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I. INTRODUCTION

Today, the allure of antitrust immunity is unmistakable. Almost all of the most prominent global cartel cases have originated from immunity applications and, in recognition, new leniency regimes are being adopted or fine-tuned in all key antitrust regimes around the world. But there is a risk that a combination of shrinking resources devoted to enforcement, and a lack of transparency and convergence in existing leniency regimes, could lead to a decline in the efficiency of leniency regimes. In this article we suggest 10 steps that will prevent any decline from occurring.

The effectiveness of leniency regimes in unearthing serious antitrust violations is apparent in the European Union, where contemporary anticartel enforcement by the European Commission has been characterized by a sharp drop in own-initiative cases. In fact, since Commissioner Almunia's tenure began in 2010, only one of the 20 cartel decisions adopted by the Commission is thought to have been an own-initiative case. Almunia's predecessor, Commissioner Kroes, seemed to attach a high value to own-initiative cases—regularly taking the opportunity to emphasize the frequency and success of cases that the Commission had started itself—reminding the business community that cartels are weaker than their weakest member.

Of course, Almunia's apparent reliance on the EU immunity program may reflect nothing more than an inherited workload. But the Commissioner is known to be a pragmatic enforcer who places a high value on other enforcement tools, such as the cartel settlement and commitments procedures.

The allure of leniency is, of course, directly related to the likelihood that infringing conduct is detected and punished harshly in a particular jurisdiction. The startling financial penalties that were avoided by banks in the recent EU financial benchmark cases make it difficult to argue that leniency is anything but a very good option. In the *Yen Interest Rate Derivatives* cartel the EU immunity applicant escaped a fine of EUR 2.5 billion—which would have been the highest fine ever to have been imposed on a company by the Commission (and in fact almost twice the value of all fines imposed by the Commission in 2013). So leniency can have a very high value. (As trustbuster Teddy Roosevelt famously said, "Speak softly, and carry a big stick.")

The picture is, of course similar in the United States, where antitrust amnesty first began. The Department of Justice Antitrust Division ("DOJ") is rightly proud of its Amnesty Program, describing it as "...by far the most effective tool for detecting cartel activity." In fact, in the years 2004 to 2010, around three quarters of all criminal cartel cases filed by the U.S. Antitrust Division

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are thought to have been initiated or advanced by information received from a leniency applicant. The ability to escape a likely custodial sentence (no matter the nationality of the defendant) has no doubt been a significant factor. Amnesty Plus (where a company under investigation self-reports another cartel and receives immunity in relation to the "new" cartel, as well as a reduction in relation to the existing one under investigation) has also become "…an increasingly important cartel-detection and case-generation tool."[2]

Against that backdrop, it is no surprise that the U.S. amnesty regime has inspired and been replicated by leniency programs in myriad countries. New countries come on line (Taiwan) and more established antitrust enforcers (Canada, United Kingdom) update and fine-tune their programs—just as the United States and the European Union have done in the past. Indeed, the United States is currently amending its ACPERA rules to give even greater protection to whistle-blowers. Amnesty Plus has also been copied elsewhere (United Kingdom, Singapore).

But high fines and/or individual sanctions do not guarantee leniency applications. Leniency regimes will only be effective if there is transparency in terms of agency procedures and trust between the agency and a potential applicant. If those elements are missing then high fines may disincentivize immunity applications completely. There are still some antitrust regimes out there that have high fines but no workable leniency program. As the ICN has said, the key elements of an effective leniency program are significant sanctions, a high risk of detection, and transparency and certainty.

Even in jurisdictions where leniency regularly leads to cartel investigations, observers may question the actual value of leniency—theorizing that leniency applications are typically made towards (if not after) the end of the cartel's natural life. Recent high profile cartel cases (in financial services and the automotive sector) are somewhat of a paradox: the cascade of cartel cases shows the effectiveness of leniency (and Amnesty Plus) but also suggest that cartel conduct took place in countries that were known at the time for their strict approach to cartel enforcement.

