determining an appropriate administrative penalty.

with its investigation. Comair further successfully applied for immunity from prosecution in terms of the CCSA's Corporate Leniency Policy.

In a separate matter, the CCSA also initiated a complaint against SAA and Lufthansa after obtaining evidence that the airlines had fixed the selling price of air tickets on flights between CapeTown/Johannesburg and Frankfurt.

The Commission also referred a complaint of an alleged abuse of dominance by SAA to the Tribunal following a complaint by Comair that SAA had used override commissions and trust payments to induce travel agents to sell SAA tickets for domestic flights in preference to the tickets of other airlines.

Following the CCSA's successful prosecution of SAA and the imposition of an administrative penalty of R45million<sup>7</sup> for the same conduct concerned in the Comair complaint above, SAA approached the CCSA with a view to settling all outstanding cases. The CCSA and SAA thereafter concluded agreements settling all three of the above matters. An agreement was also entered into with Lufthansa.

In terms of the agreement regarding the fuel surcharge complaint, SAA and SA Express undertook not to agree with any of their competitors on the introduction or increase of any levy or charge in the future, to implement a compliance programme and to jointly pay an administrative penalty in the sum of R20 million. In respect of the SAA/Lufthansa matter, SAA and Lufthansa both undertook not to fix the selling price of air tickets or any other products with any other competitor in the future, to implement a compliance programme and to pay administrative penalties of R20 million and R8,5 million respectively. In respect of the complaint relating to SAA's payments to travel agents, SAA undertook to refrain from entering into agreements with travel agents on terms which would induce them not to deal with competing airlines, to implement a compliance programme and to pay an administrative penalty of R15 million. Neither SAA nor Lufthansa admitted to a contravention in any of the agreements. Each of the administrative penalties was again arrived at by applying the formula developed by the Tribunal in the SAA matter.<sup>8</sup>

The Tribunal has confirmed the agreements in respect of the fuel surcharge complaint and the SAA/Lufthansa matter as consent orders. Comair and Nationwide Airlines (Pty) Ltd ("Nationwide"), a domestic airline which intervened in the case, opposed the Commission's application in connection with the complaint relating to SAA's payments to travel agents and the Tribunal's decision is still pending.

### **3. The General Approach of the CCSA to Plea Bargaining**

The CCSA does not have a policy outlining the instances when it will enter into plea bargaining in relation to any matter that it is investigating or which is pending before the Tribunal and is in principle prepared to consider a settlement in all cases provided the purposes of the Act can be properly served through the settlement. Matters are dealt with on a case-by-case basis on their own merits.

The CCSA has a strong preference for applying the consent order procedure in section 49D of the Act and in the case of a settlement will usually insist on proceeding by way of a consent order application. The CCSA may however, in appropriate circumstances, where the outcome of an investigation is uncertain and the respondent has addressed the competition concerns, be persuaded to discontinue its investigations. The CCSA will similarly take account of any undertakings and the basis on which they are given, when deciding whether or not to refer a complaint where a respondent (who is not prepared to enter into an

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<sup>7</sup> Referred to in footnote 6.

<sup>8</sup> Referred to in footnote 6.

agreement to be confirmed as a consent order) provides undertakings which address the competition concerns.

The CCSA, in most instances, informs the respondents of its decision to refer a complaint prior to the referral. This provides the respondent(s) with an opportunity to approach the CCSA and to enter into negotiations to settle a matter on mutually acceptable terms before the referral. In most instances settlement negotiations have been initiated by the respondents.

#### **4. The Benefits of Settlements**

A settlement by way of a consent order confers significant benefits to both the respondents and the CCSA.

From the respondent's perspective a consent order eliminates the necessity of engaging in a lengthy and costly trial, provides protection against fresh complaints relating to substantially the same conduct (as a consequence of the so-called double jeopardy provisions contained in the Act), the administrative penalty and other remedies such as interdictory relief are determined by agreement rather than being imposed unilaterally by the Tribunal and the risk of significant reputational harm as a result of the exposure generated by a trial and a possible conviction is avoided. Where the CCSA does not insist on an admission of guilt the respondent also reduces the likelihood of private damages claims by third parties.

From the CCSA's perspective a consent order provides an expeditious way of meeting the public purposes of the Act and addressing anti-competitive conduct while at the same time conserving resources. Once a settlement agreement has been made a consent order it may also be served, executed and enforced as if it were an order of the High Court. The CCSA will, as a general rule, agree to a settlement on terms and conditions which are substantially similar to those it would likely achieve through a prosecution. This includes at a minimum, the terminating of the anti-competitive conduct complained of, ensuring future compliance with the provisions of the Act and where applicable the imposition of an appropriate penalty to ensure deterrence of the offender in question and others in the marketplace.

#### **5. The CCSA's Corporate Leniency Policy**

The CCSA has a Corporate Leniency Policy ("CLP") which is designed to encourage firms participating in cartels to disclose information on the cartel's activities in exchange for immunity from prosecution or reduced penalties. The intended outcome is to encourage firms to cease cartel activity and to report the existence of the cartel to the authorities before a prosecution is instituted against the members of the cartel. Comair was able to successfully utilise the CCSA's leniency policy to obtain immunity in respect of a complaint against AASA and its members.<sup>9</sup>

When concluding any settlements of cartel cases the CCSA use the opportunity to promote the CLP to ensure that the plea-bargaining process contributes to its effectiveness. The CCSA also insists on full compliance with any conditions for immunity or leniency.

#### **6. The Format of a Consent Agreement**

Every consent agreement concluded by the CCSA contains an explanation of the complaint which is the subject of investigation, the factual findings and conclusions of the CCSA in regard to the contravention(s) of the Act, the remedies agreed upon and where applicable the amount of damages agreed between the complainant and respondent.

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<sup>9</sup> See the discussion of the CCSA vs AASA matter, Tribunal case number 43/CR/May06 on page 6.

The remedies will include at a minimum an administrative penalty, undertakings to not commit future contraventions of the Act and compliance programmes where these have not already been implemented. The agreement will also state whether or not the respondent admits the contravention in question. As a general rule the CCSA does not permit the respondent to go beyond a bare statement that it does not admit to contravening the Act.

The practice of the CCSA when applying for the confirmation of an agreement as a consent order is to attach the agreement to a notice of motion requesting the confirmation of the agreement as a consent order without placing any evidence before the Tribunal. This approach was recently challenged by Comair and Nationwide when the CCSA applied to confirm the agreement it had concluded with SAA as a consent agreement.<sup>10</sup> Comair and Nationwide both argued that the CCSA as the applicant is required to present evidence to satisfy the Tribunal that the agreement sought to be made a consent order is appropriate. The Tribunal's decision is still pending.

## **7. Right of Third Parties to Institute Private Actions for Damages**

When making a consent order, the Tribunal may, with the complainant's consent include an award of damages. If such an award is made this precludes the complaint from instituting further civil claims. Where the complainant does not accept damages in a consent order, this does not preclude the complainant from pursuing its right to claim damages in a civil court.

Where damages are alleged to arise from a contravention of the Act, the complainant is required to obtain an order from the Tribunal declaring the contravention to be a prohibited practice before instituting proceeding in a civil court. Where a consent order has been made the Act specifically preserves the right of a complainant to apply for a declaration that the conduct of a respondent constitutes a prohibited practice for the purpose of claiming damages in a civil court. Notwithstanding this protection, from the perspective of a complainant who wishes to claim damages, it is preferable that the CCSA obtains an admission of guilt when concluding settlements. This has resulted in complainants such as Comair opposing the confirmation of agreements which do not include an admission of guilt as consent orders.<sup>11</sup>

## **8. Admission of Guilt and the Role of the Complainant**

The CCSA's primary concern when settling a complaint is to secure structural remedies, or undertakings as to conduct which address the anti-competitive effects of the conduct concerned and not to serve the private interests of a complainant. It is therefore guided at all times by its considerations as to the appropriate outcome of any settlement, that is, the anti-competitive conduct must cease and future compliance with the competition laws must be ensured. If this is achieved, the CCSA will not always require that a party admit guilt as part of the terms of settlement. The CCSA will however always incorporate its findings in the settlement agreement thus ensuring that these findings form part of the public record.

In appropriate circumstances, taking account of both the public interest and the interests of third parties, the CCSA has however insisted on an admission of guilt. This has in some instances led to the breakdown of settlement negotiations with respondents who are unwilling to make admissions that would allow the complainant to institute a civil suit without having to prove the cause of action.

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<sup>10</sup> Referred to in footnote 4 and discussed on pages 6 and 7.

<sup>11</sup> Referred to in footnote 4 and discussed on pages 6 and 7.

The question whether a consent order requires an admission of a contravention is a central issue for determination in the SAA /Comair matter.<sup>12</sup> The Tribunal's decision is still pending.

The CCSA is not required to defer to or consult with the complainant in deciding how to dispose of an investigation and the complainant's participation in a proposed settlement is therefore not required except insofar as the respondent tenders damages. Where it considers it appropriate the CCSA will engage with a complainant on the merits of a proposed settlement. This occurs on a case-by-case basis and with the recognition that the complainant and the CCSA do not have a unity of interests.

## **9. The Quantum of the Administrative Penalty**

The imposition of an administrative penalty is a power granted to the Tribunal by the Act. In terms of the Act the penalty may not exceed 10% of a firm's annual turnover in South Africa and its exports from South Africa during the preceding financial year. The CCSA, assesses an appropriate penalty taking into account the factors listed in section 59(3) of the Act, such as the nature, duration, gravity and extent of the contravention, the degree to which the respondent has cooperated with the CCSA and whether the respondent has previously been found in contravention of the Act. While the CCSA has given consideration to each of these factors in the matters that it has settled no noticeable trend or pattern in its assessment of fines has emerged. The Tribunal, in its reasons for decision in the matter of the CCSA and SAA,<sup>13</sup> developed a formula for weighting each of the factors set out in section 59(3) of the Act for purposes of determining an appropriate penalty.<sup>14</sup> The CCSA applied this formula when assessing the penalties in the motor vehicle cases (except for the Toyota matter which was settled before its formulation) and the cases involving SAA and Lufthansa. All penalties imposed were calculated on the infringing line of business/affected commerce rather than the total turnover of the respondent firms concerned. The CCSA will continue to be guided by the SAA decision when assessing and agreeing to an appropriate penalty for incorporation in a consent order. It will, however advocate the use of a different formula should the circumstances of a particular case call for this.

## **10. The Role of the Tribunal**

In terms of section 49D(1) of the Act, the Tribunal may confirm an agreement as a consent order without hearing evidence. Section 49D(2) of the Act further provides that "*after hearing a motion for a consent order, the Competition Tribunal must, (a) make the order as agreed to and proposed by the Competition Commission and the respondent; (b) indicate any changes that must be made to the draft order before it will make the order; or (c) refuse to make the order*". It is therefore clear that the Tribunal is required to review any proposed remedies agreed between the parties and to exercise a discretion as to whether or not to make the agreement a consent order. In the CCSA's experience the Tribunal has taken an active role in consent order proceedings while still having regard to its views.

## **11. Conclusion**

The CCSA is of the view that it is in the public interest that it resolves matters through consent orders as an alternative to litigation where appropriate. Although it is constrained in its resources, the CCSA has not allowed the costs of litigation to outweigh its primary duty to ensure that a negotiated outcome should achieve a substantially similar result to a prosecution. The almost thirty matters that have been settled by

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<sup>12</sup> Referred to in footnote 4 and discussed on pages 6 and 7.

<sup>13</sup> Referred to in footnote 6.

<sup>14</sup> At page 77 of the reasons for the decision.

the CCSA have progressively increased awareness of the work of the CCSA and what it seeks to achieve – a free and fair economy for all.



## BIAC

*“Unlike some other systems – that of our American colleagues, for example – there is no arrangement for simplified handling of cases in which the parties to the cartel and enforcer concur as to the nature and scope of the illegal activity undertaken and the appropriate penalty to be imposed. . . . [W]e may need to look at how some form of plea bargaining procedure could bring advantages in the context of European competition law.”*

Commissioner Neelie Kroes<sup>1</sup>

BIAC is pleased to provide Working Party No. 3 with its comments on Plea Bargaining and settlement of Cartel cases.

The introduction in any jurisdiction of a plea bargaining mechanism in cartel cases raises a number of important issues for discussion. We have considered a number of these below, with a particular focus on preserving a firm’s right of defence, the interaction of plea bargaining with leniency programmes and the private enforcement of competition law.

### 1. Legal Framework and Policy Issues

#### 1.1 *Benefits and suitability of plea bargains*

We commence with some comparative observations about European and North American processes in antitrust cartel regulation. In the European administrative systems, the agency establishes the facts of the case, determines whether an infringement exists and imposes a penalty (although decisions may be appealed to Courts). North American cartel regulation separates the investigative, prosecution, and adjudication functions, wherein the agency investigates, prosecutors undertake cases, and courts determine ultimate penalties. Prosecution is undertaken under an adversarial litigation model with the agency required to prove its allegations to a high standard, usually expressed as “beyond reasonable doubt.” Trials can be prolonged and may feature factual determinations by juries having no particular experience or knowledge of competition law.

In such processes, there can be substantial systemic and participant benefits arising from plea bargaining. The adversarial prosecution model is particularly well suited to plea bargaining as a mechanism to reduce the overall pressure on scarce judicial (and agency) resources, reducing the number and scope of disputes and associated legal costs, and offering a degree of predictability for the participants. This is amply demonstrated in antitrust cases, where the overwhelming majority of (non-leniency) cases in the U.S. and Canada are resolved without the necessity of a contested proceeding, through the means of a “plea bargain” arrangement.

