

# LENIENCY

## International cartels: corporate leniency applications

*Bruce A Baird, David W Hull and Steven J Rosenbaum, Covington & Burling*

In recent years, a sea change has occurred in the attitude of antitrust enforcement authorities around the world toward cartels. These changes have involved the carrot and the stick of antitrust enforcement. The trustbuster's stick has grown as jurisdictions that once turned a blind eye toward cartels have now made stopping them a priority. An increasing number of jurisdictions have outlawed cartels. A few have also criminalised cartel activity, and the amount of fines and even prison time has increased exponentially.

Moreover, the internationalisation of cartel enforcement and greater cooperation among enforcement authorities means that an investigation in one jurisdiction may well spread to others, which multiplies a company's overall exposure. The carrot has also grown as an increasing number of jurisdictions have adopted leniency programmes, as these leniency programmes have become more sophisticated and widely used, and as authorities in different countries have increasingly cooperated with respect to providing leniency. Taken together, these changes have enormously increased incentives for companies to come forward and seek leniency once they learn of a problem, although that decision is still complex and fraught with danger.

This chapter will provide an overview of the practical aspects of planning and managing a multi-jurisdictional leniency application. The focus will be on the United States and the European Union, but the points discussed are generally valid in other jurisdictions as well. To the extent possible, the issues are discussed in the order that they generally should be considered.

### Do you have a problem?

The first step is to determine whether a company has managers who may have been involved in price fixing, market sharing, customer allocation or other illegal activity with competitors. In the harsh new world of antitrust enforcement, it can be a costly mistake to take the once-common attitude that it is better not to know. Companies should have antitrust compliance programmes to unearth the problems, and should investigate any problem learned of, by that or any other means, to determine its extent. Until the main facts are known, it is impossible to make an informed decision about whether to seek leniency and in which jurisdictions to make applications.

Once a problem is discovered, time is of the essence. You must assume that competitors may also know of the problem and be considering leniency as well. The company must know the facts in order to make a prompt, accurate decision about leniency. The investigation will be time-consuming. At the very least, it will involve interviews with managers involved in the business, with several rounds of such interviews sometimes being necessary to convince these managers to come forward, and reviews of relevant documents, including particularly the voluminous relevant email that most companies have today.

Until a leniency application is actually made, the company risks losing the race to the antitrust agency's door. In the United States, amnesty is only available to the first applicant, so the difference

between first and second can be worth tens of millions and in a big case hundreds of millions of dollars in fines and jail sentences for corporate executives. In the EU, the consequences of coming in second are not as great because those coming in later may still qualify for a reduction in the fine and there is no criminal penalty, but the difference in the amount of fine may still be drastic between the first and second applicants.

### Should you seek leniency?

Once you understand the facts, you must decide whether to seek leniency. An alternative to consider in some cases is to stop the activity, create procedures to prevent it in the future, but not to contact the authorities. There are a number of factors to consider in making this important choice.

### What is the likelihood of enforcement action?

The more likely it is that the cartel will come to the attention of the antitrust authorities, the more certain it is that the company should apply for leniency. If your client has discovered a problem, chances are that other participants in the cartel have also discovered it or soon will. Here, it is important to develop information about competitors and the relevant market to make a judgement about whether others will have the motivation and be in a position to seek amnesty. This market should be defined broadly to include any relevant area of the world. The American company that limits its view to the United States or the European company that does not consider the United States are both asking for trouble in this world of cooperation among antitrust authorities.

The United States Department of Justice (DoJ) now commonly provides information to the EU and other relevant jurisdictions. For its part, the EU has adopted a new Leniency Notice,<sup>1</sup> which makes the EU leniency programme much more congruent with the United States's and makes cooperation in antitrust matters more likely. Among other things, under the new EU Notice: (i) a company is no longer required to provide "decisive" evidence of an infringement, but only enough evidence to enable the European Commission to launch a dawn raid or establish an infringement; (ii) the first company to come forward with the requisite evidence will receive total immunity (as in the United States) where there had been much less certainty in the past; (iii) the Commission will now grant conditional amnesty at the beginning of the procedure, as in the United States, when in the past it was unwilling to make any assurances until the end of the procedure; and (iv) the amnesty may be granted even to a leader of a cartel as long as it did not coerce others into joining.

