



DEPARTMENT OF JUSTICE

“Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions”

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Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions

Cartel enforcement has reached unprecedented levels around the world. Busy cartel enforcers with an abundance of cartels to investigate and prosecute are looking for ways to enhance their efficiency and effectiveness. At the same time, cooperating cartel participants are often eager to quickly resolve their liability in multiple jurisdictions. As a result, cartel settlements have become a hot topic for discussion in international competition forums.¹ The European Commission (hereinafter “the Commission”) should be commended for its initiative in recently introducing a settlement procedure.

The Antitrust Division of the U.S. Department of Justice (hereinafter “the Division”) has a long history of settling cartel cases with plea agreements. Over 90 percent of the hundreds of defendants charged with criminal cartel offenses during the last 20 years have admitted to the conduct and entered into plea agreements with the Division. Cartel participants utilize the plea system that is available to all defendants charged with federal crimes. However, some of the provisions used in Division plea agreements are unique to cartel prosecutions. These provisions and the policies behind them are discussed in a Division paper titled, “The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All.”² Rather than retracing these issues, this paper will instead explore the similarities and differences in the ways that cooperation is currently rewarded, how cartel cases are settled in the U.S., and how they are to be settled in the EU as explained in the recent Commission Notice.³ As this paper identifies some similarities and differences between the two systems, some myths will be dispelled and some remaining questions discussed.

The Division’s experience shows that the U.S. system of settling cartel cases through negotiated plea agreements is a “win-win” situation for both the Division and settling cartel members. A third “win” is for the courts that are spared the time and resources of criminal cartel litigation. For cooperating corporate defendants,⁴ there is the obvious benefit of reduced fines, but the U.S. system of negotiated plea agreements can also provide numerous non-monetary benefits to settling corporations, such as

¹ See International Competition Network Cartel Working Group, Cartel Settlements, Report to the ICN Annual Conference Kyoto, Japan (April 2008) (hereinafter “ICN Cartel Settlements Paper”), available at http://www.icn-kyoto.org/documents/materials/Cartel_WG_1.pdf; see also OECD Policy Roundtable on Plea Bargaining (2006), materials available at <http://www.oecd.org/dataoecd/12/36/40080239.pdf>.

² See Scott D. Hammond, The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, address before the OECD Competition Committee, Working Party No. 3 (October 17, 2006) (hereinafter “The U.S. Model of Negotiated Plea Agreements”), available at <http://www.usdoj.gov/atr/public/speeches/219332.pdf>.

³ Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (hereinafter “Commission Notice on Settlements”), Official Journal of the European Union, OJ C 167, 2.3.2008, p. 1, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:167:0001:0006:EN:PDF>; see also Commission settlement documents, available at <http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html>.

⁴ Individuals may also plead guilty in the U.S. and receive substantial benefits for doing so, but this paper will focus solely on the benefits to corporations since the Commission does not prosecute individuals.

transparency and certainty as to how a company will be treated if it cooperates, and the opportunity for an expedited disposition that brings finality and allows a company to put the matter behind it. For the Division, settlement benefits include inducing increased early cooperation, which leads to early insider evidence as well as momentum in Division investigations after settlements become public.⁵ This paper will address these benefits in relation to the Commission's settlement procedure.

An effective cartel settlement system requires sufficient benefits and incentives for both the government and the cartel participant, or else neither will commit to settlement. However, the mere possibility of reduced sanctions usually will not be enough to induce a company to settle; the rewards must be transparent, predictable and certain. To assess settlement gains, a cartel participant 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. To maximize the goals of transparency, enforcers must not only provide explicitly stated standards and policies, but also clear explanations of prosecutorial discretion in applying those standards and policies.

