Cartel leniency programs: Caveats and Costs

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Despite their remarkable success in generating a large number of prosecutions over the last two decades, the proliferation of antitrust leniency programs – and their administration – has raised questions about their effectiveness and their costs.

In a 2011 article, we addressed what we considered to be several undesirable effects of these programs. In our view, some leniency applications were being made in very marginal cases, *e.g.*, in several cases in which we were involved for an alleged cartel participant, no case was ever brought by an enforcement authority after an amnesty application and several years of investigation. From the outset, the conduct in these cases seemed at worst to raise questions under the rule of reason and in our view should not have been the subject of a lengthy and expensive inquiry before the matter was closed.

A second and related problem was the tendency, in some instances, for both companies and individuals to "stretch" the facts to fit the definition of agreement or "concerted action" in order to secure immunity or leniency.[1] Unfortunately these problems persist in some jurisdictions.

There is now an additional concern. The race to seek leniency seems to have clogged the enforcement system, in some cases with applications that seem in effect to be requests for advisory opinions.[2]

The increase in the number of leniency programs (more than 60 countries now have some sort of leniency regime), sometimes administered by understandably inexperienced personnel, and the corresponding increases in costs, appear to add little to the overall goal of enforcement, *i.e.*, the detection and deterrence of anticompetitive conduct and the compensation of those adversely affected by the conduct. The time and effort expended on so many leniency applications, some of which are not based upon clearly anticompetitive conduct, would be better utilized in more productive enforcement activity.

In short, as leniency programs have spread around the world, there is a real question whether the costs associated with over-reporting and the lack of a disciplined approach by some agencies will at some point outweigh the clear antitrust enforcement benefits of leniency initiatives.

How did we get here? Companies contemplating leniency face powerful incentives to file applications not just in the one or two countries where they may do the bulk of their business, but in a host of jurisdictions worldwide, no matter how few sales may be involved to customers in those countries and regardless of the costs of doing so. The decision-making process often boils down to a variation of the classic prisoner's dilemma: "If I don't go for leniency there, how do I know my com-

1 Mark Leddy, "Cartel leniency programs – Some caveats," *Concurrences: Revue des droits de la concurrence* (September 2011), *available at* http://www.concurrences.com/Journal/Issues/No-3-2011/Cartel-leniency-programs-Some.

2 A European colleague of ours remarked that certain lawyers in the EU are in effect reverting to the old "Form AB" system (terminated in 2004) where companies could explain their conduct to the Commission in the "Form AB" and be protected from action of the Commission until the Commission took a view on the conduct. This incentivized counsel and companies to file "protective" forms to insulate their conduct from challenge. Many of the applications were never acted upon.

petitor(s) won't?" This behavior is understandable given the fear of second-guessing if a competitor files for leniency in a jurisdiction in which the initial applicant didn't file. Since many enforcement authorities feel the need to act upon an application even if other agencies with more nexus to the conduct are investigating it, the costs of these "protective" filings and ensuing investigations are not insignificant and seem to be rising. This problem is exacerbated by "amnesty plus" programs that add yet another layer of incentive to file, at little or no extra cost to the applicant, for protection even in the most marginal cases.[3]

> The race to seek leniency seems to have clogged the enforcement system

There are a few signs that the antitrust community is beginning to recognize the costs of multiple and often wholly duplicative investigations and prosecutions and the lack of even marginal deterrence value of "copycat" prosecutions. The purpose of this short paper is to suggest that the more established enforcement agencies try to bring some order and efficiency to a process that is generating significant confusion and costs for at best only marginal benefits to deterrence.

1. The proliferation of leniency programs

The last few years have seen extensive international cartel enforcement. In addition to continued strong enforcement in countries with mature regimes, jurisdictions with little, if any, enforcement history have launched broad investigations and prosecutions. In nearly all cases, this activity has been driven by leniency programs.

