LENIENCY WILL REMAIN AN ESSENTIAL PART OF THE EU'S CARTEL ENFORCEMENT TOOLKIT

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I. INTRODUCTION

In recent months, it has become a common occurrence at antitrust-related conferences and international fora to encounter discussions and panels concerning a decline in the number of cartel leniency applications received by authorities in some major jurisdictions. Assuming this is the case in certain jurisdictions in terms of absolute numbers, the causes and the question of whether it is in fact something to be concerned about are matters for debate. The issue has even been framed by some as "the decline and fall" of leniency programs, especially in Europe.[2] Others have been more tentative, noting the trend but arguing that the number of leniency applications tends to be somewhat cyclical, with investigations and enforcement actions in certain specific sectors causing clusters of applications in those same industries, which naturally have a peak before declining and eventually ending. There is even the most optimistic possible interpretation, which is that leniency is a victim of its own success and any decline in the number of cases coming to light nowadays is due to increased compliance efforts by companies and their boards, credited in part to high levels of deterrence achieved by years of strong enforcement.

The available empirical data does not allow us to draw firm conclusions. There may be some validity to the argument that, due to a strong track record of enforcement in the EU and other large jurisdictions as well as changes in the economy and business practices in many sectors, the stereotypical "smoke-filled-room" type of cartel that leniency programs were originally designed to uncover, could be less prevalent than before. However, in light of the attention that the issue is now receiving, it would be unwise for regulators simply to conclude that greater compliance is the sole reason for any reduction in the number of leniency applications.

This being said, it is not the case that regulators, including the European Commission, are simply standing by and waiting for immunity applicants to come to them. The Commission recognizes that an essential part of an effective leniency policy is to make companies perceive a credible risk that a cartel could be discovered anyway if a company does not report it first. This could occur by various means, including the Commission's own monitoring of important markets, a complaint to a competition authority from an aggrieved customer, or a tip from a whistleblower. In order to raise awareness among the public that anticompetitive conduct is illegal, that it can be reported to authorities, and that credible reports will be acted upon, in 2017 the Commission introduced an online tool allowing whistleblowers to submit tips anonymously.[3] Experienced staff vet all tips and decide if they merit further follow-up; tips which are credible but which seem to describe conduct limited in geographic scope may be passed to the relevant national competition authority ("NCA"). It is understood that the tool has already produced tips that have led to investigative steps by the Commission and by certain Member States.

2 Johan Ywesyn & Siobhan Kahmann "The decline and fall of the leniency programme in Europe," Concurrences No 1-2018.

3 http://ec.europa.eu/competition/cartels/whistleblower/index.html.

II. LENIENCY BRINGS TANGIBLE BENEFITS

All of that aside, before wading into the debate, it is useful to remember that there are still significant incentives to apply for leniency when a company has discovered cartel conduct. Obviously, chief among these for the first applicant is immunity from fines. In recent years, UBS AG avoided a fine of EUR 2.5 billion by virtue of applying for immunity in the *Yen Interest Rate Derivatives* case before the European Commission; MAN AG similarly avoided a fine of EUR 1.2 billion in *Trucks*; and Barclays a fine of EUR 690 million in *Euro Interest Rate Derivatives*.

For applicants who are not first in line, immunity is in principle not available but there are still benefits to coming in, in the form of often significant reductions in fines. A review of all cartel fines decisions adopted by the Commission under the 2006 Fining Guidelines should reveal that, in a majority of cases in which a second undertaking applied for leniency after an immunity applicant disclosed the infringement to the Commission, the leniency award for that undertaking was at least 40 percent (and frequently 50 percent, the highest reduction available).

The combination of leniency with the further 10 percent-reduction for settling with the Commission can further increase these benefits. In *Trucks* alone, approximately EUR 1.5 billion was saved by companies that applied for a reduction of fines and cooperated with the Commission's investigation. The use of the settlement procedure, which is more likely in cases where all or most participants have applied for leniency and cooperated, notably also implies the adoption and publication by the Commission of a shorter, less detailed final decision than would otherwise be the case.

There are still other benefits to cooperating under the Leniency notice. Arguably, companies can mitigate reputational damage resulting from an eventual fines decision by adopting a stance towards the investigation that signals to the public and to shareholders that they have "come clean" and will better ensure compliance in the future. Further, immunity applicants in particular have certain protections established by EU legislation ensuring that they are not disadvantaged in follow-on damages actions compared with other cartel participants, and that their employees who cooperate with the investigation will not be subject to criminal sanctions in any Member State. These will be discussed further below.

III. HOW STRONG ARE THE POTENTIAL DISINCENTIVES?

Members of the private antitrust bar have raised many different factors that they say can tip companies against reporting an infringement and/or cooperating with the investigation in a particular case. These include:

- a purported lack of certainty in relation to whether particular conduct constitutes an infringement, or whether it may do so but not be covered by the Commission's Leniency notice or the leniency program of a Member State;
- issues related to jurisdiction and case allocation between and among the Commission and NCAs; and
- uncertainty concerning exposure to private damages actions and criminal proceedings in national courts.

