Recent Developments in International Cartel Enforcement:
The EU’s New Leniency Notice

The detection and punishment of illegal cartels are at the top of the European Commission’s enforcement agenda. In 2001, the Commission meted out record fines in cartel cases totaling $1.6 billion, eclipsing the U.S. single-year record of $1.1 billion. Historically, the Commission’s famed “dawn raids” have been the most effective means at its disposal to uncover illegal activity. More recently, however, the Commission’s leniency policy — which provides an incentive for participants to blow the whistle on cartel activities — has become an increasingly important tool in its enforcement arsenal.

In February, the Commission amended its 1996 Notice on the Non-Imposition of Fines in Cartel Cases to provide an even greater incentive for cartel members to break ranks. The new Notice provides an enhanced window of opportunity for cartel participants to “come clean” by offering outright immunity and greater predictability to leniency applicants. Correspondingly, it raises the stakes for other cartel participants by heightening the risk of ultimate detection of illegal conduct — and this is precisely what the Commission hopes to achieve.

**Prior Policy: The 1996 Notice**

In the 1996 Notice, the Commission adopted a corporate leniency policy that offered fine reductions to companies that provided early and substantial help to the Commission in uncovering and prosecuting illegal cartels. While the EU policy was inspired by the U.S. Department of Justice’s Corporate Leniency Program, it differed from the U.S. program in a number of ways. In particular, in contrast to the U.S. leniency program, the European Commission retained considerable discretion in granting a reduction in fines, the amount of the reduction, and the timing of its ultimate decision — which could take several years. The resulting lack of predictability had a chilling effect on the incentive for potential leniency applicants to come forward.

In 2001, the Commission sought to improve the risk/benefit calculus by granting total immunity in three high-profile cases — to Rhône-Poulenc (Aventis) in two of the vitamins cartel matters, to Brasserie de Luxembourg in the Luxembourg brewers cartel matter, and to Sappi in the carbonless paper cartel matter. At the same time, the Commission was undertaking a fundamental overhaul of the 1996 Notice to improve the efficacy of its leniency policy.

**The Commission’s New Leniency Policy: The 2002 Notice**

The new Notice came into effect on February 14, 2002. For those cases that had been brought to the attention of the Commission prior to this date, the 1996 Notice will continue to apply. Like the 1996 Notice, the new Notice applies to secret cartels between two or more competitors aimed at fixing prices, production or sales quotas; sharing markets, including bid-rigging; or restricting imports or exports. The 2002 Notice, however, modifies prior practice by enlarging the circumstances under which an applicant may be entitled to total immunity from fines and providing for greater predictability in the process.

**Immunity from Fines.** Under the new rules, there are two scenarios where a company will be
granted complete immunity from the fine that would otherwise have been imposed:

(1) if the company is the first member of the cartel to submit evidence that enables the Commission to launch an inspection on the premises of the suspected companies (provided that the Commission was not already in possession of sufficient evidence to launch such an inspection); or

(2) if the company is the first member of the cartel to submit evidence that enables the Commission to find an infringement of its competition rules (in particular Article 81 of the Treaty of the European Community), when the Commission is already in possession of enough information to launch an inspection but not enough to establish an infringement. This type of immunity is only granted in cases where no other cartel member has qualified for immunity under the previous scenario.

In addition, even if a company qualifies under one of the foregoing scenarios, it must also meet the following three conditions to qualify for immunity:

(1) it has put an end to its involvement in the suspected infringement no later than the time it submits evidence;

(2) it must cooperate fully throughout the Commission’s administrative procedures and must provide the Commission with all evidence that comes into its possession; and

(3) it did not take steps to coerce other companies to participate in the infringement.

Notably, a company can now qualify for immunity even if it was the instigator or leader of the cartel. Under the 1996 Notice, either of these circumstances were disqualifiers.

Reduction of Fines. Even if a company does not qualify for immunity, it may still benefit from a fine reduction. If a member of a cartel provides the Commission with evidence that represents “significant added value” with respect to the evidence already in the Commission’s possession, and if it has put an end to its participation in the cartel, it can benefit from the following reductions:

- 30-50 percent reduction if it is the first company to provide such added-value evidence;
- 20-30 percent reduction if it is the second company to provide added-value evidence;
- up to 20 percent for the subsequent companies providing added-value evidence.