The auto parts case is perhaps the most visible example. In addition to the $2.6 billion in fines so far in the United States, and €1.16 billion in fines by the European Commission, six other jurisdictions have prosecuted more or less the same conduct: China ($195 million[4]), Japan ($112 million[5]), Korea ($68.7 million[6]), Canada (C$56 million[7]), Singapore ($6.7 million[8]), and Australia (A$5 million[9]). While no fines have yet been imposed in Brazil, CADE's General Superintendent has charged seven ball bearings manufacturers[10] and opened proceedings related to at least seven other auto products.[11] South Africa has an ongoing investigation,

3 "Amnesty plus" allows a company that is under investigation in one product ("Product A") to report its involvement in a conspiracy relating to a second product ("Product B"), thereby securing leniency in Product B and also securing an additional discount on a fine in Product A. *See* Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program* (Nov. 19, 2008), *available at* http://www.justice.gov/atr/frequently-asked-questions-regarding-antitrust-divisions-leniency-program.

4 *China Fines 12 Japanese Auto-parts Companies 1.24 Billion Yuan for Price Fixing, MLex* (Aug. 20, 2014, 4:07 AM), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=578331&siteid=202&rdir=1. Press reports indicate that China's auto parts investigation is expanding. *China's NDRC Expands Antitrust Probe Into New Categories of Auto-parts, MLex* (Nov. 26, 2014), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=613653&siteid=202&rdir=1.

5 Press Release, Japan Fair Trade Commission, JFTC Issued Cease and Desist Orders and Surcharge Payment Orders Against Bearing Manufacturers (Mar. 29, 2013), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2013/march/130329_2.html.

6 *Strict Sanctions Against International Cartel Activities by Global Bearing Suppliers That Continued for Longest Period of Time in History, Korea Fair Trade Commission, International Cartel Division* (Nov. 17, 2014), *available at* http://eng.ftc.go.kr/bbsadm/download.jsp?file_name1=/files/bbs/2014/&file_name2=Sanctions%20against%20Global%20Bearing%20suppliers.PDF.

7 *Seventh Guilty Plea in Competition Bureau's Investigation Involving Motor Vehicle Components, MLex* (Dec. 11, 2014, 12:52 PM), *available at* http://www.mlex.com/US/Content.aspx?ID=619144.

8 Media Release, *CCS Imposes Penalties on Ball Bearings Manufacturers Involved in International Cartel*, Competition Commission of Singapore (May 27, 2014), https://www.ccs.gov.sg/media-and-publications/media-releases/ccs-imposes-penalties-on-ball-bearings-manufacturers-involved-in-international-cartel.

9 Press Release, Australian Competition & Consumer Commission, $3 Million Penalty for Bearings Cartel Conduct (May 31, 2014), http://www.accc.gov.au/media-release/3-million-penalty-for-bearings-cartel-conduct.

10 *CADE's General Superintendence Investigates Cartel in Antifriction Bearings Market, Conselho Administrativo de Defesa Econômica* (Oct. 10, 2014), http://www.cade.gov.br/Default.aspx?1124f2061ff40b08123f10263a00.

11 *CADE's General Superintendence Investigates Cartel in the Market of Safety Devices for Vehicles, Conselho Administrativo de Defesa Econômica* (July 6, 2015), http://www.cade.gov.br/Default.aspx?bc70be4adb31c74bdf6dfe53ed51; *CADE Starts Proceeding Against Alleged Automotive Shock Absorbers Cartel, PaRR* (Oct. 1, 2015), http://app.parr-global.com/intelligence/view/1310099.

launched in October 2014, covering 82 automotive parts suppliers and 121 separate automotive parts.[12]

In auto shipping, where the DOJ investigation resulted in $135 million in fines against three companies,[13] authorities in Japan ($223 million in fines against four companies[14]); Chile ($75 million in fines against six companies[15]); and South Africa ($7.8 million fine against one company, to date[16]) have also weighed in. An investigation into at least five ocean shippers is underway in China.[17]

Other global investigations are ongoing. In capacitors, for example, where there has been one guilty plea to date in the United States[18], investigations have been reported in China, Japan, Europe, South Korea, Taiwan, and Brazil.[19]

Punishing companies in these and similar cases should yield significant benefits by deterring future anticompetitive conduct both in the affected industries and beyond. For example, the recent cases in the auto shipping industry seem likely to cause industry participants to adopt more robust antitrust compliance programs.

