



Plea Bargaining and Settlement of Cartel Cases

What are the benefits of settlements?

What circumstances contribute to successful settlements?

Do settlements undermine deterrence?

Do settlements conflict with leniency programmes?

How do settlements affect defence rights?

What is the role of courts in settlements?

For further information

For further reading

Where to contact us?

Introduction

As competition authorities have stepped up their efforts to detect and punish cartels, several cases have highlighted how differences in enforcement procedures between countries have a substantial impact on the duration of investigations and the resources that a competition authority must commit to a cartel case.

For example, after the discovery of an international cartel fixing the price of lysine, a widely-used additive in animal feed, it took almost 10 years after a plea agreement had ended the investigation in one jurisdiction before all appeals in the same case were finally exhausted in another jurisdiction.

The most basic reason for these differences is that some competition authorities can “settle” cartel cases. This means they can formally dispose of a cartel investigation through a settlement or plea agreement, in which a defendant typically admits a competition law violation, agrees to co-operate with the investigation and waives certain procedural rights, sometimes including the right to appeal, in return for a reduced sanction. Without a settlement option, prosecuting cartel cases can take many more years, as the competition authority must go through a full procedure and resolution of the case. What is more, the appeals process may be engaged, requiring additional time and resources.

Many competition authorities are therefore looking at mechanisms to allow settlements to speed up cartel investigations and save resources. But settlements can also raise concerns, for example about reduced deterrence effects, the impact on leniency programmes, the diminished role of courts, and weakened defence rights.

This *Policy Brief* looks at the use of settlements in cartel cases, the concerns they can raise and how competition authorities can respond to them. It does not, however, reflect any single jurisdiction’s experiences, policies, or practices. ■

What are the benefits of settlements?

Plea agreements or settlements can provide significant benefits to both sides. From the competition authority's point of view, they can bring about more efficient outcomes, saving resources and time and allowing the competition authority to make better use of its resources. Increased enforcement activities can overall lead to greater deterrence. From the defendant's point of view, a plea agreement or settlement likewise saves time and money and can give him a greater sense of being involved in the disposition of the case and of being able to influence its final outcome. They can also be beneficial for society, as they encourage an optimal allocation of scarce investigation and prosecution resources and thus increase the deterrent value of existing resources.

If a cartel case leads to a settlement or plea agreement, each side will give up some entitlements it would have had if the case had gone to a full trial or through a full administrative procedure ending with a formal decision. Both sides also agree together on a sanction or proposed sanction. So the competition authority may well forgo the right to seek or impose higher penalties, in return for the savings in resources and the certainty of a guilty plea. The defendant, in turn, waives certain procedural options that a more formal process and trial would provide – as well as any possibility of acquittal – in return for an outcome that may include reduced sanctions.

The benefits explain why, in jurisdictions where they are available, settlements tend to become the procedure of choice to resolve cartel cases. It also helps explain why this has become an area of great interest for many other competition authorities. ■

What circumstances contribute to successful settlements?

A policy of using settlements works best if the competition authority can establish a public record of its settlement practice and a reputation for being transparent, consistent and fair in settlement negotiations. Publishing settlements, guidelines, and public speeches about the practice can contribute to these goals. In addition, both sides must understand that they must act in good faith when they seek to settle a case.

Rules governing settlement procedure should be transparent and predictable. Defendants will be more willing to settle if they are aware of the rewards for co-operation, the risks of failing to reach a settlement, and the procedures that the competition authority

will follow. Competition authorities with experience in settlement negotiations recognize the importance of transparent and predictable procedures and have found it beneficial to adopt clear, structured procedures to settle cartel cases.

Transparent procedures and a detailed account of the offence and discussion of the appropriateness of a proposed fine also make it more likely that a court will accept the settlement reached. In addition, transparency can alleviate concerns about the effect of plea agreements on the rights of defendants. Competition authorities, however, should always retain a certain flexibility in order to correctly account for the particular facts of the case, including the level of evidence that a defendant can provide, the level of co-operation, etc.

Greater certainty can facilitate settlements. Certainty will be increased if the defendant has the right to withdraw a guilty plea if the sanction ultimately imposed by a court or other decision maker exceeds the sanction envisaged in a plea agreement, and if the defendant can waive the right of appeal. Conversely, uncertainty and information asymmetries can interfere with settlements. ■

Do settlements undermine deterrence?

Settlements should allow better use of a competition authority's resources, leading to more cartels being detected and prosecuted and increasing deterrence. But settlements of cartel cases can raise concerns about effective deterrence if they result in lower fines.

Moreover, a competition authority has to resist the temptation to use settlements to quickly clear an agency's docket and get rid of "difficult" cases. Maximizing overall deterrence can be a useful benchmark which may assist competition authorities in making decisions about the complex trade-offs inherent in settlements.

Most importantly, to maintain deterrence in cartel enforcement a competition authority must be able to impose stiff sanctions even in settled cases. This in turn depends on whether there is a credible threat that substantial sanctions could be imposed in a normal procedure or after a trial. The need to use settlements only against the backdrop of credible, substantial sanctions also suggests that this instrument should be used cautiously early in the development of a jurisdiction's anti-cartel enforcement efforts, before credible

sanctions have been established and courts have been persuaded to approve or impose high fines. ■

Do settlements conflict with leniency programmes?

Leniency programmes are an important tool of competition authorities in the fight against cartels. Depending on how leniency programs are structured, and the parameters of settlements, the relationship between both settlements and leniency programmes can raise difficult questions.

