**International Competition Network**
**Cartel Working Group**
**Subgroup 1 – General Legal Framework**

# CARTEL SETTLEMENTS

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**INTERNATIONAL COMPETITION NETWORK**

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# Cartel Settlements

## I. Introduction

The use of settlements has become a recent hot topic among anti-cartel enforcers. Settlements are regarded by many as a "win-win" anti-cartel enforcement tool that can provide a multitude of benefits to enforcers as well as to settling cartel participants. Among the many benefits that will be discussed in this paper, cartel settlements allow enforcers to free critical resources, secure valuable cooperation and create momentum in their investigations, while settling cartel participants can receive a reduction in their penalty as well as certainty and finality through the more expeditious resolution of charges against them. Settlements may be utilized by cartel participants that were not first in the door, or who are otherwise ineligible for full immunity or leniency, therefore, they provide an important vehicle for resolving charges against those who have lost the leniency race.

There is strong interest among ICN Cartel Working Group members in the topic of settlements. Accordingly, the ICN Cartel Working Group canvassed its members by sending a questionnaire regarding the use of settlements in cartel matters. Of the twenty responses received, nine jurisdictions indicated that they currently have some type of cartel settlement system in place and four jurisdictions responded that they are currently contemplating such systems.[1] The information provided by responding ICN member jurisdictions[2] provided valuable insights into the types of cartel settlement systems currently in place and the issues faced by anti-cartel enforcers in designing and implementing cartel settlement systems.

The types of settlement systems in place, or contemplated, in each jurisdiction are dependant upon the legal and procedural framework of the respective jurisdiction. This paper does not address the nuances of how particular settlement systems operate in each of these distinct cartel enforcement regimes, but instead it provides a broad overview and addresses some basic settlement issues, principles, benefits and incentives that traverse many of these systems. The discussion draws heavily on the experiences of anti-cartel enforcers[3] around the globe that have successfully reached cartel settlements. Participating ICN member jurisdictions have provided case summaries that highlight recent cartel settlements reached in a diversity of cartel enforcement regimes. This paper will discuss:

- types of cartel settlement systems;
- the interplay of leniency and cartel settlements;

[1] S*ee* Appendix A: Table of Responding ICN Member Jurisdictions.

[2] Throughout this paper, the term "jurisdictions" is used to refer to ICN member jurisdictions responding to the questionnaire on cartel settlements.

[3] Anti-cartel enforcement takes various forms around the world and cartel conduct may be investigated and prosecuted by different entities within a specific jurisdiction. Accordingly, throughout this paper, the words "government," "anti-cartel enforcers," "prosecutor," and "competition agency" are used interchangeably and are intended to generally include all public enforcers that investigate and/or prosecute cartel conduct.

- key principles to inducing cartel settlements;
- benefits of cartel settlements;
- key issues commonly addressed during settlement discussions;
- key elements of cartel settlements; and
- other contemplated cartel settlement systems.

## II. Types of Cartel Settlement Systems

Cartel enforcement regimes vary around the world, and the type of settlement system that can be successfully utilized in any jurisdiction is necessarily dependent on a multitude of factors including: the type of enforcement regime; the cartel participants that can be charged; penalties available; and the broader legal, constitutional and policy framework.

Cartel enforcement regimes may be criminal, civil, administrative, or some hybrid. The nine responding jurisdictions with settlement systems currently in place represent a cross section of these enforcement regimes and they utilize various types of settlements in cartel cases.

Anti-cartel enforcers have varying degrees of experience utilizing settlements.[4] The United States, at one end of the spectrum, has entered into hundreds of plea agreements in cartel cases over many decades, while Brazil entered into its first four cartel settlements in 2007 under its new settlement system. In France, where a settlement procedure was introduced in 2001, but first implemented in 2003, the experience to date represents a midway stage. In 2007, the French Competition Council (FCC) handed down five cartel settlement decisions, representing 24% of all cartel decisions handed down by the FCC that year. As of the time of this paper, still other jurisdictions, such as the European Union, Hungary and Sweden, are currently contemplating the introduction of a settlement procedure for cartel cases.

### A. Criminal Enforcement Regimes

Canada, Israel and the United States prosecute hard core cartel conduct as criminal violations. Corporate cartel participants in these jurisdictions are subject to criminal fines and individuals may be sentenced to incarceration and also to pay fines. In these jurisdictions, corporate and individual cartel participants may resolve cartel charges by entering into plea agreements utilizing the same criminal plea system in place for all crimes in those jurisdictions. In each jurisdiction, pleas are subject to court approval and a court imposes the defendant's sentence.

In Canada, the Canadian Competition Bureau (CCB) investigates cartel conduct, but once the investigation is completed, evidence of cartel conduct is referred to the Director of Public Prosecutions (DPP) of Canada for criminal prosecution. The DPP

[4] For the number of cartel settlements in each jurisdiction over last five years, s*ee* Appendix A: Table of Responding ICN Member Jurisdictions.

conducts plea negotiations and consults with the CCB with respect to recommending a plea and sentencing. In Israel, the Israel Antitrust Authority (IAA) is authorized to investigate and prosecute cartels criminally and to negotiate and enter into criminal pleas with cartel participants.[5] Similarly, in the United States, the Antitrust Division of the U.S. Department of Justice (Antitrust Division) criminally investigates and prosecutes hard core cartels and is authorized to negotiate and enter into plea agreements to resolve federal criminal antitrust charges.

### B. Civil Enforcement Regimes

In Australia, cartels are currently civil violations[6] and the Australian Competition and Consumer Commission (ACCC) may negotiate civil settlements or reach administrative settlements in cartel cases. In Australia, cartel settlements are usually reached during the litigation process under the general settlement procedures provided for by the Australian legal system.

In the United Kingdom, the Office of Fair Trading (OFT) has, in a number of recent cases under the Competition Act 1998, entered into agreements with one or more parties under investigation whereby a reduced penalty has been imposed in return for an admission of liability and various other types of cooperation. The aim is that the administrative procedure will be significantly shortened, and the appeal risk significantly reduced, as a result of such settlements, although a Statement of Objections and infringement decision will still be issued. This form of settlement is relevant only to investigations under the civil regime and not to prosecutions for the criminal cartel offense under the Enterprise Act 2002, which are conducted separately.

### C. Administrative Enforcement Regimes

In Germany, the Bundeskartellamt (BKA) prosecutes hard core cartels under an administrative regime. Under German law there are two procedures which can be followed in the case of a cartel violation. First, administrative proceedings may be conducted which may *inter alia* result in a declaration that a certain behavior is illegal. Second, due to the fact that cartel violations are qualified as misdemeanors, fine proceedings may be initiated with the aim of imposing fines against cartel members. In the case of a hard core cartel, the BKA will almost always initiate an administrative fine proceeding. The BKA acts both as the investigating authority and the authority imposing the fine. The BKA can enter into settlements of administrative fine proceedings. If an appeal is filed against an administrative fines decision, according to German law, the decision proceeds to an indictment to be presented in court by the public prosecution. Although a settlement can still be concluded at this stage of the proceedings, it then requires the consent of the court, the public prosecution and the defendant; in such

[5] In Israel, the IAA may also prosecute cartels civilly and may enter into civil consent decrees to resolve such charges, but criminal enforcement is favored in hard core cartel cases and criminal plea agreements are used to resolve cartel charges in all but exceptional circumstances.

[6] A proposal to criminalize cartel conduct is currently pending in Australia. Criminal sanctions would apply to both individuals and companies.

situations the BKA works closely together with the public prosecutor in order to decide whether to agree to a proposed settlement and under which conditions. In addition, in Germany certain cartel conduct, including bid rigging, may also constitute a criminal offense. If the cartel conduct under investigation constitutes a criminal violation, the BKA conducts independent proceedings only against the corporate cartel participants and the public prosecution conducts the criminal proceedings against the individuals.

France[7] and Switzerland have administrative enforcement regimes in place and may reach administrative settlements in cartel cases. In the French settlement mechanism, the agency, while administrative, works under rules of due process. The Rapporteur General of the Competition Council can reach an agreement with the firms that are willing to waive their right to challenge the charges brought against them and to accept a streamlined procedure. The College then adjudicates a reduced fine in exchange for this waiver.[8] France notes that its system allows parties to negotiate a fine reduction, either in percentage or in absolute terms, but there is no place for any negotiation whatsoever on the infringement itself.

The European Commission has an administrative cartel enforcement regime and is currently contemplating a non-negotiated settlement procedure.

### D. Hybrid Enforcement Regimes

Brazil has hybrid enforcement and settlement regimes for cartels. In Brazil, a cartel is an administrative infringement as well as a criminal offense. The Brazilian Federal Public Prosecutor is in charge of criminally prosecuting cartel offenses. There are three Brazilian antitrust 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 cartels. CADE is the administrative tribunal, composed of seven Commissioners, which makes the final rulings in connection with cartels. Administrative settlements of cartel charges are negotiated and reached with CADE, which consults with SDE about the investigation and settlement negotiations. Administrative settlements with CADE do not absolve cartel participants from criminal liability in Brazil.

## III. Interplay of Leniency and Settlements

Cartel settlements and leniency programs are often intertwined with many of the same benefits and, in some jurisdictions, shared goals. The last decade has seen the proliferation of corporate leniency programs around the world. Today upwards of 40

[7] The French Code of Commerce also includes a criminal provision allowing criminal courts to fine or imprison individuals who have played a determining role in anticompetitive practices. However, the settlement procedure only applies to administrative proceedings before the Competition Council, and not to judicial proceedings.

[8] The scope of the French settlement procedure, which is set out by the law, extends to all types of anticompetitive behavior, but in practice, it is applied mainly to hard core cartels (65% of all recorded cases).

jurisdictions have some type of leniency program[9] allowing cartel participants to self-report cartel conduct, cooperate with the government and receive immunity from prosecution or a reduction in fines. These programs share the common goal of detecting and deterring cartel offenses by inducing self-reporting and cooperation through the promise of lenient treatment.

With increasing frequency, competition authorities in multiple jurisdictions are obtaining the valuable cooperation of cartel insiders, cooperating with one another and coordinating their investigative strategies against the remaining conspirators. As a result, many competition authorities are now facing the desirable challenge of quickly obtaining strong evidence of cartel conduct and trying to find the resources to expeditiously complete investigations and bring cartel participants to justice. Similarly, once a cartel investigation goes overt, often through the execution of coordinated raids or searches, many corporations and individuals involved in international cartel activity who have not sought leniency look to quickly resolve the allegations against them in multiple jurisdictions.

While there has been global convergence in leniency programs over the last decade, this convergence dissipates when it comes to how to treat companies and their executives who lose the race for full immunity but are still in a position to offer timely and valuable cooperation. In virtually every jurisdiction that has a corporate leniency program, the first corporate cartel participant to report the cartel conduct before an investigation has begun and meet the other qualifying criteria of the jurisdiction's program, will receive full immunity from prosecution. A company that has lost the race for full immunity but still seeks to cooperate with the government in exchange for a reduction in fine may do so in various jurisdictions around the world, but must often do so under different procedures – either via a reduction in fine pursuant to a leniency program, or via a plea or settlement in jurisdictions where immunity is only available to the first applicant to qualify.

