THE U.S. CORPORATE LENIENCY POLICY: IT IS TIME FOR A RENAISSANCE

BY DONALD C. KLAWITER[1]

1 Donald C. Klawiter is the Principal at Klawiter PLLC, an Antitrust and Competition Practice in Washington, D.C. For 43 years, Mr. Klawiter has practiced antitrust law; for ten years in several trial and supervisory positions at the Antitrust Division of the U.S. Department of Justice, and for the remainder as a partner at three major international firms and in his current practice. He served in many leadership positions in the ABA's Section of Antitrust Law, serving as Section Chair for 2005-2006. Mr. Klawiter has been Chair or Co-Chair of the Section's Criminal Working Group and the International Cartel Task Force, as well as an organizer, Co-Chair, or faculty member at the Section's International Cartel Workshops (1997-2018). The author thanks James A. Backstrom, Robert B. Bell, Jennifer M. Driscoll and Joseph Murphy for reviewing this article and providing valuable insights.

I. INTRODUCTION

The Corporate Leniency Policy of the Antitrust Division of the U.S. Department of Justice is, without question, the single most effective tool in the detection and prosecution of cartels ever devised by enforcers. Significantly, 2018 marked the 40th anniversary of the original Leniency Policy of the Antitrust Division; it also marked the 25th anniversary of the revised Leniency Policy. As we celebrate these important milestones and review the stellar enforcement history that has resulted from the Leniency Policies, we should pause to assess the present state of the Policy and its future, especially as the Antitrust Division navigates through a serious downturn in leniency applicants and criminal enforcement.

This article will provide a brief historical review of the U.S. Corporate Leniency Policy from the perspective of a practitioner who served in the Antitrust Division and later, as defense counsel, sought and obtained leniency for his clients. It will be followed by a brief evaluation of the current slowing of U.S. criminal enforcement and how controversies relating to the Leniency Policy have contributed to it. Finally, it will offer the Division and the cartel defense bar "gentle encouragement" to restore, renew and seriously promote the Leniency Policy by proposing (1) urgent collaboration between the Division and the defense bar to determine solutions to the current leniency drought, including proposing revisions to the Frequently Asked Questions concerning treatment of current and past employees and characterization of "other offenses"; (2) a modest, but significant, change to better reflect today's compliance environment; and (3) a return to the relentless promotion of the Policy by the Division and the welcoming partnership that provided its greatest success in the late 1990s and 2000s. Hopefully, these steps can spark a renewal – a renaissance – in the Leniency Policy and a significant strengthening of the criminal enforcement program.

II. A BRIEF HISTORY OF THE U.S. CORPORATE LENIENCY POLICY[2]

From the beginning, the U.S. Leniency Policy has been a delicate balance of trust and good faith – and is the finest hour of collaboration among the Antitrust Division, the international corporate world and the antitrust cartel

2 This is my fourth article over almost twenty years entirely devoted to the U.S. Leniency Policy. The first three – in 2000, 2006 and 2013 – reflect the state of the Policy at that point in time with its benefits, challenges, and successes. They provide a detailed explanation of how the Leniency Policy operates and connects to international enforcement. That type of detail is not repeated in this article. The three earlier articles are Donald C. Klawiter, "Corporate Leniency in the Age of International Cartels: The American Experience," *Antitrust Magazine*, Vol.14, No.3 (Summer 2000); Donald C. Klawiter, "US Corporate Leniency After the Blockbuster Cartels: Are We Entering a New Era?," in Claus-Dieter Ehlermann & Isabela Atanasiu, eds., *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels*, pp. 489-505, Hart Publishing, 2007; Donald C. Klawiter, "Corporate Leniency: Maintaining the Integrity and Power of Antitrust Enforcement's Most Effective Tool," in Frank L. Fine, ed., *China Institute of International Antitrust and Investment: First Annual Antitrust Symposium 2013*, pp.327-345, LexisNexis 2013. All are available on-line or by email request (don@klawiterpllc.com).

defense bar. The 1978 Leniency Policy came about as a result of an unusual request by one of the titans of the antitrust bar to give the Antitrust Division substantial evidence of cartel activity in a major industry that was unknown to the Division. In return, the Division declined to prosecute the company and its executives, so there would be no criminal charges, no criminal sentences, and no *prima facie* effect in civil damage actions. From that event, and its acceptance by the Division, came the terms of that first Leniency Policy. Assistant Attorney General John H. Shenefield announced the policy to a meeting of in-house counsel in April 1978. Nervous laughter filled the room as the audience realized that he was serious, and this was now the policy of the Department of Justice. The new Policy opened the debate on the value of corporate leniency and how far the Division should properly go. It created the spark that would lead to the 1993 Policy and the stunning enforcement successes of the next 25 years.