Some current commentators say that a U.S.-style cartel settlement system is unique to a jurisdiction with criminal enforcement and cannot work in an administrative system. Similar comments were expressed years ago when the revised U.S. leniency policy was first discussed abroad. At that time, commentators around the world speculated that leniency programs could not exist in their jurisdictions because of institutional, legal, and cultural differences between the U.S. system and their own. Now, 15 years later, over 40 jurisdictions have leniency policies in place and many of these jurisdictions with a wide variety of legal cultures have drafted their leniency programs based on the U.S. model. Administrative jurisdictions have surmounted some of the same challenges in the leniency context that are now being raised in the settlement context and made U.S.-style leniency programs work to produce astounding results. The goal of this paper is to draw on our mutual experience with leniency, look past criminal versus administrative distinctions, and focus on what can be accomplished through effective cartel settlements.

Similarity: Charges and Justice Are Not Bargained Away

The term “plea bargaining” sometimes carries a negative connotation. Concerns may be based on a commonly held myth that in the U.S. prosecutors bargain away justice by securing agreements that allow defendants to plead guilty to lesser offenses. This myth stems from a misunderstanding of what is actually “bargained” during the U.S. plea process.

The Commission Notice on Settlements is clear that the Commission “does not negotiate the question of the existence of an infringement of Community law and the

⁵ For a full discussion of the benefits of U.S. plea agreements, *see* The U.S. Model of Negotiated Plea Agreements, *supra* note 2, at § VI; for a discussion of the benefits generally of cartel settlements, *see* ICN Cartel Settlements paper, *supra* note 1.

appropriate sanction.”⁶ Contrary to common perceptions, the Division does not negotiate these bases either. In fact, the U.S. Department of Justice has specific policies to ensure that plea agreements entered into by federal prosecutors do not bargain away justice and that they result in transparent, proportional and just dispositions. Department of Justice policies require that when federal prosecutors resolve cases through plea agreements, they should seek a plea to the most serious, readily provable offense.⁷ 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.”⁸ What that means is that Division prosecutors will not drop readily provable charges in exchange for a plea of guilty.

There is also a U.S. Department of Justice policy aimed at ensuring “honesty in sentencing” when plea agreements are reached. This policy requires that before accepting a plea agreement in lieu of taking a case to trial, Department prosecutors must evaluate the probable sentence a defendant would face if convicted of all counts for which the defendant could be charged, versus the sentence to be imposed pursuant to a plea agreement.⁹ 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 with the readily provable facts about the defendant’s history and conduct.¹⁰ This policy also requires that a federal prosecutor must not stand silent while a defendant argues for a sentencing reduction that is not warranted or that the prosecutor does not believe is supported by law or facts.¹¹

The Division will not forego prosecuting or imposing penalties against cartel participants for conduct the Division could already prove. It is important to note, however, that since a plea agreement can be reached in the U.S. prior to the conclusion of an investigation, a settling cartel participant may be in a position to inform the Division of additional evidence of wrongdoing of which the Division was previously unaware. In order to induce and ensure candid and complete cooperation, if a company’s cooperation pursuant to a plea agreement reveals that the suspected conspiracy was broader than had been previously identified – either in terms of the length of the scheme or the products, contracts or commerce affected – then the Division’s practice is not to use that self-

⁶ Commission Notice on Settlements, *supra* note 3, at 1.2.

⁷ 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.

⁸ 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) and § II(C), available at http://www.usdoj.gov/opa/pr/2003/September/03_ag_516.htm.

⁹ 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); see also September 22, 2003 Ashcroft Memo, *supra* note 8.

¹⁰ July 28, 2003 Ashcroft Memo, *supra* note 9, at § II(B).

¹¹ July 28, 2003 Ashcroft Memo, *supra* note 9, at § II(A)(2).

incriminating information in calculating the defendant's sentence.¹² It is not uncommon for a second-in corporate defendant to face a significantly reduced fine due to this practice. The early cooperation may help the Division to prosecute a cartel that is larger in terms of participants, geographic scope, duration or products covered than what would have been prosecuted without the insider evidence and, in the case of an Amnesty-Plus situation, to prosecute additional cartels disclosed by the pleading cartel participant. The Division is essentially rewarding an early pleading cooperator more generously than a later pleading cooperator in the same way that the Commission's leniency program rewards earlier cooperation with a larger reduction in fine.