In Brazil, Canada, Israel and the United States, 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. However, these settlements are accomplished pursuant to a distinct procedure that falls outside of the leniency program. Under such a regime, the incentives for cartel participants to settle are readily apparent. Once a company has lost the race for leniency, it is faced with the choice of litigating against the government through the end of any trial or administrative proceeding, or offering to cooperate and settle with the anticipation of receiving a lower

[9] Leniency terminology is not universal, so some clarification is necessary. "Full immunity" from prosecution, which means no corporate fine and, where individual prosecution is possible, no prosecution of cooperating executives, is available to the first qualifying company to come forward to report its cartel conduct. In some jurisdictions, full immunity is only available to the first qualifying applicant and second and subsequent companies that cooperate with the investigation are eligible to obtain reduced sentences outside of the jurisdiction's leniency program. Other jurisdictions provide for both full immunity to the first qualifying applicant and also provide for reduced penalties for applicants that are not eligible for full immunity. These different types of policies are often collectively referred to under the umbrella term "leniency programs."

fine or sentence. As discussed below, in some jurisdictions corporate settlements may also include promises of non-prosecution for certain cooperating corporate employees.

Other jurisdictions, such as Australia, the European Union (and many European jurisdictions that follow a similar leniency model), Japan and Korea have expanded their leniency programs to allow sentencing reductions for companies not eligible for full immunity that can still provide assistance to the investigation. These expanded leniency programs vary in terms of how they determine the reduction in fine a prospective cooperator will receive in return for full cooperation.[10]

In jurisdictions where a reduction in fine can be obtained for leniency applicants, a settlement system must provide some additional incentives, beyond those provided for under the leniency program, in order to induce settlements. In such jurisdictions, settlement systems are being utilized or explored without replacing existing leniency programs. France cites its settlement program as such an example. The French leniency program allows firms that intend to disclose their participation in an alleged cartel, but do not meet the conditions to be eligible for full immunity from fines, to still benefit from a reduction in fine by providing information representing a significant added value for the Competition Council. In instances where other members of the cartels have brought so much additional information forward that there is not much room left to award further fine reductions on leniency grounds, a firm may decide not to cooperate, in the hope that the evidence provided will not suffice to establish its individual liability. However, to offer firms an incentive to cooperate in such a case, French law provides an alternative settlement avenue. Should the firm take the view, once the charges have been notified by the Competition Council, that it is advisable not to challenge the case against it, the firm can apply for a settlement. The fine reduction that it can earn by doing so is not as high as the one it could have expected by applying for leniency, but still provides an incentive to settle.

Some jurisdictions with leniency programs that allow for a reduction in fine for second and subsequent applicants questioned what could be gained from a settlement system in their jurisdiction. Enforcers in some of these jurisdictions expressed a concern that if settlement incentives are too high, cartel participants will choose to utilize available settlement systems rather than leniency programs, and settlements would result in a negative effect on the leniency program. The flip-side of this concern is the situation where settlement incentives are not great enough to induce settlements and corporate cartel participants, and the attorneys that counsel them, determine that it is not in their interest to forego certain rights and settle.

Regardless of the type of leniency program available, if a settlement system is to be effective, anti-cartel enforcers must strike the critical balance between creating sufficient incentives such that a cartel participant is willing to settle, while still providing for a penalty that sends a deterrent message critical to the sustainability of an effective cartel enforcement regime. This is no easy task. In jurisdictions where a reduction in fine

[10] Some programs use a fixed percentage discount, while other programs state the discount in terms of a range of discounts available for the second-in and subsequent companies.

is available pursuant to a leniency program, offering an additional reduction to a settling party beyond any leniency reduction is the primary incentive for parties to settle. In such a system, a critical issue is making a settlement discount sufficiently attractive to cartel participants such that they are willing to settle.[11]

Some jurisdictions where the maximum cartel penalty is not all that high expressed concerns about their ability to provide an attractive enough additional settlement discount beyond that offered under their leniency program. The basic concern of these jurisdictions is that the smaller the margins for reduction of a fine, the more difficult it is to provide incentives for settlements under such a system and the more likely a settlement system is to negatively affect an existing leniency program. This concern may be best addressed by increasing the anti-cartel enforcement "stick" – that is, seeking to increase penalties – rather than trying to make the "carrot" more attractive by revising an existing leniency programs or foregoing a settlement system.

The experience of jurisdictions with cartel settlement systems currently in place illustrates that additional non-monetary incentives can also encourage cartel participants to settle. Accordingly, this paper will provide examples of elements of cartel settlements that have effectively encouraged settlements. While written by enforcers, this paper will focus on the benefits of settlements for both the government and settling cartel participants, because both must appreciate those benefits and commit to making some principled concessions beyond those offered by leniency in order to make a settlement system effective.

## IV. Keys to Inducing Cartel Settlements: Transparency, Predictability, Certainty

Transparency is the lifeblood of an effective cartel settlement system. "Transparency" and the related terms "predictability" and "certainty" are popular buzzwords in the world of anti-cartel enforcement. More than mere jargon, these principles are critical in the context of leniency and settlements where cartel participants must take the leap of self-reporting their conduct to the government, waiving certain rights, and foregoing the opportunity to lodge a defense and attempt to persuade a factfinder or appellate court that they should be exonerated of cartel charges altogether.

Having a cartel settlement system in place does not ensure that cartel participants will utilize it. Cartel participants must first fear a real possibility of detection and prosecution before they will be willing to enter into a settlement. In addition, in order to be willing to enter into settlement negotiations, cartel participants must trust the

[11] For instance, France indicates that its settlement decisions reached in 2007 provide clear signals of fine reductions that firms may expect by applying for leniency or for settlement: firms may expect a reduction of a maximum of 50% if they meet the conditions of second-ranking leniency, and a reduction of 10% to 30%, depending on a variety of parameters, if they settle the case. France notes that the increasing total and average amount of the fines imposed by the Competition Council is key in guaranteeing that a 10% rate is attractive in absolute terms, *i.e.* when compared to the prospect of the fine that would be applied but for settlement.

government entity negotiating the settlement and believe that adequate procedural safeguards are in place.[12]

In the experience of jurisdictions where cartel settlements are prevalent, cartel participants will come forward and agree to settle with the government in direct proportion to the level of confidence they have in the predictability and certainty of their treatment. Parties contemplating settlement want to know what benefits they will gain by settling with the government, what risks they run by entering into settlement discussions and how likely they are to actually reach an acceptable settlement. The more transparent anti-cartel enforcers are in implementing their settlement system, the more likely they are to induce cartel participants to settle.

## V. Benefits of Cartel Settlements

Settlements have the potential to be mutually beneficial to the prosecuting agencies and settling cartel participants. Two jurisdictions described settlements as a "win-win" situation. Benefits to enforcers may go well beyond resource savings by providing valuable cooperation, creating momentum and providing proportionality and transparency. Likewise, the benefits to settling cartel participants may transcend monetary savings and provide much needed finality and certainty for companies and cooperating corporate employees.

In order for parties to "take the plunge" and forego certain rights by entering into a settlement, they have to be convinced that doing so is in their best interest. The benefits of settling must outweigh the benefits of litigating the case to its legal and procedural end, or a settlement will not be achieved. What follows is a discussion of the potential benefits of cartel settlements for both the government and settling cartel participants. The cartel settlement systems currently in place and those proposed vary widely, and not every settlement system achieves each of the benefits described below, but the following discussion encompasses the wide range of settlement benefits identified by jurisdictions participating in this project.

### A. Benefit #1: Saving of Time and Resources

Responding jurisdictions universally agreed that the saving of time as well as human and monetary resources are significant benefits of cartel settlements. When cartel participants settle cases, the resources and time that would have been expended to investigate and prosecute numerous cartel participants is saved, and the often-limited resources of the competition authority and prosecutors are freed to turn to other cartel investigations.

[12] France believes it has achieved this balance by creating pressure through, on the one hand, higher maximum fines since 2001, higher actual fines imposed by the Competition Council and a fully-fledged leniency program and, on the other hand, by the fact that a settlement can be requested only once the charges have been notified to the firms involved, thus triggering an adversarial procedure complying with the French rules of due process.

The time and resource benefits of settlements extend to cartel participants as well. Corporations and their executives who participate in cartels can rapidly resolve their liability through settlements. The swift imposition of justice allows corporations and their executives to put cartel conduct behind them and attempt to move the company forward as a competitive participant in an industry free of collusion.

Enforcers in jurisdictions where charges cannot be resolved through settlements may face substantially prolonged investigations and prosecutions, resulting in inevitable backlog. Similarly, without the opportunity for settlements, cartel participants wishing to resolve potential charges could face years of waiting, as could potential victims awaiting damages, while the government completes its investigation and prepares its case.

Settlements, especially when working in conjunction with an effective leniency program, are a fast and efficient means for uncovering and prosecuting cartel activity. As two jurisdictions noted, the benefits do not end with the investigation that is resolved through a settlement – not only are resources freed to investigate other cartels, but the swift prosecution of more cases leads to an increased fear of detection, resulting in future self-reporting and ultimately increased deterrence.

### B. Benefit #2: Momentum and Cooperation

Another valuable benefit identified by a number of jurisdictions is the cooperation that settling cartel participants may be able to provide to the government's ongoing cartel investigation. For both parties, the rewards are significant when a cartel participant decides to break ranks with the other cartel members and cooperate with the government.

In jurisdictions where settlements are used in order to gather evidence of the cartel, the early cooperation of a settling cartel participant often provides tremendous momentum to the investigation and leads to the speedy prosecution of other cartel members. After the first company or individual settles, other cartel members know that one of their own has cracked and they frequently race to the prosecutor's door to begin settlement negotiations, as was the case in the Israeli case example below.

In addition, if the government prosecutes any non-settling holdouts, then cooperating cartel participants (including cooperating corporate employees) may provide key insider evidence against the remaining cartel members. Australia, Canada, Germany and the United States identified the ability to utilize the testimony of a settling cartel participant in the subsequent prosecution of non-settling cartel participants.

Not all jurisdictions identified momentum and cooperation as potential benefits of settlement systems. In jurisdictions where settlements only occur after the core of the investigation has taken place, enforcers point out that settlements are not intended as a vehicle to gather new evidence, but rather, allow for a simplified procedure in exchange for the possibility of obtaining a fine reduction. In these jurisdictions, settlements take place simultaneously (or almost simultaneously) with several or all cartel members rather than one after the other.

France notes that in its administrative system where settlements are considered more as a way of streamlining the procedure when firms agree not to challenge the charges in exchange for a fine reduction, benefits for enforcers are maximized only where all companies involved agree to settle the case. Although the French settlement system allows for some firms to apply for a settlement, without requiring all firms to apply, France notes that it is increasingly the case that, thanks to a "domino effect," all firms involved in a cartel eventually agree to join once one of them has applied.

### Case Example ¾ Israel: Momentum Building Settlement ¾ LPG Pleas

In March 1998, the Investigations Department of the Israeli Antitrust Authority (IAA) began investigating an alleged cartel in the liquefied petroleum gas (hereinafter – LPG or gas) market.

Subsequently, the IAA pressed criminal charges in 2004 against four LPG companies (Pasgas, Amisragas, Supergas and Dorgas) with an aggregate market share of over 90% and 15 of their senior management. The defendants were accused of engaging in cartel activity on a national scale during the years 1994-1997.

The indictment included three separate charges: The first charge related to division of the domestic gas market, including both actual consumers and prospective consumers. The second charge related to cartel in the commercial industrial gas market, including both actual and prospective consumers among businesses and factories.
The third charge related to an attempt made by the defendants to persuade an additional (fifth) gas company to join the cartel and to stop competition.

The CEOs of each gas company were charged with executive liability (according to article 48 of the Israeli Restrictive Trade Practices Act, 5748 – 1988, hereinafter: Antitrust Law) implying they were not charged with being party to the cartel (based on article 48 of the Antitrust Law). The other defendants, who were mostly sales and marketing executives, were charged with being direct parties to the cartel (based on article 47 of the Antitrust Law).

By March 2007, in the midst of hearing the prosecution witnesses, the first plea bargain was reached with Pasgas. By August 2007, the IAA reached a second bargain with Amisragas and shortly afterwards the third bargain was signed with Supergas.

As of January 2008 the Dorgas case continues to be tried in Court.