When the new Leniency Program was announced by Assistant Attorney General Anne Bingaman in 1993, it, too, was greeted with skepticism and it took some time to become a vibrant enforcement tool. While the Division heavily and skillfully promoted the new Policy, many members of the cartel defense bar held the strong belief that as long as the statutory corporate fine remained limited to $10 million, corporate clients would be unwilling to turn against their friendly competitors and to even consider the available Leniency Policy. In *U.S. v. Mrs. Baird's Bakery*[3] in 1996, the Division even declined the court's invitation to utilize the alternative sentencing provision of the Criminal Fine Enforcement Act of 1987, 18 USC 3571(d), to increase the corporate sentence dramatically. Then, four months later, the Division dramatically changed its sentencing policy in October 1996 when it, for the very first time, invoked the alternative sentencing provision to obtain a $100 million fine in *U.S. v. Archer Daniel Midland Co.*[4] That was a permanent change in antitrust sentencing policy, and it became the moment when the defense bar embraced corporate leniency and persuaded a significant number of culpable clients to seek leniency in the vitamins, graphite electrodes, food additives, chemicals, auto parts, and many other industries.

The Division successfully structured and built on the Leniency Policy by developing the concepts of Leniency Plus and Penalty Plus.[5] Importantly, the senior leadership of the Division aggressively promoted the new Policy through speeches, programs, and the incredibly valuable consultation between the Antitrust Division and the American Bar Association Section of Antitrust Law. This relationship was first known as the DOJ-FTC Working Group (Criminal) and later became the International Cartel Task Force. Because of the sensitivity and confidentiality of the discussions, the group never issued a report, but, instead, set out the issues it discussed through the Section of Antitrust Law's International Cartel Workshops, first presented in 1997 and presented every two years since.

At the same time, as the Leniency Policy became more and more successful, many jurisdictions around the world developed their own leniency policies. This development – demonstrating that imitation is the sincerest form of flattery – expanded cartel enforcement worldwide, first in Europe, then in Asia and Latin America. Rather than applying for leniency only in the U.S. and Canada, many applicants had to apply in the European Union, Brazil, Japan, Korea, Australia, South Africa, and others. While extending enforcement, it also has complicated leniency consideration and dramatically increased the cost of obtaining leniency.[6]

Despite these complications and costs, U.S. leniency applications continued to increase. As the Policy flourished, there were situations where the Division was frustrated with the timing and quality of an applicant's cooperation, or the quality of witnesses, but the Division remained committed to the partnership it had forged with defense counsel. Since virtually all of these issues remained confidential, there was no public filing on these issues until the *Stolt-Nielsen* matter was adjudicated.[7]

Stolt-Nielsen, and the evolving "marker" system that lengthened the approval period, put a strain on the Leniency Policy, as did the increasingly multi-jurisdictional focus of leniency applications. Seeking leniency at the European Commission, for example, was much more adversarial and time-sensitive than in the U.S., and the EC did not make it easy and convenient for applicants to keep statements or interviews

3 No 3-95 CR-294-R (N.D. TX, May 30, 1996).

4 Cr No 96-CR00640 (N.D. ILL, October 15, 1996) (Plea Agreement).

5 See *supra* note 2.

6 This article does not discuss in detail the high costs of applying for and obtaining leniency in multiple jurisdictions around the world. Nor does it focus on the proliferation of private damage actions in many jurisdictions. This article focuses almost exclusively on the U.S. Leniency Policy which, unlike many around the world, relate to criminal liability of corporations and individuals. For an outstanding study of leniency around the world in all of its components, see Caron Beaton-Wells & Christopher Tran, ed., *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion*, Hart Publishing 2015.