II. COULD LENIENCY LOSE ITS LUSTRE?

No one would deny the very obvious financial benefits of leniency. But at the same time there seems to be an unremitting flow of cartel cases. Does this bring into question the effectiveness of leniency programs as a means of cartel prevention? Are legal and practical considerations beginning to de-value leniency? It is certainly the case that more antitrust agencies are imposing fines in respect of the same cartels and looking to criminalize cartel conduct. National rules against double jeopardy may not help. In addition, private damages actions—once the preserve of the United States—are now common in other regions (notably in certain EU Member States) and legislative proposals seek to make it easier for victims of cartel conduct to be compensated.

Will the cutting of enforcement resources due to financial pressures globally lead to less own-initiative investigations and less vigorous enforcement which, in turn, decreases the risk of

[2] http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2012)25&docLanguage=En.

getting caught, which decreases the incentive to apply for leniency? The United States has cut the number of cartel enforcers by more than one third due to budget reasons over the last two years.

In the European Union the Commission enforced against all of the air cargo airlines that applied for leniency and confessed—and none of those that did not. In the U.S. air cargo cartel, the DOJ imposed high sanctions on the airlines that came in early and gave minimal sentences to those that held out for several years. Is there a risk that agencies will one day lack resources to pursue investigations as thoroughly as they would like? A lack of resources could one day lead to a tipping point where it is preferable for investigated companies to either obtain immunity or to contest matters for as long as possible, rather than be second-in—because the enforcers do not themselves have the resources to conduct a full investigation.

The incentive to self-report may be strong now but even the more experienced antitrust agencies need to keep their programs under review to ensure the ongoing effectiveness of their regimes. Here are 10 ways to keep leniency regimes working

#1. Enact clear rules and explain how discretion is exercised: To build trust, companies need to understand the process. Transparency and guidelines are important even in respect of areas where discretion will be used. The need for clear guidance on the leniency prize is evident in light of a recent trend in the European Union. In *Wire Harnesses*, the Commission categorized specific violations as separate cartels, such as particular rigged bids, rather than attempting to show an industry-wide cartel. This means that a leniency applicant that believes it is "second in" for the overall case could receive a lower discount than anticipated because it is not "second in" for all the infringements. Lack of predictability about how an agency will approach evidence supplied in good faith could deter leniency applications from being made, especially given the diminishing returns of being second or third in.

#2. Align the key tenets of global leniency regimes: Cartels often have an impact in multiple countries. There may not be leniency protection in all those countries and, even in countries where there is active enforcement and a leniency regime, the company may not be first in—perhaps because the conditions for granting leniency were unclear. There may also be "copy cat" investigations where an agency opens an investigation at a time when the initial investigation in the "key" jurisdictions has already been completed (and the fines imposed/harm ended). So even companies that wish to draw a line under their conduct cannot manage exposure everywhere. Even within the European Union, there is no-one-stop for immunity, just model short-form applications.

Some alignment of the key tenets of leniency regimes would help. For example, agencies approach markers very differently with different requirements regarding duration, scope, information, etc.[3] This creates a conflict for obtaining the marker and then perfecting it, and therefore adds uncertainty that can operate as a disincentive. It may cause a problem in the early phases when an applicant is investigating potentially affected products and markets. Companies may also hesitate to apply for a narrow marker until they have secured a broad marker in another

[3] A "marker" is the confirmation given to an immunity applicant (company or individual) that he/she/it is the first party to request a grant of immunity with respect to a particular cartel and meets the relevant conditions.

jurisdiction. This could deter the company from applying at all as the broad marker may also expose the company in other countries.

International consensus on the notion of "nexus" between a cartel and a particular country would help avoid "gaming" of the system (where a rival is first-in, prompted by another company's leniency application) and reduce risk of "copy cat" investigations years later. Alignment between leniency programs would also improve the quality of leniency applications received by agencies.