**Plea Bargains**

The Antitrust Law grants the IAA both civil and criminal enforcement authorities. The IAA has full discretion as to when and how to enforce the Antitrust Law. Once the legal department files an indictment, the procedure is criminal in all aspects including criminal liability. Meaning, once the IAA pursued the criminal path, reaching settlements requires an admission of guilt by the parties.

At the very first phase of the trial the presiding Judge referred the parties (*e.g.* the IAA and the defendants) to another Judge who acted as a mediator and aided the parties in reaching a plea bargain. It was agreed *ex ante* that the content of the mediation process would remain strictly confidential, meaning that not even the presiding Judge would be involved in any way.

**The First Plea Bargain**

The first plea bargain was reached in March 2007 with Pasgas and three of its managers. Pasgas admitted to being party to a cartel in two markets – potential domestic consumers and potential business and commercial consumers.

The CEO was charged with "managers' liability" (based on article 48 of the Antitrust Law), implying that he had been negligent (should have known about the collusion, but no knowledge was proven) and had not made sufficient efforts to prevent the collusion.

In the original indictment, the Chief Marketing Officer (CMO) was charged with being a party to the cartel. In the plea bargain the charge against the CMO was modified to a less severe charge – however still more severe than the charge against the CEO. As part of the plea bargain, the CMO was charged with executive liability and admitted, not only to being negligent, but also in possessing actual knowledge about the collusion that took place.

In the original indictment, the sales manager was charged with being a party to the cartel (based on §47 of the Antitrust Law). The indictment was not changed in the plea bargain.

Substantial fines were imposed on all three defendants. In addition, the CEO (who had been negligent) was sentenced to 15 days of imprisonment to be served in community service and a substantial fine due to his personal and direct interest in the corporation profits. The CMO (who had known about the cartel but was not an actual party) was sentenced to 4.5 months of imprisonment to be served in community service. The sales manager (who had been the actual party to the cartel) was sentenced to 6 months of imprisonment to be served in community service, which is the maximum imprisonment period that can be served in community service.

**Subsequent Plea Bargains**

A few months later, the second settlement was reached with Amisragas and four of its managers. The former settlement (with Pasgas) served as a minimum standard. The CEO was sentenced to 30 days of imprisonment to be served in community service (double that of the Pasgas CEO). The CMO, who was charged with being an actual party to the cartel, was sentenced to 6 months of imprisonment to be served in community service (rather than imprisonment 'behind bars') due to his age (above 76) and deteriorating health condition. The sales managers were sentenced to 6 months of imprisonment to be served in community service.

The third plea bargain with Supergas came shortly after reaching the plea bargain with Amisragas, and it included an imprisonment sentence (with no option to serve the term in the form of community service) of 100 days for the CMO in addition to an individual fine that amounts to 150,000 NIS and 12 month suspended imprisonment sentence.

The case against Dorgas is still being heard which itself has, since the Supergas plea bargain, seen one of its members – the sales manager – sign a plea bargain. Dorgas' sales manager was sentenced to 6 months imprisonment to be served in community service in addition to a substantial fine since his position was relatively at the lowest level of management. Dorgas' CEO and Chairman were charged with being actual parties to the cartel and the trial against them is still being heard. It should be noted that the evidence shows that Dorgas' senior management was far more aware of the collusion. Therefore the charges were more severe than the charges against their counterparts who were charged with executive liability as noted above.

**General Notes about Plea Bargains in Israel**

- After pressing criminal charges, plea bargains must include an admission by the defendant. The admission must be complete and cannot be followed by a *nolo contendere* plea.

- All plea bargains reached by the IAA must be ratified by the District Attorney.

- All plea bargains are in writing, brought before Court, and made public. The courts are not bound by the settlement and have the power to deviate if they deem the bargain unreasonable or against the public interest.

In return for early cooperation, anti-cartel enforcers can provide a multitude of important benefits to settling companies and individuals. Benefits identified by various jurisdictions include a reduction in fine or sentence and other non-monetary benefits such as: limiting the scope of the charged conduct, securing more favorable treatment for culpable executives where individual liability is possible, and the possibility of immigration relief for cooperating foreign cartel participants.

In jurisdictions where Amnesty Plus (also called Leniency Plus) exists, cooperation provided pursuant to a settlement can often lead to the detection of other previously unidentified cartels relating to different products or in different geographic markets. Amnesty Plus allows a cartel participant pleading guilty or receiving a reduced fine pursuant to a leniency program to report an additional cartel to the government and receive a substantial sentencing benefit as to the first offense, plus complete immunity for the newly reported conduct. Jurisdictions that have both Amnesty Plus and settlement systems in place such as Brazil, Canada and the United States have found that Amnesty Plus can be an important cartel-detection and case-generation tool that complements and encourages both settlements and leniency.

**Case Example ¾ United States: Rewards for Second-In Cooperation**

In the U.S., the potential rewards available for second-in companies who lose the race for 100% immunity under the Antitrust Division's Corporate Leniency Program, but agree early on to plead guilty to a cartel offense and cooperate with the Division's investigation, include: (1) reducing the scope of the charged conduct or the affected commerce used to calculate a company's Guidelines fine range; (2) limiting the scope of conduct charged against the company or the amount of commerce attributed to the company; (3) obtaining a substantial cooperation discount; (4) securing more favorable treatment for culpable executives; and (5) possibly qualifying for Amnesty Plus or affirmative amnesty consideration. For individual defendants, the benefits of early cooperation are quite simple – the opportunity to avoid a lengthy jail sentence.

In March 2006, the Division issued a paper discussing the potential rewards and incentives available for a company that is second-in-the-door to offer its cooperation, and the factors the Division will consider when determining the credit it will receive. S*ee* 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* www.usdoj.gov/atr/public/speeches/215514.pdf. That paper focused on the benefits earned by the Crompton Corporation for being second-in-the-door in the

Division's rubber chemicals investigation and providing information that was not public at the time the company was sentenced.

Crompton represents a gold-standard example of a company that provided exemplary cooperation and, in return, received an *extraordinary* 59% discount off its minimum Guidelines criminal fine, representing a more than $70 million reduction in its fine, due to credit for its exemplary cooperation and Amnesty Plus credit. Also, other than three high-level Crompton employees who were carved out of the corporate plea agreement, all employees who engaged in illegal conduct received full protection as part of the company plea in return for their cooperation. This is a stark comparison, to co-conspirator Bayer AG, the number-three company in the rubber chemicals investigation, which had *five* high- and mid-level individuals carved out of its corporate plea agreement. This stair-step approach of increasing the number of carve-outs for later-in corporations was also successfully implemented in the Division's DRAM investigation, where second-in Infineon had *four* individuals carved out of its plea agreement, while third-in Hynix had *five* carve outs and fourth-in Samsung had *seven*.

By way of contrast, in jurisdictions such as the EU, where the leniency program provides not only full immunity for the first applicant, but also the possibility of a reduction in fines for the second and subsequent applicants providing substantial evidence, enforcers explained that they do not need the extra incentive to settle provided by Amnesty Plus because it is possible for the applicant to receive a reduction in fine on the merits of their submission for the first cartel and full immunity for the second cartel. Under such a system, if the applicant does not take the opportunity to uncover the second cartel, they would lose immunity and may be deemed a recidivist, which in some jurisdictions can double their fine for the second cartel.

### C. Benefit #3: Transparency

Jurisdictions with cartel settlement experience identified transparency not only as an essential element of an effective settlement system critical to encouraging settlements, but also as a benefit of a settlement system. Transparency was identified as critical to fostering public confidence that there is proportional and equitable treatment of antitrust offenders.

Publicly available settlement agreements and policy documents provide much needed transparency for companies and individuals deciding whether to settle or litigate a cartel case. By viewing prior settlements, cartel participants contemplating settlement can assess the penalties imposed upon other similarly situated cartel participants and predict, with some degree of confidence, the possible benefits they could receive for settling.

Transparency is also important to the prosecuting agency's credibility among the business community and the bar. Written settlement agreements provide a publicly available record of the prosecuting agency's policies and positions that the business community and the bar can point to in counseling their employees and clients about the benefits of settling. Developing, and making public, model settlement agreements is another vehicle to enhance transparency and put cartel participants contemplating settlement on notice of the terms and obligations that will bind the parties if they enter into a settlement. Some anti-cartel enforcement agencies make such policy documents,

model settlement agreements and actual settlement agreements available on their website in order to provide such transparency.[13]

### D. Benefit #4: Proportionality

Another benefit identified by several jurisdictions is that settlements can allow for greater proportionality in charging and sentencing. Settlements may contain agreed upon charges and penalties that the government deems to be in the public interest and proportional to other members of the same cartel as well as other similarly situated cartel participants in other cartels prosecuted by the government. Prosecuting agencies may take into account such things as the timeliness of the cooperation, the quality of the cooperation, and the culpability of the settling party *relative* to other members of the same cartel in imposing or recommending the penalty imposed upon a settling cartel participant.

Where the competition or prosecuting agency is able to actually impose the penalty pursuant to a settlement, the agency has direct control and the repeated imposition of transparent and proportional penalties within and across cartel investigations will provide incentives for parties to settle.

In other jurisdictions, such as Australia, Canada, Israel and the United States, where courts impose the settling party's actual penalty or sentence, proportionality can still be achieved through settlements in cartel cases. In such jurisdictions, the government will make a sentencing recommendation consistent with existing guidelines, statutes and policies that take into account the proportionality in relation to other cartel participants and similarly situated defendants in prior cartel cases in the jurisdiction.[14] In the experience of the jurisdictions operating under such a system, courts generally tend to accept the recommendation of the government in the majority of cartel cases in which settlements are reached.

In the United States, a particular type of plea agreement makes the joint sentencing recommendation of the parties *binding* upon the sentencing court once the plea is accepted.[15] This type of binding plea agreement ensures proportionality among defendants within the same cartel investigation and across U.S. cartel investigations.

Even without the ability to bind the sentencing court, proportionality in court-imposed sentences can be achieved. Such was the case in the Israeli LPG case example discussed above, where the sentences imposed pursuant to the first set of pleas served as an important benchmark and the second pleading CEO was sentenced to double the sentence of the first CEO to plead guilty.

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[13] *See* Appendix B: Publicly Available Settlement Resources and Documents by Jurisdiction

[14] In Canada the Criminal Code of Canada (Section 718) and in the United States the U.S. Sentencing Guidelines (*available at* www.ussc.gov) and 18 USC § 3553 address proportionality in sentencing.

[15] For a discussion of these Type "C" agreements, *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) at § IV(F)(2), *available at* http://www.usdoj.gov/atr/public/speeches/219332.pdf.

### E. Benefit #5: Finality

Cartel participants facing a government investigation generally desire finality. A protracted cartel investigation and prosecution can pose a formidable burden on corporate cartel participants, their culpable executives, boards of directors and shareholders. Settlements provide the opportunity for both the cartel participant and the prosecutor to arrive at a final and definitive resolution of the matter. In jurisdictions where there are multiple possible prosecuting agencies for cartel offenses, achieving true finality via a settlement will require the government entity entering into the settlement to be able to bind the other prosecuting agencies and offer non-prosecution protection to the cartel participant, as discussed in § VIII(A)(4) below. Where this is not possible and a cartel participant must seek settlement or non-prosecution from more than one government entity, settlements may still provide substantial benefits, but achieving true finality may be more difficult and incentives to settle may be decreased.

Additionally, where settlements can provide for a waiver of appeal, they provide ultimate finality for the government and settling cartel participants and save additional resources as the prosecuting agency, courts, victims and the public are spared the often lengthy exhaustion of appeals.