Similarity: Cooperators Rewarded with Reduced Penalties

Before focusing specifically on the Commission's cartel settlement procedure, it is important to note that currently in both the U.S. and EU, cooperating cartel participants that have lost the race for full immunity from prosecution may still receive a reduced penalty. That means that in both the U.S. and EU, two equally culpable members of the same cartel can receive vastly different penalties based on their early acceptance of responsibility and the timeliness and value of their cooperation.

In the U.S., the Division's Corporate Leniency Program¹³ offers the promise of full immunity – no criminal conviction, no criminal fine, and no jail time for cooperating executives – only to the first company to report a criminal antitrust violation and to meet the other conditions of the Program. A company and its culpable executives that lose the race for full immunity under the Division's Leniency Program may face substantial penalties, including corporations paying stiff fines and culpable executives going to jail for up to ten years as well as paying a fine. However, in the U.S., corporate and individual cartel participants that lose the race for leniency can still obtain lesser sentences in exchange for their cooperation by pleading guilty to criminal charges and entering into plea agreements with the Division. Pursuant to the Commission's Leniency Notice,¹⁴ the corporate cartel participant that is the first to self-report and qualify can receive full immunity from fines, and corporate cartel participants that lose the race for full immunity may still qualify for a reduction in fine of up to 50% in exchange for their cooperation.

So, even before the formal cartel settlement system currently in place in the EU, early insider cooperation was received and rewarded in both the U.S. and the EU through the use of different vehicles – a plea agreement in the U.S. and a reduction in fine pursuant to leniency in the EU.

¹² For a detailed discussion of the benefits available to early cooperators, *see* Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, 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>.

¹³ Corporate Leniency Policy (1993), *available at* <http://www.usdoj.gov/atr/public/guidelines/0091.htm>; *see also* Leniency Policy Speeches, *available at* <http://www.usdoj.gov/atr/public/criminal.htm>.

¹⁴ Commission Notice on Immunity from fines and reduction of fines in cartel cases (hereinafter "Commission Leniency Notice"), Official Journal of the European Union, OJ C 298, 8.12.2006, p. 17, *available at* [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT).

Difference: Timing

While cartel enforcers in both the U.S. and EU can obtain and reward early and valuable cooperation, a cartel participant seeking to cooperate and quickly resolve its liability will find itself on dramatically different timelines in the U.S. and the EU.

A company that has lost the race for full immunity in the EU may still be eligible for a reduced fine if it cooperates pursuant to the Commission's Leniency Notice, but it must wait until the conclusion of the Commission's investigation to learn if the Commission will engage in settlement discussions. In the U.S., that same cartel participant that has lost the race for full immunity may immediately initiate plea negotiations with the Division to simultaneously resolve its culpability and be rewarded for the cooperation it can provide. A cooperating cartel participant can reach a settlement with the Division at any time – from very early in the Division's investigation until after formal charges are brought.¹⁵ Seriatim plea agreements are the norm in Division cartel investigations and the Division regularly negotiates, signs, and publicly files plea agreements throughout the course of its investigations. In addition, a plea agreement can be entered as soon as an agreement is reached and sentencing can take place immediately.

In the EU, a cartel participant seeking to cooperate and quickly resolve its liability may apply for a reduction in fine pursuant to the Commission's Leniency Notice, but the applicant must wait until the end of the administrative procedure to learn how its cooperation will be rewarded and the actual fine imposed. There are numerous examples of companies that have simultaneously offered to cooperate in both the U.S. and the EU but had to wait years after settling in the U.S. to learn what their fine would be in Europe. This problem is exacerbated by the numerous lengthy appeals of Commission decisions where, at times, the lag has been close to a decade.

