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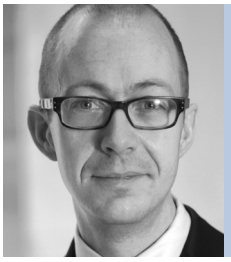

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COMPANIES THAT HAVE BEEN INVOLVED IN an illegal cartel affecting trade in the EU may significantly reduce their exposure to sanctions if they decide to co-operate with the European Commission (the Commission) under its Leniency Notice.[1] The first company to co-operate and to satisfy the formal requirements is granted total immunity from fines, while companies that co-operate subsequently may be granted a reduction in the amount of the fine, up to 50%. Given these potential benefits, the leniency program is a powerful tool in encouraging companies to provide the Commission with insider information on cartels.

A company's decision to co-operate does not come without costs, however. Co-operation entails, for all practical purposes, an admission of guilt that may impact subsequent litigation by private plaintiffs and there are potential discovery issues involved. For companies coming in after the immunity applicant, another potentially more significant cost is the risk they run of placing themselves in an even worse situation than they otherwise would be in. Indeed, there is a not insignificant degree of uncertainty involved in the process as companies are told only late in the investigative process (around the time of the statement of objections (SO)) whether they qualify for a fine reduction and, if so, in what range. It is also only at this stage that companies know whether others are co-operating. They run the risk, therefore, of 'confessing' without obtaining any reduction of the fines imposed.

In order to qualify for a fine reduction, companies must provide the Commission with incriminating evidence that represents significant added value (SAV) relative to what the Commission already has obtained. This means that the Commission will assess the value of the evidence in light of the evidence already submitted by the immunity applicant and/or obtained by the Commission through inspections or requests for information (potentially also from the applicant itself).[2] In those circumstances, while the second-in-the-door leniency applicant may stand a relatively good chance to meet the SAV threshold, it is by no means guaranteed that it will (in particular if inspections have taken place),[3] and for subsequent applicants the risk of not meeting that threshold is very real.

We discuss in the following some recent judgments that illustrate these and other issues that a company will be well advised to consider before deciding to apply for leniency.[4] First, however, we briefly outline some of the main aspects of the Commission leniency policy.

THE COMMISSION LENIENCY NOTICE

Under the Notice, to obtain immunity, the first company to co-operate must, in essence, provide the Commission with sufficient information to enable it to carry out a targeted inspection (a dawn raid).[5] That notably includes a detailed description of the cartel and its participants, supported by copies of contemporaneous incriminating documents. The company may, where justified, apply for a 'marker' to safeguard its position as first in line while it collects the evidence[6] and may also apply in 'hypothetical terms', and before formally committing to co-operate, test whether the evidence it has is likely to be sufficient to meet the immunity threshold. Once the Commission is satisfied it has enough information to carry out a targeted inspection (or send out targeted questionnaires), it will confirm to the company that it enjoys conditional immunity. In sum, once the immunity applicant has decided to co-operate, it finds itself in a situation that is relatively clear insofar as it knows what is required of it, will have some time to collect the information, and fairly quickly will get confirmation that it has met the threshold and will (provided it continues to co-operate) not be fined.

For companies that come in second, third or later, the situation is less clear. Since they need to provide the Commission with incriminating evidence that represents SAV with respect to the evidence already in the Commission's possession, these companies will need to work hard in order to qualify for the maximum reduction in fines. On paper, the situation seems clear: each slot in the leniency queue corresponds to a fine reduction within set ranges.[7] However, since there is no marker system for the leniency applicants[8], and given the importance of the timing of their submissions, these companies are in a race to secure the highest possible reduction:

- Slotting in the 'leniency queue' ultimately depends on when each

applicant meets the SAV threshold; in other words, if a company is the second in the door to adduce some evidence but if that evidence presents no or limited added value, it will not secure its second rank in the queue. On the Commission's side, this involves essentially an assessment of the evidence piece by piece.

- Moreover, once slotted, companies continue to have a strong interest in producing additional evidence of the best possible quality within the shortest possible timeframe because the reduction ultimately granted will depend on the aggregate added value of their submissions. On the Commission's side, this involves an overall assessment of the body of evidence submitted.