These new parallels to the treatment of leniency applications in the United States make parallel investigations and information sharing far easier. There are also new leniency programmes in the Netherlands and Sweden. In the United Kingdom, a proposal is pending that would criminalise cartel activity and provide a greater incentive for companies to come forward.

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Not only must you broadly define the market to consider in deciding whether leniency should be sought, but you must also consider any related markets or other markets in which competitors are active. As a matter of course, US authorities will ask witnesses whether they have knowledge of any illegal activities with respect to other markets. The US Department of Justice's Amnesty Plus Program provides an extra incentive for a company to come forward with respect to other markets. The DoJ conversely penalises companies who fail to report violations in a second market. In addition, antitrust authorities are growing familiar with the phenomenon that, when they uncover a cartel in one market, there are frequently cartels in related markets involving a similar group of competitors.

#### *What will be the damages in private civil actions?*

An important consideration in deciding whether to seek amnesty is the company's exposure in private civil actions. The exposure is greatest in the United States, where direct and sometimes indirect customers may seek treble damages and where a company may be jointly and severally liable for damages based on losses to all customers in the relevant market. There is developing law that may support claims by foreign customers in such actions. Similar damage actions are becoming increasingly common in other jurisdictions as well. Sometimes, companies that apply for leniency can manage private civil litigation in a way that minimises the damage, but if a reasonable estimate of these damages is so high that it threatens the health of the company, not an unusual occurrence when faced with a treble damage suit in a large market, that is a powerful reason not to seek leniency.

#### *What other anti-competitive conduct will be revealed?*

Another important consideration in deciding whether to seek leniency is whether there is unrelated anti-competitive conduct that would also have to be revealed in connection with a leniency application. This consideration is relevant to the decision in several respects. First, additional conduct means a greater universe of potential competitors and potential rivals for amnesty. It raises the potential stakes with antitrust authorities who will both give more credit if such conduct is revealed, but exact much greater penalties if it is not. In addition, more anti-competitive conduct means more private civil actions and higher potential damages.

The DoJ's standard amnesty letter provides, as a condition of amnesty, that a company's directors, officer and employees must "respond completely, candidly, and truthfully to all questions asked in interviews and grand jury appearances."<sup>2</sup> Recent real-world experience makes clear that, when a company fulfils this obligation, and, in so doing, reveals criminal conspiracies in another industry, the DoJ naturally expands its investigation to cover that other industry as well.

To be sure, the company whose employees have provided the relevant information, and its employees, will escape criminal prosecution for these newly discovered crimes, as long as the company has met its cooperation obligations and can meet the criteria for amnesty on the newly discovered conduct.<sup>3</sup> But the company will likely be liable for hefty treble damage civil claims in the United States, assuming (as has to be assumed) that the existence of the conspiracy will become public once other participants are prosecuted based upon the information provided.

The real world ramifications of this duty to cooperate with respect to other criminal conduct have been substantial. More than half of the DoJ's current investigations of international cartel activities were initiated by evidence obtained as a result of an investigation of a completely separate industry, including most prominently cases in which a cooperating company disclosed the existence of a second, unrelated conspiracy.<sup>4</sup>

But the implications of a company's failure to comply with the duty to cooperate is also clear. The DoJ's official policy is to treat a company's failure to report known illegal conduct in a second industry as an aggravating sentencing factor warranting fines and jail time at the upper end of the Sentencing Guidelines range.<sup>5</sup> The most widely known example of a company's and its executives' failure to live up to a duty to cooperate provides a sobering lesson indeed. F Hoffman-LaRoche pleaded guilty to price fixing with respect to citric acid, and was fined a relatively modest US\$14 million. But as part of the implementation of its pledge to cooperate, two company executives were asked if they were aware of a different cartel, this one involving in the vitamins industry.