#3. Create one-stop-shop for leniency: A genuinely innovative way to address the problems caused by the geographic cascade of cartel investigations would be to develop a mechanism to assist a company (which has decided to self-report) to receive appropriate and consistent benefits internationally. One proposal along these lines has been the creation of a global "one-stop shop" whereby applicants would apply for leniency markers through an international clearinghouse of sorts. Each participating jurisdiction would then apply its own policies and procedures to determine whether the applicant has successfully perfected its marker.[4]

#4. Make sure that a valuable second prize is available: Many leniency regimes around the world provide the possibility of complete immunity for the first company to self-report a violation. And while many also provide an incentive for the second and subsequent applicants, whether as a formal part of the leniency program or in practice as part of settlement arrangements, not all of even the major antitrust jurisdictions do (e.g. Brazil, South Africa). Leniency for subsequent applicants has a number of obvious advantages for the agency:[5]

- The second applicant's evidence may corroborate—or bring into question—the evidence already received from the immunity applicant. The evidence provided by a subsequent applicant therefore provides an essential check on the veracity of evidence provided by a company which may not be aware of the full facts—or might have misrepresented its own involvement and the operation of the alleged cartel in order to increase the chances of obtaining immunity; for example, by omitting evidence of coercion.
- The possibility of an incentive for subsequent applicants could provide for a smoother and quicker investigation of cases since an applicant obtaining immunity in one country, but a reduction for being in second place in another, is more likely to provide a waiver for the exchange of confidential information between those countries.
- Leniency for subsequent applicants can bring in more cases: an incentive to launch internal investigations may increase the likelihood of "Amnesty Plus" type leniency applications.

The availability of leniency for subsequent applicants can also address some of the drawbacks described above which result from the proliferation of global cartel investigations.

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[4] John Taladay, *Time for a Global "One-Stop Shop" for Leniency Markers*, ANTITRUST (Fall 2012).

[5] These arguments are more fully developed in the submission of BIAC to the 2012 OECD Policy Roundtable on Leniency for Subsequent Applicants http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf.

The very existence of a potential reward for subsequent applicants can strengthen the incentive for a company to apply for leniency in the first place since companies that are concerned about whether or not they would be first-in (especially in countries that do not provide a marker or reliable information about a prospective applicant's place "in the queue") may nevertheless apply for leniency in the knowledge that they stand a good chance of obtaining a reduction even if they are not the first to apply.

#5. Adopt global guidelines to avoid double counting: Assuming there is a reduction for second or third applicants, companies will still look very carefully at the likely size of the fine. Naturally the reward for being second- or third-in has to be materially less than that available for being first-in. However, the cumulative approach to fines across the world may one day be enough to deter a company from coming forward. The narrow scope of the rule against double jeopardy (and the absence of any provision of international law to ensure overall optimal deterrence) means that countries can each fine companies in respect of the same cartel for the harm caused in their respective countries.

However, some steps could be taken to preserve the leniency incentive. In particular, some alignment as to the type of sales taken into consideration when setting fines would be sensible in order to eliminate double counting. This approach need not be confined to subsequent applicants. The European Commission and DOJ have been sensitive to the issue of double counting in respect of global cartels (even though they do not have to do this). The same is true in relation to custodial sentences (*Marine Hoses*). A large obstacle may be the political and financial implications of "ceding" jurisdiction and allowing another agency to impose fines.

#6. Ensure that criminal immunity can be offered: There is a clear trend towards imposing personal sanctions on individuals when setting a corporate fine. In order to preserve the leniency incentive, corporate immunity must also give rise to criminal immunity for cooperating employees. That is the case in many countries such as United States and United Kingdom, but not everywhere. In Australia it is the CDPP that makes the decision on whether to grant criminal immunity to the company and its employees even if the ACCC is willing to offer conditional civil immunity.