For example, some jurisdictions expressed a concern that settlement discounts must be calibrated carefully and take account of the specificities of leniency regimes in order to avoid the risk of granting settlement discounts in a range that would reduce the incentives of companies to come forward and cooperate under leniency. Additionally, these jurisdictions felt that settlement discounts and discounts obtained for co-operation under leniency may also be cumulative in order to ensure that incentives to enter each of the programs remain strong and independent of each other.

Competition authorities have different views concerning the relationship between settlements and their leniency policies or similar policies that reward co-operation by cartel participants that did not receive immunity. In the United States and other jurisdictions in which full immunity is available only to the first company to report and qualify, companies that are not eligible for full immunity but wish to accept responsibility and cooperate may enter into settlements or plea agreements and may have their fines and sentences reduced, but these settlements are accomplished pursuant to a distinct procedure that falls outside of the leniency program. In the United States the guilty plea procedure used in cartel cases is available to all criminal defendants. In this approach, settlement negotiations can occur throughout an investigation, and the competition authority's ability to offer greater sentence discounts for earlier settlements increases the competition authority's ability to extract co-operation from the parties. Defence counsel confirmed that this approach facilitates negotiations with the authorities and brings an investigation more expeditiously to an end.

Other competition authorities that are currently considering introducing settlements tend to make a distinction between their leniency programs and settlement procedures. Leniency is seen as

an investigative tool whereby companies receive either immunity for disclosing the existence of a cartel or fine reductions for bringing additional evidence. On the other hand, settlements are viewed as a mechanism to obtain procedural efficiencies once the investigative work has been completed and in the phase leading up to the adoption of a formal decision or trial. Therefore, under this approach leniency and settlement procedures remain two distinct and separate tools, each serving a different purpose. ■

How do settlements affect defence rights?

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

These concerns appear less relevant to settlements in cartel cases for a number of reasons. Firstly, defendants in cartel cases are represented by sophisticated and well-paid counsel with substantial experience. They can make informed choices and typically can rely on greater resources than the competition authority. In addition, settlement procedures and plea agreements are in many ways a logical extension of practices that are already in place and widely accepted.

In the framework of leniency programmes, competition authorities already make some kind of contract offer by promising to impose no sanction on the first cartel participant who informs the authority about the cartel's activities. In addition, as competition authorities reward co-operation in the form of sentencing and/or fine discounts, companies frequently will produce self-incriminating evidence, thus waiving rights that defendants normally have in criminal and administrative procedures, in exchange for a lower sanction. The most guilty cartel participants may be able to disclose the most valuable information and may benefit from the greatest reward.

Settlements would take these practices one step further by creating a broader package that typically will include an admission of unlawful conduct, a waiver of certain rights and the assumption of co-operation obligations, in exchange for certain benefits, most importantly a reduced sanction.

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

What is the role of courts in settlements?

In criminal and civil enforcement regimes, where courts typically have to impose sanctions and have to review and approve proposed settlements, some observers have expressed a preference for more active courts to uphold the idea that settlements are subject to judicial oversight. Courts have also insisted that they do not just rubberstamp proposed settlements. In the United States, the court's role in the plea agreement process is to accept or reject a plea agreement once it has been agreed to by the parties, and if accepted, to impose sentence. The U.S. Sentencing Guidelines are used to determine the fine and jail ranges that the government and defendant will recommend to the court, and courts generally tend to accept the recommendation of the government in the majority of cartel cases in which settlements are reached. In other jurisdictions, a more informal «dialogue» between the competition authority and courts to ensure that the authority can anticipate the courts' requirements and courts understand the way the competition authority handles settlements can minimize the number of cases in which courts feel that they have to intervene in proposed settlements.

In jurisdictions with administrative enforcement against cartels, there is an important question about whether the defendant can waive the right to appeal as part of the settlement. Given the fact that in an administrative system a waiver of the right of appeal would eliminate any judicial control over cartel enforcement, it is reasonable to assume that the right of appeal should be treated differently from other procedural rights, which a defendant may typically waive in the course of a cartel investigation, such as the right against self-incrimination. This would suggest that waivers of the right to appeal should be treated with caution. ■

For further information

For more information about this *Policy Brief* and the report on “Plea Bargaining/Settlement of Cartel Cases”, please contact: Antonio Capobianco, tel.: +33 1 45 24 98 08, e-mail: antonio.capobianco@oecd.org.

For more information on the OECD’s work on competition policy, please see our website at www.oecd.org/competition or contact dafcomp.contact@oecd.org.



For further reading

OECD (2007), **Journal of Competition Law and Policy**, ISSN 1560-7771, Subscription (3 issues per year): € 152.

The following are available download at www.oecd.org/competition

OECD (2005), **Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations**, available online at www.oecd.org/dataoecd/1/33/35590548.pdf.

OECD (2005), **Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation**, available online at www.oecd.org/dataoecd/30/2/36600303.pdf.

OECD (2003), **Hard Core Cartels: Recent Progress and Challenges Ahead**, ISBN 978-92-64-10124-1, 64 pages, € 25.

OECD (2002), **Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes**, ISBN 978-92-64-19735-0, 85 pages, € 36.

OECD (1998), **Recommendation of the Council Concerning Effective Action against Hard Core Cartels**, available online at www.oecd.org/dataoecd/39/4/2350130.pdf.

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