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<sup>1</sup> Neelie, Kroes, *The First Hundred Days*, Address Before the 40th Anniversary of the Studienvereinigung Kartellrecht (Apr. 7, 2005), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/205&format=PDF&aged=1&language=EN&guiLanguage=en> at 5.

However, BIAC does not believe that it is practical, even if otherwise appropriate, to merely to “transplant” a North American-style “plea bargaining” system within the EU. In addition to the systemic differences referred to above, there are differences in agency processes, such as the EC’s policy of rendering final decisions on leniency and fine-reduction applicants only after extended analysis of corporate statements and cooperation which includes assessments of whether later applicants have provided significant added value to the evidence already in the EC’s possession at the time of the application.<sup>2</sup> These features of EU competition law enforcement should inform any proposal to implement plea bargaining.

However, as a general proposition, BIAC supports the availability of plea bargaining in cartel cases. From the EU perspective, firms should be free to distance themselves from earlier misguided action, rather than engaging in a protracted investigation to determine facts to which the defendant firm is willing to admit. This is subject to the need to ensure that any plea bargaining system adequately addresses the issues raised in this response.

## 1.2 *Preserving the rights of defence*

The successful prosecution of cartel cases places a heavy burden on competition authorities. They are expected, with limited resources, to prove to the satisfaction of an appellate body or adjudicative court that a particular firm took part in a cartel, examining any particular aggravating or mitigating factors in arriving at a suitable penalty. As noted above, the adversarial model requires proof to a court of the agency’s allegations beyond reasonable doubt. EU processes require complex factual and economic analysis of behaviour that is, by its nature, covert. EU Competition Commissioner Neelie Kroes, in a recent speech endorsing a possible plea bargaining system at EU-level, admitted that the Commission “*risks becoming the victim of its own cartel-busting success*”<sup>3</sup> if it does not manage the overload from the crackdown on cartels. According to recently published statistics, the Commission is facing a backlog of 167 applications by alleged cartelists seeking reduced penalties or full immunity from fines for disclosing the existence of secret cartels. The Commission is at pains to emphasise that its resources are limited and so, with further leniency applications likely to follow, at some point the Commission will be faced with a reality whereby it either is not able to prosecute all the cartels which are brought to its attention, or alternatively, the cartels are prosecuted after such a lengthy period of time that their proscription is largely meaningless from a business perspective.

Whilst the effective management of a competition authority’s caseload is obviously important to business, plea bargaining should not operate in such a way as to reduce a firm’s inalienable rights of defence. Plea bargaining systems operate on essentially coercive models in which the defendant firm is offered a choice between a lesser sanction and the prospect of a much more severe outcome (which may include individual liability) should the matter not be resolved at an early stage. While it is recognized that defendant firms will often undertake a form of risk analysis in determining whether to cooperate with agencies, plea bargaining must not be used by competition authorities to apply such pressure on a defendant firm to accept a plea bargain that it abandons a potentially successful full or partial defence.

<sup>2</sup> See, generally, Bertus Van Barlingen and Mark Barennes, *The European Commission’s 2002 Leniency Notice in Practice*, Competition Policy Newsletter (Autumn 2005), available at [http://ec.europa.eu/comm/competition/publications/cpn/cpn2005\\_3.pdf](http://ec.europa.eu/comm/competition/publications/cpn/cpn2005_3.pdf) at 6. Also, note that in a memo released Sept. 29, 2006, the EC has outlined certain proposed changes to the Leniency Notice including, *inter alia*, a revised requirement that reduction of fines applicants provide ‘compelling evidence’ in order to be rewarded outside the bands for reduction of fines. See, European Commission, *Public Consultation on Amendment of the Leniency Notice*, (Sept. 29, 2006), available at [http://ec.europa.eu/comm/competition/antitrust/legislation/leniency\\_en.pdf](http://ec.europa.eu/comm/competition/antitrust/legislation/leniency_en.pdf).

<sup>3</sup> Kroes, *supra* note 1 at 4.

Where predictability of result is not certain, the right to appeal the agency's determination should be preserved. It is critical, therefore, that a balance is struck between the agency's need to reduce its caseload through resolutions and coercive measures that could generate unfair results.

A good example of where a plea bargain might usefully be incorporated relates to a global cartel where, for instance, the majority of the illicit collusion took place in the U.S. and where the EU involvement was relatively limited. In such a scenario, the Commission could forego the need to establish fully an infringement in the EU where the ultimate harm may be insignificant, and yet still be seen to police cartels effectively.

From the defendant cartelists' point of view, any reduction in adjudication process will clearly be of benefit, both in terms of reduced advisors' fees during the administrative and appellate stages, reduced interruption to management time and a reduced exposure to negative publicity and thus reputation. Moreover, by engaging in plea bargaining a defendant company may also avoid the need to disclose confidential financial statements and documents, which may have been unearthed during a full investigatory process. There is also, of course, the possibility that the overall penalty to be imposed will be reduced. Indeed, in recent cases, there has been a tendency of the Community Courts not only to uphold the imposition of significant fines on cartelists, but even to *increase* the amount of an overall fine.<sup>4</sup>

### 1.3 *Relationships between criminalisation and plea bargaining*

The EC has expressed the view that reliance solely upon corporate sanctions cannot ensure adequate deterrence and that, depending upon the level of harm to competitors and consumers, individual criminal sanctions would be appropriate provided there is adequate certainty and protection of individual rights.<sup>5</sup> While a discussion of the merits of individual criminal sanctions has already been the subject of another roundtable,<sup>6</sup> BIAC has observed that optimal deterrence for hard-core cartel behaviour is a complex issue. Criminalisation, and particularly individual criminal liability for executives, provides very powerful incentives for self-reporting and case resolution in leniency regimes.

However, BIAC believes that agencies should be cautious in considering and implementing criminalisation. Large discrepancies in applicable penalties among agencies could have serious implications for leniency programs and create uncertainties as to which agency should be the recipient of an application. Plea bargaining could compound these uncertainties.

While obviously individual criminal sanctions can provide incentives for cooperation,<sup>7</sup> incorporation of individual criminal sanctions into a plea bargaining model involves a range of issues, not the least of which is the need to properly coordinate sanctions among multijurisdictional enforcement agencies so as to avoid imposition of unduly punitive and disproportionate penalties. The prospect of extradition of individuals from one jurisdiction to another could entail multiple sequential penalties of imprisonment and

<sup>4</sup> See, Case T-236/01, *Tokai Carbon and others v Commission*.

<sup>5</sup> See, OECD, *Cartels: Sanctions Against Individuals*, DAF/COMP(2004)39 (Jan. 10, 2005), available at <http://www.oecd.org/dataoecd/61/46/34306028.pdf> at 110.

<sup>6</sup> *Id.*

<sup>7</sup> This precept continues to find its high-water mark in the Antitrust Division's enforcement policy. "Nothing is a greater deterrent and nothing is a greater incentive for a cartelists, once exposed, to cooperate in the investigation of his co-conspirators than the threat of substantial incarceration in a U.S. prison." Thomas O. Barnett, *Criminal Enforcement Of Antitrust Laws: The U.S. Model*, Address Before the Fordham Competition Law Institute's Annual Conference on Competition Law and Policy (Sept. 14, 2006), available at <http://www.usdoj.gov/atr/public/speeches/218336.pdf> at 3.

the prospect of “piling on” of overly punitive measures. Further, agencies may have differing views as to the extent to which individuals may be “carved out” or excluded from defendant firm plea arrangements, leading to misalignments of enforcement policies and impacting upon incentives for defendant firms and individuals to approach agencies.

#### **1.4 Providing appropriate incentives and preventing discrimination**

Coupled with the concern that a competition authority might seek to exert inappropriate pressure on a firm to accept a plea bargain, there is a risk that firms agreeing to plea bargains will be vulnerable to discriminatory treatment by competition authorities if measures are not introduced to ensure transparency and consistency.

These are key elements of both leniency regimes and successful plea bargaining systems. The arsenal of “carrots and sticks” available to the agency should be publicly pronounced to enable firms to make an informed decision on cooperation.<sup>8</sup> In general terms, there should be greater incentives for the defendant firm following the leniency applicant than for those who resolve their cases later in the process. Where individual criminal sanctions may apply, policies of the agency as to the circumstances under which executives would be eligible for coverage under the defendant firm’s plea arrangement should be spelled out.

The likely terms of a particular plea bargain, whether it relates to a requirement that a firm publicly admit guilt or the size of any financial penalty, could (in the absence of any restraining measures) be unduly influenced by, for example, the negotiating strength of the defendant firm. In an extreme case, a large firm that acted as a cartel’s “ringleader” might receive a lower penalty than a small firm with only fringe involvement in the cartel in circumstances where both have engaged in plea bargaining. However, discrimination might be more subtle in practice. If case resolutions remain confidential, competition authorities may not offer similar plea bargains over time in comparable circumstances, seeking comfort from the fact that the terms of such bargains would not enter the public domain. In the adjudicative North American system, defendant firms are normally required to make a public admission of participation in the offence and the terms of resolution are publicly available for other participants. This works to the benefit of both agencies and participants as the agency is thereby able to demonstrate the increasingly punitive results of failures to cooperate while other defendant firms may be able to make a better informed decision on cooperation on the instant or future cases.

To avoid such discrimination, a plea bargaining system should be based on clear and published guidelines, outlining the principles that will be followed by the competition authority in concluding a plea bargain with a cartel participant (including, for example, details of which types of case are and are not considered suitable candidates for plea bargaining,<sup>9</sup> the extent of admission of guilt required by the firm in question, guidance on how the reduction in fines will be calculated, etc.). Where published fining guidelines exist in the particular jurisdiction, these should be adequately reflected in the plea bargaining guidelines, which should indicate (preferably by reference to percentage figures) the likely reduction to any financial penalty, and the circumstances in which the competition authority will consider arriving at a different form of bargain (e.g. an agreement to maintain confidentiality or a further reduction of penalty

<sup>8</sup> For example, the Japanese Fair Trade Commission sets discounting levels for firms that are second and following to the leniency process. See, Akinori Uesugi, *A Leniency Program a la Japonnaise: How It is Going to be Enforced*, Address Before the Fifth Annual Fall Forum, Section of Antitrust Law, American Bar Association (Nov. 16, 2005), available at [http://www.jftc.go.jp/e-page/policyupdates/speeches/051116uesugi\\_aba.pdf](http://www.jftc.go.jp/e-page/policyupdates/speeches/051116uesugi_aba.pdf) at 8.

<sup>9</sup> In this regard, BIAC has already expressed its cautions that cartel enforcement not be so over-inclusive as to capture complex business arrangements that are not clearly unlawful. See, OECD, *supra* note 5 at 110.

where the defendant firm co-operates with the authority).<sup>10</sup> It is particularly important in regimes having prosecutorial discretion that guidelines reflect practices both of the agency and the prosecution authority. Just as in leniency regimes, limitations upon prosecutorial discretion are key in ensuring predictability of the process.<sup>11</sup> Transparency will increase certainty for defendant firms of the likely terms of a plea bargain, and ensure consistency as between participants in the same cartel, and between defendants in general over time.

### 1.5 *Plea bargaining and leniency*

Plea bargaining should not be made so attractive that cartel members take positive comfort in the possibility of concluding a favourable bargain, to the detriment of existing leniency programmes. On September 29, 2006, both the European Commission's draft revised leniency notice and the European Competition Network's (ECN) "model leniency programme" were published.<sup>12</sup> Whilst neither document introduces a comprehensive "one stop shop" for leniency in the EU, it does make multi-jurisdictional applications for leniency easier, as multiple leniency applications can be submitted to different competition authorities in near-identical form. Thus far, the EC's leniency policy has been highly successful. However, in the event that plea bargaining becomes an attractive proposition to cartel members, the number of applications for leniency may fall, with the consequence that certain cartel behaviour remains covert. This is not to say that plea bargaining and leniency programmes cannot co-exist – the U.S. model incorporates both – but it needs to be made clear how the two interact. BIAC would also point out that introduction of criminalisation, and particular the threat of imprisonment as a mechanism to induce parties to cooperate in a plea bargaining system, could actually lead to fewer cases being brought forward and a reduction in the agency's level of success, due to the higher standards of proof which are typically associated with any deprivation of an individual's rights.<sup>13</sup>

There is also a clear overlap between plea bargaining and leniency applications as regards co-operation with the competition authority. Leniency systems generally require the cartel member to co-operate fully with the competition authority in providing useful evidence about the cartel generally, to enable the authority to reach an infringement decision. Depending on its structure, the plea bargaining system may also require the cartel member's co-operation in a similar manner. This is particularly relevant in situations where 100% immunity from fines has already been awarded to one firm, and the other members of the cartel are considering their options. They may apply for a lower level of immunity via the leniency programme, may seek to conclude a plea bargain with the competition authority, or both. The options available to them must be made clear.

## 2. *Plea Agreements and Courts*

Plea bargaining may operate in both an administrative and judicial context. Cartel behaviour is not only subject to investigation by competition authorities, but plaintiffs may be able to bring stand-alone

<sup>10</sup> Canada's Competition Bureau is currently engaged in a public consultation process upon its immunity program which was proclaimed in 2000. Among the questions under consideration is whether a formal partial leniency program should be introduced. The consultation paper is available at <http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=2022&lg=e>.

