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Uncertainty Lingers Around DOJ's Antitrust Leniency Shift

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Almost six months after the U.S. Department of Justice's Antitrust Division revised its longstanding cartel leniency policy in April, with the stated goal of "further promot[ing] accountability" from corporations involved in price-fixing, bid-rigging or other cartel conduct,[1] the antitrust bar continues to debate whether the amendments did more harm than good to the future of cartel enforcement.

The current state—and arguably declining effectiveness—of antitrust leniency programs offered by government enforcers was a major recurring topic at this summer's 2022 International Cartel Workshop,[2] hosted by the American Bar Association and International Bar Association in Lisbon, Portugal, over three days in late June.

The biennial workshop we recently attended is considered the premier international cartel conference. Senior members of the private bar and government enforcers from around the world were present.

With the debate ongoing, we take stock of the evolving leniency policies, lessons from the International Cartel Workshop, and what companies faced with a potential cartel violation should do in a changing enforcement landscape.

The Rise and Seeming Decline of Leniency

Leniency programs work to disrupt and detect cartels by encouraging participants to self-report to enforcers, providing substantial benefits to those that self-report and cooperate in the government investigation.

These benefits vary by jurisdiction and can include immunity from criminal prosecution for the corporation and individual employees, eliminated or reduced government fines, and reduced damages exposure in follow-on class actions and other private civil lawsuits.

The U.S. DOJ Antitrust Division was the first to adopt a formal leniency program in 1993, and enforcers in other jurisdictions soon followed with their own leniency programs with varied conditions.

Over time, the DOJ has come to consider the leniency program its "most important investigative tool for detecting cartel activity," according to the Antitrust Division's website.[3] Indeed, leniency programs have been highly successful from the enforcers' perspective, leading to decades of global cartel investigations and record fines from the 1990s through the mid-2010s.

However, in recent years, leniency applications appear to have declined both in frequency and in the magnitude of conduct they report. The criminal fines and penalties obtained by the Antitrust Division have declined from their peak in 2015.[4]

There has always been a policy balance to strike. For a leniency program to be effective, the benefits must be sufficiently attractive to incentivize self-reporting.

On the one hand, if the benefits are too generous and too easy to obtain, the deterrent effect of the antitrust laws' stiff penalties may be weakened.

On the other hand, if the benefits are too meager or too hard to obtain, fewer companies will self-report after discovering a potential violation. Rather, companies might reasonably choose to withdraw from a conspiracy, and then hope the statute of limitations expires without government action.

Absent a cooperating leniency applicant, prosecutors must rely on other tools to detect and investigate potential cartels, such as customer complaints, public reports and data, or individual whistleblower employees.

In practice, the April leniency program revisions to "promote accountability" meant tightening the criteria to qualify for leniency, including imposing two new requirements that applicants must satisfy in order to avoid criminal prosecution.

First was a new promptness requirement that companies must self-report to the DOJ promptly after discovering wrongful conduct. Second was an additional obligation to undertake remedial measures to redress harm and to improve the company's compliance program.[5]

These expanded requirements came on top of existing strict requirements that a leniency applicant must be the first company to report the potential violation to the DOJ, as well as a two-tiered leniency structure that provides reduced protection to companies reporting conduct that the Antitrust Division has already begun investigating—known as Type A and Type B leniency.

Against the backdrop of already-declining cartel enforcement, many in the antitrust bar have questioned whether the new, stricter leniency requirements were ill-advised and whether they may diminish what had been an extremely effective tool to detect illegal cartels.

Lessons from the International Cartel Workshop

The International Cartel Workshop provided a unique opportunity for close interaction between private attorneys, in-house counsel and government enforcers, centered around a detailed hypothetical multijurisdictional investigation involving global businesses engaged in conduct raising a variety of nuanced antitrust considerations.

Demonstrative programs took the investigation through each step, from responding to an initial government raid, to conducting internal investigation and developing a defense strategy, and through negotiating a resolution with enforcers in the U.S. and Europe.

Speakers acted out their usual real-life roles—defending or investigating a company's conduct—all in the context of the hypothetical. For example, leading cartel defense lawyers partnered with trial attorneys from the U.S. DOJ Antitrust Division to present a mock negotiation seeking to resolve the DOJ's investigation into whether a company entered anticompetitive agreements with its competitors to restrict hiring and employee poaching between the companies.

Along with demonstratives highlighting best practices around common issues in antitrust conduct investigations, the workshop also involved discussion of enforcement agencies' latest policies and priorities.

While some expressed hope that declining enforcement is a reflection of companies' increased antitrust compliance, other panelists voiced concern that antitrust violations are still occurring, but now are less likely to be reported through a leniency application.

Much discussion, formally in panels and informally in breaks and meals, focused on the reasons leniency applications may be declining and what could be done to make leniency programs more effective.

The discussions highlighted uncertainties around changes in government policies, including the U.S. DOJ's recent adoption of the promptness requirement[6] for self-reporting after discovery of wrongdoing; significant private damages exposure remaining even when government leniency is obtained; increased U.S. DOJ focus on prosecuting individual executives;[7] and tensions between the desire to punish wrongdoers and the need to offer incentives for those wrongdoers to self-report.

Other comments questioned whether agencies' efforts to expand the scope of their enforcement—such as emphasizing no-poach labor cases or focusing on practices by a few technology giants—have distracted from efforts to prosecute more traditional price-fixing and bid-rigging behavior.

What Companies Should Do Now

Overall, the ongoing debate reflects the evolving enforcement landscape and the need for legal advice adapted to the latest administration policies and developments in the U.S. and globally.

A few things remain consistent. Companies should ensure they have strong antitrust compliance programs in place to educate employees, prevent cartel behavior before it starts, and detect it promptly if things go awry.

When a company detects a potentially illegal agreement with a competitor, it should move extremely quickly to investigate, stop the behavior and understand its exposure.

But what it should do next is highly fact-specific, depending on the conduct, the nature of the industry, the jurisdictions where the company does business and many other factors.

The decision of whether to seek leniency is not an automatic one. Particularly for global companies potentially facing a multijurisdictional investigation, management must play three-dimensional chess, weighing how decisions with one enforcer in one jurisdiction may affect outcomes in another jurisdiction or in private litigation years down the road.

Amid changing legislation, government policies, and political priorities, the need for companies to have a sophisticated antitrust strategy is as strong as ever.

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[1] Jonathan Kanter, Asst. Atty. Gen., Remarks at the 2022 Spring Enforcers Summit (Apr. 4, 2022), transcript available at https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers; see also Antitrust Division Leniency Policy and Procedures, JM 7-3.300, available at https://www.justice.gov/jm/jm-7-3000-organization-division#7-3.300.

[2] https://web.cvent.com/event/791fc9a2-1a73-4b8b-8ad8-29773b9fa51a/summary.

[3] https://www.justice.gov/atr/leniency-program (last accessed Sept. 19, 2022).

[4] https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts (last accessed Sept. 19, 2022).

[5] See Press Release, U.S. Dept. of Justice, Antitrust Division Updates Its Leniency Policy and Issues Revised Plain Language Answers to Frequently Asked Questions (Apr. 4, 2022), available at https://www.justice.gov/opa/pr/antitrust-division-updates-its-leniency-policy-and-issues-revised-plain-language-answers.

[6] https://www.winston.com/en/competition-corner/boosting-immunity-doj-injects-additional-burden-and-uncertainty-to-antitrust-leniency-process.html.

[7] https://www.winston.com/en/competition-corner/the-impact-of-dojs-corporate-enforcement-policy-changes-on-antitrust-investigations.html.

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