The Commission enjoys significant discretion, in particular in determining the precise reduction within a range, and also has some discretion in assessing whether a company meets the SAV threshold.[9] The Notice defines 'added value' as 'the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel' and sets out certain criteria that will guide the Commission in this assessment (see below). However, these criteria are not exhaustive.

RECENT CASES: WHAT CONSTITUTES SIGNIFICANT ADDED VALUE?

The Commission must assess each company's actual contribution in terms of quality and timing to the establishment of the infringement.[10] As to quality, regard must be had to the extent to which the evidence, by its very nature or its level of detail, strengthens the Commission's ability to prove the facts.[11] As to timing, the Commission must assess the value of the evidence in comparison with the other evidence already at its disposal,[12] such that similar evidence from two companies will be assessed differently depending on the stage of the procedure at which it is submitted.[13]

Quality

The applicant must facilitate the Commission's task of finding and bringing to an end infringements and must reveal a true spirit of co-operation.[14] The evidence submitted must be such that it strengthens the Commission's ability to prove the cartel.[15] This includes in particular evidence that corroborates evidence already in the Commission's possession concerning the existence of the cartel or evidence that enables the Commission to assess the gravity or duration of the cartel.[16] The Commission would be entitled to refuse a reduction of the fine where, in the absence of the evidence submitted, it would also have been in a position to prove the essential elements of the cartel and impose fines.

'Companies applying for a reduction of fines should provide the Commission with any documentary evidence in support of their corporate statements which set out the first-hand information they have on the cartel.'

Companies applying for a reduction of fines should provide the Commission with any documentary evidence in support of their corporate statements that set out the first-hand information they have on the cartel behaviour. Written contemporaneous evidence is more valuable than *ex post facto* evidence (eg witness statements made in the course of the Commission's antitrust proceedings). Incriminating evidence directly relevant to the facts (eg handwritten notes from a cartel meeting) will generally have a greater value than indirect evidence (eg travel records used to establish meeting dates).[18]

Furthermore, when the Commission requires corroboration of evidence brought by immunity or leniency applicants, this creates opportunities for leniency applicants to score bonus points. For example, in *Dutch Bitumen* [2007] (Commission decision of 13 September 2006) the second in the door (Kuwait Petroleum) was granted a 30% reduction for corroborating information concerning meetings that the immunity applicant had

NOTES

1) Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C298, 8.12.2006, p17-22 (Leniency Notice). The current 2006 Leniency Notice was preceded by the 2002 Leniency Notice and the initial 1996 Leniency Notice.
2) Evidence collected during inspections at the leniency applicant's premises or collected from it through a formal request for information by the Commission is not eligible for SAV, even if the applicant subsequently decides to co-operate under the Leniency Notice.
3) See eg the *Gas Insulated Switchgear* [2008] case (Commission decision of 24 January 2007) in which only the immunity applicant was successful. Although leniency applications were made only six days after the dawn raid, the Commission did not consider that the evidence represented SAV relative to that already in its possession. Note however that, according to the Commission, the 'vast majority of the subsequent applications filed with the Commission significantly add value and get rewarded accordingly.' See OECD Working Party No 3 on Co-operation and Enforcement, 'Discussion on leniency for subsequent applicants, European Union' 23 October 2012.
4) Some of these judgments refer to earlier versions of the Commission Leniency Notice; they are nonetheless illustrative also for cases handled under the 2006 Leniency Notice.
5) Alternatively, immunity may be sought where the company is the first provide enough information to allow the Commission to find an infringement and conditional immunity has not already been granted to another company.
6) A separate issue which we will not discuss here is the broad scope of the information required by the Commission to obtain a marker.
7) The second company to co-operate (after the immunity applicant) and provide SAV qualifies for a 30-50% reduction, the third for a 20-30% reduction, and subsequent applicants a reduction of up to 20%.

