International leniency regimes: new developments and their strategic implications

William J Baer, Tim Frazer, Luc Gyselen & Frank Liss
Arnold & Porter LLP

In last year's edition, we examined the leniency programmes in three jurisdictions (the US, Canada and the EU) and described the success of the 'first-in-the-door' principle that underpins these programmes, whereby the first corporation to seek leniency with respect to a cartel offence is awarded conditional 'amnesty' (US jargon) or 'immunity' (EU jargon) from fines. Over the past years, these leniency programmes have enabled the competition authorities to detect more cartel activity and thus to step up their relentless fight against cartels.

Leniency has increasingly become a global phenomenon. In the last year or so, 'old' EU member states (Greece, Luxembourg) as well as new ones (Poland, Estonia) have followed suit and adopted their own leniency regimes.[1] Outside the EU, New Zealand announced at the end of 2004 the adoption of a leniency policy[2] and Japan amended in April 2005 its Anti-monopoly Act, introducing a leniency programme.[3]

Other jurisdictions have refined their existing leniency policies to make them more effective. In July 2005, the UK Office of Fair Trading (OFT) adopted an 'interim note' aimed at making leniency more attractive to companies, especially in hard-core cases. In particular, the OFT will look more favourably at applications that occur after a dawn raid. In such circumstances, granting leniency to companies that provide added value to the OFT's investigation (ie, information that genuinely advances the OFT's investigation) will become the norm. The OFT will also be more accessible and respond to 'hypothetical' inquiries, so that companies may know where they might be in the queue if they applied. The note is already in force, although a finalised version is expected in the second half of 2006.

Today, no one will deny that leniency programmes have become a powerful tool in the hands of enforcement authorities to weed out cartel behaviour. In spite of their success, the leniency programmes have also raised some worries. In particular, applicants have been increasingly concerned that their submissions might become discoverable in courts and expose them to greater civil liability than other cartel participants. Enforcers worry that this fear may create disincentives for potential amnesty applicants to come forward. This year's contribution will therefore focus on the efforts to address these concerns adequately, as well as providing an update on various leniency-related developments in Europe and the US over the past year.

European Union

Concerns expressed by the enforcement authority

In April 2005, the current commissioner in charge of competition, Neelie-Kroes, noted that the Commission's 2002 leniency notice has created a serious workload problem.[4] Too many applications had led the Commission to open more cases than its services were able to handle within a reasonable timeframe. Ironically, after having struggled for years to cope with the workload created by too many notifications of vertical or horizontal agreements that did not raise serious competition concerns, the Commission faced the risk of being drowned by too many leniency applications. Kroes' concern was that a new type of 'backlog' could emerge.

The figures speak for themselves. Under the old 1996 Leniency Notice, the Commission granted full immunity in only 11 out of roughly 30 cases where leniency applications were filed. Under the 2002 Notice, the Commission had already received 34 applications by the end of 2003 and it granted conditional immunity in most of these cases (27 in total).[5] In 2004, leniency applications increased again: the Commission dealt with 49 such applications in 25 different cases. This trend continues. Commission officials have stated that the first months of 2005 "have seen a sharp rise in applications for immunity".[6] Perhaps the best indication that Kroes' concerns are not exaggerated is that more than three years after the 2002 Notice, we have not yet seen a final prohibition decision involving leniency granted pursuant to that Notice.[7]

The Commission is likely to adopt the first such decision in the Italian raw tobacco cartel case. This is also the first case in which the Commission has indicated that it intends to revoke the conditional immunity initially granted to a leniency applicant on the grounds that the applicant (Deltafina, a subsidiary of Universal Leaf Tobacco) breached its duty of confidentiality. The Commission made this preliminary indication on 28 December 2004 and granted the leniency applicant the right to defend its position at an oral hearing that took place in March 2005.[8] At first sight, the Commission's attempt to revoke immunity appears inconsistent with the 2002 Notice, which provides for revocation of immunity only if the applicant does not stop participating in the cartel or if it discontinues its cooperation with the Commission. However, because the leniency applicant's early disclosure may have had a negative impact on the Commission's investigation in the case at hand, the Commission likely believes that the early disclosure breached the applicant's duty of cooperation. The Commission will give its final verdict on this issue if and when it adopts its final prohibition decision.

In order to contain the problem of workload generated by an abundance of leniency applications, Kroes has asked her services to prioritise cartel enforcement actions. This means that her services will only handle those cartels that are deemed most harmful to consumer welfare. Within the Commission's Competition department (DG Comp), a dedicated cartel directorate consisting of three units will exclusively deal with cartels.

