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COMPETITION COMMITTEE**

EXPERIENCE WITH DIRECT SETTLEMENTS IN CARTEL CASES

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FOREWORD

This document comprises proceedings in the original languages of a Roundtable on the Experience with Direct Settlements in Cartel Cases held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in October 2008.

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 l'Expérience en Matière de Règlements Transactionnels dans les Affaires liées aux Ententes qui s'est tenue en octobre 2008 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

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

Considering the discussion at the roundtable and the member country submissions, a number of key points emerge:

- (1) *There is great interest in settlements of cartel cases; many jurisdictions are currently experimenting with slightly different versions of settlement procedures as each jurisdiction seeks to maximize benefits and minimize risks of settlements within the parameters of its enforcement framework, with the ultimate goal of strengthening deterrence of cartels.*

The roundtable discussion showed widespread agreement on the potential benefits of settlements in cartel cases: competition authorities can save resources that they would otherwise need to investigate and prosecute a cartel in a “fuller” procedure, produce fully reasoned detailed decisions, and/or litigate cartel cases before courts. For defendants, major benefits include a reduced fine, greater ability to reach an acceptable resolution in a defined time frame and the ability to avoid a lengthy, costly investigation and litigation that can distract management and generate negative publicity. The public should also benefit from settlements as competition authorities can use freed-up resources to investigate and prosecute additional cartels, which should ultimately increase deterrence.

In most jurisdictions settlements in cartel cases are a recent development. There is agreement on broad principles that should inform settlement procedures and practices, such as the importance of transparency and predictability and the need to seek substantial fines in settlement agreements. However, many jurisdictions currently experiment with different approaches to settlements. The roundtable discussion highlighted that practices currently diverge on a number of important issues, including whether competition authorities should always require a defendant to admit guilt as part of a settlement, whether leniency programs and settlements should be kept as separate steps in a cartel investigation, and whether to seek uniformity of settlements or instead settle with different parties at different stages in the investigation and offer differentiated settlement discounts.

In the end, each jurisdiction must seek to develop settlement policies and procedures that fit within its enforcement framework and reflect institutional and constitutional limitations. The ultimate goal of introducing a settlement policy must be to strengthen deterrence of cartels, not merely to maximize the number of settlements.

- (2) *Settlements will be facilitated if competition authorities use transparent and predictable procedures so defendants can assess upfront the rewards for agreeing to settle as well as the risks if they decide not to settle a case. Defendants are also more likely to settle if they have the sense that they can predict certain parameters of the final outcome by agreeing to settle.*

Competition authorities and the private bar recognize the importance of transparent and predictable procedures and sanction policies in order to provide important incentives for

defendants to consider settlements. A defendant will have a greater incentive to settle if it can assess the costs and benefits of a settlement, in particular if it understands the fining system so it can estimate what sanctions it would face without a settlement and how it can reduce its exposure to sanctions by way of settlement. Conversely, uncertainty and information asymmetries can interfere with settlements.

Guidelines can provide a useful tool to enhance transparency and predictability; so can a public track record and a competition authority's reputation of being transparent, consistent and fair in settlement negotiations. The United States has a longstanding practice of using settlements and settles a large majority of all its cartel cases. A credible track record and clear fining guidelines provide useful guidance to defendants and their counsel when they assess the benefits and costs of a settlement.

Jurisdictions that are in the process of developing settlement practices have adopted different approaches to the use of guidelines and their role of enhancing predictability and transparency. There are several jurisdictions, including the United Kingdom and Germany, which have started to use settlements in cartel cases without formal guidelines. This approach might be less clear initially, but gives competition authorities greater flexibility to develop effective settlement practices and to develop guidelines as they gather experience and fine-tune their practices. The European Commission has taken a different approach and has developed guidelines before offering the possibility of settlements, even though the Commission acknowledges that it will have to develop its actual implementation practices and a track record as parties start to seek settlements.

Defendants are also more likely to settle if they have the sense that they can predict certain parameters of the final outcome by agreeing to settle. Many competition authorities have made clear, however, that certain elements of their cases, such as the existence of an unlawful agreement, a defendant's guilt and other aspects of their cases for which they have clear and strong evidence, are not subject to negotiations.

- (3) *There are strong reasons why settlements should always include a defendant's admission of guilt; however, some jurisdictions prefer retaining flexibility to decide on a case-by-case basis whether to require an admission of guilt. Which solution a jurisdiction adopts should be determined by the goal of maximizing overall deterrence.*

Many contributions to the roundtable emphasized the importance of requiring a defendant's admission of guilt in each settlement. A public admission of guilt creates the stigma that is warranted by the seriousness of the cartel offence. Admissions of guilt also avoid the public perception of a "nuisance settlement," in which the company can claim that it settled not because it was guilty but because it wanted to avoid the expenses of protracted litigation, buy peace and move on. Moreover, if defendants perceive that there is at least the possibility of a settlement without admission of guilt, they will seek to do so in every settlement, forcing the competition authority to negotiate over this issue and "pay" for the admission of guilt every time it seeks to settle a cartel case.

Other jurisdictions consider admissions of guilt an integral part of their procedural framework as settlements without an admission of guilt would not create the necessary finality in an investigation.

The roundtable also highlighted the importance of an admission of guilt for private litigation. The major incentive for defendants to seek a settlement without the admission of guilt is the

reduced exposure to private actions for damages. When a competition authority accepts a settlement without admission of guilt, it might be able to extract a higher fine in its own public case, but might reduce the defendant's overall liability, thus undermining the goal of increased deterrence.

- (4) *Jurisdictions have adopted different approaches concerning the relationship between policies to encourage cooperation and settlements: in particular, jurisdictions with longer experience in settling cases consider cooperation and settlement as integral complementary elements in a cartel investigation; other jurisdictions consider leniency programs, which encourage and reward cooperation, and settlement policies, which are used to reduce the duration and administrative burden of a case, as two distinct aspects of their cartel cases.*

The United States is an example of a jurisdiction that uses negotiated settlements without distinction between policies that reward cooperation and policies concerning the negotiated disposition of a cartel case. Rather, the two policies are applied in an integrated approach where the government offers the possibility of a settlement with a reduced sentence to encourage cooperation with the investigation, disclosure of additional evidence, the admission of guilt, and a waiver of certain procedural rights. In such a system, settlements become an investigative tool: they reward cooperation by defendants, and because earlier cooperation and settlement can be rewarded with higher sanction discounts they create additional incentives to cooperate and settle quickly.

Competition authorities that already have an established leniency program to encourage cooperation and now are introducing settlements tend to make a distinction between leniency policies and the settlement. They view rewards granted within their leniency policy as the main incentive to disclose additional evidence and cooperate with an investigation. Settlements are viewed as a mechanism to end a case at a later stage of the procedure, typically when the initial investigation has been concluded. However, this is not necessarily the only approach. Germany, for example, indicated its willingness to settle certain cartel cases during the early stages of an investigation, essentially reducing the sharp distinction between leniency/cooperation and settlements in the appropriate cases.

Settlements might undermine the effectiveness of leniency programs if combined discounts for cooperation and settlement/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. The greater the difference between the full immunity scenario for the first party to report a cartel and all other scenarios (including the situation of cartel participants that come later and cooperate with the authority's investigation and agree to settle), the greater is the incentive to come in first and seek immunity. There is a concern that settlements could undermine this incentive if they lead to unreasonably generous combined discounts for cooperation and settlement.

- (5) *Certain competition authorities have emphasised the advantages related to settlements which involve all defendants in a cartel case at the same time, arguing that such settlements will maximize resource savings for the competition authority; such an approach can raise practical problems as defendants may have different incentives to settle and it is unclear at this point whether uniform settlements can be fully implemented in practice.*

Some competition authorities that separate leniency/cooperation from settlement, such as the European Commission, have emphasised the advantages of uniform settlements (where all defendants in a case agree to settle) as opposed to "hybrid" settlements (where some, but not all

defendants settle). They argue that resource savings will be maximized if all parties agree to settle as otherwise the cases against at least some defendants will have to proceed on a “regular” path. Other jurisdictions in a similar position, however, have recognized that although hybrid settlements may not result in the same level of resource savings as settlements with all parties, considerable resource savings can still be realized if some defendants settle, at the administrative stage as well as at the appeal stage of a cartel case.

During the roundtable, questions were raised whether a strict approach against “hybrid” settlement is useful and can be maintained in practice. For a variety of reasons defendants in a single cartel may have different incentives to settle; and some may have no incentive to settle. Not allowing any settlement in these cases might undermine the entire procedure. Moreover, the competition authority might put itself into a hostage situation and increase the leverage of parties that hold out the longest against a settlement.

These issues will not arise in jurisdictions which consider rewards for cooperation and settlement as integrated policies and use the offer of negotiated settlements as part of their investigatory strategy. Differentiated settlements with different defendants in a cartel case are the norm, as different settlement terms and discounts will reflect different degrees of cooperation and differences in timing of settlement agreements.

- (6) *Defendants in a multinational cartel case likely will seek a multinational strategy to limit their exposure to sanctions and will consider a settlement if the net benefits exceed the net costs in all jurisdictions concerned; this task will be complicated as approaches to settlements and settlement procedures are substantially different among jurisdictions and as a settlement can have substantial effects on private follow-on litigation. How these factors affect incentives to settle is a largely unexplored issue; more research and discussion among all stakeholders will be required to ensure that settlements in several jurisdictions contribute to the ultimate goal of maximizing deterrence.*

The roundtable discussion also addressed private sector concerns about the effects of a settlement on cartel investigations in other jurisdictions and on private follow-on litigation. If a firm gets caught for participating in a global cartel that is investigated in several jurisdictions, it will seek to develop a global strategy to minimize its exposure to sanctions in public investigations and in private follow-on litigation. Incentives to cooperate and to seek settlements might be undermined if there is no uniform approach to settlements and if a settlement in one jurisdiction is perceived to increase exposure to sanctions in continuing investigations elsewhere and/or in private follow-on actions.

Some cooperation and coordination among competition authorities is already possible when a defendant decides to cooperate with investigations in several jurisdictions and grants confidentiality waivers to facilitate cooperation among authorities. Further improvements, in particular concerning the timing of settlements, may be difficult to achieve given the different approaches to the role of settlements.

Speakers also pointed out that potential civil litigation will frequently constitute the largest concern for a company when it considers whether to cooperate with a competition authority and whether to settle. This point is consistent with the report by some competition authorities that they find it more difficult to settle cartel cases as defendants become increasingly concerned about the effects of a settlement on private litigation, in particular if the settlement contains an admission of detailed facts and of guilt.

SYNTHÈSE

Par le Secrétariat

S'agissant des questions examinées lors de la Table ronde et des contributions des pays membres, un certain nombre de points clés se dégagent :

- (1) *Le règlement transactionnel des affaires liées aux ententes suscite un vif intérêt ; de nombreux pays expérimentent actuellement des procédures de ce type aux modalités légèrement différentes, chacun d'entre eux cherchant à maximiser les avantages et à réduire les risques dans le cadre des dispositions en vigueur, avec pour objectif final d'exercer un effet plus dissuasif à l'encontre des ententes.*

Un large consensus s'est dégagé de la discussion de la Table ronde autour des avantages potentiels des règlements transactionnels dans les affaires d'entente : ceux-ci permettent aux autorités de la concurrence de faire l'économie des ressources dont elles auraient sinon besoin pour mener leurs enquêtes et poursuivre telle ou telle entente dans le cadre d'une procédure plus « exhaustive », rendre des décisions détaillées et dûment motivées et/ou engager des procédures judiciaires. Pour les défendeurs, les principaux avantages sont, entre autres, une amende réduite, une plus grande possibilité de parvenir à une solution acceptable dans des délais déterminés et la possibilité d'éviter une enquête et une procédure longues et coûteuses, susceptibles de perturber la gestion de l'entreprise et de lui faire une mauvaise publicité. Le public devrait également tirer profit des règlements transactionnels, en ce sens que les ressources ainsi libérées peuvent être affectées par les autorités de la concurrence à d'autres enquêtes et à la poursuite d'autres ententes, ce qui devrait à terme accroître l'effet de dissuasion.

Dans la plupart des pays, le recours au règlement transactionnel dans les affaires d'entente est un phénomène récent. Il y a accord sur certains principes généraux qui doivent régir les pratiques et les procédures en matière de règlement transactionnel, comme l'importance de la transparence et de la prévisibilité et la nécessité d'imposer des amendes substantielles. Néanmoins, de nombreux pays expérimentent aujourd'hui des approches différentes des règlements transactionnels. Il ressort des discussions de la Table ronde que les pratiques actuelles divergent sur un certain nombre de points importants, notamment la question de savoir si les autorités de la concurrence doivent toujours exiger d'un défendeur qu'il reconnaisse sa culpabilité dans le cadre d'un règlement transactionnel, si les programmes de clémence et les règlements transactionnels doivent être des aspects clairement distincts d'une enquête sur une entente et s'il faut rechercher l'uniformité dans les règlements transactionnels ou, au contraire, permettre des règlements avec chacune des parties à différents stades de l'enquête et proposer des règlements différenciés.

In fine, chaque pays doit chercher à mettre en place des politiques et des procédures de règlement transactionnel qui soient adaptées à ses mécanismes d'exécution et qui respectent des limites institutionnelles et constitutionnelles. L'objectif final de l'introduction d'une politique de règlement transactionnel doit consister à renforcer l'effet dissuasif sur les ententes, et pas seulement à multiplier le nombre de règlements.

- (2) *Les règlements transactionnels seront facilités si les autorités de la concurrence utilisent des procédures transparentes et prévisibles, permettant aux défendeurs d'évaluer quel intérêt ils ont à accepter un règlement et quels risques ils encourent dans le cas contraire. Les défendeurs sont également plus enclins à accepter un règlement transactionnel s'ils ont le sentiment qu'en l'acceptant, ils peuvent prévoir certains paramètres du résultat final.*

Les autorités de la concurrence et le Barreau reconnaissent qu'il est important que les procédures et les sanctions soient transparentes et prévisibles pour inciter les défendeurs à envisager un règlement transactionnel. Un défendeur sera plus incité à accepter un règlement transactionnel s'il est en mesure d'en évaluer les coûts et les avantages, et surtout s'il peut comprendre le système d'amendes, afin de déterminer à quelles sanctions il s'exposerait en l'absence de règlement et de quelle manière cette procédure peut lui permettre de réduire son exposition à des sanctions. À l'inverse, incertitude et asymétrie des informations peuvent entraver le recours à un règlement transactionnel.

Transparence et prévisibilité peuvent être renforcées de manière efficace grâce à des lignes directrices, mais aussi par la régularité de l'action publique ou encore par la réputation de transparence, de cohérence et d'équité de l'autorité de la concurrence dans la négociation des règlements transactionnels. Les États-Unis utilisent depuis longtemps déjà les règlements transactionnels et résolvent de cette manière une grande majorité de leurs affaires d'ententes. La crédibilité de l'expérience de l'autorité concernée et la clarté des lignes directrices en matière d'amendes sont des éléments d'information utiles pour les défendeurs et leurs conseillers juridiques lorsqu'ils évaluent les avantages et les coûts d'un règlement.

Les pays qui s'emploient actuellement à développer le recours au règlement transactionnel ont adopté différentes approches des lignes directrices et de leur rôle dans le renforcement de la prévisibilité et de la transparence. Plusieurs pays, dont le Royaume-Uni et l'Allemagne, ont commencé à recourir à des règlements transactionnels dans le cadre d'affaires d'ententes sans avoir élaboré de ligne directrice officielle. Cette approche peut s'avérer moins claire dans un premier temps, mais elle confère aux autorités de la concurrence une plus grande souplesse pour mettre au point des pratiques de règlement efficaces et des lignes directrices à mesure qu'elles acquièrent de l'expérience et ajustent au mieux leurs pratiques. La Commission européenne a choisi, quant à elle, une approche différente et a mis au point des lignes directrices avant de proposer l'alternative du règlement, tout en reconnaissant qu'il lui restera à se doter de véritables pratiques de mise en œuvre et à établir des précédents lorsque les parties commenceront à rechercher des règlements transactionnels.

Les défendeurs sont également plus enclins à solliciter un règlement s'ils ont le sentiment qu'en acceptant cette procédure, ils pourront prévoir certains paramètres de l'issue finale. De nombreuses autorités de la concurrence ont toutefois clairement fait savoir que certains éléments des affaires, tels que l'existence d'un accord illicite, la culpabilité d'un défendeur ou encore d'autres aspects de leurs dossiers pour lesquels elles détiennent des preuves sérieuses et claires, ne sont pas négociables.

- (3) *Il y a de très bonnes raisons d'estimer qu'un règlement devrait toujours s'accompagner d'un aveu de culpabilité ; toutefois, certains pays préfèrent se laisser la possibilité d'exiger ou non un aveu de culpabilité, selon les cas. Le choix de chaque pays devrait être guidé par la recherche d'un effet dissuasif maximum.*

De nombreuses contributions à la Table ronde ont souligné combien il est important d'exiger du défendeur une reconnaissance de sa culpabilité de manière systématique. Admettre publiquement

sa culpabilité suscite, en effet, un discrédit à la hauteur de l'infraction commise en matière d'entente. Un tel aveu permet également d'éviter que le public ne perçoive la procédure engagée comme un « règlement de convenance » dans lequel la société peut prétendre avoir accepté le règlement non parce qu'elle est coupable, mais pour éviter les désagréments que suscitent de longues poursuites, pour avoir la paix et pour continuer son activité. En outre, si le défendeur sent qu'il a la moindre chance d'obtenir un règlement sans aveu de culpabilité, il cherchera à le faire dans chaque cas, contraignant ainsi l'autorité de la concurrence à négocier sur ce point et à « payer » pour obtenir des aveux de culpabilité pour le règlement de chaque affaire d'entente.

D'autres pays considèrent les aveux de culpabilité comme faisant partie intégrante de leur cadre procédural au motif que l'objectif d'un règlement sans aveu de culpabilité ne justifierait pas l'ouverture d'une enquête.

La Table ronde a également fait ressortir l'importance de l'aveu de culpabilité dans le cadre d'une procédure judiciaire privée. Les défendeurs qui cherchent à obtenir un règlement sans reconnaissance de culpabilité sont principalement soucieux de réduire leur exposition à des actions privées en dommages-intérêts. Si une autorité de la concurrence accepte un règlement sans aveu de culpabilité, elle pourra peut-être obtenir une amende plus lourde dans le cadre de l'affaire considérée, mais au risque de réduire la responsabilité globale du défendeur et de nuire ainsi à l'objectif du renforcement de l'effet dissuasif.

- (4) *Les pays ont adopté diverses approches des relations entre les politiques d'incitation à la coopération et aux règlements transactionnels : plus précisément, les pays qui ont une plus longue expérience de la résolution d'affaires par voie de règlement considèrent la coopération et le règlement comme des éléments qui se complètent de manière cohérente au sein de toute enquête liée à une entente ; d'autres pays estiment que les programmes de clémence, qui encouragent et récompensent la coopération, et les politiques de règlement, utilisées pour réduire la durée d'une affaire et sa lourdeur administrative, sont deux aspects distincts des affaires d'entente qu'ils traitent.*

Les États-Unis, par exemple, négocient des règlements transactionnels sans opérer de distinction entre les politiques visant à récompenser la coopération et celles prévoyant une résolution négociée des affaires d'entente. Ces deux politiques sont, au contraire, combinées dans une approche cohérente où le gouvernement offre la possibilité d'un règlement assorti d'une peine réduite afin d'encourager la coopération avec l'enquête, la communication de preuves supplémentaires, l'aveu de culpabilité et la renonciation à certains droits procéduraux. Dans un tel système, les règlements transactionnels font office d'outils d'investigation : ils récompensent les défendeurs qui coopèrent et, puisqu'ils se traduisent par des réductions de sanctions d'autant plus importantes que la coopération et le règlement interviennent tôt, ils créent des incitations supplémentaires à coopérer et accepter un règlement rapidement.

Les autorités de la concurrence qui ont d'ores et déjà mis en place des programmes de clémence afin d'encourager la coopération et qui introduisent aujourd'hui les règlements transactionnels ont tendance à établir une distinction entre ces derniers et les politiques de clémence. Elles estiment que les avantages accordés en vertu de leur politique de clémence constituent la principale incitation pour communiquer des preuves supplémentaires et coopérer avec une enquête. Les règlements transactionnels sont considérés comme un mécanisme servant à mettre un terme à une affaire à un stade ultérieur de la procédure, en général une fois que l'enquête initiale a été achevée. Il existe néanmoins d'autres approches. L'Allemagne, par exemple, a fait part de sa volonté de régler certaines affaires d'entente dès les premiers stades de l'enquête,

principalement pour atténuer, dans les affaires qui le justifient, la distinction entre programme de clémence/coopération et règlement transactionnel.

Les règlements transactionnels risquent de nuire à l'efficacité des programmes de clémence si la somme des réductions de sanctions accordées en échange d'une coopération et de celles accordées en vertu d'un règlement transactionnel/aveu de culpabilité s'avère trop généreuse. Les programmes de clémence, qui sont devenus l'un des outils les plus précieux pour détecter des ententes et enquêter sur ces dernières, reposent sur l'effet incitatif de l'absence de peine pour le premier qui dénonce une entente. Plus grande sera la différence entre le scénario de l'immunité totale pour le premier qui dénonce une entente et tous les autres scénarios (y compris celui où des parties à une entente se manifesteraient ultérieurement, coopèreraient à l'enquête des autorités et accepteraient un règlement transactionnel), plus grande sera l'incitation à être le premier à se manifester et à solliciter l'immunité. Certains craignent que les règlements ne nuisent à cette incitation s'ils aboutissent à des réductions globales de sanctions excessivement généreuses en échange d'une coopération et d'un règlement.

- (5) *Certaines autorités de la concurrence ont souligné les avantages liés aux règlements transactionnels impliquant la totalité des défendeurs dans une affaire d'entente et ont fait valoir à cet égard que de tels règlements permettent un maximum d'économies en termes de ressources pour l'autorité de la concurrence concernée. Cette approche peut poser certains problèmes d'ordre pratique vu que les défendeurs peuvent être incités de différentes manières à accepter un règlement transactionnel et il n'est pas certain pour l'instant que des règlements transactionnels uniformes peuvent être pleinement appliqués en pratique.*

Certaines autorités de la concurrence qui distinguent clémence/coopération et règlement transactionnel, comme la Commission européenne, ont souligné les avantages des règlements uniformes (dans lesquels tous les défendeurs d'une affaire conviennent d'un règlement transactionnel), par opposition aux règlements « hybrides » (où seuls certains des défendeurs y prennent part). Elles expliquent que les économies de ressources seront maximisées si toutes les parties acceptent un règlement, et que si ce dernier n'implique pas toutes les parties, l'affaire doit se dérouler « normalement ». D'autres pays partageant le même point de vue ont néanmoins reconnu que même si les règlements hybrides ne permettaient pas les mêmes économies de ressources que les règlements impliquant toutes les parties, des économies considérables de ressources pouvaient toutefois être réalisées si une partie seulement des défendeurs acceptait un règlement, et ce, aussi bien lors de la phase administrative d'une affaire d'entente que dans le cadre d'un recours.

Des participants à la Table ronde ont soulevé la question de savoir si une approche stricte à l'encontre des règlements transactionnels « hybrides » est utile et si elle peut être réellement appliquée. Pour un certain nombre de raisons, s'agissant d'une seule et même entente, il est possible que certains défendeurs se voient proposer plusieurs incitations à accepter un règlement transactionnel, tandis que d'autres ne s'en voient proposer aucune. Ne permettre aucun règlement dans ces cas de figure risque de nuire à l'ensemble de la procédure. Qui plus est, l'autorité de la concurrence risque ainsi de se retrouver prise en otage et de renforcer les moyens de pression des parties qui se refuseraient le plus longtemps à accepter un règlement.

Ces problèmes ne se posent pas dans les pays qui considèrent les avantages accordés en contrepartie d'une coopération et ceux accordés au titre d'un règlement transactionnel comme un ensemble de politiques cohérentes, et qui ont recours au règlement transactionnel dans le cadre de leur stratégie d'investigation. Les règlements différenciés pour chacun des défendeurs y sont la norme, car les différentes conditions et réductions des sanctions reflètent des degrés différents de

coopération ainsi que des différences quant au stade des négociations auquel intervient le règlement transactionnel.

- (6) *Il est probable que les défendeurs, dans le cadre d'ententes internationales, chercheront à développer une stratégie à l'échelle mondiale afin de réduire leur exposition à des sanctions, et qu'ils envisageront un règlement transactionnel si l'avantage net de ce dernier est supérieur à son coût net dans tous les pays concernés. Cette tactique est d'autant plus compliquée que les approches et procédures de règlement transactionnel diffèrent sensiblement d'un pays à l'autre et qu'un règlement peut avoir des effets non négligeables sur les poursuites judiciaires privées qui pourraient suivre. La manière dont ces facteurs affectent les incitations à accepter un règlement transactionnel est une question en grande partie inexplorée. Il sera nécessaire d'approfondir les recherches et les discussions entre toutes les parties prenantes afin de s'assurer que les règlements tels qu'ils existent dans les différents pays contribuent effectivement à l'objectif final du renforcement de l'effet dissuasif.*

La Table ronde a également examiné les préoccupations du secteur privé concernant les effets d'un règlement transactionnel sur les enquêtes portant sur une entente dans d'autres pays et sur les poursuites judiciaires privées qui pourraient suivre. Si une société est accusée d'avoir pris part à une entente internationale faisant l'objet d'enquêtes dans divers pays, elle cherchera à développer une stratégie internationale afin de réduire au minimum son exposition à des sanctions dans le cadre d'enquêtes publiques et de poursuites judiciaires privées ultérieures. L'effet des incitations à coopérer et à accepter un règlement transactionnel peut se trouver atténué faute d'une approche uniformisée des règlements transactionnels et si un règlement intervenu dans un pays est perçu comme susceptible d'accroître l'exposition à des sanctions dans le cadre d'enquêtes en cours ailleurs et/ou de poursuites judiciaires privées ultérieures.

Un certain niveau de coopération et de coordination parmi les autorités de la concurrence est d'ores et déjà possible lorsqu'un défendeur décide de coopérer dans les enquêtes menées dans différents pays et lorsqu'il renonce à ses droits à la confidentialité afin de faciliter la coopération entre les différentes autorités. D'autres progrès, notamment concernant le stade auquel peuvent intervenir les règlements transactionnels, seront peut-être difficiles à accomplir étant donné les différentes approches quant au rôle de ces règlements.

Les intervenants ont également rappelé que les poursuites civiles potentielles représentent souvent la principale préoccupation d'une société lorsque celle-ci étudie la possibilité de coopérer avec une autorité de la concurrence et d'opter pour un règlement transactionnel. Cela concorde avec le fait que certaines autorités de la concurrence estiment avoir de plus en plus de difficultés à résoudre des affaires d'entente par voie de règlement transactionnel parce que les défendeurs sont de plus en plus préoccupés par les effets qu'un tel règlement risque d'avoir en termes de poursuites judiciaires privées, notamment s'il s'accompagne d'une reconnaissance des faits et d'un aveu de culpabilité.

AUSTRALIA

This paper provides an update to note DAF/COMP/WP3/WD(2006)53 submitted by Australia on 17 October 2006. The first section of this paper sets out an overview of the legal framework for the settlement of cartel cases in Australia. The second section outlines the Courts' approach to negotiated settlements in recent cases.

1. Overview of Legal Framework

1.1 *Court to impose penalties*

The ACCC does not have any power to impose fines or penalties on parties it believes to be in breach of the Trade Practices Act 1974. The imposition of penalties is a role reserved for the Courts. Accordingly, if the ACCC believes that the TPA has been breached, it can only seek penalties by instituting legal proceedings before the Federal Court of Australia and proving its case.

If the ACCC is successful in proving its case, either as a fully contested trial or a negotiated settlement, the ACCC and other parties will then (jointly or separately) make submissions to the Court on the appropriate level of penalties. The Court will consider the submissions and a range of other factors to determine the appropriate level of penalties before making an order for penalties.

1.2 *Standard of proof*

Cartels are prohibited under section 45(2) of the TPA. To prove a breach of section 45(2) the ACCC must demonstrate that there was an agreement between competitors and/or that *that* agreement was put into effect.

The TPA currently provides for civil remedies for cartel conduct. However, due to the seriousness of the allegations, 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'. When criminal sanctions are introduced, and it is necessary to prove matters 'beyond reasonable doubt', the evidentiary hurdles will be even higher.

The Australian Government has committed to introduce legislation into the Parliament by the end of 2008 to criminalise serious cartel conduct. Under the proposed legislation¹, the ACCC will be able to refer cartel matters to the Commonwealth Director of Public Prosecution for the criminal prosecution of individuals and corporations. Under the proposed cartel offence, individuals found to have engaged in cartel conduct may be subject to imprisonment for up to 5 years and fines of \$220,000 per offence, while corporations may be liable for a maximum fine that mirrors existing maximum fines for breaches of the civil penalty provisions.

1.3 *Increase of pecuniary penalties and introduction of non-pecuniary penalties*

As foreshadowed in our previous paper, The penalties available for cartel conduct were recently increased by the *Trade Practices Amendment Legislative Amendment Act (No.1) 2006*. The increased

¹ An exposure draft Bill was released for public comments on 11 January 2008, at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1330>.

penalties came into effect on 1 January 2007. The maximum civil pecuniary penalty for corporations in relation to certain Part IV conduct (which includes the section 45(2) prohibition on cartels) is now the greater of:

- \$10 million; or
- where the value of the illegal benefit can be ascertained, 3 times the value of the illegal benefit; or
- when the value of the illegal benefit cannot be ascertained, 10% of the turnover (of the corporation and all its related bodies corporate) in the relevant period – being 12 months ending at the end of the month in which the conduct occurred.

Individuals are exposed to a civil penalty of up to \$500,000. The Trade *Practices Amendment Legislative Amendment Act (No.1) 2006* also introduced non-pecuniary penalties under section 86E of the TPA which gives the Court the power to make an order disqualifying a person from managing corporations for a period the Court considers appropriate. In addition, a prohibition on indemnity by corporations for financial liability and legal costs incurred by an individual as an officer of that corporation, were also introduced.²

2. Negotiated Settlements and the Courts

The Court recently considered penalties for cartel conduct in the 2007 case of *Australian Competition & Consumer Commission v Visy Industries Pty Ltd (No 3)*³ (**Visy judgment**). The Court found that Visy Board Pty Ltd (**Visy**) had engaged in price fixing and market sharing conduct with its principal competitor Amcor Ltd in the market for the supply of corrugated fibreboard packaging throughout Australia. The Court accepted the penalties proposed by the ACCC (and not contested by the relevant respondents) and imposed record fines of A\$36 million on Visy and further penalties of A\$1.5m on the company's former CEO and A\$500,000 on the former general manager. It should be noted that while the Court made reference to the increased penalties under the new provision, the penalties imposed in this case were based on previously applicable penalty provisions because the contravention occurred prior to 1 January 2007 when the new provision on penalties took effect.

In determining the appropriate level of penalties to be imposed, the Court reiterated the principles for the assessment of penalties. The Court outlined the factors set out below as relevant for the assessment of penalties, which include the factors set out in section 76(1) of the TPA and the factors commonly 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
- Whether the contravenor has previously been found by the court to have engaged in similar conduct

² Section 77A Trade Practices Act 1974.

³ [2007] FCA 1617.

- 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
- Similar conduct in the past
- Financial position
- Deterrent effect

The Court noted that the fact that the ACCC and the respondents proffered a penalty agreed as between themselves was relevant, although not conclusive, given that the responsibility of the imposing penalties is conferred by the TPA on the Court. In accepting that the penalty of A\$36 million against Visy was appropriate, the Court took into account, among other things, the considerations set out below.

- The gravity of the contravention as reflected by the progressive increase in maximum penalties. It was noted that the law, and the way it is enforced should convey to those disposed to engage in cartel behaviour that the consequences of discovery are likely to outweigh the benefits, and by a large margin.⁴
- While the ACCC did not make any allegations of loss caused to any customers, the Court recognised that the conduct involved was inherently likely to cause loss.⁵
- Visy's disregard for compliance with the TPA, noting that the corporate culture of Visy in relation to its obligations under the TPA was non-existent.⁶ In this regard, the Court noted the existence of a trade practices compliance manual, and the lack of any notice it was given.
- Recognition that this was by far the most serious cartel case to come before the Court in the 30 plus years in which price fixing has been prohibited by statute.⁷

In accepting the penalties of A\$1.5m on the company's former CEO and A\$500,000 on the former general manager, the Court took into account, among other things, the parties' knowledge of the

⁴ Supra note 3 at 307.

⁵ Supra note 3 at 314.

⁶ Supra note 3 at 319.

⁷ Supra note 3 at 320.

unlawfulness of the conduct in which they engaged, the length of time they engaged in the conduct, the position they occupied within the company and whether or not they instigated the conduct.

The Visy judgment is also significant as it includes some general commentary that affirms the importance of individual sanctions and deterrence. In particular, the judgment recognised that the level of penalty on individual contravenors is critical to any cartel regime, noting that while heavy penalties are appropriate for corporations, it is only individuals who can engage in the conduct which enables corporations to fix prices and share markets. In this regard, it was noted that many countries recognised this reality by enacting laws which make cartel conduct by individuals subject to criminal sanctions, and that Australia is currently in the process of looking to introduce criminalisation.

The Court also commented on the cartel's impact on the market, noting that it had the potential for the widest possible effect, as 'every day every man, woman and child in Australia would use or consumer something that at some stage has been transported in a cardboard box.'⁸

The relevance of third party actions in an assessment of penalties has yet to fully considered by Australian courts in their deliberation when determining the appropriate level of penalties.. Private class actions in relation to the Visy matter had commenced prior to the settlement of the ACCC matter, however, they are yet to be finalised and the Visy judgment was silent on what impact, if any, third party actions should have on the assessment of penalties. Broader issues such as the level of assistance provided to private parties, for example, access to documents and information, or the seeking of findings of fact by the ACCC that assist private damage claimants, still remain. However, at this stage, the ACCC's position is the same as set out in the 2006 paper - that is, the ACCC 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.

The importance that the Courts place on deterrence as a factor in imposing penalties was also noted in the 2005 case *ACCC v High Adventure Pty Ltd*.⁹ In that case, the Court stated that '[i]n some cases the penalty may be so high that the offender will become insolvent. That possibility must not prevent the Court from doing its duty for otherwise the important object of general deterrence will be undermined.'¹⁰ While this case did not relate to cartel conduct, it demonstrates the Court's general approach to deterrence as a factor in assessing penalties and its view that economic consequences such as insolvency should not outweigh the object of deterrence.

The factors for assessing penalties as applied in the Visy judgment, and set out in paragraph 0 above, are well established and continue to be applied in other cases.

⁸ Supra note 3 at 312.

⁹ [2005] FCA FC 247.

¹⁰ *ACCC v High Adventure Pty Ltd* [2005] FCA FC 247 at 11.

CANADA

1. Introduction

Plea and sentence discussions are an essential component of the criminal justice system. It is appropriate for the Director of Public Prosecutions (the DPP)¹ 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*").²

The enforcement process in Canadian competition law is comprised of two steps. The first step is the investigation or inquiry which is conducted by the Competition Bureau (the Bureau) and the Commissioner of Competition (the Commissioner).³ The second step is the prosecution of alleged offences which begins when the Commissioner refers a matter to the DPP for consideration. The DPP 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 prosecution, the DPP has the sole authority to enter into plea and sentence discussions. Ultimately, any plea to a criminal offence, as well as any agreement as to settlement, must be accepted by a Canadian superior court of criminal jurisdiction.

The Bureau issued a draft *Information Bulletin on Sentencing and Leniency in Cartel Cases* for public consultation on April 28, 2008. The draft document outlines the factors the Bureau considers when making sentencing recommendations to the DPP and the process that a party should follow when seeking a Bureau recommendation to the DPP for a lenient sentence. The public consultation closed on July 25, 2008 and the Bureau is analysing the submissions received with a view to publishing a final document in 2009. The Bureau also looks to the leniency and settlement processes of other jurisdictions as guidance in this process.

2. Cartel Provisions and Sanctions

Cartels are prohibited under sections 45, 46 and 47 of the *Competition Act*. Section 45 prohibits agreements that restrain or injure competition unduly and a violation is punishable by imprisonment for a term not exceeding five years or by a fine not exceeding \$10 million (CAD), or both. Section 46 prohibits corporations that carry on business in Canada from implementing foreign directives giving effect to a conspiracy entered into outside Canada. A violation is punishable by a fine in the discretion of the court

¹ The Director of Public Prosecutions is the head of the Public Prosecution Service of Canada (PPSC), the federal government organization responsible for prosecutions on behalf of the Attorney General of Canada. The PPSC was created by the *Director of Public Prosecutions Act* on December 12, 2006, when Part 3 of the *Federal Accountability Act* came into force. It replaces the former Federal Prosecution Service of the Department of Justice. The PPSC is independent of the Department of Justice and reports to Parliament through the Attorney General of Canada.

² <http://canada.justice.gc.ca/en/dept/pub/fps/fpd/toc.html>.

³ 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*.

(no specific limit). Section 47 prohibits bid-rigging and a violation is punishable by a fine in the discretion of the court (no specific limit) or by imprisonment for a term not exceeding five years, or both.

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 and may also be issued where no charges are laid. A prohibition order will typically enjoin the party from committing an offence or an act constituting, or directed toward, the commission of an offence under the *Competition Act*. It may also contain prescriptive terms requiring a person to undertake certain positive steps imposed by the court, or agreed to by the DPP and the party. The use of a prohibition order, either on its own or as part of a guilty plea, provides the Bureau with an alternative means to dispose of a matter, advance deterrence, enhance accountability, and where appropriate, secure restitution for consumers.

3. The Role of the Competition Bureau

While the authority to enter into plea and sentence discussions rests solely with the DPP, the Bureau participates in these discussions by providing support and making recommendations to the DPP. The FPS Deskbook recognizes the importance of consultations with the investigating agency in the plea and sentencing process and there is a significant degree of cooperation between the Bureau and the DPP throughout the enforcement process.

The Bureau is responsible for briefing the DPP on the results of its investigation and for recommending an appropriate disposition of a matter. Bureau investigators have an in-depth knowledge of cases that are the subject of plea or settlement discussions. They are in an ideal position to provide detailed information about a matter and to identify mitigating or aggravating factors pertinent to plea and sentencing considerations. Recommendations are put in writing and provided to the DPP along with a written brief indicating, in summary form, investigative steps taken, potential witnesses, and an overview of the evidence each witness can provide (including documentary evidence) should the matter proceed to trial.

4. The Role of the PPSC

Counsel from the Public Prosecution Service of Canada (PPSC Counsel) represent the DPP⁴ in proceedings before the courts of criminal jurisdiction in Canada. Counsel for the PPSC are responsible for conducting all plea and sentence discussions on behalf of the Attorney General of Canada. PPSC counsel must ensure that all plea and sentence discussions meet the standards set out in the *FPS Deskbook*.

The FPS Deskbook provides that PPSC counsel may participate in plea and sentence discussions where:

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

⁴ *Supra* note 1.

PPSC counsel consults the Bureau when considering the appropriateness of any proposed plea and sentence resolution, and considers the Bureau's view when assessing whether the proposed plea and sentence is in the public interest.

5. Role of the Court

In Canada, the final determination to impose a sentence in a criminal matter is at the sole discretion of the courts. Judges are not bound by sentencing recommendations and have the authority to determine appropriate sentences with reference to the statutory sentencing objectives and principles as set out in Canada's *Criminal Code*⁵.

6. The Process

The process for plea and sentence discussions is set out in the *FPS Deskbook*⁶.

All plea and sentence resolutions which are entered into prior to charges being laid are reduced to writing in a plea agreement, which includes a statement of admitted facts signed by the accused. 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. PPSC Counsel may agree to withdraw or stay other charges, or to reduce multiple charges to one all-inclusive charge. PPSC counsel may not proceed with unnecessary additional charges in order to secure a negotiated plea, agree to a plea of guilty not disclosed by the evidence, or agree to a plea of guilty that inadequately reflects the gravity of the accused's provable conduct.

Successful sentencing discussions will often result in an agreement regarding the range of a sentence, the specific sentence that will be recommended to the court by PPSC counsel, or the specific sentence that will be jointly recommended by PPSC counsel and counsel for the accused. Fines sought by PPSC counsel may be reduced if the accused cooperates in a timely manner with the Bureau's investigation and any subsequent prosecution by the DPP. Sentence discussions may not involve a promise not to appeal a sentence imposed at trial.

When negotiating a sentence, PPSC counsel makes the best offer to the accused as soon as practicable, and, absent a significant change in circumstances, the offer is not repeated at a later point in the process.

Sentencing discussions may result in an agreement on charge but not on sentence at which point the accused will plead guilty with sentencing left to the court. Sentencing submissions to the court will typically be made by both PPSC counsel and counsel for the accused. When sentencing discussions do not result in an agreement on sentence or charge, the two sides may reach an agreement that narrows the issues to be determined at trial.

Charges are laid by the DPP before a provincial superior 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.

⁵ R.S. 1985 c. C-46, as amended, a statutory instrument respecting Canadian criminal law.

⁶ *Supra*, note 2.

During the hearing, oral representations may be made by both PPSC counsel and counsel for the accused. The court will accept the guilty plea if it is satisfied that the accused admits certain facts, and that those facts constitute the commission of an offence.

If the court accepts the guilty plea, it will then consider the sentencing recommendation of the two parties. The court is not bound to accept the suggested sentence; however, as a matter of practice, the court will usually impose the suggested sentence unless the court finds it is clearly unreasonable. The court will consider the appropriateness of the sentence in light of the relevant provisions of the *Criminal Code*, the *Competition Act* and relevant case law.

Both the conviction and the sentence may be appealed to a higher court in the same manner as other criminal convictions and sentences. The decisions of the court on pleas and sentencing are similar to other court decisions in that they have precedential value.

7. Recent Cases

Since Canada's 2006 submission to the OECD on this topic, six cases involving section 45 conspiracy charges under the Competition Act were resolved with guilty pleas and three cases with prohibition orders. All fine levels indicated are in Canadian dollars.

- In September 2008, Stolt-Nielsen Transportation Group Ltd. (Stolt-Nielsen) and the DPP consented to the issuance by the Federal Court of Canada of an Order prohibiting Stolt-Nielsen from committing an offence under certain provisions of the Act and from doing any act directed toward the commission of such an offence. Stolt Nielsen is also subject to a variety of compliance requirements and must indemnify the Commissioner for a portion of the costs and disbursements incurred during the course of the Commissioner's investigation.
- In September 2008, one individual pleaded guilty for his part in a criminal conspiracy to fix the price of gasoline in a local market in the province of Québec. Both counsel for the PPSC and for the defence made sentencing submissions to the Court. The Court sentenced the individual to a \$10,000 fine, as sought by the DPP.
- In June, 2008 three companies and one individual pleaded guilty for their part in criminal conspiracies to fix the price of gasoline in one or more of four communities in the province of Québec. The parties agreed to co-operate with the ongoing Bureau investigation and related prosecutions. One company was fined \$1,850,000, two related companies were fined \$89,500 each, and the individual was fined \$50,000. Charges were also laid against 13 individuals and 11 companies who are accused of fixing the price of gasoline at the pump and that matter is continuing in the courts.
- The Competition Bureau obtained a prohibition order against two bio-insecticide and insect control service companies in April, 2008. The court order prevents them from committing any offence contrary to the conspiracy or bid-rigging provisions of the Competition Act and requires them to implement and maintain measures to enable them to comply with the provisions. The order followed a Bureau investigation into attempts made by the two companies to make arrangements with some of their competitors to protect their market shares. The order was issued without any admission of liability or guilty under the Act.
- In November 2007, SEC Carbon Ltd. pleaded guilty to participating in a conspiracy in the graphite electrodes market and was fined \$250,000 by the Federal Court of Canada. SEC was the eighth party to be convicted in Canada for participating in the graphite electrodes cartel and their

conviction concluded the Bureau's investigation. Fines for all parties to the cartel totalled almost \$25 million.

