

Exchanging glances

As Europe debates the introduction of a direct settlements system for cartel participants, Kent Gardiner, Bridget Calhoun, Matthew Scarlato and Volker Soyvez of Crowell & Moring LLP take a comparative look at the US plea-bargaining process

In US cartel cases, both the Department of Justice's antitrust division and corporate defendants reap substantial benefits from the well-established process of negotiated settlements, known colloquially as 'plea-bargaining'.

Companies that avail themselves of this out-of-court settlement system can plead guilty to antitrust offences in return for a reduced penalty and expedited closure, so they can put the matter behind them and get back to business.

Negotiated settlements enable the division to resolve investigations more quickly, and thus manage a larger caseload; cooperating companies often materially advance the government's discovery of evidence, and the detailed, direct interaction between the division and a cooperating party in the context of a penalty negotiation furthers the government's goals of meaningful deterrence and compliance.

Frequently, however, antitrust investigations extend beyond the US to other jurisdictions, such as the European Union, that do not have negotiated settlement processes. Thus, multinational companies that confront parallel proceedings in the US and elsewhere continue to face lengthy and uncertain cartel investigations that typically extend well beyond the resolution of their liability in the US.

But antitrust regulators outside the US are beginning to consider the benefits of a plea-bargaining process. Most notably, Neelie Kroes, Europe's Competition Commissioner, invigorated the debate over direct settlements in the EU with comments made in her April 2005 speech 'The First Hundred

Days'. In taking a "comparative glance" at the US system, Kroes acknowledged the virtues of negotiated settlements and suggested that a similar system could improve the commission's ability to control the rapidly growing docket of cartel investigations,

Antitrust regulators outside the US are beginning to consider the benefits of a plea-bargaining process

which has been given a substantial boost by the success of cross-border cooperation and the commission's revised leniency programme. While the debate over the virtues of direct settlements continues in the EU (including issues such as whether Regulation 1/2003 even permits such settlements), it is worth taking Kroes's comparative glance at the long-standing plea-bargaining system in the US.

THE EU PROCESS

A cartel investigation in the EU is frequently triggered by information received from a leniency applicant. Once the commission suspects the existence of a cartel, it will often conduct 'dawn raids' to gather documentary and possibly testimonial evidence. Then a series of informal and formal information exchanges occur, including the commission's issuance of formal legal requests in line with European law. Companies will subsequently conduct their own internal investigations to assess potential exposure and decide whether to seek a reduction in fines based on the commission's leniency guidelines.

It could then take years for the commission to gather sufficient evidence to issue a statement of objections summarising its analysis of the cartel. While parties are permitted to contest the findings in the statement of objections, the commission has the final say, and these findings form the basis of the fine imposed against each conspirator, which are announced in a final decision. Commission decisions imposing high fines are frequently challenged in Europe's Court of First Instance and appealed at the European Court of Justice. This process alone often takes several years before a resolution is obtained.

Participation in a cartel is only a civil offence in the EU; it is punishable by a fine calculated according to guidelines implemented in 2006. The EU guidelines provide a "general methodology" for the commission to determine fines intended to "reflect the economic importance of the infringement as well as the relative weight of each undertaking in the infringement". In addi-

tion to a newly adopted “entry fee” fine applicable to any violation, the commission imposes its fine based on the calculation of a “basic amount” and a “multiplier” derived from certain aggravating and mitigating circumstances. The basic amount is determined

A fundamental component of the US plea-bargaining process is transparency

by the sales of the relevant good or service, which may include sales outside of the EU – even worldwide shares – if EU-wide sales “do not properly reflect the weight of each undertaking in the infringement”, and the duration of the cartel. A percentage figure (the guidelines recommend a maximum of 30 per cent) that reflects the cartel’s impact on the relevant sales, and factors in a series of non-exclusive factors such as the nature and scope of the cartel, is applied to this amount. Regardless of the fine resulting from this calculation, however, the maximum penalty is 10 per cent of the company’s total turnover.

PLEA-BARGAINING IN THE US

In the US, the Department of Justice’s antitrust division typically bases its investigations on the proffer of an amnesty applicant, customer complaints, or its own market analysis. Once notified of an investigation, companies under investigation conduct their own internal investigations and engage in a series of discussions with the division. Timing is critical because either ‘first-in’ amnesty or ‘second-in’ leniency status may be available, and so companies race to ascertain the scope of their exposure and to make an informed decision about the prospects of leniency. The company may submit information confidentially to the division, and will often receive additional information about the government’s investigation in exchange. This exchange helps the company gain fur-

ther insight into potential exposure, and may help the government uncover additional cartel activity that has yet to be detected.