<sup>11</sup> In the Antitrust Division's leniency practice, prosecutorial discretion is formally suppressed. See, Scott Hammond, *Fighting Cartels- Why and How? Lessons Common to Detecting and Deterring Cartel Activity*, Address Before the 3<sup>rd</sup> Nordic Competition Policy Conference (Sept. 12, 2000), available at <http://www.usdoj.gov/atr/public/speeches/6487.pdf> at 7.

<sup>12</sup> See, European Commission, *supra* note 2.

<sup>13</sup> See, OECD, *supra* note 5 at 21.

actions in national courts. In both cases, it is important to consider (i) whether the terms of a plea bargain are open to appeal to a higher body and (ii) whether the conclusion of a plea bargain is itself subject to judicial scrutiny.

BIAC does not consider that plea bargains should necessarily be open to appeal, as the nature of a settlement is such that it represents the results of negotiation by the parties. Certainty of results operates as a powerful incentive for firms considering cooperation with agencies must be considered uppermost in any firm's risk assessment process. However, it is important that some level of judicial scrutiny is imposed (similar to the U.S. system, where the bargain is linked to a guilty plea and the whole procedure is subject to judicial scrutiny), to ensure that the plea bargain is concluded in accordance with the competition authority's published guidelines and that no undue pressure has been brought to bear on the cartel member in accepting the bargain. Guidelines should also establish whether a plea bargain concluded in a national court is subject to scrutiny by a higher court, or whether plea bargains concluded in a judicial (rather than administrative) context are considered sufficiently robust to not require a further review. In the North American context, statutory and jurisprudential restraints give cooperating parties a high degree of certainty that judicial scrutiny will not be such as to impair the terms of the negotiated arrangement<sup>14</sup> while enabling a public process. In any event, the chosen system must have sufficient integrity to avoid any impression of "private justice."

### 3. Plea Agreements / Settlements and Private Litigation

It is clear that there are many potential downsides for a defendant in entering into a plea bargain. Consequently, the defendant will need to be offered a substantial carrot, in the form of either the lack of a finding of guilt, or significantly reduced fines, if the incentive-based system is to function. In EU cases, assuming that the Commission will not wish to forego the possibility of third parties seeking damages on the basis of a plea-bargain, a defendant will need to be convinced that a plea-bargain is sufficiently attractive that he should forego his rights of defence and, importantly, the right to appeal the ultimate decision. This may only come in the form of a significant reduction in fines – again it is questionable whether the Commission will be prepared to stomach such a scenario when faced with defendants which it considers have committed one of the most egregious forms of competition law violations.

Also, as noted above, making plea bargaining an attractive option could have the effect of reducing the number of leniency applications, which may in turn have a knock-on effect on the number of follow-on actions brought by private claimants (particularly in those jurisdictions which allow a private claimant to rely on the facts established in the administration decision). Whether or not the terms of the bargain involve an admission of guilt (a subject that would need to be covered by published guidelines) will also have an obvious effect on the number of claims. In North American leniency regimes, plea-bargained cases typically involve an public admission of guilt which may lead private litigants to pursue civil proceedings against the defendant firms.<sup>15</sup>

The conclusion of an agreement with a competition authority (whether by way of an application for leniency, or by way of plea bargaining) does not protect the cartel member from a potentially significant number of private claims. Indeed, it risks exposing it to more. Some consideration has been given recently to the interaction between leniency applications and private enforcement, for example by the European

<sup>14</sup> See, generally, Graham Reynolds, *Contrasting Canadian and U.S. Plea Practices in Antitrust Cases*, The Antitrust Source (Mar. 2006), available at <http://www.abanet.org/antitrust/at-source/06/03/Mar06-Reynolds3=23f.pdf>.

<sup>15</sup> Section 36 of Canada's Competition Act, for example, allows private litigants to file civil proceedings and rely upon the 'record of proceedings' in the related criminal case. To date, substantial settlements for Canadian private claimants have followed the resolutions of the criminal cases.

Commission in its recent Green Paper on private actions for damages. The Commission attempts to strike a balance between encouraging firms to apply for leniency, and not inhibiting private claimants from recovering damages clearly attributable to anti-competitive conduct. The Green Paper invites comments on whether leniency applications should be kept confidential, whether some form of conditional rebate might be introduced in respect of any private claim brought against the leniency applicant, and whether it is appropriate to remove the cartel member's joint liability, limiting the leniency applicant's liability to the share of the damages corresponding to the applicant's share in the cartelised market. These options (and others) merit discussion in the context of plea bargains, as a similar balance must be struck between encouraging firms to reach bargains with competition authorities, and recognising the importance of private enforcement as a means for aggrieved individuals and businesses to recoup any losses they have suffered.



## SUMMARY OF DISCUSSION

The Chair opened the roundtable and invited Mr. Scott Hammond, Deputy Assistant Attorney General for Criminal Enforcement at the U.S. Department of Justice Antitrust Division, and Mr. Gary Spratling, a private practitioner who frequently represents private parties in cartel investigations, to present their views on the use of plea agreements in U.S. anti-cartel enforcement.

Mr. Hammond began his presentation by emphasizing that in the United States, plea agreements in cartel cases were viewed as beneficial by the government, the courts, the defendants, the victims, and the public. Although the concept of "plea bargaining" had a negative connotation because it sounded like justice was bargained away, these concerns did not apply in cartel cases: there were no lesser offences included in the cartel offence that could be bargained for, there were no charge bargains, and defendants were well represented and well informed before they waived certain rights. Mr. Hammond also pointed out that there was no longer an international debate about whether competition authorities should be able to reward cooperation by private parties in cartel investigations by reducing sanctions. The use of leniency programs was widely accepted. Today the question was how competition authorities should deal with a second or third party willing to provide timely cooperation.

Mr. Hammond next explained that while leniency programs had become the principal tool for discovering cartels, plea agreements have become a particularly important instrument for the investigation and prosecution of cartels. Over 90% of defendants charged in cartel cases were willing to admit their guilt and to enter into a plea agreement; 90% of these cases were settled before a formal indictment was returned by a grand jury. Transparency was key to encourage cooperation. Cartel members should be able to predict with a high degree of certainty the benefits of cooperation and the likely consequences if they did not cooperate. This included in the first place the ability to predict the likely sentence if the defendant was convicted without reward for cooperation. The Sentencing Guidelines made it possible for defendants to predict likely sentences. Second, parties should be aware that full immunity was available for the first to cooperate. And third, they should be aware of the rewards for cooperation if timely cooperation was provided but amnesty was not available.

As regards the benefits for the second or third party cooperating with an investigation, there was less global convergence, both with respect to applicable programs and the degree of transparency. Some jurisdictions included these parties in their leniency programs. Some countries provided fixed percentage discounts, and there were differences as to whether the starting point of the initial fine could be determined. In the U.S. experience, it was necessary to preserve flexibility as the value of cooperation of the second party could vary significantly from case to case. Therefore the United States used a discount range for second/third parties to cooperate and not fixed discounts.

The model plea agreements used by the Antitrust Division required the defendant to admit guilt. *Nolo contendere* (no contest) pleas were in principle possible in federal criminal cases, but they were not acceptable to the Antitrust Division. The plea agreements also required full cooperation and the waiver of certain rights. In return, the government would agree not to prosecute certain conduct under applicable criminal statutes, although tax and securities violations as well as acts of violence were not covered by this promise. Plea agreements had to be accepted by courts which also are responsible for imposing sanctions. Courts, however, were prohibited from participating in plea negotiations.

In concluding, Mr. Hammond summarized several benefits of a system of plea agreements. He emphasized the importance of maintaining proportionality with respect to other members of the same cartel and also across different cartel cases. Certainty and finality were also valuable advantages of plea agreements. An important instrument to obtain certainty and finality was the use of so-called “C agreements.” When “C agreements” were used, a court was free to either accept or reject a plea agreement, but if the court accepted the agreement the sentencing recommendation was binding and the court could not impose a different sentence. In the last 20 years, in 99 % of the cases courts had accepted plea agreements. Expediency and conservation of resources were also important advantages. For example, plea agreements could be entered in the course of an investigation, and the government would not wait until the end of an investigation before offering plea agreements.

Mr. Spratling first described the situation of a company that realized that it was facing international cartel exposure. He explained that in this situation, a company would have to quickly make *the* decision; this was the decision whether to self-report in order to obtain amnesty or immunity or, if amnesty or immunity is unavailable, admit guilt and cooperate with the government in the hope of winning lenient treatment, or to elect a non-cooperation strategy. The first step was predicting the potential exposure to sanctions, such as the likely and maximum exposure to sanctions in jurisdictions around the world, for the corporation as well as executives, including criminal sanctions, administrative fines, restitution, possible probation, possible court monitoring and supervision. The second step was exploring and evaluating the opportunities to avoid or mitigate sanctions.

The manner in which the various jurisdictions offered benefits for subsequent cooperating parties was one of the largest differences in the enforcement of cartel laws. Some jurisdictions included the treatment of subsequent cooperating parties in an extended leniency policy. In other jurisdictions such as the United States and Canada, the treatment of subsequent cooperating parties was pursuant to announced policies, but the penalties were negotiated between the enforcement authority and the defendant and finalized in a plea agreement. Counsel and companies favoured the plea agreement system which provided a number of important benefits.

Mr. Spratling then discussed eight benefits of a plea agreement system from a defendant's perspective. The first such benefit was autonomy. There was a sense for the defendant of being informed, of having greater confidence in the analysis of the decision, and of actively participating in determining the disposition. Even though in reality the enforcement authority had the power to pursue the case, the defendant would feel greater comfort in these proceedings and therefore was more likely to join the proceedings that lead to a disposition in the case.

A closely related benefit was predictability, which included both transparency and proportionality. When recommending to a client that it cooperate with the government, counsel had to answer tough questions by in-house lawyers, the executives, and the board of directors. They all wanted to know the scope of the charges, likely fine, and exposure of individuals. In this situation, counsel would benefit from a transparent system which created a public record against which she could evaluate what the jurisdiction has done before in similar situations and project the likely outcome. The principle of proportionality further enhanced the ability to predict likely outcomes. By way of contrast, protocols or guidelines for reductions of fines, whether they provided for specific percentages or ranges of percentages, may still allow much discretion on the part of the enforcement authority and create uncertainty as to the starting point of calculation from where the percentage reductions apply. Such a lack of predictability was a disincentive for corporations to cooperate.

The third advantage was negotiability, which allowed a defence attorney to bargain for a better deal. Of course any concession by the enforcement authority had the flip side of a greater amount of cooperation demanded from the pleading party. But in plea negotiations, counsel could seek to obtain various benefits

in return for cooperation. A fourth benefit was "optimality," which should refer to certain benefits that may be obtainable only through plea agreements. For example, in the United States, foreign individuals who agreed to accept responsibility, admit guilt, serve prison time in the United States, may nevertheless obtain written assurances that their conviction would not be used to detain or deport them later. Such a benefit was obtainable *only* through a plea agreement.

The next benefit was efficacy, which referred to efficient, economic and effective outcomes. Plea agreements were efficient since they avoided pre-trial litigation, trial and appeals. Plea agreements were economical for the defendant, in that they avoided the cost of litigation and of defending a matter through an enforcement procedure. Plea agreements were also effective in that they dispose of a matter once and for all. Obtaining certainty was another important benefit. Once it entered into a plea agreement, the defendant knew exactly what was going to happen to it. It knew what the enforcement authority was going to recommend to the court, and that in ninety-nine percent of the cases the court would impose the recommended sentence. As Scott Hammond had pointed out, cooperating parties would come forward in direct proportion to the certainty and predictability of their treatment following cooperation.

The seventh benefit was expediency. The pace of investigations and prosecutions was greatly expedited and the defendants moved swiftly to resolve their exposure, to deal with the sanctions and to put the matter behind them. The eighth benefit was finality. It could not be overstated how important finality was to defendants, the ability to bring to an end all of the corporate and individual uncertainty, anxiety and disruption of life that are attendant to government proceedings. All defendants wanted finality sooner rather than later.

Combining the benefits of plea agreements discussed in Mr. Hammond's paper and those just described from the defence perspective would explain why many observers of the U.S. system refer to plea agreements as a mutuality of beneficial outcomes. It would also explain why well over 90 percent of all cartel matters were resolved by plea agreements.

The Chair invited delegates to comment on the two presentations. Italy asked when and how cartel members typically found out about a pending cartel investigation. Mr. Hammond explained that companies may know about a cartel because they are the first to discover cartel conduct internally, or when an investigation begins and subpoenas were issued. When contacting the Antitrust Division, companies always wanted to know in the first place whether leniency was available. If not, some companies could seek plea negotiations on the next day; the Division was always willing to enter into negotiations without delay. Thus, there could be a seriatim sequence of plea agreements. Mr. Spratling added that the most common ways for parties to find out about cartels in the United States were compliance programs, tips from outsiders or individuals who resigned because they resisted orders to participate in a cartel; or external events such as an FBI investigation or dawn raid by the European Commission. The way in which cartel exposure was discovered had a critical impact on a company's reaction. In certain cases decisions about how to proceed had to be taken within a day.

South Africa asked the speakers whether plea negotiations could break down and whether statements during negotiations were protected in further proceedings. Scott Hammond explained that plea negotiations could break down on occasion, although they could sometimes start up again. Statements of a cartel member could not be used by the Division if plea negotiations broke down.

