BARGAIN HUNT

In the US, the majority of cartel cases are settled, thanks to the popularity of plea-bargaining — this is not so in the European Union. **John Pheasant** and **Eric Stock** look at the US programme of busting international cartels and what lessons the EU can learn

As the European Commission considers the comments received in its consultation on the proposed settlement procedure in cartel cases, it is useful to reflect on the similarities and, in particular, the differences between the concept of 'settlement' as envisaged by the Commission and the plea-bargaining procedure which is nowadays a central feature of the system in the US. Whereas, at the European level, there are no criminal penalties either for companies or for individuals implicated in a cartel, the criminal sanction is at the heart of US enforcement. Accordingly, while the Commission looks on 'settlement' first and foremost as a means of simplifying and possibly shortening its administrative proceedings — which lead to a cease-and-desist order and the imposition of a hefty fine for cartel behaviour — the 'settlement' process in the US focuses on keeping the defendant company out of court and its employees out of jail.

The different systems mean that there are some inherent limitations on the lessons which might be learnt in Europe (as the Commission develops a 'settlement' procedure) from a review of the plea bargain process in the US. However, a review of recent activity in the US certainly reminds us in Europe that the ability to plea-bargain with the antitrust authority does not necessarily lead to better deals — at least not for defendants.

Unlike in Europe, the antitrust division of the US Department of Justice (DoJ) must take its case to court unless it reaches a plea bargain with a defendant. A plea bargain can allow the DoJ to avoid the need to expend the resources of a trial and risk losing. For the corporate defendant, a plea-bargain offers the opportunity to avoid a long and public criminal proceeding, as well as more certainty as to the fine imposed. Although US courts technically have the authority to choose their own sentence, most US plea agreements permit the defendant to void the plea if the court does not sentence the defendant to the agreed-upon fine. For the individual, of course, the plea bargain offers the individual the opportunity to avoid the risk of a large fine and long prison stay — although the DoJ rarely, if ever, enters into agreements with individuals charged with cartel violations that do not include some jail time. The end result in the US is that the vast majority of cartel cases are settled and trials are few and far between.

The ability to plea bargain may in fact permit the DoJ to devote more resources to cartel matters than it would be able to in the absence of such a procedure. The DoJ continues to make cartel prosecutions — in particular, international cartel prosecutions — one of its highest priorities. The plea agreements announced during the past year — and a recent speech by the Deputy Assistant Attorney General responsible for criminal cartel enforcement — provide the unhappy details for those accused of involvement in cartels.

BRITISH AIRWAYS AND KOREAN AIR RECENTLY AGREED TO PAY $300M (£151M) IN FINES, WHICH TIED THE SECOND-HIGHEST FINE LEVEL EVER IMPOSED BY THE DOJ

First, the DoJ has continued — and, indeed, accelerated — its trend towards insisting on large fines in international cartel cases. The DoJ recently announced that it had obtained more than $630m (£318m) in fines for cartel cases in the fiscal year 2007, which is the second-highest amount in DoJ history. In connection with the DoJ's investigation of an alleged cartel in the air transportation industry, British Airways and Korean Air recently agreed to pay $300m (£151m) in fines, which tied the second-highest fine level ever imposed by the DoJ (which itself was a record set only in 2006 by the fine imposed on Samsung for its alleged involvement with the DRAM cartel). Fines on this scale have not been seen since the vitamin price-fixing case in 1999. The DoJ also recently announced a third fine in the air transportation investigation — $61m (£31m) for Qantas Airways — and has emphasised that the investigation remains "ongoing".