Nonetheless, with new and inexperienced agencies readily accepting leniency applications and setting new records for fines, which in turn seem to draw even more applications, it may be time to consider whether there are ways to retain and reinforce effective enforcement while ensuring that the costs of this now global enforcement machinery do not at some point outweigh its undeniable benefits.

A number of prominent lawyers have already expressed concern about the costs of leniency programs, with a particular focus on the administrative costs posed. Gary Spratling, who was singularly instrumental in developing the U.S. leniency program while he was at DOJ, has noted the substantial costs of "[c]arrying out document retrieval, review and production; translation; internal company interviews; proffers; statements; requests for information and other work in potentially dozens of jurisdictions worldwide."[20] Indeed, Gary has questioned whether leniency programs might "become a victim of [their] own success as a result of the adverse consequences flowing from the adoption and active utilization of leniency policies by an ever-growing number of enforcement authorities."[21]

Deputy Assistant Attorney General Brent Snyder of the U.S. DOJ recently suggested that "enforcement agencies can work together to minimize the burdens and expense of our investigations on leniency applicants."[22] In addition to calling for better coordination among agencies, he offered the use of predictive coding—*i.e.*, computer-assisted document review—and other techniques used

by DOJ in civil cases to reduce the costs of multiple

12 Media Release, South Africa Competition Commission, Competition Commission Probes Collusive Conduct in Automotive Industry (Oct. 13, 2014), *available at* http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-Commission-probes-collusive-conduct-in-automotive-industry.pdf.

13 Press Release, U.S. Department of Justice, Antitrust Division, Third Company Agrees to Plead Guilty to Price Fixing on Ocean Shipping Services for Cars and Trucks (Dec. 29, 2014), *available at* http://www.justice.gov/opa/pr/third-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks.

14 Jeff Sistrunk, *Japan Fines Car Shippers $223M for Price-Fixing*, *Law360* (March 19, 2014, 4:25 PM), *available at* http://www.law360.com/articles/519608/japan-fines-car-shippers-223m-for-price-fixing; Press Release, Japan Fair Trade Commission, *The JFTC Issued Cease and Desist Orders and Surcharge Payment Orders Against International Ocean Shipping Companies* (Mar. 18, 2014), *available at* http://www.jftc.go.jp/en/pressreleases/yearly-2014/March/140318.html.

15 *A Group of Global Shipping Companies Targeted by USD 75m Fine Pursued by Chile's Antitrust Regulator*, *PaRR* (Feb. 3, 2015), http://app.parr-global.com/intelligence/view/1215246.

16 Matthew Bultman, *S. Africa Fines Japanese Shipper $8.5M For Price-Fixing*, *Law360* (July 1, 2015, 2:41 PM), *available at* http://www.law360.com/articles/674691/s-africa-fines-japanese-shipper-8-5m-for-price-fixing.

17 *WWL Seeks Leniency from China's NDRC for Cargo Shipping Cartel*, *MLex* (June 19, 2015 8:42 AM), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=691356&siteid=202&rdir=1; *Japanese Shipping Company Applied for Leniency to China's NDRC Over Price Fixing*, *MLex* (Feb. 9, 2015, 8:14 AM), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=642952&siteid=202&rdir=1.