Canada asked how the government could promise a company willing to cooperate certain benefits early in the process before the value of its cooperation was clearly known. Mr. Hammond confirmed that it could be difficult to estimate early in the process the value of cooperation before the company was willing to fully disclose all of its cards. It was therefore very important to establish a public record of its settlement practice, for example by publishing settlement agreements and public speeches. In practice, the

government would expect the party to submit a hypothetical proffer outlining the nature of its cooperation. Sometimes the government may also insist on interviews with individuals. Any statements during such interviews would not be used against the individual, except for impeaching subsequent inconsistent testimony. Building good faith was crucial for both sides: the government had to develop reputation for consistent practice, and counsel should understand not to over-sell their case. Mr. Spratling confirmed that defence counsel should not oversell their case when making a proffer. It was important that the government indicate expressly what deal would be available if everything contained in the proffer was delivered, but that the deal was off the table if the party could not deliver. Mr. Hammond emphasized that there had been no case in which the government went to court to rescind a plea agreement because the party did not deliver.

The European Commission explained that it considered introducing direct settlements for cartel cases when parties admitted liability. Predictability would be provided through the leniency program, the fining guidelines and a regime introduced for direct settlements. There was an issue whether an expanded leniency regime could accommodate direct settlements. Settlements also raised a set of complex problems, such as the multiplicity of agreements with different parties that would be required. Leniency was important at an early stage of the investigation to obtain evidence about a cartel. Direct settlements, on the other hand, were more concerned with the idea of providing predictability, certainty, and accelerated procedures and would be used when the authority was near to bringing formal charges.

The European Commission raised several questions: First, there was a question as regards the degree of proof that would be required to trigger negotiations, in particular if settlements were considered early in the investigation. Another question concerned the reductions available in plea agreements for the second, third and other companies, as these reductions could have an impact on deterrence and leniency. Moreover, under the current practice decisions were directed at all cartel participants. The European Commission also asked about the total time period for the entire process of plea negotiations in cartel cases; and about the nature of the 10% of cases that were not settled.

Mr. Hammond emphasized that expanded leniency programs could be combined with a settlement system. In his view greater publicity through fining guidelines was the right way to increase transparency. As to timing, he explained that every investigation was different. The second company cooperating with the government also could provide useful, valuable and timely information. Negotiations could commence very quickly. During these negotiations the government might provide information about existing evidence to the cooperating company to encourage the company to cooperate and to direct it as to evidence that would be valuable to the government. As regards the level of proof, the government did not have to have sufficient evidence to file formal charges, but would have to know enough to show that there was a probable cause to suspect a criminal offence. The second company could qualify for 20-50% discount off of the bottom of the Guidelines range, depending on a range of factors such as the timing and value of cooperation. The Sentencing Guidelines provided a framework for initial levels of sanctions and available reductions. The 10% of cases that were not settled involved mostly individuals who elected to go to trial. There had been only one case in the last 20 years where a court rejected a jointly recommended sentence in a plea agreement because it considered the discount too generous. In that case, the head of the antitrust division appeared before the court arguing that the court should accept the lesser, negotiated settlement. This sent a strong signal that the Antitrust Division was committed to sentences agreed in a settlement.

Mr. Spratling also suggested that defence counsel would view expanded leniency and settlements not as separated regimes, but as overlapping policies. It was wrong to consider that leniency policy was for undertakings which came in early and plea agreements were for undertakings which cooperated later. Defendants would think about leniency and settlements as complementary regimes where the plea agreement provided an additional incentive to cooperate.

The United Kingdom raised a question about the interaction between public enforcement and private enforcement. Settlements could be difficult to achieve because parties would be concerned about follow-on private actions. It appeared that in the United States the likelihood of private actions was not an impediment to reaching plea agreements with the government.

Mr. Spratling explained that a plea agreement constituted prima facie evidence of guilt in a follow-on private suit, and only the question of damages was litigated in these cases. Plaintiffs reacted not only to plea agreements, but also to information in securities reporting forms, announcements of government investigation, or reports by a company executive of negotiations with the government. In one specific case the mere fact of a grand jury investigation triggered over 90 private law suits. Even though no criminal charges were brought, the private suits continued and were eventually settled. The likelihood of civil litigation was always discussed at the board level, but would not ultimately determine what action a company would take. Civil liability would be an issue in any event. It could be mitigated, for example because amnesty applicants were exposed only to single damages, but also because defendants who cooperated early with private plaintiffs would receive favourable deals.

Mr. Hammond emphasized that a plea agreement system typically worked in favour of victims of a cartel. However, in one respect plea agreements benefited defendants: plea agreements included a limited factual basis with respect to the defendant's involvement in the cartel. Not all facts were laid out in the public record, only sufficient facts to justify the plea agreement. In that sense, there was an incentive for defendants to enter into plea agreements.

Italy asked what cooperation would mean in a specific case. In particular, would simply accepting all charges, without providing additional cooperation, be sufficient to qualify for a plea agreements and some reduction of fines?

Mr. Hammond commented that a defendant who simply wanted to accept responsibility without further cooperation would have to wait until the end of the investigation when formal charges were brought. He explained that a plea only would result in very minor reduction under the Sentencing Guidelines. There have not been many plea agreements without cooperation. Less than 5% of the plea agreements in the US did not involve some component of co-operation.

BIAC outlined the North American experience where the system was based on criminalization with individual sanctions and an adversarial system with court litigation. Fully litigated cases were long, unpredictable and involved considerable resources. Plea bargaining systems in the North American environment operated based on a "coercive" model. Positive characteristics of the model were enhanced credibility, a high degree of predictability, judicial scrutiny, and transparency. There were also downsides to the adaptation of plea bargaining models. Agencies might overreach as part of this process and might threaten or might be able to obtain more severe sanctions than they could in a fully litigated process. Second, the widespread use of individual criminal sanctions in the plea bargaining system represented another layer of complexity; this could lead to piling on of harsh sanctions, particularly for individuals, which could in turn impact the incentives for cross-border cooperation.

BIAC emphasized that the North American model could not be directly introduced in Europe. Nevertheless, BIAC would welcome plea bargaining in cartel cases in Europe for several reasons. First, it allowed firms to put cases behind them. Second, competition authorities should be able to efficiently process more cases and avoid lengthy procedures. On the other hand, defendants would have to be offered benefits like reduced fines or not being required to admit guilt. It would also be important to protect rights of defence and ensure consistent treatment and transparency. It would be important to build up predictability through consistent settlement practice. Cases would have to be settled early in the process,

ideally before a full statement of objections was issued. In addition, necessary proof would be a key element of the system. Transparency built into a settlement system should also assist private litigants.

The Chair asked New Zealand to provide an overview of its newly developed process for the settlement of cartel cases. New Zealand explained that it had adopted a three stage process. In the proposal stage, parties were required to submit witness statements as to all matters in the defendant's knowledge, provide undiscovered documents, propose penalties, and explain circumstances that should be taken into account. During the assessment phase, commission staff and external counsel work through available material to assess whether the materials were adequate and satisfactory. If the materials were considered sufficient, a draft cooperation agreement and a draft agreed statement of facts were drawn up. In the recommendation phase, staff recommended to the Commission a settlement offer. The Commission could always reject the cooperation agreement.

The process was highly formalized in light of New Zealand's experience when it introduced a leniency program and settlements approximately two years ago. Then, a large number of applicants was willing to come in and cooperate with the Commission. But there was too much uncertainty about requirements under the leniency policy and therefore the policy was not easy to implement. There was also uncertainty among staff about what the Commission would require for accepting proposed settlements. In particular individuals were reluctant to cooperate in light of the uncertainty. Under the current, more detailed approach all parties knew in advance what was required from them. This has helped to Commission to put a large number of cases on a fast track. 25 cartel cases were currently under investigation and approximately 20 plea negotiations were ongoing. In the first cooperation case that was brought before the court, the Commission was instructed to advise the court in the future of the basis on which it had reached the settlement agreement and a recommended sentence. The courts were in particular concerned when sanctions for individuals were recommended. In a more recent case which was heard by the same judge that had heard the first case, the court accepted the recommended sentences as he was satisfied with the information provided. In a recent workshop the Commission had received positive feedback and the perception was that the process was working well.

The Chair next turned to the question as to how principles of equality and parity could affect settlement negotiations with multiple defendants. Australia discussed the effects of the parity principle on its settlement practice. As in New Zealand, courts were central to the settlement of cases. Although Australia had not adopted formal guidelines, the courts had given clear directions for the setting of penalties in settlement agreements. Courts required that in settlements with multiple defendants, the sanctions imposed on other defendants had to be taken into account. In many cases, there was a mix of cooperating defendants who settle and non-cooperating defendants who go to full trial. In a number of cases problems had emerged when courts used the parity principle to transfer discounts granted in settlement agreements to the sanctions sought for non-cooperating parties, thus reducing the sanctions for the more culpable. A number of judges more recently had made clear that the parity principle did not apply in this situation. The ACCC recognized that penalty submissions to courts must be clear with respect to the reasons for discounts, which increased transparency in the proceedings.

On the same issue of equality and fair treatment, Germany emphasized that equal treatment was an important constitutional right, although cooperation with the agency was a justification for different treatment. Equal treatment in settlement agreements was important from the parties' point of view, in particular in cases without leniency applications. Germany mentioned the insurance cartel case as an example: During the Bundeskartellamt's negotiations of settlement agreements, all the defendants attended joint meetings and discussed their strategy before the Bundeskartellamt; from the defendant's point of view, the most important factor determining whether to accept a proposed settlement was the perception that all companies were treated equally.

In response to a question by the Chair, France explained that in its practice it was not necessary that all parties under investigation were willing to settle a case. A settlement procedure before the Conseil de la concurrence had been introduced in 2001. It was properly called no contest procedure and not settlement procedure. The rapporteur before the Conseil and the cooperating party or parties would discuss a draft agreement. This draft agreement, however, would not bind the Conseil. The Conseil would ultimately decide the case and could impose a sanction other than the one proposed by the rapporteur. The procedure gave the Conseil a more regulatory role as it could not only impose sanctions, but also accept undertakings concerning future behaviour. Sanctions could be reduced in principle by up to 50% if a defendant was willing to cooperate during the investigation. The procedure could be used even if not all defendants in a case were willing to settle, although it was in the interest of the authority that all defendants were willing to use the non-contestation procedure.

The Chair next turned to the relationship between leniency programs and settlements. The United Kingdom mentioned that its criminal enforcement system, which had been recently introduced, did not recognize plea bargaining. He also mentioned that the OFT was a decision making authority, rather than an investigating or prosecuting authority that had to present the case to a court. The UK system distinguished between three different types of leniency: "Type A" leniency provided full immunity for the first company to disclose a cartel to the competition authority. "Type B" leniency provided for a discretionary reduction of up to 100% for the first company to come forward after an investigation has been commenced. "Type C" leniency provided for up to 50% reduction of fine when investigations had already commenced and the party was not the first to come forward.

In the UK's view, there were conceptual differences between leniency and settlements: Leniency - and plea bargaining in the US context - helped in the investigation and the development of cases, and was used to obtain all the relevant evidence at an early stage of the process. Settlements were a means to achieve an outcome in a more effective way, but they were used only once the authority had a clearer picture about a case. Leniency and settlements were connected as the latter could alter the dynamics of leniency programs by reducing incentives to apply for leniency. There could be adverse effects on Type A and B cases if settlements were used too frequently; but the risk of adverse effects was most obvious on "Type C" cases. Competition authorities could build in safeguards to limit the negative impact on leniency programs. For example, the competition authority could preserve a certain degree of unpredictability by making settlements not generally available and using discretion in deciding whether or not to offer a settlement, depending on case specific circumstances. A second safeguard was to offer lower discounts for settlements than for leniency. Settlement could be a natural progression of "Type C" leniency and the two could be combined.

The UK also discussed the effects of settlements on deterrence. There could be both positive and negative effects on deterrence. The relationship between leniency, settlements, and deterrence was multifaceted and a competition authority had to pursue a delicate balance. Effective deterrence required a track record of strong enforcement and persistent penalty setting. Settlements should not become a soft way out to negotiate away high fines. Second, there would have to be a high likelihood of being caught. Third, it was important to increase the awareness of the consequences of the infringements. Settlements could help to achieve significant cost savings, and the better use of resources should increase the likelihood of detection of more cartels. However, settlements could have a negative impact on the ability to impose high fines. Therefore, it was important to maintain a mix of cases where high fines could be imposed in some cases and settlements could be offered in others.

The Chair asked Ireland to explain its system where three parties participated in settlement procedures. Ireland explained it had recently become the first country in the European Union to obtain a jury conviction in a criminal case and that in the same case the Office of the Director of Public Prosecutions accepted pleas from 16 individuals and corporate defendants. Settlement discussions in the

Irish system are led by the Office of the Director of Public Prosecutions, without direct input by the Competition Authority. The Competition Authority can have some influence in the process, but decisions on settlement are taken finally by the Director of Public Prosecutions. The Competition Authority has developed a very good working relationship with the prosecutor and the Authority's views are entertained by the prosecutor. Another important characteristic of the system is that sentencing is the prerogative of the court and the sentence is not discussed by the court and the parties or between the public prosecutor and the defendant. The prosecutor and defendants can discuss allowing the defendant to plead to a sample of the charges and thereby dropping charges or dropping defendants. Nevertheless, these discussions can be very productive and the system overall works quite well.