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already told the Commission about but in less detail as it was not a regular attendant. Obviously, however, the later leniency applicants come in, the less chance they will stand to bring evidence that really corroborates earlier evidence. They risk merely repeating what the Commission already knows. This was the case for Nynäs, one of the other applicants in *Dutch Bitumen*, who was denied any fine reduction at all despite providing, among other things, information about the same meetings reported by Kuwait Petroleum.[19] Similarly, in *Calcium Carbide and Magnesium based reagents for the steel and gas industries* [2009], the General Court confirmed that a leniency applicant will not meet the SAV threshold if its contemporaneous documents or corporate statements merely provide some useful details but do not really help the Commission build its case. The applicant, Almamet, had submitted evidence in relation to specific cartel meetings, including dates, places and participants. However, by the time it had brought that evidence, the Commission was already aware of the existence of the cartel, the participants and details of many meetings. As a consequence, it did not grant Almamet any reduction. The Court agreed, holding that while the evidence was to some extent useful, it was only capable of 'providing some clarification of issues of secondary importance'.[20]

Conversely, if a leniency applicant brings evidence that is conclusive on a standalone basis, ie requires no corroboration, it will earn more credit than if its evidence requires itself corroboration by other sources.[21]

Timing

As also illustrated by some of the above cases, absent a marker system for leniency applicants other than the immunity applicant, a company that takes too long to collect information runs the risk that its contribution will be devalued by evidence that the Commission obtains through other sources in the interim. It risks not qualifying for a fine reduction at all, and it risks being awarded less than the maximum reduction available.

Two appeals before the General Court against the Commission's decision in *Dutch Bitumen* illustrate this.

In one case the Court was asked to assess whether the Commission had erred in granting only a 30% reduction to the second-in-the-door leniency applicant.[22] Kuwait Petroleum had submitted information that the Commission found to represent SAV, but had then waited four days before supplementing the application and delayed scheduled Commission interviews of key employees for a month. In the interim, two other companies provided the Commission with substantial information in reply to a request for information. The General Court found that the Commission did not commit a manifest error of assessment in considering that as a result, the value of the evidence Kuwait Petroleum later provided had been diluted.

In the second appeal, the Court had to assess whether the Commission had erred in denying another leniency applicant any fine reduction at all. The applicant, Nynäs, had submitted what the Commission acknowledged was very detailed evidence regarding meetings and other details. However, when the evidence was submitted, the Commission already had in its possession information submitted by the immunity applicant, obtained during inspections, and submitted by other companies co-operating. Therefore, the evidence did not strengthen the Commission's ability to prove the infringement but at most confirmed and clarified some evidence the Commission already had; hence it did not merit a reduction of the fine.[23]

Coming in late may even as such have an impact on the fine reduction, ie regardless of the quality of the leniency application. In *Chloroprene Rubber*, the applicant was third in line and argued that on account of

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8) A marker system for subsequent applicants would defeat the element of the 'race to the regulator', Discussion on leniency for subsequent applicants, European Union, note 3.
9) Case T370/06, *Kuwait Petroleum & ors v Commission (Dutch bitumen)* [2012], paragraph 49. As a result, judicial review also is limited to ascertaining whether the Commission has committed a manifest error of assessment or the failed to respect general principles of law, such as equal treatment or the protection of legitimate expectations. See also, *Almamet v Commission (Dutch bitumen)* [2013], paragraph 187.
10) *Nynäs Petroleum and Nynas Belgium v Commission (Dutch bitumen)*, [2012] paragraph 65.
11) *Almamet*, note 9, paragraph 185.
12) *Nynäs*, note 10, paragraph 74.
13) *Dow Chemical v Commission (Chloroprene rubber)* [2012], paragraph 167.
14) *Nynäs*, note 10, paragraph 62.
15) Leniency Notice, point 25.
16) Leniency Notice, point 25 and *Nynäs*, note 10, paragraph 65.
17) *Nynäs*, note 10, paragraph 63.
18) Leniency Notice, point 25.
19) *Nynäs*, note 10, paragraphs 84-87.
20) *Almamet*, note 9, paragraph 207.
21) Leniency Notice, point 25. See also *Nynäs*, note 10, paragraphs 87-88, *a contrario*.
22) *Kuwait*, note 9, paragraph 65. The application was made under the 2002 Leniency Notice.
23) *Nynäs*, note 9, paragraph 84-91, concerning the 2002 Notice.
24) *Dow Chemical*, note 13, paragraph 170.
25) In *Fuji Electric/Commission (Gas Insulated Switchgear)* [2007], decided under the 2002 Leniency Notice, the General Court acknowledged that even an application submitted after the Commission issues its statement of objections in principle may constitute SAV, in particular where material provided was previously unknown to the Commission and where it has a direct effect on the gravity or duration of the presumed cartel. Although the 2006 Notice provides that the Commission may disregard applications submitted after the SO has been issued, the above judgment arguably raises a question as to the appropriateness of this statement. See also *YKK ea/Commission (zip fasteners)* [2012], paragraph 174.
26) Discussion on leniency for subsequent applicants, European Union, note 3.
27) *Calcium carbide and magnesium* [2009], Commission decision of 22 July 2009, paragraphs 49, 340.
28) *Almamet*, note 9, paragraph 60.

