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Antitrust Law A Practice Focus

Complicated Confessions

With regulators in multiple jurisdictions, a rush for global amnesty gets tricky.

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Imagine you are walking out of your office one evening when you get an urgent phone call from the managing director of the operations of your company (or your client) in the United Kingdom. He reports rumors that your largest competitor has sought amnesty from the U.S. Department of Justice for participating in a global price-fixing cartel.

The executive is, understandably, quite nervous about a number of meetings with competitors and "price verifications" many of his salespeople conduct when dealing with aggressive buyers.

He also reports to you that he has some competitive-pricing information that he probably should not have, he has taken steps to "deal with it," and others may be "cleaning up" their files, as well.

Such a call will set in motion a complex chain of events literally spanning the globe. Within a matter of days you can expect, among other things:

(1) A grand jury subpoena from the U.S. Department of Justice. (2) Search warrants being executed in the United States. (3) Dawn raids at your European locations. (4) Searches of your Tokyo offices and facilities by the Japanese Fair Trade Commission. (5) Emergency board of directors meetings to discuss the range of disclosures that must be made in filings with various stock exchanges. (6) Dozens of private damage actions, in as many jurisdictions as support them, seeking recoveries for overcharges, attorney fees, and any other monetary remedies available. This includes treble damages in the United States.

In addition, your external lawyers in London may eventually be called upon by the United Kingdom's Serious Fraud Office to cooperate with the investigation into the possible destruction of documents at your European headquarters. You will have to launch—or hire outside counsel to launch—an internal investigation to discover whether documents have been destroyed in any of the U.S. offices, and if so, quickly report the details of that activity to the Department of Justice.

You will have to coordinate your activities with counsel in other jurisdictions. You (or your client) may have to budget hundreds of millions of dollars for fines, damages, litigation costs, and attorney fees. You will have to determine the company's potential liability, and based on that, consider whether to seek leniency from government regulators, even while recognizing that it may be too late to qualify for it. It will be years before the company can get back to business as usual.

THE LENIENCY RACE

Although the rewards of immunity—reduced fines and civil damages from cooperating with government authorities—may seem appealing, the decision to apply for leniency is complex, requiring the advice of experienced legal counsel.

For starters, companies must weigh the likelihood that enforcement agencies will detect the cartel in the absence of your leniency application, the likelihood that a competitor is planning to report the violation to obtain the highest level of leniency, and the risks of criminal prosecution and prison sentences—particularly in the United States—for company employees, regardless of where they work.

Companies must also consider the consequences of submitting an untimely application, whether and how applying for leniency will impact civil liability (in particular, discoverability in the United States of foreign leniency applications), and issues related to the protection of confidential and attorney-client-privileged communications. (For example, unlike the United States, European Union law does not extend privilege to advice provided by in-house counsel.)

And beyond these legal considerations, executives must also weigh the potential impact on the worldwide investment community and the markets' valuation of your company, as well as the potential impact on customer and supplier relationships.

In the vast majority of the cases, leniency applications will

inevitably entail detailed disclosure of the underlying violation of antitrust laws worldwide. In light of cooperation and information sharing among enforcement agencies of different nations, companies that do business in multiple countries will likely be involved in investigations, prosecutions, or civil lawsuits in multiple jurisdictions.

Competition authorities in various jurisdictions regularly exchange information about the existence of ongoing investigations to coordinate their actions.

Bilateral agreements between the United States and other jurisdictions, including the European Union and Japan, provide for cooperation on investigations, though each country's laws impose limits as well. Various other international treaties allow the signatories to request information from each other.

In addition, the International Competition Network, which encompasses 90 competition authorities worldwide (including the U.S. Department of Justice, the European Commission, and the Japanese Fair Trade Commission), allows authorities to exchange information informally.

You should, therefore, consider parallel leniency applications in multiple jurisdictions in most cases where leniency is being considered at all. And the timing is crucial. The company is in a difficult position if, for example, it is a successful first applicant in Europe but is second in the United States, with nothing valuable to trade for "amnesty plus."