Canada explained that its system was similar to the situation in Ireland. The responsibility for settlement negotiations was with the prosecutor, but the competition authority was involved in discussions.

Germany discussed its use of an amicable fine procedure. The Bundeskartellamt has mixed experience with direct settlements and plea bargaining. Settlements were very successfully used mainly during the 1970's, 1980's and 1990's. Since 2000 they were hardly used because with the move of the Bundeskartellamt from Berlin to Bonn and the competence to review Cartel Office decisions moved from the appeals court in Berlin to the appeals court in Duesseldorf. There were remarkable differences in the two courts' approach to sanctions. The court in Berlin had been tough with respect to sanctions, which had provided a strong incentive for companies to settle cases with the competition authority. The court in Duesseldorf, on the other hand, was more lenient with respect to sanctions; it had sometimes substantially reduced sanctions imposed by the Bundeskartellamt, which did not encourage firms to settle. The Berlin appeal court had also in some cases overturned settlements on the grounds that the proposed sentences were too lenient. This experience highlights the importance of consistency between the competition authority's and courts' approaches to settlements.

The Netherlands discussed the procedures it used in the construction cartel case. It emphasized that this had been an exceptional case: Because of the large number of companies involved, the competition authority had to take a series of special measures, including special fining guidelines, a special procedure and a special leniency program. The case also involved political pressure on the companies to come clean. The competition authority was confronted with hundreds of leniency requests and therefore had to design a fast track procedure. In return for participating in an accelerated sanctions procedure, the parties had to give up certain rights including single representation, access to individual files and individual contestation of the legal and factual assessment. Although the limitations of the parties' rights might appear substantial, it should be taken into account that the normal procedure remained available for the companies. Almost 90% of the companies opted for the accelerated procedure. Approximately 10% of the cases continued under the regular procedure. In the competition authority's view, the accelerated procedure had been very successful. It had become apparent that talking about bargaining, negotiation and settlement was a sensitive issue and would likely remain so in the Netherlands. The competition authority expected to use normal investigation and enforcement in the future.

In response to Mr. Spratling's question, the Netherlands explained that it did not use plea agreements in a narrow sense in the construction cartel case. The competition authority had offered a special procedure which companies could agree to follow, but there were no individual agreements between the authority and the companies.

The next part of the discussion focused on the right of appeal. Canada emphasized that appeals were not a significant matter in competition cases that were settled. There was no competition case where a party launched an appeal after the court had accepted a settlement agreement. The parties were considered to have waived their right of appeal once they have agreed to a settlement. If a court disagreed with a settlement agreement, the court of appeal normally would admonish the lower court for not having

accepted the negotiated settlement. In non-competition law cases appeals happened in a few cases. An issue frequently arising in these cases was that the waiver of the right of appeal was not an informed waiver. In competition cases defendants were represented by experienced counsel and therefore this issue would not arise.

Hungary asked Germany about the decision of the German Supreme Court which suggested that a waiver of the right of appeal could not be accepted in a court procedure before the judgement was adopted. Hungary asked whether the same principle would apply in less formal administrative procedures before the Cartel Office. Germany confirmed that according to the Supreme Court companies may not waive the right of appeal prior to a decision, which is a drawback in settlement negotiations. The Bundeskartellamt had in practice offered an informal agreement pursuant to which the company waived its right of appeal in return for a reduction of sanctions; if the party appealed, the Bundeskartellamt would start the proceeding again and impose a higher fine. But in the end it was for the appeals court to impose a fine. Although the Supreme Court had confirmed that the right of appeal was a constitutional right that could not be waived, it also accepted that there was a practical need for the use of settlement procedures; the supreme court stated that plea bargaining needs a legal framework which only the legislator can provide for. The legislator has proposed a draft legislation in 2006 which would set the legal framework for negotiations in criminal cases which would also cover cartel cases.

The Chair asked Germany whether the defendant could be required to stipulate or to admit various facts that would undermine the likelihood of a successful appeal. Germany replied that the Bundeskartellamt could require the defendants to stipulate certain facts. But if the settlement was appealed, the court would start a new procedure and the previous admissions of facts were not binding in the court procedure.

The Chair next turned to the relationship between settlements and private litigation. South Africa discussed its practice related to guilty pleas. The admission of guilt was not required for settlements as competition law violations were considered by an administrative body. But in order to commence private litigation based on a competition law violation, a decision by the competition tribunal finding a competition law violation was required. If the settlement before the Commission was without admission of guilt, the parties needed to go back to the tribunal and prove their case on their own. The Commission's initial approach had been to insist on an admission of guilt, but this had made settlements difficult and sometimes settlements had not been reached. Although there was still a preference for an admission of guilt, the Commission was now more flexible, provided appropriate remedies could be obtained. If the Commission recognized that insisting on an admission of guilt would likely lead to a breakdown of negotiations and force the Commission to litigate a case, other factors would be considered in deciding whether to insist on a guilty plea, such as a termination of the conduct, available agency resources, the strength of the case, the likely precedent and the impact on the industry. The position of the complainant was also important; the Commission was more likely to insist on a guilty plea if the complainant was a small firm and unlikely to proceed with its own case before the tribunal.

Concerning the issue as to whether restitution should be the part of a settlement or should be left to the private litigation system, the United Kingdom explained that in its view restitution should not be a mandatory part of settlements. But it could be beneficial in certain cases, for example when there was a clearly identified class of victims who were unlikely to go to court in order to obtain some form of redress. Requiring restitution was also advantageous if, for example, the defendants wanted to put a final line under their case. To encourage defendants to accept restitution obligations in settlements, competition authorities could consider granting additional reductions in sanctions. Ultimately a balance had to be struck as agency resources should not be unduly spent in lengthy negotiations of restitution obligations. Requiring restitutions could be particularly beneficial in younger enforcement regimes seeking to encourage private enforcement.

Germany agreed that restitution should not be mandatory in settlement agreements, but a competition authority could consider the position of victims. The Bundeskartellamt had recently issued fining guidelines which considered compensation of third parties as a mitigating factor when imposing fines.

Mr. Hammond added that at least in a criminal enforcement system there could be serious concerns about accepting *nolo contendere* pleas because there was a potential of abuse. To the extent *nolo contendere* pleas would be used to settle weak, problematic cases, such cases should not be brought in the first place. If a case could not be proven, it should be closed and not settled with a *nolo* plea. Requiring all companies to enter into settlements was not a useful idea; agencies should adopt a strategy of dividing defendants and use *seriatim* settlements; this created a momentum in favour of the agency, whereas requiring settlements by all parties would put all parties back in the same room and undermine autonomy and finality. Last, Mr. Hammond agreed that settlements should not undermine the effectiveness of leniency programs. But in principle plea agreements should be available in all cases regardless of the seriousness of the offence.

Mr. Spratling added that defence counsel would not view plea agreements and leniency programs as different approaches to the disposition of cases, but rather as complements to maximize the incentive to come forward and cooperate. Responding to the concerns raised by BIAC that plea agreements might allow enforcement authorities to overreach, Mr. Spratling took the opposite view and argued that plea agreements included an element of negotiability. At any time during the negotiation either party could back out and return to the formal enforcement proceedings. The unilateral, formulaic application of guidelines was a much greater concern. There were two great fears for companies considering whether to cooperate: the fear of the unknown; and the fear of arbitrary action by the enforcement authority. Plea agreements could lessen the fear of arbitrary disposition of cases. BIAC replied that arbitrary action of competition authorities was a concern, but agreed with Mr. Spratling that there was no concern about arbitrary actions in the context of plea agreements in North America.

The Chair concluded the discussion by noting the unanimous opinion that settlements could increase efficiency of enforcement efforts in terms of resolving matters more quickly and of using cooperation to build cases. Fairness, proportionality, and parity were concerns which would have to be addressed in the process. A range of obstacles had been identified by various jurisdictions which would have to be worked out before a competition authority can engage in settlement negotiations. The bottom line consensus was that many of these issues can be addressed, for example through transparency and guidelines.

## COMPTE RENDU DE LA DISCUSSION

Le Président ouvre les débats et invite M. Scott Hammond, Sous-procureur général adjoint chargé des affaires criminelles à la Division antitrust du Département de la justice des États-Unis, et M. Gary Spratling, juriste qui représente fréquemment des acteurs privés dans des enquêtes liées aux affaires d'entente, à présenter leurs vues sur le recours aux solutions négociées dans les affaires pénales concernant les ententes aux États-Unis.

M. Hammond note, pour commencer sa présentation, qu'aux États-Unis, les transactions pénales dans les affaires d'entente ont plutôt bonne presse et sont appréciés par le gouvernement, les tribunaux, les défenseurs, les victimes et le public. Malgré les connotations quelque peu négatives que véhicule ce concept, qui évoque un « marchandage » de la justice, ces préventions n'ont pas lieu d'être dans les cas d'entente : il ne s'agit en effet pas de requalifier les actes incriminés en infractions de moindre gravité ou de négocier sur la nature des chefs d'accusation eux-mêmes, et les défenseurs sont bien représentés et bien informés avant de renoncer à certains droits. M. Hammond souligne également qu'il n'y a plus débat au niveau international quant au fait que les autorités de la concurrence doivent pouvoir récompenser des parties privées pour leur coopération dans les enquêtes sur des ententes en réduisant les sanctions qui leur sont imposées. Le recours aux programmes de clémence est largement accepté. La question qui se pose aujourd'hui est de savoir comment les autorités de la concurrence doivent traiter un deuxième ou un troisième acteur prêt à coopérer en temps voulu.

M. Hammond explique ensuite que, si les programmes de clémence sont devenus le principal outil de détection des affaires d'entente, les négociations de peine sont désormais un instrument particulièrement important pour mener l'enquête et les poursuites. Plus de 90 % des défenseurs dans les affaires d'entente sont disposés à reconnaître leur culpabilité et à accepter une solution négociée : 90 % de ces affaires sont traitées avant la transmission de l'acte d'accusation par un grand jury. La transparence est essentielle pour inciter à la coopération. Les participants à l'entente doivent pouvoir prédire avec un bon degré de certitude les avantages qu'ils pourraient retirer de la coopération et à l'inverse les conséquences probables en cas de non coopération. En premier lieu, cela suppose la possibilité de prédire la peine qui serait prononcée si le défendeur était condamné sans bénéficier de clémence pour coopération. Grâce au barème des peines (Sentencing Guidelines) les défenseurs peuvent connaître à l'avance le niveau des pénalités encourues. Deuxièmement, les parties doivent savoir que le premier à coopérer bénéficiera d'une immunité totale. Troisièmement, elles doivent connaître la rétribution que peut leur valoir leur coopération si elle intervient à temps même si l'amnistie n'est pas possible.

S'agissant du bénéfice que peuvent attendre les deuxième et la troisième parties tierces en cas de coopération, les situations diffèrent davantage d'un pays à l'autre, tant au niveau des mécanismes que du degré de transparence. Dans certains systèmes juridiques, ces programmes de clémence peuvent s'étendre aux tiers. Certains pays prévoient un taux fixe de réfaction de la sanction ; et selon les pays, le montant initial de la sanction peut ou non être prédéterminé. D'après l'expérience de ce type de mécanisme aux États-Unis, mieux vaut préserver un certain degré de flexibilité car la « valeur ajoutée » de la coopération d'un tiers peut être très variable d'une affaire à l'autre. C'est pourquoi plutôt qu'un taux fixe, les États-Unis appliquent une fourchette de taux de réfaction de la sanction pour les deuxième et troisième parties tierces qui coopèrent.

Les modèles de négociation de peine utilisés par la Division antitrust supposent que le défendeur reconnaisse sa culpabilité. Ces plaidoyers, dits de *nolo contendere* (non contestation), sont en principe possibles dans les affaires pénales de niveau fédéral mais la Division antitrust ne peut les accepter. Les négociations de peine exigent également une coopération totale et le renoncement à certains droits de la défense. En contrepartie, le gouvernement s'engage à renoncer aux poursuites pénales pour une partie des infractions, mais cette promesse ne peut concerner les infractions fiscales et boursières, non plus que les actes de violence. Le compromis pénal doit être accepté par les tribunaux, auxquels il incombe de prononcer les sanctions. En revanche, les tribunaux ne peuvent pas participer aux négociations pénales.

En conclusion, M. Hammond énumère un certain nombre d'avantages que présente le système des négociations de peine. Il souligne l'importance du maintien de la proportionnalité des sanctions, tant entre les membres d'une même entente qu'entre différentes affaires d'entente. La sécurité juridique et l'irrévocabilité de la décision constituent aussi des avantages importants des négociations de peine. Le recours à une transaction de type C (C Agreement) est un instrument important pour parvenir à cette sécurité et à cette irrévocabilité. Avec ces transactions, le tribunal est libre d'accepter ou de refuser une transaction judiciaire, mais s'il l'accepte, il est tenu de se conformer à la recommandation de sanction et ne peut pas imposer de peine différente. Ces vingt dernières années, les tribunaux ont accepté la transaction dans 99 % des cas. La rapidité de traitement et l'économie de ressources sont d'autres avantages non négligeables. Ainsi, une négociation de peine peut intervenir dans le courant d'une enquête ; le gouvernement n'a pas à attendre la fin de l'enquête pour proposer la transaction.