A. The Concept of a (Secret) Cartel

The Commission's 2006 Leniency notice sets out the framework for rewarding cooperation by companies who have been party to "secret cartels." It goes on to define cartels as:

> agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour in the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing or markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.[4]

4 Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17), point (1).

This has since been incorporated into binding Union law in Article 2(14) of the 2014 Damages Directive, which further clarified that the definition above is in any case not exhaustive.[5]

The Commission's decisional practice under the 2006 Leniency notice and its 2002 predecessor has shown that it will in principle construe the above definition broadly enough to cover most patterns of behavior involving contacts between actual or potential competitors that are not known to the public nor to customers or suppliers, and are intended to influence parameters of competition, including by removing uncertainty about their respective intentions. The Commission has adopted fines decisions, and granted leniency rewards, in cases involving practices as diverse as:

- the exchange of information on weekly reference prices (*Bananas*);
- coordination of factory prices ("list prices") as opposed to final prices, and coordination on timing for the introduction of new technologies (*Trucks*);
- exchanges of information on trading positions and attempts to influence benchmark interest rates via exchanges in Bloomberg chatrooms (*Yen, Swiss Franc*, and *Euro Interest Rate Derivatives*); and
- inter-linked bilateral contacts among multiple competitors which consisted of the exchange of information on pricing intentions as well as other factors such as capacity and inventory (*Smart Card Chips*); and
- facilitation of a cartel by an undertaking that was not active on the cartelized market but which otherwise actively aided the objectives of the infringement (*Yen Interest Rate Derivatives*).

Accordingly, it is submitted that at least insofar as the European Commission is concerned, the cartel concept, even as it evolves to follow changing business realities, is sufficiently well-developed in the case law and practice to allow sophisticated antitrust lawyers to make substantive calls on potential infringements in the large majority of cases, and advise their clients accordingly. This is so even if the lawyers cannot in every case correctly predict whether the Commission would ultimately decide to devote resources to pursuing it. To the extent that uncertainty remains, the Leniency notice itself explicitly foresees the possibility for undertakings to submit an immunity application in hypothetical terms (point 16(b)) with names and other sensitive information removed. On this basis, the Commission will examine the submission to verify if the criteria for conditional immunity appear to be met, and notify the undertaking of its views before the immunity application is formally submitted (point 19). This possibility is virtually never used in practice.

The European Competition Network ("ECN"), composed of the Commission's DG Competition and the NCAs of the Member States, is taking steps to ensure that any legal uncertainty concerning whether NCAs would take a different view on whether a leniency policy would apply to a particular case than the Commission would, is minimized. The ECN+ Directive, published in the EU's Official Journal of January 14, 2019, defines a "secret cartel" as a cartel "the existence of which is wholly or partially concealed." A recital clarifies that, in order to be secret, it is sufficient that "elements of the cartel which make the full extent of the conduct more difficult to detect are not known to the public or the customers or suppliers." Articles 17 and 18 provide that all Member States must have in place leniency programs allowing them to grant immunity from or reductions of fines for secret cartels.[6] Once transposition of the Directive into national laws is complete, this should ensure that all ECN authorities will effectively be working with the same concept, even though the Directive authorizes NCAs to also award leniency to other conduct in addition to secret cartels. Any broader scope for leniency that may be possible in a particular Member State should not act as a disincentive to apply for leniency in relation to conduct that appears to come within the definition of a secret cartel.

5 Directive 2014/104/EU on antitrust damages actions (OJ L 349, 5.12.2014, p. 1).

6 Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018 to empower the competition authorities of the Member States to be more effective enforcers and ensure the proper functioning of the internal market (OJ L 11, 14.1.2019, p. 3). See recital (53), Articles 17 and 18. The Directive will come into force twenty days after its publication, whereupon the Member States will have two years to implement it.

B. Jurisdiction and Case Allocation

The lack of a one-stop-shop for leniency in the EU has often been cited as a complication that companies and their lawyers must take into account when considering whether (and where) to self-report participation in a cartel. Since there is no direct legal link between the leniency program of the Commission and those of the Member States, the Commission has always encouraged companies to protect their leniency position in the Member States when submitting a leniency application to the Commission, by submitting summary applications to all Member States concerned by the conduct at the same time. This would in principle prevent a loss of immunity status or a place in the leniency queue if the case were wholly or partially re-allocated within the ECN. This system, which respects the founding principles of work-sharing within the ECN, specifically in relation to parallel competencies and non-binding case allocation rules has worked reasonably well in most cases and will now be codified into binding law via the ECN+ Directive.

The ECN+ Directive aims to clarify the system and reduce the scope for differences between leniency regimes among its members. When the Directive comes into force, pursuant to Article 22, all NCAs will be required to accept summary applications meeting minimum criteria provided those applications cover more than three Member States as affected territories. The Commission will be recognized as the main interlocutor with the applicant until the point at which the Commission decides it will not take up all or part of the case. NCAs will further have a legal basis for accepting summary applications in a language other than an official language of the Member State, bilaterally agreed with applicants. Absent exceptional circumstances, NCAs will not be entitled to request a full application from an applicant who has already submitted a leniency application until the point at which the Commission informs them that it will not take up all or part of the case.

