The Challenges That Lie Ahead For the Amnesty Program

By John M. Majoras

The success of the Antitrust Division's Corporate Leniency Policy has been rightly hailed. Scott Hammond, the DOJ Antitrust Division's Director of Criminal Enforcement, attributes "scores of convictions and close to $2 billion in criminal fines" to the effectiveness of the policy since it was revised in 1993. And there can be no doubt that practitioners are well aware of the benefits conferred by the policy and must consider its availability when providing clients advice relating to a discovery of possible cartel behavior. Recently, Congress bolstered the potential benefits of participating in the amnesty program by holding out the carrot of detrebling civil damages and eliminating joint and several liability in follow-on actions for the same conduct, as well as brandishing the stick of significantly higher criminal penalties.

Given these developments, one would think that the outlook for the amnesty program would be quite positive. But the program may very well be facing a number of important cross roads, and how they are navigated will go a long way in determining whether the program remains the primary tool in detecting and prosecuting cartel behavior. The two areas of greatest concern are the DOJ's ongoing administration of the program and the potential effects of increasing international enforcement efforts.

The DOJ is currently facing a serious challenge in the dust-up over the revocation and subsequent judicial reinvocation of the Stolt-Nielsen amnesty. Regardless of the final outcome of this isolated case, how the Division treats future applicants and the lessons it absorbs as a result of this saga may well present the longest lasting implications.

The ultimate effectiveness of the leniency program is not based on whether it is good public policy. By this point, there is little debate on that merit, and it is reinforced with the
international expansion of amnesty programs. Rather, effectiveness will always depend on straightforward economic analysis. Do the benefits of participating in the program offset the costs that the decision will necessarily carry? A critical factor in conducting that analysis is the ability to assess with some accuracy each side of the balance.

Let's look first at the costs. A decision to participate in the leniency program must be made with the expectation that it will become public -- whether as a result of a company's assessment that it must be disclosed under applicable regulations or simply as a result of the subsequent investigation and/or prosecution. Disclosure will immediately be followed by the filing of class action lawsuits in federal and state courts. The plaintiffs' bar is quite willing to crank up the litigation machinery on nothing more than the announcement of an investigation, some boilerplate conspiracy language and an allegation that prices are inflated. In a situation where the conduct clearly violates the law, eventual settlements of the civil cases can be anticipated and even quantified.

A business can also anticipate revenue losses from the future sales of the products at issue. If the conspiracy were effective, free market forces would likely lead to price declines. But even if the conspiracy were not particularly effective, the publicity of an investigation and the pressures that customers might exert as a result, could themselves lead to price declines that are at least temporary.

Participating in the leniency program also extracts a human cost that is much harder to quantify. The time, energy and patience of senior management are necessary to marshal a leniency application through the process. This can be magnified if the business is international and applications are being made in a number of jurisdictions. Participants in the anti-competitive conduct will have to dedicate themselves to providing information and cooperation to the
government agencies, and there is undoubtedly a psychological toll felt by the cooperating individuals, if not the company as a whole. All of these factors add to the cost of participating in the leniency program.

Many of the benefits can also be quantified. The avoidance of a monetary penalty can be substantial. The 2004 amendments increased the maximum corporate fine from $10 million to $100 million, while still maintaining the alternative calculation of "double the gain or loss." The latter provision had already led to fines far in excess of the $10 million cap in the vitamins, lysine and other investigations. Less quantifiable from a monetary standpoint, yet a readily identifiable benefit of leniency, is the avoidance of prison and the consequence of a felony conviction. The 2004 amendment also increased those penalties, and the history of sentences for antitrust violations shows an obvious upward trajectory in the amount of time that convicted violators are forced to serve.

One purported benefit that may get more headlines than it ultimately deserves is the possibility of facing, in related civil actions, only single damages attributable solely to the participant's own share of affected commerce, rather than on a joint and several basis. On its face, this would seem like a huge benefit. Additionally, it would most likely spur the smaller members of the cartel to come forward first because they would have the most to gain. The math is fairly easy.

