INTERNATIONAL LENIENCY REGIMES: NEW DEVELOPMENTS AND STRATEGIC IMPLICATIONS*

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One of the more remarkable developments in competition policy over the past decade has been the surge in international anticartel enforcement and the increasing degree of cooperation among international antitrust enforcement authorities in prosecuting these global conspiracies. The proliferation of corporate leniency or amnesty regimes has significantly contributed to this development by handing enforcement authorities a highly effective tool for ferreting out illegal cartel activity and by giving cartel members a strong incentive to inform on their coconspirators.

The hallmarks of a successful leniency programme have become clear: improve the predictability, transparency, and consistent application of the process in order to encourage cartel participants to come forward to confess their sins. All three leniency regimes addressed in this article — the United States, Canada, and the European Union (EU) — now follow the "first in the door" principle, essentially automatically awarding full amnesty to the first corporation to seek leniency with respect to an offence. This, of course, maximises the pressure on individual cartel members to come clean. The competition authorities of these jurisdictions have also clarified how they apply their respective requirements needed in order to gain leniency, which are now quite similar.

All three leniency programmes have had to respond to the threat of civil treble damage actions in U.S. courtrooms, including the risk that leniency applicants will find their applications discoverable in civil litigation. All three have taken steps to strengthen the incentives for potential amnesty applicants to come forward despite this threat. Overall, the growth of parallel leniency regimes has made it imperative for a leniency applicant to consider the international aspects of leniency and the extent of information-sharing between foreign authorities.

I. The U.S. Leniency Model

In the eleven years since the Antitrust Division of the U.S. Department of Justice (the Division) substantially

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revised its leniency policy, the U.S. amnesty programme has become the "most effective generator of international cartel cases" for the Division and, "unquestionably, the single greatest investigative tool available to anticartel enforcers."/1/ The U.S. amnesty programme has generated over U.S. $1.5 billion in criminal fines since fiscal year 1997 and an increase in the rate of amnesty applications from one per year under the old leniency regime to as high as three per month under the new regime./2/ The success of the U.S. amnesty programme has derived in large measure from its transparency and the degree of certainty it provides to prospective applicants, making clear in advance the benefits of cooperation to the amnesty-seeker. No doubt the ratcheting up of penalties for cartel activity — including increasingly large criminal fines and lengthy prison sentences — has also contributed to making amnesty a more attractive proposition./3/

A. The U.S. Process

Under the U.S. amnesty programme, a corporation automatically receives a conditional grant of amnesty if it fully admits its involvement in anticompetitive activity before the Division's investigation has begun. Amnesty means that the corporation and its cooperating directors, officers, and employees will not be subject to criminal prosecution./4/ In order to qualify, the corporation must be the "first in the door" to bring information about the anticompetitive activity to the Division, must report its wrongdoing with "candour and completeness," and must commit to provide "full, continuing and complete cooperation" to the Division throughout its investigation./5/ This last obligation can entail a substantial commitment in time and resources by the corporation in assisting the government in the preparation and prosecution of its case against the corporation's coconspirators. The same amnesty standards apply if a corporation confesses its wrongdoing after the Division has already initiated an investigation, so long as the applicant applies early in the investigation. If the applicant applies later, the Division has greater discretion to reject the application.

The Division treats as confidential the identity of, and all information disclosed by, an amnesty applicant. Further, the amnesty applicant is not required to waive its attorney-client or work-product privilege by providing information to the Division as part of its amnesty application. Paperless submission of amnesty applications is also now permitted by the Division, which enables an applicant to avoid creating documents that could be used against it in civil cases. The Division has also clarified that it will not share information provided by an amnesty applicant with foreign antitrust enforcement authorities (unless permitted by the applicant) because of the "Division's overriding interest in protecting the viability of the Amnesty Program."/6/

B. Recent U.S. Developments

Two recent developments will likely contribute to the continuing effectiveness of the U.S. amnesty programme by altering the cost-benefit calculus facing a prospective applicant in a way that encourages cooperation and promotes deterrence.

1. Statutory Changes

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (2004 Act), Title II of the National Cooperative Standards Development Act,/7/ was signed into law on 22 June 2004, and contains three provisions of interest to the prospective amnesty applicant.