The answer they gave was 'no'. But when it turned out that that answer was false – such a conspiracy did exist, and the executives had been well aware of that fact – the consequences were dire. Hoffman LaRoche ended up paying a criminal fine of US\$500 million for its role in the vitamin conspiracy, by far the largest in history.<sup>6</sup> And the two foreign executives who falsely denied knowledge of the conspiracy ended up serving time in US prisons for their role in it.<sup>7</sup>

#### *What will the penalties be?*

Another consideration in deciding to seek amnesty is the penalties that antitrust authorities will seek. One aspect of these penalties is the company's exposure to fines in various jurisdictions. In recent years, fines have increased exponentially, reaching as high as US\$500 million. For example, in the *Vitamins* case, the DoJ imposed six individual fines of over US\$100 million while the European Commission imposed two fines of over US\$100 million. These fines are dramatically reduced for successful leniency applicants. In addition, the DoJ has been willing to seek jail sentences for corporate executives and courts have imposed such sentences. These have not typically been lengthy sentences, usually several months in jail, but they are unprecedented in antitrust cases. European companies, whose executives may be beyond US jurisdiction, have been told to provide executives to go to prison as a condition of settling the case against the company. Leniency, of course, eliminates the prospect of jail.

#### *What will be the drain on corporate resources?*

Leniency applications can be very disruptive and resource-intensive. Antitrust authority demands for documents and interviews require a substantial commitment of resources and can become a full-time job for some managers. The process may also have an effect on morale as managers must grapple with the issue of whether to come forward and may find themselves having to implicate others with whom they have worked their entire careers.

#### *Will there be pressure and retaliation within the industry?*

In many countries, loyalty toward family and friends is a core value and has greater importance than respect for the law, particularly if breaking that law is not viewed as morally wrong. In the corporate context, this means that a company may be very reluctant to come forward if it means implicating other companies in the industry, particularly as, in many areas of the world, participation in a cartel is not viewed as morally wrong. This reluctance may be particularly strong in Europe and Asia where companies in the same industry have traditionally had close ties. In addition, a company may fear retaliation by its competitors in other markets.

#### *What antitrust authority will have jurisdiction?*

An important question to ask in seeking leniency is which antitrust authorities will have jurisdiction. The United States asserts antitrust jurisdiction over other countries if there are effects on the US economy. The United States is therefore frequently one of the relevant juris-

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dictions, but in this age of multinational companies, it is rarely the only relevant jurisdiction. If any part of a company's activities could affect the US economy, with its heavy antitrust penalties, it would be an important consideration in determining whether to seek leniency.

#### How do you save your place in line?

Once a company decides to apply for leniency, it should move quickly to get to the head of the line. As a general rule, enforcement authorities in the various jurisdictions involved should be contacted simultaneously to avoid the possibility of gaining protection in one jurisdiction but losing it in another. In both the United States and the EU, it is possible to 'put down a marker' to save a company's place in line prior to making a formal leniency application. This procedure allows a company to inquire whether there is anyone who is ahead of it, and, if not, it secures the company's place at the head of the line for some period of time prior to making a formal leniency application. This 'marker' may be put down simply by contacting the relevant agency to establish that amnesty is available and to notify the agency that the client will be making an application. This marker is only appropriate if you have almost completed an investigation and can in a short time perfect the leniency application. Otherwise, you have alerted the authorities to the problem and not obtained protection.