- In October 2007, Bayer Group pleaded guilty to participating in three international price fixing conspiracies in the rubber and chemicals industry and was fined a total of \$3.465 million.
- In September 2007, Ibiden Co. Ltd. pleaded guilty to aiding and abetting a conspiracy to fix the price of isostatic graphite and was fined \$50,000. Ibiden had provided significant and early cooperation in connection with the investigation and, as a result, lenient treatment was recommended. Ibiden is the third company to plead guilty in Canada in relation to the supply and sale of isostatic graphite.
- In February 2007, a case involving six auto body shops in the city of Fort McMurray was resolved with a consent Prohibition Order. The Order prohibits the companies from, directly or indirectly, communicating or exchanging information relating to pricing, and from entering into any agreement or arrangement relating to pricing with any other Fort McMurray auto body repair service. The companies were required to publish a corrective notice outlining the terms of the Order in the local newspaper and to implement a compliance program. The order was issued without any admission of liability or guilty under the Act.
- In July 2007, Du Pont Performance Elastomers pleaded guilty and was fined \$4 million in connection with its agreement with competitors to fix the prices of polychloroprene rubber sold in the North American market.

8. Conclusion

Firms under investigation are motivated to participate in plea and sentence discussions in order to obtain a less punitive sentence than might otherwise be obtained through litigation, and to avoid the attendant costs. The primary benefit for the Government of Canada is the avoidance of unnecessary litigation and its attendant costs and uncertainties. The rules of process are transparent and predictable. The DPP, having regard to the recommendations of the Bureau, strives to ensure proportionality across all cases, approaching similar cases in a similar manner. Public reporting of settlements reached assists in deterrence, and encourages the early resolution of other similar matters.

CZECH REPUBLIC

1. Introduction and context

This contribution covers the recent development and experience in the field of direct settlement in the Czech Republic. It is a follow-up to the contribution that the Office for the Protection of Competition of the Czech Republic (hereinafter the Office) drafted for the OECD Competition Committee roundtable on Plea Bargaining, that took place in October 2006 (hereinafter 2006 Contribution)

In its 2006 Contribution, the Office held that the Czech competition law does not provide for any specific procedure for plea bargaining. The Office thus discussed three specific approaches, allowing for reduction or even non-imposition of penalty to undertakings that stop the anticompetitive behavior: settlement of the case before initiating the formal procedure, accepting commitments proposed by the undertakings and the reduction of fine in the appellate procedure.

This remains to be true. However, there has been significant development in the Czech Republic since the October 2006 meeting. First, in February 2008, the Office issued its rules on so called alternative solution of certain competition cases. In this document the Office described the cases and conditions under which it does not initiate an administrative proceeding, or terminates administrative proceedings in course as a response to cooperation of the parties to the proceeding or investigation. Second, the Office has recently engaged in a “real” settlement procedure that provides for significant lowering of fine as a consequence of guilty plea. The two issues are discussed in more detail below.

2. Rules for alternative solution

As stated in 2006 Contribution, since 2004, the Czech Competition law provides for the possibility of adopting Commitments Decision. The Office may, in course of the first-instance proceeding, issue a decision on imposition of commitments proposed by the parties to the proceeding.¹ Such decision, providing the proposed commitments are sufficient for elimination of anticompetitive situation, enables closing 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. Several cases have been closed with the adoption of commitments, since then. In addition, the 2006 Contribution states, that there has been a significant shift in a sense of an attempt of the Office to solve as many less grave cases of infringement as possible, especially those committed negligently, before the formal proceeding was initiated.

This approach has brought many benefits for the effective enforcement of competition rules in the Czech Republic. The Office can swiftly close cases of less importance and save its sources to more serious infringements, while the undertakings can escape from lengthy proceedings and fines with limited adverse impact on their reputation and professional business image.

¹ The “commitments” contained in the Czech Competition Act 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.

Even though this attitude has been highly welcome by undertakings and practitioners, some doubts have been raised as to the predictability of the rules and choice of cases, that are candidates for the commitments solution.

As a response to this debate and with the aim to increase predictability, transparency and uniformity of its activities in that field, the Office issued on its website guidelines summarizing rules and outlining the approach to be taken in the future.

In its Notice on the alternative solution of certain competition issues the Office declared that cooperation with undertakings suspected of anti-competitive infringements, may under certain circumstances lead to the fast and efficient restoration of distorted competition. In such cases, the Office is ready not to initiate the administrative proceeding, or eventually conclude the already initiated administrative proceedings without decision stating that an administrative offence has been committed by this action. Nevertheless, as the Office clearly stated, the alternative solution is not always possible; there are competition problems which cannot be solved in other way than by sanction. The system of adoption of sanctions and the prevention through commitments are interconnected: the authority of the competition office and the seriousness of the appeal to a “non-sanction” solution of an individual case by the Office results directly from the reality of threat of a fast sanction imposition that exceeds the essential threshold of sensibility.

Two forms of cooperation on the part of undertakings is considered by the Office as the alternative solution of competition issues:

- Elimination of competition problems prior to the initiation of the administrative proceeding (Situation A). In this case, an administrative proceeding is not opened.
- Adoption of commitments proposed by the parties to the proceedings within the first instance proceeding (Situation B)

The core of the Notice is the definition of cases and conditions under which the Office does not initiate the administrative proceedings, or terminates the administrative proceedings in course. In deciding, whether a case is an appropriate candidate for alternative solution the Office takes into account gravity of the anti-competitive action, its duration, or, in case of collusive behavior, also a question, whether such an agreement has only been concluded, or whether it has already been realized.

The preconditions for alternative solution are different whether the alternative solution has to be adopted in Situation A or in Situation B. The outline is in the following chart.

Table 1.

Type of anticompetitive conduct		Situation A (before opening of formal procedure)	Situation B (within administrative procedure)
Less serious infringement	Not realized	Available	Available
	With limited effect	Available	Available
	Others	NA	Available
Serious infringement	Agreement distorting competition which has not been realized	NA	Available
	Which has been terminated, and which had a limited effect on the competition, and which did not show signs of a hard-core restriction	NA	Available
Very serious infringement	Others	NA	NA
		NA	NA

Very serious infringements: price fixing horizontal agreements, horizontal agreements on market division or output-restriction horizontal agreements; abuse of dominant position with significant impact on a broader group of consumers.

Serious infringements: other horizontal agreements, RPM and market division vertical agreements, other particular abuse of dominant position.

Less serious infringements: other vertical agreements of minor significance with a limited impact on consumers, which affect only a minor part of the market, and other less serious distortions of competition.

Alternative solution of competition issues outside the administrative proceeding provides lower rate of legal certainty to all subjects involved, i.e. to the affected undertakings, to the Office and also to the third parties. The Office thus applies the alternative solution outside the administrative proceeding in a narrower range of situations than is the case of alternative solution in the framework of the administrative proceeding.

When considering the adoption of commitments the Office takes into account the fact that the decision on commitments to a certain extent complicates the legal situation of third parties, because the Office's decision does not declare the illegality of action of the undertakings concerned. In the proceedings before the civil court third parties cannot rely on the preceding decision of competition authority and they themselves have to prove all conditions of liability of a defendant.

The Notice also provides for set of procedural framework, in which the alternative solution may be sought for. Full text of the notice in English is annexed to this contribution or is available at the website of the Office.²

3. Settlements

Hereinafter, the development in the area of settlements is referred to. First, cases, where settlement procedure has been successfully applied by the Office, are described. Then the experience, assessment and outlooks in this field are discussed.

² See <http://www.compet.cz/en/competition/antitrust/competition-advocacy/#c262>.

3.1 *Kofola case*

On 25 July 2008 the Office issued its decision in *Kofola* case.³ It was the first case handled by the Office in its history that was solved by using a procedure fulfilling the main features of settlement as defined by the OECD.⁴

During the investigation initiated in November 2007, the Office proved that the companies of the Kofola group, producer of soft drinks, entered during the years 2001 to 2008 into vertical agreements on resale price maintenance with their customers prohibited according to the Czech competition law. The agreements were concluded with some of the wholesale customers in various regions of the Czech Republic. These customers were bound to apply unified prices in further sale. The agreements restrained competitive relations among Kofola customers and therefore decreased consumer benefits, otherwise resulting from the unharmed competition on the market of non-alcoholic beverages.

It was the parties to the proceeding that asked for settlement of this case. As a legal basis the Office used its guidelines for calculation of fines that provide for up to 50 per cent discount of fine as an award for cooperation during administrative proceeding.⁵

Once it became clear, that the Office had enough evidence at its disposal for proving existence of anticompetitive behaviour, Kofola Group fully cooperated with the Office. The undertaking at the very initial stage declared that it was interested in a fast and effective solution and promised qualified cooperation.

As the second step, the parties to the proceeding filed with the Office the formal Request for initiation of settlement procedure. In their Request the parties repeated their intention to fully cooperate and informed the Office that they had initiated an internal antitrust audit. The aim of this audit was to unveil anticompetitive conduct within the holding and to identify relevant information and documents to be presented to the Office in order to help it to prove all elements of the infringement and to help to reach quick closing of the proceeding.

While designing settlement procedure to be applied the Office took into account the draft and the final wording of the Commission Notice on the conduct of settlement procedures.⁶ The procedure applied by the Office was heavily inspired by the Commission's rules, but some elements had to be modified in order to reflect the Czech legal system and specifics of the case.

Settlement procedure applied by the Office in its *Kofola* case consisted of the following steps:

- Formal Request for initiation of settlement procedure;
- Discussion on the preliminary findings and objections between the Office and the parties;

³ See Office's decision No. S 095/2008/KD-14495/2008/810 of 25 July 2008.

⁴ See OECD Plea Bargaining/Settlement of Cartel CASE. DAF/COMP(2007)38, p. 9.

⁵ See point 34 of the guidelines - Guidelines of the Office for the Protection of Competition on the method of setting fines imposed pursuant to art. 22 par. 2 of the Act No. 143/2001 Coll. on the Protection of Competition as amended

⁶ See 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 (Text with EEA relevance), Official Journal C 167, 2.7.2008, p. 1–6

- Preliminary request for settlement by the parties;
- Specification and amendment of the file and information contained in the preliminary request ;
- Final request for settlement by the parties consisting of:
 - an acknowledgement of the parties' liability for the infringement that is subject to the proceeding, including legal qualification, and the duration of infringement in accordance with the results of the settlement discussions;
 - an indication of the maximum amount of the fine the parties foresee to be imposed and which the parties accept;
 - the acknowledgment by the parties that they have been sufficiently informed of the preliminary findings and specific objections the Office envisages to employ in its decision, and that the parties have been given sufficient opportunity to study the findings and objections and comment on them;
 - the parties' confirmation that, taking into account the mentioned facts, they do not request any further procedural measure, incl. proposals of further evidence, and that they do not request oral hearing;
- Formal acceptance of the Final request by the Office.

Kofola Group acknowledged its liability for the infringement and its legal qualification. They accepted the objections rose by the Office, specified the beginning of the infringement, the fact, that RPM had been entered and fulfilled intentionally, and explained the reasons for this conduct. They admitted that pressure had been made by them on their contractual partners – distributors to keep the prescribed resale prices. The parties provided the Office with the list of all contracts with RPM provisions.

During the proceeding, the parties modified their contracts so that they no longer contained anticompetitive provisions and provided the Office with the relevant evidence. At the same time, the parties undertook that they would inform all their partners that they were and would not be bound to keep the prices set or recommended by the seller for resale.

The results of the settlement procedure are remarkable: the length of the administrative proceeding was significantly shortened and, at the same time, the fine to be imposed was substantially lowered. According to the decision of the Office, Kofola Group has to pay CZK 13,5 mil. (EUR 0,5 mil.) fine, which is only a half of the fine otherwise to be imposed if the settlement procedure did not take place.

Even though the Office repeatedly informed the parties that the settlement procedure has no implications as concerns their right to defend themselves within the administrative and judicial review, the parties did not appeal the first instance decision and it became final and effective.

3.2 Other cases

In September 2008, the Office confirmed that the undertaking Albatros had fulfilled all conditions to qualify for settlement. The subject matter of the proceeding are RPM and agreements limiting buyers in their decision whom to resale. The combined application of both contractual provisions aimed at the protection of specialized booksellers against fierce price competition of supermarket chains, especially in case of highly attractive children books, namely seventh volume of Harry Potter in Czech language.

Similarly as in *Kofola* case, the Office intends to lower the fine to 50 per cent of otherwise applicable level as a response to very proactive approach of the party to the proceeding as concerns unveiling the real nature, extent and duration of the infringement.

At the present, the application of settlement procedure is considered at least in one additional proceeding led by the Office.

3.3 *Experience, assessment and outlooks*

The following part discusses general explanations, thoughts and plans of the Office in the field of settlements.

As already mentioned, settlement procedure has not any direct and explicit background in the Czech legal system. Furthermore, contrary to other jurisdictions, settlement rules are not elaborated in any soft-law document in the Czech Republic. The Office cannot rely on its previous case law. Even though, the Office repeatedly decided to seek settlement with parties to the proceeding. It was done no sooner the Office checked and verified, that principles of settlement procedure are not contrary to the Czech law. As a framework for its deliberation about the amount of discount from fine, the Office used the Guidelines for setting of fines (see above).

Settlements were used even in cases of RPM, even though the Office is fully aware of the fact, that such procedure is worldwide more or less used as a procedural tool in case of horizontal cartel agreements. Having that in mind, however, the Office considered the procedure appropriate for effective and rapid solution of administrative proceedings concerning infringements of vertical character, as well.

In two so far settled cases, the Office decreased the fine by 50 per cent, what is substantially more than the Commission offers in its rules for settlements. What matters is the fact, that the Office employed the settlement in vertical agreements cases, whereas the Commission intends to use settlement solely for cartels. Considering the fact, that both in Czech and European competition law the parties to vertical agreement are not entitled to use the benefits of leniency programs⁷, settlement procedure could be used as an investigative tool towards the vertical agreements, without otherwise relevant fear of compromising the effectiveness of leniency programs. This was fully applicable in both mentioned cases; the parties to the proceedings not only admitted their liability and legal qualification, but they provided the Office with the additional evidence about the infringement in question, that were not in its possession and that represented significant added value. Having done that, their significantly contributed to full discovery of illegal behavior, its extent and duration. Within the framework of leniency program, provision of such evidence would qualify the undertaking for up to 50 per cent reduction in fine.⁸ In other words, the reason for more substantial discount of fine during settlement in two Czech cases, as compared to the EC settlement program, is the fact that settlement procedure was in the Czech Republic used both as a procedural measure to shorten the administrative proceedings and as an investigative tool. The Office made clear that in case of horizontal (cartel) agreements where the leniency program is used as a primary investigative tool and where the parties might be provided with full or partial immunity from fine for provision of evidence,

⁷ See Leniency programme on imposition of fines in accordance with the Article 22 of the Act No. 143/2001 Coll., on the Protection of Competition and on amendment to certain Acts (Act on the Protection of Competition) (hereinafter referred to as “the Act”) as amended, on prohibited agreements distorting the competition, on condition that certain additional requirements are fulfilled the parties to the cartel can be granted immunity from a fine or a reduction of a fine, <http://www.compet.cz/en/competition/antitrust/new-leniency-programme/#c211>.

⁸ See point 1.2.3 of Leniency programme.

such significant reduction of fine would not be possible; in case of cartels the settlement procedure cannot be used for investigation.

In its *Kofola* decision, the Office emphasized that there is no legal title for settlement procedure (i.e. there is a discretion of the Office whether it would permit the request of parties to settle) and that acknowledgement of liability and legal qualification is an obligatory precondition for its application. The Office will follow these basic principles in its following decisional activity and it will weigh pros and cons of the settlement procedure in every single case. According to the Office's (limited) experience, the following unambiguous positives, on the one hand, and potential drawbacks, on the other, can be identified.

The Office deems that the main contributions of the settlements are effective reparation of an anticompetitive situation, substantial savings of competition authority's resources while retaining the possibility of imposing substantial fine. The deterrence connected with substantial fines that are imposed in settlements decision is the main advantage of this procedure as compared to other forms of alternative solution, mainly commitments decisions where no fines are imposed.

Settlements lead to substantial shortening of first instance proceedings. Contrary to other cases, a formal statement of objections was not drafted and discussed with parties to the proceeding. In *Kofola* case, the Office did not need to spend its material and personal resources on performance of second instance proceeding or on its defense before the court, because the parties did not appeal the decision. Saved time and resources could be used for investigation of other cases.

So far experience seems to prove that the main incentive for undertakings to settle their cases is the possibility to dispose of their case, i.e. to influence its outcome and duration of administrative proceeding. The limitation of negative impacts of antitrust investigation on their reputation and good name is deemed to represent the main beneficial feature of settlements. Undertakings refer to negative influence of lowering their reputation and uncertainty about the length and consequences of investigation (incl. the actual amount of fine to be imposed) on their activities in many other areas. Among others, impact on stock prices, availability of loans and credits or doubts of potential strategic partners, are mentioned by them. They appreciate the possibility to seek transparent and quick completion of their case by settlements, for they limit negative consequences of investigation and increase legal certainty of investigated undertakings and third parties.

As concerns risks of settlement procedure, the fear of lack uniformity is sometimes mentioned. The risk might be even higher in case the competition authority has not fixed procedural rules for settlements. Also for this reason, the Office intends to draft and issue guidelines on settlements, once it has enough experiences with this procedure. The guidelines shall cover the typical cases that are appropriate candidates for settlements, as well as procedural rules and limits for discounts from fines.

Specific consequence of substantial use of settlement procedure, that has not been discussed so far, at least in the Czech Republic, is the fact, that incomes of state budget flowing from fines imposed by competition authority might be significantly decreased.

Some commentators point out, that settlements may have adverse consequences for private enforcement of competition law. Settlements decisions will usually contain fewer details than normal decision, they will be shorter and this can diminish the usefulness of it in follow on civil proceedings. On the contrary, the position of plaintiffs might be better because the settlement decision incorporates unreserved acknowledgment of liability for infringement. Due to the total underdevelopment of private enforcement of competition law in the Czech Republic, this risk seems to be very limited.

On the other hand, the Office deems that resignation on some procedural tools for defense that the parties do is not a drawback or real risk. First, settlement procedure neither requires, nor foresees such resignation. If parties to the proceeding opt for not appealing a settlement decision, they do that on factual basis, voluntarily (initiation of settlement procedure is basically up to a party and he party may at any time close this procedure) and on the basis of fully informed choice between different variants of further course of proceeding, that is made by an undertaking having for such selection enough sources, information, experience and expertise. The Office is therefore convinced that settlement procedure does not breach principles of justice and fair process.

APPENDIX

Competition Advocacy – Notice of the Office for the Protection of Competition on the Alternative Solution of Certain Competition Issues

1. Introduction

The role of the Office for the Protection of Competition (hereinafter “the Office”) is first and foremost to protect competition as such. The forms of distortion of competition, review of which falls under the Office’s competence pursuant to the Act No. 143/2001 Coll., on the protection of competition and on amendment of certain acts (Act on the Protection of Competition), as amended (hereinafter the Act, or the Act on the Protection of Competition), are so-called prohibited agreements¹, abuse of dominant position² and certain cases of concentration of undertakings (mergers)³ (Article 1, paragraph 1 of the Act).

The activities of the Office are in principle conducted in ex post supervision form – the Office assesses, whether the law has been breached or not by the competitors’ action. This happens in case of prohibited agreements and abuse of dominant position; in the area of merger review this happens in case of the implementation of non-approved mergers (Article 18, paragraph 5 of the Act)⁴.

Besides the Act on the Protection of Competition the Office applies in relation to the prohibited agreements and abuse of dominant position which could significantly affect trade between EU Member States (so-called conducts with Community dimension)⁵, directly applicable Community law, specifically Article 81, or Article 82 of the Treaty establishing the European Community (hereinafter the EC Treaty)⁶. In relation to mergers which may be reviewed by European Commission (hereinafter the Commission), thus so-called mergers with community dimension, the Office, however, does not have any decision-making powers⁷.

The Act on the Protection of Competition stipulates only the formal procedure which the Office follows if it considers that the violation of competition law has occurred (either Czech or Community). In such cases the Act assumes an initiation of the administrative proceeding at the end of which the Office on

¹ Cf. Article 3 and following of the Act.

² Cf. Article 10 and following of the Act.

³ Cf. Article 10 and following of the Act.

⁴ *Ex ante* regulation (which the Office performs in connection with the approval of mergers (cf. particularly Articles 16 and 17 of the Act), is not included in this document.

⁵ *Ex ante* regulation (which the Office performs in connection with the approval of mergers (cf. particularly Articles 16 and 17 of the Act), is not included in this document.

⁶ *Ex ante* regulation (which the Office performs in connection with the approval of mergers (cf. particularly Articles 16 and 17 of the Act), is not included in this document.

⁷ Council Regulation (EC), No 139/2004, Article 21, paragraph 3.

the basis of the gathered information declares whether an administrative offence⁸ has been committed, and if so, the Office eventually decides to impose a fine⁹ or a remedy¹⁰.

Furthermore, in case of proceedings on prohibited agreements or abuse of dominant position the Act gives explicitly the possibility to decide on imposition of measures, which were proposed together by the parties to the proceedings (thereinafter the commitments)¹¹.

The Office holds the view that cooperation with undertakings which are suspected of anti-competitive infringements, may under certain circumstances lead to the fast and efficient restoration of distorted competition. In cases where the undertakings are prepared to remedy their action out of their own initiative, the Office is ready to offer a helping hand to these undertakings; if the anti-competitive situation is remedied, the Office is ready not to initiate the administrative proceeding, or eventually conclude the already initiated administrative proceedings without decision stating that an administrative offence has been committed by this action.

The partnership approach between the Office and the undertakings may in many cases lead to a faster and more reliable achievement of the aim of competition policy, which is the protection of competition, but also to the restoration of competitive conditions in the market. The rapidity of this solution is connected with the informality of the approach. Higher reliance of the results is based on the assumption that the undertakings identify themselves more with measures they themselves adopt (although after formal steps taken by the Office) than with a fine which is imposed always against the will of its addressee.

Nevertheless, it is unquestioned that the alternative solution is not always possible; there are competition problems which cannot be solved in other way than by sanction. The Office believes that the system of adoption of sanctions and the prevention through commitments are interconnected: the authority of the competition office and the seriousness of the appeal to a “non-sanction” solution of an individual case by the Office results directly from the reality of threat of a fast sanction imposition that exceeds the essential threshold of sensibility. Thus the Office applies concurrently with these rules strictly its principles for imposing fines¹².

This document describes the cases and conditions under which the Office does not initiate the administrative proceedings, or terminates the administrative proceedings in course, depending on the seriousness of an anti-competitive conduct, with regard to the fact whether and for how long the anti-competitive state has lasted and on the measure of undertaking’s cooperation. These procedures are in this document called “alternative solution of competition issues”.

The Office is convinced that the primary consideration of the possibility of alternative solution of competition issues is the assessment of gravity of the anti-competitive action, its duration, or in case of agreements distorting competition also a question, whether such an agreement has only been concluded, or whether it has already been realized. It is necessary to take into account also the fact that the choice of alternative solution influences essentially the procedural situation of the subject harmed by the anti-

⁸ Cf. Article 7, paragraph 1, Article 11, paragraph 2 and Article 18, paragraph 5 of the Act.

⁹ Cf. Article 7, paragraph 1, Article 11, paragraph 2 and Article 18, paragraph 5 of the Act.

¹⁰ Cf. Article 23, or Article 18, paragraph 5 of the Act.

¹¹ Cf. Article 7, paragraphs 2 – 5, and Article 11, paragraphs 3 – 7 of the Act.

¹² Guidelines of the Office on the method of setting fines (<http://www.compet.cz/en/competition/antitrust/guidelines-on-the-method-of-setting-fines/>), thereinafter the Guidelines on setting fines.

competitive action in the framework of the judicial proceedings on the damages caused by anti-competitive actions (see below).

Alternative solutions of competition issues, as described in this document, do not represent the only way the Office may cooperate with the undertakings on the elimination of competition problems. Procedures of the Office described in this document thus do not affect the so-called Leniency programme¹³ related to cases, where an undertaking enables the Office to prove a prohibited agreement for which the Office has not had sufficient evidence before. Moreover, the further on described procedures do not affect the possibility of the Office to decrease the fine during the appellate proceedings if the party to the proceeding has fulfilled the remedies imposed on it in the first instance decision.

The rules mentioned below are not applied by the Office in non-standard cases where it is possible to define clearly the specificities of cases and the measure of difference and where this different procedure is necessary for effective protection of competition.

2. Alternative solution of competition issues in general

The following forms of cooperation on the part of undertakings is considered by the Office as the alternative solution of competition issues:

- Elimination of competition problems prior to the initiation of the administrative proceeding, and
- Adoption of commitments proposed by the parties to the proceedings in the framework of the first instance proceeding.

The possibility of the alternative solution of competition issues is dependent, among others, on the gravity of the infringement the undertakings are suspected to have committed. In its application practice¹⁴ the Office distinguishes among three categories of infringements'gravity, differing in the extent of threat for competition:

- Very serious infringements: namely price fixing horizontal agreements, horizontal agreements on market division or output-restriction horizontal agreements; abuse of dominant position with significant impact¹⁵ on a broader group of consumers, implementation of mergers contrary to a legitimate decision of the Office, and non-fulfillment of measures imposed by the Office pursuant to Article 18, paragraph 5 of the Act.
- Serious infringements: other horizontal agreements, resale price maintenance and market division vertical agreements, other particular abuse of dominant position or violation of prohibition of merger implementation pursuant to Article 18, paragraph 1 of the Act in cases than different from those mentioned in "14. i" above, and
- less serious infringements: other vertical agreements of lesser significance with a limited impact on consumers, which affect only a minor part of the market, and other less serious distortions of competition.

¹³ The Office's *Leniency programme* (<http://www.compet.cz/en/competition/antitrust/new-lenency-programme/>).

¹⁴ Guidelines on setting fines, paragraphs 21 – 24.

¹⁵ Both direct and indirect impact on consumers is taken into account.

Conditions for alternative solution of competition issues before the initiation of the administrative proceeding and in the framework of the administrative proceeding are entirely specific; for this reason this document deals only with their individual forms. Alternative solution of competition issues outside the administrative proceeding provides lower rate of legal certainty to all subjects involved, i.e. to the affected undertakings, to the Office and also to the third parties. The Office thus applies the alternative solution outside the administrative proceeding in a narrower range of situations than is the case of alternative solution in the framework of the administrative proceeding.

3. Elimination of competition problems prior to the initiation of the administrative proceeding

Pursuant to Article 20, paragraph 1, letter a) of the Act the Office supervises, whether and how the undertakings fulfill their duties resulting from the Act or from decisions of the Office issued on the basis of this Act. Pursuant to Article 20, paragraph 2 of the Act the Office proceeds in the course of supervision appropriately pursuant to Article 21, paragraph 5 to 9 of the Act, thus pursuant to provisions which regulate the administrative proceedings before the Office.

Investigations conducted by the Office in order to find whether violation of law has taken place or not, are regarded as initiated by the Office's ex officio. These investigations may basically end either in a conclusion that in the given case the violation of law has not taken place, and that outside the course of the administrative proceeding, or the Office initiates the administrative proceeding or the case is passed on to other relevant body.

If the Office learns about possible violation of law, it conducts an investigation to find out whether the detected facts give reasons for the initiation of an administrative proceeding in the given case (cf. Article 21, paragraph 3 of the Act).

If the detected facts give reasons for the initiation of an administrative proceeding, the Office preliminary analyses the gravity of the action in question, and whether the anti-competitive action has already been realized and if so, the duration of the infringement.

The Office is of the opinion that in case of certain less serious infringements it is not contrary to preventive sanction policy of the Office if it does not initiate the administrative proceeding (and thus does not decide on the commitment of the infringement, or on imposing a sanction) under the condition that the competition problem will be fully eliminated in the near future.

In case the Office, on the basis of a preliminary assessment, comes to a conclusion that it is possible to assess the anti-competitive action as less serious and that this action either has not been realized or has had a limited impact on competition, then, provided it does not result from the circumstances of the case that in order to get evidence it is necessary to undertake investigation on the premises in the course of the administrative proceeding (cf. Article 21, paragraphs 5 and 6 of the Act), the Office notifies, before the initiation of the administrative proceedings, the undertakings suspected of committing the infringement of the fact in which of their action the Office sees a possible violation of the Act or Articles 81 and 82 of the Treaty. Limited impact on competition is, according to this point, assessed mainly from the territorial point of view (area affected by the anti-competitive action), from the personal point of view (the number of competitors and consumers influenced by the anti-competitive action), and from the time point of view (the duration of the infringement).

If the undertaking which has been notified by the Office according to the preceding point of the suspicion of having committed an anti-competitive infringement, announces the Office in 10 days in writing, that it is to eliminate the identified competition problem, the Office invites this undertaking to submit in one month and not longer a proposal of a measure, implementation of which will lead to a full

elimination of the competition problem. Such a proposal must contain a deadline in which the competitor implements the measures in question.

If the Office receives a proposal of a measure in the period stated in the previous paragraph, it assesses its sufficiency. The sufficiency of the measure is assessed from the point of view of the ability to properly, i.e. timely and completely, eliminate the competition problem. It is not possible to regard as sufficient such measure, the implementation of which is dependent on uncertain circumstances or which is not implemented immediately.

The proposed measures have to be of such a character and intensity that their implementation is capable of justifying the resignation on authoritative declaration of unlawfulness of the action and on imposition of administrative sanction on action, which is normally considered as an infringement of law. It can be thus applied only when the implementation of the proposed measure leads to an objective possibility of immediate and full solution of the detrimental situation caused by the anti-competitive action.

If after assessing the above-mentioned criteria the Office finds that the proposed measures are sufficient, the Office does not initiate the administrative proceeding, and this will last as long as the undertaking fulfills conditions contained in the proposal of the measure.

If the Office does not receive the proposal of a measure in the given period, or if the Office does not find the proposed measures sufficient, eventually if the undertaking concerned does not act according to the proposed measures, the Office initiates the administrative proceeding.

4. Adoption of commitments proposed by the parties to the proceeding in the course of the first instance proceeding

Both in administrative proceedings on agreements distorting competition and on abuse of dominant position the Office may impose on the parties to the proceeding an obligation to fulfill measures they have jointly proposed, if such measures are sufficient for the protection of competition and if the detrimental situation is eliminated thereby. If the Office does not find such measures sufficient, it communicates the reasons for such finding to the undertakings in writing and it continues with the proceeding; otherwise it shall impose fulfilment of such measures and terminate the proceedings¹⁶. The parties to the proceeding may propose the measures to the Office in writing within 15 days following the day, on which the Office delivered to them its objections to the agreement; any proposal or changes in the proposed measures made after this period shall be taken into account by the Office only in cases deserving special attention. The parties to the proceeding are bound by their proposals towards the Office, as well as mutually among themselves, or towards the third parties, and following the proposal, until the decision of the Office is issued, they must not perform the agreement in its original wording¹⁷. The Office may not issue a decision imposing the measures, if the prohibited agreement has already been performed and if it resulted or could have resulted in a substantial distortion of competition¹⁸, or if the abuse of dominant position resulted in a substantial distortion of competition¹⁹.

The Act enables the parties to the proceeding suspected of having concluded a prohibited agreement or abused their dominant position to propose the Office measures (commitments), the fulfillment of which leads to elimination of the situation the Office (on the basis of the information obtained in the course of the

¹⁶ Article 7, paragraph 2, or Article 11, paragraph 3 of the Act.

¹⁷ Article 7, paragraph 3, or Article 11, paragraph 4 of the Act.

¹⁸ Article 7, paragraph 4 of the Act.

administrative proceeding) regards as detrimental. In case the fulfillment of such commitments is sufficient for the protection of competition, the Office issues a decision which imposes fulfillment of these measures on the parties to the proceeding and simultaneously terminates the proceedings (Article 7, paragraph 2, and Article 11, paragraph 3 of the Act, thereafter “the decision on commitments”).

Decision-making practice of the Office shows that the proposed commitments should have such characteristics and intensity that their fulfillment is able to justify the termination of the administrative proceeding in progress which may eventually lead to an imposition of sanction for an infringement regarded as an administrative delict. This is an exceptional situation when the interest in an instant and full settlement of the detrimental situation outweighs the interest in punishment of the guilty undertaking, and subsequently the interest in legal certainty of third parties²⁰.

When considering the adoption of commitments it is necessary to take into account the fact that the decision on commitments in a certain way complicates the legal situation of subjects affected by the anti-competitive behavior, either consumers, or competitors of the parties to the proceedings (the so-called third parties), because the Office’s decision does not declare the illegality of action of the undertakings concerned. In the proceedings before the civil court such third parties cannot rely on the fact that the question, whether the administrative delict has been committed and by whom, has already been bindingly solved as a preliminary question²¹, and they themselves have to prove basic conditions of private responsibility for anti-competitive behavior.

All the parties to the proceedings submit the proposal of commitments jointly (Article 7, paragraph 2 and Article 11, paragraph 3 of the Act); in the case of a prohibited agreement it thus has to be a joint proposal of all its participants, in the case of collective dominant position a joint proposal of all the undertakings in the dominant position in the relevant market. In case any of the parties to the proceeding does not agree with the proposed commitments, it is not possible to issue the decision on the commitments.

The proposal of commitments has to be offered within 15 days following the day on which the Office delivered its objections to the parties to the proceedings; if there are more parties to the proceeding, this period starts on the day the last party has received the objections. Statement of objections is not defined by the Act; however, from the existing decision-making practice of the Office it results that it is such statement of the Office (therefor it is not a decision), in which are the parties to the proceeding notified: which of their actions are regarded by the Office as unlawful; which of the legal provisions were violated; and on the basis of which evidence did the Office come to such conclusion. The statement of objections is generally an individual administrative act undertaken in the course of the administrative proceeding following the termination of evidence gathering, but before the parties to the proceeding inspect the documentation serving as the basis for the decision^{22, 23}.

The proposal of commitments is binding for the parties to the proceeding. After the proposal of commitments has been submitted to the Office, the parties to the proceedings may not continue in action, which was indicated by the Office as detrimental in the statement of objections (e.g. they may not fulfill an agreement, which the Office regards as prohibited), and thus have to proceed according to the proposed commitments (Article 7, paragraph 3 and Article 11, paragraph 4 of the Act). In case any of the parties to the proceeding does not comply with this obligation, the submission is not regarded as proposals of commitments in accordance with the law.

²⁰ Cf. the decision of the Office for the Protection of Competition of May 15, 2006 R 10/2005 ČSAD Liberec

²¹ Cf. Article 131, paragraph 1 of the Act No. 99/1963 Coll., Rules of Civil Procedure, as amended

²² Cf. Article 36, paragraph 3 of the Act No. 500/2004 Coll. on Administrative Proceedings, as amended.

²³ The possibility of proposal of commitments after this period is described below.

The decision on commitments may not be issued if the action, which the Office regards as detrimental on the basis of the gathered evidence, has already been performed and has resulted (or could have resulted) in a substantial distortion of competition (Article 7, paragraph 4 and Article 11, paragraph 5 of the Act). The Office holds a view that with regard to these provisions of the Act the decision on commitments may be accepted only if it relates to:

- less serious infringement;
- serious infringement in the form of agreements distorting competition which has not been performed so far;
- serious infringement which has been terminated, and which had a limited impact on the competition, and which did not show signs of a hard-core restriction pursuant to Article 6, paragraph 2 of the Act, or pursuant to paragraph 11 of the Commission Notice on the de minimis agreements²⁴.

Limited impact on competition is, according to this point, assessed mainly from the territorial point of view (area affected by the anti-competitive action), from the personal point of view (the number of competitors and consumers influenced by the anti-competitive action), and from the time point of view (the duration of the infringement).

The Office assesses only such proposals of commitments that have to be delivered within 15 days following the statement of objections. Later proposals shall be taken into account by the Office only in cases deserving special attention. Similar regime stands also for significant changes in the already proposed commitments. This does not exclude later partial modification or specification of the timely proposed commitments.

If the Office receives the proposal of commitments in the stated period, it assesses the sufficiency of commitments with a view to their ability to eliminate the detrimental situation, and proceeds pursuant to criteria stated in paragraphs 22, 23, 28 and 29.

Provided the Office finds the commitments sufficient, it imposes the obligation of their fulfillment on the parties to the proceeding and by the same decision it concludes the administrative proceeding. Such decision does not declare a breach of competition law.

If the Office

- does not receive the proposal of commitments;
- receives the proposal of commitments after the stated period and it is not a case deserving special attention;
- finds the proposed commitments insufficient,
- it continues in the administrative proceeding. In the two last mentioned cases the Office notifies the parties to the proceedings of this fact in writing.

²⁴ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty (de minimis) (2001/C 368/07).

The Office believes that commitments pursuant to Article 7, paragraph 2 and following of the Act or Article 11, paragraph 3 and following of the Act must be strictly differentiated from remedial measures pursuant Article 23 of the Act (hereinafter “remedial measures”). Remedial measures are complementary instrument the Office may use if it concludes that neither the authoritative declaration of an anti-competitive infringement together with its prohibition for the future, nor the eventual sanction imposed in the form of a fine pursuant to Article 22, paragraph 2 of the Act, constitutes sufficient measures to achieve the aim of the Act. From its nature it is an imposition of measures defining an obligation to restore the previous state resulting from the parallel prohibition of particular action and from a general obligation to refrain from unlawful action. The relationship of the two instruments, i.e. commitments and remedial measures, is as follows: if the Office does not find the commitments proposed by the parties to the proceeding sufficient to eliminate the detrimental situation, it may, provided the conditions of the Act are fulfilled, impose measures (similar in substance and form) as remedial measures pursuant to Article 23 of the Act²⁵.

The Office continuously supervises the fulfillment of commitments by which it conditioned the termination of the administrative proceeding; the supervision is performed pursuant to Article 20, paragraph 2 of the Act. If the Office discovers that some undertakings do not fulfill the measures adopted pursuant to Article 7, paragraph 2 or Article 11, paragraph 3 of the Act, it imposes a fine on these undertakings pursuant to Article 22, paragraph 2 of the Act. This does not affect the procedure pursuant the following point.

Even if the administrative proceeding has been terminated as a result of adoption of commitments proposed by the parties to the proceeding, the Office may re-initiate the administrative proceedings, provided one of the three situations anticipated by the Act occurs. The Office re-initiates the administrative proceedings pursuant to Article 7, paragraph 1, or Article 11, paragraph 2 of the Act, if

- the conditions decisive for the decision on the termination of the proceeding have significantly changed;
- the undertakings have acted contrary to the imposed measures, or
- the decision on the termination of the proceeding has been issued on the basis of false or non-complete documents, data or information²⁶.

In such cases the re-initiation of proceeding is not obstructed by the principle of the authority of the thing judged.

²⁵ Cf. points 81 to 88 of the justification of decision R 10/2005 of May 5, 2006 in the *ČSAD Liberec* case.

²⁶ Article 7, paragraph 5, or Article 11, paragraph 6 of the Act.

FRANCE

1. Introduction

Ainsi que cela avait été exposé dans la note de la délégation française du 17 octobre 2006, la transaction ou procédure de non contestation des griefs a été introduite en droit français de la concurrence par la loi N°2001-420 du 15 mai 2001 sur les nouvelles réglementations économiques (ci-après, « Loi NRE »). Cet outil, novateur à l'époque de sa conception, a fait l'objet d'une application croissante, qui a permis au Conseil de la concurrence (ci-après le « Conseil ») de préciser progressivement sa pratique décisionnelle au cours des sept dernières années.

La note préparée en 2006 faisait état de perspectives mitigées quant au futur de la procédure de non contestation. Le présent document met en lumière les évolutions récentes de la pratique décisionnelle du Conseil, qui témoignent d'un second souffle et d'un rôle de plus en plus attractif de la procédure de non contestation des griefs, d'une part, et bien installé dans la panoplie des outils procéduraux du Conseil de la concurrence. Il reviendra, dans un premier temps, sur les éléments de contexte à l'origine de ces évolutions (I), ensuite sur leurs effets concrets en pratique (II) et pour finir, sur les évolutions prévisibles (III).

2. La transaction en droit français de la concurrence : un contexte évolutif

2.1 *Un outil novateur pour le Conseil de la concurrence*

La procédure de non contestation des griefs est apparue, en droit français de la concurrence, dans un contexte tout à fait particulier qui explique d'une part, ses spécificités et d'autre part, son évolution, dont voici trois éléments majeurs:

- Premièrement, l'article 73 de la Loi NRE (modifiant l'article L.464-1 du Code de commerce) instaurant cette procédure, ne précisait pas l'ensemble de ses modalités de mise en œuvre. Le Conseil a donc été conduit à forger progressivement sa pratique décisionnelle, dans le cadre tracé par le code de commerce.
- Deuxièmement, la procédure française n'a pu s'inspirer des expériences étrangères en l'absence, à l'époque, de procédure strictement comparable. La principale procédure existante, la procédure américaine du « plea bargaining » et du « plea guilty », est apparue trop différente pour inspirer la procédure française. En effet, le « settlement » américain, venant en second rang derrière la clémence fait office d'outil de détection des pratiques anticoncurrentielles et permet de négocier également les éléments constitutifs de l'infraction reprochée et sa qualification juridique, alors que dans le cadre de la procédure de non contestation, seul le montant de réfaction de la sanction fait l'objet de négociations, l'objectif principal de la procédure étant d'accélérer la procédure administrative.
- Troisièmement, le mécanisme de consultation publique¹ qui permet d'associer les entreprises « utilisatrices » à la mise en place des détails d'une procédure donnée n'était pas encore pratiqué

¹ Dont les résultats sont accessibles sur des pages dédiées du site Internet du Conseil : http://www.conseil-concurrence.fr/user/standard.php?id_rub=223 et http://www.conseil-concurrence.fr/user/standard.php?id_rub=259

par le Conseil. La mise en œuvre de la pratique de non contestation des griefs n'a donc pas bénéficié du dialogue avec les acteurs du droit de la concurrence (entreprises ou associations mais aussi, autorités de la concurrence). Or, l'exemple des consultations publiques effectuées depuis lors par le Conseil de la concurrence montre que cet exercice permet de mieux comprendre les « incitations » des différents acteurs et de recueillir des avis très utiles pour préciser les modalités techniques des outils procéduraux prévus par le code de commerce.