18 Press Release, U.S. Department of Justice, Antitrust Division, NEC Tokin Corporation to Plead Guilty and Pay $13.8 Million for Fixing Price of Electrolytic Capacitors (Sept. 2, 2015), *available at* http://www.justice.gov/opa/pr/nec-tokin-corporation-plead-guilty-and-pay-138-million-fixing-price-electrolytic-capacitors.

19 *NDRC Confirms Antitrust Probes Into Capacitors, Auto Parts, and OTA Companies*, *MLex* (July 2, 2014, 8:10 AM), http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=555390&siteid=202&rdir=1; *Comment: Japanese Raids Put More Pressure on Global Capacitors Cartel*, *MLex* (June 24, 2014, 5:26 PM) http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=552121&siteid=190&rdir=1; *Superintendent Opens Process to Determine International Cartel in the Capacitor Market*, *Conselho Administrativo de Defesa Econômica* (December 2, 2014), http://ftp.cade.gov.br/Imprimir.aspx?Conteudo=2277.

20 David Vascott, *Spratling: Leniency Programmes May Be a Victim of Their Own Success*, *Global Competition Review* (Mar. 25, 2013), *available at* http://globalcompetitionreview.com/news/article/33304/spratling-leniency-programmes-may-victim-own-success/.

21 *Id.*

22 Brent C. Snyder, Deputy Assistant Attorney General for Criminal Enforcement, U.S. Department of Justice, Antitrust Division, Remarks at the Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), *available at* http://www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago.

document reviews and productions. He also noted the disruption caused by interview demands from agencies around the world and the need for agencies to coordinate in this respect.[23]

Procedural coordination on documents and witness interviews among investigators should reduce costs and speed up the processes. But the issue goes beyond repetitive document production and multiple witness interviews. The sheer number and scope of investigations and the resulting fines and related costs raise real concerns about proportionality and fairness. In some cases, it can take many years to come to the end of the formal proceedings, at very significant costs to the companies involved in legal fees and management time. Of course, up to a point these expenditures are a natural and justifiable part of the defense process and companies engaging in demonstrably anticompetitive conduct must bear the burden of these costs.

Nonetheless, in cases like auto parts, where the first leniency application in wire harnesses was filed in advance of February 2010 dawn raids, nearly six years later there are still unresolved government proceedings and civil damages actions. As far as we know, several of these unresolved investigations are still in their early stages and will likely take years to resolve. Moreover, the wire harness civil litigation in the U.S. remains at an early stage, with discovery and class certification likely to last at least until mid-2016. It could well be 10 years before the matter is finally resolved. On its face this seems excessive, and the legal fees alone in that one case are no doubt staggering. Some of these costs will likely be absorbed by the companies involved but some costs are equally likely to be passed on to customers.

In our view, it would be helpful if the countries that led the way to more robust antitrust enforcement around the world would also take the lead in discussing and implementing a more sensible and coordinated substantive and procedural approach to international price-fixing investigations among the world's enforcement agencies.

23 *Id.*

While cooperation and restraint among enforcement agencies in international merger investigations is neither easy nor perfect, there are merger cases where jurisdictions with a relatively modest interest in a transaction defer to the one or two enforcement agencies with the most at stake. While there are obvious differences in merger and cartel enforcement, and the analogy may not be sufficiently apt for some, there would seem to be no reason why a broadly similar approach might not work in the cartel context, *i.e.*, those jurisdictions with the most at stake in a cartel case would take the lead in government enforcement actions. Of course, if customers in the secondary jurisdictions were impacted by the conduct, they should be able to seek relief in their civil courts if allowed to do so by local law. But having three or more government agencies prosecute essentially the same conduct is excessive and seems highly unlikely to advance the goal of deterrence.

