Corporate leniency applications

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Enforcement authorities that once turned a blind eye towards cartels have become increasing hostile towards them and, indeed, have taken rigorous measures to combat them. Nearly 100 jurisdictions now have some type of anti-cartel legislation and a few have even criminalised cartel activity. As a result, the number of cartels detected, the level of fines imposed, and even the amount of jail time served have increased exponentially.

One of the most important developments behind the dramatic increase in cartel prosecutions has been the internationalisation of cartel enforcement and greater cooperation among enforcement authorities. This cooperation means that an investigation in one jurisdiction may well spill over into others, thereby multiplying a company's overall exposure. Indeed, in February 2003, coordinated searches and interviews were carried out for the first time in an international cartel investigation by authorities of the United States, the European Union, Canada and Japan.[1] Fourteen companies in nine countries were investigated. In addition, both the German and Japanese governments have recently conducted searches for documents at the request of US antitrust authorities.[2]

A second and equally important reason for the increase in cartel cases is the growing number of leniency programmes. As a result of its generous leniency programme, amnesty applications in the United States have reached a record high, and are now averaging three per month.[3] Also, authorities in different countries are increasingly cooperating with each other in providing leniency. Taken together, these changes have drastically increased incentives for companies to come forward and seek leniency, although that decision remains complex and fraught with danger.

This article will provide an updated 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, although the points discussed are generally valid in other jurisdictions as well.

Is there a skeleton in the closet?

The first step is to determine whether your client has been involved in price fixing, market sharing, customer allocation or other illegal activity with competitors. Ideally, companies should have antitrust compliance programmes to unearth any problems, and should immediately investigate any problem discovered and determine its seriousness. 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.

If a problem is discovered, time becomes of the essence. Your client's internal company investigation will be time-consuming, disruptive, and resource-intensive. It will involve interviewing executives and employees involved in the business, and include going through relevant e-mail, notes, diary entries, and business expense sheets with a fine-toothed comb. You must ensure that all documents are gathered and preserved because document destruction can give rise to separate criminal penalties and harm the ability of your client to defend itself against a private civil suit. In addition, in the European Union, the destruction of documents may increase the level of your client's eventual fine.

You must assume that that the race to the antitrust agency's door has already begun, ie that your competitors know of the problem and are also considering leniency. 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 European Union, the consequences of coming in second are not as great because those doing so may still qualify for a reduction of up to 50 per cent in the fine and there is no criminal penalty, but the difference in the fines imposed on the first and second applicants may still be drastic.

If a problem is discovered, your client should quickly set up an internal crisis management team which will be fully dedicated to the matter. This team should include in-house counsel, a representative from the corporate communications department and senior (but impartial) executives. If necessary, a multi-jurisdictional team should be established in order to deal with the situation where applications have to be made in several jurisdictions.

Should you seek leniency?

Once you have digested 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, and not to contact the authorities in the hope that it will never be discovered. There are a number of factors to consider in making this important choice.

What is the likelihood of detection?

The more likely it is that the cartel will come to the attention of the antitrust authorities, the more imperative 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. You must consider whether it is likely that your competitors will try and seek leniency and also examine the jurisdictions in which the cartel operated. The United States Department of Justice (DoJ) now commonly provides information to the European Union and other relevant jurisdictions. Indeed, the DoJ is currently conducting more than 40 international cartel investigations, and four-and-half out of all US criminal prosecutions during the last five years have been against non-US firms.[5] Therefore, you must define the market broadly to include any relevant areas of the world because you may have to apply for leniency in more than one jurisdiction.

In the European Union, the likelihood of detection has increased dramatically with the European Commission's adoption in February 2002 of a revised leniency programme.[6] Under its previous leniency

programme, full amnesty was not guaranteed at the outset and, as a result, the Commission adopted only two to three decisions a year. The revisions to the EU leniency programme brought it closer to the US programme in that it offers, subject to certain conditions, full immunity from fines for the first applicant to come forward with sufficient evidence for the European Commission to launch an investigation. Subject to certain conditions, a later-reporting applicant will receive a guaranteed a reduction in its fine of between 20 and 50 per cent, depending whether it is the second, third or last applicant to come forward. In order to benefit from immunity, or a reduced fine, none of the applicants must have taken steps to coerce other companies to participate in the cartel.

Under the current leniency programme, the Commission is now adopting an average of one decision a month. The Commission's teeth have no doubt been sharpened as reflected by the fact that, in 2002, the European Commission levied fines in excess of €1.1 billion (US$1.2 billion) and it even had to create a second dedicated cartel unit within DG Competition in order to deal with the increased workload.