L'ensemble de ces facteurs explique que la pratique décisionnelle du Conseil ait évolué au cours du temps, progressivement enrichie par les applications concrètes de la procédure.

2.2 Les objectifs spécifiques de la procédure française

La procédure de non contestation des griefs permet au Conseil de consentir une réduction d'amende lorsque deux conditions cumulatives sont réunies à savoir, d'une part, l'entreprise concernée doit renoncer à contester les griefs notifiés par le Conseil de la concurrence de manière claire et formelle et, d'autre part, elle doit proposer des engagements visant la modification de sa conduite future sur le marché. La mise en œuvre de la procédure implique donc la renonciation de l'entreprise à contester les griefs dans tous leurs aspects, à savoir, les faits, leur qualification et leur imputation, ainsi que la proposition d'engagements. Les gains sont mutuels : gains en termes de réduction de sanctions pour l'entreprise, gains procéduraux pour le Conseil.

Le déclenchement de la procédure repose sur le rapporteur général, qui apprécie si les conditions d'ouverture sont réunies et qui rencontre les entreprises afin de s'assurer qu'elles ne contestent pas les griefs et d'évoquer les conséquences de cette renonciation sur le quantum de l'amende.

La procédure de non contestation permet aussi de réaliser certains gains d'efficacité procéduraux. En effet, le rapporteur est dispensé d'examiner plus avant les pratiques, ce qui permet notamment d'éviter d'avoir à établir un rapport (correspondant au second stade de la procédure contradictoire classique du Conseil) postérieurement à la notification des griefs, et conduit à raccourcir l'instruction du dossier de plusieurs mois.

Ce gain direct de temps est complété par d'autres gains procéduraux : le Conseil peut consacrer les ressources ainsi libérées à d'autres priorités et les entreprises n'ont en principe pas d'intérêt à former des recours en appel contre les décisions de non contestation. Cet avantage est loin d'être négligeable en considération des pouvoirs de la cour d'appel de Paris, qui est en mesure d'effectuer un réexamen complet des décisions du Conseil – c'est-à-dire, un réexamen susceptible de s'étendre non seulement aux questions de légalité et de procédure, mais aussi aux mérites du dossier, y compris à l'analyse factuelle et économique.

Il convient à ce stade de relever, en dépit du fait que ces deux procédures conduisent les entreprises à proposer des engagements au Conseil, que les objectifs de la procédure de non contestation doivent être clairement distingués de ceux de la procédure d'engagements. La procédure de non contestation des griefs aboutit à une qualification au fond des pratiques, la durée de la procédure contradictoire étant réduite, alors que la procédure d'engagements conduit à la clôture du dossier, sans qu'il soit procédé à la qualification juridique des pratiques.

2.3 Le champ de la procédure

Les entreprises peuvent, en toutes circonstances, demander le bénéfice de la procédure de non contestation. Si aucune infraction au droit de la concurrence n'est *a priori* exclue du champ de la procédure française de transaction, cette procédure apparaît particulièrement appropriée dans le cas d'accords horizontaux (11 sur 17 affaires du Conseil à ce jour). Elles n'ont cependant aucune garantie d'obtenir

satisfaction, car le rapporteur général dispose d'une large marge d'appréciation pour décider des cas dans lesquels l'application de la procédure de non contestation est opportune. Il procède, dans ce cadre, à l'évaluation au cas par cas du mérite de chacun des dossiers, sous réserve du contrôle de l'erreur manifeste d'appréciation par le Conseil², comme cela avait été exposé dans la précédente note présentée à l'OCDE à ce sujet.

La décision *Câbles*³, qui concernait un appel d'offres dans le secteur des câbles de haute tension et la décision *Linge*⁴, où un grief d'entente horizontale visant à répartir les clients et à harmoniser les prix a été retenu à l'encontre des entreprises mises en cause, constituent des exemples caractéristiques de l'application de la procédure de non contestation des griefs à des ententes injustifiables.

La non contestation a également été appliquée à deux cas d'entente ayant par ailleurs donné lieu à des demandes de clémence. La décision *Déménageurs*⁵, était le premier cas d'application combinée des deux procédures, le dénonciateur ayant été exonéré tandis que plusieurs autres entreprises mises en cause bénéficiaient d'une réduction d'amende de 10%. Dans la décision *Contreplaqué*⁶ de mai 2008, le Conseil a à nouveau procédé à cette application combinée et a accordé une immunité totale de l'amende à la société UPM Kymmene Corporation qui avait dénoncé une entente d'une durée de 17 ans dans le secteur des contreplaqués exotiques. Deux des huit autres sociétés parties à l'entente ont obtenu une réduction de 10% en contrepartie de leur renonciation à contester les griefs.

Mais la pratique décisionnelle du Conseil couvre aussi des cas de restrictions verticales et certains abus de position dominante, ce qui constitue également, s'agissant de ce dernier type d'infraction, une spécificité de la procédure de « transaction » française. Le Conseil a en effet développé, concernant les abus de position dominante, une solide pratique décisionnelle, clarifiant le droit applicable dans ce domaine et facilitant le choix des entreprises de renoncer à contester les griefs notifiés, le cas échéant. L'application de la non contestation en cas d'abus de position dominante représente une économie procédurale additionnelle, la discussion ne s'ouvrant qu'avec une entreprise et la prise d'engagements permettant en principe, dans ce type de cas, de trouver des solutions concrètes aux problèmes posés sur le marché.

L'affaire *France Télécom*⁷ est un bon exemple des avantages que peut représenter l'application de la procédure de non contestation en présence d'un comportement unilatéral. Dans cette affaire, l'opérateur historique de télécommunications avait exercé des pratiques discriminatoires et dénigré les services des opérateurs alternatifs au profit de ceux de sa propre filiale opérant sur le marché de l'Internet à haut débit. France Télécom a accepté de renoncer à contester les griefs d'abus de position dominante sur le marché de la boucle locale. Elle a également proposé des engagements modifiant substantiellement son comportement

² Conseil de la concurrence, décision n°06-D-09 du 11 avril 2006, relative à des pratiques mises en œuvre dans le secteur de la fabrication des portes.

³ Conseil de la concurrence, décision n°07-D-26 du 26 juillet 2007, relative à des pratiques mises en œuvre dans le cadre de marchés de fourniture de câbles à haute tension.

⁴ Conseil de la concurrence, décision n°07-D-21 du 26 juin 2007, relative à des pratiques mises en œuvre dans le secteur de la location-entretien de linge.

⁵ Conseil de la concurrence, décision n°07-D-48 du 18 décembre 2007, relative à des pratiques mises en œuvre dans le secteur du déménagement national et international.

⁶ Conseil de la concurrence, décision n°08-D-12 du 21 mai 2008, relative à des pratiques mises en œuvre dans le secteur de la production de contreplaqué.

⁷ Conseil de la concurrence, décision n°07-D-33 du 15 octobre 2007, relative à des pratiques mises en œuvre par la société France Télécom dans le secteur de l'accès à Internet à haut débit.

futur sur le marché, en instaurant un ensemble de mesures de mise en conformité (*compliance*), de suivi et contrôle (*monitoring*). Ces mesures, dont le Conseil a estimé qu'elles représentaient un engagement substantiel en considération des pratiques passées de l'opérateur historique, ainsi que le fait que l'abus ait eu lieu sur un marché de petite taille en comparaison des autres marchés sur lesquels l'entreprise en cause exerçait ses activités, ont amené le rapporteur général à recommander au collège l'imposition d'une amende d'un montant maximum de 60 millions d'euros. Le risque financier auquel l'opérateur était confronté était ainsi significativement réduit et le collège, à la suite du rapporteur général, a réduit l'amende à 45 millions d'euros⁸.

2.4 *Le moment de la procédure*

Il est crucial pour le Conseil que les calendriers d'enclenchement des différentes procédures disponibles pour garantir le respect des règles de concurrence soient clairs et garantissent la meilleure efficacité de chacun de ces outils.

La clémence est un outil de détection des cartels accessible immédiatement avant l'ouverture d'un dossier de cartel (immunité totale, de premier rang) ou avant que le dossier ne devienne suffisamment solide (immunité partielle, de second rang) pour permettre de déclencher une enquête ou de conclure à l'existence d'une infraction au droit de la concurrence. Sa disponibilité est immédiate, avant même l'enclenchement de mesures d'instruction. Les procédures d'engagement et de non contestation ne sont, pour leur part, accessibles qu'à un stade ultérieur de la procédure, après la saisine du Conseil.

Ainsi que le Conseil l'a souligné dans son communiqué relatif aux engagements en matière de concurrence⁹, la procédure d'engagement n'est susceptible de trouver application que préalablement à une notification de griefs, lorsque la pratique en cause donne lieu à des préoccupations de concurrence qui peuvent être identifiées et résolues par la prise d'engagements restaurant la concurrence pour le futur sur le marché. Cette procédure n'est pas appliquée dans les cas où le comportement a causé un dommage important au bien être du consommateur et porté atteinte à l'économie.

La procédure de non contestation s'avère particulièrement appropriée lorsque l'application des autres outils est exclue, étant donné qu'elle est chronologiquement disponible en dernier recours, afin d'écourter la procédure dans un dossier. Malgré son positionnement tardif, elle conserve toute son attractivité à la fois pour l'autorité de la concurrence et pour les parties, même dans les cas où le Conseil s'est autosaisi à la suite d'une demande de clémence. La procédure de non contestation des griefs fait en effet partie d'un tout cohérent formé avec les autres procédures alternatives (clémence et engagements), en considération duquel les entreprises disposent d'une certaine flexibilité s'agissant de leur positionnement stratégique à savoir, celui par exemple de venir en clémence ou d'attendre et de voir ce que font les autres membres du cartel, avant de transiger s'il le faut ou d'aller au contentieux.

En somme, la procédure d'engagements est un instrument privilégié dans les cas qui ne justifient pas nécessairement l'imposition d'une amende et où l'entreprise propose volontairement une solution adaptée, crédible et vérifiable pour résoudre pour le futur des préoccupations de concurrence sur le marché, alors que la non contestation a pour objectif principal de mettre fin à – ou de sanctionner rapidement – une situation où il faut assurer la dissuasion et où l'élaboration d'un remède pro-compétitif est, en conséquence, de moindre importance dans l'échelle des priorités de l'autorité de la concurrence.

⁸ Le montant de l'amende finalement imposée avait néanmoins augmenté en considération de la réitération des pratiques par France Télécom.

⁹ Conseil de la concurrence, communiqué de procédure du 3 avril 2008, relatif aux engagements en matière de concurrence, (http://www.conseil-concurrence.fr/doc/cpro_enga_avril08.pdf).

Un facteur de difficulté, auquel le Conseil avait déjà consacré certains développements dans la note préparée en 2006, s'ajoute à l'ensemble de ces considérations : en raison de la séparation des fonctions d'instruction et de décision au sein du Conseil, les entreprises négociant avec le rapporteur général puis avec le collègue qui n'est pas lié par la proposition du chef de l'instruction. En pratique, le Collège a néanmoins pour bonne pratique de considérer l'opportunité d'un renvoi à l'instruction lorsqu'il envisage de s'écarter substantiellement, et dans un sens défavorable aux entreprises, des propositions de l'instruction, ce qui constitue une garantie pour les entreprises.

3. Les aspects pratiques de la mise en œuvre de la non contestation

3.1 La nature des engagements

La non contestation des griefs, comme la clémence, requièrent la coopération de l'entreprise mise en cause. L'incitation principale d'une telle entreprise à renoncer à contester les griefs consiste dans la réduction de l'amende encourue. Or, la nécessité pour les entreprises de mesurer les avantages concrets de cette coopération, et celle, pour l'autorité de la concurrence, de ne pas révéler à l'avance le point de départ du calcul de la réduction d'amende (c'est-à-dire, le montant de l'amende qui serait imposée en l'absence de non contestation), afin de déjouer les calculs des entreprises qui pourraient vouloir mesurer le risque économique associé au comportement anticoncurrentiel, apparaissent difficilement conciliables.

La note élaborée par la délégation française en 2006 exposait déjà cette difficulté et traçait quelques pistes à explorer dans le futur afin d'accroître l'attractivité de la procédure de non contestation. L'autorité de concurrence a commencé, en 2007 à préciser dans sa pratique décisionnelle la grille de lecture permettant de mieux comprendre les liens entre les contributions apportées par les entreprises sous la forme d'engagements et les conséquences susceptibles d'y être attachées. En effet, la non contestation des griefs implique, comme dans le cadre de la procédure d'engagements, une négociation de l'entreprise mise en cause sur la façon dont elle peut modifier son comportement sur le marché – le montant de réduction finale dépendant de la valeur ajoutée apportée par les engagements souscrits.

De manière simplifiée, la grille de lecture développée par le Conseil peut être présentée ainsi :

- un taux de réduction d'amende de 10% est envisageable dans les cas de non contestation simple, c'est-à-dire dans lesquels les entreprises renoncent à contester la matérialité des faits, la qualification juridique et l'imputation des griefs, sans pour autant prendre des engagements allant au-delà de l'adoption d'un programme de conformité minimum (engagements de formation et/ou d'information interne). Ces engagements ne sont pas considérés comme des engagements de pure forme, même s'il ne sont pas récompensés dans la même mesure que les engagements comportementaux. Le Conseil considère qu'ils ont une valeur pédagogique importante, en particulier dans les affaires où il n'apparaît pas facile de s'engager à faire davantage (cartels) et dans les cas où il faut encourager un véritable changement d'habitudes (et de culture) au sein de l'entreprise.

Dans la décision *Câbles*, par exemple, les entreprises en cause opérant sur le marché des câbles électriques, s'étaient entendues sur le montant respectif de leurs offres à l'occasion de deux appels à concurrence. Le Conseil a considéré que la renonciation à contester les griefs et la prise d'engagements de mise en œuvre d'un programme de mise en conformité simple l'autorisaient à accorder une réduction de 10% de la sanction encourue, contrepartie procédurale de la non contestation.

- un taux de l'ordre de 15 à 30% peut en revanche être observé lorsque les entreprises conçoivent des engagements allant au delà de simples programmes de formation et d'information.

Dans la décision *Linge*, qui fournit une illustration des cas où il peut être avantageux pour les entreprises de s'engager davantage, les entreprises en cause, qui exerçaient leurs activités dans le secteur de la location et du nettoyage de linge de travail (uniformes, etc.), s'étaient entendues dans le cadre d'un pacte de non agression à l'occasion d'appels d'offres. Elles ont proposé des engagements qui allaient au-delà du périmètre habituel des programmes de mise en conformité et comprenaient la mise en place d'un système d'alerte professionnelle (*whistleblowing*) portant sur les infractions au droit de la concurrence. Elles ont en outre proposé des engagements comportementaux portant d'une part, sur la transparence des rencontres professionnelles entre concurrents afin de réduire les risques de collusion, et visant d'autre part, à fluidifier le marché en supprimant les obstacles juridiques au changement de fournisseur (par l'insertion de clauses de sortie des contrats). La valeur ajoutée de ce cumul de propositions a conduit le Conseil à accorder un taux de réduction d'amende de 25 à 30%.

Plus récemment, et dans une moindre mesure (réduction de 20%), la décision *Nettoyage industriel*¹⁰ visait des entreprises qui s'étaient également entendues dans le cadre d'un appel d'offres. Ces entreprises ont renoncé à contester les griefs qui leur avaient été notifiés et se sont engagées à mettre en œuvre des actions de formation en droit de la concurrence ainsi qu'un système de *Whistleblowing* permettant à chacun de leurs employés d'informer anonymement un médiateur de toute infraction au droit de la concurrence. Les entreprises en cause se sont enfin engagées à introduire une clause dans les contrats de travail de leurs employés prévoyant leur licenciement pour faute grave en cas de participation à un cartel.

La souscription d'engagements structurels en matière de non contestation, à laquelle il n'a jamais été fait appel devant le Conseil, quoique cela soit juridiquement possible, devrait être réservée à des cas exceptionnels, la préférence devant être donnée aux engagements comportementaux dans tous les cas où ceux-ci permettent de mettre fin aux infractions constatées par le Conseil et d'obtenir les évolutions souhaitées.

3.2 Conserver les incitations à la clémence de second rang

Le Conseil doit s'assurer que la clémence de second rang, qui peut être récompensée à hauteur de 50% en fonction de la valeur ajoutée apportée par le demandeur, demeure plus attractive que la non contestation. Ce principe de hiérarchisation entre clémence et non contestation doit cependant être nuancé lorsque les demandeurs de clémence ont tant apporté au Conseil qu'il n'est plus sérieusement concevable d'obtenir une valeur ajoutée dans l'affaire, à l'exception d'informations permettant de retenir un grief sur un autre marché ou d'étendre la durée d'un grief (ce qui permettrait à l'entreprise d'obtenir une exonération totale de sanction sur ces aspects de l'infraction). En effet, dans ce cas, il ne serait pas opportun de s'interdire automatiquement de transiger et d'accélérer le traitement de l'affaire.

A l'ensemble des constatations qui précèdent, le Conseil doit ajouter une mention de la réforme, déjà entamée, de l'autorité française de la concurrence (et de son fonctionnement).

4. Une évolution souhaitable de la procédure de non contestation

La loi de modernisation de l'économie, dite loi « LME » n°2008-776 du 4 août 2008 crée la nouvelle Autorité de la concurrence qui succède au Conseil de la concurrence. Le législateur donne à cette nouvelle entité le statut d'autorité administrative indépendante dont le rôle est de veiller au libre jeu de la concurrence et d'apporter son concours au fonctionnement concurrentiel des marchés à l'échelon européen

¹⁰ Conseil de la concurrence, décision n°08-D-13 du 11 juin 2008, relative à des pratiques relevées dans le secteur de l'entretien courant des locaux.

et international. L'article 97 de cette loi habilite le Gouvernement à prendre une ordonnance dont un avant-projet a été publié par le ministère de l'Economie, de l'Industrie et de l'Emploi cet été. Une des évolutions envisagées dans ce texte concerne la procédure de non contestation.

Les bilans successifs récemment dressés par le Conseil à cet égard tendaient à suggérer la suppression du lien automatique entre la non contestation des griefs et la prise d'engagements, pour rendre ses derniers optionnels et réserver une telle option aux cas où elle permettrait d'amender, par la souscription d'engagements crédibles, pertinents et vérifiables, le comportement passé d'entreprises pour rétablir la concurrence sur le marché. L'entreprise choisissant d'exercer cette option aurait droit à une réduction d'amende supplémentaire par rapport à celle qui lui aurait été accordée si elle s'était limitée à renoncer à contester les griefs.

Une telle évolution permettrait de renforcer l'objectif fondamental de la procédure de non contestation qui est l'économie procédurale et de ressources en réduisant la durée de traitement des dossiers, tout en maintenant l'objectif de dissuasion des entreprises contrevenantes. Un tel changement permettrait d'accroître l'efficacité de la procédure et les gains associés en présentant la prise d'engagements comme une simple option, disponible seulement dans les cas qui s'y prêtent.

Cette perspective n'est cependant pas exclusive d'évolutions de la procédure de non contestation à droit constant. Dans l'affaire *France Télécom*, le Conseil a déjà exercé la possibilité de proposer un plafond de réduction d'amende en valeur absolue, afin d'accroître la prévisibilité de la réduction. Dans cette affaire, le rapporteur général et l'entreprise en cause se sont mis d'accord sur un plafond de sanction limité en valeur absolue (60 millions d'euros), compte tenu du chiffre d'affaires mondial de l'entreprise et du plafond légal de l'amende encourue (5 milliards d'euros réduits de moitié, soit 2,5 milliards d'euros).

Il n'est pas certain néanmoins, que cette possibilité s'offre au Conseil dans d'autres cas. Les circonstances de l'affaire *France Télécom* étaient en effet très particulières, compte tenu du cumul de deux éléments : d'une part, l'entreprise en cause avait un chiffre d'affaires mondial extrêmement important, de sorte qu'elle était exposée à une amende potentiellement très élevée et que le jeu du plafond légal applicable en matière de transaction ne réduisait que très marginalement l'incertitude ; d'autre part, la pratique unilatérale qui lui était reprochée avait eu lieu sur un marché étroit par rapport à l'ensemble de son portefeuille d'activités. Pour autant, le Conseil n'exclut pas la possibilité d'avoir à nouveau recours à une telle solution si un nouveau cas s'y prêtait.

GERMANY

1. Regulatory Framework

The Bundeskartellamt is the authority responsible both for prosecuting offences that qualify as administrative offences under the German Act against Restraints of Competition (ARC) and for imposing fines on the offending companies and natural persons. The fining decisions of the Bundeskartellamt can be appealed in court. Any fine imposed by the Bundeskartellamt that is not appealed within the statutory period for appeal takes effect.

The decision of a defendant not to appeal and to let the fine as it is imposed by the Bundeskartellamt take effect may be regarded as a settlement solution, since court proceedings are avoided. However, defendants also have the option of an “early settlement”, before the proceedings of the Bundeskartellamt have been terminated and a fine has been set.

According to the ARC and the relevant guidelines of the Bundeskartellamt on the setting of fines, the conduct of a defendant (a company or a natural person) after the offence and during the period of prosecution can be taken into consideration as an extenuating (fine-reducing) circumstance when determining the fine to be imposed.¹ The willingness of a defendant to conclude a settlement within the proceedings of the Bundeskartellamt can be an extenuating circumstance. Other possible extenuating circumstances are, e.g., compensating parties damaged by the offence before the Bundeskartellamt has reached its decision, or cooperation on the basis of the leniency programme.

2. Proceedings

The Bundeskartellamt may offer an early settlement to a defendant at any stage of the proceedings, once it has gained an overall picture of the offence and the relevant evidence.

The proceedings are usually opened by a settlement offer by the Bundeskartellamt to the defendants. If defendants express their interest to settle, individual sessions with the Bundeskartellamt are scheduled. In these sessions, the following usually forms the basis of discussion:

- facts of the case,
- scope of objections and liabilities,
- corresponding evidence,
- resulting conclusions and
- circumstances to be taken into account for determining the fine.

¹ See Notice no. 38/2006 on the imposition of fines under Section 81 (4) sentence 2 of the German Act against Restraints of Competition against undertakings and associations of undertakings - Guidelines on the setting of fines - of 15 September 2006, batch no. 17, published at <http://www.bundeskartellamt.de/wEnglisch/download/pdf/Bussgeldleitlinien-E.pdf>.

The defendants have the opportunity to express their views on any of these or other factors they deem relevant. At the end of the session, a short deadline is set within which it is to be decided whether a settlement can be agreed or not. If the defendant wishes to reach an early settlement this will usually necessitate a guilty plea. The Bundeskartellamt will place its proceedings on a “fast track” and the settling defendant will receive, depending on the progress of the proceedings, a short statement of objections and within a short time frame a fining decision.

The reduction of the fine in a settlement must not jeopardize the attractiveness of the leniency programme.

During the “fast track” proceedings and as long as the decision has not become legally binding, the defendant has the option to terminate the settlement proceedings. There is no obligation on the defendant to abandon the right to appeal; in fact, this is not an option as an abandonment is not legally possible in Germany. Where the settlement proceedings are terminated, the case reverts back from “fast track” to the ordinary procedure. The latest possibility for terminating settlement proceedings is the deadline of the period for appeal against the imposed fine. In this case the Bundeskartellamt can amend the fine and come to a new decision.

3. Experience

The likeliness of a successful settlement depends very much on the circumstances of each single case. A key criterion is, of course, the quality of evidence (i.e. relevant for the chances of an appeal). Beyond this there are some general, not case-specific as well as case-specific factors that affect the likeliness of a settlement.

In the Bundeskartellamt’s practice of fine setting, the following not case-specific factors have been identified:

- Legal framework (i.e. likeliness of high fines that “hurt”/low fines),
- Fine-setting practice of the Bundeskartellamt (i.e. high/low fines in recent cases),
- Fine-setting practice of the courts (i.e. increase/reduction of fines in recent cases).

There are also circumstances which are related to the individual case. Some of these, in the experience of the Bundeskartellamt, are:

- Number of parties involved (i.e. few/many),
- Structure of the markets (i.e. single market/network of regional markets),
- Structure of the undertakings (i.e. management/ownership relationship),
- Duration of the offence (i.e. short time/long-running),
- Strategy of the lawyers (i.e. loss-minimizing defence/conflict oriented defence).

Due to the limiting factors mentioned above, a settlement is only possible in some case.

NETHERLANDS

1. Introduction

The Netherlands Competition Authority (NMa) sees direct settlements as a useful tool in the enforcement of competition law.

In the point of view of the NMa, the instrument of settlement agreements appears in two different forms. Firstly, direct settlements are used to gather additional information about the cartel and to reach a quick resolution of a case. The instrument has been used in this manner in jurisdictions where leniency programs offers immunity from fines to only the first company that comes forward and confesses its violating the law, leaving other parties that might be interested in applying for the program empty-handed. As a solution, these other parties receive a reduction in their fines in exchange for their cooperation within the direct settlements regime, which is likely to include an admission of guilt.

Secondly, in jurisdictions such as the European Union and The Netherlands, direct settlements are mainly used to accelerate administrative procedures. The NMa does not see direct settlements as a discovery instrument, as its leniency program already encourages undertakings to provide additional information about their cartel even when they have lost the race for immunity. They can obtain a reduction in fines if they provide additional information about the infringement of the Dutch Competition Act. The possible acceleration of the process has been acknowledged in the European Commission's Regulation on settlement procedures for cartels, and it has been of great significance to the NMa in its handling of the nationwide cartel in the construction industry since 2004. This type of settlement procedure is primarily aimed at expediting the administrative process. Internally, the NMa refers to it as the "accelerated procedure".

This contribution first provides some general remarks about the NMa's experience in settlement agreements and how it is different from the European Commission's procedure. We then illustrate our experiences with three cases that the NMa concluded using the instrument of settlement agreements.

2. When the NMa uses direct settlements

The NMa generally adheres to the policy issues that it already mentioned in its contribution to the meeting of 17 October 2006. We at the NMa do not have any general guidelines for procedures leading up to settlement agreements. In the cases described in this contribution, we adapted our procedures that were initially drafted for the construction cartel on a sector-by-sector basis. However, there are certain commonalities among the cases that the NMa considered fit for settlement.

Firstly, these cases often concerned bid-rigging and concerned sectors in which the NMa had already imposed penalties before. The latter made undertakings more receptive to settlement proposals as they had a clear benchmark against which to weigh their options.

Secondly, all cases described in this contribution concerned rather serious infringements of the Competition Act.

Thirdly, convincing evidence was present, and leniency requests had been filed in most cases. As for the participants in the settlement, it often concerned leniency applicants, and, in the majority of cases, not all of the alleged offenders entered into the settlement agreement.

Unlike the European Commission's new procedure for direct settlements, parties had the possibility to withdraw from the agreement. However, only a few parties withdrew from the agreement. Also, there was only a small number of parties that were excluded from the settlement agreement because they did not comply with its terms. Companies in all settlement procedures attached great importance to the fact that they could receive at least an estimate of the expected fine. A 15 per cent reduction of the initial fine proved to be sufficient to persuade most parties involved, while offering an additional reduction for damages paid to identifiable victims of the cartel also appeared to be a good incentive to participate in the agreement.

3. Construction

The NMa has a modest track record when it comes to direct settlements, but they have helped a lot in bringing our procedures in the wide-scale construction cartel to an end on time. Companies were offered the option of an accelerated procedure, which had been designed specifically for this project, primarily because of the high number of parties involved, many of which had applied for leniency. In order to participate, parties waived their rights to individual hearings and to individual access to the file in favor of having one representative assigned by all parties. Participants agreed not to challenge the Statement of Objections as far as it described the facts and their legal classification. Parties received a 15 per cent reduction in their fine in exchange for their participation in the accelerated procedure.

Sanctions were based on special guidelines, and parties were informed of the expected fine before the NMa issued its final decision. Parties had the possibility to appeal against the fine's amount, and to appeal on the grounds of special circumstances that were particular to that company. In appeal, parties were required to comply with the same conditions. Approximately 90 per cent of the companies involved in the cartel opted for the accelerated procedure and only 10 per cent appealed to the NMa's decision.

4. Horticulturists

In December 2005, the NMa settled with nine horticulturists, who rigged bids in five public procurement procedures in the municipality of Maastricht.¹ Two of the companies involved applied for leniency after the NMa had started an investigation. These companies received a reduction in their fines (of 75 per cent and 35 per cent) since the information that they brought forward was significant to the investigation. After issuing the Statement of Objections, the NMa designed a settlement procedure, heavily based on those developed in the construction-industry case. The procedure was aimed at accelerating the administrative process, but also at compensating the aggrieved party. The NMa informed the companies of the possibility of a settlement agreement, explaining that their fine would be lowered if they compensated the municipality of Maastricht and not challenged the Statement of Objections' conclusions. In exchange, they would receive a reduction in their fines of 50 per cent of the damages paid to the municipality.

5. Galvanizing firms

In December 2006, eight companies were fined for dividing the Dutch market for galvanized products (mainly building materials) from 1 January 1998 to 1 July 2002.² The companies involved in the agreement exchanged customer data with an administrative office, which in turn compiled lists every year

¹ Decision of the NMa, 15 December 2005, *Openbaar Groen Maastricht*.

² Decision of the NMa, 28 December 2006, *Verzinkerijen*.

allocating specific customers to each company. The galvanizing companies regularly discussed how to implement their agreement. If a customer approached a company to whom he had not been assigned, that company was supposed to discourage the customer to place his order with the company. This was mainly done by listing a higher price than the assigned company would have listed. The NMa concluded that this conduct among the companies involved had the shared intention to maintain a permanent division of customers in the Netherlands.

Representatives of the companies involved in the infringement agreed with the NMa, during the oral hearings, that their conduct indeed classified as a cartel. However, they pleaded that, since the time of the infringement, a number of management changes had occurred, thereby clearing out staff involved in the conduct. Almost all of their customers were construction agencies, and one of the alleged offenders actually had applied for leniency when construction companies were called upon by the Dutch government to come clean. These were all reasons for the parties present at the hearing to inquire whether the special fining guidelines that had been developed for the procedures in the construction industry could be applied in the present case. The subsequent proposal made by the NMa was accepted by all parties, and it implied that certain aspects of the construction-industry fining guidelines would be applicable to their case on the condition that parties would not contest the facts nor the assessment of the facts in the statement of objections. Furthermore, they would not contest the fine's amount nor the manner in which it had been calculated. Prior to entering into the settlement agreement, parties had already been informed of the expected fine. It was important to the NMa that all companies entered into the settlement agreement, as the envisaged acceleration of the procedure, which had been the main reason for the NMa to settle, would have otherwise been frustrated. After the companies had agreed to the terms of the settlement, the NMa was able to close the case within two weeks, where this would have otherwise taken several months, and a high probability would otherwise remain that the parties would appeal the decision, first to the NMa and afterwards in court.

6. Conclusion

The NMa is willing to use direct settlement in particular circumstances. We are very alert to the danger that a direct settlement system can pose to the effectiveness of our leniency regime. We do not intend to put our leniency regime in jeopardy. We are also alert to the importance of achieving the right balance between protecting the rights of defence of the undertakings concerned and achieving an efficient administrative procedure.

NEW ZEALAND

1. Executive Summary

- New Zealand's Commerce Commission (the Commission) submitted *Plea Bargaining/ Settlement of Cartel Cases*¹ to the OECD Competition Committee for the October 2006 roundtable, setting out how cartel cases are dealt with in New Zealand.
- Since then, enforcement action against cartels has continued to receive major attention. The number of cases has increased, and cases have become more complex. The scale of current cartel investigations requires significant resources.
- Many Commission cartel investigations have an international dimension and can involve numerous parties in many countries. The international dimension raises issues of jurisdiction and the principles of equity and parity.
- The Commission reached further successful settlements in civil penalty proceedings against cartel members. The judgments in the wood chemical cartel case resulted in the highest penalties to date in New Zealand for cartel offences. They total over NZ\$7.5 million, and three individuals are still before the Court.
- In its 2008-2011 Statement of Intent, the Commission confirmed that discretionary investigations will concentrate on cartel investigations resulting from leniency applications and that robust and vigorous action will be taken against cartel activity.²
- The Commission has initiated measures to enable it to resolve cartel cases more readily. They include a review of the leniency policy and the development of sentencing submission guidelines cases. The initiatives aim to increase both the incentive to co-operate and the efficiencies possible when parties do co-operate.

2. Introduction

The Commission submitted a paper *Plea Bargaining/ Settlement of Cartel Cases* to the OECD Competition Committee for the October 2006 roundtable discussions. The submission was broad and covered a comprehensive range of topics including:

- the Commission's responsibility under the Commerce Act 1986 (the Act) for investigating cartels;

¹ *Plea bargaining/settlement of cartel cases*. Commerce Commission's paper submitted to the 2006 OECD Competition Committee Roundtable, available online at <http://www.oecd.org/dataoecd/12/36/40080239.pdf>.

² Commerce Commission's *Statement of Intent 2008–2011*, available online at <http://www.comcom.govt.nz/Publications/ContentFiles/Documents/Sol%202008-11.pdf>.

- the Commission's leniency and co-operation policies, the rationale for them and the procedures followed to apply them; and
- the approach of the New Zealand Courts to penalty recommendations and agreed statements of fact.

This paper reports on developments in cartel cases since October 2006.

3. Summary of the Commission's powers in cartel investigations and settlements

Participation in a cartel is a civil and not a criminal offence in New Zealand. Part 2 of the Act covers cartel conduct, as it proscribes price fixing under section 30 (*per se* breaches) and contracts, arrangements or understandings that have the purpose, effect, or likely effect of substantially lessening competition in a market (rule of reason breaches) under section 27 of the Act.

The Commission has powers to compel parties to provide information. Where the Commission uses its powers of compulsion under section 98 of the Act, criminal action may be sought where parties fail to provide information or documents sought. Similar action may be taken where any person attempts to deceive or knowingly mislead the Commission. The Commission may defend any judicial review proceedings brought that allege procedural failure.

In a further judgment³ in the case against the Koppers Arch and Osmose companies (the wood chemicals case), settlements have been reached with 12 of the 15 defendants. The other three defendants, whose protest on jurisdiction was set aside in a reserved judgment on 16 March 2007, were granted leave to appeal by consent on 7 May 2007. This was heard in July 2008, and the judgment on the appeal is awaited. The defendants had challenged the Court's jurisdiction on the grounds that they reside outside New Zealand.

The Commission's leniency policy provides that the first cartel member to report the cartel to the Commission, and to co-operate fully in the investigation, will be granted immunity.

In addition to its leniency policy, the Commission operates a co-operation policy. This allows the Commission to exercise its discretion and to take a lower level of enforcement action, or no action at all, against individuals or businesses in exchange for information and full, continuing and complete co-operation. A lower level of enforcement action may include a settlement, or a submission by the Commission to the Court on behalf of an individual or business on a proposed penalty. In a judgment in February 2008 on the Koppers Arch case⁴ the Fernz defendants received a discount of 50 percent on the penalties otherwise payable. The defendants explored the possibility of a settlement with the Commission, made early admissions of liability, cooperated with the Commission and waived any jurisdictional bar to the claims against them, in exchange for a lower penalty.

Decisions on the most appropriate response for closing investigations are based on the Commission's findings. Where there appears to have been little or no harm the Commission could decide to take no further enforcement action, to issue information and warning letters, or to enter into settlements with the parties which are to be confirmed by the Court. In other cases investigations may be followed by a decision to fully prosecute the parties. It is important to note that only the Court can determine a breach of the Act and award penalties.

³ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (Unreported, High Court Auckland, 8/2/2008, Williams J, CIV 2005-404-2080).

⁴ *Commerce Commission v Koppers Arch*, above n 3, [22].

4. Developments to improve the effectiveness of the cartel programme

In its 2008-2011 Statement of Intent, the Commission has again affirmed that cartels remain a major focus as they are considered to be the most harmful of anti-competitive practices. The Commission reiterated its commitment to taking robust and vigorous action against cartel activity.

The Commission will review its major litigation portfolio in 2008/09 to assess what further action it can take to ensure that cases proceed to full trial only where there are no alternative forms of resolution available. Negotiation of settlements may be undertaken in circumstances where the Commission holds the view that the benefits may provide a more appropriate outcome. Full defendant trials absorb considerable resources and the Commission is seeking to use a wider range of interventions to resolve some cases more readily. Court action taken by the Commission may be settled or withdrawn at any time after the decision to prosecute fully was taken.

The Court is central to the imposition of penalties for cartel offences in New Zealand. The Commission uses information obtained through discovery and co-operation to persuade defendants that its recommended causes of action are sustainable, and seeks to negotiate penalty recommendations that can be submitted to the Court. Within the recommendation on settlements, the Commission would agree to recommend to the Court that a defendant's penalties should be meaningfully discounted for early admissions of liability and for effective co-operation with the Commission.

The development of sentencing guidelines in cartel cases will increase the transparency and predictability of penalties. This will help the Courts and will provide an incentive for the parties to come forward. Although the Courts do not have to accept the penalties recommended by the Commission, there has not yet been a case in New Zealand where the Courts have not accepted the Commission's recommendations.

The leniency policy has assisted the Commission to become aware of several cartels and to take enforcement action against them. The Commission expects that more cases involving defendants seeking co-operation will be resolved through agreement on a statement of facts, followed by a joint submission by the defendants and the Commission to the Court on penalty.

In the first co-operation case brought before a New Zealand Court, the Commission was instructed to advise the Court in future on the basis on which it had reached a settlement agreement and recommended penalty. The Court was particularly concerned where sanctions for individuals were recommended. In the February 2008 judgment in the Koppers Arch wood chemicals case, the Judge commented on the difficulties for the parties and the Court in agreeing the appropriate penalty. The Judge also noted the difficulty the Court faced in assessing the appropriateness of recommended penalties having regard to the wide range of circumstances, the limited precedents and the problem of retaining comparability, both with other cases and within the same case where there were spaced agreements.⁵ The development of sentencing guidelines for cartel cases is intended to assist in addressing questions on how principles of equity and parity could affect multiple defendants.

The Commerce Commission (International Co-operation and Fees) Bill was introduced into Parliament in New Zealand in September 2008. The bill seeks to provide for greater co-operation between the Commerce Commission and its overseas counterparts, most notably the Australian Competition and Consumer Commission. The bill would allow the Commission to share information it acquired from its own investigations with other regulatory bodies, even where that information would otherwise be confidential. The bill also permits the Commission to exercise statutory information gathering powers to

⁵ Ibid [7].

assist its overseas counterparts. On the basis of reciprocity, the Commission would receive more information from overseas regulators to assist its investigations into alleged cartel conduct affecting New Zealand. At present there are impediments to this form of co-operation between regulators. The bill, if passed into legislation, could have important ramifications, given the international dimension of many cartels and alleged cartels affecting markets in New Zealand.

5. Recent experiences relating to cartel investigations and settlements

Since the Commission's report of October 2006, further guilty pleas and "agreed" penalties were accepted by the High Court in February 2008 in the Koppers Arch wood chemical cartel case.⁶ This case has resulted in the highest penalties imposed in New Zealand to date for cartel offences, and the total penalties now exceed NZ\$7.5 million. Three Nufarm companies, (which traded under the "Fernz" name until the business was sold to Osmose New Zealand), were fined a total of NZ\$1.9 million. These companies were found guilty of price fixing and market sharing with Koppers Arch. The penalties were still relatively low, as the activity took place prior to the 2001 amendments to the Commerce Act that increased penalties, and as significant discounts were agreed because of the early timing of the guilty pleas. The former Managing Director of Koppers Arch Investments Pty Limited admitted liability for his involvement and was fined NZ\$35,000.

As a result of its leniency policy, the Commission has become aware, through persons applying for immunity, of more international cartels that are impacting on New Zealand markets. This has resulted in the increased significance of jurisdictional issues in cartel investigations.

In March 2007, the Commission received an important judgment from the High Court that will assist with cartel prosecutions. It was held that the Commission can proceed with its penalty action against the three non-resident defendants in the Koppers Arch cartel case. The High Court set aside the protest of the three defendants and held that people who enter cartel agreements overseas aimed at a New Zealand market can be pursued in the New Zealand Courts.⁷

Up to October 2006, immunity had been sought in eight cartel cases, and was granted in seven of these.⁸ Legal proceedings are currently being conducted in three major cartel cases that are supported by evidence from previous cartel members covered by immunity.

Parties subject to high profile cartel investigations in other jurisdictions have been filing leniency applications in New Zealand out of their concern that the Commission would be likely to start an investigation to follow up what had been discovered elsewhere. During 2007 and 2008 the Commission received a further three leniency applications, all from major international cartels. Leniency was granted in two of the cases. It was declined in the third, as the Commission had already given conditional leniency to a member of that cartel.

Major investigations are continuing in two large and complex international price fixing cartels in the air cargo and freight forwarding markets, as well as for a domestic cartel investigation in the cardboard market.

The Commission also has launched proceedings against the French companies Alstrom Holdings SA and Schneider Electric Industries SA, as well as the German company Siemens AG, in relation to an

⁶ Ibid [52].

⁷ *Commerce Commission v Koppers Arch Wood Protection (NZ) Ltd* (Unreported, High Court Auckland, 16/3/2007, Williams J, CIV 2005-404-2080).

⁸ *Plea bargaining/settlement in cartel cases*, above n 1, p 127.

alleged global cartel supplying gas insulated switchgear. The Commission claims that the conduct of the cartel had an effect on the New Zealand electricity industry. These proceedings mirror those taken by the European Commission in relation to the same corporations.

During 2008 the Commission reached an administrative settlement in a case where an elevator company alleged that one of its sales managers had been subject to an inappropriate approach by an employee of a competitor in relation to invitations the companies had received from a university for quotations. The Commission concluded that the circumstances did not justify legal proceedings, and a formal warning was given to both the company from which the approach had been made and to the employee in question.

6. Summary

The investigation of cartels, particularly those with an international dimension, has become an increasingly significant part of the Commission's discretionary work to enforce the Commerce Act's prohibition of anti-competitive practices, and work on cartels will continue to have a high priority. Cartel investigations are resource-intensive, particularly where a case leads to a full defendant trial, and the Commission is reviewing its processes to maximize the impact of its investigation and enforcement activities, including by seeking to utilize alternative forms of resolution in appropriate cases.

UNITED KINGDOM

In this paper, the OFT will update, by reference to casework experience, its 2006 contribution to the WP3 roundtable on plea bargaining/settlement of cartel cases.¹ For the purposes of this paper, “settlement” means the process through which the OFT imposes a reduced penalty for a Competition Act 1998 (“CA98”) infringement, in response to an admission of liability and various other types of co-operation. For the avoidance of doubt, it should be added that the settlements process does not relate to the criminal cartel offence under the Enterprise Act 2002 (“EA02”).

It should be stated at the outset that the key concerns discussed in the OFT’s 2006 paper remain. These were to ensure that the level of penalty reduction available in a settlement should not be so high as to have an adverse impact on the OFT’s leniency programme.² As discussed in the 2006 paper, there is also an overriding concern to ensure that undertakings continue to be deterred from engaging in anti-competitive activities, despite the possibility of settlements.³ Nevertheless, while the OFT still approaches settlements with a suitable degree of caution, in practice, it recognises that properly deployed, settlements can be a valuable addition to the OFT toolkit.