7 *Stolt-Nielsen* was the first and only attempted expulsion from the U.S. Leniency Policy that became public. Essentially, the Division believed that Stolt-Nielsen gave the Division incorrect information about the timing of its withdrawal and the evidence it provided.

protected from private damage actions. Ultimately, the inability of major jurisdictions to compromise with each other and simplify procedures for the applicant added to the degree of difficulty in achieving leniency. This set of obstacles, however, did not appear to dampen the enthusiasm for leniency applications in the U.S.

The final major development in the U.S. Leniency Policy's history came in the 2010s and primarily involved the auto parts and banking industries. The most significant feature of auto parts was the extensive – some would say excessive – use of Leniency Plus, where a small number of major companies provided evidence in many markets in exchange for multiple Leniency Plus agreements. While this resulted in the largest investigation in antitrust history, it also created resentment by many smaller companies that were implicated by the industry giants, as well as allegations that the large companies coerced the small companies into cartel behavior.[8]

To some extent, the Leniency Policy was a victim of its own success. With size came more rules and procedures – and far less transparency. The 2017 Frequently Asked Questions created more questions and concerns. Persuading clients to seek leniency is hard enough; persuading them when rules are changing or being reinterpreted – or even appear to be – is unsettling to the client and damaging to the credibility of the Leniency Policy.

III. THE CURRENT DECLINE IN CRIMINAL ENFORCEMENT – AND LENIENCY

The decline in criminal enforcement is dramatic and continuing. From FY 2008 through FY 2018, the United States secured $10.5 billion in corporate criminal fines, the vast majority of which resulted from leniency-based cases. Over the past three years, total corporate fines were only $700 million – this significant drop followed four consecutive years of over $1 billion in fines. Recently, the *Financial Times* reported that criminal antitrust enforcement is at its lowest point since the Nixon Administration.[9]

Given its impressive history, why is criminal enforcement at such a low point? The factors of multijurisdictional leniency, multijurisdictional enforcement, and multijurisdictional damage actions have increased its cost and complexity, but the benefits to the applicant seeking leniency in multiple jurisdictions are palpable. There is no way to answer the question of the decline in enforcement with confidence and precision. The possibilities are industry behavior, the degree of prosecutorial focus, or the lack of incentives for corporate cooperation. With respect to industry behavior, there are a few practitioners and commentators who will argue that industries have seen the impact of huge fines, jail sentences, and damage actions and have cleaned up their anti-competitive conduct. Those who have practiced in this area, or studied the economics of collusion, or observed human behavior will understand that many business executives, especially in desperate economic times, will turn to cartel behavior to solve their revenue problems – and justify it as saving their companies. The ageless wisdom of Adam Smith's *Wealth of Nations* is as relevant today as it was in 1776.

As to the intensity of prosecutorial focus, a change of presidential administrations always brings about some bumps, and this change was more disruptive for a variety of reasons. The departure of Brent Snyder as the Deputy Assistant Attorney General for Criminal Enforcement slowed the opening of new investigations, a situation made more acute by the fact that it took over a year to bring in a successor. At the same time, the Division lost several of its most experienced and accomplished criminal prosecutors and managers in the past three years. Before that, in 2011, the Division announced that it would close four of the Division's field offices – in Philadelphia, Cleveland, Atlanta, and Dallas, taking away hundreds of years of prosecutorial (and, importantly, trial) experience that was responsible for blockbuster actions such as vitamins (Dallas), graphite electrodes (Philadelphia), USAID Egyptian infrastructure (Atlanta), and many others. This depletion of quality prosecutors between 2011 and 2018, together with the "all hands" effort the Division required for the auto parts investigations and bank rate manipulation investigations, did not provide the firepower to even begin to fill the pipeline.

The drop in the number of significant leniency applications also has been a major factor in the decline in criminal enforcement. Almost every major cartel investigation over the past two decades was the result of a leniency applicant. The Policy, which was promoted with such enthusiasm and great success in the late 1990s and early 2000s, has fallen into disrepair for a number of reasons, many related to breaches in the delicate balance of trust between the Division and leniency applicants. The "red carpet" approach of welcoming partnership between the Division and the applicant has waned over the years because of claims of breaches of trust and good faith between the parties. *Stolt-Nielsen*,

8 See *supra* note 2. The 2013 article provides a detailed analysis of this issue, including the concern that these large companies were "the organizer" or "leader" or otherwise "coerced" companies to participate in cartel behavior.