### F. Benefit #6: Certainty

When cartel participants approach anti-cartel enforcers to discuss possible settlements, they are undoubtedly looking for certainty about the type of penalty or sentence that will be imposed. To that end, both the government and cartel participants are often able to agree to many, if not all, of the material terms of the settling party's penalty or sentence *prior* to its imposition. Indeed, in some cases, the parties may reach an agreement on a penalty or sentence which is then imposed by the agency itself, thus providing ultimate certainty. As discussed above, while absolute certainty is not guaranteed in jurisdictions where the court imposes the ultimate sentence, a settling cartel participant can feel relatively confident that courts will follow the government's recommendation in most jurisdictions.

Cartel participants wishing to enter into settlements are also seeking certainty with respect to future charges. For instance, in jurisdictions where individuals can be held criminally liable, corporate settlements may also provide culpable corporate executives with the certainty that if they fully cooperate, they will not be prosecuted for the conduct to which their employer pled guilty. These types of non-prosecution protections for cooperating individuals provide an important incentive for corporations to settle early and the cooperation of these covered executives can be a valuable source of insider evidence for prosecutors. Likewise, customers, banks, shareholders, and other financial partners of the pleading corporation can rely on the certainty that the corporation has resolved its criminal liability and has put its legal troubles with the government behind it.

## VI. Drawbacks and Impediments to Cartel Settlements

While responding jurisdictions cited vastly more benefits, when asked about drawbacks of settlement systems, some jurisdictions did cite to public perceptions as well as policy and legal considerations as possible drawbacks and impediments.

Some jurisdictions cited constitutional impediments to certain aspects of settlements, in particular they cited concerns that waiver of appeal or other rights might violate certain rights of the settling party. One jurisdiction cited a concern that parties entering into settlement negotiations may be merely trying to gain an advantage by finding out what their fine might be and delaying the investigation.

An obvious drawback of settlements cited by several jurisdictions is that when entering a settlement, as with leniency, the government will have to settle for something less than the maximum possible penalty that could have been imposed against a cartel participant in order to secure the deal. The penalties will likely be less than they would have been if the prosecuting agency proved its case against the cartel participant and the court or sentencing body imposed a penalty. Although reduced penalties are an inherent downside, jurisdictions that have cartel settlement systems in place agree that the benefits gained from settlements outweigh the additional penalties that might have been obtained absent a settlement.

In some jurisdictions the concept of "parity" between cartelists in the same matter and across different cartels is important for courts. These jurisdictions cited the concern that a multitude of settlements, where the government has accepted less than the maximum they could have sought in a fully contested case, may impact upon a judge attempting to determine the penalty in a subsequent fully contested case. Specifically, the concern is that in such circumstances, the contested penalty may be diminished by reference to the cases in which settlements were reached.

Some jurisdictions cited concerns that the public and courts would view settlements unfavorably and perceive settlements as compromising justice. Several jurisdictions said that there is a negative public perception of settlements as a lesser outcome than possible if a case is continued through to its procedural end. Along these lines, the term "plea bargaining" often carries a negative connotation among the general public, because it implies that prosecutors are bargaining away justice by securing settlements that allow settling parties to plead guilty to lesser offenses. Transparency and predictability in settlement policy and process is critical to dispelling these concerns. The success of a settlement system in the public's eye can hinge on the transparency provided by the prosecuting agency. As the United States Supreme Court has stated, "Plea bargaining is an essential component of the administration of justice. Properly administered, it is to be encouraged. . . . It leads to prompt and largely final disposition of

most criminal cases."[16] Competition enforcers using negotiated settlements in cartel cases have overcome these negative connotations by entering into transparent and principled settlements and policies.

Other concerns noted include: settlements may result in lesser publicity than litigated trials; settlements may not be considered precedent in later cases; settlements may not further develop cartel law; and jurists may feel that settlements encroach on the domain of the courts.

Finally, a few jurisdictions without settlement systems expressed concerns regarding the impact of settlements on their leniency program and queried whether a settlement system might diminish incentives to seek leniency. This issue is discussed above at § III.

## VII. Key Issues Commonly Addressed During Cartel Settlement Discussions

While the following list is certainly not exhaustive, and the issues are dependant on the law and procedure in each jurisdiction, the responses received from jurisdictions with settlement systems currently in place indicate that settlement discussions with cartel participants commonly focus on the following key issues, as appropriate in each jurisdiction:

- **Who will enter into the settlement?** For corporate cartel participants, what specific entity will be charged (*e.g.* parent company or its subsidiary)? Will multiple related corporate entities be covered by the settlement? If so, who will negotiate and enter into the settlement on behalf of these entities? If the prosecution of individuals is possible, will any individuals be charged?

- **What violations will the settlement cover?** What is the scope of the alleged cartel conduct covered by the settlement, including the nature of the anticompetitive conduct (*e.g.* bid rigging, price fixing and/or market allocation), the products or services covered by the conspiratorial agreement, and the duration and geographic scope of the conspiracy? Will the government consider a settlement alleging a narrower conspiracy in terms of goods/services, geographic scope or duration covered? In addition to cartel offenses, has the cartel participant committed any collateral offenses that may be charged including other types of fraud or obstruction, and will the settlement attempt to cover such offenses?

- **Will an admission of guilt be required in order to settle?** Will the settling party be required to admit guilt or the factual basis underlying the cartel conduct?

[16] *Santobello v. New York*, 404 U.S. 257, 260-61 (1971). The Federal Prosecution Service Deskbook in Canada contains a similar statement, "Discussions between Crown and defence counsel which are intended to lead to a narrowing of the issues at trial, or which may avoid unnecessary litigation altogether, form an important and necessary part of the criminal justice system."

- **What cooperation will the settling party provide?** To what extent will the settling party be required to provide documents, witnesses or other evidence to inculpate co-conspirators?

- **Are there other cartel offenses the party can report?** Can the settling party report and provide cooperation regarding other cartel conduct and, if available, qualify for amnesty plus or be otherwise rewarded for such cooperation?

- **Who will be covered by the nonprosecution and cooperation provisions of the settlement?** For corporations, which corporate entities and employees will be subject to the cooperation and nonprosecution provisions of the settlement, as well as those entities or individuals specifically "carved out" or excluded from these provisions?

- **What will be the penalty or sentence?** What will be the agreed upon or recommended penalty or sentence, including the fine for corporations and, if individuals can be prosecuted, the period of incarceration and fine for individuals? What will be the affected volume of commerce or other basis for establishing the fine?

These are likely issues that a cartel participant will want to address with the government during the course of settlements discussions. In jurisdictions where negotiation does not take place as a part of the settlement process, some of these issues will obviously not be presented.

While settlement systems vary, the more anti-cartel enforcement agencies are transparent about these issues through the use of clear settlement policy statements or making actual or model settlement agreements public, the more cartel participants will be encouraged to enter into settlement discussions.

## VIII. Key Elements of Cartel Settlements

The following section will enumerate some of the basic elements of cartel settlements identified by jurisdictions with settlement systems currently in place. This discussion presupposes that there will be a written settlement document memorializing the agreement between the government and the settling cartel participant. Jurisdictions that have settlement systems in place generally enter into a written settlement agreement signed by the government and the settling cartel participant. Several jurisdictions noted that once entered, these settlement agreements are generally viewed as binding upon the signing parties and would likely be reviewed under applicable contract principles in the relevant jurisdiction. Written agreements were viewed by a number of jurisdictions as helpful in avoiding misunderstandings between the parties as to the terms of the agreement, and also promoting transparency by fully apprising the court, the bar, the business community and other cartel members of the terms of the agreement the parties have reached.

Recognizing that every jurisdiction is different, below are some key elements identified by participating jurisdictions that should be considered when entering into a settlement or designing a settlement system. The elements will be divided into substantive and procedural elements for purposes of this discussion, however, an actual settlement agreement will likely address them in a different order.

## A. Key Substantive Elements of Cartel Settlements

### 1. Admission of Guilt or Factual Basis

A cartel settlement must, at minimum, describe the cartel conduct at issue. Jurisdictions differ, however, as to whether a settling party must admit guilt and/or admit to the factual basis underlying the cartel conduct the settlement resolves.

Canada, Germany, Israel and the United States all require an admission of guilt or confession in order to enter into a cartel settlement.

In the United States, a defendant entering into a plea agreement with the Antitrust Division must be willing to plead guilty to the charged cartel conduct at arraignment and make a factual admission of guilt.[17] Under U.S. rules of criminal procedure, pleas of *nolo contendere* (no contest) allow the defendant, with the consent of the court, to be convicted and sentenced for the crime without admitting guilt; however, U.S. Department of Justice policy requires, except in extraordinary circumstances, that attorneys for the government oppose attempts by defendants to plead *nolo contendere*.[18] Attorney General Herbert Brownell, Jr. expressed the basic objections to *nolo* pleas in a U.S. Department of Justice directive in 1953 stating:

> One of the factors which has tended to breed contempt for Federal law enforcement in recent times has been the practice of permitting as a matter of course in many criminal indictments the plea of *nolo contendere*. While it may serve a legitimate purpose in a few extraordinary situations and where civil litigation is also pending, I can see no justification for it as an everyday practice, particularly where it is used to avoid certain indirect consequences of pleading guilty, such as loss of license or sentencing as a multiple offender. Uncontrolled use of the plea has led to shockingly low sentences and insignificant fines which are not deterrent to crime. As a practical matter it accomplished little that is useful even where the Government has civil litigation pending. Moreover, a person permitted to plead *nolo contendere* admits his guilt for the purpose of imposing

[17] While in years long past, primarily when cartels were misdemeanor criminal offenses in the United States, the Antitrust Division did not oppose pleas of *nolo contendere* in certain cartel cases, the Antitrust Division has for decades made it a practice to oppose a defendant's request to enter into a plea of *nolo contendere*. The Department's policy of objecting to *nolo* pleas is so steadfast that few defendants even inquire about the possibility today.

[18] See United States Attorney's Manual 9-27.500, Offers to Plead Nolo Contendere – Opposition Except in Unusual Circumstances, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.500

> punishment for his acts and yet, for all other purposes, and as far as the public is concerned, persists in this denial of wrongdoing. It is no wonder that the public regards consent to such a plea by the Government as an admission that it has only a technical case at most and that the whole proceeding was just a fiasco.[19]

Not every jurisdiction currently requires an admission of guilt in order to settle a cartel case. For instance, in Brazil an admission of guilt is not necessarily required unless the investigative proceedings were initiated with evidence obtained under a leniency agreement.[20]

Whether an actual admission of guilt is required or not, settlements will almost certainly contain some factual basis describing the cartel conduct in which the settling party participated. For instance, due to the nature of their settlement system, in Australia, while an admission of guilt is not required, factual admissions of the cartel conduct are submitted to the court that is responsible for imposing any settlement orders. Typically this involves the alleged cartelists withdrawing their denial of liability within their defense to the matters subject to the settlement and agreeing to a statement of facts,[21] tendered jointly by the alleged cartelist and the ACCC to the Court. This statement is usually submitted in advance of a hearing and settlements frequently occur well in advance of any hearing involving contesting parties. In France, a full and unambiguous waiver of the right to challenge the charges in all respects (law, facts and responsibility) is expected from the firms that want to settle the case once they have received the charges notified by the Investigation Services of the Competition Council. In Canada there must be facts on the record which allow a court to find an offense, usually in the form of an agreed statement of facts.

For some jurisdictions, the articulation of a factual basis has been critical to gaining the settlement benefits of transparency and momentum. Such an admission puts other cartel participants contemplating pleading, as well as the public and cartel victims, on notice of the cartel conduct resolved by the settlement. Likewise, a settlement that does not contain an admission of guilt or a factual basis underlying the cartel conduct can diminish the deterrent effect of the prosecution and may also encourage negative public perception of settlements. A member of the public or business community reading reports of a cartel settlement where the settling party does not admit guilt may view the conduct it addresses as merely a technical violation and the company's decision to settle as a means of resolving a "nuisance" claim that was not worth the time and effort to dispute. Several jurisdictions also noted that the policy of requiring an admission of guilt

[19] *See id.*

[20] In Brazil, when investigative proceedings are not initiated with evidence obtained under a leniency agreement, CADE will decide on a case-by-case basis whether to settle if the defendant is not prepared to admit guilt.