It will be recalled that the 2006 paper included discussion of the *Independent Schools* case, which was the first settlement under Competition Act 1998 (“CA98”). In *Independent Schools*, the OFT on 20 November 2006 agreed a resolution of its investigation into an agreement between independent schools to exchange information about intended fee levels.⁴ All fifty schools investigated agreed to the proposed resolution. Under the terms of the settlement, the schools admitted liability for their participation in the infringing information scheme. All but one of the schools agreed to pay a penalty that was considerably lower than the penalty which would otherwise have been imposed.⁵ The schools additionally 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 occurred. The schools also agreed to limit their representations to the OFT’s statement of objections, addressing only material factual inaccuracies.

Since then, the OFT has entered into settlement agreements in three cases:⁶

- Airline Passenger Fuel Surcharges (price fixing);

¹ The agreements reached in these cases have variously been described as ‘settlements’, ‘early resolution agreements’ or ‘direct settlements’; the term ‘settlement’ will however be used throughout this paper.

² See for example, para. 5 of the 2006 paper.

³ See for example, para. 6 of the 2006 paper.

⁴ OFT decision CA98/05/2006 of 20 November 2006.

⁵ One school was not required to pay a penalty, on the grounds that it benefitted from Crown immunity, since the sole trustee was the Secretary of State for Defence.

⁶ It should also be noted that the Office of Rail Regulation, which has the power to apply the Competition Act and Articles 81 and 82 EC Treaty in the railway sector, in November 2006 entered into a settlement agreement in a Chapter II/Article 82 case. See *EWS*, ORR decision of 17 November 2006..

- *Dairy* (alleged exchange of commercially sensitive pricing information); and
- *Tobacco* (alleged unlawful practices in relation to retail prices).

This paper will first set out the usual contents of a settlement package with the OFT under CA98. There will be a brief discussion of each of the post-*Independent Schools* settlement cases mentioned above and then a discussion of the key points that can be extracted from the OFT's approach to date with respect to settlements.

1. Content of the settlement package

The OFT's 2006 paper suggested that minimum requirements for any settlement package should be an admission of liability for the infringement, including as to the alleged scope and duration. In return for such a submission, the paper observed, a competition agency such as the OFT would offer to impose a financial penalty which is lower than that which would be imposed were the undertaking not to accept the offer.⁷ These have proven to be key elements of all three of the OFT settlements since *Independent Schools*.

In the 2006 paper, the OFT suggested that while it might not be an essential part of any settlement procedure, undertakings might agree also to waive certain procedural rights in relation to the further course of the proceedings and thereby gain additional reductions in financial penalties.⁸ In its approach to settlements to date, the OFT has taken the view that a party to a settlement must agree to a stream-lined procedure. Ordinarily, this would mean that the parties will agree not to submit extensive written representations (limiting the representations only to factual inaccuracies) and/or not to request oral hearings.

In practice, the OFT is also very unlikely to enter into extensive negotiations with the parties as to the level of penalties. Doing so would again tend to obviate the benefits of the settlement process. The OFT does not have, however, a fixed settlement discount to be offered to the parties: the appropriate settlement discount is determined on a case by case basis.

The OFT will also expect the parties to agree to co-operate with the OFT during the administrative process as well as to agree to appeal co-operation. What constitutes administrative co-operation will depend upon the circumstances of the case – often this will not mean that the parties are required to provide any additional information to the OFT over and above what they have already done. The OFT does not rule out, however, that in some cases, information provision could be required as part of the settlement process. Appeal co-operation will ordinarily mean the OFT reserves the right to make an application to the Competition Appeal Tribunal (“CAT”) to increase the penalty over what was agreed under the settlement, if the party to the settlement appeals the OFT infringement decision to the CAT.

2. Cases since Independent Schools

2.1 *Airline Passenger Fuel Surcharges*⁹

In June 2006, the OFT publicly confirmed that it was carrying out an investigation into possible collusion between British Airways and Virgin Atlantic over the price of long-haul passenger fuel

⁷ See para. 43 of the 2006 paper.

⁸ See para. 44 of the 2006 paper.

⁹ See OFT press release 113/07 of 1 August 2007.

surcharges. The alleged collusion took place between August 2004 and January 2006 and resulted in an average increase of £55 per ticket for a typical long-haul return flight. The OFT's investigation was conducted in parallel to a similar investigation by the DOJ.

The investigation was prompted by Virgin Atlantic, which came forward with information regarding the alleged collusion. Virgin Atlantic will benefit from immunity under the leniency programme as a result.

In August 2007, the OFT confirmed that British Airways had agreed a settlement with the OFT, whereby it admitted six instances of collusion during the relevant time period. As well as entering into settlement discussions, British Airways cooperated with the OFT under the leniency programme and this cooperation is also reflected in the penalty to be imposed. Following the leniency and settlement reductions, the penalty to be imposed on British Airways is £121.5 million. The final decision will set out the OFT's full findings and the basis for the calculation of the penalty.

Separate to the civil investigation, there is an ongoing criminal investigation under the EA02. The OFT in August announced that four individuals had been charged with the criminal cartel offence under the EA02.¹⁰ The corporate admission by BA does not imply that any individuals are guilty of the criminal cartel offence. In the context of Virgin's leniency application, Virgin's staff were given immunity from criminal prosecution.

2.2 *Dairy*¹¹

In September 2007, the OFT issued a statement of objections ("SO") in the *Dairy* case. It provisionally found evidence of collusion between certain large retailers (Asda, Morrisons, Sainsbury's and Tesco) and dairy processors on the retail price of certain dairy products.

One of the parties to the infringement, Arla, had applied to the OFT for leniency and will receive full immunity from penalties.

Following the SO, all but three of the parties admitted their involvement in anti-competitive practices and undertook to cooperate fully with the OFT's investigation, including providing further evidence as far as reasonably possible. These parties agreed to pay individual penalties which, combined, come to a maximum of over £116 million. However, each of these parties will receive a significant reduction in the penalty that would otherwise be imposed on it, on condition that it continues to provide full cooperation. The settlement agreements with these parties were announced in December 2007. In February 2008, one further party, Lactalis McLelland, agreed a settlement with the OFT. According to the press release issued at that time, the combined penalties before taking into account any reduction for settlement come to a maximum of over £120 million.

The OFT's case will continue against Morrisons and Tesco, the two parties which have chosen not to settle. The OFT will not be in a position to decide if the law has been infringed by either of these parties until it has reviewed their responses to the provisional findings set out in the SO. The OFT will consider these carefully, along with the evidence in the case as a whole, before reaching any final decision as to whether the law has been infringed by these parties.

¹⁰ See OFT press release 93/08 of 7 August 2008.

¹¹ See OFT press release 170/07 of 7 December 2007.

2.3 *Tobacco*¹²

Six companies in July 2008 reached settlement agreements with the OFT in which they have admitted engaging in unlawful practices in relation to retail prices for tobacco products in the UK, and have agreed to pay individual penalties which come to a combined maximum of £173.3m before discounts.

The companies are Asda, First Quench, Gallaher, One Stop Stores (formerly named T&S Stores), Somerfield, and TM Retail.

The agreements result from a process following the OFT's SO issued in April 2008. This set out the OFT's proposed findings that two tobacco manufacturers and eleven retailers had variously engaged in one or more unlawful practices in relation to the retail prices of a number of tobacco products in breach of CA98.

Under the settlement agreements, each of the six settling parties has admitted liability in respect of all of the infringements alleged against it. Each of these parties will receive a significant reduction in the financial penalty that might have otherwise been imposed on condition that it continues to provide full co-operation with the OFT.

A number of the six parties had previously applied to the OFT for leniency, and the total penalties the parties have agreed to pay if all leniency and settlement discounts are given is £132.3m, rather than the pre-discount penalties total of £173.3m.

A further company, Sainsbury's, was the first to apply to the OFT for leniency and will receive complete immunity from financial penalty if it continues to co-operate fully.

The investigation against six other parties to whom the SO was sent is continuing. These parties have an opportunity to make representations to the OFT on its proposed findings. The OFT will not be in a position to decide if the law has been infringed by any of these six parties until it has reviewed their responses to the provisional findings set out in the SO. The OFT will consider these carefully, along with the evidence in the case as a whole, before reaching any final decision as to whether the law has been infringed by these parties.

3. **Discussion**

In its 2006 roundtable paper, the OFT noted that it was at a relatively early stage in its thinking on this issue. Since then, and having regard to the cases discussed above, the OFT views settlements in an increasingly favourable light and regards them as a valuable addition to its toolkit. By leading to a more effective and efficient use of resources, settlements can enable the OFT to undertake more high-impact projects and increase deterrence. However, the OFT is still of the view that resolving cases by using settlements is not cost or risk free. It remains vital that settlement policies are designed and properly implemented in order to avoid harming the OFT's leniency programme, deterrence and the effectiveness of the competition regime overall.

In view of the fact that the OFT's policy with respect to settlements continues to evolve, the OFT has not yet adopted guidance in this area. Nevertheless, the OFT approach in the above cases may be instructive and the following factors relating to the specific case are likely to be relevant:

¹² See OFT press release 82/08 of 11 July 2008

- Likely significant saving of resources: the OFT is only likely to agree to a settlement where if doing so is likely to yield considerable resource savings to the OFT;
- Law and facts of the case are relatively clear: As a matter of practicality, cases falling under this head may often be cartel cases. Cases involving a large number of parties may also lend themselves to settlements, as this can increase the likelihood of significant resource savings. None of the OFT settlement cases to date have raised complex market definition or dominance issues. Abuse of dominant position cases may not readily lend themselves to settlements, but, unlike the European Commission, the OFT does not definitively rule out the possibility of settlement in such cases.¹³

In addition to considering the specifics of the case, when deciding whether to accept a settlement, the OFT will take a portfolio-based approach. The OFT is only likely to use the settlement procedure where it considers, in the view of the specific particulars of the immediate case, and the OFT's overall portfolio of cases, that a settlement is appropriate. Relevant factors under this head are likely to include consideration of what impact the settlement may have on the number and range of other cases (or other work) that the OFT is pursuing (or wishes/or intends to pursue), as well as strategic considerations such as the potential impact of a settlement on leniency and wider deterrence.

In the OFT's 2006 paper on settlements, the OFT raised the question as to whether it would be appropriate to settle with certain parties in cases where others do not wish to settle.¹⁴ At that point in time, the OFT considered that there might have been merit in agreeing to settle with certain parties only or even with sub-sets of parties (for example, those whose participation in a cartel was marginal in terms of scope, duration, activities or benefits). Since writing that paper, the OFT has gained experience with such "hybrid settlements" (see the discussion above of the *Dairy* and *Tobacco* cases). Hybrid settlements will not necessarily result in the same level of reduced administrative burden as ones where all of the parties agree to settle. Nevertheless, the hybrid settlements agreed by the OFT are expected to result in a considerably reduced burden to the OFT at the administrative stage. Furthermore, the OFT anticipates that hybrid settlements may yield savings with regard to appeal costs. This is because of the highly resource-intensive, full-merits nature of the appeal system in the UK. The OFT acknowledges that in other regimes in the EU, where the administrative process may be more complex and/or where the appeal system is less intensive, hybrid settlements may be viewed with greater scepticism. All that said, the less comprehensive resource savings that will result is a clear factor that the OFT will take into account when deciding upon whether to enter into a hybrid settlement.

Another area of learning since 2006 has been with respect to the stage at which the settlement negotiations will take place. In its 2006 paper, following its experience in *Independent Schools*, the OFT suggested that any settlement discussions should take place at or around the time when a statement of objections was prepared and ready to be issued.¹⁵ Practical experience since indicates that settlement discussions are indeed likely to commence when the OFT is at the stage of issuing its statement of objections. In the majority of cases, this is the first point at which the OFT's fully articulated case can be tested internally to ensure that it meets, based on the available evidence, the strong and compelling standard required to establish an infringement. Thus, in the *Dairy* and *Tobacco* cases, the settlement discussions both commenced when the OFT sent the statement of objections to the parties. It is very important to note that the OFT has not excluded entirely the option of settling cases earlier, in cases where

¹³ As noted above, the ORR reached a settlement in the EWS case, which was a Chapter II/Article 82 EC Treaty infringement case.

¹⁴ See para. 49 of the 2006 paper.

¹⁵ See para. 38 of the 2006 paper.

it is able to reach a requisite view on the evidence sooner. This can be inferred from the experience in the *Airline Passenger Fuel Surcharges* case, in which the OFT announced the settlement, without having previously announced that it had issued a statement of objections.

With regard to discussions with the parties, the OFT endeavours to be reasonably flexible. This means that on the one hand, the OFT approach is not entirely elastic. Other than representations on alleged manifest errors,¹⁶ the OFT will not enter into any discussion on the substance of the case. The rationale for this is clear: being drawn into discussions of substance will obviate the benefit of entering into the settlement process in the first place, which is to reduce administrative burdens. Similarly the OFT will set out a strict timetable for its settlement discussions. This is to ensure that the investigation is not delayed disproportionately in the event that resolution does not prove possible.

On the other hand, based upon the OFT's experience with the settlements, this also means that the OFT will not take an overly rigid approach to settlement discussions. For example in the *Independent Schools* case the parties and the OFT entered into relatively lengthy and detailed discussions over a number of weeks to agree the settlement. This was driven by the nature of the infringements, the status of the parties as charitable organisations and the need to consider an innovative solution in light of the exceptional circumstances of the case.

In taking this flexible approach the OFT will always seek to ensure that the overriding principles of fairness, transparency and consistency are taken into account within and across cases.

4. Conclusion

The OFT continues to recognise that there are costs and benefits associated with the settlement process. The costs include the risk of adverse impact on the OFT's leniency programme and on deterrence. However, there may be clear benefits in terms of resource savings to the OFT, which may enable the OFT undertake more high-impact enforcement activity and to increase deterrence. OFT experience since the 2006 paper suggests that, by managing these risks and leveraging the benefits, settlements can be a valuable addition to the OFT's enforcement toolkit.

¹⁶ "Manifest errors" are errors of law or fact that are obvious on the face of the SO.

UNITED STATES¹

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.² 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.”³ 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.⁴ 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

¹ The US submission was originally delivered by Ann O’Brien, Senior Counsel to the Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Dept. of Justice, at the 13th annual EU Competition Law and Policy Workshop in Florence, Italy, on June 6, 2008.

² 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>.

³ 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>.

⁴ 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>.

defendants,⁵ 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 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.⁶ 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.

1. 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 appropriate sanction."⁷ 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

⁵ 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.

⁶ 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.

⁷ Commission Notice on Settlements, *supra* note 3, at 1.2.

seek a plea to the most serious, readily provable offense.⁸ 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.”⁹ 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.¹⁰ 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.¹¹ 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.¹²

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-incriminating information in calculating the defendant’s sentence.¹³ 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.

⁸ 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.

⁹ 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.

¹⁰ 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.

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

¹² July 28, 2003 Ashcroft Memo, *supra* note 9, at § II(A)(2).

¹³ 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>.

2. 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 Program¹⁴ 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,¹⁵ 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.

3. 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.¹⁶ 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

¹⁴ 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>.

¹⁵ 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).

¹⁶ 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.

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.

4. 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 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.”¹⁷ 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.¹⁸

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.¹⁹ 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.

5. 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

¹⁷ See United States Sentencing Commission Guidelines Manual § 8C4.1 (November 1, 2007), available at <http://www.ussc.gov/2007guid/GL2007.pdf>.

¹⁸ 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>.

¹⁹ Commission Notice on Settlements, *supra* note 3, at 1.1.

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.

6. 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.²⁰ 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.

7. 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.²¹ 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.

8. 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.

²⁰ See Federal Rule of Criminal Procedure 11.

²¹ *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.

9. 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.²² 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

²² 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).

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.

10. 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.

11. 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 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.

12. 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.²³ 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

²³ Commission Notice on Settlements, *supra* note 3, at 1.2.

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."²⁴ 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 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.

13. 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

²⁴ Commission Notice on Settlements, *supra* note 3, at 2.2.16.

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.

EUROPEAN COMMISSION

1. Introduction

In the field of competition law enforcement, the term "settlement" is equivocal, since it carries different meanings in different jurisdictions. In some jurisdictions, settlements can be regarded as an investigative tool which may provide in addition to the investigation new and strong evidence to the competition authority; in other cases, it can be regarded as a negotiated procedure in which the competition authority and the defendant give up enforcement rights and protection rights respectively. Only the latter type of settlements can be properly called "negotiated settlements". The European Commission, taking into account its legal and institutional environment, has recently put into force an original settlement procedure which differs from existing regimes and which is certainly not negotiated.

In 2005, the Commissioner for Competition Neelie Kroes recognised that "unlike some other systems – that of our American colleagues, for example – there is no arrangement [in the EU] 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"¹. Three years later, the European Commission has filled the lacuna and introduced a settlement procedure for cartels which will allow it to settle cartel cases through a simplified procedure². The legislative package consists of a Commission Regulation, which accommodates the settlement option within the existing framework of Commission Regulation (EC) n° 773/2004 together with a Commission Notice (the "settlement notice"). The Notice³ sets out the specifics of the new procedure and provides guidance for the legal and business community. This followed six months' consideration of 51 contributions received during a public consultation on a draft package launched on 26th October 2007. The competition authorities of EU Member States were also closely involved. The settlements package entered into force on the 2nd of July 2008.

The settlement procedure is only applicable to cartel cases, not all anti-trust cases. This is partly because experience shows that litigation in cartel cases mainly relates to circumstances having a bearing on the amount of the fine and liability of parent companies for actions undertaken by their subsidiaries. Consequently, in order to settle cartel cases, the companies under investigation and the Commission are expected to discuss the scope and accuracy of the facts and evidence, while in other anti-trust cases they would engage also in discussions on intent, on market definition or on the balancing of anti-competitive and pro-competitive effects of the restriction of competition. It seems therefore more likely to reach quicker convergent views in cartel cases and settle the case accordingly. Moreover, amongst antitrust cases, cartel investigations are comparatively more frequent and often entail a heavier procedure in view, among other things, of the multiplicity of parties and languages involved and the jurisdictional issues they raise (e.g. discovery).

¹ 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=HTML&aged=0&language=EN&guiLanguage=en>

² Commission Regulation (EC) n° 622/2008 of 30 June 2008 amending Regulation (EC) n° 773/2004, as regards the conduct of settlement procedures in cartel cases

³ Official Journal C 167, 2.7.2008, p. 1–6.

2. Benefits of settlement procedure

When parties are convinced of the strength of the Commission's case in view of the evidence gathered during the investigation and of their internal audit, they may be ready to acknowledge their involvement in an infringement and accept their liability for it, in order to shorten the procedure and obtain a reduction of the fine. With the settlement programme, undertakings can expect a reduction of fine of 10%. The reduction in fine will be equal for all settling parties. A settlement procedure therefore provides scope for reducing the length of the administrative procedure, given acceptance by parties of the Commission's case.

Given this, EU settlements can provide significant benefits to both sides. From the European Commission's point of view, where the parties to a cartel case agree with the Commission findings, it has an instrument to speed up the adoption of a Decision. Specifically, the Commission's Statement of Objections (SO) endorsing the contents of the parties' "settlement submission" (see below) may be shorter than a SO issued to face a contradiction. Since the parties would have been heard effectively during the settlement discussions in anticipation of the "settled" SO, other procedural steps could be simplified so that, following confirmation by the parties, the Commission could proceed swiftly to adopt a final decision. The settlement procedure should thus allow the Commission to handle more cases with the same resources, thereby fostering the public interest in the Commission's delivery of effective and timely punishment, while increasing overall deterrence.

EU settlements 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 a case and of being able to influence the final outcome, produce more transparent and predictable results, and provide for certainty and finality. With the settlement programme, undertakings can expect a reduction of fine of 10%. The reduction in fine will be equal for all settling parties.

3. The settlement procedure

Any company which becomes aware that it is being investigated in a cartel case (for example, by being inspected or receiving a request for information) may indicate to the Commission its interest in exploring the possibility of a settlement. If the Commission considers that the case may, in principle, be suitable for settlement, it will explore the interest in settlement of all parties to the same proceedings. It may do this also on its own initiative, even if the parties have not already indicated their interest in a settlement. It is important to emphasise that companies are not obliged to enter settlement discussions, or to ultimately settle and the Commission may only apply the settlement procedure upon parties' explicit request. Nor is there any right to settle for companies.

Should the Commission consider a case suitable for settlement, it will initiate settlement proceedings only once the investigation takes it to the stage of being ready to draft a Statement of Objections. It will at that point send a letter to all parties to the proceedings setting a final time limit to express their interest in a settlement procedure in writing. Once the parties have made a written request for such a procedure, the Commission may then decide to open discussions before the drafting of a Statement of Objections. The request by the parties should contain a number of elements: i) an acknowledgement of the parties' liability for the infringement; ii) an indication of the maximum amount of the fines the parties foresee to be imposed by the Commission; iii) the parties' confirmation that they have been informed of the Commission's objections in a satisfactory manner and that they have been given the opportunity to be heard; iv) the parties' confirmation that they will request neither access to the file nor a formal oral hearing;

and v) the parties agreement to receive the SO and the final decision of the Commission in a given language of the European Community⁴.

Settlement discussions will tackle in a timely manner the alleged facts, their classification, the gravity and the duration of the infringement and the liability for the individual involvement in the cartel on the basis of the evidence in the file supporting the envisaged objections. This includes discussing the potential maximum fine net of any other reduction. The procedure will not give companies the ability to negotiate with the Commission as to the existence of an infringement of Community law or the appropriate sanction. The Commission will not bargain about evidence or its objections, however, parties will also be heard effectively in the framework of the settlement procedure and parties will therefore have the opportunity to influence the Commission's objections through argument.

In the course of the discussions accessible versions of documents (other than evidence) listed in the case file may be disclosed upon reasoned request when it is justified to enable a company to ascertain its position on a given time period or issue, and where this disclosure does not jeopardise the overall efficiency sought with the settlement procedure⁵. The parties to the proceedings and their legal representatives are not allowed to disclose to any third party the content of their discussions with the Commission's services or of any documents to which they have had access. A breach of this rule may constitute an aggravating circumstance to be taken into account in setting the fine.

If the parties are convinced of the case, the Commission may set a time-limit for them to introduce a formal request ("settlement submission") to settle the case. The settlement submission would be formulated according to a specified template and drafted along with the results of the settlement discussions. The settlements submission will contain in particular the acknowledgement of their involvement in the infringement, their commitment to follow the settlement procedure and an estimate of the potential fine, in anticipation of the formal objections⁶. The Statement of Objections would reflect the contents of the settlement submission.

The Commission would retain the possibility to depart from the parties' settlement submission until the final Decision. Specifically, if the Commission does not endorse the settlement submission of the parties in a Statement of Objections or in a final decision, the acknowledgments provided by the relevant parties are deemed to have been withdrawn and cannot be used against them. The treatment of the case would then revert to the "standard" procedure, including a new Statement of Objections, the possibility to request access to the file and an oral hearing. Also, if no settlement was explored or reached, the standard procedure would apply by default.

Moreover, after a "settlement" has been provisionally agreed between the parties and DG Competition of the European Commission, and a draft Commission decision on this basis has been drafted, the College of Commissioners may decide not to adopt the draft decision⁷. However, in such a case, before adopting any decision departing from the "settlement", the Commission would have to inform the parties concerned and adopt a new Statement of Objections subject to the ordinary rules of procedure, and which could not be based on acknowledgements provided by the parties in view of a settlement. Clearly, such a departure from

⁴ See Article 20 of the Notice.

⁵ This issue is addressed in Articles 15 to 17 of the Notice

⁶ According to Article 20 of the Notice

⁷ This is because of the principle of collegiality of European Commission Decisions, and the benefit of having meetings of the Advisory Committee of National Competition Authorities of EU Member States, which is consulted on draft Commission anti-trust decisions.

a settlement should occur only exceptionally if the usefulness of the settlement instrument is to be preserved.

4. Settlement procedure, rights of defence and Courts

Effective enforcement of Community competition law must remain compatible with full respect of the parties' rights of defence, which constitutes a fundamental principle of Community law to be respected in all circumstances, and in particular in antitrust procedures which may give rise to penalties. In line with this principle, parties' rights of defence under the settlement procedure remain the same as in the ordinary procedure. They are simply exercised in the framework of bilateral discussions, both orally and by means of a submission, in anticipation of the formal notification of objections. Parties choose between the settlement procedure and the ordinary procedure freely and in a fully informed manner. For the parties' rights of defence to be exercised effectively, the Commission must hear their views on the objections against them and supporting evidence before adopting a final decision, and must take them into account by amending its preliminary analysis, where appropriate⁸.

By introducing a settlement phase, the Commission increases companies' options to be informed earlier of potential objections and of the evidence supporting them. In addition, companies would be informed of the likely range of fines prior to the adoption of the final decision. On the basis of these facts and documents, the parties have the opportunity to express their views to the Commission. This enables them to influence the contents of the Statement of Objections and, thereby, of the decision itself. Full access to file remains available after the Statement of Objections for those who do not settle, and the parties may decide at any moment to stop the settlement discussions or not to send a settlement submission. Furthermore, the parties may call upon the Hearing Officer at any time during the settlement procedure in relation to issues that might arise relating to due process, as is the case in the ordinary procedure. This constitutes an additional guarantee for the respect of the rights of defence.

The Commission will not transmit settlement submissions to national courts without the consent of the parties, in line with the provisions in the Commission Notice on co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC⁹.

Finally, all decisions taken by the Commission under Regulation (EC) N°1/2003 are subject to judicial review in accordance with Article 230 of the Treaty. Moreover, as provided in Article 229 of the Treaty and Article 31 of Regulation (EC) N°1/2003, the Court of Justice has unlimited jurisdiction to review decisions on fines adopted pursuant to Article 23 of Regulation (EC) No 1/2003. Therefore, a company which is the subject of a Commission decision based on a settlement which it has made with the Commission can still appeal the Commission Decision to the Court of First Instance.

5. Settlement procedure and leniency

The Commission leniency programme is an investigatory tool¹⁰. It aims at uncovering cartels and collecting evidence to discharge the Commission's burden of proof. The Commission Notice on immunity from fines and reduction of fines in cartel cases (the Leniency

⁸ In line with settled case-law, the Commission shall base its decisions only on objections on which the parties concerned have been able to comment and, to this end, they shall be entitled to have access to the Commission's file, subject to the legitimate interest of undertakings in the protection of their business secrets.

⁹ OJ C 101, 27.4.2004, p. 54; point 26.

¹⁰ See press release [IP/06/1705](#)

Notice¹¹) rewards companies which voluntarily disclose to the Commission the existence of a cartel and bring evidence to prove the infringement. The reduction of the fine varies depending on the timing and significant added value of the information and evidence provided. In contrast, settlement aims at simplifying and expediting the procedure leading to the adoption of a formal decision, thereby allowing for procedural savings and the internal redeployment of enforcement resources.

The "Settlements Notice" rewards concrete contributions to procedural efficiency. All parties settling in the same case will receive equivalent reductions of the fine (10%), because their contribution to procedural savings will be equivalent. Indeed, the co-operation covered by the Settlement Notice is different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is covered by the Leniency Notice. Provided that the co-operation offered by an undertaking qualifies under both Commission Notices, it can be cumulatively rewarded accordingly.

After the introduction of a settlement procedure, the incentive for companies to ask for leniency will remain unchanged, for the following reasons: First of all, the reduction of fines under the leniency programme is considerably more significant than the 10% settlements reduction. Secondly, leniency will not be available once settlement discussions start, which will be after the purely investigative phase. To the extent that companies have an interest in obtaining a maximum reduction in their fine, they will therefore have a strong interest to favour leniency. However, as the reductions of fine under the two procedures are cumulative, companies will always have an incentive to ask for both.

6. Summary and Conclusion

It can be seen from the above that although the settlement procedure is limited to cartel cases, not every cartel case will be suitable for settlement. Regulation (EC) N° 773/2004 bestows on the Commission the discretion whether to explore the settlement procedure or not in cartel cases, while ensuring that the settlement procedure cannot be imposed on the parties. The Commission retains a broad margin of discretion to determine which cases may be suitable to explore the parties' interest to engage in settlement discussions, as well as to decide to engage in them or discontinue them or to definitely settle. The rights of defence of undertakings are fully respected, and the programme is complementary with the leniency programme.

This tool having only been introduced on 2 July 2008, there are no completed settlement agreements on which DG Competition can report at the time of writing. An evaluation of this very new instrument will only be possible after a longer period of experience.

¹¹ OJ C 298, 8.12.2006, p. 17.

BRAZIL

1. Introduction

This paper aims at briefly explaining the legal framework applicable for direct settlement of cartel cases in Brazil, as well as presenting the recent experience of the Brazilian Competition Policy System (BCPS)¹ in this area.

Law No. 11.482, dated May 31, 2007, amended the Brazilian Competition Law and introduced the possibility of direct settlements in cartel cases. Before this amendment, the CADE or the SDE (*ad referendum* of CADE) could settle with the defendants in administrative proceedings except those related to cartels. The CADE is the antitrust agency with power to enter into settlements, and the SDE and CADE's Attorney General Office may issue nonbinding opinions directed to the CADE on whether to settle or not.

The introduction of settling cartel cases represents a remarkable improvement: early cooperation on the part of the defendants saves public resources, cut down litigation, enable early payment of a significant sum of money and provide expedited treatment and more certainty and transparency to the business community. Settling also proves beneficial for the defendant, as it often means a more efficient use of resources on the part of the company. The first four settlements have already been executed, and others are currently being negotiated.

2. Requirements for direct settlements in cartel cases

Article 53 of Law No. 8.884/94 provides that the amount to be paid to settle a cartel case must be at least one per cent of the entire gross revenues of the company in the year before the initiation of the investigation (this requirement is not applicable to cases involving other types of anticompetitive practices).

Additionally, under the terms of the law, CADE is allowed to settle with only one defendant (i.e., it is not necessary that all the defendants settle or settle at the same time). If that happens, the investigation will stop with respect to the defendant that settled and proceed with respect to the other defendants.

In September 2007, the CADE issued Resolution No. 46/2007, establishing the negotiation rules². According to such regulation, a settlement procedure in cartel cases has to follow the requirements below:

¹ The Antitrust law and practice in Brazil is governed primarily by Law n. 8.884, of 1994, as amended in 2000 and 2007 (the Competition Law). The so called "Brazilian Competition Policy System" (BCPS) is composed of three agencies -- namely, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), the Secretariat of Economic Law of the Ministry of Justice (SDE), and the Council for Economic Defense (CADE). SDE is the chief investigative body in matters related to anticompetitive practices and it also issues non-binding opinions in merger cases. SEAE issues non-binding opinion in merger review and it may also issue non-binding opinions related to anticompetitive practices. CADE is the administrative tribunal, composed of seven Commissioners, which takes the final decisions regarding anticompetitive practices and merger reviews.

- The applicant can only try to settle once (“one-shot game”);
- The negotiation period is for 30 days, renewable for another 30 days;
- The negotiation process may be confidential at the discretion of the CADE;
- If the case was initiated using evidence obtained under a leniency agreement, it can only be settled with admission of guilt. In all other cases, the CADE will decide on a case-by-case basis whether to settle where the defendant is not prepared to admit guilt;
- Apart from the minimum sum to be paid provided by the law, the CADE will also take into account the moment in time the company comes forward (the earlier in time, the greater chances to pay a reduced sum);
- A settlement with the CADE does not mean that the case will be criminally settled. A criminal settlement has to be negotiated on a case-by-case basis with the state and federal criminal prosecutors.³

The interested party has to consider these rules in preparing a proposal for a settlement to the CADE. The settlement may be proposed until the beginning of the judgment session of the respective administrative proceeding at the CADE. Such proposal has to specify, at least:

- The obligations of the defendant in order to stop the investigated conduct and its harmful effects;
- The amount of the sum to be paid;
- The details of a compliance program; and
- Turnover information of the company referring to the year prior to the initiation of the investigation in order to confirm that the sum paid is one percent of such turnover.

Once it is executed between CADE and the interested party, the settlement agreement (*Termo de Compromisso de Cessação – TCC*) can be judicially enforced, and it suspends the investigation against that party. If by the end of its term the CADE acknowledges that all the obligations set forth in the Agreement have been fulfilled, the investigation is filled.

Additionally, according to Article 14 of Law No. 8.884/94, in February 2008 the SDE, as the chief antitrust investigative authority, issued guidelines on the principles that guide its analysis of settlement proposals in cartel cases (the *Guidelines* are available at www.mj.gov.br/sde, both English and Portuguese versions). The most important concern of the SDE while analyzing such proposals, concerns shared by CADE, are (a) the preservation of the Brazilian Leniency Program (negotiated and executed by the SDE),

² After one year of experience of the Resolution No. 46/2007, the CADE is currently revising the settlement procedures in order to decrease negotiation costs and increase predictability and hence the demand for settlements.

³ Apart from being an administrative infringement, cartel is also a crime in Brazil, punishable by a criminal fine or imprisonment from two to five years. Brazilian Federal and State Public Prosecutors are in charge of criminal enforcement in Brazil. Since 2003, the SDE, as the chief investigative antitrust authority, with the support of the SEAE, is increasing cooperation with the Federal Police and Public Prosecutors to ensure that managers and directors of companies face full criminal liability.

which is the main tool of the anti-cartel policy in Brazil⁴; (b) the effective deterrence of future anticompetitive practices; and (c) the avoidance of obstacles to the administrative and criminal persecution of cartels, as well as to private actions for damages caused by such anticompetitive practice. For recommending a cartel settlement to the CADE, the SDE takes into consideration the following requirements:

- Admission of guilt in all hardcore cartel cases where the SDE has a significant amount of direct evidence (usually collected in dawn raids): the SDE takes the view that it is extremely important not to execute agreements that may result in a *sub-optimal punishment* of the investigated party; otherwise, negotiated settlements could become a more appealing option than the Leniency Agreement. In this scenario, a company that participates in a cartel would have strong incentives to continue to practice the illegal conduct and, should the Government detect the conduct through its own investigation and obtain sufficient proof to ensure a conviction, then negotiate a settlement in an early stage of the administrative proceeding without the admission of its participation in the practice and without the obligation of actively cooperating with the investigation. Therefore, the investigated party would evade from his responsibilities for the practice of cartel, among them the reparation of the damages caused to third parties by the cartel. For these reasons, the SDE understands that, in the cases of hardcore cartels with direct evidence, an integrated approach as to the incentives provided by the Leniency Program and the negotiated settlement only fulfills the public interest if there is the requirement to admit the participation on the conduct by the interested party).
- In the case of investigations initiated by means of a Leniency Agreement, the admission of guilt by the applicant has to be similar to that of the beneficiary of the Leniency Agreement and never lesser, in order to keep the incentives for leniency;
- Active and full cooperation of the companies with SDE's investigations;
- Payment of a settlement sum that guarantees deterrence.

⁴ The Brazilian leniency program was launched in 2000, and the SDE is the antitrust agency with power to negotiate the leniency agreement. The requirements are as follows: (i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully cooperate with the investigation; (v) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant. The benefits are full or partial immunity depending on whether the SDE was previously aware of the illegal conduct at issue. If the SDE was unaware, the party may be entitled to a waiver from any penalties. If the SDE was previously aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the "good faith" of the party in complying with the leniency agreement. A leniency agreement shelters administratively and criminally the directors and managers of the cooperating firm if those individuals sign the agreement and fulfill the requirements provided in the law. There is a growing number of candidates to the program, including members to international cartels. This reflects in the number of search warrants served: (i) in 2003, 2004 and 2005, 11 warrants were served and 2 people were detained without charges; (ii) in 2006, 19 warrants were served; and (iii) in 2007, 84 warrants were served and 30 people were detained without charges for a 10-day period. More information can be obtained in the "Leniency Policy Interpretation Guidelines" available at SDE's website: <http://www.mj.gov.br/dpde>.

3. The settlement experience

3.1 *Cartel cases settled by the CADE*

Cade has approved four out of fifteen settlements proposals⁵ presented by companies in cartel cases so far: JBS/SA (slaughter-house cartel), Lafarge Brasil SA (alleged cement cartel), Alcan Embalagens do Brasil (alleged plastic bags cartel) and Bridgestone Corporation (alleged marine hose cartel).

The chart below shows the timing, requirements, amounts paid⁶, existence of leniency agreement and SDE's opinion on whether CADE should have settled or not the cartel cases.

⁵ Each proposal shall contain more than one proponent. Taking this into account, it can be said that thirty three entities have subscribed the mentioned proposals (fourteen companies, three trade associations and fifteen individuals).

⁶ The amounts are collected to the Federal Fund of Diffuse Rights, which is managed by a interministerial commission presided by the Chief of Staff of the SDE. The resources of the Fund are applied in projects in the areas of environmental protection, consumer protection, competition policy and national cultural heritage.

Table 1.

Company	Alleged Conduct	Affected market	Timing	Requirements	Contribution	Leniency Agreement	SDE's opinion
Bridgestone Corporation	Hard core cartel	Maine hose	After dawn raid, during investigation (08/2008)	Admission of guilt; effective and full cooperation	RS1,594,000,00 (appr. 13% equivalent to the present value of a fine of roughly 20%)	yes	Favorable to the agreement as CADE required a admission of guilt, effective cooperation and the payment of an appropriate settlement sum
Lafarge Brasil S/A	Hard core cartel	Cement	After dawn-raids, during investigation (11/2007)	No a admission of guilt; compliance program	RS43,000,000,00 (appr. 10% of the annual gross turnover; equivalent to the present value of a fine of roughly 15%)	no	Contrary to the agreement as it encompassed an alleged hard core cartel with direct evidence and the CADE did not require a admission of guilt. The SDE considered that the deterrence effect was not achieved with the agreement
JBS/SA	Soft cartel	Slaughter-house	By the time of the judgment (11/2008)	No a admission of guilt; compliance program	RS13,761,944,40 (appr. 2,5% of total gross turnover in the relevant market)	no	The SDE did not issue an opinion in connection with this case
2 individuals (manager and employee)					10% of the company's contribution (manager) and approx. USD3,600,00 for the other one (employee).		
Alcan Embalagens do Brasil	Hard core cartel	Plastic bags	During investigation	No a admission of guilt; compliance program	RS24,218,550,57 (appr. 10% equivalent to the present value of a fine of roughly 15%)	no	Contrary to the agreement as it encompassed an alleged hard core cartel with direct evidence and the CADE did not require a admission of guilt. The SDE considered that the deterrence effect was not achieved with the agreement
1 individual (manager)					10% of the company's contribution (manager)		

It is to be mentioned that the settlement in the marine hose cartel was the sole comprising admission of guilt. As noticed above, according to CADE's Resolution, admission of guilt was mandatory in this case since the administrative proceedings were initiated by means of a leniency program.

Besides, it should be stressed that Bridgestone Corporation gross revenue in Brazil in 2007 was excessively low to be considered the basis for the contribution, not properly reflecting the weight of the company's alleged participation in the infringement. Thus, the CADE has adopted the "European Commission Guidelines on the Method of Setting Fines"⁷ and took Bridgestone's percentage share of the total worldwide sales of marines hose and applied this share to the aggregate sales within the Brazilian market for the product. The result was taken as the value of sales for the purpose of setting the basic amount of the settlement sum.

Finally, it is emphasized that the marine hose settlement was also the only one in which the company agreed to collaborate effectively and actively with the investigations, presenting a number of cartel communications to the authorities.

Regarding the timing of the proposal, as mentioned before, the settlement may be proposed until the beginning of the judgment session of the administrative proceeding related to the investigated conduct. The Brazilian experience, although incipient, shows that the Tribunal is willing to negotiate a proposal any time within the legal provision, unless it lacks the legal requirements.

The Tribunal takes the view that settlement is an alternative to the fully adversarial proceedings of pursuing a trial. A case is settled only if the CADE concludes that this procedure maximizes cartel deterrence in comparison to the trial outcome. A settlement may increase deterrence if it provides new evidence and collaboration with investigations, increasing the likelihood of detection and decreasing the costs of prosecution, and/or if it saves resources and time of antitrust enforcement. Therefore, a commitment to stop a cartel or its harmful effects may be more valuable than pursuing the trial. Not only granting finality and saving administrative resources, but also the judicial review proceedings and shortcomings related to enforcement of the decision must be considered as incentives for the CADE to settle in a cartel case.

While issuing its non-binding opinion to the CADE with respect to all cases presented, the SDE strictly followed its Guidelines, as it recognizes the importance to reach predictability and transparency in the treatment of such settlement proposals. Up to date, the SDE issued 7 non-binding opinions to the CADE on whether to settle or not a case. Except for the Bridgestone settlement proposal (alleged marine hose cartel), the SDE took the view that the settlement proposal was not sufficient to deter collusion and keep the appropriate incentives for the Leniency Program. This is so because in all the cases the SDE issued an opinion the investigation was related to an alleged hard-cartel with direct evidence collected in dawn raids (plastic bags and cement cases).

3.2 *Settlements rejected by the CADE*

In the first year of Resolution No 46/2007, only four out of fifteen companies that applied for settlements had their proposals accepted. It is worth mentioning that the number of companies that are potential applicants for settlements, taking into account just cases with direct evidence of hard core cartels, exceeds 200. The incipient use of this alternative to fully adversarial proceedings may be due to the lack of predictability and uncertainties regarding its effects on criminal and private suits that are settled in the administrative area.

⁷ [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:HTML) ; see particularly paragraph 18.

As to the settlements rejected by the CADE, it is worth mentioning those presented in connection with the security guard services cartel investigation. At the day of CADE's final decision, the Reporting Commissioner was filled up with several last minute applications, made by seven companies, three trade associations and seven individuals. It was considered that the proposals had not met the requirements of Internal Regulations and had also been presented at a rather inadequate moment.

In addition, in a different cartel case, there were three other settlement proposals brought to judgment during the investigations. However, they were unanimously rejected since they offered a settlement sum considered insufficient to deter collusion and did not offer any effective collaboration with the investigations. In all the settlements proposals rejected by the CADE, the SDE also issued contrary opinions as it considered that the proposals were not sufficient to deter collusion and keep the appropriate incentives for the Leniency Program.

ISRAEL

1. Introduction

Cartels have always been perceived as detrimental to social welfare and the public interest. Israeli courts, as their EU and U.S. counterparts, have repeatedly expressed the view that collusive behavior undertaken by market participants is the utmost malevolence of the competitive process.¹

The Israel Antitrust Authority (hereinafter: "IAA") is authorized to prosecute violations of the Restrictive Trade Practices Act, 5748-1988 (hereinafter: "Antitrust Law"). Criminal cases are brought before the Jerusalem District Court.

The IAA is further certified to resolve hard-core cartel matters through settlements reached with cartel participants, as long as the latter serve the public interest. In most cases, such settlements are accomplished through plea bargains.² To this end, no difference exists between a plea bargain in a cartel case and any other type of criminal offence.

The practice of plea bargaining or settlement has met with judicial approval and pervades the legal system wherein antitrust proceedings are formally settled without a trial in a negotiated disposition of cartels cases.³ Such settlements can be regarded as contracts bestowing a trade of various risks and entitlements. That is, the defendant admits an antitrust violation and relinquishes the right for a trial in return for a reduced sentence or fine, thus evading a more complex and protracted criminal proceeding. By the same token, the IAA renounces the entitlement to seek the highest sentence or fine and brings about a more efficient and expedient outcomes.