The Commission's settlement procedure likely will not dramatically change the timing of this process. Under the Commission's bifurcated system, a cartel participant seeking a reduction in fine pursuant to the Commission's Leniency Notice will have to provide substantive cooperation and then wait until the end of the Commission's investigation to see whether the Commission invites cartel participants to engage in settlement discussions pursuant to its Notice on Settlements. A cartel participant seeking to settle will then have to wait until the end of the Commission's administrative procedure to know its actual fine and if it received the settlement discount to be applied cumulatively to any leniency reduction.

Difference: Goals of Cartel Settlement

In the U.S., from the Division's perspective, the goals of cartel settlements are to: 1) receive cooperation; 2) create and sustain momentum in its investigations; and 3) resolve cartel cases quickly without the need for litigation. Once a cartel participant and the Division decide to enter into a plea agreement, both the government and the

¹⁵ 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.

defendant proceed along an entirely different path than they would have if the case went to trial. Promises are made on each side. The Division promises not to bring further charges against the defendant for the reported conduct and to recommend a certain settlement discount at sentencing. The defendant promises to waive its procedural rights – such as the right to formal charge by indictment, the right to a trial, and the right to appeal – and to provide substantial and ongoing cooperation. The type of cooperation the Division typically receives from a pleading corporation is extensive and the U.S. Sentencing Guidelines appropriately term such cooperation “substantial assistance.”¹⁶ The specific types of cooperation a pleading corporation is required to provide to the Division are specified in the plea agreement and usually include providing documents and witnesses (including those located abroad) to assist the Division in its investigation.¹⁷

The Commission’s settlement system, in contrast, maintains virtually the identical investigative structure as its ordinary procedure but provides for the possibility of an additional monetary reduction in fine for “settlement” in exchange for “cooperation” after the conclusion of the Commission’s investigation. The Commission makes clear that the cooperation sought under its settlement procedure is different from the voluntary production of evidence to trigger or advance an investigation covered under the Commission’s Leniency Notice.¹⁸ Under the Commission’s settlement procedure, the required “cooperation” is essentially a waiver of certain procedural rights and not the type of substantial assistance that is provided to the Division by settling cartel participants in the U.S.

Difference: Finality and Expediency

Since the Commission’s settlement system does not provide for early settlements, and because a cartel participant that wishes to settle must still wait until the end of the administrative process to know the amount of its fine, a corporate cartel participant cannot achieve the early finality in the EU that it can in the U.S. when it enters into a plea agreement with the Division and is able to put the matter behind it immediately.

The time and resource savings the Commission expects to receive from settlements appear to be limited to the time saved by not having to provide access to the file, oral hearings or translations, and any time saved by writing a more streamlined statement of objections. But even these procedural efficiencies may not be obtained under the Commission’s settlement procedure unless all cartel participants seek to settle, since the Commission would otherwise have to continue with the full-blown, ordinary procedure for the non-settling cartel members.

¹⁶ See United States Sentencing Commission Guidelines Manual § 8C4.1 (November 1, 2007), available at <http://www.ussc.gov/2007guid/GL2007.pdf>.

¹⁷ See ¶ 14 of the Division’s Model Annotated Corporate Plea Agreement (Last Updated December 19, 2006), available at <http://www.usdoj.gov/atr/public/guidelines/220671.htm>.

¹⁸ Commission Notice on Settlements, *supra* note 3, at 1.1.

Difference: Momentum

In the U.S., early cooperators not only provide valuable evidence that the Division can use against other co-conspirators, but also once their plea agreements are filed on the public record they often provide strong momentum that expedites the Division's investigation and prosecution of other conspirators and even, in an Amnesty-Plus situation, other cartels. Plea negotiations are confidential, but once agreements are reached, the plea agreement is filed with the court and made public.¹⁹ Other cartel participants can then see that co-conspirators have accepted responsibility and promised to cooperate, and they often quickly line up to plead guilty. The momentum created by seriatim settlements before the conclusion of an investigation is a powerful benefit to the Division that has no counterpart under the Commission's settlement procedure.