At any point in the process, but typically after the division indicates that it intends to bring criminal charges, a company may plead guilty to avoid a trial and a potentially adverse judgment. If so, the parties discuss and agree upon a set of key facts, and the nature and extent of the criminal offence or offences that are the subject of the plea. Then, pursuant to the parties’ negotiations as directed by the US Corporate Leniency Program and the US Sentencing Guidelines, a penalty is calculated and incorporated into the plea agreement. Upon approval by a federal court, the company’s liability and penalty are definitively established.

In negotiating the penalty, the division continues to adhere to the US Sentencing Guidelines, even though they were rendered merely “advisory” by the Supreme Court in the *United States v Booker* case. Similar to the European Commission’s new system, the US Sentencing Guidelines’ basic formula starts with a “base fine” and then applies a multiplier based on a “culpability score”. The base fine is calculated by multiplying the “volume of affected commerce” (generally, the company’s relevant sales in the US during the conspiracy period) by 20 per cent, which represents the assumed “overcharge” associated with the cartel. A culpability score is then calculated, based on factors such as cooperation and acceptance of responsibility, whether high-level personnel were involved in the violation, and obstruction of justice. The culpability score is then translated into a multiplier ranging from 0.75 to 4, which is applied to the base fine amount. Although US antitrust laws determine a maximum fine for corporate defendants of \$100 million, general criminal penalty statutes provide for an “alternative maximum fine” that allows the division to seek fines based on twice the total gain or loss that is realised or inflicted by the cartel, which can easily exceed \$100 million.

A FIRST GLANCE: TRANSPARENCY

A fundamental component of the US plea-bargaining process is transparency. The Department of Justice’s antitrust division advocates a “tradition of maximising transparency and predictability” in penalty negotiations. The division’s view is that this transparency extends to all aspects of the process – including leniency, negotiation and fine calculation. This is based on the idea that transparency is what makes the plea negotiation process a viable option for corporate defendants. The more predictable critical variables are to a company, the more likely it will be to cooperate and voluntarily

assist the investigation. And cooperation is undoubtedly the cornerstone of an antitrust investigation, as antitrust authorities typically build their cases on voluntary proffers of information.

But does the US system really provide sufficient transparency in fine negotiation? It is hard to dispute the division’s commitment to making its “second-in” policy fully transparent. But corporate defendants still face a high degree of uncertainty when it comes to calculating fines. While the division provides general criteria and guidelines to the public, it is often reluctant to share the fruits of its investigative efforts with corporate defendants who are trying to assess their exposure. Even if a defendant is willing to admit guilt, it frequently enters the negotiation process without any knowledge of the division’s evidence that establishes the company’s specific participation in the cartel, and therefore its potential financial exposure.

Moreover, the division’s plea agreements provide little information that subsequent defendants can use as precedent to predict their own potential exposure. Part of the problem stems from the nature of

Corporate defendants still face a high degree of uncertainty when it comes to calculating fines

the plea-bargaining process itself; it is a private, one-on-one negotiation that does not become part of the public record, except through limited presentations to the court that must approve the negotiated plea. In addition, plea negotiations by their nature involve ‘cutting deals’, and are therefore less reliant on a precise list of publicly understood factors.

But an increasing number of elements of the penalty calculation appear to be fair game for negotiation. Recent plea agreements demonstrate that companies are able to negotiate a variety of issues affecting the

ultimate fine imposed, including the duration of the cartel, product definition, specific customers or customer groups affected, and other limitations on the “volume of commerce” at issue. In some respects, the lack of broad public disclosure has facilitated these case-specific deals because it permits advocacy that is neither confined to prior precedent nor subject to public scrutiny.

In short, the US system is characterised by two types of transparency: broad, publicly disclosed guidelines that explain how the division will generally deal with cooperating companies, and specific information that can be gleaned from experience with particular plea negotiations, which offer insight into creative approaches to achieving resolution.