[21] Even though the party admits the facts, such joint statements are generally not regarded as *prima facie* evidence of those facts in another proceedings, for example third party proceedings.

in cartel conduct is consistent with the universally agreed upon sentiment that cartels are the most egregious and harmful violations of competition law.[22]

While an admission of guilt furthers many anti-cartel enforcement goals, it is important to consider the timing and form of such an admission. Jurisdictions that currently require an admission of guilt generally require that the admission be made at the time a settlement is accepted and entered by the court or administrative body. A requirement of an admission of guilt prior to the entrance of the actual settlement, especially a written admission, may discourage cartel settlements. Members of the defense bar worldwide have repeatedly explained, in the context of both leniency and settlements, that requiring written submissions raises concerns about possible adverse collateral consequences in other proceedings such as private civil litigation or other enforcement proceedings. These fears may be exacerbated and further discourage settlements if a written admission of guilt is required during the course of settlement discussions without adequate assurances by the government regarding how the information may be used against it if a settlement is not reached or is breached, as discussed in §VIII(B) below.

### 2. Penalty or Sentence

Other than resolving cartel exposure and moving forward, the primary benefit to a settling cartel participant is the reduction in the penalty or sentence that would have been imposed if they contested the matter to its procedural end. During settlement discussions, the settling party will want to know the penalty or sentence they should expect to face. Depending on the settlement system in place, the government's position as to the penalty or sentence may be memorialized in various forms – as an agreed upon or recommended penalty or sentence which may have to be accepted or approved by a court or higher government body, or as an agreement between the parties that is self-effectuating once a settlement agreement comes into force.

The more specificity that the prosecuting agency can provide as to how the sentence was reached, the further it will go to achieving the settlement benefits of transparency, momentum, predictability and proportionality. To provide the greatest transparency, prosecuting agencies may enumerate, to the extent possible, the amount of reduction in fine or sentence that was given in recognition of the settling party's acceptance of responsibility and cooperation. References to any sentencing guidelines calculations also helps to provide maximum transparency and predictability.

[22] *See* ICN Working Group on Cartels, "Defining Hard Core Cartel Conduct," Report prepared for the ICN 4th Annual Conference Bonn, Germany (June 2005) *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf.

### 3. Cartel Participant's Cooperation

The inclusion in cartel settlement agreements of a commitment by the settling party to provide full, continuing, and complete cooperation was cited by several jurisdictions as the most beneficial aspect of a settlement agreement for prosecutors. Other jurisdictions, such as the EU, that have a reduction in fine available to cartel participants beyond the first to report pursuant to a leniency program, did not cite cooperation as a settlement component because they view settlements only as a tool to obtain procedural efficiencies once the investigation is over, rather than as a source of evidence during the course of an investigation.

The amount of the substantial assistance reduction in the fine or period of incarceration to which the government will agree to recommend is usually tied to the timeliness and quality of the cooperation that the settling party is able and willing to provide. This not only provides an incentive to settle, but also helps ensure the quality of cooperation the settling party will provide. In addition, cooperation requirements may also provide a response to the public perception or implication at any trial that the settling party is receiving a "free ride."

The specific types of cooperation that a settling cartel participant is required to provide vary widely among jurisdictions based on the quantum and type of evidence the government must prove. Such cooperation may include: (1) providing the government with documents and information in the possession, custody, or control of the settling party; (2) corporate employees or an individual defendant appearing for interviews, court appearances and trials; or (3) the corporation, and any related entities covered by the settlement, using their "best efforts" to secure the cooperation of current (and sometimes also former) corporate employees covered under the settlement, including making employees available at the corporation's expense for interviews and testimony. It is important to note that, in order to be most effective, the cooperation requirements contained in a settlement should be ongoing obligations and the government should be able to void the settlement, as discussed below, for failure to comply with the cooperation obligations, even after the sentence or penalty is imposed.

### 4. Government's Agreement Not to Bring Further Charges

Each jurisdiction indicated that their settlements include some promise by the government signatory not to bring further charges against the settling party for the conduct under investigation. Without such a promise by the government there is no certainty or finality – paramount concerns of the settling party. Corporate settlements may extend the non-prosecution promises to related corporate entities and, where individuals may be prosecuted, certain cooperating employees; other culpable or non-cooperating employees may be "carved-out" of the non-prosecution protections of a corporate settlement.[23] The non-prosecution protection may be conditioned on the

[23] For a full discussion of the Antitrust Division's carve-out policy in U.S. plea agreements, *see* Scott D. Hammond, "The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All," address

completion of other events, such as a court's acceptance of a settlement or the imposition of the recommended penalty or sentence.

Where a jurisdiction's law and policy allow, the scope of the non-prosecution terms may include promises not to prosecute the settling party for other violations committed in furtherance of the cartel conduct (*e.g.* various types of fraud). Such broad non-prosecution protections provide settling parties with the finality and closure that they seek from the settlement. The non-prosecution terms must be carefully crafted to provide the settling parties with the needed assurances that they will not be subjected to further prosecution, while at the same time ensuring that the government is not inadvertently immunizing defendants for crimes it is not aware of or for which it does not have the authority to immunize. For instance, in the United States, certain violations such as those of federal tax, securities law or crimes of violence are specifically exempted from the non-prosecution terms of such plea agreements.[24]

In some jurisdictions, anti-cartel enforcers are faced with the challenge of settling cartel cases where one or more government entities have the authority to prosecute cartel offenses. The optimal solution in such a scenario may be to have the various prosecuting agencies agree that none will prosecute the settling party and to have the settlement agreement provide for "global" non-prosecution. Logistically, global nonprosecution could be accomplished several ways, for instance, each government entity with the ability to prosecute cartel conduct could: (1) become signatories to a settlement agreement; (2) promise not to bring additional charges and vest one government entity, such as the competition enforcement agency, with the authority to enter into a settlement agreement with the cartel participant providing for global non-prosecution from all possible prosecuting agencies; or (3) execute simultaneous but separate non-prosecution agreements at the time of the settlement. Competition agencies can undoubtedly find other creative ways to provide global non-prosecution protections to settling cartel participants.

Providing global non-prosecution protection for settling cartel participants is no small task in jurisdictions where there are dual administrative and criminal prosecutorial systems for cartel offenses, or in jurisdictions where there are several possible prosecuting agencies. Where global non-prosecution protection cannot be provided, a settlement system may still be effective. However, it will not provide the ultimate certainty and finality that a cartel participant seeks through a settlement and may provide less incentive for cartel participants to settle if they must still resolve their culpability with one or more additional government entities. However, as the Brazilian cement case discussed below exemplifies, cartel settlements may still be achieved in such a context and provide substantial benefits.

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before the OECD Competition Committee, Working Party No. 3 (October 17, 2006) at § V(J), *available at* http://www.usdoj.gov/atr/public/speeches/219332.pdf.

[24] *See* ¶ 13 of the Antitrust Division's Model Annotated Individual Plea Agreement and ¶ 16 of the Model Annotated Corporate Plea Agreement *available at* http://www.usdoj.gov/atr/public/criminal.htm.

## Case Example ¾ Brazil: First Cartel Settlement ¾ Cement Cartel

After 10 years investigating the cement sector, the Secretariat of Economic Law (SDE) received, in November 2006, an informant who provided detailed information on suspected cartel participants, frequency of meetings and the manner in which they controlled and agreed on prices, consumers and market allocation. In February 2007, SDE, in cooperation with the Federal Police, conducted 9 simultaneous dawn-raids at the offices of the major cement producers in Brazil – including the offices of Lafarge Brasil, Votorantim, Camargo Correa and Holcim – and the industry associations. The documents seized by SDE include 14 hard disks and more than 3,000 pages of documents.
A month later, SDE initiated formal proceedings against 8 cement companies, 6 managers and directors and 3 industry associations. Finally, in November 2007, the Council for Economic Defense (CADE) entered into its first settlement of a cartel case in Brazil with the cement company Lafarge Brasil S.A., a branch of the French Group Lafarge.

According to the Brazilian Competition Law (Law No. 8,884/94), as amended by Law 11,482/2007, negotiated settlements may be used to resolve any administrative proceedings, including cartels. In this case, the defendant must pay a sum in the minimum amount of 1% of the gross revenues of the company in the year before the initiation of the proceedings and there is no maximum sum determined by the law.
CADE also issued a regulation establishing additional settlement rules, which states that if the case was initiated using evidence obtained under a leniency agreement, the company interested in settling must plead guilty. In all the other instances, CADE will decide on a case-by-case basis if the defendant is not prepared to admit guilt.

It is important to note that in Brazil a cartel is an administrative infringement as well as a criminal offence and, therefore, contrary to what happens with leniency agreements – where officers and managers of the first company to come forward are completely protected from criminal liability – a settlement with CADE does not entail a criminal settlement. This settlement has to be negotiated with the state-level and federal criminal prosecutors.

The process of a negotiated settlement begins when a company under investigation hands in a written settlement proposal to CADE. The proposal will then be distributed to a Reporting Commissioner who will be in charge of the settlement proceedings that may take up to thirty days (renewable for more than thirty-days, at the discretion of CADE). Finally, the Reporting Commissioner must present the final version of the settlement to the CADE's Plenary, where the other six commissioners may only vote for or against the whole settlement.

The final settlement is a written binding contract that is enforced by CADE. The company may not withdraw from the settlement after it has been approved. Upon breach of the settlement, a fine shall be paid, the investigative proceeding starts up again and the company may be found in violation of the antitrust laws.

In the case of Lafarge, since the investigative proceedings did not initiate with evidence obtained under a leniency agreement the defendant's proposal did not contain an admission of guilt (*nolo contendere*), but contained other obligations, such as, (i) to cease the conducts under investigation; (ii) the payment of R$ 43 million (approximately US$ 24 million), which constitutes 10% of the company's gross revenue of the financial year prior to the initiation of the administrative proceeding; (iii) the adoption of an antitrust compliance program; and (iv) an obligation of free access by the Brazilian Antitrust Authorities to the company's offices.

CADE's Plenary issued a decision accepting the proposal by Lafarge with a dissenting vote by one of the Commissioners and contrary opinions by SDE and the Federal Public Prosecutors Office.

## B. Key Procedural Elements of Cartel Settlements

### 1. Commencement and Initiation of Cartel Settlements

As an initial procedural matter, cartel participants interested in settling will need to know when and how settlement discussion may be initiated. This may be addressed in a jurisdiction's settlement policy or it may be a function of the broader legal framework in place in the jurisdiction. Most jurisdictions that currently have a cartel settlement system in place allow for the initiation of settlement discussions at any time during the course of the investigation and prosecution of the cartel. There is usually more for cartel participants to gain in the form of a reduced penalty if they offer to settle early and cooperate with the government's ongoing investigation, but most jurisdictions have the flexibility to accept a settlement even after formal charges have been filed. In fact, a number of the settlements provided as examples by ICN members were reached after charges were filed (see Israel, Brazil, and Australia case examples), and substantial benefits were still achieved through these settlements.

In France, a settlement agreement cannot be concluded before charges have been filed (*i.e.* before a statement of objections has been issued by the Competition Council). France notes that while a direct gain in time is lessened, an indirect time gain remains insofar as appeals are less frequent and less successful. France also notes that another advantage of its settlement system is that the case of the authority is stronger at this later stage, thus firms may be more inclined to settle.

