

Plea Bargaining in Cartel Cases in the Shadow of 1 ½ Trials

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This paper examines how the possibility of private follow-on litigation can affect negotiated settlements in cases brought by competition authorities against cartels, in particular how private follow-on litigation can influence negotiating strategies of defendants in cartel cases.

A basic model of plea bargaining assumes that a settlement should largely reflect what would have been the outcome had the case gone to trial or ended with a formal decision, minus some adjustment to reflect saved resources. Thus, it is said that plea bargaining occurs "in the shadow of a trial." This model can in principle be used to explain outcomes of negotiated settlements in cartel cases, whether the competition authority relies on criminal or administrative/civil enforcement.

However, a major difference between negotiated settlements in "ordinary" criminal cases and in cartel cases is the possibility of private follow-on litigation in which plaintiffs seek damages from cartel participants. When such private action for damages is likely, defendants will be aware that the scope and content of their plea agreement might affect their exposure to damage awards in follow-on private litigation. Thus, negotiations between a competition authority and a defendant will occur not only in light of the competition authority's case, but also in the shadow of a possible or likely follow-on civil trial. The civil trial, however, will be a much more immediate concern for the defendant than for the competition authority.

The paper examines how settlement negotiations of cartel cases can be affected when the competition authority focuses only on its "own" case, but the defendant considers also the effects of a settlement with the competition authority on private follow-on litigation. This situation might make it more likely that the two sides in the competition authority's case will reach a settlement. The defendant might make concessions that in the competition authority's view improve the outcome, but might reduce the defendant's exposure to civil damages; for example, it might accept a higher fine in exchange for being charged with a shorter duration of the cartel, or in exchange for not having to plead guilty. Such an outcome, however, might not reflect the public's interest in maximizing overall deterrence from both private and public enforcement. The paper examines whether and how competition authorities seeking to settle cartel cases can adapt their strategies to maximize overall deterrence, rather than maximize the outcome only of the competition authority's case. Another effect of private follow-on litigation could be that "cheap" settlements become less likely in which a competition authority is willing to grant a disproportionate sentence discount to hide a weak case that might not withstand court review. Private follow-on litigation could become an "insurance" device protecting the public against undesirable settlements of weak cases.