Procedure. In an effort to address the lack of predictability that characterized its prior leniency policy, the Commission has introduced a series of new procedural rules. A company wishing to apply for immunity from fines can contact the relevant services of the Commission, and the Commission will immediately inform it whether immunity is still available. If immunity is available, the company can choose either to submit its evidence to the Commission in hypothetical terms (providing a descriptive list of the evidence it proposes to disclose) or immediately provide the Commission with all the evidence in its possession.

After having examined the evidence, the Commission will, if the applicant meets the requirements, grant conditional immunity in writing. Immunity will definitively be granted at the end of the administrative procedure if the applicant has continued to meet its obligations (i.e., full cooperation, termination of its involvement in the cartel, and no coercion of other companies to participate in the cartel).

The procedure is similar when applying for a reduction of the fine. The Commission will make a preliminary conclusion on whether the evidence submitted provides “significant added value.” If it does reach such a conclusion, it will, no later than the date on which a statement of objections is issued, inform the applicant of its intention to apply one of the reductions described above. The final decision on the reduction will become effective at the end of the administrative procedure.
Commentary

There is no doubt that the European Commission will continue to investigate and prosecute hard-core cartels vigorously; 2002 may well set a new record for fines in cartel cases. Nor can there be any doubt that the new leniency policy will prompt an increasing number of firms to “turn State’s evidence” in the EU in return for immunity from fines or significant fine reductions. That has certainly been the experience in the United States since it adopted a similar policy. In today’s global enforcement environment, however, a company considering whether to take advantage of such policies must develop a comprehensive strategy for minimizing its potential multijurisdictional exposure before seeking immunity in any particular jurisdiction. As is the case in almost all aspects of competition policy today, there must be a global strategy.

For example, leniency programs in effect in virtually every jurisdiction are predicated on a “first in” policy, at least for purposes of granting total immunity. As a result, it is critical to orchestrate initial contacts with the relevant antitrust authorities to ensure that you are the first mover in all potentially affected jurisdictions — and to be prepared to deal with nondisclosure assurances that may be sought by certain enforcement agencies, most notably by the U.S. Antitrust Division. In this connection, it is also important to remember that you may have separate exposure at the EU Member State level notwithstanding the fact that the European Commission grants immunity; unlike the merger control regime, there is no “one-stop shop” in the EU when it comes to cartel enforcement.

Another complexity arises from the fact that immunity may not be available in all affected jurisdictions, either because they don’t have any formal immunity program or because you can’t qualify for immunity under their existing program. In Canada, for example, immunity is not available to a firm that was the instigator or leader of the illegal activity. The same is true in Germany and under Ireland’s newly announced immunity program. Thus, while the new EU leniency policy brings about considerable convergence with existing U.S. practice, the U.S. and the EU are by no means the only games in town, and it is essential that your overall risk assessment and strategy take this important fact into account.

And last but certainly not least, issues associated with inevitable follow-on private litigation must be taken into account. Unfortunately, falling on your sword to obtain immunity from one or more enforcement agencies doesn’t score any points with private plaintiffs. To the contrary, it merely assures you of a place at or near the top of the list of named defendants and may leave you virtually defenseless. Weighing this risk and mapping out an effective strategy for subsequent private litigation case management must occur up front, certainly before you have your first sit-down with the government enforcers.

In short, the new EU leniency policy enhances the ability of firms to avoid and/or reduce fines in the EU by disclosing illegal activity and thereafter cooperating with DG Competition in the prosecution of that activity. By harmonizing EU leniency policy with existing U.S. practice, the new Notice will also facilitate the ability of leniency applicants to maximize the prospect of achieving a trans-Atlantic immunity package early on in the process. The implications of seeking immunity in any jurisdiction, however, are multidimensional and call for the development of a comprehensive strategy and careful coordination in implementing that strategy on a global basis — both literally and figuratively.

In all events, it seems clear that the global antitrust enforcers are doing everything they can to encourage the parties to “gentlemen’s agreements” to engage in most “ungentlemanly” conduct. Companies that continue to operate under the assumption that a “code of silence” will protect illegal conduct from detection or successful prosecution are at ever-increasing risk in this new environment.
Further Information

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