The air transportation plea agreements also contain ominous tidings for individuals alleged to have been involved in international cartels. A company that enters into a plea agreement with the DoJ will typically obtain an agreement from the DoJ not to prosecute company employees, except for a short-list of employees that the DoJ considers most culpable. But these 'carve-out' lists are getting longer and longer. In the British Airways and Korean Air Lines plea agreement, the DoJ excluded 10 and seven individuals, respectively, from immunity. These individuals, whose names were made publicly available when the DoJ filed the plea agreements with the court, are all vulnerable to prosecution by the DoJ. (Whether the DoJ has the willingness or resources to extradite and prosecute all of these individuals, however, remains to be seen). By way of comparison, in 1999 only four individuals were excluded from immunity when F Hoffman-La Roche agreed to pay $500m (£252m) — still the highest cartel fine in US history — as a result of the vitamins case.

This is only the latest development in a string of bad news for non-US executives accused of cartel violations. Only a decade or so ago it was virtually unheard of for non-US nationals located outside the US to spend time in US prisons for antitrust offences. Over the past decade, the DoJ has cracked down on non-US executives, but even in 2000-05 the average sentence imposed on non-US nationals for antitrust offences was three to four months. In the past year, however, the DoJ has insisted in several cases that non-US nationals serve much longer sentences. In connection with the DRAM cartel, for example, two Korean citizens recently agreed to serve sentences of 14 months and 10 months, respectively.

In April 2007, when the 14-month sentence was announced, it was the longest prison sentence that any non-US citizen had agreed to serve for antitrust violations. But only a few months later, in November 2007, the DoJ announced that two more non-US citizens had agreed to plead guilty and serve 14-month sentences for their participation in the alleged marine hose conspiracy. Last year was undoubtedly a bad year to be accused of a cartel offence.

The trend towards increased prison time for non-US executives reflects the impact of an overall trend by the DoJ to seek more and longer prison sentences in cartel cases. In fiscal year 2007, DoJ cartel prosecutions resulted in more than 31,000 'jail days', more than twice the number of 'jail days' imposed in any previous year in the DoJ's history. In the 1990s, 37% of defendants charged by the DoJ's antitrust division were sentenced to jail time. But since fiscal year 2000, the DoJ has sentenced almost 60% of defendants charged with cartel offences to time in jail. At the same time, the average prison sentence for cartel offences rose from eight months in the 1990s to 19 months since fiscal year 2000.

Since 2005, the DoJ has also had another tool at its disposal to investigate cartels — increased incentives to enter the corporate leniency programme. As a result of US legislation in 2004, over the past two years companies that have obtained leniency from the DoJ have been entitled to 'de-trebling' of damages in civil cases. This means that if a company blows the whistle, not only does it avoid any criminal liability, but it also is subject only to single (not treble) damages in civil cases brought by customers (including class actions). This may have contributed to the increase in successful cartel investigations by the DoJ, as DoJ officials have stated publicly that the leniency programme has resulted in more than half of the division's major cartel investigations.

The risks for companies and individuals accused of cartel violations keep getting higher. Not only must non-US companies and individuals now be concerned about more aggressive enforcement of cartel offences by competition authorities outside of the US — even in the US the dangers of receiving higher fines and longer prison terms continues to increase.

In the US, the plea bargain system has such obvious advantages (in terms of leniency and certainty) so that relatively few cartel cases come to trial (we do not address here private actions for damages). In Europe, the Commission does not need to have a court trial to punish a cartel offender but nor does it have the power to sentence individuals to jail. The end result may be that whatever its final proposals for a settlement procedure may be, neither side will ever have the same incentives to settle as it does in the US. This is not to say that European cartel cases will not settle — they surely will — but it may be considerably more difficult to fashion a procedure in Europe which has such obvious benefits for the companies involved to make a settlement procedure attractive. From the Commission's perspective that would be an opportunity missed, namely the opportunity to free up valuable investigatory and enforcement resources within the European Union's competition authorities to pursue other cases — including additional cartel cases. It will be interesting to see whether, as a result of the consultation process, modifications can be made to the current proposal to provide greater incentives to settle. ■

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IN NUMBERS:

$630M

THE SUM OF DOJ FINES OBTAINED FOR CARTEL CASES IN 2007