9 "US Antitrust Enforcement Falls To Slowest Rate Since 1970s," *Financial Times*, November 29, 2018.

where the Division attempted to expel a company from the leniency program, and *UBS*, where the leniency applicant in the bank rate manipulation investigations was charged with "another crime," are examples of those very public controversies. Regardless of your position on these events, it was changes in the interpretation of treatment of corporate executives and interpretation of other crimes not being covered by the Leniency Policy that have opened up a rift between the Division and the cartel defense bar that needs serious attention. The fact that more than 50 jurisdictions around the world have signed on to the leniency idea following the initiatives of the U.S. and Canada – and later the EC – makes the need to renew the U.S. Policy all the more critical to the successful future of cartel enforcement.

The actions that have breached the delicate balance of trust on both sides of the leniency equation are detailed elsewhere. A particularly outstanding description is in a very recent article by Robert B. Bell & Kristin Millay.[10] The Bell-Millay article sets out the details of the 2017 changes to the Leniency Policy's Frequently Asked Questions relating to the availability of leniency for "antitrust crimes only" and the Division's discretion to exclude highly culpable current employees from Type B Leniency. Both the Division's treatment of UBS in 2014 for "other crimes" and the seeming shift of its Policy towards employees sent alarm bells to the cartel defense bar members who had grown up and advised clients about leniency in a much more transparent setting. In addition to the reasons for the decline in criminal enforcement discussed above, these unilateral changes in the Leniency Policy's rules further contributed significantly to the downward spiral of antitrust criminal enforcement.

IV. THREE POSITIVE STEPS TOWARDS A RENAISSANCE IN THE U.S. CORPORATE LENIENCY POLICY

The success of the U.S. Leniency Policy has made the Antitrust Division the preeminent criminal antitrust enforcement agency, and it has brought competition and the rule of law to industries around the world. Neither the Division nor the defense bar can allow these disagreements and alleged breaches to relegate this great Policy to a historical footnote. From its inception, the Leniency Policy was based on trust – on a positive partnership of the Division and the corporate entity and its counsel. The balance has always been a delicate one that was successful over hundreds of attempts for over 25 years. I offer three modest and positive suggestions to renew and revitalize the Policy.

A. Division Leaders and Cartel Bar Leaders Must Communicate Urgently and Positively About the Leniency Policy

The 2017 revisions of the Frequently Asked Questions provoked a firestorm from the cartel defense bar that has now raged for almost two years. The reaction from the cartel defense bar was immediate and loud, resulting in a large number of unfavorable reviews (some of which are collected in footnote 44 of the Bell-Millay article). The reviews focus on the treatment of corporate employees and the "other crimes" discussion, as well as the Division's attitude towards leniency applicants. The passage of time has done nothing to resolve the problem and rebuild trust between the Division, potential leniency applicants, and the cartel defense bar. It is clear that few, if any, of the potential applicants will be visiting the Division anytime soon.

The first step is to bring the Division leadership together with the cartel bar leadership in confidential discussions. The ABA Section of Antitrust Law's International Cartel Task Force is the perfect vehicle to begin such discussions – it worked in the 1990s and 2000s as the DOJ-FTC Working Group (Criminal). It can be confidential, which will lower the temperature and allow for proposals that can establish balance and trust.

After candid input and constructive discussions, the Division leadership can take what it learned in the confidential discussions to propose changes and clarifications to the Frequently Asked Questions and the Policy. The fact that Division and defense leaders worked in good faith to renew the Policy will go a long way towards bringing leniency applicants back to the Division's door.

B. Make Compliance a Part of the Conditions of Obtaining Leniency

The Division takes justifiable pride that the text of the Corporate Leniency Policy has not changed in 25 years. While that is commendable, the Policy also must reflect the signs of the times to remain vibrant and effective. This proposed amendment reflects the views of several accomplished criminal practitioners that compliance is today a central element of successful enforcement. This change in the Leniency Policy will, if executed properly, improve the Policy and give the Division a greater certainty that the Policy will work effectively.