First, the 2004 Act substantially increases the penalties facing a corporation for antitrust violations, amending the Sherman Act to provide for maximum corporate fines of U.S. $100 million, a tenfold increase from the previous level. An individual convicted of a Sherman Act violation is now subject to a fine of up to U.S. $1 million and ten years in prison, up from U.S. $350,000 and three years under the prior version of the statute. The upward revision of the statutory penalties — particularly, the threat of longer prison sentences for individuals — should enhance deterrence and provide greater incentives for corporations and individuals to enter the U.S. amnesty programme./8/

While the amnesty programme eliminates the prospect of federal prosecution and fines, the corporation that decides to enter the amnesty programme also risks opening the floodgates of follow-on private lawsuits: treble damages actions by federal class plaintiffs, individual plaintiffs, and state indirect purchaser plaintiffs with the prospect of joint and several liability. The second and third provisions of the 2004 Act seek to encourage participation in the U.S. amnesty programme by offering an amnesty applicant the prospect of a significant reduction in civil liability — if the amnesty

applicant provides "satisfactory cooperation" to civil plaintiffs.

For cooperating amnesty applicants, civil antitrust liability is reduced in two respects. First, only single damages are allowed. This "detrebling" provision will alleviate the risk posed by future litigation by reducing its expected cost, thus increasing the likelihood a corporation will choose the amnesty option. Second, the Act limits the federal and state civil liability of an amnesty applicant to the damages attributable to the commerce of the amnesty applicant in the goods or services affected by the violation. This provision has the effect of eliminating the doctrine of "joint and several liability" for an amnesty applicant, under which, in the context of a cartel prosecution, each corporate cartel member would potentially be liable for the full amount of a plaintiff's damages, irrespective of the cartel member's share in the affected commerce.

An example may be the best way to illustrate the potential benefit of the 2004 Act's provisions to an amnesty applicant. Suppose a civil plaintiff class is found to have suffered U.S. $100 million in damages from a price-fixing cartel. Before the 2004 Act, a single member of the cartel with only a 10 percent share in the affected market could face U.S. $300 million in liability (the full U.S. $100 million trebled), even if the cartel member is an amnesty applicant. Under the 2004 Act, however, if the cartel member were a cooperating amnesty applicant, it would only be liable for U.S. $10 million in damages (the portion of the U.S. $100 million in damages attributable to the cartel member's 10 percent share of the affected commerce without trebling). In other words, the 2004 Act reduces the potential liability facing the corporation by a factor of 30 — a huge incentive for the corporation to cooperate with the government and blow the whistle on its fellow cartel members./9/

It is unclear how much and in what fashion the 2004 Act will change the behavior of amnesty applicants. The reduction in civil liability is conditioned on a finding by the court that the applicant has provided "satisfactory cooperation" to civil plaintiffs. While the 2004 Act provides a general checklist of items that will constitute "satisfactory cooperation" in the civil cases,/10/ the various state and federal courts will need to decide, on a case-by-case basis, precisely how exacting those requirements will be. This determination is not made until the end of the civil trial. As a practical matter, the amnesty applicant may be unwilling to embark on the risky course of providing cooperation to civil plaintiffs unless it is able to obtain an assurance beforehand from civil plaintiffs to support a finding of satisfactory cooperation. The statute is, therefore, most likely to facilitate early settlement talks and negotiations between the applicant and the civil plaintiff over the terms of cooperation. If a settlement is reached, there will be no need for the court to assess the value of the amnesty applicant's cooperation.

Prior to assuming any such cooperation obligations, the applicant would also be well advised to consider its prospective civil liability in jurisdictions outside of the United States, and to carefully weigh the potential benefits of the 2004 Act's provisions against the potential foreign implications of providing such detailed cooperation to U.S. civil plaintiffs./11/ A high degree of foreign exposure may well outweigh the benefits of both the "detrebling" provision and the elimination of joint and several liability.

2. The U.S. Supreme Court's *Empagran* Decision

The second development of potential consequence to amnesty applicants is the recent Supreme Court decision in *Hoffmann-La Roche Ltd. v. Empagran S.A.,* 124 S. Ct. 2359 (2004), issued on 14 June 2004./12/ The *Empagran* case arose as a consequence of the Division's successful prosecution of the worldwide vitamins cartel, which resulted in almost U.S. $1 billion in criminal fines, the imprisonment of several culpable executives, and numerous lawsuits by U.S. direct and indirect purchasers under both federal and state antitrust laws. The issue that faced the Supreme Court in *Empagran,* however, involved not the domestic purchaser claims, but rather the question of whether foreign purchasers of vitamins sold in purely foreign commerce could obtain jurisdiction under the Foreign Trade Antitrust Improvement Act (FTAIA), based on other parties' valid domestic purchaser claims, in order to seek treble damages under the Sherman Act.