Commissioner Kroes has also voiced some sympathy for the concept of plea bargaining.[9] Plea bargaining would allow whistle blowers to admit guilt and then essentially come to an agreement with the Commission about the nature and scope of the illegal activity as well as the appropriate level of the fine to be imposed. This would simplify proceedings and thus relieve the Commission staff of their current heavy workload when dealing with cartel cases. Whether the Commission will ultimately embrace plea bargaining, however, will depend on the success of its dedicated cartel directorate in handling the current workload.

Concerns expressed by the business community

The business community has expressed concerns about a number of shortcomings in the current procedures. These shortcomings may render cartel members less willing to seek immunity and thus ultimately jeopardise the effectiveness of the Commission's leniency programme.

Public statements by Commission officials suggest that they are well aware of these concerns and are making efforts to address them.

Discoverability

Leniency applicants are concerned that third parties may ask courts—within the EU or elsewhere—to order disclosure of leniency statements in civil actions for damages suffered as a result of overcharges by cartel members. Within the EU, this concern needs to be assessed against the background of regulatory and judicial developments unrelated to competition law that have led to increased transparency in EU decision-making. On the regulatory front, the European Parliament and the Council adopted Regulation 1049/2001 granting EU citizens a general right of access to documents produced by EU institutions.[10] On the judicial front, in its *Zwartveld* judgment, the European Court of Justice held that the Commission has a duty to cooperate with national courts.[11]

In its recent *VfK* judgment,[12] the Court of First Instance (CFI) annulled a decision whereby the Commission had refused to grant a consumer organisation the right of access to numerous documents (totalling close to 50,000 pages) from its file in the Austrian banks ('Lombard Club') cartel case. The Commission had argued inter alia that disclosure of these documents would undermine the protection of the purpose of its inspections and investigations within the meaning of Art 4(2) of regulation 1049/2001. In its 2002 Leniency Notice, the Commission actually states that disclosure of leniency documents would also fall under that exception. In the *VfK* case, the CFI did not reject the Commission's argument out of hand but it held that the Commission should have carried out a concrete, individual examination of every document instead of making a sweeping statement concerning the entire file. This suggests that the Commission will be able to avoid disclosure of leniency documents—as long as the Commission explains why access to specific leniency documents would undermine the purpose of its inspections and investigations.

The Commission has also minimised the risk of discovery of leniency applications in civil litigation by no longer insisting that applications be written and signed by the applicant. Oral statements, taped and transcribed by the Commission, are now accepted and have become common practice. The applicant is asked to review the transcript but does not have to sign it. The Commission has sole control over the unsigned transcript because it is an official Commission document, rather than a company document.[13] This is particularly relevant for US private litigation, as the key standard for discoverability is whether the particular document is within the custody or control of the litigation party.

The *Zwartveld* judgment, however, requires the Commission to cooperate with the national courts within the EU. In the competition law field, the Commission has always taken to heart this duty. More specifically, it has indicated that national courts can request access to documents it holds.[14] However, the Commision will only hand over leniency documents subject to the applicant's consent.[15]

The Commission also ensures that corporate statements made in conjunction with a leniency application do not get into the hands of third parties via other alleged cartel members. It does so, however, without curtailing these companies' rights of defence. Since these companies have a right of access to the file if and when they receive a statement of objections, they are given the opportunity to listen and/or read the leniency applicant's corporate statement and can make notes about it. However, they cannot make copies of the statement (as this would give them 'control' over it and make the statement discoverable in US courts). As to the documentary evidence produced by the leniency applicant along with its statement, the alleged cartel members can make copies since the normal rules regarding access to the file apply.

Sanctions on individuals versus corporate immunity

In a number of jurisdictions, the competition law regimes allow for criminal sanctions to be imposed on individuals.[16] There is a growing concern that the risk of prosecution may render cartel members less willing to come forward and unveil existing cartels in pursuit of corporate leniency.[17]

The Commission has addressed this concern by providing that any leniency information passed on within the European Competition Network (ECN)[18] cannot be used in evidence by member states to impose criminal sanctions on employees or former employees of the leniency applicant.[19] The issue remains, however, as to whether a member state may impose criminal sanctions upon the employees of a company that had received immunity or leniency from the Commission, based on the Commission's statement of objections or final decision.

Multiple leniency programmes in the EU

The Commission and 18 out of the 25 national competition authorities (NCAs) have adopted leniency programmes.[20] Within the ECN, a leniency application to one competition authority—whether the Commission or an NCA—does not constitute a valid application to another ECN member. There is no 'one-stop shop'. Companies that wish to enjoy immunity from (or a reduction of) fines must file a leniency application in each jurisdiction. This is of concern to prospective applicants given that, for purely practical reasons, it may not always be possible for a whistle-blower to be 'the first in the door' everywhere. The concern is exacerbated by the fact that the leniency programmes in place within the ECN are not identical.