The powers of the European Commission will be increased as of 1 May 2004 with the implementation of the so-called 'modernisation programme' established by Regulation 1/2003.[7] The new legislation represents a major overhaul of the procedural rules governing the enforcement of EU competition law and will extend the European Commission's powers of investigation. The Commission will have the right to search the private homes of executives for evidence, and will be entitled to conduct on-the-spot interviews with executives and fine the company for any executive's refusal to reply to their questions up to 1 per cent of the company's worldwide turnover in the preceding business year.

This new parallel treatment of leniency applications in the United States and the European Union makes parallel investigations and information sharing far easier. There are also leniency programmes in France, Germany, Ireland, the Netherlands, Sweden and the United Kingdom. It is important to note that leniency granted by the European Commission in Brussels will not afford you safety in all 15 EU Member States because national authorities remain free to apply their own domestic rules.[8] At present, the dividing line between EU and national cartel investigations remains unclear and it is possible for your client to find itself in a situation where it has been granted provisional full immunity from administrative fines by the European Commission, but is still subject to administrative fines and/or criminal sanctions imposed by national competition authorities under their domestic rules. Until the situation is clarified, companies are advised to seek leniency in all jurisdictions in the European Union, regardless of whether they have been given immunity from fines by the European Commission.

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. 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, then that is a powerful reason not to seek leniency.

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. Recently, the exposure has become even greater as a result of case law that allows foreign customers who have sustained cartel-related injury outside the United States to sue for treble damages in some jurisdictions in the United States, as long as another plaintiff has filed a claim in the US market and the cartel at issue has affected US commerce, which will almost always be the case for a worldwide cartel. It should be noted that the courts are split on this issue.[9] Ironically, the DoJ has weighed in against the judicial recognition of such claims for fear that the permitting of treble damage actions by foreign plaintiffs whose injuries arise out of foreign conduct would create too large a risk of unlimited treble damages and would therefore discourage participation in the amnesty programme.[10]

Civil plaintiffs' prospects for success in European cartel cases appear to be on the rise. In a recent case involving Hoffmann-La Roche and fellow conspirator Aventis, the English High Court ruled that non-English purchasers of vitamins could sue for damages in English courts.[11] Since English courts appear to be more inclined to award higher damages than their counterparts on the Continent and their discovery rules also appear to be more liberal, this judgment may pave the way for the English courts to become the courts of choice by plaintiffs located in other European countries.

What other skeletons 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.

You must therefore 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. Similarly, in the European Union, if the European Commission has uncovered a cartel in one market, the next place that it will look will be related markets.

The real-world ramifications of this duty to cooperate with respect to other criminal conduct has been substantial. Indeed, half of the DoJ's antitrust investigations involve international cartels,[12] and half of those investigations 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.[13] The most widely known example was seen in the Vitamins cartel case where Hoffmann-LaRoche had to pay a criminal fine of US$500 million for its role in the vitamin conspiracy, by far the largest in history.[14] Most recently, a top-ranking executive was indicted by US enforcement officials notwithstanding his company's prior conditional acceptance into the amnesty programme, apparently as a result of his failure to be entirely forthcoming about his activities. The company itself announced that the status of the company's own amnesty had become 'unclear'.[15]

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 increase exponentially, reaching as high as US$500 million. In the past four years, US courts have sentenced more individual cartel defendants to a year or more of imprisonment than in all the previous 10 years combined.[16] In addition, the DoJ has been willing to seek jail sentences for non-US corporate executives and courts have imposed such sentences. 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. Non-US corporate executives from Canada, Germany, Switzerland, Sweden and France have served prison terms in US jails for US antitrust law violations.[17] Indicted individuals who refuse voluntarily to submit to US jurisdictions are now placed on the Red Notice list maintained by Interpol, which in many jurisdictions serves as a request that the individual be arrested.[18] Leniency, of course, eliminates the prospect of jail.

In considering the amount of potential fines, you must keep in mind the applicable statute of limitations. In the United States, the statute of limitations is five years for criminal violations. In the European Union, it is five years from the day on which the cartel infringement ceases.

How and when do you approach the authorities?

Once a company decides to apply for leniency, it should move quickly to ensure it is the first applicant in 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 the United States, it is possible to 'put down a marker' by contacting the relevant agency and establishing whether amnesty would be available, thereby saving 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, to secure the company's place at the head of the line for some period of time prior to making a formal leniency application. In the United States, this 'marker' may be put down simply by contacting the DoJ to establish that amnesty is available and to notify the agency that the client will be making an application. This marker is only appropriate, however, if you have almost completed an investigation and can quickly perfect the leniency application. Otherwise, you have alerted the authorities to a cartel and not obtained any protection.