A lower court decision allowing the Empagran claims to go forward was largely premised on the necessity of

increasing deterrence of cartel activity. Defendants and various *amici* (including the U.S. Department of Justice and various foreign governments, including the Federal Republic of Germany, Canada, Japan, Belgium, and the United Kingdom) argued, however, that permitting such foreign purchaser suits to go forward would, in fact, undermine deterrence. The key consideration identified by these governmental *amici* involved the threat posed by Empagran's expansive liability regime to their respective leniency programmes. Their concern was that companies considering amnesty applications would be discouraged from doing so if the consequence of confessing their cartel involvement included worldwide liability under U.S. law./13/

In its *Empagran* ruling, the Supreme Court determined that the FTAIA precludes foreign purchasers from bringing suit in U.S. courts under the Sherman Act where their foreign injuries are "independent of any adverse domestic effect" and remanded the case to the D.C. Circuit for further proceedings./14/ The Court, however, expressly declined to endorse either the plaintiffs' or the governmental entities' view of the deterrence issue./15/

II. The EU Leniency Model

In early 2002, the European Commission (Commission) issued a new leniency notice/16/ (2002 Notice) that introduced a "first in the door" policy similar to the U.S. model. Replacing the old 1996 Notice, it increased the transparency and predictability of the EU process. This, in turn, increased the incentives for companies to unveil the existence of the cartels in which they participated and seek full immunity./17/

The figures speak for themselves. Under the old Notice, the Commission has so far granted full immunity in only eleven out of around thirty cases where leniency applications had been filed. Under the 2002 Notice, thirty-four such applications have been filed in barely two years, and in twenty-seven cases, the Commission has granted full immunity, has started an investigation, and is now preparing statements of objections finding an infringement of Article 81 of the Treaty of Rome./18/

A. The EU Process

Pursuant to the 2002 Notice, companies can apply for immunity from fines or for a reduction of a fine. Timing in either instance is critical. The Commission will not consider other applications for immunity from fines or applications for a reduction of a fine before it has taken a position on an existing application for immunity in relation to the same suspected infringement./19/ Moreover, the level of reduction of fines also depends on the order in which the applications come./20/

B. Immunity from Fines

The Commission will grant full immunity from fines to the cartel member who is the first to submit evidence enabling the Commission to either launch an investigation by way of an unannounced inspection/21/ or issue a statement of objections./22/ Under the first scenario, the evidentiary threshold is low compared to the 1996 leniency regime where the production of "decisive evidence" of an infringement was required./23/

To qualify for immunity, as in the U.S. programme, applicants must cooperate fully with the Commission throughout the administrative proceedings, must immediately end their involvement in the alleged cartel, and must not have taken steps to coerce other firms to participate in the cartel./24/ Cartel ringleaders may also qualify for immunity, another significant change from the EU's previous approach.

Once it has verified that the evidence meets the standard set out above, the Commission will grant conditional, full immunity and it will do so promptly./25/ In contrast, under the 1996 Notice, the Commission had discretion to fix the reduction of the fine between 75 percent and 100 percent. Moreover, the applicant had to wait until the very end of the procedure to find out whether or not its application qualified for immunity.

An extra incentive for the potential immunity applicant is that it can choose to present the evidence first in hypothetical terms by producing a list accurately reflecting the nature and content of the evidence./26/ After having verified that the listed evidence would be sufficient to either launch an investigation or issue a statement of objections, the Commission will set a date for disclosure of the actual evidence. Upon disclosure, the Commission will verify that the evidence corresponds to the description made in the list and, if it does, promptly grant conditional full immunity.

C. Reduction of Fines

Leniency applicants that do not qualify for full immunity will still be eligible to receive a reduction of fines if they submit evidence of the suspected infringement that represents "significant added value" with respect to the evidence already in the Commission's possession./27/ Applicants for fine reductions must immediately terminate their involvement in the alleged cartel. They are under no duty to cooperate throughout the administrative procedure, but the Commission will take into account such cooperation when it sets the level of the fine at the end of the procedure./28/

The level of reduction (up to 50 percent) will depend on the time at which the evidence was submitted and the extent to which the evidence represents "added value."/29/ The Commission will inform the applicant before it issues a Statement of Objections./30/

D. Confidentiality and Disclosure Issues

These issues will mostly arise in the context of the following two situations: on the one hand, private civil enforcement actions in EU or non-EU courts (especially within the United States)/31/ and, on the other hand, cooperation between the Commission and other competition authorities (especially the members of the European Competition Network and the U.S. antitrust authorities).