the value of the evidence its application should have earned it the maximum discount of 30% instead of the 25% it had received. The Commission however had taken into account that the evidence was submitted late: ten months after the first inspection, four months after the second inspection and four months after the application by the second in the door.[24]

That being said, the fact that evidence is submitted at a late stage when the Commission has already obtained significant information does not in itself preclude the possibility to secure a reduction of the fine, provided the company is able to contribute evidence that, even at a late stage of the procedure, still represents SAV.[25]

SCOPE OF REPORTING

Once companies decide to co-operate in a pending cartel investigation, they typically conduct detailed in-house investigations in the course of which they may – at some point in time – uncover problematic behaviour in other areas. What are their options? A distinction needs to be made.

If the newly discovered behaviour relates to an entirely separate cartel, the company could consider submitting an immunity application. According to the Commission, immunity applications made by companies in such circumstances often lead the Commission to launch new investigations in sectors related to those previously subject to investigation.[26]

If the relevant behaviour merely widens the scope of the cartel that is under investigation, the company can claim partial immunity based on the evidence related to this behaviour, as the Leniency Notice explicitly provides. Alternatively, the Commission will reward the company with an extra reduction of the fine because its information presents SAV. *Calcium Carbide and Magnesium* is a case in point. The Commission had carried out inspections in relation to a suspected cartel in the calcium carbide powder market. The second and fourth leniency applicants supplied information covering also other neighbouring products (calcium carbide granulates and magnesium granulates),[27] earning them both reductions of their fines as the Commission subsequently extended the scope of its investigation on this basis. As already noted, Almamet, which was the third company to co-operate, ultimately was denied any reduction because it had reported information limited to calcium carbide on which the Commission already had significant information

Almamet contested the Commission's decision, arguing that the investigation could not after inspections be broadened based on evidence reported by other companies. The Court rejected this argument. The activities for the different products formed part of the same single and continuous infringement and:

> '... an undertaking that wishes to benefit from [...] the Leniency Notice must communicate to the Commission all the information and evidence available to it that relates to a cartel, irrespective of whether the Commission has already initiated an investigation into that cartel and, if it has, of the precise scope of that investigation'.[28] While the outcome is not surprising given the finding that the activities all formed part of the same cartel, the case highlights the critical importance of a broad internal investigation once a company decides to co-operate. And in circumstances where it may be unclear whether an activity is part of the same cartel, it may be advisable to discuss with the Commission the best approach to adopt, including potentially submitting a new immunity application.'

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Case T-410/09 Almamet v Commission (Dutch bitumen) [2013] OJ C032/17

Calcium carbide and magnesium based reagents for the steel and gas industries (case COMP/39.396) Commission decision 2009/C 301/14 [2009] OJ C301/18

Case T-77/08 Dow Chemical v Commission (Chloroprene rubber) [2012] OJ C080/15

Dutch Bitumen (case COMP/38.456) Commission decision 2007/L 196/40 [2007] OJ L196/44

Case T-132/07 Fuji Electric/Commission (Gas Insulated Switchgear) [2007] OJ C140/36

Gas Insulated Switchgear (COMP/F/38.899) Commision Decision 2008/C 5/07 [2008] OJ C005/7

Case T370/06 Kuwait Petroleum & ors v Commission (Dutch bitumen) [2012] OJ C355/19

Case T347/06 Nynäs Petroleum and Nynas Belgium v Commission (Dutch bitumen) [2012] OJ C355/14

Case T-448/07 YKK ea/Commission (zip fasteners) [2012] OJ C243/13