Remaining Question: Transparency, Predictability and Certainty as to Fine?

Commentators and members of the antitrust bar have said that the 10% settlement reduction offered by the Commission is not sufficient to induce companies to settle.²⁰ The success of the Commission's settlement procedure, however, will not hinge solely on the amount of the settlement discount offered, but on the transparency, predictability and certainty of the fine a cooperator can expect to pay. In the Division's experience, prospective cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation. A party is more likely to settle if it is 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.

A critical issue to the success of the Commission's settlement procedure will be the Commission's transparency in discussing the fine that a cartel participant can expect to pay. A percentage discount means little to a cartel participant that cannot predict the starting point for its fine reduction. While the Commission has Fining Guidelines in place, they are relatively new and they have not yet been applied in many matters. Therefore, the more transparency that the Commission can provide as to how it will apply its Fining Guidelines, the more likely parties are to settle. If cartel participants cannot assess their possible fines with reasonable certainty, they may choose to seek leniency but not settle, resulting in a scenario where a cartel participant provides cooperation to receive leniency but then litigates its fine.

Similarity: Rights are Respected

Another reason sometimes offered for the proposition that U.S.-style plea bargaining cannot work in administrative systems is that rights of defense must be respected. Again, implicit in this response is a misimpression that the rights of settling defendants are not respected in the U.S. plea process.

¹⁹ See Federal Rule of Criminal Procedure 11.

²⁰ *EU Settlements Procedure Met with Skepticism*, Global Competition Review (June 30, 2008), available at http://www.globalcompetitionreview.com/news/news_item.cfm?item_id=6935

The Commission's settlement procedure makes it clear that a settling party's rights of defense will be respected and provides for a Hearing Officer to arbitrate due process issues during the settlement process.

In the U.S., defendants also have constitutional and due process rights, including the right: 1) to be formally charged by indictment; 2) to plead not guilty; 3) to a trial by jury (where the defendant can cross-examine witnesses and present evidence); 4) against self-incrimination; and 5) to appeal a conviction and sentence. In order to convict a defendant of a criminal offense, the Division must prove its case beyond a reasonable doubt, a standard that is higher than the standard of proof required in administrative or civil jurisdictions. A defendant who chooses to plead guilty and enter into a plea agreement with the Division will waive the rights enumerated above. This waiver must take place before a court, prior to acceptance of a plea. The court must find that the waivers were executed knowingly and voluntarily, that the defendant received competent legal representation, and that the defendant fully understood the nature of the offense and applicable maximum penalties. The Commission's settlement procedure is different because it does not require a waiver of some of these rights, such as a waiver of appeal, but it is similar in that it provides for a waiver of certain procedural rights such as access to the file, a formal hearing and translation.

In the U.S., these rights are held by the defendant who can choose to waive any right if done knowingly and voluntarily. Such waivers provide valuable benefits for enforcers and defendants by saving time, money, and resources. By ending all further litigation, these waivers provide ultimate finality and certainty for all parties. Without such waivers, resources are not saved, true finality and certainty are not achieved, and the full benefits of settlement are not realized. The best testament to the Division's success in respecting the rights of settling cartel participants is the dozens of companies and individuals that have ample financial resources and are represented by skilled counsel who decide to plead guilty and enter into plea agreements with the Division each year.

Similarity: Neither DG Competition nor the Division Impose Cartel Sanctions

Another often repeated myth is that U.S.-style plea agreements will not work in the EU because it is the College of Commissioners that imposes fines, and not DG Competition. However, the U.S. and the EU are much closer in that regard than many people appreciate. In the U.S., even when a sentencing agreement is reached with the Division, it is the court that must accept the plea and impose the cartel participant's actual sentence. Similarly, in the EU, the College of Commissioners must adopt the final decision containing the fine amount.

What this means is that in both jurisdictions cartel participants are asked to engage in settlement discussions and arrive at an agreed sanction with a government entity that does not actually impose the sanction. Cartel participants must rely on the good-faith commitments of the competition authority that it will stand behind a fine recommendation that is the result of a settlement.