The starting point is the Commission's statement in its 2002 Notice according to which any written leniency application "forms part of the Commission's file" and "may not be disclosed or used for any other purpose than the enforcement of Article 81 EC."/32/ What does this mean in practice?

The Commission will not itself disclose to EU courts any documents submitted by a leniency applicant without the latter's consent./33/ It relies on the *Zwartveld* and *Postbank* case law to justify this attitude./34/ In essence, the argument is that nondisclosure is necessary to preserve the proper functioning of the EU leniency system.

However, there is always a risk that leniency applications end up in the courts via other routes. More specifically, while complainants will only receive a non-confidential version of a Statement of Objections and have no access to the file, all cartel members that receive a Statement of Objections will be given access to the supporting evidence, including leniency material. It is true that the Commission will urge these parties not to disclose or use this material for any other purpose than defending their interests in the proceedings pending before it. However, the Commission has no firm legal basis for insisting on compliance with its request./35/

The Commission has nevertheless sought to preserve the confidentiality of leniency applications in a number of ways.

First, due to some of the same concerns that animated the governmental *amici* in *Empagran,* the Commission has made significant efforts to ensure that its leniency policy is not undermined by the risk that the corporate leniency statements submitted to it are disclosed in non-EU civil proceedings (especially within the U.S. courts) where claims for damages — and, in the United States, treble damages — are at stake. Thus, it has intervened as an *amicus* before U.S. district courts in order to prevent documents provided within the context of its leniency programme from being used against the leniency applicant./36/

Second, the Commission has modified its procedures to minimise the risk of discovery of such corporate statements by civil litigants. Oral statements, which are taped and transcribed by the Commission, are now accepted. The transcript becomes an official Commission document, not a company document./37/ One potential complicating factor with the oral process is the Commission's desire to have the leniency applicant certify the accuracy of the transcript before it is put in the file. Some leniency applicants have expressed concern that the certification requirement would make the transcript an admission of liability by the company. They fear that civil plaintiffs will seek to compel defendants who are the subject of a Statement of Objections and have obtained a copy pursuant to their rights of access to produce a copy of any such transcripts in the court where the damage action is pending. Such a result would create a real disincentive to companies considering a leniency application. It is an issue that warrants further consideration by the Commission.

What about disclosure of leniency applications between the Commission and the twenty-five national

competition authorities (NCAs), which — together — form the European Competition Network (ECN)?/38/ First, a preliminary point must be made. A leniency application to one competition authority within this network — either the Commission or an NCA is not a valid application to any of the other authorities. The Commission, therefore, advises prospective applicants to apply for leniency to all ECN members that "may be considered well placed to act against the infringement in question."/39/

Whether or not leniency applicants follow this advice, all ECN members will receive information about any application(s) filed somewhere within the ECN. Early on in the process, ECN members indeed inform each other of basic information concerning the cases brought before them in order to ensure — where necessary — their swift reallocation to the best placed authority (*i.e.,* a single NCA or the Commission) or authorities (*i.e.,* several NCAs acting in parallel)./40/

No ECN member is supposed to use this information as the basis for starting an investigation on its own initiative, under Articles 81 and 82 or under national competition law./41/ It is true that an ECN member can request from another ECN member more detailed information in order to use it as evidence for the purpose of applying Articles 81 and 82 (and, in parallel, its national competition law)./42/ However, transmission of any information submitted by a leniency applicant is subject to the latter's consent./43/

The Commission will not share confidential information (including leniency applications) with the U.S. antitrust authorities "save with the express agreement of the source concerned."/44/

E. Recent EU Developments

The Commission has intervened — unsuccessfully — as *amicus* before the U.S. Supreme Court in *Intel Corp. v. Advanced Micro Devices, Inc.* to warn against another threat to its leniency programme./45/ At stake was the interpretation of 28 U.S.C. § 1782(a) pursuant to which U.S. district courts can order the production of documents for use in a proceeding "in a foreign … tribunal." The Commission argued that it was not a "tribunal." It warned that characterising it as such would jeopardise the confidentiality of leniency applications made to it and, hence, deter prospective leniency applicants. The Supreme Court observed *inter alia* that the Commission had not shown that the provision in § 1782(a) that aims at preserving "any legally applicable privilege" would be ineffective to prevent discovery of such confidential information.