For example, consider a conspiracy with three participants that had a cumulative effect of $500 million in overcharges. Company A has a 10% share of the market, Company B has 30% and Company C has 50%. Under the Sherman Act, each has a theoretical civil exposure of $1.5 billion plus attorneys' fees. On the criminal side, however, the penalties for Company C can be as high as $500 million (under the two-times-affected-commerce formulation), $300 million for
Company B, and $100 million for Company A. Without the recent detrebling provisions, Company A's incentive to seek leniency may not even be as high as Company C's. But with those provisions, Company A stands to reduce potential civil liability to $50 million.

Encouraging the smaller player to enter the leniency program accomplishes a number of reasonable goals. The larger participants, who are also often the ringleaders, will face the biggest, headline-grabbing fines. The larger participants also presumably accounted for the largest amount of actual damages, so they shouldn't stand to have a net gain, or at worst break even, after civil damages are assessed.

So why do I call it a "purported" benefit of participating in the leniency program? Because its actual effectiveness remains unclear. Whether an applicant can obtain the benefit in the civil case is in large part a function of whether the civil plaintiffs feel like the cooperation standard has been met. The civil court ultimately decides whether the Act's provisions will apply, but only after it considers "any appropriate pleadings from the [plaintiff]." There is no specific definition of "satisfactory cooperation," although the Act specifies that the amnesty applicant must provide a full account of all facts relevant to the civil actions, provide all related documents, and cooperate in depositions and testimony. It is as yet unclear whether providing the same information to plaintiffs that was provided to the government will satisfy this standard.

Other questions include whether the amnesty applicant can still contest civil liability while still satisfying the cooperation standard. Not all amnesty applications disclose well-defined conspiracies. Indeed, the leniency policy contemplates that applicants will disclose conduct that may not be actionable at all. Will plaintiff support "rewarding" a defendant for information that does not clearly establish liability? Until there is sufficient experience to see how questions like this will be resolved, it is not clear how potential leniency applicants will
value the provisions relating to civil actions. It will be interesting to see if the five-year sunset clause to these provisions will even provide an adequate experience base. It will also be interesting to see whether the growth in worldwide private enforcement actions will offset the perceived benefit of the new U.S. provisions. For example, it is now clear that Europe will likely adopt measures to encourage private enforcement actions.6

As with many things in the law, the leniency program works well, and its application is clear, in the easy cases. An "easy" case in this instance is one in which the conduct has clearly violated the antitrust laws, and the leniency applicant can readily provide the information that will lead to prosecution of the other conspirators. But what about the scenario where the conduct is less clear?

An actionable agreement to fix prices or allocate markets is not always accompanied by specific agreements on price targets or market percentages. The now infamous meetings among the lysine conspirators that were documented so well on FBI tapes is now (one would hope) the rare price-fixing conspiracy in the United States. Nobody would argue that bringing facts to the DOJ that include specific targets and goals that were documented and enforced will quickly earn a leniency agreement, as long as the other prerequisites to the program are met.7

But what about the scenario in which the conduct is debatably actionable under the Sherman Act? Assume that rather than specific agreements, the competitors occasionally met and discussed general market conditions and that those discussions included laments that prices were too low or capacity was too high. Throw in an occasional remark along the lines of "we're too small to have much influence, but if some other companies took some down time, we would certainly do our part." Have the antitrust laws been violated? One could certainly make that argument, especially if the words were followed by action.
So the new General Counsel arrives and learns that the above scenario has unfolded. The lawyer's view is that there is some real potential of criminal and civil liability and immediately considers the DOJ's leniency program. But accompanying that thought is a host of additional concerns. By applying to the program, the company, if it is public, will have to consider whether to disclose the application in its SEC filings. One way or another it is virtually certain that the application will become public, and accompanying that certainty is the equally certain onslaught of civil actions. On top of this, companies that operate internationally will have to consider whether the conduct has also occurred in other jurisdictions that have amnesty programs.

In some respects, the U.S. program will always have a higher priority to potential applicants as long as the United States remains one of the few nations with criminal penalties for competition violations. The stakes are considerably higher when individuals are facing loss of liberty and businesses are facing additional restrictions that may accompany criminal convictions. But for these same reasons, those individuals and companies may have geared their conduct in the U.S. so that it is more mindful of the competition laws than how they may be acting in other parts of the world. For example, it would not be surprising to see very specific instances of price-fixing conduct in non-U.S. markets, while the activity directed to the United States is either above-board or more akin to an implicit understanding.