Typically, Division plea agreements contain a joint sentencing recommendation specifying that a specific sentence or sentencing range is appropriate.²¹ After accepting the plea agreement, the court will impose the defendant's sentence. U.S. courts accept the joint sentencing recommendations contained in Division plea agreements with high frequency.

The Division has built a strong track record of persuading courts to accept plea agreements in its cartel cases and impose sentences consistent with those agreements. Courts are willing to accept these plea agreements and impose the recommended sentences contained in them because the Division brings to the court only sentences that it believes are just and proportional. Courts can also be confident that both parties are well represented by counsel. Cartel participants engaging in settlement negotiations are aware of the Division's track record with courts and are confident that the Division will stand behind its sentencing recommendation should the courts question it at sentencing.

Difference: Differentiated Settlement Discounts

Another difference between the U.S. plea system and the Commission's settlement system is that the settlement discount in the U.S. can be, and usually is, different for various cartel participants, whereas in the EU the settlement discount is a fixed figure for all settling parties.

In the U.S., the settlement discount cartel participants can receive is dependent upon the timeliness of their acceptance of responsibility and the quality of their cooperation, with earlier settling defendants receiving larger settlement discounts than those received by later pleading defendants. This is consistent with the race-to-the-prosecutor's-door mentality that has successfully fueled leniency programs around the world. A cartel participant that is the "second-in" to self-report and loses the race for leniency in the U.S. can still win a substantial settlement discount by pleading guilty. This system induces quicker, higher quality cooperation.

While, as previously discussed, second and subsequent cooperators can receive substantial rewards under the Commission's leniency program, the fixed settlement discount for all settling parties provides little additional incentive for cartel participants to line up to be the first to settle, since the last-in receives the same discount.

Remaining Question: Are All Cartel Participants Required to Settle?

Questions remain as to whether the Commission will accept settlements in a "hybrid" situation where some cartel participants are prepared to settle, but others are not. Since the Commission's settlement procedure is set up with the goal of obtaining

²¹ The Division and the defendant may enter into a type of plea agreement that requires the court to either accept the recommended sentence in the plea agreement or to reject the entire plea agreement. For a comprehensive discussion of sentencing recommendations contained in U.S. plea agreements, *see* The U.S. Model of Negotiated Plea Agreements, *supra* note 2, at § IV(F).

procedural efficiencies, rather than inducing cooperation or creating momentum in its investigations, an “everyone or no one” approach is appealing from the Commission’s viewpoint because a hybrid settlement will not achieve the procedural efficiencies the Commission hopes to gain through settlement. From the perspective of cartel participants contemplating settlement, and the counsel who advise them, this may be unsettling. If a company expends the time and resources to seek settlement, only to be told at the end that its settlement offer will not be accepted because a co-conspirator does not wish to settle, it will not be pleased and its counsel may advise against engaging in the settlement process when representing future clients.

In addition, the “everyone or no one” approach is inconsistent with the race mentality that has been so successful in the leniency context. Instead of destabilizing the cartel as co-conspirators rush to cooperate with the government, in an ironic twist, an “everyone or no one” settlement system might actually promote further coordination as those inclined to settle or not to settle attempt to influence the entire group.

Difference or Similarity: Negotiation or Discussion of the Merits?

As previously mentioned, the Commission Notice on Settlements makes clear that the Commission will not negotiate the existence of a cartel infringement or the appropriate fine.²² The concept that the settlement system must be “non-negotiated” is likely driven by a desire to distinguish the system from a U.S.-style plea system because of the negative connotations associated with plea bargaining discussed above. Hopefully this paper has dispelled some of the myths that lie beneath those negative connotations, including dispelling the notion that U.S. prosecutors negotiate charges or bargain away justice.