2. The Potential Benefits Associated with Settlements Involving Cartels

Plea bargains may represent an efficient and attractive mean for resolving cartels cases, yielding imperative benefits to competition agencies as well as to the undertakings and recidivists concerned.

In particular, concluding a plea bargain with a member of a hard-core cartel may significantly save resources and time for both the IAA and the courts, *a fortiori* considering that cartel cases are typically

¹ E.g., CrimA 4855/02 *State of Israel v. Burovitch* ISRSC, 59(6) 776, 941, 2005 Antitrust 5000783; CrimA 7068/06 *State of Israel v. Ariel Elec. Eng'g, Traffic Light & Control Ltd.* ISRSC, 83 Dinim Elyon 545, 2007 Antitrust 5000597; cf. *Verizon Comm'n Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) ("negotiation between competitors may facilitate the supreme evil of antitrust: collusion").

² The General Director may seek, pursuant to § 50B of the Law, a consent decree from a District Court or the Antitrust Tribunal. He may also issue a Determination with regards to a certain prohibited restrictive arrangement. Further discussion is undertaken infra.

³ E.g., R.E. Scott & W.J. Stuntz, *Plea Bargaining as Contract* 101 *Yale L.J.* 1909, 1913-1917 (1992).

complex and involve multiple defendants and momentous evidentiary challenges.⁴ Furthermore, truncating or entirely avoiding a full-pledged legal and economic investigatory and prosecutorial process allows the IAA to allocate its (scarce) resources more efficiently and enhance its overall enforcement endeavors, thus leading to greater deterrence.⁵

Efficacy considerations did not go unnoticed by the Israeli Courts, which eloquently stated in a recent cartel case:⁶

"Indeed, needless to stress the immense and constantly increasing overload which lies on the courts. In a number of decisions the Supreme Court has highlighted the considerable escalation in crime in general, and grave crime in particular, in recent years, and the reality in which more and more cases deal with multiple defendants, and contain tens of witnesses and a growing body of evidence materials. Such cases are often far more complicated than in the past, and require a much longer handling time ... The above-said is predominantly relevant to the "dinosaur cases", as the case in front of us is ... under these circumstances, the respective weight of the interests favoring plea bargains is augmented, particularly those plea bargains which originate at relatively early stages of the trial."

Moreover, a plea bargain may also assist greatly in securing conviction of additional members of the cartel, and accentuates the defendants' admission of the facts and their willingness to bear responsibility for their wrongdoing. As aptly observed:⁷

"Courts no longer merely acknowledge the necessity of plea bargains, but recognize their value and contribution. It is not only a practical need, but a legal construction for which a public interest exists, and which is grounded in the adversary legal system. Such an approach is compatible with contemporary developing trends, which call for deliberation and communication among parties to a criminal procedure. These trends give weight to the defendant's willingness to take responsibility for his actions, and to the need to incorporate such responsibility on his part once contemplating alleviation of his punishment."

3. The Legal Framework - An Overview in a Nutshell

When criminal charges are brought, the IAA may decide, under appropriate circumstances, to enter a plea bargain with the suspected defendant (not necessarily with them all).⁸ Antitrust plea resolutions are honored by the courts as long as they serve the public interest under the specific circumstances of the case.⁹

⁴ See e.g. Shimon Shetreet, *The Limits of Expeditious Justice*, in *Expeditious Justice: Papers of The Canadian Institute for the Administration of Justice* 30 (The Carswell Company, Toronto, 1979) (maintaining that "some particularly complex antitrust cases reach dimensions that it is doubtful whether traditional justice is the proper process").

⁵ See e.g. J. Grogger *Certainty vs. Severity of Punishment* 29 *Economic Inquiry* 297 (1991); Thomas J. Miceli, *Plea Bargaining and Deterrence: An institutional Approach*, 3 *European Journal of Law and Economics* 249 (1996); Cf. A. W. Alschuler, [The Defense Attorney's Role in Plea Bargaining](#), 84 *Yale L.J.* 1179 (1975); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 *Harv. L. Rev.* 1037 (1984).

⁶ CrimC (Jer) 366/04 *State of Israel v. Biderman* ISRDC, 37(7) Dinim Mehozi 756, 2007 Antitrust 5000594, at ¶18 (references omitted).

⁷ CrimA 1958/98 *John Doe v. State of Israel* [2002] ISRSC, 57(1) 577, ¶ 24; CrimA 2153/03 *Idilberg v. State of Israel* [2002] ISRSC, available at: http://www.nevo.co.il/Psika_word/elyon/02021530-b07-e.doc.

A plea bargain could be entered into at any stage of the criminal process¹⁰, namely, during the investigation, prior to the formal procedure, post indictment as well as during the proceedings before Court. Whilst no formal structural restrictions are imposed, the more advanced the stage of the criminal process is, the smaller is the public interest in reaching a plea bargain. Generally, a plea bargain concerning the punishment will not be entered into after the defendant has been convicted by the Court.

Parties can withdraw from a plea bargain as long as the defendant did not admit before the Court to the facts included in the indictment. The IAA can withdraw from the plea bargain at this stage, if it serves the public interest. If the defendant wishes to withdraw after that point, the Court may allow it given special reasoning.

A settlement with cartel participants may also be reached by signing a Consent Decree. Pursuant to § 50B of the Law, the General Director may seek a consent decree from a District Court or the Antitrust Tribunal in lieu of conducting either criminal or civil proceedings against a party alleged to be in violation of the Law.¹¹ A consent decree must be based upon an agreement reached between the General Director and such a party and may be issued without an admission of liability or guilt on the part of that party. Consent decrees frequently enjoin the parties to an alleged restrictive agreement to pay a fine to the State Treasury,¹² and/or contain provisions mandating, prohibiting or regulating certain conduct by such party including the annulment of the restrictive agreement.

3.1 *Judicial Review*

As noted above, a plea bargain involving antitrust charges is treated in the same manner as any other plea bargain in Israel. It must first be approved by the District Attorney, after which the IAA files it in the

⁸ The IAA acknowledges that settlements will be facilitated by the employment of transparent and predictable procedures. The IAA regularly discloses the evidence against a member of a cartel in the process of disclosure of investigation materials that were gathered in the case, unless such materials are confidential by law. As soon as the indictment was filed, the defendants are entitled to go through all investigation materials that were gathered in the case. In any stage prior to the indictment, there is no duty to disclose evidence to potential defendants. However, in some cases the main evidence could be disclosed to the potential defendant even at this stage, before indictment but after completion of the investigation, if intentions to enter a settlement before the indictment is submitted exist.

⁹ CrimC (Jer) 366/04 *State of Israel v. Biderman* ISRDC, 37(7) Dinim Mehozi 756, 2007 Antitrust 5000594, at ¶ 11 (citing CrimA 1958/98 *John Doe v. State of Israel* [2002] ISRSC, 57(1) 577, ¶ 24); *see generally*, CrimA 1820/98 *Angel v. State of Israel* ISRSC, 52(5) 97, 105-06; *accord* Rehearing HCJ 1988/08 *Movement for Quality Gov't v. Attorney Gen.* [2008] ISRSC, 87 Dinim Elyon 800.

¹⁰ *See* State Attorney's Instructions for Reaching Plea Bargains (Dec. 21, 2005), *available at* <http://www.justice.gov.il/NR/rdonlyres/E574AA8D-4C12-4AA4-B70D-65F8B2A1E7A4/0/8x1.pdf>.

¹¹ The General Director is further authorized to issue a Determination with regards to a certain prohibited restrictive arrangement. The determination is published in the printed press as well as in the official statutory gazette and can be used as a *prima facie* evidence of its content in any legal proceeding. This latter legal instrument is often used to facilitate private enforcement in cases prosecution is not feasible. Needless to stress, however, that in hard-core cartel cases, given the severity of the offence, criminal enforcement is usually favored and indictments are filed. The utilization of consent decrees or determinations in the context of cartels is, thus, restricted to exceptional circumstances.

¹² *See* AT 701/07 *Gen. Dir. v. Israeli Ass'n of Imported Cement Mfrs.* ATTRIB, 2007 Antitrust 5000478 (NIS 2 million).

Jerusalem District Court, together with an amended indictment, if necessary.¹³ The defendant is then arraigned, pleads guilty of the charges listed in the indictment and is convicted by the court. Finally, the parties present to the court their arguments as to the sentencing. Some plea bargains include an agreed-upon sentence, which both parties request that the court impose. Other plea bargains prescribe only an agreed-upon range for the sentence. Still others leave each of the parties free to request whatever sentence it believes appropriate.¹⁴

Notwithstanding, even when the plea bargain settles the sentencing issue, the parties are required to assert their contentions regarding the punishment, since the Court is not restricted to the settlement reached within the plea bargain. The Court will then autonomously appraise the plea bargain, as well as the considerations that led the IAA to reach the plea bargain. As long as the punishments are found to be reasonable, the Court will tend to approve the plea bargain. The Court, however, may deviate from the punishments purported by the plea bargain, if they are found to be unreasonable in the Court's opinion given the specific circumstances of the case in question. The Court has a full discretion to contest and probe the agreement, and to impose a penalty it envisages as appropriate.

If the Court does not approve the plea bargain and imposes a more lenient sentence on the defendants, the IAA may appeal its decision before the Supreme Court. This would be a very rare occurrence. If, on the other hand, the Court does not approve the plea bargain and sentences a harsher punishment on the defendants, the latter may appeal its decision before the Supreme Court.¹⁵

3.2 *The Appropriate Range of Penalty*

The IAA employs no specific guidelines on the determination of the penalties within a plea bargain. When determining punishments within a plea bargain, the IAA weighs the circumstances of the specific cartel case against former cartel cases, past decisions and sentences ruled by the Court.

In order to augment the benefits of and resolve the difficulties inherent in plea bargains, the IAA's policy is to consider signing plea bargains with accused persons (or parties) who come forward at the early stage of the process and agree to testify or provide evidence that can be used to convict other participants. The underlying reasoning for such practice is that a party who reaches a plea bargain at an early stage of the case brings about more substantial saving in judicial time and resources, hence allowing the IAA to allocate its resources more efficiently. In addition, this practice induces defendants to start negotiating at an earlier stage.

A plea bargain that was signed with a defendant in a certain case surely serves as a benchmark for the level of punishment of other defendants in the negotiation process with the other defendants in the same cartel case.

¹³ Consent decree settlements are approved by either the Antitrust Tribunal or the Jerusalem District Court.

¹⁴ See Instructions for Reaching Plea Bargains, *supra* at 1-3, 5. Moreover, the IAA acknowledges that the leniency program's effectiveness must not be impaired by the reduction of penalties. In that vein, the IAA accounts for the notion that in instances where sanction discounts are too munificent, incentives to apply for leniency may be seriously undermined.

¹⁵ There was one case involving a cartel in the PVC piping sector in which the District Court imposed on the convicted firms fines that were higher than what was agreed within the plea bargain. The defendants appealed before the Supreme Court which eventually ruled that the original plea bargain should be approved and sentenced the defendant according to the punishments specified therein. See also CrimC (Jer) 160/96 *State of Israel v. Chuliot, Plastic Indus.* ISRDC, 26(7) Dinim Mehozi 761, 1996 Antitrust 3001628.

The baseline for the level of punishment in a certain case will apply to all defendants; however, the IAA takes into consideration the unique circumstances of each individual case. Subsequently, it will seek a punishment which correlates to the actions taken by each defendant, as well as its status in the cartel and other relevant personal circumstances. The latter may lead to differences in the punishments that will be imposed on different defendants in the same cartel case.

4. The IAA Experience

The IAA's demonstrated policy has been to issue criminal indictments against all parties to a hard-core cartel. Over the last years several settlements have been completed in cartel cases by means of a plea bargain.¹⁶

Several paradigm illustrations for the disposition of cartel cases are presented herein.

In the paint market, a cartel was uncovered in 2001 between Tambur Ltd., a declared monopoly, and a number of DIY retail chains, which coordinated the prices at which Tambur's leading products would be sold to end-users between 1994 and 1998. The latter collusive conduct secured that Tambur's products would be sold at uniform prices.¹⁷ The Court established that the monopolistic position of Tambur was to be regarded as an aggravating circumstance. Tambur's sales manager, who coordinated and facilitated the engagement in price fixing on behalf of Tambur, was convicted and sentenced to an imprisonment of two months to be served in public service, in addition to a fine of 20,000 NIS.¹⁸

In the market for international diamond dispatching, Brink's Israel Ltd. and Malka Amit Ltd., coordinated diamond dispatch prices for export from Israel and allocated the market for three years.¹⁹ Brink's and its director were sentenced under a plea bargain in July 2002. The director was sentenced to 5 months imprisonment to be served in public service and a fine of 100,000 NIS; the company was sentenced to pay a fine of 1,000,000 NIS. In his verdict, the judge stressed the importance of ensuring that the imposed fine would have a deterrent effect, especially by reflecting the profits gained from the involvement in the illegal cartel activity.

In the frozen vegetables market, in June 2005 the IAA filed an indictment against five undertakings and their respective managers in the District Court of Jerusalem. According to the latter indictment, the companies conspired in a cartel from 1992 until 1998 to coordinate product prices and discount rates. In addition, it specified that the companies divided customers among themselves. The frozen vegetables market in the relevant period was estimated at 160 million NIS. The companies and their executives were convicted under a plea bargain with the IAA.²⁰ Fines of up to 900,000 NIS were imposed upon the firms

¹⁶ In the past 5 years 7 settlements were concluded. Notably, most plea bargains were concluded only after the formal criminal process was initiated and not during the investigation stage.

¹⁷ CrimA (Jer) 1142/01 *State of Israel v. Shulstein* ATTRIB, 2002 Antitrust 3013197 (conviction and sentencing under a plea bargain in an RPM case); CrimA (Jer) 1262/01 *State of Israel v. Shnayderman*, ATTRIB 2001 Antitrust 3014987

¹⁸ The manager appealed the District Court's sentencing. The Supreme Court, ascertaining that the penalty imposed on the accused was rather lenient in respect to the felonies he was convicted of, rejected the appeal. CA 7495/02 *Shnayderman v. State of Israel*.

¹⁹ CrimA (Jer) 1142/01 *State of Israel v. Brinks*, ATTRIB, 2002 Antitrust 3014999.

²⁰ CrimA (Jer) 960/05 *State of Israel v. Margalit* ISRDC Dinim Mehozi 36(3) 981, 2006 Antitrust 5000441.

and the executives received fines of up to 180,000 NIS (that fine was reduced by the Supreme Court from 250,000 NIS) in addition to 6 months imprisonment to be served in community services. One executive was sentenced to 30 days imprisonment in jail.

In 2007, the District Court of Jerusalem approved plea bargains reached by the IAA pertaining to a nation-wide cartel in the market for liquefied petroleum gas (LPG), which operated during the years 1994-1996, encompassing four dominant gas undertakings (Pazgaz, Amisragas, Supergas and Dorgas) with an aggregate market share of over 90% and 15 members of their senior management.²¹ The process involved 215 prosecution witnesses and over 30,000 documents containing relevant evidence, and resulted in imprisonment sentences and heavy fines that were imposed by the Court on the cartel participants. Three of the four companies that were indicted and their executives have reached plea bargains with the IAA. The fines for the companies ranged between 1.25-4.04 million NIS per company. Most executives were sentenced to up to 6 months' imprisonment to be served in community services and payment of individual monetary fines of up to 1.25 million NIS. An important achievement of one of the plea bargains was the fact that one of the companies' CEOs was sentenced to serve 100 days in prison with no option to serve the term in community services.

5. Conclusion

Plea bargains play a predominant role in the Israeli legal system, and are acknowledged as a legitimate mean to resolve antitrust criminal procedures, as long as the settlement adequately serves the public interest. It is implemented vis-à-vis the parties through consistent, predictable and transparent set of principles.

The IAA recognizes the imperative benefits associated with the implementation of negotiated cartel cases through plea bargains, which entail acceleration of the investigation, disposal of unnecessary litigation and its attendant costs and uncertainties, and the establishment of a strong deterrence mechanism.

²¹ See, e.g., CrimC (Jer) 366/04 *State of Israel v. Oldak* ISRDC, 38(3) Dinim Mehozi 102, 2007 Antitrust 5000704 (sentencing a director to 100 days of imprisonment, 12 months as a suspended sentence of three years and a fine of NIS 150,000). See also AT 612/06 *Gen. Dir. v. Straus Elite Ltd.* ATTRIB, 37(4) Dinim Mehozi 298, 2007 Antitrust 5000477 (a consent decree proceeding: agreement to pay NIS 5 million).

SOUTH AFRICA

1. Introduction

This short paper on South Africa's experience with settlement procedures in cartel cases draws on the guidance provided by the Competition Tribunal of South Africa ("CTSA") for determining appropriate administrative penalties and the experience of the Competition Commission of South Africa ("CCSA") in utilising the principles set out by the CTSA.

2. Guideline from the CTSA

Section 58(1)(a)(iii) of the Competition Act 89 of 1998, as amended, ("the Act") authorises the CTSA to impose an administrative penalty with or without the addition of any other order as part of a remedy for a prohibited practice. In terms of section 59, an administrative penalty imposed by the CTSA may not exceed 10% of the respondent firm's annual turnover in South Africa and its exports from South Africa, during the firm's preceding financial year.

Section 59(3) states that when determining an appropriate penalty, the CTSA must consider the following factors:

- the nature, duration, gravity and extent of the contravention;
- any loss or damage suffered as a result of the contravention;
- the behaviour of the respondent;
- the market circumstances in which the contravention took place;
- the level of profit derived from the contravention;
- the degree to which the respondent has co-operated with the Competition Commission and the Competition Tribunal; and
- whether the respondent has previously been found in contravention of this Act.

While the above factors were generally taken into account by the CCSA in its determination of an appropriate administrative penalty, the CTSA provided definitive guidance on the application of the above 7 factors, in the calculation of an administrative penalty, when it delivered its judgment in the SAA matter¹ in 2005.

In arriving at the guideline, the CTSA took the factors it had to consider in terms of section 59 and gave them a weighting relative to one another so that they added up to 10%, the maximum permissible level for a fine in terms of section 59(2). The CTSA also explained what they took into account in

¹ Case Number: 18/CR/Mar01, Competition Commission v South African Airways (Pty) Ltd.

allocating a specific weight to each of the 7 factors. However, the CTSA cautioned parties wishing to utilise the CTSA's guidance by stating that:

The approach that we have adopted in calculating the size of the administrative penalty attempts to lend rationality to an important decision. While the Act specifies a non-exhaustive list of factors that are to be taken into account, it does not weight these in any way... [At] least the approach adopted here is intended to act as a guideline for the future. However, further experience with the Act may indicate that either the weightings are inappropriate or that we have not exhaustively considered all the factors that may exist. In this decision we have set out our thinking in some detail in order to assist readers to understand how we approach the difficult task of allocating to legal and factual conclusions a rating that can inform the size of the penalty.

The CTSA's guideline is set out in Table 1 below.

Table 2. Allocation of weightings to section 59 factors

Factor	%
<p>a) nature, duration and extent of contravention</p> <p>This factor is given the highest weighting. Firstly, because it deals with three separate issues, nature, duration and extent and thus as a matter of quantity it is the most wide ranging of the factors. Secondly, it needs to be weighted heavily enough to provide for a meaningful distinction between various types of contravention. Duration, for instance could refer to the act being perpetrated over a period of months or years. It is also important to differentiate sufficiently between types of prohibited practice. For instance, a section 4(1)(b) prohibition, the so-called hard-core cartel, would be considered the most egregious form of conduct and so would receive a higher allocation than a less serious form of prohibited conduct e.g. resale price maintenance.²</p>	3%
<p>b) loss or damage as a result of contravention</p> <p>Here we would look at loss or damage to competitors and/or consumers as a result of the prohibited practice. This receives a lower weighting as the competitors/consumers can recoup this loss through a claim for civil damages.</p>	1,0%
<p>c) behaviour of respondent</p> <p>This deals with the behaviour of a respondent firm in relation to the market i.e. consumers and competitors as opposed to how it responds to the regulators which falls under subparagraph (f). This factor must be weighted sufficiently high to serve as both an aggravating factor for respondents whose behaviour in the market justifies, but on the other hand, is there to provide mitigation to those who attempt to redress the adverse effects of their conduct.</p>	1,0%
<p>d) market circumstances</p> <p>Here we deal with what the nature and dynamics of the market are at the time of the contravention. We examine here the type of market, its structure and history. We look at how materially the conduct impacted or could have impacted on the market structure.</p>	1,0%
<p>e) level of profit derived</p> <p>Here what we are dealing with is made quite specific. Nevertheless evidence of the level of profit derived as a result of the contravention is difficult to prove in practice and for this reason the factor, while not unimportant, is not given a high weighting.</p>	0,5%

² In this regard, the Tribunal added, when allocating a weighting for SAA specifically, that the worst exclusionary abuse might therefore qualify for a weighting of 1,5% depending on the extent and duration which we then look at".

f) degree of co-operation with CCSA and CTSA	1,5%
This factor is given a high weighting because of the importance we attach to co-operation with the regulators. Those who co-operate should be able to score well in mitigation of the penalty whilst those who have not, should be penalised.	
g) found in previous contravention	2%
This factor needs a high weighting as a repeat offence is very serious and needs to be adequately deterred.	
Total	10%

Source: Case Number: 18/CR/Mar01, Competition Commission v South African Airways (Pty) Ltd

Having set out the weightings allocated to each factor, the CTSA went on to apply the guideline to the SAA matter and arrived at a penalty of R45 million (\$5.4 m)³ for SAA's anti-competitive conduct in the airline industry. This penalty amounted to 2.25% of SAA's annual turnover during the preceding financial year.

3. Cartel cases utilising the guideline

The CCSA and the parties it has negotiated with have made use of the CTSA guideline in the cases which followed the abovementioned SAA judgment. A few such cases are briefly discussed below.

3.1 Tiger Brands Limited

Following an investigation into allegations of price fixing and market allocation in the bread industry, Tiger Brands Limited ("Tiger Brands") agreed to pay a penalty of R98 784 869.90 (\$11.9 m), amounting to 5.7% of its national turnover for bread operations for the 2006 financial year. In arriving at the penalty, the CCSA took into account that:

- the contravention involved both price fixing and market allocation designed to cement the price fixing agreement;
- independent distributors and consumers suffered financial losses as a result of the respondents conduct;
- the industry had historically been subject to price regulation which may have contributed to a culture of discussions amongst competitors in the industry;
- Tiger Brands had conducted an internal investigation and provided the CCSA with additional information; and
- Tiger Brands had not previously been found to have contravened the Act.

In this regard it is important to note that the CTSA had also previously established a principle of calculating the administrative penalty on the affected line of commerce, being that part of the turnover of the respondent firm which directly related to the anti-competitive conduct. As such, the penalty imposed on Tiger Brands related to its bread operations for the 2006 financial year, as opposed to its entire turnover for this period.

³ Rate of exchange as at 19 September 2008: \$ - R8.267.

The CTSA confirmed the agreement as a consent order.⁴

3.2 *Network Healthcare Holdings Limited*

In the matter against Network Healthcare Holdings Limited (“Netcare”) and Community Hospital Group (Pty) Ltd (“CHG”), the respondents agreed to pay a penalty of R 6 000 000.00 (\$ 0.7 m) amounting to approximately 2% of CHG’s turnover for engaging in price fixing on private hospital tariffs and for prior implementation of a merger. The CTSA found the penalty agreed to by the CCSA to be inappropriately low, and declined to confirm it as an order. The CTSA found that the CCSA had not given sufficient weight to all the facts concerning the failure to notify the merger, the degree of co-operation by the respondents, the behaviour of the respondents and the long duration of implementation. It also found that the CCSA had followed the wrong approach in calculating the turnover affected in the collusion violation, namely the turnover of CHG, the acquired firm.

This matter has been taken on appeal by Netcare.

3.3 *New Reclamation Group (Pty) Ltd*

The CCSA and New Reclamation Group (Pty) Ltd (“Reclam”) agreed that Reclam was to pay a penalty of R145 972 065.00 (\$17.6 m) for agreeing to fix prices with its competitors for the purchase of non-ferrous scrap metal and for entering into arrangements with its competitors to divide markets by allocating territories and customers for the supply of ferrous and non-ferrous metals. This penalty amounted to 6% of Reclam’s annual turnover in the affected markets.

The CTSA confirmed the agreement as an order.

3.4 *Adcock Ingram Critical Care (Pty) Ltd*

Adcock Ingram Critical Care (Pty) Ltd agreed to pay a penalty of R53 502 800.00 (\$6.4 m) for engaging in collusive tendering and market allocation in the public and private hospital markets respectively. The penalty amounted to 8% of its annual turnover. In this case, the CCSA allocated the maximum weighting to all the section 59 factors, except the factor relating to a previous contravention.

By this time, the CCSA had started to take a tougher approach to the calculation of administrative penalties and in this matter, where the CCSA found no factors in favour of the respondent (aside from the fact that there had been no previous finding of a contravention against it), the CCSA imposed the highest penalty to date, in percentage terms. Furthermore, the CCSA moved away from the principle of calculating the penalty on the affected line of commerce, which in this case would have meant penalising the respondent on its turnover from intravenous fluids, and imposed the penalty on AICC’s entire turnover.

The CTSA confirmed the agreement as an order.

⁴ In terms of section 49D of the Act, the CCSA may conclude a consent agreement with a respondent and the CTSA may confirm that agreement as an order in terms of section 58(1)(b).

BIAC

1. Introduction

The business community has a generally positive appreciation of the possibility which is increasingly open to them to settle antitrust cases rather than going through the full procedure when an infringement is alleged. While the subject of today's roundtable is restricted to cartel issues, most of the remarks submitted here are also applicable to other forms of antitrust enforcement actions such as dominant positions, which we believe can also be resolved by settlement in many circumstances.

Naturally however, the practice of settlements (otherwise called "plea agreements", "early resolutions", etc.) raises a few concerns. The nature of questions faced by business entities with respect to their general attitude to settlements varies greatly. In North America, plea-bargaining is a long-standing practice, and the questions are more about potential deviations from the process. Conversely, settlements in antitrust matters (and more generally for something other than private, or tax-related disputes) are still fairly new in Europe, and business entities have to take a view on a process which is still very much in the making. The idea that breaches of the law, which can often result in criminal sanction for entities or individuals in their home jurisdiction or abroad, can be dealt with by a negotiation between the "judge" and the "delinquent", does not obviously fit with many European cultures. However, the business community's response is undeniably positive.

Leaving aside philosophical considerations, what is the practical interest of settlements for business entities? While the efficiency advantages to the agencies are well known, are they the same for companies? Indeed it is clear that they can also benefit from an opportunity to reduce the distraction, damage to reputation and the legal cost of a lengthy procedure; in many cases this outweighs the concessions made in terms of rights of defense, and the loss of a chance to prevail in the end. Also, we believe there is a general perception that settlements enhance the good administration of justice simply because they speed it up and reduce procedural bureaucracy, which can only improve the overall quality of the enforcement action whilst releasing agency resources to pursue other cases.

Issues that business entities may have with antitrust settlements on both sides of the Atlantic are different but proceed from the same cause: by nature, the position of the parties in the negotiation is asymmetrical. Therefore, to make settlements an attractive option, the lack of symmetry should not be worsened by inconsistent and unpredictable outcomes, and of course the reward must be sufficient, ensuring that potential collateral damage is limited.

Additional considerations relate to the new international situation resulting from the parallel expansion of settlements and private enforcement actions, which complicates the assessment of the defendants (e.g. the possible "domino effect" of settling in one jurisdiction but not in other jurisdictions in which the cartel activity may have had effects), thus reducing the potential attractiveness of such schemes.

As always, the companies' primary concerns are:

- transparency,
- legal certainty, and

- cost containment.

The purpose of this paper is to review very briefly how these concerns are addressed in the settlement process, and because of the widely different historical background of its introduction in the legal environment, it makes sense to review in turn the issues that have arisen in North America and in various European jurisdictions, and then to point out some issues resulting from the globalization of the settlement processes.

2. In North America

Plea agreements have overwhelmingly been the principal method of resolving cartel proceedings in the U.S. Of the 448 criminal cases filed between 1998-2007, more than 90% are estimated to have been resolved through plea agreement.¹ For corporate defendants in these actions, the principal motivations for entering into plea agreements have been to avoid the potential imposition of larger penalties and to finally resolve the investigation in order to return to the operation of the underlying business.

Under the U.S. system, cooperating defendants can benefit significantly from their cooperation. The United States uses a system of Sentencing Guidelines to advise the imposition of criminal sanctions, although the determination of facts supporting the sentence fall within the fact finding authority of the jury.² In a negotiated plea agreement, the defendant and the Antitrust Division of the Department of Justice typically agree to a set of principles governed by the sentencing guidelines which – assuming acceptance by the court – determine the penalty imposed. The Sentencing Guidelines reduce the penalty for cooperating defendants and provide for mitigating factors that can weigh in favour of a cooperating party. If the defendant instead refuses to accept responsibility and forces the case to a jury trial, the defendant will lose the benefit of these provisions and the DOJ typically will oppose any effort by the defendant to argue mitigating circumstances. Thus, the acceptance of a plea agreement by defendants will act to reduce the penalty that otherwise would accompany a cartel violation.

Companies accused of cartel violations also often prefer a speedy resolution to a cartel prosecution, particularly when the evidence of a violation is strong. Assuming a violation, a delay in prosecution carries only the limited benefit of extending the time at which a company may have to pay a fine. There are strong countervailing factors, however, including the likelihood that the resulting fine may be higher and, more importantly, the ongoing distraction and stigma of a prosecution.

In the U.S., defending against a cartel proceeding at trial tends to be an all-consuming exercise for a company, even when the alleged cartel impacts only a small part of the overall business. A great deal is often at stake, including very large fines, potential prison sentences for executives, and possible debarment of the company or division from federal contracting work. If the company believes that it is likely to lose in any event, then it is far better off in “cutting its losses” by agreeing to a known penalty and putting the matter behind it as quickly as possible.

While the U.S. authorities often have a large volume of compelling evidence regarding an alleged cartel, such is not always the case. In these instances, there often are questions as to whether an agreement existed, whether the agreement was “hard core” and should be treated as per se unlawful or was instead “rule of reason” conduct or whether a party actually joined other conspiring parties in their unlawful

¹ See Antitrust Division Workload Statistics 1998-2007, available at <http://www.usdoj.gov/atr/public/workstats.htm>.

² The United States Sentencing Guidelines are issued by the United States Sentencing Commission and contained within the Federal Sentencing Guidelines Manual, <http://www.ussc.gov/guidelin.htm>. See also, U.S. v. Booker, 543 U.S. 220 (2005).

endeavour. In these instances, a plea arrangement is less likely. It is important for the authorities to carefully weigh the evidence in such cases and not assume that all cartels are alike and that all agreements among competitors are pernicious in nature. Efforts to overreach – for example by refusing to discern between affected and unaffected commerce – can result in perverse results including wrongfully punishing conduct that should not be punished.

To be sure, the laws, procedures and sanctions weigh strongly in favour of the government. As a former Chief Judge of the New York Supreme Court once quipped, “prosecutors have so much influence on Grand Juries, they could get them to indict a ham sandwich.”³ Given the extreme nature of potential penalties there are significant risks for defendants of refusing to enter into plea agreements.

The same remarks apply more or less in Canada, where over the last 25 years or more virtually every price fixing case that has been resolved has been resolved by settlement⁴. Some members of the legal community and the business community fear that this may lead to a situation where there is a near absence of case law development as there is now almost no judicial involvement in these matters. The impact of new developments such as the publication by the Competition Bureau earlier this year of a draft Information Bulletin on Sentencing and Leniency in Cartel Cases remains to be seen. There is significant pressure on companies to come forward as early as possible often before the all the facts are known. This, and the pressure in favour of the quick disposal offered by settlement, may result in heavy consequences especially for leniency (as opposed to full immunity) applicants. It is therefore very important that the authorities in such cases carefully scrutinize the facts and reject cases where it is doubtful that a prosecution would succeed if the case were tried. This is particularly true in Canada where price fixing is not unlawful per se, and where the government must prove an undue lessening of competition effect to obtain a conviction.

3. In Europe

As mentioned above, settlements are a fairly new experience in Europe, which implies that the “case law” derived from the practice of national agencies remains limited, with the exception of France where there have been 18 cases since the settlement procedure was introduced in 2001, involving cartels (in 10 decisions) as well as vertical agreements or unilateral practices. In the U.K., although “early resolution” has apparently become the preferred means for the authorities to dispose of cartel cases and although the OFT has made an appreciable effort to communicate the policy implications of these decisions, there have been only five settled cases, which makes it still difficult for the business community to draw lessons.

However, the general reaction of European business to settlements is clearly favourable, for the efficiency reasons outlined earlier. There is naturally some degree of criticism, which reflects the traditional, and sometimes contradictory, concerns of transparency, legal certainty, and cost containment.

In the U.K. for instance there are concerns over the fact that settlement has become the preferred route for the OFT in significant cases, despite the claim that it is a “prioritization tool”. Indeed no cases were closed “in the ordinary course” in the past two years. Excessive use of settlements reduces transparency because the process occurs behind closed doors without judicial control (even though there is no requirement for a settling party to give up its right to appeal to the CAT).

³ A famous quote by Judge Sol Wachtler. See, “New Top State Judge,” New York Daily News, July 31, 1985, p.3.

⁴ The comments in section III of this paper with respect to private actions apply with full force in Canada. An applicant for immunity or leniency will have to carefully consider the impact of the near-inevitable private actions (i.e. class proceedings) that will generally follow public disclosure of the existence of the cartel.

Uncertainty is also, inevitably, one of the pitfalls of the process. In France for instance, while settlements have over time been more reliable, it is usually still difficult to assess the compensation that will be granted in exchange for a given commitment. In order to obtain a reduction in fine, a company must also commit itself to prevent any new anticompetitive practice. The amount of reduction directly depends on the commitments: the broader and the more innovative the commitments, the larger the fine reduction. This practice has raised criticism since it tends to confuse two different approaches (that of “pure” commitments and that of settlement) and that it hampers the predictability of the settlement, even more so because it will become increasingly difficult over time to provide “innovative” commitments. Also, the fact that in certain cases the *Conseil de la Concurrence* has not followed the recommendations of the *Rapporteur Général* (who conducts the negotiation) creates additional uncertainty reducing the attractiveness of the settlement procedure, even if this has only happened once to the detriment of the settling company.

This is even more true in Germany, where the settlement process has been criticised for its extreme flexibility. There is no general framework for settlement in the German Competition Act or in the notices issued by the *Bundeskartellamt*. Each case is treated individually and case-by-case. Some very high profile cases have indeed been settled (most notably the charges against Pro7/RTL regarding rebates for advertisements) and the difference between contemplated fines in the absence of a settlement and settled fines have been far more important than the 10% available under the new EU regime. The *Bundeskartellamt* is keen on providing substantial incentives for settlements not only in the form of discounts. It has also offered to exercise its discretion to investigate or to abstain from investigating related charges in the interest of companies that are willing to settle.

But the ultimate concern probably lies in the level of the discounts granted, and again experience may be too short to derive a clear, harmonised policy from the national agencies’ record. While in the U.K. some voices are heard saying that the large discounts granted so far in direct settlements may affect the general deterrence of the antitrust policy and contribute to make them the priority route of infringement control, in France some fear that the trend observed in recent years to decrease the levels of discounts (in the case of cartels, where the parties merely commit to a compliance program, the *Conseil de la Concurrence* now usually grants a 10% reduction) will reduce the attractiveness of settlements.

In any case, the European Commission’s enforcement of its new settlement procedure is bound to influence the position of the national agencies.

The proposed new policy had received a fairly critical appreciation during the consultation process, and some but not all of the comments from the business community have been taken into account.

While it is, of course, too early to make an assessment of the policy, and while the major interest of the procedure is to enable the negotiation of the amount of the fine, there are already a number of concerns that have been voiced, about:

- the potentially unfair lack of symmetry in the access to information: especially because of the rule denying access to the file except if “justified” at the discretion of the Commission;
- the rigidity of the process requiring the submission of a written proposal with the proposed amount of the fine;
- the required admission of guilt (even though mitigated by the possibility to make oral statements) which makes the defendant’s position in case of resumption of the normal procedure much weaker, and increases exposure to damages action: it makes the decision to ask for settlement a

point of no-return, and this may deter companies who have a defensible case from crossing that bridge (so frustrating the efficiency purposes of the Commission, especially in “hybrid” cases).

While the latter concern is probably inherent to any settlement procedure, the Commission’s policy differs from the national agencies’ with respect to the maximum amount of reduction. Ten percent is generally perceived as too low to make the European settlement procedure attractive. The alleged reason (to protect the attractiveness of the leniency procedure) does not necessarily require such a restrictive attitude. While it is too early to draw conclusions from the British experience, it appears that the higher percentages granted by the *Conseil de la Concurrence* have not undermined its leniency procedure.

4. Implications of International Cartel Settlements on Private Rights of Action and Criminal Procedures

The “globalization” of settlements, i.e. the increased use of the process in jurisdictions where it was ignored before, combined with the expansion of private actions and the trend to apply more often the criminal provisions of antitrust legislation, will add significant complexities to the matter.

Indeed, in antitrust like in any kind of litigation, a defendant faced with the dilemma of entering into settlement negotiations or pursuing the administrative or judicial procedure is in great need of visibility on the potential consequences of the admissions which are by nature a condition to the settlement. In international antitrust cases, the complexities are huge. These consequences may affect outstanding cartel investigations in other jurisdictions, and potential private actions in the defendant’s own jurisdiction and abroad. As timing is of the essence in a settlement, agencies should be conscious that these very complex considerations can affect the decision-making capacity of the defendant, and affect the attractiveness of the process (either diminishing the defendant’s appetite for entering into negotiation or raising the “price” that he is willing to pay) unless some precautions are taken.

The international collateral risks taken by the defendant who makes an admission for the purposes of a settlement are multi-faced. First, there is a jurisdictional risk: for instance, the admission made by a company in one country may create the minimum contact necessary to give jurisdiction to authorities which would otherwise not have it, or allow them to “pierce the corporate veil” and seek the foreign parent company’s liability. There is an important evidentiary risk: the admission can be used by an authority which would otherwise be unable to collect the foreign evidence necessary to support its case. There are also risks relating to the assessment of the scope of the case, e.g. with respect to the market definition or the period of the alleged offence, and to the varying approach to the recovery of damages by indirect customers. Finally, there are procedural risks: for instance, a foreign settlement can be invoked by a claimant in a U.S. action where the mere fact that there is an antitrust investigation abroad would not be sufficient to meet U.S. pleading standards.

Of course these complexities are amplified when it comes to criminal procedures. The recent, much-publicized Marine Hoses case provides an example. While the pleading guilty by the three individual defendants in the U.S. preserved their legal entitlement in the U.K. to the normal presumption of innocence until proven guilty and their freedom to decide to plead guilty to the U.K. offence, in practice it was clear that they would do so because of the dual U.S./U.K. nature of the U.S. plea agreement. The issue is even more acute in a situation where the company has chosen to plead guilty, and the indicted individuals choose to fight conviction.

As a consequence, the success of settlement procedures, which again are recognized by both the business entities and antitrust authorities as in the joint overall interest, depends on a number of precautions being taken. Agencies should not construct a settlement process that introduces unnecessary risks or costs on defendants in foreign jurisdictions, where those risks or costs do not carry benefits for the

settling jurisdiction. A number of decisions by agencies implicate these risks. Among the more important are:

- the use of written decisions in settlements;
- requirements for transporting physical evidence into the jurisdiction;
- requiring an admission of guilt by pleading defendants;
- confidentiality of evidence gathered in the course of investigation and prosecution of defendants;
- requiring the parent corporation to be a party to the settlement agreement;
- required consents to sharing of information with other competition agencies; and
- descriptiveness and conclusiveness of key evidentiary issues such as duration of conspiracy, product market definition, scope of damages, impact on direct/indirect purchasers, etc.

In recognition of foreign sovereignty, considerations of comity, and the desire to avoid excessive penalization of cartel offenders, agencies should not construct a settlement process that introduces unnecessary indirect costs on defendants in foreign jurisdictions, where those costs do not carry direct benefits for the settling jurisdiction's consumers.

More generally, in the field of settlements like in other domains of antitrust, with transnational cases becoming more frequent, there is a clear need for convergence of the agencies' policies. Otherwise, the attractiveness of settling with one agency while knowing that the full administrative or court procedure will have to be conducted elsewhere on the same case, or that settlement will be available in the other jurisdiction on much less attractive conditions, is much reduced. The OECD's efforts to achieve this, as reflected in its recent Policy Brief, are certainly appreciated by the business community, and should help to overcome some of the major current impediments to the achievement of settlements in antitrust cases.

SUMMARY OF DISCUSSION

The Chair opened the Roundtable and introduced the two guest speakers: Gary Spratling of Gibson, Dunn & Crutcher, and Marc Hansen, Latham & Watkins. The Chair explained that the Roundtable would address several issues, including: the legal framework and policy objectives of settlements; incentives to settle and relationships with other enforcement tools; tactical issues in settlement negotiations; and procedural issues in settlement negotiations. He then gave the word to Mr. Spratling.

Mr. Spratling started his presentation by referring to the U.S. submission which described that during the last 20 years more than 90 percent of the defendants charged with a criminal cartel offence chose to enter into plea agreements with the U.S. Department of Justice (DOJ) Antitrust Division. In these plea agreements, defendants have admitted guilt and agreed to cooperate with the criminal investigation, rather than contest the charges and make the government prove its case. This includes cases where corporate defendants had to pay millions of dollars in fines and individual defendants were sentenced to substantial jail terms.

Mr. Spratling observed that 90 percent is a remarkable number; the best explanation for such a high rate of settlements are the benefits of plea agreements in the United States, which flow equally to DOJ, the cartel participants, the courts, the judicial system and the public at large. These benefits include more effective and timely enforcement, more effective punishment and greater deterrence. He explained that in a plea agreement, DOJ would negotiate a reduction in fines, which is determined within the framework of the U.S. Sentencing Guidelines, in exchange for the defendant's cooperation, admission of guilt, disclosure of certain facts, and waiver of certain rights. DOJ listens to a defendant's views on the geographic scope of a cartel, product covered, the duration, affected commerce, the defendant's role, and the appropriate fine. Contrary to a widely held view in jurisdictions outside the United States, however, DOJ does not negotiate whether a defendant had been engaged in cartel activity and what type of charges it will bring, and will also not add or drop charges in favour of lesser charges.

Mr. Spratling moved on to discuss factors that are important to cartel participants when they are contemplating a settlement. The first factor is reducing the penalty, which in the case of a corporation means reducing the fine. This reduction has to be significant to compensate for the waiver of rights and the costs of cooperation. Cooperation can be very costly and potentially very disruptive to a corporation: it must not only admit guilt, but also publicly state that certain facts are true (which increases its exposure in civil litigation); cooperate fully and completely with the investigation by giving a full account of all the known facts; produce all documents wherever in the world they are located; make executives and other employees available; and give interviews and trial testimony at the request of DOJ. Defendants entering into a plea agreement also waive the right to a trial, including the right to appeal their sentence. The greater the reduction in fine, the greater the inducement to settle as the proposed settlement will appear more beneficial to the management and the board that makes the decision to cooperate. Transparency in the fining system is a necessary element of a settlement system as a defendant could assess the benefits of a deal only if it could determine what the fine would be but for the plea agreement.