Additionally, in virtually all ICN member jurisdictions that already have a settlement system in place, either the government or a cartel participant can initiate settlement negotiations.

**Case Example — Australia: Record Penalty Imposed after Settlement ¾ Visy Case**

In late 2004, senior executives of Amcor Limited, the parent company of Amcor Fibre Packaging Australasia (collectively referred to as Amcor) which was the second largest corrugated fibreboard packaging (CFP) manufacturing company in Australia, approached the Australian Competition and Consumer Commission (ACCC) and admitted to having engaged in a price fixing and market sharing cartel with its major rival, the largest CFP manufacturer in Australia, Visy Board Pty Ltd (Visy). Together, Visy and Amcor supplied approximately 90% of the CFP market in Australia.

Under the ACCC's policy at the time, Amcor was granted leniency (which, under the current system, would result in immunity) from prosecution by the ACCC.

**The Cartel**
Amcor admitted that it had entered into an agreement with Visy to increase prices and retain respective market shares in the CFP market. As is required under the ACCC's immunity policy, Amcor provided the ACCC with a vast array of information and evidence, including some very unique evidence – taped covert recordings of discussions between senior Amcor executives and the CEO of the Visy Group (which included Visy). ACCC interviews with senior Amcor executives also provided compelling evidence of cartel conduct, including the extent of the involvement of Visy's most senior staff, the Chairman of the ultimate Visy holding companies, the CEO of Visy Industries and the General Manager of Visy.

The cartel conduct spanned almost 5 years, underpinned by an 'overarching understanding' which was arrived at in early 2000 between Mr Peter Brown, the then Managing Director of Amcor Australasia (a subsidiary of Amcor), and the CEO of the Visy Group, Mr Harry Debney. This broad understanding included an agreement to collude on tenders for major contracts, in order to ensure that Amcor and Visy each retained their major customers. If any major customer was 'stolen' by one company, then that company would be required to provide 'compensation' to the other company by ensuring that an account, or accounts, of similar value changed hands in the opposite direction.

Some of the world's large corporations, through their large Australian subsidiaries, were affected by this overarching understanding. This included Nestle, Coca Cola, Cadbury Schweppes, Goodman Fielder, Foster's and Gillette. In turn, many of their customers in downstream markets were affected. In addition to the overarching understanding, Amcor and Visy had a number of sub-understandings in relation to particular customers to either share the market or price fix.

The cartel also included agreements by Visy and Amcor to collude in imposing annual price increases on CFP products purchased by non-contract customers, which were typically small businesses, such as fruit and vegetable growers, between 2000 and 2003 inclusive.

**The Visy Defence**
The ACCC commenced proceedings against Visy in December 2005 in relation to the abovementioned conduct. Visy's defence to the allegations was that the conduct never occurred and that its communications with the Amcor executives were for the purpose of "camouflage" and to gain market intelligence. In effect, Visy's defence amounted to an argument that if Visy had sought to engage Amcor in cartel conduct, it had only done so with a view to taking market share from Amcor. In his findings, Justice Heerey was unsympathetic to this line of argument, referring to it as the "John le Carre defence", an obvious insinuation to Visy's claims of double-crossing and dirty deals.

**Case Preparation**
With a 6 month trial set to begin in October 2007, the ACCC and its legal team had a significant task ahead of them in preparing for trial. This included:

- interviewing scores of witnesses in every state in Australia;
- preparing and filing 111 detailed witness outlines of evidence, most of which were likely to be called to give oral evidence in chief during the trial;
- reviewing nearly 130,000 documents produced for inspection by Visy, some individual documents totaling hundreds of pages in length;
- dealing with complex confidentiality claims and stringent undertakings to the Court;
- briefing expert witnesses on four continents; and
- briefing a total of 22 barristers, including a team of 14 retained for the purposes of reviewing in detail the voluminous documentary and witness evidence in respect of every aspect of the pleadings.

**Settlement Negotiations**
With less than two months before the scheduled trial date, the parties entered into several weeks of highly sensitive settlement negotiations.

The negotiations resulted in an Agreed Statement of Facts and consent orders, which included agreed penalties between the parties. The documents and penalty figures were presented to Justice Heerey at a penalty hearing on 16 October 2007.

**The Court's Judgment**
Justice Heerey ordered:

- a penalty of $36 million against Visy Board Pty Ltd – the single largest penalty to date for contravening the *Trade Practices Act*;
- additional $2 million penalties, in total, against Mr Debney and Mr Carroll for their part in the conduct, bringing the total to a record $38 million – more than twice that ever imposed by the Federal Court in a single proceeding brought by the ACCC;
- approximately 50 pages of declarations and injunctions against Visy, Mr Pratt, Mr Debney and Mr Carroll; and an order that Visy pay the ACCC's costs (which are likely to be in the millions of dollars) and undertake a trade practices compliance program.
-

Justice Heerey noted that the cartel had been run deliberately at the highest level in Visy, and that senior executives did not hesitate before engaging in the illegal conduct. His Honour also noted that this conduct occurred despite the existence of a trade practices compliance manual, which "might as well have been written in Sanskrit" for all the notice that was taken of it within Visy.

Justice Heerey was sceptical as to the remorse of Mr Pratt, who admitted his knowledge of the cartel in the Agreed Statement of Facts, yet attempted to revive Visy's early defence publicly by stating that Visy did not appreciate the complexities of the *Trade Practices Act* and was in fact seeking to take advantage of its rival, Amcor. His Honour found that there was no doubt that Mr Pratt knew that the cartel, to which he gave his approval, was seriously unlawful.

He stated in his judgment that "…Every day every man, woman and child in Australia would use or consume something that at some stage has been transported in a cardboard box. The cartel in this case therefore had the potential for the widest possible effect."

## 2. Enumeration and Waiver of Rights

Some jurisdictions said that their settlement agreements included an enumeration of the rights and procedural safeguards that would have been afforded to the settling party had they not settled. Such enumerated rights may, among others, include: the right to be formally charged; the right to plead not guilty; the right to a trial or hearing; the right against self-incrimination; and the right to appeal a conviction and sentence.

In some jurisdictions, a settling cartel participant is required to explicitly waive the enumerated rights and must acknowledge that these waivers are made knowingly and voluntarily. In the United States, foreign defendants must also waive any jurisdictional defenses available.

Other jurisdictions do not require a waiver of some or all of these rights. For example, Germany specifically mentioned that they could not require a waiver of appellate rights. However, while a waiver of appeal cannot be required in Germany, many settling parties choose not to exercise their appeal right and thus, in most cases, settlement still achieves the efficiency and resource benefits of fewer appeals. Similarly, in France, a waiver of the right to challenge the charges does not extend to the right to

appeal the settlement decision.[25] It is also the case in France that, unlike the early years of the settlement procedure when firms "tested" some of its aspects before the courts, today, very few settling parties choose to appeal.

In the United States and Israel, the parties waive appeal except that the defendant remains free to appeal a sentence more severe than the proposed sentence maintained in the plea agreement and the government maintains the right to appeal a sentence that is less severe than that contained in the plea agreement.

### Case Example – Germany: Advertising Time Marketing Cartel Settlement

In November 2007 the Bundeskartellamt imposed fines totaling 216 million euros against the advertising time marketing companies of the two private broadcasting groups RTL and Pro7Sat.1. In detail, it issued one order imposing fines of 96 million euros against IP Deutschland GmbH, active for RTL, and another order imposing fines of 120 million euros against SevenOne Media GmbH, active for Pro7Sat.1, on the grounds that these marketing companies concluded anti-competitive discount agreements with media agencies or the advertising industry in the form of contracts for the broadcasting of television advertising spots.

The two proceedings were based on a search of the premises of both advertising time marketing companies and a number of media agencies in June 2007 during which substantial evidence of the existence of the anti-competitive agreements was seized. In the course of this search and soon afterwards the lawyers of IP Deutschland GmbH and SevenOne Media GmbH contacted the responsible 6th Decision Division at the Bundeskartellamt with regard to the allegations and the further procedure. In these discussions, particularly after having been confronted with the possibility of a fine and its indefinite amount, the parties concerned expressed their willingness to enter into a settlement. Since the proceedings before the Bundeskartellamt are administrative proceedings, at this stage the Bundeskartellamt is competent to settle a case itself. Only if an appeal is lodged will the fines decision be given the status of an indictment for presentation in court by the public prosecution. At this stage a possible settlement needs the consent of the court, the public prosecution and the defendant and the Bundeskartellamt works closely together with the public prosecutor's office to decide whether to agree to a proposed settlement and under which conditions. However, in the given case the Bundeskartellamt, after weighing-up the risks and benefits, exercised its discretion so as to commence parallel negotiations about a possible settlement with IP Deutschland GmbH on the one hand, and with SevenOne Media GmbH on the other hand.

In these negotiations the Bundeskartellamt, on the one side, was primarily interested in obtaining a confession from the parties concerned in order to reduce resource expenses in connection with its investigations. Moreover, the Bundeskartellamt would have been very interested in obtaining a waiver of the right to appeal, particularly with regard to the financial and personnel resources required for possible court proceedings. Furthermore, from the Bundeskartellamt's point of view, the unappealability of the order imposing the fine generally has the additional advantage of raising the chances of the conviction of further parties concerned since it involves a so-called *ne bis in idem*. This means that after a decision has become final, the party concerned can no longer be prosecuted for an administrative offence but at the most for a criminal offence. If a criminal offence does not come into consideration, he has no right to withhold information since he cannot incriminate himself by testifying in proceedings against other parties concerned.

[25] France notes, however, that the scope of credible arguments to appeal will be limited, in practice, to the elements and criteria taken into account for fixing the fine and fine reduction.

However, a waiver of the right to appeal is unfortunately ineffective under German case law. The parties concerned, on the other side, were in the first place interested in obtaining the least possible fine in the negotiations. In that respect they discussed *inter alia* the aspect deliberate intent/negligence and the relevant period of the turnovers to be considered for the calculation of the fines. Furthermore, the parties concerned were very interested in achieving favorable payment conditions (installments) and the termination of proceedings against the individuals directly involved in the infringement.

In the course of the negotiations the existing evidence was not formally disclosed to the parties concerned. However, they basically knew which documents and, thus, which evidence the Bundeskartellamt had seized during the search. Finally, in October 2007 it was agreed both with IP Deutschland GmbH and with SevenOne Media GmbH that the respective marketing company will confess to having committed the alleged violations and, in return, the Bundeskartellamt will impose the above-mentioned fines which were significantly lower than the fines which would otherwise have been imposed. In addition, both IP Deutschland GmbH and SevenOne Media GmbH were granted the possibility to pay the fines in two installments. Finally, the Bundeskartellamt also agreed to terminate the proceedings against the individuals directly involved in the infringement.

According to usual practice the agreement was not made in writing. The Bundeskartellamt was able to guarantee IP Deutschland GmbH and SevenOne Media GmbH the outcome of the proceedings as agreed upon due to the fact that it acts both as the investigatory authority and as the authority imposing the fine. Furthermore, each of them received a draft of the order to be issued against them in advance and were granted the possibility to comment. In case one of the parties concerned had not felt bound by the settlement and appealed against the decision, however, the Bundeskartellamt would have been in the position to react accordingly. Although the confession made for settlement purposes may not be used in such a case, with regard to the strong evidence available the Bundeskartellamt could have issued a new (appealable) fines decision setting the fine only within the general fines procedure and without any reduction.

However, in the given case no appeal was filed against the orders imposing the fines and they became legally binding in December 2007.

### 3. Role of Court and Public Filing

Some jurisdictions said that their settlement agreements address the role of courts in the settlement process including whether the court: reviews or accepts the settlement; imposes the penalty or sentence; can impose a sentence or penalty other than that which the parties have agreed to, and if that happens, what recourse (*e.g.* withdrawal or appeal) the parties have. Alternatively, if the government signatory to the agreement will impose the penalty or sentence with no court involvement, the settlement agreement would likely articulate that instead.