The situation is not as clear-cut in the European Union. According to the EU Leniency Notice, a company may apply for leniency by either providing the European Commission with all the evidence relating to the suspected infringement, or by presenting its evidence in hypothetical terms that would include a description of the evidence to be provided later. Upon receipt of the evidence, the Commission will provide the company with a written acknowledgement of receipt of the company's application. At this point in the procedure, the company clearly has established its position at the head of the line and may only lose this position if, after reviewing the evidence submitted, the Commission determines that it does not meet the conditions for the grant of leniency.

The problem arises if a company has put down a marker and, before it perfects its application in the manner envisaged by the Leniency Notice, a second applicant arrives at the Commission's door with a truckload of evidence. As putting a marker down is an informal procedure that is not sanctioned by the Leniency Notice, the legal status of the company's application during the period between the initial contact and the formal application is tenuous, at best. Unless the first applicant is able to come forward immediately with evidence that satisfies its obligations under the Leniency Notice, it could lose its place in line. As a practical matter, this uncertainty means that, in the EU, companies should try to make the formal leniency application as soon as possible after having put the marker down.

This marker phase is a critical part of the amnesty process. There is tension between the due diligence necessary to understand the cartel activity well enough to accurately put down a marker, versus the need to get that marker down in multiple jurisdictions before a competitor. It is important not to make your marker too narrow so that some activities are not covered, or too broad so that the authorities expect information which is not forthcoming.

#### How do you close the deal?

Once markers have been put down, the next phase of the process is to make a detailed proffer in all jurisdictions which will result in an amnesty letter from the authorities. The letter at this stage will typically be 'conditional'. That is, it is still contingent on the authorities verifying through witnesses and documents that there is proof of what you say. A detailed oral proffer is the key step at this stage. Because of discovery rules in private litigation, these proffers in the United States are given orally so as not to create a document which

can be discovered. To be persuasive and to obtain results sought, the proffer must be very detailed and be the product of a full review of relevant documents and close interviews of relevant witnesses. An effective oral proffer will take the better part of a day to complete, and may take several days.

In the EU, the European Commission appears to be moving toward the US approach. In the past, the Commission generally insisted on a written corporate statement before it was willing to grant leniency. The Commission was not willing to accept oral statements, presumably because such statements were not sufficient to meet the requirement of providing 'decisive evidence'. This requirement of providing a corporate statement created a disincentive for companies to come forward because this statement could be discoverable in private damage actions in the United States where exposure to damages was greatest.

Under the new Leniency Notice, the Commission has shown greater willingness to accept oral proffers in lieu of a corporate statement. At least in part, this change reflects the new Notice's lowering of the evidentiary standard that must be met by applicants. It also reflects the Commission's sensitivity to problems that a written statement can pose to applicants in the United States. As in the United States, if the Commission considers that the applicant has met the Leniency Notices evidentiary standard, it will grant conditional amnesty by means of a letter.

The making of proffers in various jurisdictions must be coordinated in order to ensure full protection. While information given to one authority under leniency procedures cannot be shared with others unless the company waives protections against such disclosure, there is danger that antitrust authorities' efforts to confirm information given to them may result in premature publicity and a race to the regulator's door if proffers are not coordinated so that they are made close in time to each other.

#### How is a deal confirmed?

Once the proffers are made and conditional amnesty letters are negotiated and provided which adequately protect the company from further action by antitrust authorities, these authorities must typically confirm what has been proffered to them before a final amnesty will be provided. A first step is the limited waiver of prohibitions of disclosure of the information so that the various antitrust authorities can work with each other to create cases including search warrants and dawn raids against other competitors. In addition, a period of continued preparation occurs as documents requested by the authorities are given to them, and witnesses are prepared and provided for interviews by the authorities. Indeed, the company's investigation may continue.

Once conditional immunity is obtained, antitrust authorities will typically provide additional coverage if necessary to cover subsequent disclosures. At this stage it is in a company's interest to ensure that every witness is talked to, that every document is read, and that all possible anti-competitive activity is disclosed to the government. This investigation and disclosure must include not only the principal market being investigated by the authorities, but any other anti-competitive activity known by any company employees. If counsel does not undertake to rigorously ensure that these standards are met, the whole leniency process may be in vain as another problem ruins the protection obtained.