III. The Canadian Leniency Model

In September 2000, the Canadian Competition Bureau (Bureau) promulgated its Immunity Program, an amnesty programme that closely parallels the U.S. model./46/ Under the Immunity Program, a corporation and its cooperating directors, officers, and employees receive amnesty from criminal prosecution under the Canadian Competition Act if it comes forward to report its anticompetitive activity and agrees to cooperate with the Bureau.

A corporation may seek amnesty from the Bureau either before an investigation has been initiated or before the Bureau has obtained sufficient evidence to warrant referring the matter to the Attorney General for prosecution. As under the U.S. model, in order to receive amnesty under the Immunity Program, a corporation must be the "first in the door" to report the anticompetitive activity and must agree to provide full disclosure and continuing cooperation to the Bureau. Like its U.S. counterpart, the Bureau will not disclose the identity of, or information provided by, the immunity applicant to foreign enforcement authorities./47/ And as in the United States, the revised Canadian amnesty programme, with its near guarantee of immunity to a corporation that meets its requirements, has led to a surge in amnesty applications to the Bureau.

IV. Conclusion

As illustrated above, a corporation with international sales or global aspects of its business that is deciding whether to seek amnesty must be familiar with the complex issues presented in multiple jurisdictions before it goes to an enforcement authority in any single jurisdiction. While the various amnesty programmes have their similarities, they also have their unique differences and subtleties. Ideally, the corporate amnesty-seeker should retain corporate counsel with the knowledge, resources, and expertise, as well as the international

presence and familiarity with the different leniency regimes needed, to work through these issues on a multi-jurisdictional basis. Otherwise, close coordination among the corporation's international and domestic counsel is essential.

ENDNOTES

/1/ *See* U.S. Dep't of Justice, "Status Report: An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program," 1 Feb. 2004, *available at* <www.usdoj.gov/atr/public/guidelines/202531.htm> (Status Report); Address by Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, U.S. Dep't of Justice, "Detecting and Deterring Cartel Activity through an Effective Leniency Program," 21-22 Nov. 2000, *available at* <www.usdoj.gov/atr/public/speeches/ 9928.htm>.

/2/ *See* Status Report.

/3/ *See id.* (noting that "the Division has long held the belief that the best and surest way to deter and punish cartel activity is to hold the most culpable individuals accountable by seeking jail sentences").

/4/ The Division's parallel Leniency Policy for Individuals provides an alternative method by which officers, directors, or employees of a corporation can approach the Division on their own behalf, not as part of a corporate proffer, to seek amnesty in return for cooperation. *See* U.S. Dep't of Justice, Leniency Policy for Individuals, *available at* <www.usdoj.gov/atr/public/guidelines/0092.htm>.

/5/ The other requirements of the U.S. amnesty programme are that the amnesty-seeking corporation must (1) upon discovery of the illegal activity, take prompt and effective action to terminate its participation in it; (2) make its confession of wrongdoing as "truly a corporate act" rather than the isolated confessions of individual executives; (3) where possible, make restitution to injured parties; and (4) not have coerced another party to participate in the illegal activity and clearly not have been the leader in, or originator of, the activity. U.S. Dep't of Justice, Corporate Leniency Policy, *available at* <www.usdoj.gov/atr/public/guidelines/0091.htm>.

/6/ Address by Gary R. Spratling, Deputy Assistant Attorney General, Antitrust Division, U.S. Dep't of Justice, "Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy — An Update," 16 Feb. 1999, *available at* <www.usdoj.gov/atr/public/speeches/2247.htm>.

/7/ Pub. L. No. 108-237, 118 Stat. 661.

/8/ The statutory increase in Sherman Act penalties is potentially of greater significance in light of the Supreme Court's recent decision in *Blakely v. Washington,* 124 S. Ct. 2531 (2004), which requires every fact necessary under the applicable sentencing regime to enhance the sentence above the statutory maximum to be determined by the jury under the "beyond a reasonable doubt" standard. The new maximum would allow the Division to obtain significant fines without invoking either the Sentencing Guidelines or the "double the gain or loss" alternative statutory maximum contained in the Criminal Fines Improvement Act of 1984, 18 U.S.C. § 3571(d) as amended in 1987.