The 'one-stop shop' approach is one solution to the problem.[21]There may also be other pragmatic ways of overcoming the above concern. For instance, the Commission may decide to quickly open the case before one or more NCAs do so, since this would preclude action by any member state. The Commission may also work towards a form of 'soft harmonisation' whereby the NCAs would accept the validity of the leniency application that has been filed to the Commission. A third solution would be to apply a 'stop-the-clock' principle enabling a whistle-blower to file elsewhere in the EU before other leniency candidates can do so.

United States

DoJ anti-cartel enforcement activity

US criminal enforcement against international cartels has continued at a high level over the past year, driven in large measure by the DoJ amnesty programme we described in detail in last year's article.

Since last year, two participants in the Dynamic Random Access Memory (DRAM) investigation (in which Micron Technology has acknowledged receiving DoJ amnesty) agreed to pay criminal fines totalling $345 million. These two fines ($185 million and $160 million for Hynix and Infineon Technologies, respectively) represented the third and fourth largest criminal antitrust fines in US history, and the two largest ever obtained apart from the vitamins cartel.[22]

Amnesty applications also assisted the DoJ's ongoing investigation of cartel activity in the synthetic rubber industry, which yielded combined fines in excess of $200 million over the past year from firms such as DuPont Dow Elastomers, Crompton Corporation, Bayer AG, and Zeon Chemicals LP.[23]

First application of amnesty de-trebling provisions of the 2004 Act

In our article last year, we discussed the then-recent implementation of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (the '2004 Act'), which sought to encourage amnesty applications by offering applicants the prospect of a significant reduction in potential civil liability, so long as the applicant also offers

'substantial cooperation' to civil plaintiffs suing on the basis of the same conduct. In exchange for such cooperation, the 2004 Act limits the amnesty applicant's civil liability to damages resulting from the applicant's own sales (eliminating the prospect of 'joint and several liability'), and also waives the 'trebling' of actual damages that is otherwise automatic in US civil antitrust cases.

There continues to be debate among US competition lawyers as to whether the damages limitation provisions of the Act will offer much real comfort to amnesty applicants. Some argue that since most civil cases already settle for some percentage of alleged actual damages attributable to the settling defendants' own sales, the Act offers little meaningful benefit. Others believe, however, that elimination of the potential for treble damages, in particular, could materially affect civil plaintiffs' leverage in settlement negotiations with the amnesty applicant.

The amnesty-related provisions of the 2004 Act have now been applied in at least one case. The firms of Marsulex and ChemTrade Logistics (a successor entity to the Marsulex business) were granted an exemption from both treble damages and joint and several liability by the United States District Court for the Northern District of Illinois, following the filing of an uncontested joint motion by the firms and plaintiffs' counsel based on the firms' DoJ amnesty and their subsequent cooperation with the civil plaintiffs regarding antitrust violations in the sulfuric acid industry.[24]

Attempted DoJ revocation of Stolt-Nielsen amnesty

As in the EU, last year saw the first US effort to revoke corporate amnesty in a pending investigation. But the effort was blocked by a federal district court. In January of 2003, the DoJ had issued a grant of conditional amnesty to Stolt-Nielsen Transportation Group Ltd for its role in the international tanker shipping cartel. In March of 2004, however, the DoJ informed Stolt-Nielsen that its amnesty was being revoked based on evidence developed by the DoJ that its unlawful activities had continued into November 2002, rather than terminating in March 2002 as had been represented by Stolt-Nielsen to the DoJ in its amnesty application.

According to the DoJ, Stolt-Nielsen's continued participation in the cartel activity to November 2002 made it ineligible to receive amnesty because it meant that the company had failed to take "prompt and effective action to terminate its part in the anti-competitive activity-being reported upon discovery of the activity".

In January 2005, following a two-day evidentiary hearing, the US District Court for the Eastern District of Pennsylvania delivered a sharp rebuke to the DoJ, issuing an injunction upholding Stolt-Nielsen's amnesty and barring the government from indicting the company for its participation in the shipping tanker cartel.