2. The marker system

The "marker" system in the United States, the EU, Brazil, and Canada (among others)[24] can reduce the problems posed by both the race to leniency and the apparent inability of some agencies at the outset to separate matters of real competitive concern from benign or neutral conduct. The marker system allows companies to conduct a more thorough internal investigation while holding their place in the leniency line. A marker allows applicants to withdraw their application if upon investigation they conclude that the conduct at issue does not amount to a violation. This has been a helpful addition for the national programs that have adopted it and should in our view be utilized in all jurisdictions with leniency programs. The marker system, however, needs to be carefully administered by experienced prosecutors and regulators.

24 *See* Organization for Economic Co-operation and Development (OECD), *Use of Markers in Leniency Programs* (Dec. 16, 2014), *available at* http://ec.europa.eu/competition/international/multilateral/2014_dec_leniency_programs_en.pdf; *Brazil's CADE Negotiating Leniency Agreements With Auto Parts Makers, PaRR* (Dec. 11, 2013), http://app.parr-global.com/intelligence/view/1049129; Canadian Competition Bureau, *Immunity Program: Frequently Asked Questions, Step 1: Requesting an Immunity Marker* (Sept. 25, 2013), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03594.html; The Office of Fair Trading (OFT), *Applications for Leniency and No-action in Cartel Cases: OFT's Detailed Guidance on the Principles and Process* (July 2013), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

One negative of the marker system may be that the ability to withdraw the marker provides yet another incentive for companies to seek markers upon the slightest indication of bad conduct. As an extreme example, we are aware of one case where a company initially sought markers in more than a dozen products, and then abandoned all of the markers after many months of investigation. As noted above, amnesty plus programs may be in part responsible for the proliferation of markers in marginal cases because they can be obtained at little or no cost to the applicant.

> The sheer number and scope of investigations and the resulting fines and related costs raise real concerns about proportionality and fairness

In 2012, Scott Hammond, then Deputy Assistant Attorney General for Criminal Enforcement at DOJ, reported that about one-third of firms drop their marker because they do not find illegal conduct in their internal investigation.[25] On the one hand, this might seem like a healthy development, suggesting that companies and their counsel are ready to seek amnesty whenever they suspect a possible problem and that regulators are willing to drop a case where evidence of genuinely anticompetitive conduct is scant. On the other hand, we suspect that in many cases markers are being sought and obtained for conduct that from the outset has little or no chance of resulting in an enforcement action. There needs to be some judgment exercised along the way by company counsel or by the enforcement agency.

Also, in our view, absent exceptional circumstances, agencies should not initiate investigations of the leniency applicant's competitors before a marker is perfected. This would avoid imposing undue costs on market participants and reduce the likelihood of unwarranted civil claims that generate their own very substantial costs.

For their part, practitioners should resist recommending that their clients call multiple enforcement agencies at the faintest hint of troubling conduct. Even where markers are available, defense lawyers should exercise judgment and restraint to avoid turning the leniency system into a search for an advisory opinion.

25 Leah Nylen, *One in Three Leniency Applicants Drop Their Marker, DOJ Official Says*, *MLex* (June 7, 2012, 5:00 PM), http://www.mlex.com/US/Content.aspx?ID=245815. The gap between the number of leniency applications and prosecutions is not limited to the United States, where the criminal prosecution of companies and individuals might provide a greater incentive for marker filings. Data from other jurisdictions show that many companies apply for leniency for conduct in markets where no one is ultimately prosecuted. For example, in 2014 the JFTC reported 50 leniency applications but only 12 cartel decisions; in 2013 the agency reported 102 leniency applications but only 14 cartel decisions. *Rating Enforcement 2015: Japan's Fair Trade Commission*, *Global Competition Review* (June 16, 2015), *available at* http://globalcompetitionreview.com/surveys/article/38861/japans-fair-trade-commission; *Rating Enforcement 2014: Japan's Fair Trade Commission*, *Global Competition Review* (May 29, 2014), *available at* http://globalcompetitionreview.com/surveys/article/36069/japans-fair-trade-commission. Even after accounting for the possible lag between a leniency application and an enforcement action, this suggests that a large majority of leniency applications never result in prosecution.