How the DOJ reacts to these dynamics in the context of its leniency program may go a long way in determining the continued strength of the program. As Scott Hammond recognized in a 2004 speech in Sydney before the ICN Workshop on Leniency Programs, transparency in enforcement policies is critical to the success of the leniency program.

Cooperation from violators, in turn, has been dependent upon our readiness to provide transparency throughout our anti-cartel enforcement program so that a company can predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not.
Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially when there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program.8

The Corporate Leniency Program speaks in terms of reporting "illegal antitrust activity."
The Model Amnesty Letter setting forth the conditions and terms of the amnesty agreement states that the applicant wishes to "report to the Antitrust Division possible [e.g., price fixing] activity or other conduct violative of the Sherman Act . . . ."

A plain reading of that language means that if a corporation reports activity that possibly violates the Sherman Act and otherwise fulfills the obligations of the leniency program, it should receive amnesty. It is questionable, however, whether the Division applies the program by its express terms or has added an additional element based on its ability to actually maintain a prosecution of the other participants in the scheme.

There can be no doubt that the Division may be disappointed if the information it obtains -- even though complete and accurate -- is insufficient on its own to ensure a successful prosecution. Likewise, the amnesty applicant may not be the cartel participant that took careful notes or otherwise documented participation. In fact, the applicant may have had only minimal participation in the cartel and is unable to disclose much of the conduct beyond the one or two meetings in which it participated. Indeed, the new civil lawsuit incentives from the 2004 amendments, the impetus to participate in the leniency program is all the greater for the smaller participants in a cartel, because they have the most to gain from detrebling damages and the removal of joint and several liability.
The U.S. program is often cited as an example of the type of program needed to avoid uncertainty about the outcome from participation. In a recent paper assessing the leniency program in the Netherlands, the author concluded that it would be a mistake to require a "decisive evidence" criterion (one that would only award leniency if the proffered evidence can itself make the case against other conspirators). Instead, he proposed that the U.S. and U.K. model should be used and that "any information on a cartel should be welcomed warmly."\(^9\)

Whether the welcome is so warm in the United States for less-than-decisive evidence is questionable. The low-hanging fruit has been gathered. Increasingly, the Division will be faced with fact patterns that are either marginally actionable or difficult to prosecute. Presumably, the Division is interested in ferreting out even relatively benign violations of the antitrust laws. But until potential applicants are convinced that the program will be applied as written, \textit{i.e.,} for reporting of the possibility of a violation, the program will not reach its full potential. Applicants must be certain that their reports will invoke the benefits of the program because the reporting itself can bring significant consequences.

It will also be important to see how the Division copes with the current Stolt-Neilsen problem. A retrenchment to begrudging awards of leniency would be a particularly unfortunate response to an isolated incident that can presumably be avoided through language in the leniency letter about when the information was discovered and when the conduct stopped.

Also important will be whether the Division seeks a certain quality to the information that it is offered. If an applicant does not possess direct evidence of cartel behavior or perceives the conduct to be something less than an iron-clad agreement to fix prices, will the DOJ nonetheless recognize that information has been provided about a "possible" violation of the Sherman Act?
The DOJ recognizes that it can offer a very large benefit to applicants in the leniency program and, understandably, would like to see a commensurate benefit that will aid in an ultimate prosecution. But the standard for leniency is not a balancing test between the information offered and the benefits conferred. Until applicants can see that the program will be applied even for conduct that presents a difficult case to prosecute, the leniency program may not live up to its full potential.

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4 For purposes of this discussion, I will leave out consideration of the potential deterrent effect of the leniency program. Although it is now a staple in any compliance program to discuss the existence of the leniency program as yet another reason not to enter into an antitrust conspiracy because all of one's co-conspirators will be incented to one day disclose the cartel, it is questionable whether conspiracy-minded individuals or entities would likely factor that consideration into the start-up planning. Nonetheless, it would seem to have some influence as more and more cartels are disclosed as one of the members decides to take advantage of the amnesty provisions.

5 This not to say that they are always wrong in doing so. Disclosures of price-fixing investigations are quite frequently followed by prosecutions and discovery of serious violations. Of course, that is not always the case, and the current ease of maintaining significant antitrust litigation with its consequent costs based on nothing more than the announcement of an investigation or leniency application should be addressed.


7 The discussion here only focuses on applications under Part A of the Leniency Program.