Jurisdictions with settlement systems currently in place, except Germany, make settlement agreements or terms public. In limited circumstances, such as where disclosure will jeopardize the integrity of a covert investigation, such disclosure may be delayed. The public disclosure of settlement documents or terms provides transparency to the bar and business community. Importantly, if corporate defendants were allowed to enter into secret deals with the government to resolve their culpability for cartel conduct, investors, members of the public and the victims of the charged crime would naturally question the fairness and transparency of the penalty imposed.

### 4. Confidentiality of Cartel Settlement Discussions and Information

Parties will expect transparency as to whether and how settlement discussions are considered confidential. A few jurisdictions identified that their settlement agreements specifically address this issue. However, it is likely most jurisdictions have existing law or policies that address confidentiality even if it is not specifically addressed in a settlement agreement. Provisions addressing this issue may include whether statements made by the settling party or its counsel in the course of settlement discussions are generally admissible at any trial or hearing or may be otherwise used if settlement discussions break down.

Similarly, transparent policies should address what will happen if a party enters into a settlement and then breaches the agreement by, for example, failing to fully cooperate. In the United States plea agreements specifically enumerate that under such circumstances, documents, statements, information, testimony, or evidence provided by the defendant, defendant's counsel, or a corporate defendant's employees, may be used against the defendant.[26] As previously discussed, fears of disclosure of settlement information can provide a disincentive to settlement, so transparency as to how such information is treated is critical to encouraging settlements.

### 5. Withdrawal from a Cartel Settlement Agreement

Parties expect a settlement document to address whether and when a party may withdraw from a settlement agreement. The jurisdictions that responded to an inquiry about withdrawal stated that in their jurisdictions withdrawal from the settlement is generally allowed until the time it is entered, accepted, or otherwise made final by the appropriate court or administrative body. While withdrawal is largely an issue of the applicable law and policy in the relevant jurisdiction, clearly articulating in any settlement agreement the ability of either party to withdraw leads to a more transparent and predictable settlement system and may avoid procedural problems should either party wish to withdraw.

### 6. Violation of a Cartel Settlement Agreement

An underlying premise of all cartel settlements is that the settling party will not continue to engage in the cartel conduct that is the subject of the settlement. Continuous participation in a cartel after a settlement is reached invariably violates the settlement agreement, but more importantly, will almost certainly subject the settling cartel participant to further prosecution.

If a settling cartel participant is required to provide ongoing cooperation to the government as a condition of the settlement, the agreement will usually contain a provision outlining what will happen if a settling party does not comply with the cooperation requirements or other provisions of the settlement agreement. This term of

[26] *See* ¶ 20 of the Antitrust Division's Model Annotated Individual Plea Agreement and ¶ 23 of Model Annotated Corporate Plea Agreement *available at* http://www.usdoj.gov/atr/public/criminal.htm.

the settlement agreement may address: (1) who makes the determination that the agreement has been violated (*e.g.* the government prosecuting entity or court) and whether that decision is subject to review; (2) how the settling party will be notified of its violation; (3) what portions of the settlement will be voided and the triggering event for when they will become void (*e.g.* upon government notice, court determination, or after a certain period of time after notice); (4) what offenses will be subject to prosecution in the event the agreement is voided; (5) how statements, information, testimony, or evidence provided by the settling cartel participants may be used against them;[27] and (6) a waiver of the settling party's right to challenge the use of such evidence if the settlement is voided. If applicable, settlements may also allow for the tolling of any statute of limitations perhaps for the period between the date of the signing of the settlement and a time certain after the date that the government gives notice of its intent to void the settlement agreement. It is notable, however, that no jurisdiction identified a case in which a settling party was deemed in violation of a cartel settlement.

France also notes that because its system requires settling cartel participants to come up with commitments to modify their future behavior, and where the Competition Council makes such commitments compulsory, breaching this aspect of the settlement would amount to a breach of an injunction.[28]

### 7. Entirety of a Cartel Settlement Agreement

Settlement agreements in some jurisdictions contain a statement that the settlement constitutes the entire agreement between the government and the settling party and address the terms under which the agreement can be modified. Such statements are viewed as adding integrity to the settlement document and providing the public and any reviewing courts or agencies with assurances that no side agreements or compromises were reached between the parties.

### 8. Voluntariness, Court Acceptance and Review by Counsel

Depending on the legal requirements in the jurisdiction where the settlement is reached, responding jurisdictions also noted that settlement agreements may contain additional representations such as: (1) a statement that the settling party's decision to settle was freely and voluntarily made (*i.e.* not the product of coercion); (2) a statement that the government made no promises as to whether the court or other penalty-imposing body will accept or reject the recommendations contained in the settlement; and (3) a general statement wherein the settling party acknowledges that all legal and factual

[27] For individuals located abroad, if applicable, the language on voiding the agreement may include a provision that the factual basis contained in the settlement agreement provides a sufficient basis for any possible future extradition request made by the government, and that the settling party agrees not to oppose such extradition request. *See* optional ¶ 21 of the Antitrust Division's Model Annotated Individual Plea Agreement *available at* http://www.usdoj.gov/atr/public/criminal.htm.

[28] French courts deem such a breach an "extremely serious" violation of the law. Paris Court of Appeal, Case Société France Telecom of 11 January 2005.

aspects of the settlement have been reviewed with an attorney, and that the settling party is satisfied with that attorney's legal representation in the matter.[29]

## IX. Other Possible Cartel Settlement Agreement Provisions

The elements outlined above are the more common terms of a settlement that parties will likely expect to see in a cartel settlement. The following are additional provisions that some jurisdictions include in their settlements. These provisions may not be applicable or desirable in all jurisdictions and are offered as possible additions to standard settlement agreements.

### A. Debarment and Other Administrative Actions

Settling parties that are required to admit guilt may face collateral ramifications, especially in bid-rigging cases, such as debarment from performing government contracts. While debarment may act to deter collusion on government contracts, potential debarment from the performance of government contracts may also act as a disincentive to entering into settlements, especially in industries where government contracts constitute most or all of the cartel participant's business. In order to diminish this disincentive, cartel settlements may include some type of assurance regarding debarment, such as a provision stating that, if requested, the prosecuting agency will advise the appropriate officials of any government agency considering administrative action of the fact, manner, and extent of the cooperation of the settling party. While such a provision cannot guarantee the outcome of any administrative action by another agency, it provides assurances that the prosecuting agency will make other government entities aware of the settling party's cooperation, which may be helpful when debarment from future government projects is possible but discretionary.

### B. Cease Conduct

Settlements in some jurisdictions like Australia, Brazil, and Canada contain explicit orders or injunctions requiring that the settling party agree to cease and desist the cartel contact at issue in the settlement. If such a cease and desist order is part of the settlement, the settlement will also need to address how compliance is monitored and enforced, which may include mandated compliance programs.

For instance, in Brazil, the signatory party presents the compliance program at the time of the execution of the settlement and agrees to train all employees and to enforce the program, and an internal body of CADE monitors compliance and informs CADE's Reporting Commissioner if the party is not fulfilling its obligations.[30] A similar regime exists in Australia where the Court can order a party to implement a compliance program and have the program audited by an independent third party.

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[29] For examples of such provisions, *see* ¶¶ 19 - 21 of the Antitrust Division's Model Annotated Corporate Plea Agreement *available at* http://www.usdoj.gov/atr/public/guidelines/219263.htm.

[30] An example of a compliance program adopted in Brazil as a condition to the cement settlement is *available at* http://www.cade.gov.br/ASPIntranet/temp/t32020081029358155.pdf.

In France, the parties wishing to enter into a settlement agreement must commit themselves to modifying their behavior in the future, and the settlement agreement may include reports to the competition agency or any other measure allowing it to monitor the effective implementation of the compliance program. This condition is intended to develop measures that would not necessarily have been deemed worthy outside the framework of a settlement, be it initiatives aimed at restoring or furthering competition and/or compliance programs. If effectively monitored, France believes that such steps can bring additional added value, insofar as companies that have already agreed not to challenge the findings of the agency and to settle the case willingly commit themselves, in addition, to some proactive behavior.

In the United States, the Antitrust Division used to seek injunctive orders in cartel cases to prohibit defendants from engaging in the cartel conduct at issue, but the Division discontinued this practice some years ago since a plea agreement resolves the defendant's culpability for the cartel conduct at issue and, if it is later discovered that the settling party continued to engage in cartel conduct or engaged in additional cartel conduct after the settlement, that conduct would be prosecuted as a new and distinct offense and the recidivist cartel participant would likely face a substantially higher sentence for the subsequent offense. A subsequent prosecution is deemed by the Antitrust Division to have a more deterrent effect than a contempt proceeding for violating the previous injunction.

### C. Limitations on Use of Self-incriminating Information

Cartel participants wishing to enter into settlement discussions may be concerned that information they divulge in the course of their settlement discussion or cooperation will lead to an increase in their penalty. For instance, a corporate cartel participant might be concerned that it will divulge information not previously in the possession of the government as to the scope or duration of its cartel participation that will increase its fine exposure. To address this concern and promote candid and complete cooperation, a cartel settlement agreement may contain a provision stating that the government agrees that self-incriminating information provided by the defendant pursuant to the settlement will not be used to increase the volume of affected commerce attributable to the defendant or the resulting fine range. This type of provision is typically at the discretion of the government, but when included in settlements with early cooperators, it is a generous concession that acts as an additional incentive for companies and their cooperating employees to provide complete and candid cooperation.

### D. Provisions Applicable to Foreign-Based Cartel Participants

While the prosecution of foreign-based individuals for cartel conduct is not yet prevalent in most jurisdictions, in the United States over 30 individuals from 9 countries have pled guilty to participating in or obstructing the investigation of international cartels and been sentenced to serve jail time in U.S. prisons. Virtually all of these defendants were outside the jurisdictional reach of U.S. anti-cartel enforcers when they agreed to come to the United States, plead guilty and serve jail time.

While the following settlement provisions may not be applicable in most jurisdictions, they do serve as an example of ways in which certain inducements have, over time, and in conjunction with the threat of severe sanctions, provided incentives to cartel participants to accept responsibility, cooperate with the government's investigation and agree to serve jail sentences. By way of example, the Antitrust Division will agree to certain provisions in its plea agreements with foreign-based defendants to encourage them to submit to U.S. jurisdiction and plead guilty to cartel charges in the United States, including agreeing to: (1) expedite the sentencing process for pleading foreign-based defendants; (2) not take any action to arrest, detain or serve the individual with process or prevent the individual from departing when traveling to the United States for interviews or testimony in order to fulfill cooperation requirements under the plea agreement, unless that individual commits perjury, contempt, obstructs justice or makes a false statement; and (3) guarantee, before they enter into a plea agreement, that a criminal conviction will not result in the foreign national's deportation and permanent exclusion from the United States.[31]

These provisions are important concessions to foreign defendants and may tip the balance in favor of pleading guilty rather than remaining outside jurisdictional reach. The resulting cooperation from early pleading foreign nationals is often extremely valuable and creates momentum in an investigation as additional foreign nationals line up to plead guilty and resolve their culpability.

**Case Example — United States: Settlement Contemplates Criminal Prosecution and Incarceration in Multiple Jurisdictions — Marine Hose**

On December 12, 2007, the Antitrust Division filed historic plea agreements with three British nationals in the marine hose investigation. Not only were the 30, 24, and 20 month jail sentences the defendants agreed to serve the three longest sentences ever agreed to by foreign nationals for U.S. antitrust offenses, but for the first time, the plea agreements anticipated and addressed the criminal prosecution of, and imposition of a jail sentence upon, the defendants for a cartel offense in another jurisdiction.