Failure to automatically extend the benefits of immunity to individuals may deter companies from applying because they are unable to secure the cooperation of a key individual. Lack of automatic criminal immunity in a jurisdiction could also mean that an implicated individual does not bring the violation to light (because of the exposure it means for that individual) or applies for immunity himself (precluding the company from being first). Each of these factors muddies the waters for a would-be immunity applicant—even where the company has discovered a rogue employee and wants to cooperate fully itself. These issues can also arise in a jurisdiction where criminal immunity is available but where the individual is concerned they will be exposed in other countries.

#7. Immunize a successful applicant for all related criminal offenses*:* These days a great many antitrust cartels also infringe other criminal laws, e.g. wire fraud, Foreign Corrupt Practices Act ("FCPA") in the United States. It is unrealistic to proceed as if an antitrust infringement exists in a vacuum. An agency's offer of antitrust immunity is illusory if the individual could be prosecuted for other related crimes.

There is a strong case to be made for immunity in respect of FCPA when antitrust immunity is sought. Technically, there may be no issue of double jeopardy but the additional offense is really just part of the former—and the two infringements give rise to the same effects. This issue is arising in the financial services sector. Companies are perhaps fined by regulators first as they are in constant dialogue with them. Could this be another area (as in relation to fines and individual sanctions) where agency discretion could be exercised to impose one fine at the right level?

#8. Manage the tension with private actions: There can be a tension between encouraging leniency applicants to report all details of their infringements and the right of cartel victims to claim damages in court. In particular, leniency applications may result in more interesting or easier discovery/disclosure for claimants (especially if it is possible to obtain the actual incriminating leniency application—which, of course, is evidence that would not otherwise exist). The tension becomes even greater when applicants feel the need to make broad applications to cover the full range of products that they believe may have been cartelized. In the United States, the de-trebling of damages and the elimination of joint and several liability goes some way to addressing the tension (which may be less anyway given the attractions of criminal immunity).[6]

Further, in countries where the infringement decision is not binding as to liability (e.g. the United States and many other countries outside the European Union), leniency has the disadvantage that it makes it practically impossible to contest liability whereas non-leniency applicants might continue to do so even after an infringement decision (e.g. as to duration, particular products involved, etc.).

In the European Union a common question is whether exposure to damages will prevent companies from applying for immunity. However, this does not appear to be the case. Exposure may mean that companies are careful about the scope of the final decision—e.g. settle a cartel case to avoid a full decision and even appeal (despite being the immunity applicant) to ensure that the affected products etc. are not described in overly wide terms in the final infringement decision. However, this may change as EU private actions are on the increase and class actions may one day be the norm.

The European Commission has published a draft Directive that tries to strike the right balance between leniency and private actions. Perhaps the thorniest issue is access to leniency evidence. The EU Leniency Notice states that, under normal conditions, public disclosure of documents and written or recorded statements received in respect of the Leniency Notice would undermine certain public or private interests. However, in *Pfleiderer*, the ECJ held that EU law must not be interpreted as precluding a person who has been adversely affected by an infringement of EU competition law from being granted access to documents relating to a

[6] Note, however, that the de-trebling is not automatic. In *In Re: Aftermarket Automotive Lighting Products Antitrust Litigation* the court ruled that the whistle-blower was not entitled to limitation on civil damages because it had failed to provide satisfactory cooperation. The court held that the applicant should have disclosed a statement from an employee even though the statement had not been confirmed as accurate. This ruling is the first time a court has denied a leniency applicant ACPERA's single-damages protection for failure to provide sufficient cooperation and underlines the extent of the cooperation obligation.

leniency procedure. The ECJ invited national courts to balance the conflicting aims thereby giving rise to an inconsistent and unsatisfactory approach in the protection of leniency evidence.