M. Spratling commence par décrire la situation d'une société qui s'aperçoit qu'elle est en passe d'être mise en cause dans une affaire d'entente internationale. Dans cette situation, explique-t-il, la société va devoir prendre la décision rapidement : doit-elle s'incriminer elle-même pour obtenir l'amnistie ou l'immunité ; si ces possibilités ne s'offrent pas à elle, va-t-elle reconnaître sa culpabilité et coopérer avec les autorités dans l'espoir de bénéficier de clémence, ou va-t-elle opter pour une stratégie de non-coopération ? La première étape consiste à prédire le risque de sanction, c'est-à-dire les sanctions probables et maximales encourues dans différents systèmes judiciaires du monde, par la société et par ses dirigeants, notamment les sanctions pénales, les amendes administratives, les dommages-intérêts, les mises sous probation, le contrôle et la surveillance judiciaires. La deuxième étape est d'explorer et d'évaluer les possibilités qui s'offrent pour éviter ou atténuer les sanctions.

L'une des principales différences que l'on observe dans l'application des lois en matière d'entente tient à la manière dont les différents systèmes judiciaires traitent les acteurs qui acceptent de collaborer avec la justice par la suite. Parfois la clémence s'étend aux autres parties. Dans d'autres pays comme aux États-Unis et au Canada, le traitement des autres parties est conforme aux règles annoncées, mais les pénalités font l'objet d'une négociation entre l'autorité d'application et le défendeur et sont finalisées dans une transaction judiciaire. Les conseillers juridiques comme les entreprises sont favorables au système des négociations de peine, qui présente un certain nombre d'avantages importants.

M. Spratling énumère ensuite huit avantages du système de négociations de peine du point de vue de la défense. Le premier est l'autonomie. Le défendeur a le sentiment d'être informé, de pouvoir davantage se fier à l'analyse de la décision et de participer activement à la détermination de l'arrangement. Même si, en réalité, l'autorité d'application a le pouvoir d'aller jusqu'au procès, le défendeur sera plus à son aise avec un tel dispositif, et il a donc plus de chances de participer à la procédure qui aboutira au règlement de l'affaire.

Autre avantage, étroitement lié au précédent : la prévisibilité, qui suppose à la fois la transparence et la proportionnalité. Avant de recommander à son client de coopérer avec les autorités, l'avocat doit répondre à des questions délicates et pressantes de la part des juristes internes de la société, de ses dirigeants et de son conseil d'administration. Tous veulent savoir quels griefs peuvent leur être reprochés,

quel est le montant probable des amendes encourues, et quel est le risque pour les individus. Dans cette situation, l'avocat a intérêt à ce qu'il existe un système transparent dont les décisions sont publiques et peuvent donc l'aider à évaluer ce qui a été décidé en pareille situation par la juridiction en question et à en déduire l'issue probable de leur affaire. Le principe de proportionnalité améliore encore la capacité à prédire le résultat. En revanche, les protocoles ou les barèmes indicatifs de réfaction des amendes, qu'ils soient présentés sous forme de pourcentage ou de fourchettes de pourcentages, laissent toujours une certaine latitude à l'autorité d'application et constituent une source d'incertitude concernant la base de calcul à laquelle s'applique la réfaction. Ce manque de prévisibilité ne pousse guère les sociétés à coopérer.

Le troisième avantage est la négociabilité : l'avocat de la défense peut transiger afin d'obtenir une solution plus favorable pour son client. Bien sûr, toute concession de l'autorité d'application a pour contrepartie une plus grande coopération de la part de la défense. Mais dans les négociations de peine, l'avocat peut chercher à obtenir différents avantages pour son client en compensation de sa coopération. Le quatrième avantage est l'« optimisation », qui renvoie à certains avantages qui ne peuvent être obtenus qu'avec les négociations de peine. Par exemple aux États-Unis, les ressortissants étrangers qui ont accepté de reconnaître leur responsabilité, d'avouer leur culpabilité et de faire de la prison aux États-Unis, peuvent toutefois obtenir l'assurance écrite que leur condamnation ne sera pas utilisée ultérieurement pour les détenir ou les expulser. Une telle chose peut être obtenue *uniquement* par une transaction judiciaire.

Autre avantage, l'efficacité, c'est-à-dire que l'affaire trouve une issue efficiente, économique et effective. Les transactions judiciaires sont efficaces, car elles évitent la procédure contentieuse préalable au procès, le procès lui-même et le procès en appel. Les négociations de peine sont économiques pour le défendeur, car elles lui évitent d'avoir à supporter les coûts de la procédure contentieuse, ainsi que les coûts liés à la procédure d'exécution. Les négociations de peine sont enfin efficaces, c'est-à-dire que l'affaire est réglée une fois pour toute. La certitude de l'issue est aussi un avantage important. Une fois qu'il conclut une transaction judiciaire, le défendeur sait exactement ce qui va se produire. Il sait ce que l'autorité d'exécution va recommander au tribunal et dans 99 % des cas, le tribunal se conformera à la recommandation en prononçant sa sentence. Comme le soulignait Scott Hammond, la propension des parties à se déclarer sera directement proportionnelle à la certitude et à la prévisibilité de leur traitement si elles coopèrent.

Le septième avantage est la rapidité du règlement. Les délais des enquêtes et des poursuites sont nettement plus brefs et les défendeurs agissent rapidement pour arriver à la résolution du risque, affronter les sanctions et passer à la suite. Le huitième avantage, le dénouement. On ne saurait sous-estimer l'attrait que revêt pour les défendeurs le dénouement de l'affaire, la perspective de mettre un terme à l'incertitude quant aux conséquences pour l'entreprise et pour l'individu, de mettre fin à l'anxiété et aux perturbations de la vie quotidienne associées à une procédure judiciaire. Tous les défendeurs sont désireux d'en finir aussi rapidement que possible.

L'addition des avantages des négociations de peine cités dans par M. Hammond dans sa communication et de ceux qui viennent d'être décrits et qui adoptent le point de vue de la défense explique pourquoi de nombreux observateurs du système américain considèrent ce mécanisme comme avantageux pour toutes les parties. Cela explique aussi pourquoi plus de 90 % de toutes les affaires d'ententes sont résolues de cette manière.

Le Président invite les délégués à faire des commentaires sur ces deux présentations. L'Italie demande à quel moment et dans quelles conditions les parties à des ententes s'aperçoivent qu'une enquête sur leur cas est imminente. M. Hammond explique que les sociétés peuvent avoir connaissance d'une entente en étant les premières à constater une conduite suspecte en interne, ou alors une fois l'enquête lancée, lorsque les citations à comparaître sont reçues. Lorsqu'elle contacte la Division antitrust, une société souhaite

toujours savoir d'emblée si elle peut bénéficier de la clémence. Dans le cas contraire, certaines sociétés peuvent demander de négocier dès le lendemain ; la Division est toujours favorable à l'ouverture des négociations sans délai. Il peut donc y avoir une séquence de plusieurs négociations de peine successives (*seriatim*). M. Spratling ajoute qu'aux États-Unis, lorsque les parties apprennent l'existence d'une entente injustifiable c'est le plus souvent grâce aux programmes de mise en conformité, par des renseignements émanant de personnes extérieures ou d'individus qui ont démissionné pour échapper à un ordre qui leur était donné de participer à une entente ; ou encore suite à des événements extérieurs comme une enquête menée par le FBI ou une perquisition-surprise de la Commission européenne. La manière dont l'intéressé a eu connaissance de son implication dans une entente injustifiable a un impact critique sur la réaction de l'entreprise. Dans certains cas, la marche à suivre doit être décidée en une journée.

L'Afrique du Sud demande aux orateurs s'il peut arriver que les négociations soient rompues et si, dans ce cas, les déclarations faites au cours des négociations sont protégées pour la suite de la procédure. Scott Hammond explique que les négociations peuvent parfois être rompues mais qu'elles peuvent aussi parfois reprendre. Les déclarations faites par un participant à une entente ne peuvent pas être utilisées par la Division si les négociations ont été rompues.

Le Canada demande comment le gouvernement peut promettre à une société désireuse de coopérer qu'elle bénéficiera de certains avantages à un stade aussi précoce de la procédure, alors même que la valeur de cette coopération n'est pas connue avec certitude. M. Hammond convient qu'il peut être difficile d'estimer dès les premiers temps de l'enquête, et avant que la société soit prête à abattre toutes ses cartes, quelle sera la valeur de la coopération. Il est donc très important que soient connues publiquement les pratiques antérieures en matière de règlements, par exemple par la publication des accords de transaction conclus ou par des déclarations publiques. En pratique, le gouvernement pourra demander à la partie de faire une « déclaration conditionnelle » (*hypothetical proffer*) décrivant en termes généraux la nature de sa coopération. Il se peut que le gouvernement exige d'avoir des entretiens avec certaines personnes. Toute déclaration faite durant ces entretiens ne pourra pas être utilisée contre l'individu, sauf pour empêcher un témoignage contradictoire par la suite. Construire la confiance est essentiel de part et d'autre : les pouvoirs publics doivent préserver leur réputation de cohérence dans la pratique, et les conseillers juridiques doivent comprendre jusqu'où il ne faut pas aller trop loin. M. Spratling confirme que la défense ne doit pas « trop en promettre » dans la déclaration conditionnelle. Il est important que le gouvernement fasse savoir expressément tout ce que la défense peut espérer si les promesses sont tenues, mais il doit être clair que la transaction n'aura pas lieu si la défense ne coopère pas comme elle l'a indiqué. M. Hammond souligne qu'il ne s'est jamais produit que le gouvernement annule un règlement négocié parce que la défense n'avait pas apporté la coopération promise.

La Commission européenne explique qu'elle envisage d'instituer la possibilité d'un règlement direct dans les affaires d'ententes lorsque les parties reconnaissent leur culpabilité. La prévisibilité serait apportée par un programme de clémence, un barème des amendes et par l'introduction d'un régime pour le règlement direct. Le problème se pose de savoir si un régime étendu de clémence serait compatible avec le règlement direct. Le règlement pose également un ensemble de problèmes complexes, notamment la multiplicité des accords qu'il faudrait passer avec différentes parties. La clémence est importante à un stade précoce de l'enquête pour obtenir les premiers éléments de preuve concernant une entente. Le règlement direct, en revanche, a davantage pour but d'apporter de la prévisibilité, de la certitude et l'accélération des procédures, et serait utilisé au moment où l'autorité est sur le point de déposer l'acte de mise en accusation.

La Commission européenne pose plusieurs questions : premièrement, quel est le niveau des preuves qui seraient nécessaires pour déclencher les négociations, en particulier si un règlement est envisagé à un stade précoce de l'enquête. Autre question, celle des réfections auxquelles pourraient prétendre dans une transaction judiciaire la deuxième, la troisième et les autres sociétés en cause, sachant que le niveau de ces

réfactions pourrait avoir un impact sur la dissuasion et sur la clémence. De plus, dans la pratique actuelle, les décisions sont applicables à l'ensemble des membres de l'entente injustifiable. La Commission européenne demande également quelle est la durée totale du processus de négociations judiciaires dans un cas d'entente ; elle souhaite en outre avoir des précisions sur la nature des 10 % de cas qui ne font pas l'objet d'un règlement.

M. Hammond souligne que les programmes de clémence élargie peuvent être combinés à un système de règlements. De son point de vue, la publicité, sous la forme d'un barème des peines, est le meilleur moyen d'améliorer la transparence. S'agissant de la durée, il explique que chaque enquête est différente. La deuxième société qui coopère avec le gouvernement peut aussi apporter des informations utiles et valables en temps utile. Les négociations peuvent s'ouvrir très rapidement. Au cours de ces négociations, le gouvernement peut indiquer à la société en question quels éléments sont déjà en sa possession afin de l'encourager à coopérer et de lui faire comprendre quels éléments seraient appréciés. S'agissant du niveau des preuves, le gouvernement n'a pas besoin d'avoir autant d'éléments qu'il en faudrait pour prononcer la mise en accusation, mais doit en savoir assez pour qu'il y ait suspicion d'infraction pénale. La deuxième société peut espérer une réduction de 20 à 50 % du niveau plancher par rapport à l'amende stipulée dans le barème des peines (Sentencing Guidelines), en fonction de différents facteurs comme le moment où est intervenue sa coopération et sa valeur intrinsèque. Le barème des peines offre un cadre pour le niveau initial des sanctions et les réductions possibles. Les 10 % de cas qui ne font pas l'objet d'un règlement concernent essentiellement des individus qui choisissent d'aller jusqu'au procès. En vingt ans, il y a eu un seul cas où un tribunal n'a pas suivi la recommandation conjointe dans le cadre d'une transaction : la Cour avait estimé que la réduction était trop généreuse. Dans cette affaire, le chef de la Division antitrust est venu convaincre le tribunal d'accepter la transaction négociée avec la peine allégée. Par cet acte, il a affirmé clairement que les peines négociées dans le cadre de la transaction avaient valeur d'engagement pour la Division antitrust.

M. Spratling note également que les avocats de la défense considèrent la clémence élargie et le règlement négocié non comme des régimes séparés mais comme des solutions présentant des recoupements partiels. Il est erroné de considérer que la politique de clémence soit réservée aux entreprises qui se sont incriminées à un stade précoce, alors que le règlement négocié serait destiné aux entreprises qui ne coopèrent que plus tard. Les défenseurs voient dans la clémence et le règlement négocié des régimes complémentaires dans lesquels la transaction judiciaire est une incitation supplémentaire à coopérer.