Transparency also contributes to more predictable results. Mr. Spratling explained that predictability depends on two features: the transparency of a fining system and its proportionality. When a lawyer recommends to a client that it should settle and cooperate with the government, in-house lawyers, management and the board of directors generally ask tough questions. They want to know what the

charges would be if the company settles and cooperates; which of the corporate entities are going to be charged; how high the fine will be. Mr. Spratling explained that these questions cannot be answered unless a jurisdiction is transparent in its fining system. In the United States, plea agreements are public and there is a public record of what the DOJ has done in similar situations. Plea agreements also reflect the principle of proportionality, not only among defendants in a given matter, but also across matters. In these circumstances, counsel can make an informed prediction to answer the questions just mentioned.

Conversely, protocols or guidelines for the calculation or reduction of fines, whether they use a specific percentage or range, may give the enforcement authority too much discretion. The same guidelines might justify a hypothetical fine that can be two or three times greater than another hypothetical fine. In such a case, the method of calculation is not transparent and the fine is not predictable. Unpredictability can serve as a major disincentive for cartel participants contemplating entering into a settlement agreement. Even if the reduction of a fine for a settlement is transparent and certain – such as the 10 percent in the European Commission's settlement procedure - it cannot cure the lack of transparency in calculating the initial amount of a fine.

Plea agreements can also expedite the pace of an investigation and prosecution. They allow the target of an investigation to move swiftly to resolve its exposure, deal with the sanctions and put the matter behind it. Because the DOJ's main goal in cartel settlements is obtaining the cartel participants' cooperation throughout the investigation and in the disposition of the case, a cartel participant can initiate plea negotiations with the DOJ at any time in order to resolve its culpability and obtain credit in the investigation.

Mr. Spratling continued that the analysis of the benefits of settlement agreements is becoming increasingly complex in a global context. The BIAC submission, for example, states that “*the globalisation of settlements combined with the expansion of private actions plus the trend towards criminal prosecution in greater numbers of jurisdictions will add significant complexities to the analysis,*” and that “*the potential consequences of the admissions, which typically are required as a part of settlements, are huge as they may affect the government's investigation or private action in the defendant's own jurisdiction, or those admissions may affect the government investigation or private actions in other jurisdictions.*” Mr. Spratling agreed with both points. He explained that the process for a cartel participant that is facing the decision whether or not to come forward and cooperate in a government investigation involves roughly four steps:

- The process starts with an analysis of the potential exposure to sanctions around the globe. A corporation must analyze its potential exposure and its most likely exposure to sanctions by enforcement authorities in each jurisdiction one by one as well as its cumulative exposure worldwide;
- The cartel participant then has to identify and evaluate the opportunities to avoid or mitigate sanctions around the globe. In nearly all jurisdictions the only way to avoid or mitigate sanctions is to self-report and cooperate through an immunity or leniency programme and, except in the case of an immunity applicant, to enter into a settlement agreement or plea agreement with the enforcement authority. This evaluation of net benefits of entering into a plea or settlement agreement must proceed jurisdiction by jurisdiction and must take into account the consequences of actions taken in one jurisdiction on the status in all other jurisdictions;
- The process continues with an analysis of civil litigation costs around the globe. A company evaluating the decision to cooperate in the international cartel context must appreciate the nearly certain civil litigation that is going to occur in the United States and more recently in other

jurisdictions as well. In recent years the cost of civil litigation in the United States have at times exceeded the combined cost of government sanctions in all jurisdictions;

- Finally, the cartel participant has to determine the net global value of seeking immunity or leniency, cooperating with the government, entering into a plea agreement or direct settlement on the one hand or pursuing a different strategy on the other hand.

Mr. Spratling concluded with some basic principles, both for enforcers and for counsel representing cartel participants:

- A robust effective international anti-cartel enforcement programme depends on the cooperation from at least some cartel participants;
- Prospective cooperating cartel participants come forward in direct correlation to the net value of anticipated benefits of cooperation as well as the predictability or uncertainty of obtaining those benefits;
- A jurisdiction should attempt to maximise the benefits of cooperation *i.e.*, maximising the incentives for cartel participants to come forward, through a leniency policy and a settlement policy that are complementary and cumulative;
- Cartel participants make the decision on whether to cooperate on a global basis. A cartel participant, whether evaluating the net benefit of seeking leniency or the net benefit of entering into a settlement agreement, will consider the totality of benefits and costs across all relevant jurisdictions and not just the benefits and costs in the subject jurisdiction where the settlement agreement is available;
- The requirements in a jurisdiction's leniency policy or settlement policy must not place a cooperating cartel participant in a worse position than a cartel participant who does not cooperate, either in collateral proceedings in the same jurisdiction or in government or private proceedings in other jurisdictions. This, again, means that a jurisdiction's settlement policy must be evaluated not just domestically but globally.

The Chair thanked Mr. Spratling and asked Mr. Hansen to take the floor. Mr. Hansen started by saying that he agreed with the themes that Mr. Spratling had developed, including the global aspects of settlements which has to be the starting and ending point for any advice to clients. Mr. Hansen explained that he would focus his remarks on that issue and discuss how in his understanding the European Union's ("EU") system might work in the future. He continued that in contrast to the United States, where 90 percent of cartel cases have been settled, no case has been settled by the European Commission so far. The wealth of experience in the United States means that there is a degree of transparency and certainty, and a track record. Mr. Hansen mentioned that transparency and certainty are critical factors also in Europe: if there is no sufficient transparency and certainty it is very difficult to advise a client; if counsel can advise clients, it is difficult to predict how clients will react to opportunities to settle cases with authorities that are about to put a settlement system into place, such as the European Commission.

Mr. Hansen continued that in the EU there is a framework for settlements but no practice, which is effectively the opposite of the situation in Germany and the UK. He therefore intended to comment on some of the policy objectives and incentives and some tactical issues that are raised by the Commission's procedure and discuss how some of these issues are functions of the European Community's administrative law and regulatory system as well as the constitutional system of the EU.

Mr. Hansen explained that the Commission's DG Competition, as an administrative service, cannot negotiate a plea bargain, which he believes is an absolutely critical difference from what one can see in some other countries. DG Competition is an administrative service and there are a number of institutional, constitutional, practical and also legal requirements that limit its abilities to do certain things that other countries can do. DG Competition has put in place a Regulation and a Notice on settlements – the Notice is the more important document because it creates legitimate expectations for parties and sets the standard to which the Commission may be held by the courts. Importantly, however, Mr. Hansen cautioned against reading the Notice too literally, perhaps the way many US practitioners may read it. In fact, the Commission can go further and can act in a manner not contemplated by the Notice as long as it respects certain basic legal requirements such as, for instance, the principle of non-discrimination.

The explicit purpose of the Commission's settlement package is to reduce the duration of cases. Mr. Hansen mentioned that some cases go quickly and others go slowly, but that overall there is a great need to expedite cases. He has personally experienced cases with six years between a dawn raid and the Statement of Objections. Mr. Hansen pointed out that when one adds three to five years, and perhaps an even longer period, for judicial review, it is understandable why settlements can be very attractive as they should hopefully reduce those long periods.

Mr. Hansen explained that the Notice provides that the parties can at any time express their interest in settling. However, it has been the decision of the Commission to consider a settlement only once DG Competition has arrived at a final view as to the scope and nature of the infringement and on the likely penalties. He pointed out that, most significantly, this meant that the Commission's settlement system does not operate as an investigative tool; the investigation is over by the time one gets to a settlement. It also means that DG Competition will prepare a full Statement of Objections and consult the Legal Service of the Commission. All of this takes place before any settlement has even started. Mr. Hansen pointed out that, effectively, this means that an investigation has been ongoing for 12 to 24 months, and sometimes even more, before DG Competition even starts looking into the possibility of a settlement and before the process under the Notice can be triggered. According to the Notice, DG Competition will at this point informally approach a number of parties to canvass their views on a possible settlement, which is a sign of the broad discretion that the Commission has in the process.

If the Commission decides that it will open settlement negotiations, it will communicate this to the relevant parties and the opportunity for leniency will be closed. Bilateral discussions between each of the parties and the Commission will then start. The Commission will communicate to the parties the essential allegations, the estimate of the likely range of fines and the applicable leniency band. At that point, the settlement discussion starts; the Commission says it will "hear the parties" – not negotiate – on issues of scope of the case and legal qualification of the incriminating conduct. Mr. Hansen pointed out that while the Commission says that there will not be any negotiations, the Notice suggests that there can be a "common understanding" on the scope of the potential objections and the estimation of the range of likely fines. Importantly, because a full Statement of Objections already exists at that point, DG Competition cannot just drop charges as dropping part of the case would mean changing the legal qualification. If that occurs, DG Competition would have to go back to the Legal Service, explain why the excluded part[s] should not have been prosecuted and seek a new approval from the Legal Service. DG Competition thereby effectively gives up its prosecutorial discretion. Mr. Hansen highlighted the different situation in the U.S. system, where prosecutorial discretion is to some extent still intact.

Mr. Hansen continued with the issue of fines: In principle, DG Competition states that it is open to discuss the fine calculation. However, not much is known about the fine calculation. Mr. Hansen mentioned that during the ICN meeting in Tokyo, Mr. Mehta of DG Competition explained that a discussion on fines would cover the following issues: where in a given leniency band a company would be placed, what would be the appropriate percentage of turnover to be applied in the base fine, what would be

the appropriate entry fee, as well as aggravating and mitigating circumstances and the deterrence factors. This explanation was very useful because this process has not yet been available in cartel cases; parties have been able to make written submissions on fines, but there has been no opportunity to discuss them with DG Competition.

Another aspect of the Commission's settlement system concerned disclosure rules. Mr. Hansen explained that the parties to settlement discussions are prohibited under penalty of an increased fine from disclosing the settlement discussion and the evidence provided. Many corporations, however, are subject to disclosure obligations under securities laws. It may not be a significant issue not to disclose right away that one has entered into negotiations with an authority, but in cases with protracted settlement procedures there could be a substantial time lag between having entered into settlement discussions and the moment the actual settlement decision becomes public. The situation worsens for the so-called "hybrid cases:" these are cases where some companies settle but others do not. In such a situation the settlement process may take even longer. The Commission will have to address this situation because it will not want to cut out an entire group of corporations from the possibility of a settlement just because the corporations are publicly listed and therefore cannot withhold disclosure of the fact that they discuss a settlement until a final disposition is reached.

The next aspect was the Commission's system of a unitary 10 percent discount for all settling parties in all cases. Mr. Hansen questioned whether that would constitute a meaningful incentive for parties to settle. According to him, much will depend on whether the real benefit of the settlement process will be the ability to influence the Commission's case; whether the dialogue leading to the so-called "common understanding" is what companies are really interested in or whether they are not just going for the 10 percent discount. Mr. Hansen cautioned, however, that it is difficult to see how the 10 percent discount in itself can be a meaningful incentive to settle, as long as it is not possible to reliably anticipate the initial fine to which the 10 percent reduction will be applied. In other words, there is a clear link with the issue of transparency, the Commission's Fines Guidelines and its fining policy in previous cases. If a corporation cannot predict the initial fine amount then the net fine amount is not going to be an incentive for a company. Mr. Hansen continued that he and other counsel did not believe that the EU system of fines is transparent in part because in quite a few cases parties approached the Commission two or three times for a recalculation of the fines. This demonstrates that there is no exact standard to calculate the fine. He pointed out that if a unitary fixed discount is used and the discount is 10 percent of something which may vary widely, incentives to settle will be undermined.

Mr. Hansen's last point related to the fact that the Commission has rejected the idea of granting different reductions to parties that have different legal and evidentiary positions. Mr. Hansen pointed out that he understands the Commission's position that a possibly weaker case against one party cannot be reflected by a larger fine reduction. But the Commission would not be able to maintain its opposition to differential fine reductions and, at the same time, maintain its resistance to hybrid cases. This effectively leaves the Commission open to hostage taking and Mr. Hansen pointed out that it is difficult to see why the Commission puts itself in such a position. The same holds true for the unitary 10 percent discount to all settling companies irrespective of the situation of each individual company; this will inevitably drive some companies away and it exacerbates the issue of rejecting hybrid cases. If the Commission would always seek to grant the same discount to all parties and would want all parties to settle, there might be very few cases with the necessary dynamics to reach a settlement.

Mr. Hansen finished with the two following comments:

- It must be possible to submit a settlement submission in oral form. That is a key point because in light of U.S. private litigation the form of admissions is an absolutely critical factor to determine whether to enter into a settlement;

- The other factor, which is key in light of emerging European private litigation, is that the final Commission decision resulting from the settlement process will be a "short form decision" with significantly less information than a full decision. The Statement of Objections will be very short as well. As a result, there will be less information that binds national courts.

The Chair thanked the two guest speakers. He mentioned that the Secretariat had received 14 submissions which indicated a significant interest in the topic of the Roundtable. The Chair next mentioned that the French submission emphasized that in order to benefit from the settlement procedure a defendant must both admit guilt and propose suitable remedies. The Conseil de la Concurrence apparently is in favour of legislative changes that would eliminate the link between the admission of guilt and the proposal of remedies. The Chair invited the French delegation to explain this position and clarify how such legislative changes could contribute to enhancing the policy objectives of the settlement procedure.

The representative of France started by pointing out that the "*non-contestation*" of charges – *i.e.*, a stipulation by a party not to contest any aspects of the charges raised against it, including the facts, the qualification of the facts, and their imputation - does not amount to a confession or an admission of guilt. In addition, in French penal law the non-contestation of charges cannot form the base of an accusation against the leader of a company which has been charged with having participated in practices considered unlawful under Article L 426 du Code de Commerce.

A procedural reform has made settlements with commitments optional to increase the efficiency of investigations in cases where a settlement appeared appropriate. A company which chooses to settle would be entitled to a greater reduction in the fine than it would have received if it decided only not to contest the charges against it. As the Conseil de la Concurrence has indicated by way of its decisions as well as in its Annual Report, commitments in the area of horizontal agreements and practices generally consist of educating employees to make them aware of the competition rules. Such commitments, even though they are not without interest, will not bring substantial and verifiable improvements to the proper functioning of the markets affected by the unlawful practices, but it appears difficult to draft commitments that *ex post* could restore competition on the market.

When the Conseil de la Concurrence investigates horizontal practices, the main factor taken into consideration when determining the reduction in fines is that the investigation will be facilitated and accelerated when a defendant agrees to settle; in particular, such a procedure eliminates the need of a report, which otherwise constitutes the second "*étape contradictoire*" in the Conseil de la Concurrence's procedure. Since 2006, the Conseil de la Concurrence has developed an information chart which allows companies to better understand the connection between their contribution in the form of commitments and the possible consequences in terms of a reduction in fine.

The Chair turned to the Brazilian delegation. The Brazilian submission states that "an integrated approach as to the incentives provided by the leniency programme and the negotiated settlement only fulfils the public interest if there is the requirement to admit the participation on the conduct by the interested parties". The Chair asked the Brazilian delegation to explain how incentives to apply for leniency and to enter into a settlement agreement are preserved in the Brazilian system.

The representative of Brazil explained that Brazil has gone through a significant change in cartel prosecution since 2003; the use of new investigative instruments such as the leniency programme, dawn raids and wire tapping has caused a dramatic increase in the likelihood of detecting cartels. Cartels of major economic relevance have been discovered in sectors such as the cement industry, chemical industry and gas industry. As a consequence, litigation costs have significantly increased and in 2007 a mechanism to settle cartel cases was introduced.

The main goal of the settlement procedure is to increase deterrence. If settlements are too attractive they may have an adverse effect on the leniency programme - the main investigatory instrument for detecting cartels. This is the reason why CADE has decided that proposals to settle in cases where leniency agreements have been entered into must include an admission of guilt and a fine sufficiently high to deter collusive behaviour. In cases without leniency agreements SDE, the main investigative body, and CADE, the administrative tribunal, have adopted slightly different positions in their first cases involving settlements: in cases concerning hard core cartels where a significant amount of direct evidence already exists, SDE requires an admission of guilt; CADE, however, recognizing the negative spill over effects of a guilty plea, allows settlements without a guilty plea but instead requires payment of the full expected value of the fine.

The representative of Brazil speculated that the differences were due to the different roles of SDE and CADE: SDE is responsible for the leniency programme and hence concerned with the preservation of that programme; CADE is responsible for the enforcement of its final administrative decisions and concerned with the efficiency of the enforcement procedure. The representative noted, however, that with regard to employees of companies participating in hard core cartels and "soft cartels," both SDE and CADE agree that whether or not an admission of guilt is required can be decided on a case-by-case basis without jeopardizing the leniency programme.

After only one year of experience it is difficult to draw any definite conclusions about the interaction between the settlement procedure and the leniency programme. However, the following points should be mentioned:

- Less than 10 percent of potential defendants in hard core cartels where there were direct evidence had proposed a settlement;
- Nearly half of the defendants had their proposals accepted, which is five percent of the total of potential defendants;
- All of the defendants were willing to pay a higher price in order to reach finality (*i.e.*, end the case);
- There has not yet been a case where an individual has admitted guilt, perhaps because of concerns about criminal liability;
- The demand for leniency is still growing; so no adverse effects of the settlement policy on the leniency programme have been observed;
- The settlement procedure has been used with caution, mainly in cases where the infringement was minor and going forward with a trial would have higher cost.

The Chair encouraged a discussion on the issue of whether defendants should be required to admit guilt in a settlement. He explained that there appear to be three possibilities: (1) defendants are not required to admit guilt; (2) defendants are always required to admit guilt; and (3) it can be decided on a case-by-case basis whether an admission is required.

The representative of the European Commission explained that in the EU an admission of guilt will be a condition for settlements in cartel cases. The reason for this approach is the European case law which suggests that there would not be the finality that the Commission seeks if a party merely does not contest the charges against it. In particular, in such a case the basic facts underlying the settlement are not considered final as between the Commission and the settling parties.

The representative of the Commission commented on what had been said earlier about the Commission's settlement procedure. Differently from the United States, the Commission has a system whereby it issues a full Statement of Objections and adopts an individual decision against all the parties - which is then often attacked in court. The Commission has had individual cases against hundreds of companies over the last six or seven years. Appeals mostly concern the amount of the fine rather than the accuracy of facts. Therefore, the introduction of a settlement procedure could bring significant changes to the current litigation over fines. This could create benefits and save resources not only to DG Competition but also to the Commission's Legal Service. It is clear that the settlement procedure has to fit into the Commission's current cartel enforcement system.

In response to a comment made earlier regarding the Commission's position that it will not negotiate with parties, the representative of the Commission emphasized that DG Competition cannot negotiate with parties about the disposition of a case. However, there will nevertheless be scope for discussion and there will be flexibility in the system.

The representative of the Commission also commented on predictability. He explained that a settlement can be part of a package which includes not only the plea to settle but also the willingness to cooperate with the Commission by way of submitting information that will help the Commission to establish the infringement. However, the Commission does not intend to change the way its leniency program operates; in that system, benefits for early cooperation are quite well distinguishable from those that can be achieved by agreeing to settle. He pointed out that strong incentives are built into the Commission's system and the success of the Commission's Leniency Notice is clear. The reason for applying a unitary 10 percent reduction to all settling parties is that the benefit which is created when the Commission can come to a quicker administrative resolution of a case is an advantage brought about when all parties are involved in the settlement; parties are therefore compensated in an equal way. Leniency is a separate matter.

The representative of the Commission explained that the Commission will discuss fines with companies. The discussion on fines will most likely take place early on in the process in order to create predictability, and to create a starting point which a company can use to decide whether or not a 10 percent reduction is a sufficient incentive. The points about fines mentioned before with reference to a speech of Mr. Mehta are reflected in the Fines Notice. Clearly, there are elements which will be open to debate, but the Commission is not willing to give in or cut corners on the points it believes it can prove in a case. The representative also said that cases which lasted six years and much more and that have gone back and forth internally for re-discussion on the fines are an exception today. Cases will be dealt with quicker. He also clarified that the Commission has never stated that it is against hybrid cases. However, it wants to avoid running a dual investigation where it has to carry on with both a full procedure and a settlement procedure. He predicted that early cases most likely will focus on situations where all parties will be settling because the Commission wants to demonstrate both to the outside world as well as internally that the settlement system works, that it is efficient, and that parties benefit from settlements.

The Chair asked if the Commission could elaborate on the issue of the timing of settlements. Apparently the Commission intends to focus on situations where it can settle with all parties, which is presumably at the end of an investigation. While this hopefully will not be six years down the road, it is probably at a later stage, which in turn could affect the Commission's ability to coordinate with other jurisdictions that may have different settlement procedures with different timing. He asked the Commission to provide its views on the potential benefits of coordinating with other jurisdictions and to what extent the Commission currently can seek such coordination.

The representative of the European Commission replied that the question relates primarily to leniency and not to settlements. Companies that have decided to negotiate a settlement in a jurisdiction are typically

companies that have decided to cooperate, notably because there is a combination of cooperation and settlement in other jurisdictions. He continued that the benefits of leniency are significant for the first party after the immunity applicant that cooperates; its fines could be reduced by up to 50 percent. The 10 percent additional discount is the add-on for the settlement but the main incentive for a company to report to the Commission comes from cooperation under the leniency program.

Obviously, the Commission will still have to proceed with a rather full investigation; however, the true benefit to the Commission will be not only a shorter decision but also that it can work with a Statement of Objections that is shorter. This will make the procedure shorter albeit not significantly so. Therefore, in response to the question raised by the Chair, it is not the settlement process as such which is decisive for companies when deciding to cooperate with the Commission. If parties cooperate and decide to settle in all jurisdictions the Commission will still be able to coordinate and cooperate with other agencies in a useful way, for example by relying on waivers.

The Chair thanked the representative of the European Commission and asked whether Mr. Spratling or Mr. Hansen wanted to comment on any of the issues that the representative of the Commission had raised and/or on the particular issue whether an admission of guilt should be required.

Mr. Spratling mentioned that he was happy to hear statements such as those made by Mr. Mehta at the ICN conference, and those made in the Commission's submission to the Roundtable which states that the *"settlement discussions will tackle in a timely manner the alleged facts, their classification, the gravity and the duration of the infringement, the liability individual involvement in the cartel, the basis of the evidence in the file supporting the objections and the potential maximum fine and the reduction."* These issues are the same issues that are discussed in a system where there is a plea negotiation. In Mr. Spratling's view, it is positive that the Commission is willing to discuss these issues because this approach is essential for the settlement system to work.

The timing of a settlement in the Commission procedure is always a problem for counsel retained to develop an integrated international response to an international cartel investigation. It is not possible to predict, with the same level of certitude as in some other jurisdictions, what the result of the settlement is going to be and one has to wait much longer for the result. That significantly complicates the situation of companies that are deciding what to do and when to do it because of the collateral effects in various other jurisdictions. When it is possible to proceed in all jurisdictions simultaneously, there is control of collateral effects. Nonetheless, Mr. Spratling acknowledged the Commission's objective to accelerate the process and to bring it more in line with other investigations.

Mr. Spratling also commented on the Brazilian contribution. Referring to information submitted by Brazil, he suggested that out of approximately 15 proposals for settlement only four had been approved; in six out of seven cases where CADE had requested a non-binding advisory opinion from SDE, SDE said the settlement should not go ahead. Mr. Spratling mentioned that he did not fully understand the reasons for those outcomes, although he pointed out that the reasons should not necessarily be clear because some of them would be confidential and within the procedural discretion. One of the principles that are set forth in the submission is a desire to protect the leniency system. For a person who in U.S. practice watches a marrying of the leniency system and the plea agreement system with the settlement system - a certain amount of credit is given for cooperation and for reaching a disposition - there should be no limitation, conceptually, on a jurisdiction having a sliding scale for cooperation and a sliding scale for settlement. The total reduction in fines would be based upon the benefit of each of those actions. For example, the cooperation of one company, depending on the time it reports to the authority, may only deserve a 15 percent reduction; on the other hand, a company that cooperates, agrees to a settlement, moves the matter along, makes admissions on record and pleads guilty may have a very strong dynamic effect with respect to advancing the matter and should, therefore, deserve much more credit than the third or fourth to report.

Leniency and settlement can be joined together and can be cumulative without doing damage to the leniency system. So while he agrees that it is important not to harm the leniency incentive system he is concerned about there being false conflicts between those two systems.

Last, Mr. Spratling mentioned a statement in Brazil's submission that the authorities do not want to reach a "suboptimal punishment" in a plea agreement. Israel's submission, on the other hand, expressly states that the reason why the IAA is entering into settlement agreements is to forgo the right to seek the highest fine in favour of the public benefit of expediting a resolution and bring a matter to rest. Thus, if the public benefit is considered as the optimal calculus then there should be no risk in using settlements with fine reductions. However, because he did not see exactly what the Brazilian submission was referring to when using the term "suboptimal," he thought it sounded as if the punishment had to be as high as possible. He also noted that the representative of Brazil had said earlier that some of the companies that had settled had been willing to pay more for finality. In Mr. Spratling's view both the enforcement authority and the cartel participant should hope that the cartel pays less because the case is brought to an end quicker.

The representative of Brazil replied that the settlement procedure plays two different roles in the Brazilian legal context: first, like a second leniency, it constitutes an investigative instrument. In a transaction when the company collaborates the authority gives something in return – a discount on the fine. Second, the settlement procedure can play the role of a prejudicial agreement. Generally companies challenge administrative decisions in court. The Brazilian model of the settlement procedure is structured to decrease litigation costs. The goal of settlements is absolutely clear: the competition authority has to enforce competition law and, with regard to cartels, deterrence should be maximized. He explained that there are several available instruments to reach that goal. The leniency agreement is one of them and the settlement is another, which can be designed to be complementary. There are very complex interactions between the instruments and the authority is proceeding with caution to understand the interaction and to finetune the system, which is why, so far, there have only been a few cases per year. Finally, it is worth mentioning that the authority is not imposing a higher fine on companies that decide to settle; companies sign the settlement because it is beneficial for them. What was said earlier is that the authority is demanding exactly the expected value of the fine (the present value of the fine); and some defendants have a higher willingness to pay in return for an end to the case they decide to settle. The representative added that this is good for the competition authority and for the companies.

The Chair asked Mr. Hansen if he wished to respond to the European Commission's intervention. Mr. Hansen said that although he had not previously discussed the leniency interplay, he wanted to mention that a leniency programme is a way forward in many cases and it may combine very nicely with the settlement procedure. If it does, it will have the effect on limiting appeals. However, a key issue regarding the interplay concerns hybrid cases; looking at that interplay, the Commission needs to make hybrid cases almost the norm. Many cases will include some parties who believe that the Commission's case is not as strong as it is against some of the leniency applicants; or there can be difficult issues of law - that is particularly true in cases which concern several jurisdictions and where not all parties will settle. Mr. Hansen pointed out that he could only think of one case where all parties had settled, thus making the point that it is a very unique circumstance. In his view, if the Commission wants the settlement system to work, the issue of settling with multiple parties is more key than the unitary discount issue and more key than many other issues. If the Commission wants a sophisticated system, it will have to adjust the current system in several ways: it may have to review the 10 percent unitary reduction; but the critical issue will be the hybrid cases.

Mr. Hansen then turned to the issue of global coordination. Mr. Hansen said that perhaps this would change over time but currently the aspect of multi-jurisdictional investigation might prevent the Commission's system from working effectively as it seems difficult to coordinate the Commission's settlement process with the processes in other countries. What makes a system attractive is the opportunity

to discuss the case. In many systems there is not sufficient opportunity for dialogue today, including the Commission's system.

The Chair moved on the United States. The representative of the United States commented on the question regarding the importance of an admission of guilt in settlements. He had three observations on that point:

- It is the United States' position that an admission of guilt is always required and is very important in cartel cases. Hard core cartels are the most serious competition offences and they warrant the stigma that comes with the admission of guilt. It should not be underestimated what a deterrent the admission of guilt can be.
- Public perception is very important. When an authority settles a case for a significant amount of money but allows the defendant to get away without having to admit guilt, the authority risks that there will be a perception that this was a “nuisance settlement,” that the company settled not because it was guilty but because it wanted to buy peace and move on. No competition authority can afford having companies questioning the integrity of its settlement process and therefore it is important that there is an admission of guilt. In this way the situation can be avoided where a company, either in the business community or in the media or just publicly generally, tries to explain that its decision to settle was based on dollars and cents.
- The United States used to have a policy where from time to time the DOJ would accept a plea of "no contest." Even though it probably accepted such a plea in only one out of hundred cases, the first thing that the defendant would ask in every subsequent plea negotiation for was a no contest plea over which the DOJ had to negotiate. In the early 1990'ies it was decided to stop this practice. It took only a couple of years before the issue was never again raised in negotiations. If a country has a policy that entertains the possibility of a non-guilty plea, the issue will come up in each settlement negotiation. It was therefore preferable not to leave that door open.

The representative concluded with a comment on what, in his view, motivates companies to seek a settlement: companies are interested in certainty, finality and expediency. A company wants to go on doing its business, wants to be able to deal with its banks and with its financial partners and it wants to put the matter behind it. Companies want to know how their cooperation can reduce the fine; if they are not able to predict how the cooperation will reduce the fine - if they think they may have to wait two, three or four years to get to the end of the road where they actually have a settlement - then it may be difficult for a company to see the difference between cooperating and settling versus fighting.

The Chair gave the floor to the European Commission. The representative of the European Commission sought to explain what goals the Commission intends to pursue with the settlement procedure: The Commission is ready to discuss with companies and would not adopt a take-it-or-leave-it position. The Commission will be open to explain its case and to provide access to the file to demonstrate support for its findings, including any exculpatory information. There will be an opportunity to ask for additional information on the file so that there is a "common understanding" between the Commission and the parties about what the case is about. In this way the companies can understand that there is support for the Commission's conclusions, what aspects are considered aggravating circumstances, the liability of particular entities within a group of companies, etc. All those issues will be well explained and, hopefully, a company will feel relatively comfortable entering into a settlement on that basis.

The possibility to come to the Commission to discuss the fine offers something quite exceptional compared to what was previously the norm. A company will be able to come to the Commission and discuss the issue of fines without committing itself to a settlement. That opportunity should encourage

hesitating companies to come forward. The Commission hopes to bring in all companies in those cases that are fit for settlement, where the Commission's conclusions are clear, where the duration of the alleged infringement is clear, and where the issues at stake are quite transparent. Hopefully, hybrid cases will not become the norm.

The Chair explained that in its submission the Czech Republic discussed a particular matter that had been settled; Apparently the authority believed that the matter offered significant advantages both to the authority and to the settling parties. The Chair asked the Czech delegation to describe what it had done and why it found the outcome of the case so advantageous.

The representative of the Czech Republic explained that today there is no legal framework for settlements in the Czech Republic and hence not much experience with settlements. Settlement discussions started for the first time in 2008.

The first case settled in the Czech Republic was the *Kofola* case. This was a test case to see whether the authority was able to handle settlements and whether settlements were effective. The idea of a settlement in the *Kofola* case originated from the companies themselves; the companies knew about settlement discussions at the European level and persuaded the Czech authority to follow the same path. Subsequently, the authority and the parties entered into an agreement. The experiences from the test case were positive: many positive results were achieved, for example: the illegal behaviour was terminated; a fine of € 500.000 was imposed, which was substantial and had deterrent effects even though it reflected a 50% reduction; resources were saved because the settlement procedure was significantly shorter than the normal procedure, mainly because the authority did not have to draft a Statement of Objections. Resources were also saved because the parties did not appeal the decision, even though they were informed that the settlement had no impact on the right to appeal.

For the companies the main advantage of the settlement procedure was the ability to arrive at a quick end to the case. The companies wanted to influence the outcome and the length of the proceeding. The companies referred to the negative impact the case had on their reputation, the negative impact of an unclear outcome of the investigation, the negative influence of the investigation on stock prices and on the ability to get loans and credits as well as the negative impact that may affect potential strategic partners. The Czech Republic has no private enforcement so the issue of affecting any subsequent private litigation was not relevant. In addition, the representative explained that the companies decided to settle even after considering potential risks involved in waiving some of their rights of defence.

The Czech authority would like to continue exploring the possibility of entering into settlements because the results had proven to be very positive. It is not excluded that the settlement procedure could be used as an investigative tool as well. Last, the representative from the Czech Republic mentioned that under Czech law an admission of guilt is required in a settlement.

The Chair thanked the Czech delegation and called on the Israeli delegation to discuss the role of guidance on potential penalties during plea negotiations; how necessary is guidance, and what impact can it have on an effective settlement system. The representative of Israel explained that several factors need to be considered when discussing settlements. These factors can be categorized into four different groups:

- First, the nature of the case: its severity, the circumstances, the duration of the cartel, the market affected, whether the cartel had an internal enforcement mechanism, and the involvement of each party in the cartel;

- Second, timing within the investigation and prosecution: the timing of negotiation of the settlement - before or after indictment, the time of the trial itself, at what stage of the trial the settlement has been negotiated and discussed;
- Third, the quality of the case in terms of the evidence for different charges and for the different parties;
- Fourth, while negotiating, whether the authority has reached a settlement with any of the parties - which would obviously affect the other settlements under discussion.

The representative of Israel explained that throughout the years, the IAA has concluded over 50 percent of its cases through settlements, with some or all of the parties involved. In Israel, each settlement has to be discussed with the district attorney and approved by the district court in Jerusalem. In order to introduce guidelines for settlements, there needs to be a body of law and a number of convictions by the court. This is to obtain a set of criteria that can help the authority to develop guidelines for sanctions, for example whether or when imprisonment or fines is the appropriate sanction. The representative explained that although there currently is a good record of cases in Israel, there is still a need for additional decisions as well as court judgments in cartel cases before guidelines can be developed. The procedure, in terms of the settlement and negotiating with the different parties, is already transparent because there is always an indictment in each cartel case the IAA has settled.

The representative concluded by saying that the IAA's track record is good: there are many settlements and the fines achieved have been relatively high. However, she noted that there is still room for improvement; the IAA would like more support from the courts in the form of more information about the procedure so that guidelines can be issued. The representative also noted that settlements also create deterrence. They also send a message to the public that the IAA has the capacity to go through a full trial and obtain good results. Before settling, the IAA has an internal policy discussion as to whether or not a settlement should be reached; there may be both positive and negative consequences of a settlement and those are always discussed.

The representative of Australia intervened to respond to the question earlier raised by the Chair regarding the importance of admissions of guilt in settlement procedures. Australia has been waiting for many years for legislation to make cartel conduct criminal. It has been promised by the new government. However, in a civil context, the approach in Australia is similar to the one in the United States: an admission of liability is an essential prerequisite for a settlement. It has been the Australian experience that there is some room for manoeuvre in negotiating settlements, namely the extent of the admission and in particular what conduct is admitted. In Australia, the ACCC has no power to impose its own final penalties. Instead it puts together an "agreed statement of facts" with a recommended penalty which it presents to a court; the judge reviews the agreed statement of facts and decides whether or not the penalty that has been recommended by the parties is within the court's power to accept.

The representative of Australia explained that the ACCC is facing increasing challenges in settlements; not because of the amount of the penalty or fine, but because of what goes into the agreed statement of facts. The reasons for that appear to be twofold: one is the potential for third parties to use the agreed statement of facts in a damages claim. This is a relatively new developing area in Australia but one where the ACCC is finding that settlement negotiations are taking significantly longer than they have in the past. The second reason is the question whether such a document can be relied on in other jurisdictions.

The Chair gave the floor to Chinese Taipei. The representative of Chinese Taipei had one question for the guest speakers concerning incentives to settle. The representative wanted to understand more about

the likelihood that an agency detects or establishes an offence and the incentive to settle. His impression from the very high rate of settlements in the United States, and from the comments made by the U.S. delegation, was that it does not matter to a company that an offence is detected or established. The representative wanted to know whether it was also the experience of Mr. Spratling and Mr. Hansen that once a company is offered an opportunity to settle it does no longer care about being charged with an offence; the company only wants to leave all matters behind it and move on.

Mr. Spratling confirmed that companies want to get a case behind them. He explained that if a company finds out that a cartel has been detected, the likelihood that its participation in the cartel will be detected or reported by somebody else is extraordinarily high. The business/risk assessment that goes on within a company inevitably leads to the conclusion that the company cannot bank on not being discovered. The cost of not acting early is so great compared to the opportunities if the company moves quickly that today there is no company management or board of directors that would decide not to report illegal behaviour it has detected.

The manner in which a company finds out about its exposure has a huge influence on its assessment of the detection risk. In some cases the infringement has already been detected which affects how quickly the company has to move. Sometimes the first step is to verify that there is real risk and to conduct an internal investigation. If the risk has been established then the likelihood that somebody is going to report it is so great that a company does not get a chance to consider other alternatives. In today's world with Sarbanes Oxley and other disclosure requirements, the individual exposure for a member of a board who knew about an infringement and decided not to report it is enormous and any counsel to that individual would advise against not reporting. If the board itself retains separate counsel (which is typical these days), counsel would strongly advise against being part of a plan that does not report the infringement. If this type of matters gets as high as to management or board level, it is going to be reported. In such a case, the company would analyse its exposure, its opportunities to avoid or mitigate any sanctions, it would look at civil litigation costs and make a decision as to what to do.

The Chair thanked Mr. Spratling and called on the delegation from the United Kingdom. The Chair mentioned that in the UK submission there are two examples of hybrid settlements, namely the diary and the tobacco cases, and he asked the delegation to share its views on hybrid settlements.

The representative of the United Kingdom explained that in the UK there is no formal settlement procedure or regulation. However, there have been four cases where a settlement has been reached. Policy is developing through cases. Although the United Kingdom recognizes the potential benefits of settlements in some cases in terms of resource savings and increased deterrent effect, there is also concern that settlements might have an adverse effect on its leniency programme or on deterrence generally.

In terms of hybrid settlements, the United Kingdom recognized that there might be two types of hybrid settlements: (1) settling with some parties and not others; (2) settling in relation to some infringements but not others. In the United Kingdom, two out of the four settlement cases have been hybrid settlements and they involved settling with some of the parties and not others. In those cases, the enforcement case continues against the parties which chose not to settle. These hybrid settlements may not result in the same level of resource savings as settlements in which all parties agree to settle. But the OFT still expects to make considerable resource savings at the administrative stage in relation to the parties that have settled, as well as at the appeal stage through a decreased risk of appeals being lodged from the settling parties. This is important in the United Kingdom because it has a resource intensive full merits appeal system. At the time of the Roundtable the two hybrid cases were still pending and no final decision had been taken. Time will tell what savings were made in those cases.

The Chair next asked BIAC for its comments. The representative of BIAC explained that, in general, the business community is very much in favour of settlements for all the reasons that had already been mentioned, notably because settlements lead to reduced fines and take away the distraction of a long trial. Moreover, shorter time spent on a case will reduce the amount of legal fees, which is a consideration that is almost as important for the decision makers in a company as the amount of the ultimate fine. However, there are concerns for companies and these may be very different depending on what side of the Atlantic the company is operating.

In the United States and Canada, the concerns are mainly related to the extensive use of the settlement procedure, or plea bargaining. Settlements are becoming the prevailing way of disposing of cartel cases and many companies strongly question whether it is good that 90 percent of cases are settled. The main concern is that the pressure to reach a settlement is so high only because the alternative, which is a long trial with a jury, brings so much uncertainty and higher costs that it makes a settlement look like the "lesser evil." This may result in situations where companies are led to make early admissions on the facts, the scope of the case and the nature of the case, regardless of whether it is a hard core cartel or one which would justify a rule of reason approach.

In Europe, the concerns are different because the procedure is still new and issues relate more to predictability and the amount of fine reductions which are being promised. While there have been a few settlement cases in Germany and in the United Kingdom, there is more of a track record in France with 18 settlements since 2002 - 10 of which concerned cartel cases. Even with that track record, issues of predictability remain. The amount of the fine reduction depends on the quality of the commitments that have been made, in particular their innovative nature. It is very difficult in France, even with the information grid, to know whether a commitment will be considered innovative enough; and with time it becomes more and more difficult to be innovative. There have also been concerns about unpredictability in the few cases that have been settled in the United Kingdom and Germany where there is no procedural framework which provides guidance. The European Commission's settlement procedure also raises concerns regarding predictability and other issues such as the rigidity of the procedure. For example, the requirement that a company has to make a written offer with the amount of fine it is prepared to accept. The level of the fine reduction is also a cause for concern; even in countries which used to apply higher fine reductions there seems to be a tendency, for example in France, to limit the reduction to 10 percent because that is the amount set by the Commission.

The BIAC representative explained that all these concerns are amplified by the "globalization of the settlement procedure." The fact that cartels have more and more often an international nature and that settlements are becoming more frequent, the development of private actions, and the more frequent use of criminal enforcement procedures increase the potential collateral damage for companies settling in only one country. This affects not only the ongoing or potential procedures in other countries, but also private actions and criminal procedures in other countries. The representative concluded that BIAC wishes to draw the attention of competition authorities to the need to take this new international context into account when deciding on settlement procedures and creating new settlement procedures. Authorities need to consider the "globalization effect" of an admission of guilt, the lack of confidentiality of evidence, the requirement to share information with other jurisdictions, and the requirement to have the settlement decision in writing.

The representative of the United Kingdom made one observation concerning the BIAC submission which suggested settlements are the preferred means to dispose of cases in the United Kingdom. This is not the case. Settlement is only one part of a portfolio of different approaches. It may seem that that there are many settlements going on because the OFT has announced settlements in a number of cases in a period of 15 to 20 months. But it is certainly not the preferred means of disposing with cases and the OFT expects to see cases go through the full procedure just as it expects to settle cases.

The representative of Brazil commented on the U.S. proposition that an admission of guilt should always be required in a settlement procedure. The representative argued that the positioning of a settlement procedure within the legal system of a country is essential to the proper design of a settlement policy; the best solution may differ significantly from country to country. A general proposition as that made by the U.S. delegation does not apply to every jurisdiction. In view of all the contributions to the Roundtable, two questions regarding the admission of guilt appear relevant when developing a well designed settlement procedure: (1) does the formation of a cartel constitute a criminal offence; and (2) does the settlement lead to finality in the criminal and administrative/civil aspects of a case.

In Brazil, an admission of guilt is mandatory in cases with a leniency agreement. So far there is the experience in only one case and that case was settled also in the United States. There has been no case where the admission of guilt concerned only Brazil so it is too early to know whether this affects other enforcement procedures and whether criminal prosecution decreases the incentive to settle.

The Chair turned to a particular issue mentioned in the German submission. He explained that the German submission describes a situation in which parties cannot waive their right to appeal. However, the Bundeskartellamt has found a way to structure settlements so that the benefits of a settlement are only enjoyed if the settling party does not file an appeal against the Bundeskartellamt decision. The Chair asked the German delegation to describe how it approaches this issue.

The representative of Germany explained that in the German settlement system defendants usually have to plead guilty. Moreover, although the right to appeal a decision of the Bundeskartellamt cannot be waived, in the case defendants decide to appeal the Bundeskartellamt's decision a withdrawn guilty plea as such can be used as an allegation in further proceedings.