Starting the Race

If your company decides to race for leniency, there are many rules and requirements to wade through. These include considering the following:

(1) Whether your company's role in any conspiracies disqualifies you from leniency;

(2) What forms of leniency or amnesty you are entitled to receive, and whether all of the promised rewards can be guaranteed by the antitrust authority;

(3) Whether and how to obtain an anonymous consultation to find out the expected order of applications and the availability of full or partial amnesty;

(4) Whether you should apply for leniency before or after the start of an investigation;

(5) How much and what information you must provide to receive leniency;

(6) Whether you will be rewarded for providing information about other conspiracies or cartels;

(7) How to minimize the discoverability before U.S. courts of foreign leniency applications;

(8) What the applicable deadlines for the submission of evidence are;

(9) How to prepare for face-to-face contact with enforcement officials; and

(10) How to manage evidence and witnesses, including documents, company officers, and employees, and even how to manage shareholders.

Around the World

Every leniency program has different rules, procedures, and requirements. A thorough understanding of how the programs work and interact is crucial. It can be gained only by repeated interactions with the enforcement authorities over a range of cartel investigations.

- In the United States the "amnesty" program was among the first of its kind. It has been very successful in ending cartels that the Justice Department would not have otherwise discovered. The program has been the model for a growing number of countries.

The U.S. approach includes not bringing any criminal charges against the firm that is first to report criminal cartel activity. It also limits that firm's civil liability in subsequent private litigation to actual damages only for the applicant's own sales (as compared with triple damages with joint and several liability).

Leniency is granted to the first to apply before an investigation starts. It requires that the applicant also cooperate fully, make restitution where possible, and not have been the ringleader in the illegal activity.

A company under investigation for one violation can obtain "amnesty plus"—immunity from criminal prosecution in the new investigation and a discount in fines in the original investigation—by reporting a different violation, which can be the same conduct in a different product or geographical market.

- In Japan the leniency program entered into effect only in January 2006. The program rewards the first three companies that confess and cooperate with the relevant authority, the Japan Fair Trade Commission.

The first applicant to report its violations will receive a complete exemption—from fines and criminal accusation—if the application is made before an enforcement investigation begins. A maximum of two other applicants in a single conspiracy can earn reductions in fines of 30 percent or 50 percent.

The applicants must comply with conditions similar to those in the U.S. and EC programs, but if the investigation has started, the application must be made within the first 20 days. The Fair Trade Commission also has the discretion to grant a second or third applicant immunity from criminal prosecution. There is no amnesty-plus program in Japan.

Early indications are that the Japanese program will have the same effect as the U.S. and EU programs in encouraging companies to come forward with information on cartels. According to a survey published in August 2005 by the Jiji Press English News Service, more than 40 percent of the largest Japanese firms were considering leniency applications.

- In the European Union a grant of leniency by the European Commission consists of immunity from EC administrative fines.

Leniency is available to the first applicant to report a conspiracy unknown to the European Commission or, if the European Commission has already launched an investigation, the first to provide evidence sufficient to establish a violation. An applicant must provide any and all evidence in its possession and cooperate fully in the investigation. The applicant must not have taken steps to coerce others into the illegal activity.

The European Commission requires a much fuller confession of the violation than is the case in the United States, and the EC application may be used as evidence of the violation. And while the European Commission does not impose criminal penalties,

some EU countries—notably the United Kingdom and Ireland—may undertake criminal enforcement. A successful EC leniency application will not affect potential criminal penalties where they apply.

Discretionary leniency, in the form of fine reductions, is available to later applicants (after the first one) that provide evidence that adds significant value to the investigation. The European Commission does not have an amnesty-plus program like the one in the United States, however.

Adding to the complexity of these multiple jurisdictions, in Europe the situation is further complicated by the existence of 26 authorities—the European Commission plus 25 national authorities—each with its own power to investigate and punish violations of European competition law.

Therefore, potential leniency applicants in Europe face uncertainty in determining to which authority or authorities they should submit applications. For example, the German authorities have just issued a major revision of their leniency program, with important changes in every facet of the program.

Understanding the differences among leniency programs can be quite daunting. The stakes are high, and proper guidance is crucial to complete the marathon of international legal clashes that lies ahead. Success requires an experienced team of international specialists with experience in assisting leniency applicants in all the major jurisdictions, as well as experience in helping those who have not won the race for leniency and must deal with the consequences.

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