The principal grounds for the district court's decision were (i) that the conditional amnesty agreement did not explicitly reference any particular date respecting Stolt-Nielsen's withdrawal from the shipping tanker conspiracy, and (ii) that the government had received the 'benefit of the bargain' from the amnesty agreement because it had obtained guilty pleas from co-conspirators Odfjell and Jo Tankers. The DoJ has appealed the district court injunction to the United States Court of Appeals for the Third Circuit.[25]

DC Circuit ruling in Empagran

In our article last year, we described in detail the decision of the United States Supreme Court in *F Hoffmann-LaRoche Ltd v Empagran SA*,[26] a purported class action brought on behalf of foreign purchasers of vitamin products asserting damages arising from the vitamins cartel. We further noted that one of the key policy arguments made by the defendants and various amici (including the US DoJ and various foreign governments, including Germany, Canada, Japan, Belgium and the United Kingdom) related to the potential adverse impact that a broad construction of US civil antitrust jurisdiction would have on leniency programmes in international cartel cases—as firms would be less likely to confess their roles in unlawful activities if the consequences for doing so included worldwide liability under US law.

In *Empagran*, the Supreme Court held unanimously that the plaintiffs' asserted injury had to arise from the US effects of the challenged conduct—and that it was not sufficient to allege merely that some other party had been injured in US commerce by the unlawful conduct. Rather than dismiss the case outright, however, the Supreme Court then remanded the *Empagran* case to the United States Court of Appeals for the District of Columbia Circuit (DC Circuit) to consider in the first instance the legal viability of the plaintiffs' so-called 'alternative theory'—that US jurisdiction would nonetheless be appropriate if the foreign plaintiffs could show that their foreign injuries would not have been possible 'but for' the US domestic effects given the economic interdependence of US and foreign vitamins markets.

On 28 June 2005, a unanimous panel of the DC Circuit decisively rejected the *Empagran* plaintiffs' 'alternative theory' as a matter of law and ordered dismissal of the action in its entirety on the principal ground that the appropriate legal test was not 'but for' causation, but rather 'proximate cause'.[27] Finding that the plaintiffs' alleged foreign injuries were proximately caused by the "foreign effects of price-fixing outside of the United States", and that such injuries were at best only indirectly caused by the conspiracy's alleged US effects, the panel ruled that the plaintiffs' claims failed to meet the requirements for subject matter jurisdiction in the US courts.[28]

Notes

1 These countries introduced leniency regimes on the following dates: Poland (1 May 2004), Luxembourg (1 May 2004), Estonia (1 August 2004) and Greece (2 August 2005).

2 New Zealand's leniency policy is based largely on the Australian two-tiered model, whereby companies that do not qualify for immunity under the leniency policy may nonetheless be granted immunity under the broader 'cooperation policy'.

3 The Amended Act is expected to come into force in 2006. It provides for a leniency system in which only three companies will qualify for leniency. In addition, the first whistleblower coming forward before the initiation of the investigation will be entitled to immunity from fines, the second to a reduction of up to 50 per cent, and the third up to 30 per cent. Any whistleblower coming forward after the initiation of the investigation will be entitled to a 30 per cent reduction only.

4 See Neelie Kroes, 'The First Hundred Days', 40th Anniversary of the Studienvereinigung Kartellrecht 1965–2005, International Forum on European Competition Law.

5 See ¶ 30 of the Commission's 23rd Report on Competition Policy (2003). For general comments on the 2002 Notice, see F Arbault and F Peiro, 'The Commission's new notice on immunity and reduction of fines in cartel cases: building on success', Competition Policy Newsletter no. 2002/2 (p 16) and B van Barlingen, 'The European Commission's 2002 leniency notice after one year of operation', Competition Policy Newsletter no. 2003/2 (p 16).

6 See Anna Saarela and Paul Malric-Smith, 'Reorganisation of cartel work in DG Competition', Competition Policy Newsletter no. 2005/2.

7 See William Baer, Tim Frazer and Luc Gyselen, 'Cartel prosecution around the world', PLC Competition Law 2005/2006 at footnote 1.