Le Royaume Uni pose une question concernant l'articulation entre l'action pénale et l'action civile. Un règlement peut être difficile à trouver lorsque les parties redoutent qu'il soit suivi d'actions au civil. Il semblerait qu'aux États-Unis, le risque d'actions au civil ne soit pas un obstacle à la conclusion de règlements négociés avec le parquet.

M. Spratling explique qu'un règlement négocié constitue une preuve *prima facie* de culpabilité dans un procès civil subséquent où seul le montant des dommages fait question. Les plaignants agissent non seulement en réaction au règlement négocié, mais aussi suite à des informations contenues dans des documents boursiers, à l'annonce d'une enquête pénale ou à des révélations d'un responsable de la société concernant des négociations avec le parquet. Dans un cas particulier, la simple nouvelle d'une enquête de « grand jury » a déclenché plus de 90 procès civils. Même s'il n'y a aucune inculpation pénale, les procès civils suivent leur cours et finissent par faire l'objet de règlement. Le risque contentieux au civil est toujours examiné au niveau du Conseil d'administration, mais ne détermine pas à terme la décision de la société. La responsabilité civile serait de toute façon un point à considérer. Elle pourrait être atténuée, par exemple parce que les parties qui postulent à l'immunité ne risquent que les dommages simples, mais aussi parce que les défenseurs qui coopèrent dès le début avec les demandeurs bénéficieraient d'un traitement plus favorable.

M. Hammond souligne que le système de règlement négocié sert généralement les intérêts des victimes de l'entente. Mais à un égard toutefois, les négociations de peine bénéficient aux défendeurs : elles posent une limite factuelle à la participation du défendeur à l'entente. En effet, tous les faits ne sont pas versés au dossier public, mais seulement ceux nécessaires pour justifier la solution négociée. En ce sens, cela accroît l'attrait de la transaction judiciaire pour le défendeur.

L'Italie demande ce que signifierait la coopération dans un cas spécifique. En particulier, le simple fait de reconnaître sa culpabilité pour tous les griefs, sans apporter plus de coopération, suffirait-il pour pouvoir prétendre à un règlement négocié et une réfaction des amendes ?

M. Hammond répond qu'un défendeur qui souhaiterait uniquement accepter la responsabilité sans autre coopération devrait attendre la fin de l'enquête que la mise en accusation soit prononcée. Il explique que le seul fait de plaider coupable n'entraîne qu'une très faible réfaction de l'amende d'après de barème des peines. Aux États-Unis, les règlements négociés sans coopération sont très rares. Moins de 5 % des négociations de peine ne s'accompagnent pas de coopération sous une forme ou sous une autre.

Le BIAC revient brièvement sur l'expérience de l'Amérique du Nord, dont le système est fondé sur la pénalisation des sanctions individuelles et sur un système accusatoire avec procédure contentieuse. Un procès en bonne et due forme dure longtemps, son issue est imprévisible et il consomme des ressources considérables. Les systèmes de transaction judiciaire dans le contexte nord-américain fonctionnent suivant un modèle « coercitif ». Les avantages qu'offre ce modèle sont la crédibilité, la prévisibilité, le contrôle judiciaire, et la transparence. L'application des modèles de transaction judiciaire présente aussi des inconvénients. Avec ce processus, le risque est que les autorités frappent trop fort ; elles peuvent menacer d'imposer ou imposer des sanctions plus lourdes que celles auxquelles aurait abouti un procès en bonne et due forme. Deuxièmement, le large recours aux sanctions pénales individuelles dans le système des transactions judiciaires représente une couche supplémentaire de complexité ; cela peut aboutir à un empilement de sanctions sévères, particulièrement pour les individus, ce qui risque d'avoir un impact dissuasif sur la coopération internationale.

Le BIAC souligne que le modèle nord-américain ne pourrait pas être copié tel quel en Europe. Toutefois, le BIAC est favorable à la pratique des négociations de peine dans les cas d'entente, et ce pour plusieurs raisons. D'abord, elles permettent aux entreprises de tirer un trait sur les affaires. Deuxièmement, les autorités de la concurrence pourraient traiter davantage d'affaires et éviter des procédures prolongées. En contrepartie, il faudrait que les défendeurs puissent bénéficier d'avantages comme l'allègement des amendes, ou le fait de ne pas être contraints de reconnaître leur culpabilité. Il serait aussi important de protéger les droits de la défense et de veiller à la cohérence et à la transparence du traitement. Les règlements devraient intervenir à un stade précoce de la procédure, de préférence afin la remise de l'énoncé des objections. En outre, la nécessité de la preuve doit être un élément clé du système. La transparence associée à un système de règlement devrait aussi aider les parties aux procès civils.

Le Président demande à la Nouvelle Zélande de faire un tour d'horizon de sa nouvelle procédure pour le règlement des affaires d'entente. La Nouvelle Zélande explique qu'elle a adopté une procédure en trois étapes. Dans la phase des propositions, les parties sont invités à produire des témoignages concernant tous les aspects dont le défendeur a connaissance, à produire des documents non encore divulgués, à proposer des pénalités, à exposer les circonstances particulières qu'il convient de prendre en considération. Pendant la phase d'évaluation, le personnel de la commission et des avocats extérieurs examinent les éléments disponibles pour évaluer si les documents fournis sont pertinents et satisfaisants. Si les pièces sont jugées suffisantes, un projet d'accord de coopération et un projet de reconnaissance des faits sont établis. Dans la phase de recommandation, le personnel recommande à la Commission une proposition de solution négociée – laquelle peut toujours rejeter l'accord de coopération.

Ce processus est extrêmement formalisé, ce qui s'explique par l'expérience de la Nouvelle Zélande lorsqu'elle avait instauré un programme de clémence et de règlements il y a environ deux ans. Un grand nombre de candidats étaient alors désireux de se faire connaître et de coopérer avec la Commission. Mais il y avait trop d'incertitudes quant aux impératifs de la politique de clémence, et le système a été difficile à mettre en oeuvre. Pour le personnel de la Commission lui-même, il n'était pas évident de déterminer à quelles conditions la Commission envisagerait un règlement négocié. Les individus étaient particulièrement réticents à coopérer face à cette incertitude. Avec le système actuel, beaucoup plus détaillé, toutes les parties savent à l'avance ce qui est attendu d'elles. Cela permet à la commission de régler beaucoup plus d'affaires par la procédure rapide. Vingt-cinq affaires d'ententes font actuellement l'objet d'une enquête et environ vingt négociations de peines sont en cours. Lors de la première affaire de coopération que le tribunal a eu à connaître, il a été demandé à la Commission d'indiquer dorénavant au tribunal sur quelle base elle était parvenue à l'accord de règlement et de recommander une sanction. Les tribunaux étaient préoccupés lorsque des sanctions étaient recommandées contre des individus. Dans une affaire plus récente qui a été traitée par le même juge que la première affaire, le tribunal a accepté les peines recommandées car il était satisfait de l'information fournie. Le système semble bien fonctionner puisque la Commission s'est vue discerner un satisfecit à l'occasion d'un atelier récent.

Le Président passe alors à la question de savoir si les principes d'égalité et de parité risquent d'affecter les négociations de règlement avec plusieurs défendeurs. L'Australie indique quels sont les effets du principe de parité sur sa pratique en matière de règlement. Comme en Nouvelle Zélande, les tribunaux sont au coeur du règlement des affaires. Bien que l'Australie n'ait pas adopté formellement de barème, les tribunaux ont reçu des orientations claires concernant l'établissement des sanctions dans les accords de règlement. Les tribunaux souhaitent que dans le règlement des affaires comptant plusieurs défendeurs, les sanctions imposées aux autres défendeurs soient prises en compte. Or, dans de nombreux cas, il y a à la fois des défendeurs qui négocient un règlement et des défendeurs qui ne coopèrent pas et vont jusqu'au procès en bonne et due forme. A plusieurs reprises, des problèmes se sont posés lorsque des tribunaux, en application du principe de parité, ont appliqué les mêmes réductions accordées dans le cadre des accords aux parties qui n'avaient pas coopéré, aboutissant à une réduction des sanctions pour les plus coupables. Plus récemment, un certain nombre de juges ont indiqué clairement que le principe de parité ne s'appliquait pas dans cette situation. L'ACCC convient que les recommandations aux tribunaux en matière de sanction doivent clairement motiver la réduction, ce qui améliore la transparence de la procédure.

Sur cette même question de l'égalité et de l'équité du traitement, l'Allemagne souligne que l'égalité de traitement est un droit constitutionnel important, même si la coopération avec l'autorité peut justifier un traitement différencié. L'égalité de traitement dans les accords de règlement est importante aux yeux des parties, en particulier dans les affaires où la clémence ne s'applique pas. L'Allemagne cite en exemple une affaire d'entente survenue dans le secteur des assurances : pendant les négociations du Bundeskartellamt en vue des accords de règlement, tous les défendeurs ont participé à des réunions conjointes et ont discuté de leur stratégie avec le Bundeskartellamt ; du point de vue du défendeur, le facteur le plus déterminant pour accepter ou non une proposition de règlement est le sentiment que toutes les sociétés reçoivent un traitement égal.

En réponse à une question du Président, la France explique que d'après son expérience, il n'est pas nécessaire que toutes les parties faisant l'objet d'une enquête soient désireuses de parvenir à un règlement. Une procédure de règlement avec le Conseil de la concurrence a été engagée en 2001. Elle a été à juste titre intitulée « procédure de non contestation », et non procédure de règlement. Le rapporteur au Conseil et la (les) partie(s) qui coopère(nt) examinent un projet d'accord. Mais ce projet d'accord ne lie pas le Conseil. Le Conseil prend alors sa décision finale et peut imposer une sanction différente de celle qu'a proposée le rapporteur. Cette procédure donne au Conseil un rôle plus réglementaire, puisqu'il peut non seulement imposer des sanctions, mais aussi accepter les engagements concernant le comportement futur de l'entreprise. Les sanctions peuvent être réduites en principe jusqu'à 50 % si un défendeur est disposé à

coopérer pendant l'enquête. La procédure peut être utilisée même si tous les défendeurs dans la même affaire n'optent pas pour un règlement, mais il est de l'intérêt de l'autorité de concurrence que tous les défendeurs consentent à la procédure de non contestation.

Le Président s'intéresse alors à la relation entre les programmes de clémence et les règlements. Le Royaume Uni indique que son système pénal, établi récemment, ne reconnaît pas la négociation de peines. Il indique aussi que l'OFT est une autorité décisionnaire, et non une autorité d'enquête ou d'accusation qui présenterait l'affaire devant un tribunal. Le système britannique distingue entre trois types de clémence. La clémence de « type A » accorde l'immunité totale à la première société à divulguer l'existence d'une entente injustifiable à l'autorité de concurrence. La clémence de « type B » prévoit une réfaction discrétionnaire pouvant aller jusqu'à 100 % pour la première société à abattre ses cartes une fois l'enquête lancée. La clémence de « type C » consiste en une réduction pouvant aller jusqu'à 50 % de l'amende accordée à une partie qui se dénonce une fois l'enquête engagée et qui n'est pas la première à le faire.

Aux yeux du Royaume Uni, il existe des différences conceptuelles entre la clémence et les solutions négociées: la clémence – et la négociation de peine, dite « plea bargaining » dans le contexte américain – facilite l'enquête et le déroulement des affaires, et sera utilisée pour obtenir tous les éléments pertinents à un stade précoce de la procédure. Les règlements négociés constituent un moyen de parvenir à une issue de manière plus efficace, mais ils interviennent une fois que l'autorité a déjà une idée assez claire de l'affaire. La clémence et les règlements négociés sont liés, car l'existence de ces derniers peut modifier la dynamique des programmes de clémence en réduisant la motivation à demander la clémence. Les effets seraient peut-être négatifs dans les affaires des « type A » et de « type B » s'il y a trop souvent règlement négocié ; le risque d'incidences négatives est plus fort encore pour les affaires de « type C ». Les autorités de concurrence peuvent prévoir des sauvegardes pour limiter l'impact négatif des solutions négociées sur les programmes de clémence. Par exemple, l'autorité de concurrence peut préserver un certain degré d'imprévisibilité en restreignant l'accès au règlement négocié, et en déterminant de manière discrétionnaire si cette possibilité sera offerte ou non, en fonction des circonstances spécifiques. Une seconde sauvegarde consiste à établir que les règlements permettent des niveaux de réfaction plus faibles que la clémence. Le règlement pourrait alors être un prolongement naturel de la clémence de « type C » et les deux possibilités pourraient être combinées.

Le Royaume Uni examine aussi l'impact des règlements négociés sur l'effet de dissuasion. Cet impact peut être à la fois positif et négatif. La relation entre clémence, règlements négociés et dissuasion comporte de multiples facettes et l'autorité de concurrence doit rechercher un délicat équilibre. L'efficacité de la dissuasion doit s'appuyer sur des antécédents forts d'application et sur la constance dans la fixation des pénalités. Les règlements négociés ne doivent pas devenir un mécanisme flou pour échapper à des amendes élevées grâce à des négociations. Deuxièmement, la probabilité d'être confondu doit être forte. Troisièmement, il est important d'améliorer la sensibilisation aux conséquences des infractions. Les règlements négociés peuvent contribuer à réaliser d'importantes économies de coûts, et la meilleure utilisation des ressources devrait accroître les chances de déceler davantage de cas d'ententes. Toutefois, les règlements peuvent avoir un impact négatif sur la possibilité de prononcer des amendes élevées. Par conséquent, il est souhaitable qu'il continue d'exister des cas où des amendes élevées sont imposées et d'autres où la possibilité est offerte d'un règlement négocié.

