Introduction

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

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

3. Leaving aside philosophical considerations, what is the practical interest of settlements for business entities? While the efficiency advantages to the agencies are well known, are they the same for companies? Indeed it is clear that they can also benefit from an opportunity to reduce the distraction, damage to reputation and the legal cost of a lengthy procedure; in many cases this outweighs the concessions made in terms of rights of defense, and the loss of a chance to prevail in the end. Also, we believe there is a general perception that settlements enhance the good administration of justice simply because they speed it up and reduce procedural bureaucracy, which can only improve the overall quality of the enforcement action whilst releasing agency resources to pursue other cases.
4. Issues that business entities may have with antitrust settlements on both sides of the Atlantic are different but proceed from the same cause: by nature, the position of the parties in the negotiation is asymmetrical. Therefore, to make settlements an attractive option, the lack of symmetry should not be worsened by inconsistent and unpredictable outcomes, and of course the reward must be sufficient, ensuring that potential collateral damage is limited.

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

5. As always, the companies’ primary concerns are:

- transparency,
- legal certainty, and
- cost containment.

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

I. In North America

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

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

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the acceptance of a plea agreement by defendants will act to reduce the penalty that otherwise would accompany a cartel violation.

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

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

10. While the U.S. authorities often have a large volume of compelling evidence regarding an alleged cartel, such is not always the case. In these instances, there often are questions as to whether an agreement existed, whether the agreement was “hard core” and should be treated as per se unlawful or was instead “rule of reason” conduct or whether a party actually joined other conspiring parties in their unlawful endeavour. In these instances, a plea arrangement is less likely. It is important for the authorities to carefully weigh the evidence in such cases and not assume that all cartels are alike and that all agreements among competitors are pernicious in nature. Efforts to overreach – for example by refusing to discern between affected and unaffected commerce – can result in perverse results including wrongfully punishing conduct that should not be punished.

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

12. The same remarks apply more or less in Canada, where over the last 25 years or more virtually every price fixing case that has been resolved has been resolved by settlement4. Some members of the legal community and the business community fear that this may lead to a situation where there is a near absence of case law development as there is now almost no judicial involvement in these matters. The impact of new developments such as the publication by the Competition Bureau earlier this year of a draft Information Bulletin on Sentencing and Leniency in Cartel Cases remains to be seen. There is significant pressure on companies to come forward as early as possible often before the all the facts are known. This, and the pressure in favour of the quick disposal offered by settlement, may result in heavy consequences especially for leniency (as opposed to full immunity) applicants. It is therefore very important that the authorities in such cases carefully scrutinize the facts and reject cases where it is doubtful that a prosecution would succeed if the case


4 The comments in section III of this paper with respect to private actions apply with full force in Canada. An applicant for immunity or leniency will have to carefully consider the impact of the near-inevitable private actions (i.e. class proceedings) that will generally follow public disclosure of the existence of the cartel.
were tried. This is particularly true in Canada where price fixing is not unlawful per se, and where the government must prove an undue lessening of competition effect to obtain a conviction.

II. In Europe

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

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

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

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

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

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

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

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

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

- the potentially unfair lack of symmetry in the access to information: especially because of the rule denying access to the file except if “justified” at the discretion of the Commission;
- the rigidity of the process requiring the submission of a written proposal with the proposed amount of the fine;
- the required admission of guilt (even though mitigated by the possibility to make oral statements) which makes the defendant’s position in case of resumption of the normal procedure much weaker, and increases exposure to damages action: it makes the decision to ask for settlement a point of no-return, and this may deter companies who have a defendable case from crossing that bridge (so frustrating the efficiency purposes of the Commission, especially in “hybrid” cases).

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

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

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

22. Indeed, in antitrust like in any kind of litigation, a defendant faced with the dilemma of entering into settlement negotiations or pursuing the administrative or judicial procedure is in great need of visibility on the potential consequences of the admissions which are by nature a condition to the settlement. In international antitrust cases, the complexities are huge. These consequences may affect outstanding cartel investigations in other jurisdictions, and potential private actions in the defendant’s own jurisdiction and abroad. As timing is of the essence in a settlement, agencies should be conscious that these very complex
23. The international collateral risks taken by the defendant who makes an admission for the purposes of a settlement are multi-faceted. First, there is a jurisdictional risk: for instance, the admission made by a company in one country may create the minimum contact necessary to give jurisdiction to authorities which would otherwise not have it, or allow them to "pierce the corporate veil" and seek the foreign parent company’s liability. There is an important evidentiary risk: the admission can be used by an authority which would otherwise be unable to collect the foreign evidence necessary to support its case. There are also risks relating to the assessment of the scope of the case, e.g. with respect to the market definition or the period of the alleged offence, and to the varying approach to the recovery of damages by indirect customers. Finally, there are procedural risks: for instance, a foreign settlement can be invoked by a claimant in a U.S. action where the mere fact that there is an antitrust investigation abroad would not be sufficient to meet U.S. pleading standards.

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

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

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

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

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