8 See ULT's Form 10-Q filed with the US Securities and Exchange Commission on 9 August 2005.

9 See note 4.

10 Regulation (EC)n No. 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001.

11 Case C-2/88 Imm Zwartveld [1990] ECR I-3365.
12 Case T-2/03, Verein für Konsumenteninformation v Commission 13 April 2005 (not yet reported).
13 This means that no form of admission by the leniency applicant is retained in the Commission's files. However, the lack of any such admission may reduce the evidentiary force of the leniency statement before the EU courts in order to prove the existence of an illegal cartel.
14 See Commission Notice on cooperation between national courts and the Commission in applying Article 85 and 86 of the EEC Treaty, OJ C39, 13.2.1993, now replaced by Commission notice on the cooperation between the Commission and the courts of the member states in the application of Articles 81 and 82 EC, OJ C101, 27.4.2004.
15 See 2004 Commission notice on cooperation between the Commission and the courts cited at footnote 14 above.
16 Within the EU this is the case for example in Cyprus, Estonia, Germany, Greece, Ireland, Malta, the Netherlands, Portugal, Slovenia and the United Kingdom. In Hungary, legislation criminalising cartels entered into force in September 2005.
17 The Swedish competition authority opposes the introduction of criminal penalties for cartel offences, precisely because it considers that such penalties will be counterproductive to its leniency policy.
18 This Network is comprised by the Commission and the 25 national competition authorities (NCAs) of the EU member states.
19 See Article 12(3) of Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L 1, 4 January 2003. See also B van Barlingen Op cit at footnote 5 above.
20 The EU member states that currently operate a leniency programme include: Belgium, Cyprus, the Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Poland, Slovakia, Sweden and the United Kingdom (source: DG Comp website).
21 See for example Neelie Kroes' speeches in Milan, 7 February 2005, 'Building a Competitive Europe—Competition Policy and the Relaunch of the Lisbon Strategy and in Brussels', 10 March 2005, 'Taking Competition Seriously – Antitrust Reform in Europe'.
22 See http://www.usdoj.gov/atr/public/press_releases/2005/208655.htm; http://www.usdoj.gov/atr/public/press_releases/2004/205437.htm.
23 See http://www.usdoj.gov/atr/public/press_releases/2005/207231.htm; http://www.usdoj.gov/atr/public/press_releases/2004/202815.htm; http://www.usdoj.gov/atr/public/press_releases/2004/204602.htm; http://www.usdoj.gov/atr/public/press_releases/2005/207142.htm.
24 See Marsulex, Inc and Chemtrade Logistics (US) Inc's Agreed Motion for a Finding of 'Satisfactory Cooperation' and Limitation of Damages Pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, *In re Sulfuric Acid Antitrust Litigation*, No. 03 C 4576 (ND Ill 30 June 2005).
25 See http://www.usdoj.gov/atr/cases/f209100/209127.htm.
26 542 US 155 (2004).
27 *Empagran SA v F Hoffmann-LaRoche, Ltd*, 2005 WL 1512951 (DC Cir 28 June 2005).
28 Arnold & Porter partners Bruce Montgomery and Frank Liss defended Hoffmann-La Roche Inc and Roche Vitamins Inc throughout the vitamins proceedings, and with our Arnold & Porter colleague and former FTC chairman Robert Pitofsky, represented Roche in the DC Circuit and Supreme Court *Empagran* appeals.

Arnold & Porter LLP

BRUSSELS
11, Rue des Colonies-Koloniënstraat 11
B-1000 Brussels, Belgium
Tel: +32 2 517 6600
Fax: +32 2 517 6603
Contact: Marleen Van Kerckhove
e-mail: marleen.vankerckhove@aporter.com

WASHINGTON
555 Twelfth Street, NW
Washington, D.C. 20004-1206
Tel: +1 202 942 5000
Fax: +1 202 942 5999
Contact: William Baer
e-mail: william.baer@aporter.com

Other offices: New York, Los Angeles, London, Denver, Northern Virginia

Website: www.arnoldporter.com

Arnold & Porter LLP's Antitrust/Competition & Trade Regulation Practice assists clients in the United States and Europe in a broad array of industries with comprehensive expertise in both transactions and litigation. More than 60 competition and antitrust attorneys are resident in the firm's offices internationally. They have advised on major mergers and acquisitions, litigation and investigations, criminal antitrust, and have provided counselling in regards to federal, state and European laws governing competition, pricing, distribution, consumer protection and advertising, and intellectual property. Arnold & Porter's lawyers have held significant senior government positions, including chairman of the Federal Trade Commission (FTC); director of FTC's Bureau of Competition; deputy assistant attorney general at the Antitrust Division, Department of Justice (DOJ); and general counsel of the FTC.

Arnold & Porter opened its Brussels office in August 2003 and it has since expanded to a team of 10 competition/antitrust lawyers. Most recently, Luc Gyselen, a senior official with the Directorate-General for Competition (DG Comp) at the European Commission, joined the office as a partner. Heading the European competition practice from Brussels is EU competition expert Marleen Van Kerckhove. Ms Van Kerckhove and Mr Gyselen are joined by partner Susan Hinchliffe, who is permanently based in Brussels, and Tim Frazer, head of the UK competition practice, who divides his time equally between Brussels and London. The team collaborates with the head of Arnold & Porter's global antitrust practice, William Baer, who is based in Arnold & Porter's DC office but also spends a significant portion of his time in Brussels.