Le Président demande à l'Irlande d'expliquer son système, dans lequel les procédures de règlement associent trois parties. **L'Irlande** explique qu'elle est récemment devenue le premier pays de l'Union européenne à obtenir la condamnation par un jury dans une affaire pénale alors que dans cette même affaire, le Bureau du Director of Public Prosecutions a aussi accepté des plaidoyers de 16 défendeurs individus et entreprises. Dans le système irlandais, les discussions en vue d'un règlement négocié sont conduites par Bureau du Director of Public Prosecutions, sans participation directe de l'Autorité de concurrence. L'Autorité de concurrence peut avoir une certaine influence sur le processus, mais au final les

décisions de règlement sont prises par le Director of Public Prosecutions. L'Autorité de concurrence a formé une très bonne relation de travail avec le ministère public et ses vues concernant les décisions sont généralement écoutées par le ministère public. Une autre importante caractéristique du système est que la détermination de la peine est la prérogative du tribunal et n'est pas discutée par les tribunaux et par les parties, ni entre le ministère public et la défense. L'accusation et la défense peuvent discuter ce qui permet à la défense de répondre à certains des chefs d'accusation, de sorte qu'il pourra y avoir abandon de tout ou partie des chefs d'accusation, voire des poursuites. Mais ces discussions peuvent être très productives et le système dans son ensemble fonctionne assez bien.

Le Canada explique que son système est comparable à la situation irlandaise. La responsabilité du règlement des négociations incombe au ministère public, mais l'autorité de concurrence participe aux discussions.

L'Allemagne explique qu'elle recourt à une procédure extra-judiciaire pour l'établissement des amendes. Le Bundeskartellamt a une expérience mitigée en matière de règlement direct et de négociations de peine. Le règlement a été utilisé principalement dans les années 70, 80 et 90. Depuis 2000 ils sont devenus beaucoup plus rares du fait du déménagement du Bundeskartellamt de Berlin à Bonn, et que la compétence de supervision des décisions du Bureau des Cartels est alors passée de la Cour d'appel de Berlin à celle de Düsseldorf. Or, ces deux juridictions ont une approche très différente des sanctions. La Cour d'appel de Berlin a tendance à prononcer des sanctions sévères, ce qui incite fortement les sociétés à rechercher un règlement avec l'autorité de concurrence. La Cour d'appel de Düsseldorf en revanche, montre plus de clémence dans ses sanctions ; il lui est arrivé de réduire considérablement les sanctions imposées par le Bundeskartellamt, ce qui n'incite guère les sociétés à souhaiter un règlement. La Cour d'appel de Berlin a à plusieurs reprises annulé plusieurs règlements négociés au motif que les peines prononcées étaient trop légères. Cette expérience souligne l'importance d'une cohérence entre les approches de l'autorité de concurrence et des tribunaux en matière de règlements.

Le représentant des Pays-Bas présente les procédures utilisées dans son pays dans une affaire d'entente dans le secteur du bâtiment. Il souligne qu'il s'agissait d'une affaire exceptionnelle : du fait du grand nombre de sociétés impliquées, l'autorité de concurrence a été amenée à prendre une série de décisions spéciales – barème d'amendes spécial, procédure spéciale et programme de clémence spécial. Cette affaire se caractérisait aussi par le fait que des pressions politiques étaient exercées sur les sociétés pour qu'elles reconnaissent les faits. L'autorité de concurrence a reçu plusieurs centaines de demandes de clémence, et a donc dû établir une procédure accélérée. Pour pouvoir bénéficier d'une procédure accélérée de sanction, les parties devaient renoncer à certains droits – représentation individuelle, accès individuel aux dossiers et contestation individuelle de l'évaluation de la forme et du fond. Ces restrictions aux droits des parties peuvent, certes, paraître importantes, mais rappelons que les sociétés pouvaient toujours choisir la procédure normale. Près de 90 % des sociétés ont pourtant opté pour la procédure accélérée. Environ 10 % des dossiers ont suivi la procédure normale. De l'avis de l'autorité de concurrence, la procédure accélérée a très bien fonctionné. Il apparaît que parler de marchandage, de négociation et de règlement est un point sensible aux Pays-Bas et va le demeurer. L'autorité de concurrence pense qu'à l'avenir elle utilisera les procédures normales pour l'enquête et la répression.

En réponse à une question de M. Spratling, les Pays-Bas expliquent que ce n'est pas un système de négociations de peine au sens étroit qui a été utilisé dans l'entente injustifiable du secteur du bâtiment. L'autorité de concurrence a proposé une procédure spéciale que les sociétés pouvaient consentir de suivre, mais il n'y a pas eu d'accords individuels entre l'autorité et les sociétés.

La discussion s'oriente alors sur les droits de recours. Le Canada note que l'appel n'est pas une question essentielle dans les affaires d'atteinte à la concurrence qui font l'objet d'un règlement négocié. Dans aucune de ces affaires l'une des parties n'a fait appel une fois l'accord de règlement accepté par le

tribunal. Les parties sont réputées avoir renoncé à leur droit d'appel une fois qu'elles ont convenu du règlement. Si un tribunal est en désaccord avec un accord de règlement, la Cour d'appel va adresser une remontrance à ce tribunal de rang inférieur pour ne s'être pas conformé au règlement négocié. Il est parfois arrivé, dans des affaires ne concernant pas la concurrence qu'un appel soit interjeté. Le problème qui se pose souvent dans ces cas est que le renoncement au droit d'appel n'était pas « éclairé ». Dans les affaires de concurrence, les défendeurs sont représentés par un conseil juridique expérimenté et cette situation ne se présente pas.

La Hongrie demande à l'Allemagne des précisions sur l'arrêt de la Cour suprême allemande selon lequel le renoncement aux possibilités d'appel ne peut pas être accepté dans une procédure judiciaire avant l'adoption du jugement. La Hongrie demande si le même principe s'appliquerait dans des procédures administratives moins formelles devant le Bundeskartellamt. L'Allemagne confirme que d'après la Cour suprême, les sociétés ne peuvent pas renoncer à leur droit d'appel avant une décision, ce qui constitue un obstacle aux négociations. En pratique, le Bundeskartellamt propose effectivement un accord informel stipulant que la société renonce à son droit d'appel en contrepartie d'une réduction des sanctions ; si la partie faisait appel, le Bundeskartellamt recommencerait la procédure et imposerait une amende plus élevée. Mais à terme il incombait à la Cour d'appel de fixer l'amende. Tout en confirmant que le droit d'appel est un droit constitutionnel auquel il n'est pas possible de renoncer, la Cour suprême reconnaît aussi qu'il existe un besoin pratique de procédures de règlement ; la Cour suprême estime que la négociation de peine nécessite un cadre juridique que seul le législateur peut créer. En 2006, le législateur a introduit un projet de loi qui revient à donner un cadre juridique aux négociations dans les affaires pénales, et s'appliquerait aussi aux affaires d'entente.

Le Président demande à l'Allemagne si le défendeur peut être tenu de déclarer ou de reconnaître différents faits qui compromettraient les chances de succès d'une procédure en appel. L'Allemagne répond que le Bundeskartellamt peut exiger que les défendeurs reconnaissent certains faits. Mais si le règlement négocié faisait l'objet d'un appel, le tribunal engagerait une nouvelle procédure et les déclarations antérieures n'auraient pas de valeur juridique dans la procédure du tribunal.

Le Président oriente alors la discussion sur la relation entre les règlements négociés et l'action au civil. L'Afrique du Sud expose sa pratique concernant le « plaider coupable ». La reconnaissance de culpabilité n'est pas impérative pour qu'il y ait règlement négocié car les violations du droit de la concurrence sont examinées par une instance administrative. Mais pour engager une action au civil sur la base d'une infraction au droit de la concurrence, il faut qu'une décision préalable du Tribunal de la concurrence ait conclu à l'existence de l'infraction. Si le règlement négocié devant la Commission ne s'accompagne pas d'une reconnaissance de culpabilité, les parties doivent retourner devant le tribunal et plaider elles-mêmes leur cause. Initialement, la Commission exigeait une reconnaissance de culpabilité, mais cela rendait difficile, voire impossible, de parvenir à un règlement négocié. Certes, une reconnaissance de culpabilité est préférable, mais la Commission est maintenant plus souple, à condition que des mesures correctives satisfaisantes soient trouvées. Si la Commission reconnaît que le fait d'exiger une reconnaissance de culpabilité risque d'entraîner une rupture des négociations et de contraindre la Commission à poursuivre, d'autres facteurs seront pris en compte pour déterminer s'il faut exiger un plaidoyer coupable – l'engagement à mettre un terme à une conduite, les ressources disponibles de l'agence, la consistance du dossier, le précédent que l'on cherche à établir, et l'impact pour le secteur. La situation du plaignant est également un facteur important ; la Commission aura davantage tendance à exiger un plaidoyer coupable si le plaignant est une petite entreprise ayant peu de chances d'aller jusqu'au bout des poursuites au tribunal.

S'agissant de savoir si les dommages doivent être inclus dans le règlement négocié ou s'ils doivent être cantonnés à l'action au civil, le Royaume-Uni explique que de son point de vue le dédommagement ne doit pas être obligatoire dans le cadre d'un règlement. Mais il peut être souhaitable dans certains cas, par

exemple lorsqu'il y a une classe clairement identifiée de victimes qui a peu de chances de se pourvoir en justice pour obtenir réparation. Le fait d'imposer le versement de dommages est également avantageux si, par exemple, les défendeurs sont désireux de mettre un point final à l'affaire. Pour inciter les défendeurs à accepter les obligations d'indemnisation du règlement négocié, les autorités de concurrence peuvent envisager d'accorder des réductions de peine supplémentaires. A terme il faut trouver un équilibre, car des négociations sur les obligations d'indemnisation entraînent, si elles se prolongent trop, un gaspillage des ressources de l'autorité de concurrence. Imposer des indemnisations peut être particulièrement utile dans les régimes de création récente, afin d'encourager leur mise en œuvre sur le plan du civil.

L'Allemagne convient que l'indemnisation ne doit pas être obligatoire dans les accords de règlement, mais une autorité de concurrence doit prendre en compte la position des victimes. Le Bundeskartellamt a récemment publié un barème des amendes prévoyant que le niveau des sanctions pécuniaires soit réduit lorsque les tiers sont indemnisés.

M. Hammond ajoute que, dans un système accusatoire en tout cas, il peut être très gênant d'accepter les plaidoyers de *nolo contendere* (non contestation des griefs) car il existe un risque d'abus. La tentation existe, en effet, d'utiliser les plaidoyers de *nolo contendere* dans les dossiers mal ficelés qui posent problème. Mais ces affaires ne doivent tout simplement pas être présentées à la justice. Si une affaire ne peut pas être exposée clairement, elle doit être close et certainement pas réglée par un *nolo contendere*. Il n'est pas utile d'obliger toutes les sociétés à rechercher un règlement négocié ; la stratégie des autorités de concurrence doit être de diviser les défendeurs et de recourir à des négociations de peine successives ; cela crée une dynamique favorable à l'autorité de concurrence, alors qu'imposer un règlement pour toutes les parties serait revenu à réunir toutes les parties dans une même pièce, au prix de l'autonomie et de la résolution de l'affaire. Enfin, M. Hammond convient que les négociations de peine ne doivent pas pénaliser l'effectivité des programmes de clémence. Mais en principe un règlement négocié doit être possible dans tous les cas quelle que soit la gravité de l'infraction.

M. Spratling ajoute que les avocats de la défense ne considèrent pas les négociations de peine et les programmes de clémence comme des approches divergentes pour traiter les affaires, mais comme des outils complémentaires pour maximiser l'incitation à témoigner et à coopérer. Revenant sur les questions soulevées par le BIAC, qui redoutait que les négociations de peine ne permettent aux autorités de concurrence de frapper trop fort, M. Spratling est d'avis contraire ; il estime que les négociations de peine introduisent une possibilité de négociation. A tout moment de la négociation l'une des parties peut reculer et revenir à la procédure normale. L'application unilatérale et mécanique de barèmes est une situation beaucoup plus préoccupante. Les deux hantises des sociétés qui hésitent à coopérer sont la peur de l'inconnu, et la peur d'une décision arbitraire de l'autorité d'application. Les négociations de peine permettent d'atténuer la crainte d'un traitement arbitraire des affaires. Le BIAC répond que l'arbitraire des autorités de concurrence est effectivement un souci, mais convient avec M. Spratling qu'en Amérique du Nord, il n'y a pas lieu de craindre une décision arbitraire dans le contexte des négociations de peine.

Le Président conclut cette discussion en notant que les participants reconnaissent de manière unanime les avantages des transactions négociées : elles peuvent améliorer l'efficacité des efforts d'application en permettant une résolution plus rapide des affaires et en utilisant la coopération pour constituer les dossiers. L'équité, la proportionnalité et la parité sont des questions réelles auxquelles il faut apporter des réponses. Les différents pays ont mis en évidence une série d'obstacles qu'il faut résoudre avant qu'une autorité de concurrence ne puisse s'engager dans les négociations de règlement. Mais le consensus est que presque tous ces problèmes peuvent être résolus, notamment grâce à la transparence et aux barèmes de peines.