Applicants who have submitted summary applications will be given an opportunity to submit a full application should the NCA take up the case. If they do so within the time given by the NCA, the NCA will consider it as having been submitted at the time of the submission of the summary application. The Directive clearly puts the onus on applicants to keep NCAs updated if the scope of the conduct they have reported to the Commission changes, and NCAs can check if the scope matches up via cooperation within the ECN.[7] These clear principles should serve to reduce uncertainties concerning scope that could result in loss of immunity or leniency status in a Member State. However, the primary responsibility for ensuring that any summary application it submits is devoid of ambiguities as to its scope lies with the applicant, as recognized by the Court of Justice of the EU in the *DHL* case.[8] That preliminary ruling concerned an applicant that was beaten to immunity status in relation to conduct concerning road freight forwarding in Italy despite being first in line at the Commission-level for this conduct in addition to rail and sea freight forwarding. The applicant lost its position because its summary application failed to mention road freight forwarding, and another participant applied for immunity for that sector before the first applicant was able to supplement its application.

C. Exposure to Private Damages and Criminal Sanctions

It used to be the case that in principle, companies considering whether to self-report cartels in Europe that were no wider than EEA-wide in scope, had little to fear in terms of legal exposure from any entity other than the competition authorities themselves. Financial exposure was largely limited to the fines imposed by the Commission or NCAs, while criminal liability was virtually non-existent within the EU. In recent years, this has changed. With the introduction of the Damages Directive and the recognition in case law that victims of cartels must have the right to seek redress in the courts, together with an increase in the number of Member States in which criminal prosecution for cartel offenses has become a possibility, it is said that the weighing of risks in relation to coming clean has become more complicated.

Private practitioners claim that this new unpredictability may make some clients more reluctant to self-report. This may well be the case, although it must be acknowledged that there is no good reason why a company that has uncovered a serious infringement of competition law within its ranks, and thereby harmed consumers, should be faced with an "easy" choice. The purpose of a leniency policy is not, and cannot be, to relieve infringers of all the consequences of their actions. The Commission and NCAs have taken steps to ensure that leniency remains as attractive as possible within certain constraints. The provisions of the Damages Directive concerning the protection from discovery of documents specifically prepared for purposes of leniency, as well as the limitation of joint and several liability for immunity applicants have been extensively discussed in the literature and there is no need to do so here.[9]

7 Recital (63).

8 Case C-428/14 *DHL v. AGCM*, judgment of January 20, 2016.

9 See Damages Directive, Articles 6(6), 11(4)-(6).

The ECN+ Directive introduces further measures. In order to bring protection from discovery into line with the practice of the Commission, NCAs will be required to accept leniency statements in oral form or by any other means that will permit applicants not to take possession, custody, or control of the statements. Most importantly, Member States will be required to ensure that current and former directors, managers, and other members of staff of immunity applicants are substantially protected from individual administrative and criminal sanctions based on the cartel behavior under national competition laws, provided those individuals cooperate with prosecuting authorities. Member States are also free to extend such protection from sanctions, or mitigation of sanctions, to current or former directors, managers, or other staff of applicants for reduction of fines.[10]

IV. CONCLUSION

It is clear from the above considerations that deciding whether to report participation in a cartel infringement is not simple. Companies have to take into account financial exposure, reputational damage, relations with shareholders and the costs, burdens and uncertainties of managing investigations by sometimes multiple authorities, among other factors. Competition authorities understand this, and should make efforts to preserve incentives for companies to come in, provided these incentives do not tip the balance against effective deterrence and rightful compensation of victims. Self-reporting in the area of competition law in Europe is currently voluntary with few exceptions (for example, the UK's Financial Conduct Authority imposes on companies it regulates a duty to disclose to it any significant infringement of competition law). However, the voluntary system of reporting cartel infringements in exchange for leniency should not give rise to the impression that enforcement authorities do not take a very dim view of the prospect of companies essentially sitting on information they have discovered about their own participation in a cartel, and waiting for the infringement to be time-barred.

Once made aware of the conduct, boards of directors or senior management should obviously ensure that the company ceases its own participation in the cartel. This is not, however, a definitive step towards bringing the infringement as a whole to an end. Only the disclosure of the cartel to a competent authority can reliably achieve that. From a compliance standpoint, therefore, failing to report is clearly an inferior approach, even if all other appropriate measures are taken. The harm is allowed to continue and victims go uncompensated. Competition authorities will therefore continue to develop improved tools for detection and *ex officio* enforcement. Additionally, cartel enforcers could begin looking more closely at the specific internal reporting mechanisms of companies under investigation. It could even be envisioned, among other things, to treat evidence that participation in a cartel was known to senior management and covered up for a significant period while an infringement continued, as an aggravating circumstance justifying an increase in fines. Future reforms of leniency programs, when they occur, might do well to emphasize strengthening the stick, rather than further sweetening the carrot.

10 ECN+ Directive, Articles 20(1), 23(1)-(2), recital (66).

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