No doubt because it is difficult to weigh conflicting and very different interests the European Commission has since published a draft Directive which sets out new rules relating to the disclosure of evidence. There are three categories: (i) evidence that deserves total protection (leniency statements and settlement submissions); (ii) documents that were prepared during proceedings (which can be disclosed once the agency has taken a decision the case) and (iii) pre-existing evidence for which there is no protection. The Commission is therefore trying to give some protection and transparency to both parties.

Another key plank of the Directive is to manage the financial exposure of an immunity applicant. Currently, cartelists are jointly and severally liable for damages. The draft Directive proposes to limit the liability in damages of a successful immunity applicant to that owed to its direct or indirect customers (except when the claimants can show that these are unable to obtain full compensation from other cartelists). The aim is to ensure that immunity applicants still come forward without limiting the right to full compensation.

The draft Directive also extends the limitation period for claimants and sets forth a presumption of harm. Overall, the Commission is trying to manage the tension between private damages and an effective leniency policy. It remains to be seen whether these extra elements will tip too far in the interest of the claimants meaning that immunity applications become riskier. That tension will be far greater as and when class actions are possible in the European Union.

#9. Adopt realistic but sympathetic cooperation obligations: There is a risk of harming leniency incentives when the cooperation requirement is unclear, unrealistic, or conflicts with requirements elsewhere. For example, the agency will legitimately require access to employees and perhaps even former employees—but leniency should not be lost if the company has acted in good faith to secure cooperation but still fails to do so. Guidance needs to make it clear that the agency only expects the company to do its best, giving reasonable examples of what would not be acceptable.

Agencies of course need to be aware that a company may be looking to make a number of applications. The U.K.'s OFT at one stage implied that companies may not be cooperating if they conducted too full an investigation (which they obviously have to do to understand their liability and obtain a marker in countries where more information is required than for an OFT marker). A similar issue arose in relation to legal professional privileges. At one stage the OFT wanted to make early interview notes disclosable. This was intended to assist the OFT but raised a number of controversial issues including concerns about whether the disclosure would mean that the notes could be used in other jurisdictions.

#10. Remember that "You get what you pay for:" Are there problems inherent in rewarding the very offender that should be punished? Is there a risk that the enormity of worldwide exposure leads the applicant to exaggerate their involvement—or even characterize a mostly vertical arrangement as a horizontal one in order to bring it within the class of agreements for which leniency is available in a given country? In some countries an individual whistle-blower can be rewarded (United Kingdom, South Korea). There is an open question as to whether this leads to frivolous claims or whether it actually fills a gap. Certainly the South

Korean model seems to work well (and the equivalent in the tax sector in the U.S. False Claims Act works very well). However, there is no known case of it being used to success in the United Kingdom and the DOJ has not adopted it.

III. CONCLUSION

Successful regimes engender trust by being clear and transparent—explaining how discretion will be applied and being sensitive to the needs of the applicant (including in relation to other jurisdictions).

But the lesson from history is that leniency regimes need to be updated to keep them working as markets and business activities change.[7] Global cartels, the proliferation of agencies, subsequent "copy cat" investigations, and class actions may one day deter companies from applying for leniency (or at least in certain cases).

Work at the global level is needed to align the key tenets of a leniency regime (like the ICN Recommended Practices for pre-merger control). This would bring greater predictability for companies who wish to put their houses in order. Agencies should also eliminate double counting when imposing fines. A one-stop shop would be even better to ensure optimal use of leniency and high quality applications.

Agencies may be reluctant to make changes to a system that they see as working well (at that point in time). But shortcomings in even the best leniency regime (e.g. poor or unpredictable benefits for subsequent leniency applicants) will be magnified by the inevitable growth in class actions and exponentially increasing fines. The stakes may change. Agencies need to keep their rules and procedures under review to ensure that leniency does not lose its lustre.

[7] For example, the European Union amended its leniency program to provide greater up-front certainty for applicants and the U.S. introduced Amnesty Plus.