In the EU, penalty calculation is far less transparent. In fact, Kroes disfavours such an approach, and has stated that she “cannot see how allowing potential infringers to calculate the likely cost/benefit ratio of a cartel in advance will somehow contribute to a sustained policy of deterrence and zero tolerance”. While this might make sense at a theoretical level, as a practical matter it seems unlikely that corporate executives would make decisions to participate in cartels based on a calculation of potential fines. Today, the risks of global investigations, high fines, multiple damages from private litigation in various jurisdictions, potential extradition, personal criminal exposure in the US and elsewhere, and the heightened scrutiny of the ethics and compliance of senior management, all make it untenable for a senior executive to decide to participate in an illegal cartel based on a calculation of the costs and benefits from engaging in such activity. Indeed, the US experience seems to confirm that, even with a fairly transparent process, companies are not carrying out such cost/benefit analyses.

In any event, the hypothetical increased deterrent effect of an uncertain penalty would itself have to be weighed against the negative effect that uncertainty has on a company’s willingness to cooperate. If the goals of competition authorities in the US and the European Union are to deter cartel behaviour, punish violators fairly and efficiently resolve cartel cases, meaningful transparency is a key aspect of any plea negotiation process.

A SECOND GLANCE: IMPACT

Another aspect of US cartel enforcement – and one that has come under particular scrutiny in recent years – is the US Sentencing Guidelines’ 20 per cent “proxy” that presumes cartels have a 20 per cent impact on the relevant commerce for purposes of calculating the fine. The 20 per cent proxy

was adopted in 1991, based on the belief that performing an actual impact analysis in every case was overly burdensome, and that 20 per cent was a fair estimate of the likely overcharge from a cartel. Since its inception, however, the presumption has been heavily criticised as being both too high and too low an estimate. And since the Supreme Court’s *Booker* decision, the debate has shifted to whether the very concept of a proxy in lieu of engaging in a real impact analysis is a good idea. Among the voices in the debate is that of the Antitrust Modernization Com-

Companies favour global coordination because they do not want to pay duplicative penalties

mittee, an organisation created to review US competition laws. The committee disfavours the 20 per cent proxy, recommending, first, that the Sentencing Commission revisit the issue of whether 20 per cent is an appropriate estimate and, second, that an amendment to the Sentencing Guidelines be made to permit an overcharge analysis if either party can demonstrate that the actual impact of the cartel is materially different to the 20 per cent proxy.

Almost all commentators disfavour the continued use of the 20 per cent presumption, except for the most important party to the debate – the division. Post-*Booker*, the division essentially has taken a ‘business as usual’ approach. In fact, the division has declared its disapproval of cooperating defendants who advocate an impact analysis in lieu of the 20 per cent proxy, taking the position that these defendants will “have to wait until the end of the investigation for [their] day in court”.

Such a proxy for actual harm is entirely unique to the US criminal justice system – all other types of business crimes require an assessment of actual impact. And the fact that the 20 per cent presumption has been

criticised as both too high and too low makes it increasingly likely that the presumption is not a valid estimate. Indeed, it is a clear example of expediency over accuracy.

The division’s continued support for the 20 per cent presumption also appears at odds with its own Corporate Leniency Program. Boiled down, the programme has three essential elements: confess, cooperate and provide restitution. But how can the division force companies to provide restitution if it refuses to consider the actual impact of the cartel?

The perceived burden imposed on the courts and the parties by an impact analysis may also no longer be justified. Historically, impact analysis was viewed as a complicated and burdensome process involving conflicting economic theories and opinions. But today the division has substantial in-house economic expertise, and companies routinely engage economic experts to determine the impact of the cartel to help their advocacy with the division and to aid in follow-on civil litigation cases.

It should be noted, however, that while the division has taken a hard line on the 20 per cent proxy, it has seemed receptive to new arguments regarding other aspects of the Sentencing Guidelines. It has shown a willingness, for example, to calculate penalties based on more flexible interpretations of the volume of affected commerce.

As for the European Commission, the new EU Guidelines make clear that its methodology is based in part on the “gravity” of the offence, and give the commission the discretion to perform an impact analysis when calculating the fine. Even the 30 per cent maximum impact is only a general guideline. So, because the commission is unencumbered by any proxy, corporate conspirators should be able to work with it to establish the cartel’s market impact for penalty calculations.

With the rise of global companies and the corresponding need for global cartel enforcement, it makes sense to take a global perspective on deterrence and restitution and to avoid duplicative penalties. In the US, the Department of Justice’s antitrust division recognises this perspective, at least to some extent, in that its policy is to limit the volume of commerce analysis to the company’s US sales.