#### Conclusion

Managing a leniency application in an international cartel case is akin to playing a multi-tiered chess game with the added complications that the rules are slightly different on each board and the timer is running on all boards at once. Counsel must be prepared to play

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in several jurisdictions virtually simultaneously so as not to get beaten by the clock, and must have a coherent global strategy that takes into account the effects of its moves in one jurisdiction on its position in the others. Counsel must have a sound understanding of the rules in each jurisdiction and what is at stake in each jurisdiction.

The winner is the company that minimises its overall exposure, not the one that wins the most games. A strategy that focuses on one board at a time is unlikely to be successful: not only is time likely to run out on at least some of the other boards, but even if a company obtains amnesty in two out of three jurisdictions, it may lose the game by incurring a substantial fine in the third or by making a strategic mistake in one that undermines its efforts in the others such as by failing to understand that information that is considered confidential in one jurisdiction may be subject to discovery in another.

#### Notes

- 1 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ (2002) C45/3.
- 2 See Gary R Spratling, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, 'Making Companies an Offer They Shouldn't Refuse', February 16, 1999, available at <http://www.usdoj.gov/atr/public/speeches/2247.htm>.
- 3 Scott D Hammond, Director of Criminal Enforcement, Antitrust Division, US Department of Justice, 'When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?', March 8, 2001, available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.
- 4 US Department of Justice, 'Status Report, Corporate Leniency Program', June 1, 2002, available at <http://www.usdoj.gov/atr/public/guidelines/11314.htm>.
- 5 Hammond, *supra*.
- 6 *US v F Hoffman-LaRoche Ltd*, Criminal No. 3:99-CR-184-R, *Trade Regulation Reporter* (CCH), US Antitrust Cases-Summaries ¶45,099, at 45,427 (ND Tex., May 20, 1999).
- 7 Press Release, US Department of Justice, April 6, 2000, available at [http://www.usdoj.gov/atr/public/press\\_releases/2000/4494.htm](http://www.usdoj.gov/atr/public/press_releases/2000/4494.htm).

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Covington & Burling plays a leading role in all fields of antitrust law, both in the United States and Europe. With offices in Washington, New York, London, Brussels and San Francisco, Covington & Burling has broad experience in dealing with every facet of the regulation of domestic and international commerce, including in particular the application of antitrust and unfair competition laws.

Our clients on competition matters operate in numerous and diverse industries and include such well-known companies and organisations as the American Automobile Association, the American Petroleum Institute, the Association of American Railroads, Bacardi, Bank One, CBS Affiliates, Eli Lilly, ExxonMobil, GlaxoSmithKline, Goodyear, Microsoft, the National Football League, PPL Corporation, Procter & Gamble, Trane, and Union Pacific, among many others. Our

antitrust clients also include non-profit institutions and many smaller organisations and companies, including start-up companies seeking to engage in joint research, to enter or create new markets, to merge with others, or to operate over the Internet.

On the criminal side, we have represented clients in investigations involving advertising, chemicals, concrete, extractive industries, food supplements, industrial products, milk contracts, and other targeted industries. This work includes recent experience with the antitrust amnesty programmes of US Department of Justice and the European Commission and Canadian investigations as well. As appropriate, we draw upon the considerable expertise of our criminal law practice group, which includes former US Attorney and Deputy Attorney General Eric Holder, two former Deputy Associate Attorneys General (Ethan Posner and Jean Veta), the former Chief of the Securities and Commodities Fraud Task Force in the Manhattan US Attorney's Office (Bruce Baird), the chief of the Criminal Division (Matt Fishbein) and an Associate US Attorney (Aaron Marcu) of that office, an Assistant US Attorney in Los Angeles (John Potter), and Special Counsel to the President Lanny Breuer.