It is the experience of the Bundeskartellamt that once a guilty plea has been made, the settlement does not break down so a discussion of what would happen if the defendant went back on its promise to settle is largely theoretical. The representative said that the Bundeskartellamt could, however, think of two possible actions in such a case: (1) the Bundeskartellamt would revoke its fine decision made during the settlement procedure and issue a new decision. This decision would not take into consideration the attenuating circumstances that were considered within the settlement procedure, so the fine would be higher; or (2) the Bundeskartellamt could decide to let the case go to court and then argue its case in court.

The Bundeskartellamt has been very flexible in its procedure when negotiating a settlement. There are no strict regulations on how the Bundeskartellamt has to proceed, although the cases that have come up have helped to provide some "guidance" to the business community. Settlement procedures with the Bundeskartellamt may start right after a dawn raid and in such cases the Bundeskartellamt might proceed with a short Statement of Objections and instead come to a very quick decision. However, a settlement procedure may also start after the issuance of a Statement of Objections. Negotiations can include all defendants or a select number of defendants, there is no "all or nothing" approach to the settlement procedure.

The Chair made a last call to delegates to make an intervention before the guest speakers' concluding remarks.

The representative of Russia explained that Russia has an administrative enforcement system, but no formal procedure for early settlements of cases. The representative explained that Russia is hesitant to adopt such a system because of the variety of the cartel cases the authority encounters. In 2008, the authority detected 26 cartel cases in the oil sector alone and each case was different in terms of evidence, the nature of the violation, but also other parameters that are crucial for a case. However, the

representative explained that the authority does discuss aspects of its cases with cartel participants during the investigation and those discussions could be characterized as a "quasi settlement procedure."

The procedure is relatively transparent; it starts with a formal note to cartel participants informing them that the authority has initiated a case against them. Subsequently, cartel participants are invited to meet the authority. At that point the nature of the allegations will be explained and participants are provided with information about previous decisions in similar cases. The remaining part of the investigation depends on the actions taken by the cartel participants. If a confession is made at an early stage of the procedure the fine will most likely be lower than if a confession is made at a later stage. Fines in cartel cases range from one percent to fifteen percent of the cartel participant's turnover in the relevant market so the difference in fine can be quite substantial when considering whether or not to cooperate with the authority.

The timing of the confession is not the only factor taken into consideration by the authority. Whether evidence is strong or some evidence is lacking, and what resources are needed to pursue the investigation are also important factors. The volume of trade affected and the influence of the cartel on the national economy are also important; that applies especially to the Russian oil industry where the authority has imposed fines of up to a billion Rubles. Recurrence is also a factor taken into consideration. When prosecuting cartels the authority seeks to ensure that the cartel activities terminates, rather than punishing the cartels, and tries to find possible behavioural or structural remedies to ensure competition in the future.

The representative of the Netherlands commented on BIAC's call for more convergence and said that convergence is only possible when lenience programmes are the same. In the Netherlands, like in the United States and the EU, a company can get immunity from fines when it is the first one to report on a cartel. However, companies that come in second and third to confess involvement in a cartel will receive a reduction in fines if they offer additional evidence. In the representative's view, there is no need for an extra investigative tool, such as the plea agreement in the United States, because the Netherlands can only accelerate its administrative procedure, which is what it did in its first settlement case. The Settlement Guidelines were created after the experience with that case. The NMa, however, made clear already at the outset of the case that the Guidelines were specific for that one case only.

The representative explained that, formally, the NMa does not have any legal base on which to accelerate procedures but because there is a precedent setting settlement, companies refer to that precedent and ask for a settlement. In recent years, the NMa has accepted to settle only a few cases and only if all parties involved agreed to do so; there have not been any hybrid cases. In cases that settled, the NMa made sure that there was a benchmark for the appropriate fines and sometimes it sent letters to the companies interested in settling stating what the range of likely fines is.

The Chair gave the two guest speakers the opportunity to share their final thoughts.

Mr. Hansen noted that not much had been said about civil litigation, which sometimes is the biggest issue for a company. Therefore, when reflecting on incentives it is important to see how they interlink with civil litigation. The probative value of a decision which contains an admission of guilt is a very important issue; a settlement leads to a decision earlier and, therefore, in some cases and some countries a settlement leads to stronger private court cases earlier. It is clear that appeals may be a way to delay civil litigation, at least in some cases such as those concerning the European Commission's decisions. In several jurisdictions today the appeal of a decision which a plaintiff uses to bring a follow-on action must be exhausted before the civil case can be brought. A number of cases in the United Kingdom are quite clear on that requirement, and a number of other countries (*e.g.*, Germany) have made a decision the basis for civil litigation. This is a very significant incentive that is important to fully appreciate.

Mr. Hansen mentioned that an interesting issue had been raised in the exchange between Mr. Spratling and the representative of the Chinese Taipei which is also linked to the issue of civil litigation: when a company finds out about a possible cartel involvement it would stop the conduct, but the conduct is not always reported to a competition authority. Mr. Hansen explained that the question of "likelihood of enforcement" is quite separate from "likelihood of detection." There are many situations where a company ends up with a situation where it is not clear what should be done and where a very complex judgment has to be made as to whether it is appropriate to report. One of the major factors to consider is potential civil litigation. A company will weigh the benefit of reporting to an authority and seeking immunity against many other factors including how likely it is that if the company reports there will be an actual enforcement action. However, the major factor in this equation is that the company may be exposed to civil litigation.

Mr. Spratling had four final comments. First, with respect to Mr. Hansen's final comments, Mr. Spratling agreed that the immediate reaction of what to do when one detects a potential illegality vary from jurisdiction to jurisdiction and it is true that some cartels that are detected are not reported. However, if it is a U.S. based company or a company where there is any likelihood that executives may go to jail because of the jurisdictional reach of the DOJ, the company is going to make sure that executives do not go to jail. That situation entails a completely different calculus compared to when a company is discussing whether or not it will have to pay a fine.

Second, Mr. Spratling commended the Bundeskartellamt for the simplicity and directness of its approach to settlements and its Guidelines which allow it to grant a reduction for attenuating factors and then to define a settlement as an attenuating factor. Mr. Spratling said that the simplicity of that approach could be instructive to many.

Third, it cannot be overstated how important it is for a board of directors to get a case behind it and to be able to return to what that company is supposed to be doing rather than dealing with litigation and especially uncertain litigation.

Fourth, as enforcement authorities make their enforcement decisions and develop policy in consideration of the global consequences, so do cartel participants and their counsel. For that reason, when counsel for a cartel participant looks at the settlement option in any jurisdiction, it is looking at the advantages in that jurisdiction but more importantly it is looking at the requirements of that settlement and what effects it will have in other jurisdictions. Mr. Spratling made this his last point because he wanted to encourage the representatives of the enforcement authorities present at the Roundtable to also evaluate their own systems on that basis.

The Chair thanked everyone for their contributions. He pointed out that the issues discussed are very important and that it is his perception that authorities are increasingly dealing with each other not only in investigations but also in settlements and negotiated resolutions. That presents new challenges and new opportunities.

COMPTE RENDU DE LA DISCUSSION

Le Président ouvre la Table ronde et présente les deux invités d'honneur : Gary Spratling de Gibson, Dunn & Crutcher, et Marc Hansen de Latham & Watkins. Il explique que la Table ronde abordera différents points, notamment le cadre juridique et les objectifs des règlements transactionnels, les incitations à opter pour un règlement et leurs relations avec d'autres moyens d'action, les aspects tactiques de la négociation de règlements transactionnels et les aspects procéduraux de ces négociations. Le Président passe ensuite la parole à M. Spratling.

M. Spratling fait tout d'abord référence à la contribution des États-Unis, dont il ressort qu'au cours des 20 dernières années plus de 90 pourcent des défendeurs accusés d'une infraction pénale d'entente ont opté pour une transaction judiciaire avec la division antitrust du département américain de la Justice (DOJ). Dans le cadre de ces transactions judiciaires, les défendeurs ont reconnu leur culpabilité et accepté de coopérer à l'enquête pénale au lieu de contester les charges retenues contre eux et de contraindre les autorités à apporter la preuve de leurs allégations. Dans ces affaires, certaines entreprises défenderesses se sont vu infliger des amendes de plusieurs millions de dollars tandis que certains défendeurs à titre personnel ont été condamnés à de lourdes peines d'emprisonnement.

M. Spratling fait observer que 90 pourcent est un chiffre remarquablement élevé qui s'explique essentiellement par les avantages que présentent les transactions judiciaires aux États-Unis aussi bien pour le DOJ que pour les participants à des ententes, les tribunaux, le système judiciaire et public en général. Elles permettent notamment une application de la loi plus efficace et plus rapide, des sanctions plus efficaces et un effet dissuasif plus prononcé. Dans le cadre d'une transaction judiciaire, le DOJ négocie des réductions d'amendes selon les modalités prévues par lignes directrices américaines relatives aux condamnations en contrepartie de la coopération du défendeur, de ses aveux, de la communication de certains faits et de sa renonciation à certains droits. Le DOJ recueille le point de vue du défendeur sur la portée géographique de l'entente, les produits concernés, la durée de l'entente, le marché concerné, le rôle du défendeur et l'amende la mieux adaptée. Toutefois, contrairement à une idée largement répandue en dehors des États-Unis, les négociations du DOJ ne portent pas sur la question de savoir si le défendeur a pris part ou non à une entente ni sur la nature des charges que le DOJ retiendra, et ne peuvent pas non plus aboutir à l'ajout ni au retrait de certains chefs d'accusation en vue d'alléger les charges qui pèsent sur le défendeur.

M. Spratling évoque ensuite les facteurs déterminants dont les participants à des ententes doivent tenir compte lorsqu'ils envisagent un règlement transactionnel. Le premier d'entre eux est la réduction de la peine, c'est-à-dire, dans le cas d'une entreprise, la réduction de l'amende. Cette réduction doit être suffisamment importante pour compenser la renonciation à certains droits et les coûts de la coopération. Coopérer peut s'avérer très coûteux et potentiellement très préjudiciable pour une entreprise, car celle-ci doit non seulement reconnaître ses torts, mais aussi admettre publiquement la véracité de certains faits (ce qui accroît son exposition lors de poursuites judiciaires civiles), coopérer pleinement et sans réserve à l'enquête en rapportant de façon exhaustive les faits dont elle a connaissance, fournir tous les documents y afférents, où qu'ils se trouvent – dans le monde entier –, mettre à disposition ses cadres et employés, se soumettre à des interrogatoires et témoigner à la demande du DOJ. Les défendeurs qui optent pour une transaction judiciaire renoncent aussi au droit à un procès, et notamment au droit de faire appel de leur condamnation. Plus grande sera la réduction de l'amende, plus le règlement transactionnel présentera de l'intérêt, car il apparaîtra d'autant plus avantageux aux dirigeants et aux administrateurs à qui revient la

décision de coopérer. Un dispositif de règlement transactionnel doit nécessairement comporter un système d'amendes transparent, car un défendeur ne peut évaluer les avantages d'une transaction que s'il est en mesure de déterminer quel serait le montant de l'amende en son absence.

La transparence contribue aussi à des résultats plus prévisibles. M. Spratling explique que la prévisibilité repose sur deux éléments : la transparence et le principe de proportionnalité du système d'amendes. Lorsqu'un avocat-conseil recommande à son client d'opter pour un règlement transactionnel et de coopérer avec les autorités, les juristes de l'entreprise, la direction et le conseil d'administration posent habituellement des questions pointues. Ils souhaitent savoir quelles seront les charges retenues si l'entreprise opte pour un règlement et coopère, quelles entités de l'entreprise seront visées et quel sera le montant de l'amende. M. Spratling fait remarquer qu'il est impossible de répondre à ces questions dans une juridiction dépourvue d'un système d'amendes transparent. Aux États-Unis, les transactions judiciaires sont rendues publiques et les décisions prises par le DOJ dans des situations similaires sont consignées dans un document accessible au public. Les transactions judiciaires appliquent également le principe de proportionnalité, non seulement entre les défendeurs, mais aussi d'une affaire à l'autre. Dans ces circonstances, un avocat-conseil peut fournir un pronostic éclairé en réponse aux questions ci-dessus.

À l'inverse, les protocoles ou lignes directrices établis pour le calcul ou la réduction des amendes, qu'ils stipulent des pourcentages précis ou des fourchettes, peuvent conférer à l'autorité chargée de l'application de la loi un pouvoir d'appréciation excessif. Les mêmes lignes directrices peuvent justifier différentes amendes hypothétiques dont le montant peut varier dans un rapport de deux à trois. Dans ce cas, la méthode de calcul n'est pas transparente et l'amende n'est pas prévisible. L'absence de prévisibilité peut constituer un facteur dissuasif de taille pour les participants à des ententes qui envisageraient de conclure un accord par voie de règlement transactionnel. Même si la réduction d'une amende dans le cadre d'un règlement est fixée avec transparence et certitude, comme les 10 pourcent prévus par la procédure de règlement de la Commission européenne, elle ne peut pallier le manque de transparence du calcul du montant de l'amende initiale.

Les transactions judiciaires peuvent également accélérer le rythme d'une enquête et d'une action publique. Elles permettent à la personne ou à l'entité visée par une enquête de mettre rapidement un terme à son exposition, d'acquiescer les sanctions retenues contre elle et d'aller de l'avant. Étant donné que, par les règlements qu'il conclut dans le cadre d'affaires d'ententes, le DOJ cherche avant tout à obtenir la coopération des participants d'un bout à l'autre de l'enquête et lors de la conclusion de l'affaire, un participant à une entente peut commencer à négocier une transaction avec le DOJ à tout moment pour établir sa culpabilité et tirer profit de sa coopération à l'enquête.

M. Spratling explique que dans un contexte mondialisé, l'examen des avantages d'un accord par voie de règlement transactionnel devient de plus en plus complexe. La contribution du BIAC, par exemple, fait valoir que « *la mondialisation des règlements transactionnels jointe à l'augmentation du nombre des actions privées et à l'évolution actuelle en faveur de poursuites pénales constatée dans un nombre croissant de juridictions compliquera sensiblement cet examen* », et que « *les conséquences potentielles de l'aveu de culpabilité, qui est généralement exigé dans le cadre des règlements transactionnels, sont immenses car ces derniers peuvent avoir une incidence sur une enquête des autorités ou une action privée dans la juridiction du défendeur, mais aussi sur une enquête des autorités ou une action privée dans d'autres juridictions.* » M. Spratling marque son accord sur ces deux points. Il explique que le processus de décision d'un participant à une entente qui s'interroge sur l'opportunité de se manifester auprès des autorités pour coopérer à leur enquête se décompose schématiquement en quatre étapes :

Le processus commence par une analyse de l'exposition potentielle à des sanctions à l'échelle mondiale. Une entreprise doit analyser son exposition potentielle et son exposition la plus probable à des

sanctions de la part des autorités judiciaires dans chaque juridiction séparément et évaluer son exposition totale dans le monde ;

Le participant à une entente doit ensuite déterminer et évaluer si et comment il peut éviter ou atténuer des sanctions à l'échelon mondial. Dans presque toutes les juridictions, la seule façon d'éviter ou d'atténuer des sanctions consiste à se dénoncer soi-même et à coopérer au titre d'un programme d'immunité ou de clémence et, sauf pour le candidat à l'immunité, à conclure un accord par voie de règlement ou une transaction judiciaire avec l'autorité en charge de l'application de la loi. Cette évaluation des avantages nets d'un accord par voie de règlement ou d'une transaction judiciaire doit être effectuée juridiction par juridiction et doit tenir compte des conséquences d'une action engagée dans une juridiction sur la situation dans toutes les autres juridictions ;

Vient ensuite une analyse du coût des poursuites civiles dans le monde entier. Une entreprise qui étudie la possibilité de coopérer dans le cadre d'une entente internationale doit être pleinement consciente des poursuites civiles qui seront quasi certainement engagées aux États-Unis et, depuis peu, dans d'autres juridictions également. Ces dernières années, le coût des poursuites civiles aux États-Unis a parfois dépassé le montant total des sanctions infligées par les autorités dans toutes les juridictions concernées ;

Enfin, le participant à une entente doit calculer le montant net des coûts auxquels il s'expose au niveau mondial, d'une part s'il sollicite une immunité ou un programme de clémence, coopère avec les autorités et conclut une transaction judiciaire ou un règlement transactionnel, et d'autre part s'il poursuit une stratégie différente.

M. Spratling conclut en énumérant certains principes élémentaires concernant à la fois les autorités chargées de l'application de la loi et les avocats-conseil représentant les participants à des ententes :

La solidité et l'efficacité d'un programme international de lutte contre les ententes reposent sur la coopération d'au moins plusieurs participants ;

Le fait que des participants à des ententes se manifestent en vue d'une coopération est directement lié à la valeur nette des avantages escomptés de la coopération et au caractère prévisible ou incertain de ces avantages ;

Chaque juridiction devrait chercher à maximiser les avantages de la coopération en développant autant que possible les incitations poussant les participants à des ententes à se manifester, via des politiques complémentaires et cumulables en matière de clémence et de règlement transactionnel ;

Les participants à des ententes décident de coopérer ou non en fonction des implications à l'échelle mondiale. Un participant à une entente qui évalue l'avantage net d'un programme de clémence ou d'un accord par voie de règlement se décidera sur la base de la totalité des avantages et des coûts dans toutes les juridictions concernées et pas uniquement dans celle qui lui donne la possibilité de conclure un accord par voie de règlement ;

Les conditions attachées à une politique de clémence ou de règlement dans une juridiction ne doivent pas placer un participant à une entente dans une position moins avantageuse que celle d'un participant qui ne coopérerait pas, que ce soit dans le cadre de procédures parallèles engagées dans la même juridiction ou d'actions privées ou publiques engagées dans d'autres juridictions. Cela signifie, une fois de plus, que la politique en matière de règlement transactionnel doit être évaluée à l'échelle mondiale et pas uniquement au niveau de la juridiction qui la met en œuvre.

Le Président remercie M. Spratling et invite M. Hansen à prendre la parole. M. Hansen indique tout d'abord qu'il partage l'avis de M. Spratling sur les points qu'il a abordés, et notamment sur la dimension

mondiale des règlements, qui doit constituer l'alpha et l'oméga de tout conseil prodigué à un client. M. Hansen explique qu'il axera son propos sur cette question et qu'il évoquera la manière dont, à son sens, le système de l'Union européenne pourrait fonctionner à l'avenir. Il rappelle que, contrairement aux États-Unis, où 90 pourcent des affaires d'entente sont résolues par voie de règlement, la Commission européenne n'en a jusqu'à présent réglé aucune par cette voie. Les États-Unis ont une vaste expérience de cette pratique et font état à ce titre d'un certain niveau de transparence et de certitude, et donc d'antécédents. M. Hansen estime que la transparence et la certitude sont des facteurs déterminants en Europe également : faute d'un niveau suffisant de transparence et de certitude, il s'avère très difficile de conseiller un client, et si un avocat-conseil peut conseiller ses clients, il demeure difficile de préjuger de la manière dont ces derniers réagiront s'il leur est proposé de résoudre une affaire en concluant une transaction avec des autorités qui s'approprient à mettre un système de transaction en place, comme c'est le cas pour la Commission européenne.

M. Hansen souligne que l'UE dispose d'un cadre pour les transactions mais qu'elle n'a aucune expérience pratique en la matière, à l'inverse de l'Allemagne et du Royaume-Uni. Il se propose donc de commenter certains objectifs et certaines incitations en termes de politiques publiques, ainsi que certaines questions tactiques soulevées par la procédure de la Commission, puis de voir comment une partie de ces problèmes découle du système réglementaire et du droit administratif de la Communauté européenne ainsi que du régime constitutionnel de l'UE.

M. Hansen explique qu'en tant que service administratif, la DG Concurrence de la Commission ne peut négocier une transaction judiciaire, ce qui, à ses yeux, constitue une différence tout à fait essentielle avec ce que l'on peut constater dans d'autres pays. La DG Concurrence est un service administratif et un certain nombre de dispositions institutionnelles, constitutionnelles, pratiques et juridiques restreignent sa capacité d'action là où d'autres pays peuvent agir. La DG Concurrence a mis en place un règlement et publié une communication concernant les procédures de transaction, la communication étant le plus important de ces deux documents car elle crée des attentes légitimes pour les parties et établit la norme que la Commission peut se voir contrainte de respecter par décision de justice. M. Hansen met toutefois en garde contre une lecture trop littérale de cette communication, comme celle qu'en font peut-être de nombreux praticiens des États-Unis. En fait, la Commission peut aller plus loin et agir d'autres manières que celles envisagées par la communication tant qu'elle respecte certaines dispositions légales fondamentales comme, par exemple, le principe de non-discrimination.

L'objectif affiché des dispositions communautaires en matière de transactions est de réduire la durée des procédures. M. Hansen explique que si certaines affaires sont rapidement résolues, d'autres progressent lentement et que, de manière générale, le besoin d'accélérer les procédures se fait cruellement ressentir. Lui-même se souvient avoir traité des affaires où six années se sont écoulées entre la perquisition et la communication des griefs. M. Hansen souligne que si l'on ajoute à cela trois à cinq années, voire plus, de recours en révision, il est compréhensible que les transactions puissent s'avérer très attractives vu qu'elles doivent en théorie réduire ces délais importants.

M. Hansen explique que la communication prévoit pour les parties la possibilité de manifester à tout moment leur volonté de procéder à un règlement transactionnel. Toutefois, la Commission a décidé de n'envisager une transaction qu'une fois que la DG Concurrence a établi de manière définitive la portée et la nature de l'infraction ainsi que les sanctions probables. M. Hansen souligne, surtout, que de ce fait le système de règlement transactionnel de la Commission ne remplit pas la fonction d'outil d'investigation, car l'enquête est d'ores et déjà bouclée lorsqu'une partie obtient la possibilité de procéder à une transaction. Il s'ensuit également que la DG Concurrence doit exposer les griefs de façon détaillée et consulter le service juridique de la Commission. Tout cela intervient avant même l'ouverture d'une procédure de transaction. M. Hansen fait remarquer que, dans les faits, une enquête peut donc durer de 12 à 24 mois, voire davantage, avant même que la DG Concurrence ne commence à envisager la possibilité

d'un règlement transactionnel et que le processus visé à la communication de la Commission puisse être lancé. Aux termes de la communication, la DG Concurrence prend alors contact avec certaines parties de manière informelle afin de recueillir leurs opinions quant à une éventuelle transaction, ce qui témoigne du pouvoir discrétionnaire de la Commission à cet égard.

Si la Commission décide d'ouvrir des négociations en vue d'un règlement transactionnel, elle en avise les parties concernées, après quoi aucun programme de clémence ne peut plus être sollicité. Des discussions bilatérales entre la Commission et chacune des parties seront alors engagées. La Commission notifiera aux parties les principales allégations, ainsi qu'une estimation de la fourchette probable des amendes et des mesures de clémences correspondantes. À ce stade sont entamées les discussions de transaction. La Commission affirme qu'elle « recueillera le point de vue des parties » - sans qu'il soit question de négociation - sur des questions inhérentes à la portée de l'affaire et à la qualification juridique du comportement incriminé. M. Hansen fait observer qu'aux dires de la Commission il n'y aura aucune négociation, alors que la Communication suggère la possibilité d'une « appréciation commune » de la portée des griefs envisagés et de l'estimation de la fourchette probable des amendes infligées. Il est important de noter qu'à ce stade, une communication des griefs a d'ores et déjà été adressée et que la DG Concurrence ne peut donc plus abandonner des charges à son gré, car elle devrait dans ce cas modifier la qualification juridique retenue. Si elle abandonnait effectivement certaines charges, la DG Concurrence devrait se tourner de nouveau vers le service juridique, expliquer pourquoi la ou les charges abandonnées n'auraient pas dû faire l'objet de poursuites et solliciter de nouveau l'approbation du service juridique. La DG Concurrence renonce ainsi de facto au pouvoir discrétionnaire dévolu à l'accusation. M. Hansen souligne la différence avec le système des États-Unis, où l'accusation a conservé dans une certaine mesure son pouvoir discrétionnaire.

M. Hansen passe ensuite à la question des amendes : en principe, la DG Concurrence se dit prête à discuter du montant des amendes. Cependant, on sait peu de choses à propos de ce calcul. M. Hansen précise que pendant la réunion du RIC à Kyoto, M. Mehta, de la DG concurrence, a indiqué que les discussions sur les amendes portent sur les points suivants : dans une fourchette donnée, de quel niveau de clémence une entreprise bénéficierait-elle, quel pourcentage des ventes conviendrait-il de prendre en compte pour le calcul de l'amende de base, quel seuil serait approprié, et enfin quelles circonstances aggravantes ou atténuantes et quels facteurs de dissuasion seraient retenus. Ces explications sont très utiles du fait que cette procédure n'a encore jamais été proposée dans les affaires d'ententes. Les parties ont eu, en effet, la possibilité d'adresser des observations écrites concernant les amendes, mais jamais celle d'en discuter avec la DG Concurrence.

Un autre aspect du système de règlement de la Commission est abordé, celui des règles de communication d'informations. M. Hansen explique qu'il est interdit aux parties à des discussions de transaction de divulguer le contenu desdites discussions et les preuves fournies, sous peine d'une majoration de leur amende. Cependant, de nombreuses entreprises sont soumises à des obligations de communication d'informations en vertu de la législation sur les valeurs mobilières. Le fait qu'une entreprise ne dévoile pas immédiatement l'ouverture de négociations avec une autorité n'est peut-être pas de la première importance, mais dans les affaires connaissant des procédures de règlement longues, une longue période risque de s'écouler entre l'ouverture des discussions de transaction et le moment où la décision est effectivement communiquée au public. La situation se complique davantage pour les affaires dites « hybrides » : dans certaines affaires, certaines entreprises parviennent à un accord, mais d'autres pas. Dans une telle situation, le processus de règlement peut s'avérer encore plus long. La Commission devra traiter ce problème car elle ne souhaite pas devoir priver toute une catégorie d'entreprises de la possibilité d'un règlement transactionnel pour la simple raison que ces entreprises sont cotées en bourse et qu'elles ne peuvent pas dissimuler leur participation à des discussions de transaction jusqu'à ce qu'un accord final soit trouvé.

M. Hansen évoque ensuite le système de la Commission, qui prévoit une réduction unitaire de 10 pourcent pour toutes les parties à la transaction et pour toutes les affaires. M. Hansen se demande si un tel système est susceptible d'inciter de manière significative les parties à opter pour une transaction. Selon lui, cela dépend en grande partie de la question de savoir si le véritable avantage de la procédure de transaction sera ou non la capacité d'influer sur la position de la Commission, si le dialogue aboutissant à une « appréciation commune » intéresse vraiment les entreprises ou si ces dernières cherchent à obtenir une réduction supérieure à 10 pourcent. M. Hansen fait toutefois remarquer qu'il est difficile d'imaginer que la réduction de 10 pourcent puisse à elle seule constituer une incitation significative à accepter une transaction tant qu'il est impossible de prévoir de manière fiable le montant de l'amende initiale à laquelle cette réduction sera appliquée. En d'autres termes, cette question est clairement liée à celle de la transparence, aux lignes directrices de la Commission concernant les amendes et à la politique menée en la matière par cette dernière dans les affaires précédentes. Si une entreprise n'est pas en mesure de prévoir le montant de l'amende initiale, alors le montant net de cette amende ne peut constituer une incitation pour cette entreprise. M. Hansen explique que lui-même et d'autres avocats-conseil considèrent que le système d'amendes de l'UE n'est pas transparent, en partie parce que dans plusieurs affaires, les parties ont demandé à la Commission de recalculer les amendes à deux ou trois reprises. Cela prouve qu'il n'existe pas de norme précise en matière de fixation des amendes. M. Hansen souligne que l'application d'une réduction fixe et unitaire de 10 pourcent sur un montant susceptible de varier considérablement réduira l'efficacité des incitations à opter pour une transaction.

Enfin, M. Hansen évoque le refus de la Commission d'accorder des réductions différenciées aux parties dont la situation est différente sur le plan juridique et en termes de preuves. M. Hansen explique qu'il comprend la position de la Commission selon laquelle les faiblesses éventuelles d'un dossier constitué contre une partie ne peuvent justifier une réduction d'amende plus importante. Toutefois, la Commission ne saurait à la fois maintenir son opposition aux réductions d'amendes différenciées et refuser les affaires hybrides. En pratique, elle court le risque de se faire prendre en otage et M. Hansen ajoute qu'il était difficile de comprendre pour quelles raisons elle se met dans une telle position. Il en est de même pour ce qui est de la réduction unitaire de 10 pourcent accordée à toutes les entreprises participant à une transaction sans tenir compte de leur situation individuelle. Ce système détournera inévitablement certaines entreprises de cette procédure et relance par ailleurs la question du rejet des affaires hybrides. Si la Commission cherche systématiquement à accorder la même réduction à toutes les parties et souhaite que toutes les parties prennent part à la transaction, très peu d'affaires présenteront probablement toute la dynamique nécessaire pour parvenir à une transaction.

M. Hansen formule en conclusion les deux remarques suivantes :

Il devrait être possible de soumettre oralement une proposition de règlement. Il s'agit d'un point important car, comme le montrent les poursuites privées aux États-Unis, la forme des aveux est un facteur tout à fait déterminant dans la décision d'opter pour un règlement ;

L'autre facteur, qui s'avère essentiel compte tenu de l'émergence des poursuites privées en Europe, est la nécessité que la décision finale de la Commission rendue à l'issue de la procédure de règlement soit une « décision succincte », contenant largement moins d'informations qu'une décision détaillée. La communication des griefs sera également très brève et contiendra de ce fait moins d'informations ayant valeur contraignante pour les tribunaux nationaux.

Le Président remercie les deux invités d'honneur. Il indique que le secrétariat a reçu 14 contributions, ce qui témoigne d'un grand intérêt pour le thème de la Table ronde. Le Président signale ensuite que la contribution française souligne que pour bénéficier de la procédure de règlement, un défendeur doit à la fois admettre sa culpabilité et proposer des mesures correctives adaptées. Le Conseil de la Concurrence est apparemment favorable à des modifications de la loi visant à supprimer le lien établi entre l'aveu de

culpabilité et la proposition de mesures correctives. Le Président invite la délégation française à clarifier sa position et à expliquer de quelle manière de telles modifications de la loi pourraient contribuer à promouvoir les objectifs de la politique menée en matière de procédure de règlement.

Le représentant de la France fait d'abord observer que la non-contestation des charges, c'est-à-dire l'engagement d'une partie de ne contester d'aucune manière les charges pesant contre elle, et notamment les faits, la qualification des faits et leur imputation, n'a pas valeur d'aveu ou de reconnaissance de culpabilité. Par ailleurs, dans le droit pénal français, la non-contestation des charges ne peut constituer la base d'une accusation contre le dirigeant d'une entreprise accusée de participation à des pratiques jugées illicites au sens de l'Article L 420-6 du Code de Commerce.

Une réforme de procédure a rendu facultatifs les règlements assortis d'engagements afin de renforcer l'efficacité des enquêtes dans les affaires où un règlement s'avérait approprié. Une entreprise qui choisit de procéder à un règlement peut ainsi prétendre à une réduction d'amende plus importante que celle dont elle aurait bénéficié si elle avait uniquement décidé de s'abstenir de contester les charges retenues contre elle. Comme l'a indiqué le Conseil de la Concurrence dans ses décisions et dans son rapport annuel, les engagements pris dans le domaine des ententes et des pratiques horizontales consistent en général à éduquer les employés pour les sensibiliser aux règles de la concurrence. Même s'ils ne sont pas dépourvus d'intérêt, ces engagements ne permettront pas d'améliorer de manière sensible et vérifiable le fonctionnement des marchés affectés par des pratiques illicites, mais il apparaît difficile de concevoir des engagements propres à rétablir ex post la concurrence sur le marché.

Lorsque le Conseil de la Concurrence conduit une enquête sur des pratiques horizontales, le principal facteur pris en compte lors de la fixation de la réduction des amendes est le fait que l'enquête sera facilitée et accélérée si un défendeur accepte un règlement transactionnel. Plus précisément, une telle procédure dispense de la nécessité d'un rapport, qui constitue normalement la seconde étape, dite étape contradictoire, de la procédure du Conseil de la Concurrence. Depuis 2006, le Conseil de la Concurrence publie un tableau d'information qui permet aux entreprises de mieux comprendre quels rapports existent entre leur contribution sous forme d'engagements et les éventuelles conséquences en termes de réduction d'amende.

Le Président se tourne vers la délégation brésilienne, dont la contribution indique qu'« une approche cohérente des incitations mises en place dans le cadre du programme de clémence et du règlement négocié ne profite au public que si elle prévoit l'exigence que les parties intéressées reconnaissent leur participation au comportement incriminé ». Le Président demande à la délégation brésilienne d'expliquer comment sont préservées les incitations à solliciter un programme de clémence et à conclure accord par voie de règlement transactionnel dans le système brésilien.

Le représentant du Brésil explique que depuis 2003 son pays a sensiblement modifié sa politique de lutte contre les ententes. L'utilisation de nouveaux outils d'investigation tels que les programmes de clémence, les perquisitions et l'espionnage électronique a en effet entraîné une nette hausse du taux de détection des ententes. Des ententes d'importance économique majeure ont été découvertes dans des secteurs tels que l'industrie cimentière, l'industrie chimique et l'industrie gazière. Par conséquent, les coûts des poursuites judiciaires ont fortement augmenté et, en 2007, un mécanisme visant à régler les affaires d'entente par voie de transaction a été introduit.

L'objectif premier de la procédure de règlement transactionnel consiste à renforcer l'effet dissuasif. Si le règlement est trop intéressant, il risque d'avoir un effet négatif sur le programme de clémence, principal outil d'investigation pour la détection d'ententes. C'est pourquoi le CADE a décidé que les propositions de règlement soumises dans le cadre d'affaires dans lesquelles ont été conclus des accords de clémence doivent comporter des aveux et une amende suffisamment élevée pour dissuader tout comportement

collusif. S'agissant des affaires sans accord de clémence, le SDE, principal organe d'investigation, et le CADE, le tribunal administratif, ont adopté des positions légèrement différentes dans leurs premières affaires impliquant des règlements : dans les affaires liées à des ententes injustifiables où des éléments de preuve ont d'ores et déjà été réunis en quantité suffisante, le SDE exige un aveu de culpabilité, tandis que le CADE reconnaît les répercussions négatives que peuvent avoir des aveux. Il autorise donc des règlements sans aveu mais exige le paiement du montant intégral de l'amende prévue.

Le représentant du Brésil émet l'hypothèse que ces différences sont dues aux fonctions différentes que remplissent le SDE et le CADE : le SDE est en charge du programme de clémence, et donc soucieux de préserver ce programme, tandis que le CADE est chargé de faire appliquer ses décisions administratives rendues en dernier ressort et veille à l'efficacité des poursuites judiciaires. Le représentant fait toutefois observer que, s'agissant des employés d'entreprises qui participent à des ententes injustifiables et à des ententes dites « légères », le SDE et le CADE s'accordent à dire que la décision d'exiger ou non des aveux peut être prise au cas par cas sans mettre en péril le programme de clémence.

Après seulement une année d'expérience, il est difficile de tirer des conclusions définitives à propos de l'interaction entre la procédure de règlement et le programme de clémence. Toutefois, il convient de mentionner les points suivants :

Moins de 10 pourcent des défendeurs potentiels dans des ententes injustifiables pour lesquelles des preuves directes ont été recueillies ont proposé de procéder à un règlement ;

Près de la moitié des défendeurs ont vu leur proposition acceptée, soit cinq pourcent de la totalité des défendeurs potentiels ;

Tous les défendeurs étaient disposés à payer un prix plus élevé pour parvenir à une résolution (c'est-à-dire pour mettre un terme à l'affaire) ;

Il n'existe encore aucun exemple d'affaire où une personne physique a reconnu sa culpabilité, peut-être par crainte de voir engager sa responsabilité pénale ;

Les demandes de programmes de clémence vont toujours croissant ; aucun impact négatif de la politique de règlement sur le programme de clémence n'a été observé ;

La procédure de règlement a été utilisée avec prudence, essentiellement dans des affaires portant sur des infractions mineures et pour lesquelles il aurait été plus onéreux d'engager un procès.

Le Président invite les participants à discuter de la question de savoir si les défendeurs devraient être tenus de reconnaître leur culpabilité dans le cadre d'un règlement. Il explique que trois possibilités se présentent : (1) les défendeurs ne sont pas tenus de reconnaître leur culpabilité ; (2) les défendeurs doivent systématiquement reconnaître leurs torts et (3) la décision peut être prise au cas par cas.

Le représentant de la Commission européenne explique que, s'agissant de l'UE, la possibilité de règlement transactionnel dans les affaires d'entente est subordonnée notamment à l'obtention d'aveux. La justification de cette approche se trouve dans la jurisprudence européenne, qui suggère que l'objectif de la Commission ne sera pas atteint si une partie se contente de ne pas contester les charges pesant sur elle. En particulier, dans ce cas, la véracité des principaux faits à l'origine d'un règlement transactionnel n'est pas établie de manière définitive entre la Commission et les parties au règlement.

Le représentant de la Commission commente les propos tenus auparavant concernant la procédure de règlement de la Commission. À la différence des États-Unis, la Commission dispose d'un système dans le cadre duquel elle communique les griefs de façon détaillée et arrête une décision individuelle contre toutes

les parties, décision souvent attaquée en justice par la suite. La Commission a traité des affaires individuelles contre des centaines d'entreprises au cours des six ou sept dernières années. Les recours en appel portent principalement sur le montant des amendes infligées plutôt que sur la véracité des faits. L'introduction d'une procédure de règlement pourrait par conséquent permettre des changements considérables concernant les actions en justice engagées actuellement à propos des amendes. Cette évolution pourrait présenter certains avantages et permettre à la DG Concurrence mais aussi au service juridique de la Commission d'économiser des ressources. Il ne fait aucun doute que la procédure de règlement doit s'intégrer dans le système actuel de lutte contre les ententes au niveau de la Commission.

En réponse à un commentaire formulé plus tôt à propos de la position de la Commission selon laquelle cette dernière ne négociera pas avec les parties, le représentant de la Commission souligne que la DG Concurrence n'est pas en mesure de négocier la conclusion d'une affaire avec les parties. Néanmoins, une place sera laissée à la discussion et le système sera mis en œuvre avec une certaine souplesse.

Le représentant de la Commission formule également quelques observations concernant la prévisibilité des sanctions. Il explique qu'un règlement transactionnel peut constituer une partie d'un ensemble comprenant non seulement une demande de règlement, mais aussi une proposition de coopération avec la Commission en lui fournissant des informations de nature à l'aider à établir l'infraction. Cela étant, la Commission n'a pas l'intention de modifier le fonctionnement de son programme de clémence. Ce système distingue très clairement les avantages accordés en contrepartie d'une coopération précoce de ceux pouvant être obtenus en acceptant une transaction. Il fait remarquer que de fortes incitations sont intégrées au système de la Commission et que le succès de sa communication sur la clémence est manifeste. L'application d'une réduction unitaire de 10 pourcent pour toutes les parties au règlement se justifie par le fait que l'avantage pour la Commission d'une conclusion administrative plus rapide d'une affaire repose sur l'implication de toutes les parties dans le règlement. Les parties sont donc récompensées de manière égale. La clémence est une question distincte.

Le représentant de la Commission explique que cette dernière discutera des amendes avec les entreprises. La discussion des amendes interviendra le plus souvent à un stade précoce du processus afin de permettre une certaine prévisibilité et de créer un point de départ à partir duquel l'entreprise pourra décider si une réduction de 10 pourcent est une incitation suffisante ou non. Les aspects relatifs aux amendes auxquels il a été fait référence précédemment lorsqu'ont été évoqués les propos de M. Mehta sont abordés dans la communication de la Commission sur les amendes. Il est évident que certains éléments pourront être débattus, mais la Commission ne souhaite ni abandonner les points qu'elle estime être en mesure de prouver dans une affaire, ni transiger sur ces derniers. Le représentant indique également que les affaires qui durent six années, voire beaucoup plus, et font de nombreux allers-retours en interne pour discuter encore et encore du montant des amendes sont aujourd'hui une exception. À l'avenir, les affaires seront traitées plus rapidement. Le représentant précise aussi que la Commission n'a jamais affirmé être opposée aux affaires hybrides. Néanmoins, elle souhaite éviter d'avoir à conduire une double enquête dans laquelle elle devrait mener de front une procédure complète et une procédure de règlement. Enfin, il pense que les premières affaires concerneront très probablement des situations dans lesquelles toutes les parties prendront part à la transaction car la Commission souhaite montrer au reste du monde et à l'UE que le système de règlement transactionnel fonctionne, qu'il est efficace et que les parties en tirent des avantages.

Le Président invite la Commission à fournir des précisions sur le stade auquel les règlements sont envisageables. Apparemment, la Commission a l'intention de concentrer ses efforts sur les situations où elle est en mesure de parvenir à une transaction avec toutes les parties, sans doute à l'issue d'une enquête. Même si l'on peut espérer que cela ne prendra pas six ans, il est probable que le stade du règlement interviendra assez tardivement, ce qui risquera d'empêcher la Commission de bien coordonner son action avec d'autres juridictions dotées de procédures de règlement peut-être différentes et de calendriers différents. Le Président demande le point de vue de la Commission quant aux éventuels avantages d'une

action coordonnée avec d'autres juridictions et souhaite savoir dans quelle mesure elle peut aujourd'hui rechercher une telle coordination.

Le représentant de la Commission européenne répond que cette question concerne principalement le programme de clémence et non les règlements transactionnels. Les entreprises qui ont décidé de négocier un règlement dans une juridiction donnée sont habituellement des entreprises qui ont décidé de coopérer, notamment parce que d'autres juridictions combinent coopération et règlement. Le représentant explique ensuite que les avantages de la clémence sont considérables pour la première partie qui coopère après le candidat à la l'immunité. Les amendes de cette partie peuvent être diminuées de moitié. La réduction de 10 pourcent supplémentaire est un élément accessoire lié au règlement mais, pour une entreprise, la principale incitation à se manifester auprès de la Commission est la participation au programme de clémence.

De toute évidence, la Commission devra malgré tout mener une enquête relativement approfondie. Cependant, le véritable avantage qu'elle en tirera ne sera pas uniquement une décision plus rapide, mais aussi la possibilité de travailler avec une communication des griefs plus succincte. Cela raccourcira la procédure, quoique de manière modérée. Par conséquent, pour répondre à la question posée par le Président, la procédure de règlement n'est pas en soi l'élément déterminant dans la décision d'une entreprise de coopérer avec la Commission. Si des parties coopèrent et décident de procéder à un règlement dans toutes les juridictions, la Commission sera toujours en mesure de coordonner son action et de coopérer avec d'autres instances, par exemple en sollicitant des déclarations de renoncations à certains droits.

Le Président remercie le représentant de la Commission européenne et demande si M. Spratling ou M. Hansen souhaitent formuler des commentaires sur l'un des points abordés par le représentant de la Commission et/ou sur la question plus précise de savoir si des aveux doivent être exigés ou non.