/9/ Note, however, that this provision of the 2004 Act does not in any way diminish the plaintiff's net recovery. Joint and several liability still applies normally to any other defendant(s) not covered by an amnesty agreement with the Division, from whom the plaintiff could seek the balance of its recovery up to the U.S. $300 million total. This provision thus has the overall effect of enhancing the joint and several liability of non-cooperating members of the cartel, which, in turn, increases the incentives for each individual cartel member to be the "first in the door" to seek amnesty protection.

/10/ Under the 2004 Act in order to qualify for civil detrebling, an amnesty applicant must provide the civil plaintiffs with (1) a full account of all potentially relevant facts; (2) all potentially relevant documents or other items; (3) the applicant's best efforts to obtain reasonable access to all of its employees covered by the amnesty agreement for interviews, depositions, or testimony; and (4) complete and truthful responses in discovery. Pub. L. No. 108-237, § 213(b), 118 Stat. 661, 666-67.

/11/ The corporation must expect that information provided to U.S. civil plaintiffs will eventually end up in the hands of foreign litigants.

/12/ Arnold & Porter LLP attorneys Robert Pitofsky, Bruce Montgomery, and Franklin Liss represented defendants Hoffmann-La Roche, Inc. and Roche Vitamins, Inc. in the *Empagran* proceedings before the Supreme Court.

/13/ *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners at 19-21, 23-24, *Empagran* (No. 03-724), *available at* <www.usdoj.gov/osg/briefs/2003/3mer/1ami/20030724.mer.ami.pdf>.

/14/ *Empagran,* 124 S. Ct. at 2366.

/15/ *Id.* at 2372. For additional discussion of the issues raised by *Empagran,* please see Arnold & Porter LLP's Client Advisory, "The Supreme Court Decision in *Empagran,*" *available at* <www.arnoldporter.com/pubs/files/Advisory-Supreme_Court_Decision_Empagran(6-2004).pdf>.

/16/ *See* O.J. C 45, 19/02/2002 [2002 Notice].

/17/ In his speech "Proactive Competition Policy and the Role of the Consumer" (Dublin, European Competition Day, 29 Apr. 2004), Commissioner Monti describes the

new EU leniency programme as a "formidable tool" for encouraging firms to cooperate with the Commission in uncovering existing cartels.

/18/ *See* ¶ 30 of the Commission's 23d Report on Competition Policy (2003). For general comments on the 2002 Notice, see F. Arbault & F. Peiro, "The Commission's New Notice on Immunity and Reduction of Fines in Cartel Cases: Building on Success," *Competition Policy Newsletter* 2002/2 (p. 16), and B. Van Barlingen, "The European Commission's 2002 Leniency Notice after One Year of Operation," *Competition Policy Newsletter* 2003/2 (p. 16).

/19/ *See* 2002 Notice, at ¶¶ 18 and 25.

/20/ *Id.* at ¶ 23(b).

/21/ *Id.* at ¶¶ 8(a) and 9.

/22/ *Id.* at ¶¶ 8(b) and 10.

/23/ Most "first in the door" applicants have, therefore, come forward under the first scenario. In contrast, under the 1996 Notice, most applicants had approached the Commission in a defensive way, *i.e.,* after an unannounced inspection or a formal request for information, which only enabled them to apply for a reduction of fines. See B. Van Barlingen, *supra* note 18, at 16.

/24/ *See* 2002 Notice, at ¶ 11.

/25/ *Id.* at ¶ 15. Immunity is conditional because it is subject to compliance with the conditions set out in ¶ 11.

/26/ *Id.* at ¶ 13. In other words, a company cannot go for fishing expeditions to find out on an anonymous basis whether another cartel member has already submitted an immunity application.

/27/ *Id.* at ¶¶ 20-22. The concept of "added value" refers to the extent to which the evidence strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the facts in question.

/28/ *Id.* at ¶ 31.

/29/ *Id.* at ¶ 23.

/30/ *Id.* at ¶¶ 24-26. Applicants who are too late to benefit from immunity but who provide evidence relating to facts previously unknown to the Commission "which have a bearing on the gravity or duration of the suspected cartel," can take comfort from the fact that the Commission will ignore that evidence when determining the level of the fines imposed upon them. *Id.* at ¶ 23.

/31/ *Id.* at ¶ 31: a successful leniency applicant is not protected "from the civil law consequences of its participation in an infringement of Article 81 EC."