The new EU Guidelines, by contrast, permit the European Commission to take into account global sales and market shares if it finds that EU-wide data is insufficient. While there is no history yet to the commission’s application of the new guidelines, this approach seems to ignore the fact that fines may also be imposed in the US and elsewhere, and presents the strong prob-

ability that the aggregate fines will substantially exceed any reasonable calculation of global impact.

Of course, companies favour global coordination because they do not want to pay duplicative – and therefore excessive – penalties. But it also seems short-sighted from the perspective of global competition policy to impose duplicative penalties, because both the division and the commission strongly encourage global cooperation and coordination in antitrust cartel prosecutions. It would seem more consistent with these global enforcement goals to minimise the risks of inconsistent impact assessments that could result in cumulative penalties that substantially exceed the economic gravity of the offence. And it is worth noting that each jurisdiction's guidelines give the enforcers the discretion to take a global enforcement perspective into account.

A THIRD GLANCE: COMPANY-SPECIFIC NEGOTIATIONS

If the European Commission decides to establish a direct settlement process, it must grapple with the issue of consistent treatment of cartelists. This includes the proportionality of fines imposed on each cartel member. One area of particular concern is the potential for factual inconsistencies among different settlements. Under current EU procedure, the commission investigates virtually every exhaustive detail of the conspiracy and determines the fines against all cartel members as part of the same decision. Consistent with this procedure, one option would be to establish an 'all-or-none' system where either all parties agree to settle or no one does. In practice, though, it is highly unlikely that all the cartel participants (of different sizes and levels of participation) would agree to settle at the same time. So the prospect of simultaneously negotiat-

ing all of companies' individual penalties appears slim.

In the US, the antitrust division negotiates with companies individually. This approach permits the division to engage each company as it deems appropriate, which makes it more likely that the negotiated punishment will fit the crime and the company's specific role in it. The division is still able to maintain consistency in its penalties by starting with the 'second-in' applicant and then working down the line, which provides a frame of reference for each subsequent settlement. As for potential factual inconsistencies, the division keeps the factual basis of a plea to the most limited level of detail, and does not make any such findings binding on other parties. In the US system, an additional incentive to obtaining second-in leniency is having the first seat at the negotiating table when working out the relevant plea period or the duration of the cartel.

For the European Commission to adopt a similar approach, it would first need to shift its current 'leave no stone unturned' approach and satisfy itself that justice – and consistency – can be served with an agreed-upon set of the key facts. Alternatively, this issue could be addressed using a middle-ground approach that gives other cartel members an opportunity to object to the factual basis for a settlement prior to its enactment. But even this idea raises the possibility that one cartel participant could effectively block a settlement between the commission and another cartel participant if critical facts are contested – which would undermine the incentives for individualised negotiation.

Corporations undoubtedly prefer an individualised system. It affords companies the greatest level of control over their own destinies, freeing them from the potentially inconsistent goals of other parties – often their

fiercest competitors – who may have different incentives and levels of participation in the cartel. And even if only a few cartel participants settle, it still minimises the government's and the settling parties' burden and expense, and often encourages other cartel members to settle as well. Likewise, having individualised settlements in both the US and the EU would further encourage the rate of cooperation and early resolution of global cartel cases.

TAKING A CLOSER LOOK

The possible shift in the European approach to direct settlements, as raised by Kroes's comments, highlights the recognition that a more abbreviated procedure can deliver substantial value without compromising the pursuit of justice. The establishment of a direct settlement process in the EU would greatly benefit both the commission and corporations, especially those facing global investigations. Efficiency of time and resources would serve the interests of all parties involved, permitting the commission to resolve more cases and companies to pay for their misdeeds and achieve closure. And as the foregoing 'comparative glances' demonstrate, the commission has the benefit of a well-established US penalty negotiation system as a real-life experiment to help it determine the appropriate elements of an EU direct settlement process. The US system may have something to consider as well from the commission's greater willingness to assess a cartel's economic impact.

Kent A Gardiner is chair of Crowell & Moring LLP and a partner in the firm's antitrust group. Bridget E Calhoun is also a Washington, DC-based antitrust group partner. Matthew F Scarlato is with the Washington, DC office and Volker Soyez is with the Brussels office. They are both associates in the antitrust group.