The situation is not as clear-cut in the European Union. Although the EU's leniency programme provides for the submission of evidence on a hypothetical basis in order to establish whether it would be sufficient for a grant of leniency, it does not really provide for a US-style marker system. In practice, this lack of clarity may give rise to problems. For instance, suppose that a company informs the European Commission that it wishes to set up a meeting to discuss an application for immunity (similar to the US marker system), and, before the meeting, a second applicant arrives at the Commission's door with a truckload of evidence. The second applicant would have beaten the first applicant in the race to the Commission's door because it would have been the first to present enough evidence to allow the Commission to grant leniency. As there is no specific provision in the EU's leniency programme for markers, the legal status of a company's application during the period between the initial contact and the formal application is tenuous at best. Until the Commission clarifies this point, applicants would seem well advised not to assume that they have secured their place in line until they have provided enough information to meet the leniency programme's evidentiary thresholds.

The 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 put down a marker, and 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 are led to expect information that will not be forthcoming.

How do you close the amnesty deal?

Once you have placed your marker, the next phase of the process is to make a detailed proffer in all jurisdictions in which you are seeking amnesty. 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 that 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 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 European Union, the European Commission appears to be moving toward the US approach as it has shown greater willingness to accept oral proffers in lieu of a corporate statement. This reflects the Commission's sensitivity to the problems that a written statement can pose to applicants in the United States. The Commission has intervened directly as amicus curiae in cases before the US courts, requesting that the plaintiff's application for disclosure should not include applications for leniency submitted by parties in the European Union as this would weaken the effectiveness of the EU and US leniency programmes.[19] In order to pre-empt US discovery rules, the Commission is willing to accept oral applications which are recorded and transcribed and, thus, become internal Commission documents that are not discoverable by plaintiffs in the United States. Indeed, the European Commission has already processed at least five leniency applications on the basis of oral statements. As in the United States, if the European Commission considers that the applicant has met its leniency programme's evidentiary standard, it will grant conditional immunity from fine 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. 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

The combined success of leniency programmes and the increased emphasis of international cooperation between antitrust authorities has resulted in a significant rise in cartel detections. Consequently, companies are now facing greater civil as well as criminal liability.

Managing a leniency application in an international cartel case

is complex , time-consuming and resource-intensive. Moreover, managing multiple leniency applications is like juggling in that you must keep several balls in the air at once and, if you allow even one to drop, you ruin the entire act.

Notes

1 R Hewitt Pate, Acting Assistant Attorney General, Antitrust Division, US Department of Justice, Anti-Cartel Enforcement, 'The Core Antitrust Mission', 16 May 2003, available at http://www.usdoj.gov/atr/public/speeches/201199.htm.

2 Id.

3 Id.

4 Deborah Majoras, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, 'A Review of Recent Antitrust Division Action', 12 June 2003, available at http://www.usdoj.gov/atr/public/speeches/201159.htm.

5 Scott D Hammond, Director of Criminal Enforcement, Antitrust Division, US Department of Justice, 'A Summary Overview of The Antitrust Division's Criminal Enforcement Program', 23 Jan. 2003, available at http://www.usdoj.gov/atr/public/speeches/200686.htm.

6 Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ (2002) C45/3, available at www.europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf

7 Regulation 1/2003 is available at www://europa.eu.int/eur-lex/pri/en/oj/dat/2003/l_001/l_00120030104en00010025.pdf

8 The European Union comprises 15 European countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom. From 1 May 2004, a further 10 countries will be joining the European Union and therefore will shortly become subject to European anti-cartel legislation: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

9 Compare *Den Norske Stats Oljeselskap AS v Heeremac Vof*, 241 F. 3d 420 (5th Cir. 2001)(denying such claims) with *Kruman v Chrisitie's Int'l Plc*, 284 F.3d 338 (2d Cir. 2002), and *Empagran SA v F Hoffmann-La Roche Ltd*, 315 F.3d 338 (DC Cir. 2003)(upholding such claims). For a discussion of the implications of these cases, see J Atwood and C Oatway, 'Antitrust Law: Foreign Market Claims', *National Law Journal*, 5 May 2003, at B8.

10 Pate 2003.

11 *Provimi Ltd v Aventis Animal Nutrition SA and others*, Queen's Bench Division (Commercial Court) [2003] EWHC 1211 (Comm) (6 May 2003).

12 Scott D Hammond, Director of Criminal Enforcement, Antitrust Division, US Department of Justice, 'A Summary Overview of The Antitrust Division's Criminal Enforcement Program', 23 Jan. 2003, available at http://www.usdoj.gov/atr/public/speeches/200686.htm.

13 Marjoras 2003.

14 *US v F Hoffmann-La Roche Ltd*, Criminal No., 3:99-CR-184-R, Trade Regulation Reporter (CCH), US Antitrust Cases-Summaries ¶45,099, at 45,427 (ND Tex. 20 May 1999).

15 *Wall Street Journal*, 25 June 2003, p. A-3.

16 Hammond 2003.

17 Id.

18 Id.

19 See Bertus van Barlingen, 'The European Commission's 2002 Leniency Notice After One Year of Operation', *Antitrust*, Spring 2003, Vol. 17, No.2, at 84