The plea agreements contemplated the defendants' cooperation with and prosecution by the U.K.'s Office of Fair Trading ("OFT") in addition to their cooperation with and prosecution by the Antitrust Division. The plea agreements also allow for the possibility of concurrent prison sentences, in effect, in the United States and the United Kingdom, and provide that if sentences of imprisonment are imposed in the United Kingdom, the Division and defendants will recommend that the U.S. sentencing court reduce the prison sentences recommended in the Division plea agreements by one day for each day of imprisonment imposed in the United Kingdom.

After the three British nationals entered their guilty pleas in U.S. district court, in keeping with the terms of the plea agreements, the district court deferred the U.S. sentencing and the defendants were escorted in custody to the United Kingdom for the purpose of cooperating with the OFT's investigation, pleading guilty to a cartel offense and serving any prison time in the U.K.

[31] For a detailed discussion of these provisions in U.S. plea agreements, *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) at § V, *available at* http://www.usdoj.gov/atr/public/speeches/219332.pdf.

On December 18, the OFT charged the three executives with violating the Enterprise Act by "dishonestly participating in a cartel to allocate markets and customers, restrict supplies, fix prices and rig bids for the supply of marine hose and ancillary equipment" in the United Kingdom.

The cooperation in the marine hose investigation and the resulting charges and pleas are monumental milestones in international cartel enforcement in a number of ways: (1) the U.S. plea agreements for the first time contemplate criminal prosecution and the imposition of jail time against individual cartel participants in multiple jurisdictions; (2) the agreed-upon jail sentences called for by the U.S. plea agreements were record jail sentences for foreign nationals pleading guilty to antitrust offense in the United States; and (3) the charges in the United Kingdom against these defendants are the first criminal cartel offenses charged under the U.K.'s Enterprise Act since it came into force in 2003. All of these milestones were, at least in part, made possible by the ability of the United States to enter into plea agreements that are flexible enough to respond to new situations and provide meaningful incentives to settle.

## X. Other Contemplated Cartel Settlement Systems

The European Commission has proposed a non-negotiated settlement procedure that aims at achieving procedural efficiencies once the investigation itself is over, whereby parties would agree to a streamlined procedure in exchange for a settlement reduction. Hungary and Sweden, both of whom have leniency programs similar to the European Commission's program, are also considering the possibility of some type of settlement procedure. The following is a description of the Commission's proposal.

### Non-Negotiated Settlement System: The European Commission's Draft Legislative Package to Introduce Settlement Procedure for Cartels in the European Union

On 26 October 2007 the European Commission launched a public consultation on a package designed to allow for settlements of cartel cases where the parties not only acknowledge their involvement in the cartel and their liability for it but also agree to a faster and simplified procedure. The package consists of a draft Commission Notice and a draft Commission Regulation. Settlements would aim to simplify the administrative proceedings and could reduce litigation in cartel cases, thereby freeing resources to pursue more cases. The draft proposal would allow the Commission to impose a lower fine on parties who agree to the settlement procedure.

The proposed system of settlements is limited to cartel cases; it does not apply to other antitrust cases. On the other hand, not all cartel cases will be suitable for a settlement. The Commission will have a broad margin of discretion to determine which cartel cases are suitable. Conversely, companies are not obliged to enter settlement discussions or to ultimately settle and the Commission may only apply the settlement procedure upon parties' written request.

In cases where companies are convinced that the Commission could prove their involvement in a cartel, a settlement could be reached with the parties on the scope and duration of the cartel, and their individual liability for it. To this end, parties would be made aware of the envisaged objections and the evidence supporting them, and would be allowed to state their views thereon in anticipation of the formal objections.

If parties chose to introduce a settlement submission acknowledging the objections, a Commission's statement of objections (SO) endorsing the contents of the parties' settlement submission could be much shorter than a SO issued to face a contradictory procedure. Since parties would have been heard effectively

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. Such cooperation would be different from the voluntary production of evidence to trigger or advance the Commission's investigation, which is already covered by the Leniency Notice.

Since parties will be heard effectively in the framework of the settlement procedure, they will therefore have the opportunity to influence the Commission's objections through argument. However, the proposed settlement procedure will not involve negotiations or bargaining on evidence, objections or sanctions. Any company which becomes aware of the existence of an investigation (*e.g.* a leniency applicant, the addressee of a measure of investigation in general or the addressee of a decision of inspection in particular) may already at that stage indicate to the Commission its interest in exploring settlements. Should the Commission consider a case suitable for settlement, it will initiate settlement proceedings once the "core" investigation (leniency, inspections) takes it to the stage of being able to draft a statement of objections. It will then explore the interest in settlement discussions of all parties to the proceedings by letter setting a final time-limit to express their interest in writing.

Parties wishing to settle a case with the Commission will have to declare their interest in settlement discussions, appoint a representative per undertaking and submit a written settlement submission in the terms discussed with the Commission and containing:

- an acknowledgement of the parties' liability for the infringement;
- an indication of the maximum amount of the fines the parties foresee to be imposed by the Commission;
- 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 make their views known to the Commission;
- the parties' confirmation that, in view of the above, they do not envisage requesting new access to the file or requesting to be heard again in an oral hearing, unless the Commission does not endorse their settlement submission;
- the parties' agreement to receive the statement of objections and the final decision pursuant to Article 7 and 23 of Regulation (EC) No 1/2003 in a given official language of the European Community.

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 written 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 full statement of objections, the possibility to request full access to the file and an oral hearing. Also, if no settlement was explored or reached, the standard procedure would apply by default and remain the fall-back option.

After a "settlement" has been reached between the parties and DG Competition of the European Commission, the College of Commissioners may decide not to follow the settlement. However, it cannot adopt a decision departing from the "settled" objections without informing the parties concerned and adopting a new statement of objections subject to the ordinary rules of procedure and which cannot be based on acknowledgements provided by the parties in view of settlement. Clearly, such a departure from a settlement should occur only exceptionally if the usefulness of the settlement instrument is to be preserved.

The percentage reduction to be applied to fines in cases where a settlement is reached has yet to be determined by the Commission, following a public consultation. The settlement reduction will be deducted from the fine that a company would normally have to pay according to the provisions of the Commission's current guidelines on fines. When applicable, the reduction of fine given under the settlements procedure will be cumulative with the reduction of fine under the leniency programme.

Parties' rights of defence under the settlement procedure will 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 written submission, in anticipation of the formal notification of objections. Moreover, the right of appeal is retained: a company which has received a decision after a settlement with the Commission can appeal the Commission decision to the Court of First Instance.

The deadline for comments on this draft settlement system was 21 December 2007. After the public consultation, the views of EU Member States will be sought, and it is anticipated that adoption of the Regulation and the Notice introducing the settlements system will take place in 2008.

See all relevant documents at: http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html

## XI. Conclusion

As discussed in this paper, cartel settlements can provide enormous benefits to the government, cooperating cartel participants, the courts, the victims, and the public at large by persuading cartel members – through the promise of transparent, proportional, expedited, certain, and final dispositions – to cooperate early and accept responsibility for their cartel conduct. Settlements can be a win-win situation for all parties involved. As competition enforcers in various jurisdictions face the challenges of designing and implementing settlement systems, they will be well served by remaining focused on the benefits that may be achieved through settlements and how these benefits can be obtained within their enforcement regimes.

## Appendix A: Table of Responding ICN Member Jurisdictions

| **Jurisdiction** | **Cartel Enforcement Regime** (Administrative, Civil Criminal) | **Cartel Settlement System?** | **Type of Settlement System** (Administrative, Civil Criminal) | **Number of Settlements in Last 5 Years** |
|---|---|---|---|---|
| Australia | Civil | Yes | Admin/Civil | |
| Brazil | Admin/Civ/Crim | Yes | Admin/Criminal (Separate settlements) | 4 |
| Canada | Criminal | Yes | Criminal | 25 |
| Czech Republic | Administrative | No | | |
| European Union | Administrative | No (Proposal under consultation) | | |
| El Salvador | Administrative | No | | |
| France | Administrative | Yes | Administrative | 39 |
| Germany | Administrative (Criminal offenses prosecuted by public prosecutor) | Yes | Administrative | 101 (Note: All fines decisions not appealed are counted as settlements) |
| Hungary | Admin/Criminal | No (Considering possibility) | | |
| Ireland | Civil/Criminal | No | | |
| Israel | Civil/Criminal | Yes | Criminal | 7 |
| Japan | Admin/Civ/Crim | No | | |
| Korea | Admin/Civ/Crim | No (Examining possibility) | | |
| Mexico | Administrative | No | | |
| Netherlands | Administrative | No | | |
| Sweden | Administrative | No (Proposal pending) | | |
| Switzerland | Administrative | Yes | Administrative | 4 |
| Turkey | Admin/Civil | No | | |
| United Kingdom | Civil/Criminal | Yes (Currently in civil cartel investigations only) | | 4 (Note: 3 are still ongoing) |
| United States | Criminal | Yes | Criminal | 207 |

## Appendix B: Publicly Available Settlement Resources and Documents

### Australia:

Visy documents:
ACCC media release: http://www.accc.gov.au/content/index.phtml/itemId/802635/
Federal Court Judgment: http://www.austlii.edu.au/au/cases/cth/federal_ct/2007/1617.html

### Brazil:

Publicly available settlement agreements for both cartel and non-cartel cases:
http://www.cade.gov.br/jurisprudencia/tcc.asp

Cement settlement:
http://www.cade.gov.br/ASPIntranet/temp/t32020081029358155.pdf
SDE's opinion on settlement agreements:
http://www.mj.gov.br/sde
http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm
http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={EDB72BD5-9425-4116-889D-ED971CA94BBB}&ServiceInstUID={2E2554E0-F695-4B62-A40E-4B56390F180A}

### Canada:

Some notable settlements can be found at:
Fort McMurray Auto Body Shops:
http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02280e.html

Sotheby's and Sotheby's (Canada) Inc.:
http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02162e.html

Fine Paper:
http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02018e.html

Bulk Vitamins:
http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/00456e.html

### European Union:

Documents regarding the European Commission's proposed settlement procedures in cartel cases are available at: http://ec.europa.eu/comm/competition/cartels/legislation/settlements.html

### France:

Information regarding two recent decisions by the French Competition Council where they reduced the fine taking into account settlement procedures are available (in French) at:
http://www.conseil-concurrence.fr/pdf/avis/07d21.pdf; and
http://www.conseil-concurrence.fr/user/standard.php?id_rub=211&id_article=799

### Germany:

Fines decisions regarding recent settlements are available (in German) at:
http://www.bundeskartellamt.de/wDeutsch/download/pdf/Kartell/Kartell06/B3-129-03.pdf
German submission for OECD Working Party No. 3 on Co-operation and Enforcement Roundtable on Plea Bargaining / Settlement of Cartel Cases, available (in English) at:
http://www.bundeskartellamt.de/wDeutsch/download/pdf/OECD/Plea_Bargaining_Roundtable.pdf

**United Kingdom:**
Press releases for matters where the OFT has pursued settlements are available at:

http://www.oft.gov.uk/news/press/2006/88-06
http://www.oft.gov.uk/news/press/2006/166-06
http://www.oft.gov.uk/news/press/2007/49-07
http://www.oft.gov.uk/news/press/2007/113-07
http://www.oft.gov.uk/news/press/2007/170-07
http://www.oft.gov.uk/news/press/2008/22-08

**United States:**
The U.S. Department of Justice, Antitrust Division's model plea agreements are available at:
http://www.usdoj.gov/atr/public/criminal.htm

Publicly filed plea agreements are available at: http://www.usdoj.gov/atr/cases.html

Policy guidance, including, 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), are available at: http://www.usdoj.gov/atr/public/speeches/219332.pdf