M. Spratling se félicite de la déclaration de M. Mehta à la Conférence du RIC ou encore des informations contenues dans la contribution de la Commission à la Table ronde, d'où il ressort que « *les discussions en vue d'un règlement aborderont rapidement les faits reprochés, leur qualification, la gravité et la durée de l'infraction, la responsabilité inhérente à l'implication individuelle de l'entreprise dans l'entente, les éléments de preuve versés au dossier et sur lesquels se fondent les griefs, ainsi que l'amende maximale potentielle et la réduction de cette dernière* ». Ces questions sont les mêmes que celles discutées dans le cadre d'un système prévoyant une transaction négociée. M. Spratling voit d'un œil positif le fait que la Commission souhaite discuter de ces questions car cette approche est essentielle pour le bon fonctionnement du système de règlement.

Le stade auquel doit intervenir un règlement transactionnel dans la procédure de la Commission est toujours un problème pour un juriste chargé d'élaborer une réponse internationale cohérente à une enquête sur une entente internationale. S'agissant de l'UE, il est impossible de prévoir avec le même degré de certitude que dans d'autres juridictions quelle sera l'issue du règlement et la décision de la Commission se fait attendre largement plus longtemps. Cela complique considérablement la situation des entreprises lorsqu'elles doivent arrêter une stratégie et un calendrier, en raison des effets collatéraux dans diverses autres juridictions. Lorsqu'il est possible d'engager une procédure dans toutes les juridictions concernées simultanément, les effets collatéraux peuvent être contrôlés. Toutefois, M. Spratling se félicite que la Commission souhaite accélérer la procédure et la mettre davantage en harmonie avec d'autres enquêtes.

M. Spratling formule également quelques commentaires sur la contribution brésilienne. Se reportant aux informations fournies par le Brésil, il fait observer que sur environ 15 propositions de règlement, seules quatre ont été approuvées et que sur les sept affaires pour lesquelles le CADE a sollicité un avis consultatif du SDE, le SDE a dans six cas préconisé de ne pas poursuivre le règlement. M. Spratling

explique qu'il ne comprend pas bien les raisons de ces résultats, mais a fait remarquer que cela tient peut-être au fait qu'elles sont en partie confidentielles et relèvent du pouvoir discrétionnaire des autorités. L'un des principes mis en avant dans la contribution brésilienne est le souhait de protéger le système de clémence. Pour une personne qui, comme cela se fait aux États-Unis, envisagerait de combiner clémence et transaction judiciaire dans un règlement négocié (une certaine réduction d'amende est accordée pour avoir coopéré et être parvenu à une résolution), rien ne s'oppose théoriquement à ce que la juridiction concernée soit dotée d'un premier barème progressif pour la coopération et d'un deuxième barème également progressif pour le règlement. La réduction totale des amendes serait établie sur la base des avantages apportés par chacune de ces actions. Par exemple, il se peut que la coopération d'une entreprise, selon le moment où cette dernière se manifeste auprès des autorités, ne mérite qu'une réduction de 15 pourcent. En revanche, une entreprise qui coopère, convient d'un règlement, fait progresser l'affaire, fait des aveux dûment consignés et plaide coupable peut avoir un effet dynamique très prononcé sur l'évolution de l'affaire et devrait par conséquent mériter un niveau de récompense de loin supérieur à la troisième ou à la quatrième entreprise qui se manifesterait. Clémence et règlement peuvent être combinés et se superposer sans préjudice pour le système de clémence. Par conséquent, s'il convient de l'importance de ne pas porter préjudice au système d'incitation fondé sur la clémence, M. Spratling regrette que les deux systèmes soient opposés à tort.

Enfin, M. Spratling rappelle que, d'après la contribution brésilienne, les autorités ne souhaitent pas voir une transaction judiciaire aboutir à une sanction d'un niveau « sous-optimal ». En revanche, la contribution israélienne indique expressément qu'en optant pour des accords par voie de règlement, l'IAA se prive de son droit de solliciter des amendes maximales, pour privilégier des résolutions accélérées et mettre rapidement fin aux affaires, dans l'intérêt du public. Ainsi, si l'objectif ultime est l'intérêt du public, le recours à des règlements assortis de réductions d'amendes ne devrait présenter aucun risque. Toutefois, n'ayant pas compris ce que la contribution brésilienne entend précisément par l'expression « sous-optimal », M. Spratling se demande s'il ne s'agit pas d'infliger une sanction aussi sévère que possible. Il fait également remarquer que le représentant du Brésil a indiqué que certaines entreprises étaient prêtes à acquitter une amende plus élevée afin de mettre un terme à la procédure. Aux yeux de M. Spratling, l'autorité compétente et le participant à une entente devraient tous deux rechercher une amende moins élevée, puisque l'affaire est résolue plus rapidement.

Le représentant du Brésil répond que la procédure de règlement joue un double rôle dans le contexte juridique brésilien : premièrement, comme un deuxième programme de clémence, elle fait office d'outil d'investigation. Lorsqu'une entreprise collabore dans le cadre d'une transaction, l'autorité lui accorde en retour une réduction d'amende. Deuxièmement, la procédure de règlement peut jouer le rôle d'accord préjudiciel. En règle générale, les entreprises forment des recours en justice contre les décisions administratives. La procédure brésilienne de règlement est conçue de manière à diminuer le coût des poursuites. L'objectif des règlements est parfaitement clair : l'autorité de la concurrence se doit de faire respecter le droit de la concurrence et doit rechercher l'effet dissuasif maximum à l'égard des ententes. Le représentant du Brésil explique que divers instruments sont prévus pour atteindre cet objectif. Parmi eux figurent l'accord de clémence et le règlement, qui peuvent être considérés comme complémentaires. Des interactions très complexes régissent ces outils et l'autorité agit avec prudence afin d'appréhender ces interactions et d'affiner le système en conséquence, ce qui explique pourquoi, jusqu'à présent, seules quelques affaires ont été traitées chaque année. Enfin, il convient de mentionner que l'autorité n'inflige pas une amende plus élevée aux entreprises qui optent pour un règlement : celles-ci choisissent le règlement parce qu'il est avantageux pour elles. Pour revenir à ce qui a été dit précédemment, l'autorité exige le montant exact prévu de l'amende (montant actualisé de l'amende), et il arrive que certains défendeurs soient prêts à verser certaines sommes en contrepartie de la conclusion de l'affaire qu'ils décident de résoudre par règlement. Le représentant ajoute que cette solution est intéressante à la fois pour l'autorité de la concurrence et pour les entreprises.

Le Président demande à M. Hansen s'il souhaite réagir à l'intervention de la Commission européenne. M. Hansen explique que bien qu'il n'ait pas encore abordé la question des interactions liées à la clémence, il souhaite préciser qu'un programme de clémence est dans de nombreux cas le meilleur moyen d'obtenir le résultat escompté et qu'il peut parfaitement être combiné à la procédure de règlement. Dans ce cas, les recours en appel s'en trouveront restreints. Toutefois, l'une des principales questions qui se posent en termes d'interactions est celle des affaires hybrides : au vu de ces interactions, la Commission doit faire des affaires hybrides une quasi-norme. De nombreuses affaires impliquent des parties qui estiment que l'argumentaire de la Commission à leur encontre n'est pas aussi solide que celui visant certains des candidats au programme de clémence, ou certaines questions épineuses de droit peuvent se poser, notamment dans les affaires visant plusieurs juridictions et dans lesquelles toutes les parties ne participent pas au règlement. M. Hansen dit avoir connaissance d'un seul exemple d'affaire où toutes les parties avaient pris part à un règlement, insistant ainsi sur le caractère rarissime de ce cas de figure. À ses yeux, si la Commission souhaite que le système de règlement fonctionne, la question des règlements différenciés doit être traitée en priorité, avant celle de la réduction unitaire et de nombreuses autres questions. Si la Commission souhaite se doter d'un système sophistiqué, elle devra adapter le système actuel à plusieurs égards : elle devra peut-être revoir la réduction unitaire de 10 pourcent, mais la question essentielle sera celle des affaires hybrides.

M. Hansen passe ensuite à la question de la coordination internationale. Il explique que cette situation évoluera peut-être avec le temps, mais qu'actuellement, la dimension multijuridictionnelle d'une enquête peut entraver le bon fonctionnement du système de la Commission car il semble difficile de coordonner la procédure de règlement transactionnel de la Commission avec les procédures en place dans d'autres pays. L'attractivité d'un système tient à la possibilité qu'il offre de négocier une affaire. La possibilité de dialogue est aujourd'hui insuffisante dans de nombreux systèmes, y compris celui de la Commission.

Le Président donne la parole aux États-Unis. Le représentant des États-Unis revient sur la question de l'importance des aveux dans un règlement et formule sur ce point les trois observations suivantes :

Les États-Unis estiment que des aveux sont toujours nécessaires et très importants dans les affaires d'entente. Les ententes injustifiables constituent la plus grave entrave à la concurrence et justifient le discrédit suscité par des aveux. L'effet dissuasif d'un aveu de culpabilité ne doit pas être sous-estimé.

Le ressenti du public est très important. Si une autorité règle une affaire en contrepartie d'une importante somme d'argent sans contraindre le défendeur à reconnaître ses torts, l'opinion publique risque d'y voir un « règlement de convenance » accepté par l'entreprise non pas parce qu'elle était en tort, mais comme un moyen d'acheter la paix et de passer à autre chose. Aucune autorité de la concurrence ne peut se permettre de voir des entreprises mettre en doute l'intégrité de sa procédure de règlement, d'où l'importance d'un aveu de culpabilité. De tels aveux permettent d'éviter qu'une entreprise tente de faire croire dans le monde des affaires, dans les médias ou par sa communication en général que sa décision de procéder à un règlement a été prise sur la base de considérations pécuniaires.

Les États-Unis ont par le passé mené une politique où le DOJ acceptait parfois une reconnaissance de culpabilité sur le plan strictement pénal. Même si le DOJ n'acceptait probablement une telle procédure que dans une affaire sur cent, dans chaque négociation suivante, le défendeur commençait par demander à reconnaître sa culpabilité sur le plan strictement pénal et le DOJ devait alors négocier. Au début des années 90, il a été décidé de mettre fin à cette pratique. Au bout de deux ans seulement, elle avait totalement disparu des négociations. Si un pays a pour politique de maintenir la possibilité d'une reconnaissance de culpabilité sur le plan strictement pénal, la question se posera dans chaque négociation de règlement. Il était donc préférable de ne pas laisser cette porte ouverte.

Le représentant termine en abordant ce qui, à ses yeux, incite une entreprise à solliciter un règlement : ce qui intéresse les entreprises, c'est la certitude, la possibilité de parvenir à une conclusion ferme et définitive et la rapidité. L'objectif d'une entreprise est de continuer à exercer son activité, de pouvoir traiter avec sa banque et ses partenaires financiers, et elle cherche pour cela à tourner la page. Les entreprises souhaitent savoir comment leur coopération peut permettre de réduire leur amende. Si elles ne sont pas en mesure de prévoir de quelle manière leur coopération réduira leur amende, si elles estiment qu'il leur faudra peut-être compter deux, trois ou quatre années avant de parvenir à un règlement, et il leur est alors peut-être difficile de voir une quelconque différence entre, d'une part, coopérer et conclure un règlement et, d'autre part, se défendre.

Le Président donne la parole à la Commission européenne. Le représentant de la Commission européenne explique les objectifs que la Commission s'est fixés en mettant en place sa procédure de règlement : la Commission est disposée à négocier avec les entreprises et ne fait pas de proposition de type « à prendre ou à laisser ». Elle est prête à expliquer ses arguments ou à accorder l'accès au dossier afin de faire la preuve de ses allégations, sans omettre tout élément à décharge. Il sera possible de demander que soient versés des éléments complémentaires au dossier afin de parvenir à une « appréciation commune » entre la Commission et les parties sur les faits incriminés. De cette manière, les entreprises peuvent constater que les conclusions de la Commission sont dûment motivées, et prendre connaissance des aspects considérés comme des circonstances aggravantes, savoir quelles entités d'un groupe d'entreprises verront leur responsabilité engagée, etc. Toutes ces questions seront largement expliquées et il est à espérer que les entreprises se sentiront suffisamment en confiance pour opter pour un règlement à la lumière de ces informations.

La possibilité de se tourner vers la Commission afin de négocier le montant de l'amende offre désormais des conditions relativement exceptionnelles par comparaison avec la pratique antérieure. Toute entreprise pourra en effet s'adresser à la Commission et examiner la question de l'amende sans pour autant s'engager dans une procédure de règlement. Cette opportunité devrait encourager les entreprises hésitantes à se manifester. La Commission espère ainsi convaincre toutes les entreprises impliquées lorsqu'il s'agit d'affaires qui se prêtent à un règlement, lorsque les conclusions de la Commission et la durée de l'infraction alléguée sont claires et lorsque les enjeux sont suffisamment transparents. Il est à espérer que les affaires hybrides ne deviendront pas la norme.

Le Président explique que dans sa contribution, la République tchèque a évoqué une affaire qui a été résolue par voie de règlement. Apparemment, les autorités ont estimé que cette formule pouvait apporter des avantages substantiels à la fois à l'autorité et aux parties au règlement. Le Président demande à la délégation tchèque de revenir sur ces faits et d'expliquer pourquoi elle a trouvé le règlement si avantageux.

Le représentant de la République tchèque explique qu'il n'existe aujourd'hui en République tchèque aucun cadre légal pour les règlements et que son pays a par conséquent une expérience limitée de ces derniers. Les premières négociations en vue de règlements ont eu lieu en 2008.

L'affaire *Kofola* a été la première affaire résolue par voie de règlement en République tchèque. Il s'agissait d'une affaire test devant servir à déterminer d'une part la capacité de l'autorité de mener à bien les règlements et d'autre part l'efficacité de cette procédure. L'idée de recourir à un règlement dans l'affaire *Kofola* est venue des entreprises elles-mêmes. Ces dernières avaient connaissance de l'existence de discussions en vue de règlements à l'échelon européen et ont persuadé les autorités tchèques de faire de même. L'autorité et les parties ont conclu par la suite un accord. L'expérience tirée de cette affaire test a été concluante et les résultats obtenus ont été positifs à de nombreux égards. Elle a permis de mettre fin au comportement illégal, une amende de 500 000 € a été infligée, soit un montant non négligeable et qui a eu des effets dissuasifs malgré une réduction de 50 %, et des économies ont été réalisées car la procédure de règlement a été largement plus courte que la procédure normale, en premier lieu parce que l'autorité n'a

pas eu à rédiger de communication des griefs. L'économie de ressources réalisée a également tenu au choix des parties de ne pas faire appel de la décision rendue, bien qu'elles aient été informées que la conclusion d'un règlement ne les empêchait pas d'introduire un tel recours.

Pour les entreprises, le principal avantage de la procédure de règlement a été de pouvoir parvenir à une conclusion rapide de l'affaire. Les entreprises souhaitaient influencer l'issue et la longueur de la procédure. Elles ont fait valoir l'impact négatif de l'affaire sur leur réputation, les conséquences d'une enquête dont les résultats resteraient flous, l'effet négatif de l'enquête sur le cours de leur titre en bourse et sur leur capacité d'obtenir des prêts et des lignes de crédit, ainsi que la mauvaise image qu'elle donnait vis-à-vis de leurs partenaires stratégiques potentiels. Il n'existait pas de procédure privée en République tchèque, si bien que la question de l'influence d'un règlement sur toute poursuite privée susceptible de faire suite à une action publique ne se posait pas. Par ailleurs, le représentant explique que les entreprises ont décidé de procéder à un règlement même après avoir pris en considération les risques potentiels qu'impliquaient leur renonciation à certains droits de la défense.

L'autorité tchèque souhaiterait explorer plus en avant la possibilité de conclure des règlements car les résultats obtenus se sont avérés très positifs. La procédure de règlement pourrait également être utilisée en tant qu'outil d'investigation. Enfin, le représentant de la République tchèque précise que le droit tchèque exige la reconnaissance des faits dans le cadre d'un règlement.

Le Président remercie la délégation tchèque et invite la délégation israélienne à évoquer le rôle des conseils et informations fournis concernant les sanctions potentielles au cours de la négociation d'une transaction, la mesure dans laquelle ces conseils et informations sont nécessaires et l'impact qu'ils peuvent avoir sur l'efficacité d'un système de règlement. La représentante d'Israël explique que plusieurs facteurs devaient être pris en compte lors de la discussion d'un règlement. Ces facteurs peuvent être regroupés en quatre catégories :

Premièrement, la nature de l'affaire : sa gravité, ses circonstances, sa durée, le marché affecté, l'existence de mécanismes d'application internes à l'entente et l'implication de chacune des parties à l'entente ;

Deuxièmement, le calendrier de l'enquête et des poursuites judiciaires : le calendrier de négociation du règlement – avant ou après la mise en accusation – la date du procès proprement dit et le stade du procès auquel le règlement est négocié et discuté ;

Troisièmement, la solidité de l'affaire en termes d'éléments de preuve correspondant aux différentes charges et aux différentes parties ;

Quatrièmement, la question de savoir, pendant le déroulement des négociations, si l'autorité est parvenue à un règlement avec l'une des autres parties, ce qui affecterait de toute évidence les autres règlements en cours de discussion.

La représentante d'Israël explique qu'au fil des années l'IAA a conclu par voie de règlement plus de 50 pourcent des affaires qu'elle a traitées, en impliquant soit la totalité, soit une partie des parties. En Israël, chaque règlement doit être discuté avec le procureur de district et approuvé par le tribunal de district de Jérusalem. Afin de mettre en place des lignes directrices en matière de règlement, il est nécessaire de pouvoir s'appuyer sur un corpus de lois et un certain nombre de condamnations prononcées par le tribunal. Il s'agit d'obtenir un ensemble de critères de nature à aider l'autorité à formuler des lignes directrices pour le choix des sanctions, par exemple pour déterminer si une peine d'emprisonnement ou des amendes constituent une sanction appropriée, et dans quels cas. La représentante note que malgré les nombreuses résolutions d'affaires par règlement qu'Israël compte aujourd'hui à son actif, d'autres décisions et d'autres

jugements du tribunal devront encore être prononcés dans ce domaine avant que des lignes directrices puissent être élaborées. Pour ce qui est du règlement et de la négociation avec les différentes parties, la procédure est déjà transparente car une mise en accusation intervient dans chaque affaire d'entente que l'IAA a réglée.

La représentante indique enfin que le bilan de l'IAA est bon : de nombreux règlements ont été conclus et les amendes infligées ont été relativement élevées. Néanmoins, elle a fait remarquer qu'il existe toujours une marge d'amélioration possible. L'IAA souhaiterait en effet bénéficier d'un plus grand soutien des tribunaux, qui pourraient lui fournir des informations plus détaillées concernant les procédures, afin de lui permettre de publier des lignes directrices. La représentante fait également observer que les règlements ont eux aussi un certain effet dissuasif. Ils donnent au public le sentiment que l'IAA a la capacité de traduire une entreprise en justice et d'obtenir de bons résultats. Avant chaque règlement, l'IAA discute en interne de la pertinence de procéder ou non à un règlement. Un règlement peut avoir des conséquences positives et négatives et ces aspects font toujours l'objet d'une discussion.

Le représentant de l'Australie répond à la question posée précédemment par le Président à propos de l'importance des aveux dans les procédures de règlement. L'Australie attend depuis de nombreuses années que soit édictée une législation visant à faire des agissements en matière d'entente une infraction pénale. Cette législation a été promise par le nouveau gouvernement. Toutefois, sur le plan civil, l'approche de l'Australie est similaire à celle développée aux États-Unis : reconnaître ses torts est l'une des principales conditions préalables à un règlement. L'Australie prévoit une certaine marge de manœuvre dans les négociations de règlements, concernant l'étendue des aveux et plus particulièrement la nature des comportements acceptés. En Australie, l'ACCC ne peut pas imposer elle-même les amendes qu'elle souhaite. Au lieu de cela, elle établit un « exposé conjoint des faits » assorti d'une sanction préconisée qu'elle soumet à un tribunal. Le juge examine l'exposé conjoint des faits et décide si le tribunal peut ou non accepter la sanction recommandée par les parties.

Le représentant de l'Australie explique que l'ACCC est en butte à des difficultés croissantes en matière de règlements, concernant non pas le niveau des sanctions ou des amendes, mais les éléments portés à l'exposé conjoint des faits. Ce phénomène s'explique par deux raisons. La première est la possibilité pour des tiers d'utiliser l'exposé conjoint des faits aux fins d'une demande de dommages-intérêts. Cette pratique est encore relativement nouvelle en Australie, mais l'ACCC estime que les négociations de règlements sont de loin plus longues que par le passé. La deuxième raison est la question de savoir si un tel document peut servir dans le cadre de procédures ouvertes dans d'autres juridictions.

Le Président donne la parole au Taipei chinois. Le représentant du Taipei chinois pose une question aux invités d'honneur concernant les incitations au règlement. Il souhaite en savoir plus quant à la probabilité qu'une agence détecte ou établisse une infraction et incite à procéder à un règlement. Son impression, à la lumière du taux très élevé de règlements aux États-Unis et des commentaires formulés par la délégation des États-Unis, est qu'il importe peu aux entreprises de voir une infraction détectée ou établie à leur encontre. Le représentant souhaite savoir si M. Spratling et M. Hansen partagent le sentiment qu'une fois qu'une entreprise se voit proposer la possibilité de convenir d'un règlement, peu lui importe d'être accusée d'une infraction et elle se soucie uniquement de régler le problème et de passer à autre chose.

M. Spratling confirme que les entreprises souhaitent se débarrasser des affaires dont elles font l'objet. Il explique que si une entreprise se rend compte qu'une entente a été détectée, la probabilité que sa participation à cette entente sera détectée ou dénoncée par un tiers est extrêmement grande. L'évaluation de la situation par l'entreprise en termes d'incidences commerciales et/ou de risques conduit inévitablement cette dernière à ne pas miser sur le fait qu'elle ne sera pas démasquée. Pour l'entreprise, il est beaucoup plus coûteux de s'abstenir d'agir de manière précoce que d'opter pour les possibilités qui lui sont offertes.

si elle agit rapidement, à tel point qu'aujourd'hui aucun dirigeant d'entreprise ni aucun conseil d'administration déciderait de ne pas signaler un comportement répréhensible qu'il a détecté.

La façon dont une entreprise prend conscience de son exposition est déterminante dans son évaluation du risque d'être détectée. Dans certains cas, l'infraction a déjà été détectée, ce qui influe sur la rapidité dont l'entreprise doit faire preuve. Parfois, la première étape consiste à vérifier l'existence d'un risque réel et à mener une enquête interne. Si le risque est établi, la probabilité que quelqu'un dénonce l'infraction est tellement forte que l'entreprise n'a aucune alternative. Dans le contexte actuel, avec la loi Sarbanes-Oxley et les diverses exigences posées en matière de communication d'informations, le risque personnel encouru par un membre d'un conseil d'administration qui déciderait de ne pas dénoncer une infraction dont il connaît l'existence est énorme, et aucun avocat-conseil ne lui conseillerait de ne pas la dénoncer. Si le conseil d'administration fait lui-même appel à un avocat-conseil externe (ce qui est la pratique courante aujourd'hui), ce dernier déconseillera fortement toute implication dans une stratégie visant à ne pas dénoncer l'infraction. Si des faits d'une telle nature remontent jusqu'à la direction ou au conseil d'administration, ils finiront par être rapportés. Dans ce cas, l'entreprise examinera son exposition, ses possibilités d'éviter ou d'atténuer les sanctions, elle se renseignera sur le coût de poursuites civiles et arrêtera une décision quant à la marche à suivre.

Le Président remercie M. Spratling et invite la délégation du Royaume-Uni à prendre la parole. Le président précise que la contribution du Royaume-Uni comporte deux exemples de règlements hybrides, à savoir l'affaire des agendas et celle du tabac, et il demande à la délégation de faire connaître son point de vue sur les règlements hybrides.

Le représentant du Royaume-Uni explique que son pays n'a arrêté aucune procédure officielle ni de réglementation en matière de règlement. Toutefois, des règlements ont été conclus en quatre occasions. La politique des pouvoirs publics prend forme au fil des affaires traitées. Bien que le Royaume-Uni reconnaisse les avantages potentiels des règlements dans certaines affaires en termes d'économie de ressources et de renforcement des effets dissuasifs, il craint que les règlements ne puissent avoir un effet négatif sur son programme de clémence ou en matière de dissuasion en général.

S'agissant des procédures hybrides, le Royaume-Uni fait une distinction entre deux types de règlements : (1) un règlement convenu avec certaines des parties mais pas toutes ; (2) un règlement convenu pour certaines infractions mais pas toutes. Au Royaume-Uni, deux des quatre règlements conclus sont des règlements hybrides et ont impliqué certaines des parties seulement. Dans ces deux affaires, la procédure engagée à l'encontre des parties est toujours en instance car ces dernières ont refusé la possibilité de convenir d'un règlement. Il se peut que ces règlements hybrides n'aboutissent pas au même niveau d'économie de ressources que les règlements impliquant toutes les parties incriminées. L'OFT s'attend malgré tout à des économies de ressources substantielles sur la phase administrative concernant les parties qui ont participé au règlement, mais aussi sur les éventuels recours en appel car les parties qui participent à un règlement ont peu de chance d'introduire un recours. Ce point est important car le Royaume-Uni est doté d'un système de recours de pleine juridiction qui nécessite des ressources importantes. À la date de la Table ronde, ces deux affaires hybrides sont encore pendantes et aucune décision définitive n'a été arrêtée. Le temps dira quelles économies auront été réalisées dans ces deux affaires.

Le Président invite ensuite le BIAC à faire part de ses commentaires. Le représentant du BIAC explique qu'en règle générale les milieux d'affaires se disent très favorables aux règlements pour toutes les raisons d'ores et déjà évoquées, et notamment parce qu'ils aboutissent à des réductions d'amendes et évitent de perdre du temps avec de longs procès. Qui plus est, les frais de justice sont d'autant moins élevés qu'une affaire est réglée rapidement, aspect presque aussi important que le montant de l'amende finale aux yeux des décideurs d'une entreprise. Toutefois, certaines préoccupations demeurent pour les entreprises,

préoccupations qui peuvent être très différentes selon que l'entreprise opère d'un côté ou de l'autre de l'Atlantique.

Aux États-Unis et au Canada, les inquiétudes portent principalement sur l'utilisation extensive de la procédure de règlement ou de la négociation transactionnelle. Les règlements deviennent le mode prédominant de conclusion des affaires d'ententes et de nombreuses entreprises se demandent sérieusement s'il est bon que 90 pourcent des affaires soient résolues de cette manière. La principale crainte est que la pression en faveur du règlement devienne si forte qu'elle ferait apparaître ce dernier comme « un moindre mal », pour la simple raison que l'alternative à ce dernier, à savoir un long procès avec un jury, comporte trop d'incertitudes et des coûts beaucoup plus élevés. Cela pourrait aboutir à des situations où les entreprises en viendraient à reconnaître d'emblée les faits ainsi que la portée et la nature de l'affaire sans se préoccuper de savoir s'il s'agit d'une entente injustifiable ou d'une entente qui justifierait une approche de la règle de raison.

En Europe, les préoccupations sont d'un autre ordre car la procédure est encore récente et les questions portent davantage sur la prévisibilité et le montant des réductions d'amendes promises. Tandis que l'Allemagne et le Royaume-Uni ont réglé quelques affaires par voie de règlement, la France fait état d'une plus grande expérience en la matière avec 18 règlements depuis 2002, dont 10 ont concerné des affaires d'entente. Malgré cette expérience, des questions demeurent en termes de prévisibilité. Le montant des réductions d'amendes dépend de la qualité des engagements pris, et notamment de leur caractère novateur. En France, il est très difficile, malgré les informations disponibles, de prévoir si un engagement sera considéré suffisamment novateur et plus le temps passe, plus il devient difficile de faire preuve d'innovation. Certaines préoccupations concernant le manque de prévisibilité ont également été évoquées dans les quelques affaires résolues par voie de règlement au Royaume-Uni et en Allemagne, où il n'existe aucun cadre procédural ni orientations. La procédure de règlement de la Commission européenne suscite également des inquiétudes en termes de prévisibilité mais aussi à d'autres égards comme la rigidité de la procédure, et notamment l'obligation pour l'entreprise de soumettre une proposition écrite stipulant le montant de l'amende qu'elle est prête à accepter. Le niveau de réduction de l'amende est également source d'inquiétude. Même dans les pays qui avaient par le passé l'habitude d'infliger des réductions d'amendes plus élevées, il semble que la tendance, en France par exemple, consiste désormais à limiter la réduction à 10 pourcent, suivant ainsi le modèle de la Commission.

Le représentant du BIAC explique que toutes ces inquiétudes sont amplifiées par la « mondialisation de la procédure de règlement ». Le fait que les ententes présentent de plus en plus souvent une dimension internationale et que les règlements deviennent de plus en plus fréquents, ajouté au développement des poursuites privées et au recours plus fréquent à des poursuites pénales, augmente les dommages collatéraux potentiels pour les entreprises qui procèdent à un règlement dans un seul pays. Cela influe non seulement sur les procédures potentielles ou pendantes dans d'autres pays, mais aussi sur les actions privées et les procédures pénales dans d'autres pays. Le représentant indique pour terminer que le BIAC souhaite attirer l'attention des autorités de la concurrence sur la nécessité de tenir compte de ce nouveau contexte international lorsqu'elles arrêtent des décisions dans le cadre de procédures de règlement et qu'elles mettent en place de nouvelles procédures en la matière. Les autorités doivent prendre en considération l'« effet mondialisation » d'un aveu de culpabilité, le manque de confidentialité des preuves ainsi que l'obligation de partager des informations avec d'autres juridictions et celle de communiquer par écrit la décision du règlement.

Le représentant du Royaume-Uni formule une observation à propos de la contribution du BIAC, dont il ressort que le moyen préféré de résolution des affaires au Royaume-Uni est le règlement. Ce n'est pas le cas. Le règlement n'est qu'un élément d'un éventail d'approches diverses. Il peut sembler que de nombreux règlements sont en cours car l'OFT a annoncé l'ouverture de règlements dans un certain nombre d'affaires sur une période de 15 à 20 mois. Mais il ne s'agit certainement pas du mode le plus prisé pour

résoudre les affaires, et l'OFT s'attend d'ailleurs à un volume égal d'affaires conclues par la procédure classique et d'affaires résolues par voie de règlement.

Le représentant du Brésil réagit à la suggestion des États-Unis selon laquelle des aveux devraient toujours être exigés dans une procédure de règlement. Il fait valoir que l'intégration d'une procédure de règlement dans le système juridique d'un pays est essentielle pour la conception même d'une politique de règlement, et que la solution la meilleure peut à ce titre varier considérablement d'un pays à l'autre. Une proposition d'ordre général telle que celle soumise par la délégation des États-Unis n'est pas pertinente pour toutes les juridictions. À la lumière de toutes les contributions à la Table ronde, il semble que deux questions concernant le problème des aveux doivent être posées lors de la conception d'une procédure de règlement adaptée : (1) la constitution d'une entente est-elle une infraction pénale et (2) le règlement apporte-t-il une réponse ferme et définitive aux aspects pénaux et administratifs/civils d'une affaire ?

Au Brésil, des aveux sont obligatoires dans les affaires dans lesquelles a été conclu un accord de clémence. Jusqu'à présent, ce cas de figure ne s'est présenté qu'une fois, à savoir dans une affaire résolue par voie de règlement également aux États-Unis. Aucune affaire impliquant uniquement le Brésil n'a donné lieu à des aveux, donc il est trop tôt pour déterminer si ce paramètre affecte ou non d'autres poursuites judiciaires et si les poursuites pénales réduisent l'efficacité de l'incitation au règlement.

Le Président passe à une question spécifique évoquée dans la contribution allemande, laquelle décrit un système qui ne permet pas aux parties de renoncer à leur droit de faire appel de la décision rendue. Toutefois, le Bundeskartellamt a trouvé une façon de structurer les règlements de telle sorte que leurs avantages ne puissent être acquis qu'à la condition que les parties impliquées s'abstiennent d'introduire tout recours contre ses décisions. Le Président demande à la délégation allemande de préciser son approche de cette question.

Le représentant de l'Allemagne explique que dans le système de règlement allemand, les défendeurs sont en général tenus de reconnaître leur culpabilité. Par ailleurs, bien que le droit de faire appel d'une décision du Bundeskartellamt ne puisse être refusé, dans le cas où les défendeurs décident de faire appel de la décision du Bundeskartellamt, des aveux peuvent, même s'ils sont retirés par la suite, faire l'objet d'une accusation en vue de poursuites ultérieures.

L'expérience du Bundeskartellamt révèle qu'une fois établie la reconnaissance de culpabilité, le règlement ne peut être cassé, de sorte que toute discussion portant sur ce qui arriverait dans l'éventualité où le défendeur reviendrait sur sa promesse de procéder à un règlement est en fait purement théorique. Le représentant explique que le Bundeskartellamt pourrait toutefois envisager deux actions possibles dans un tel cas de figure : (1) le Bundeskartellamt révoquerait sa décision prise concernant l'amende dans le cadre de la procédure de règlement et rendrait une nouvelle décision – étant entendu que cette décision ne prendrait pas en compte les circonstances atténuantes retenues lors de la procédure de règlement, si bien que l'amende serait plus élevée – ; ou (2) le Bundeskartellamt pourrait décider de poursuivre l'affaire en justice et de défendre sa thèse devant un tribunal.

Le Bundeskartellamt a fait preuve d'une grande souplesse dans la négociation de règlements. Aucune réglementation précise ne prescrit la manière dont le Bundeskartellamt doit procéder, bien que les affaires qui ont surgi aient contribué à fournir certaines « orientations » aux milieux d'affaires. Les procédures de règlement avec le Bundeskartellamt peuvent commencer juste après une perquisition surprise et, dans de telles affaires, le Bundeskartellamt peut poursuivre avec une communication des griefs succincte et parvenir à une décision très rapide. Toutefois, une procédure de règlement peut aussi commencer après la notification d'une communication des griefs. Les négociations peuvent impliquer tous les défendeurs ou un certain nombre d'entre eux seulement, et il n'existe pas d'approche de type « tout ou rien » de la procédure de règlement.

Le Président invite les délégués à prendre la parole une dernière fois avant les conclusions des invités d'honneur.

Le représentant de la Russie explique que son pays est doté d'un système d'application de la loi par la voie administrative, mais d'aucune procédure officielle concernant la résolution d'affaires par voie de règlement anticipé. Il indique que la Russie hésite à adopter un tel système en raison de la diversité des affaires d'ententes que rencontre l'autorité. En 2008, l'autorité a détecté 26 affaires d'ententes rien que dans le secteur pétrolier, chacune d'entre elles étant différente en termes de preuves et de nature de l'infraction, mais aussi concernant d'autres paramètres essentiels. Toutefois, le représentant fait savoir qu'au cours d'une enquête sur une entente, l'autorité discute de certains aspects de l'affaire avec les parties impliquées et que ces discussions peuvent être assimilées à une « quasi-procédure de règlement ».

La procédure est relativement transparente ; elle commence par une notification officielle aux participants à une entente les informant que l'autorité a ouvert une procédure à leur encontre. Les participants à une entente sont ensuite invités à rencontrer l'autorité. À ce stade, ils se voient expliquer la nature des accusations et reçoivent des informations concernant des décisions prises dans des affaires similaires antérieures. La suite de l'enquête dépend de la stratégie retenue par les participants à l'entente. Si des aveux sont faits dès les premiers moments de la procédure, l'amende sera très probablement moins élevée que s'ils interviennent à un stade plus avancé. Les amendes infligées dans le cadre d'affaires d'ententes vont de un à 15 pourcent du chiffre d'affaires du participant à une entente sur le marché affecté, de sorte que la différence de montant de l'amende peut être un élément tout à fait considérable pour l'entreprise qui étudie la possibilité de coopérer ou non avec l'autorité.

Le moment auquel la culpabilité est reconnue n'est pas le seul facteur pris en compte par l'autorité. La solidité ou l'insuffisance des éléments de preuve, ainsi que la quantité de ressources nécessaires à la conduite de l'enquête, constituent également des facteurs importants. Le volume des ventes affectées et les répercussions de l'entente sur l'économie nationale ont aussi leur importance, notamment dans le secteur pétrolier russe, où l'autorité a infligé des amendes atteignant un milliard de roubles. La récidive est également un aspect pris en considération. Lorsqu'elle poursuit des ententes, l'autorité cherche davantage à s'assurer qu'il est mis fin aux comportements incriminés plutôt qu'à punir les entreprises, et s'efforce de trouver d'éventuelles mesures correctives comportementales ou structurelles afin de préserver la concurrence à l'avenir.

Le représentant des Pays-Bas formule des observations suite à l'invitation du BIAC à plus de convergence et déclare qu'une telle convergence n'est possible que si les programmes de clémence sont identiques. Aux Pays-Bas, comme aux États-Unis et dans l'UE, une entreprise peut être exemptée d'amende si elle est la première à dénoncer une entente. Toutefois, les entreprises qui se manifestent en deuxième ou en troisième position pour avouer leur implication dans une entente bénéficient elles aussi de réductions d'amende si elles fournissent des preuves supplémentaires. Aux yeux du représentant des Pays-Bas, il n'est pas nécessaire de mettre en place un nouvel outil d'investigation, comme la transaction judiciaire aux États-Unis, car les Pays-Bas ne peuvent qu'accélérer leur procédure administrative, ce qu'ils ont d'ailleurs fait lors de leur premier cas de règlement. Des lignes directrices relatives aux règlements ont été publiées au vu de l'expérience tirée de cette première affaire. Le NMa a cependant clairement indiqué dès le début de l'affaire que ces lignes directrices n'étaient applicables qu'à celle-ci.

Le représentant explique qu'officiellement, le NMa ne dispose d'aucune base juridique sur laquelle décider d'accélérer les procédures, mais comme il existe un précédent de règlement, les entreprises se réfèrent à ce dernier pour réclamer un règlement. Au cours des dernières années, le NMa a accepté de procéder à un règlement uniquement dans quelques affaires et à la condition que toutes les parties impliquées acceptent d'y participer, tandis que l'on ne recense aucune affaire hybride. Dans les affaires résolues par voie de règlement, le NMa a veillé à ce que des amendes adaptées soient fixées via une

évaluation comparative et a parfois adressé un courrier aux entreprises visées pour leur indiquer la fourchette probable de leur amende.

Le Président donne la parole aux deux invités d'honneur afin qu'ils puissent faire part de leurs dernières impressions.

M. Hansen a fait observer que la question des poursuites civiles a été peu abordée, alors qu'il s'agit parfois de la principale préoccupation des entreprises. Par conséquent, lorsque l'on étudie la question des incitations, il convient de considérer également leurs implications en termes de poursuites civiles. La valeur probante d'une décision accompagnée d'une reconnaissance de culpabilité est un point très important ; un règlement permet une décision plus rapide et, par conséquent, pour certaines affaires et dans certains pays, il permet à une action privée d'aboutir plus rapidement à une décision. De toute évidence, les appels peuvent être un moyen de retarder des poursuites civiles, au moins dans certaines affaires, comme celles concernant les décisions de la Commission européenne. Aujourd'hui, plusieurs juridictions imposent que toutes les voies de recours contre une décision rendue dans le cadre d'une action publique aient été épuisées avant qu'un plaignant puisse engager une action civile sur la base de cette décision. Un certain nombre d'affaires au Royaume-Uni ne laissent pas d'équivoque sur ce point, tandis que d'autres pays (l'Allemagne, par exemple) exigent qu'une décision soit rendue à l'issue d'une action publique pour qu'une action civile puisse être engagée. Il s'agit là d'une incitation très importante qu'il convient d'étudier de manière approfondie.

M. Hansen rappelle qu'une question intéressante a été soulevée lors de l'échange entre M. Spratling et le représentant du Taipei chinois, question qui présente aussi certains liens avec celle des poursuites civiles : lorsqu'une entreprise prend conscience de son éventuelle implication dans une entente, elle met fin à son comportement répréhensible, mais ce comportement n'est pas toujours rapporté à une autorité de la concurrence. M. Hansen explique que la question de la « probabilité de voir la loi appliquée » et la « probabilité de la détection » d'un comportement sont deux notions distinctes. Il existe de nombreux cas de figure où une entreprise met un terme à une situation où il est difficile de déterminer ce qu'il conviendrait de faire et où seule une analyse très complexe permettrait de savoir s'il y a lieu de se dénoncer auprès des autorités. L'un des principaux facteurs à prendre en compte est le risque de poursuites civiles. Une entreprise évaluera les avantages d'une dénonciation auprès des autorités et d'une demande d'immunité par rapport à de nombreux autres facteurs, notamment la probabilité d'une véritable action coercitive si l'entreprise se manifeste. Toutefois, pour l'entreprise, le principal élément de cette équation reste le risque d'une exposition à des poursuites civiles.

M. Spratling formule quatre observations finales. Premièrement, concernant les dernières remarques de M. Hansen, M. Spratling convient que les toutes premières dispositions prises suite à la détection d'un comportement illégal potentiel varient d'une juridiction à l'autre et qu'il est vrai que certaines ententes détectées ne sont pas toujours signalées. Cependant, dans le cas d'une entreprise implantée aux États-Unis ou d'une entreprise qui risque d'une façon ou d'une autre de voir ses cadres condamnés à des peines de prison, en raison de l'étendue des compétences du DOJ, elle veillera à ce que ces derniers évitent la prison. Cette situation implique des calculs tout à fait différents en comparaison avec une entreprise qui examine l'éventualité de devoir payer une amende.

Deuxièmement, M. Spratling félicite le Bundeskartellamt pour la simplicité et le caractère direct de son approche des règlements ainsi que pour ses lignes directrices aux termes desquelles une réduction peut être accordée au titre de circonstances atténuantes et un règlement peut lui-même être considéré comme une circonstance atténuante. M. Spratling déclare que beaucoup de pays pourraient tirer des enseignements de la simplicité de cette approche.

Troisièmement, pour un conseil d'administration, l'importance de mettre un point final à une affaire et de voir l'entreprise reprendre le cours normal de ses activités plutôt que d'avoir à faire face à des poursuites, surtout si leur issue est incertaine, ne saurait être surestimée.

Quatrièmement, s'il est vrai que les autorités chargées de l'application de la loi arrêtent leurs décisions et mettent au point des politiques en tenant compte des conséquences de celles-ci à l'échelle mondiale, il est vrai aussi que les participants à des ententes et leurs avocats-conseil agissent de la même manière. De ce fait, lorsqu'un avocat-conseil sollicité par un participant à une entente étudie l'option d'un règlement dans une juridiction donnée, il en examine les avantages dans cette juridiction, mais surtout, il examine ses conditions et ses effets dans d'autres juridictions. M. Spratling fait ce dernier commentaire car il souhaite encourager les représentants des autorités en charge de l'application de la loi présents à la Table ronde à évaluer aussi leur propre système à la lumière de cette réflexion.

Le Président remercie les participants pour leur contribution. Il souligne la grande importance des questions examinées et indique qu'à ses yeux, les autorités procèdent de plus en plus à des échanges d'informations non seulement aux fins de leurs enquêtes, mais aussi dans le cadre des règlements et des solutions négociées, ce qui représente de nouveaux défis et ouvre de nouvelles perspectives.