10 Robert B. Bell & Kristin Millay, "The Corporate Leniency Program: Did the Antitrust Division Kill the Goose that Laid the Golden Eggs?," *Antitrust Magazine*, Vol. 33, No. 1 (Fall 2018).

Over the past 20 years, defense counsel often have proposed that the Division should give credit or consideration at sentencing for a serious compliance program. The U.S. Sentencing Guidelines for Organizations provide for such consideration. For much of that time, the Division ignored that provision, as well of the practices of the rest of the Department of Justice. It argued that a company should get no credit for its compliance program because, if the company was convicted of cartel conduct, the compliance program did not work. The movement to give companies credit for antitrust compliance programs has gained momentum in recent years with Division leadership acknowledging the debate and the value of compliance. The Division has even proposed appointment of compliance monitors as a condition for probation in certain cases.

Until recently, no leniency regime around the world required compliance programs as a condition of granting leniency. Last June, however, the Hong Kong Competition Commission, with Brent Snyder (who previously led the criminal program at the Antitrust Division) heading its cartel enforcement program, was the first to propose a compliance program requirement. The U.S. should follow this excellent idea.

This added requirement – that the applicant establish and implement an effective compliance program – will have three benefits. First, it will restore compliance to its rightful place as the centerpiece of antitrust criminal enforcement. As many of us who regularly promote serious compliance training know, it is hard to understand why this provision had not been part of the formal policy over the past 25 years. Second, with its implementation, a compliance program will acquaint the leniency applicant's employees with the contours of cartel behavior and its implications, as well as make them more focused and better informed witnesses in the leniency process, and better sources of possible Leniency Plus evidence. Third, with effective compliance training for employees of the leniency applicant, the Division should be far more comfortable with not prosecuting those employees and with their continued employment. It is certainly a step in the direction of solving some of the issues raised by the 2017 FAQ revisions.

This new provision of the Leniency Policy will supply a spark that will help to revitalize the U.S. Leniency Policy. It will bring the Policy back to the headlines in the antitrust law environment, as well as to the attention of corporate counsel globally. Combining that provision with a return to the "true partnership" and clarification of the policy on employees and other offenses, the Division will see a movement to more leniency applications and a restoration of criminal enforcement to the level of its most productive past.

C. Return the Leniency Policy to a Positive and Enthusiastic Partnership

The Leniency Policy was not an easy concept to accept. Many Division prosecutors initially bristled at the idea of "giving it away" – some still do. Corporate executives were skeptical of counsel's recommendations to pursue leniency– at least until the level of fines imposed and damages awarded gained their attention after 1996. It took enormous effort by the Division leadership, particularly Gary Spratling, to promote the Policy with great enthusiasm. In speech after speech, Gary and his successors explained the benefits of the Leniency Policy – ZERO fines, ZERO jail, etc. – and pledged full partnership with the applicant to get it over the goal line. From personal experience, the Division was true to its word. Yet, defense counsel had a very hard job of convincing its clients to apply. The Division's public pledge and private assistance made the difference – good faith and trust were real.

Over the years, that fervor waned. Division officials scolded leniency applicants to be more forthcoming and to provide information faster. I suspect that the approach of the European Commission, with its more grudging acceptance of leniency applicants in a more impersonal system, unfortunately has influenced U.S. enforcers. I am certain that the Division was justified in complaining about the timing and degree of cooperation of some leniency applicants; the tragedy is that the Division's rebuke was public and generic – and that caused resentment and inaction and fewer applications.

The business world and its legal counsel must be made aware anew that the Leniency Policy exists and that the Antitrust Division ardently enthusiastically welcomes the partnership with the companies and counsel. If the Division rises to the occasion by helping leniency applicants to succeed rather than setting up more obstacles, there will indeed be a renaissance in criminal enforcement. If not, the greatest antitrust enforcement program ever will be a fading memory.

V. CONCLUSION

It is time for a renaissance in the U.S. Leniency Policy and criminal antitrust enforcement. A renaissance looks back to the wisdom and success of the past and takes inspiration from it. With that wisdom and success, it also develops its own creative ideas. The renaissance is intended to make things better. In an environment of good faith on both sides, it assuredly will.

CPI COMPETITION POLICY INTERNATIONAL

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.