/32/ *Id.* at ¶ 33. *Cf.* ¶ 32 where the Commission also rejects such disclosure under the Community's Regulation favouring public access to documents.

/33/ See the Commission's Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (O.J. C 101 27/04/2004) at ¶ 26. Another matter is the disclosure of the identity of leniency applicants. While the Commission will keep the identity of these applicants confidential during the investigation, it will disclose it in its final prohibition Decision since it must explain the reason for immunity or any reductions of fines granted.

/34/ Case C-2/88, ECR 1990 I-4405 (*Zwartveld*) and case T-353/94, ECR 1996 II-921 (*Postbank*). In the latter case, the Court of First Instance (CFI) states that the Commission may refuse to disclose documents to national judicial authorities where the disclosure of that information would be capable of interfering with the functioning and independence of the European Community (*see* ¶ 93).

/35/ *Cf.* the CFI's *Postbank* judgment, cited in *supra* note 34 (concerning the complainant's use of a Statement of Objections in a national EU court).

/36/ *In re Methionine Antitrust Legislation* (N.D. Cal. July 29, 2002), the Commission was successful. *In re Vitamins Antitrust Legislation* (D.D.C. Dec. 18, 2002), it was not.

/37/ *See* B. Van Barlingen, *supra* notes 18-19.

/38/ *See generally* S. Blake and D. Schnichels, "Leniency following Modernisation: Safeguarding Europe's Leniency Programmes," *Competition Policy Newsletter* 2004/2 (p. 7).

/39/ See the Commission's Notice on Cooperation within the Network of Competition Authorities (O.J. 101/43 of 27/04/2004), at 38. Of course, the applicant only has such an interest in jurisdictions that have a leniency programme in place. Fourteen of the twenty-five EU Member States currently operate a leniency programme: Belgium, Cyprus, the Czech Republic, Finland, France, Germany, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Slovakia, Sweden, and the United Kingdom.

/40/ See Article 11-2 and Article 11-3 of Council Regulation No. 1/2003 (O.J. L1/1 of 4 Jan. 04). Commission and NCAs are obliged to provide such information to each other; NCAs amongst each other may do so.

/41/ See ¶ 39 of the Notice cited at *supra* note 39.

/42/ See Article 12 of Council Regulation No. 1/2003 cited at *supra* note 40.

/43/ See ¶ 40 of the Notice cited at *supra* note 39 where it is stated that the "network members will encourage leniency applicants to give such consent, in particular as regards disclosure to authorities in respect of which it would be open to the applicant to obtain lenient treatment."

/44/ See exchange of interpretative letters attached to the bilateral agreement between the government of the \United States and the Commission regarding the application of their competition laws. O.J. L95/51 of 27

Apr. 1995.
/45/ Judgment of 21 June 2004, 124 S. Ct. 2466 (2004).
/46/ Competition Bureau, Information Bulletin, Immunity Program under the Competition Act, 21 September 2000.
/47/ Competition Bureau, Immunity Program Frequently Asked Questions, 24 November 2003. ■

INTERNATIONAL BUSINESS COMPLIANCE PROGRAMS*

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I. Introduction to Corporate Compliance Activities

A corporate compliance program is an internal management system which assists employees in understanding and following targeted legal principles on an organized basis. Corporate compliance programs usually have two principal thrusts — a program to educate employees about the relevant law, and a management system to organize and monitor employee behavior. There are no legally mandated standards for compliance programs; they are usually designed based upon specific factors such as the size of the organization, the countries in which it operates, the laws covered under the program, the level of regulation of the industry in question, and the company's compliance history.

To be effective, a compliance program must be adopted at the highest level of the organization (usually by the board of directors) and overseen on a regular basis by a senior corporate official. The adoption of a compliance policy, by itself, is not sufficient; there must be an ongoing program of overseeing employee activities which adjusts to changes in the law and the organization. Many companies view the goal of a corporate compliance program as establishing a "culture" of legal compliance within the company.

Compliance programs are customarily used in a variety of legal areas which present significant legal risk to U.S. companies, including employee relations (including sexual harassment and employee discrimination), insider trading, antitrust, securities laws, government contracting, and international business. While the focus of this article is on international business compliance, the principles discussed herein are applicable to these other areas of legal compliance as well.

Executive and judicial branch authorities have held that adoption of formalized company-wide compliance programs are strongly encouraged to assist in compliance with relevant laws. Such programs help assure that the company's management and employees are aware of applicable

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