A question that remains, one that will be critical to the success of the Commission’s settlement procedure, is: what does the Commission mean when it says it will not negotiate? The Commission Notice on Settlements says that the discussions “will allow the parties to be informed of the essential elements taken into consideration so far, such as the facts alleged, the classification of those facts, the gravity and duration of the alleged cartel, the attribution of liability, an estimation of the range of likely fines, as well as the evidence used to establish the potential objections.”²³ When and how this information is discussed with parties contemplating settlement will be critically important to the willingness of cartel participants to engage in settlement discussions with the Commission.

In the U.S., once plea negotiations commence, a candid two-way dialogue takes place between the Division and the cartel participant’s counsel regarding certain key terms of a possible plea agreement, including: the entity to be charged; the scope of the alleged conspiratorial conduct to be charged; the products or services covered by the conspiratorial agreement; the duration and geographic scope of the conspiracy; the scope

²² Commission Notice on Settlements, *supra* note 3, at 1.2.

²³ Commission Notice on Settlements, *supra* note 3, at 2.2.16.

of the nonprosecution protections and cooperation requirements; the sentencing recommendation; and the cooperation that the defendant is prepared to offer. In the experience of the Division, this dialogue is necessary to reaching a settlement. If the Division and the defendant were to just put their final offers on the table without this dialogue, they likely would be like ships passing in the night with their offers relying on vastly different assumptions and fine figures that could be orders of magnitude apart.

While, as previously discussed, the Division will not negotiate charges it can readily prove, the Division will listen to arguments from cartel participants negotiating settlements as to why the evidence does not support the charges and sentence calculations proposed by the Division and, therefore, the scope of the charge should be limited and the sentence reduced. Understanding the scope of a multinational cartel or calculating the volume of commerce affected by the defendant's participation in a cartel are not easy tasks, and the Division is willing to listen to cartel participants on these issues. Of course the Division looks to other sources to verify the information provided by those seeking settlement, but it is not uncommon that cartel participants are able to persuade the Division to alter its original charge or sentencing recommendation due to facts, evidence, and industry nuances of which the Division was not previously aware.

As previously discussed, transparency as to the potential fine range the Commission is contemplating will be very important. In addition, engaging in discussions during the settlement process regarding the scope and duration of the cartel violation contemplated – optimally before a cartel participant must submit a settlement submission – will also be critical to reaching a settlement that will be acceptable to both the Commission and the settling cartel participant. The Commission's settlement procedure does allow for discussions and seems to envision that at least some of these items will be discussed. The semantics of whether a dialogue between the Commission and cartel participants seeking settlement is called “negotiation” or “discussions” is less important than whether and to what extent it actually takes place. The more cartel participants are able to engage in a dialogue with the Commission in the context of settlement discussion, the more likely it is that a mutually-agreeable resolution will be reached.

Conclusion

The leniency programs that have proliferated and flourished around the world during the last decade have resulted in cracking a previously unimaginable number of cartels. As a result, cartel enforcers in a growing number of jurisdictions are trying to find ways to more quickly resolve cartel cases. As a result, cartel settlements are at the forefront of discussions in competition forums.

The Commission should be commended for adopting a settlement procedure to complement its highly successful leniency program. The Commission has built a leniency track record, and it will now begin to build a settlement track record. The bar and the business community, who are stakeholders in the process, still have some remaining questions about how the Commission will implement the settlement procedure,

and they will be watching closely. The good news is that the Commission, cooperating cartel participants, and their counsel all have a vested interest in making cartel settlements work because they hold potential benefits for them all.

This paper has attempted to dispel some myths about the U.S. plea system and point out some similarities between the U.S. and EU systems that might not be readily apparent. Some substantial differences do remain between the U.S. system and the Commission's settlement procedure, as they once did in the leniency context. Our collective experience in the leniency context teaches us that what might not seem possible often is possible. That lesson can be applied in the settlement context as we focus not on distinguishing criminal from administrative systems but look instead at how cartel settlements can have benefits for all parties involved and ultimately benefit consumers through increased cartel enforcement.