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Leniency—What Exactly are the Implications for the Applying Undertaking in the European Union?

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I. INTRODUCTION

Leniency programs are one of the most revolutionary solutions introduced into cartel detection and prosecution systems in the last few decades. Leniency has increasingly become a powerful tool at the disposal of the antitrust authorities who frequently rely on it in fighting cartels. Due to the fact that many of the large global cartels have been identified and investigated as a result of immunity applications, leniency is very often considered as the most effective tool for detecting cartel activity.

The antitrust authorities benefit significantly from leniency programs. Thanks to cooperation with former cartelists they are afforded an opportunity to obtain insider evidence on cartel infringement, which otherwise may be difficult to detect because of the secret nature of cartels. Conversely, a cartel participant reporting itself, and providing evidence of a cartel, can obtain total immunity from a fine or a reduction of such penalty.

Examples of recent high profile European Commission (“EC”) antitrust investigations in which leniency played a significant role are recent cartels in euro and yen interest rate derivatives. Barclays’ revealing of the existence of the euro cartel meant it obtained full immunity and thereby helped it to avoid a fine of around EUR 690 million for its participation in the infringement. At the same time, UBS received full immunity for revealing the existence of the yen cartels and thereby avoided a fine of around EUR 2.5 billion for its participation in five of the seven infringements. Citigroup received full immunity for one of the infringements in which it participated, thereby avoiding a fine of around EUR 55 million. Jointly, between 1998 and 2013, leniency applications contributed to the opening of 93 investigations by the EC in which 71 existing cartels were detected and fined with the participation of over 610 businesses.

Leniency also had its share in major cartel investigations conducted in other Member States, e.g. the one closest to the author, the Polish antitrust authority. In the biggest cartel case to date involving almost all the cement producers in Poland (the cement cartel case), two entities applied for lenient treatment, namely Lafarge and the Heidelberg Group. The former was granted full immunity, the latter a 50 percent reduction of its fine. The remaining cartel members ended up with approximately EUR 100 million in fines. In another high profile case, a leading DIY chain store, Castorama, received full immunity for revealing the existence of anticompetitive practices in the domestic paint wholesale market and thereby avoided a fine of approximately EUR 55 million.

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Model leniency programs provide immunity to businesses from any antitrust fines that would otherwise have been imposed. In most cases in the European Union the following conditions have to be met:

1. The applicant is the first to submit evidence that, in the authority's view, at the time it evaluates the application will enable such authority to carry out inspections or enables the finding of an infringement of competition law in connection with an alleged cartel.
2. The authority did not, at the time of the application, already have sufficient evidence to adopt an inspection decision, or had not already carried out an inspection, or did not have sufficient evidence to find an infringement of competition law in connection with the alleged cartel arrangement.
3. The conditions attached to leniency are met.

Companies that do not qualify for immunity may still benefit from a reduction of a fine. However, depending on the leniency program, there might also be some exclusions from immunity from fines. The most common reason of exclusion is coercion of another undertaking into participating in the cartel.

Leniency is a tempting offer when infringing conduct is likely to be detected and punished—in particular when detected internally in terms of routine risk monitoring or a whistleblower notification without prior knowledge of the existence of cartel behavior in the first place. A company threatened with an antitrust investigation might want to consider a leniency application, at least as part of its risk management. Professional management of the company's reputation and financial risks will certainly include reasonable assessment of all the circumstances of this solution including taking into account all advantages and disadvantages of an application for leniency.

Self-reporting can have also a downside for a company's business activity. It could represent an opportunity for a company but, on the other hand, it involves some risks that each future leniency applicant should take into account.

Obviously, opting for leniency should never merely involve a simple cost-benefit analysis. This article is not intended to encourage or discourage a business from filing a leniency application—that should be always a deliberate choice of the companies concerned. It is to indicate the most significant, standard implications of a leniency application presented in an objective comparative manner based on the SWOT² analysis method and aims to present a full picture.

II. LENIENCY (SWOT) ANALYSIS

A. Strengths

The attractiveness of leniency results from the fact that there is no other legal way in which a company can obtain 100 percent immunity from an antitrust fine. Therefore, from a purely financial point of view, leniency seems to be a promising solution for a business.

² Analysis of a project of business situation evaluating its strengths, weaknesses, opportunities, and threats.

Moreover, if a company wants to reorganize its operations so as to comply with antitrust rules in the future, a potential leniency application can facilitate such change.

The leniency procedure, in many cases, requires the carrying out of an audit in a company in order to assess the scale and scope of the infringement. It can be helpful for future risk management and for introducing or improving the compliance program so as to mitigate the risk of violations and fines in the future. Also, most competition authorities require businesses to submit such applications in the first place in case of detection of any competition law infringement as a requirement of an effective compliance program.

B. Weaknesses

Despite the clear benefits of leniency, a company applying for immunity has to bear in mind that it will imply both admission of cartel involvement and cooperation with the antitrust authority during the proceedings. There is no “one-stop shop” solution in terms of leniency applications, which means filing for lenient treatment with one antitrust authority does not grant a marker in any other authority potentially concerned. Therefore, in cases where companies take part in cross-border cartels, they expose themselves to penalties in several jurisdictions and would only be fully protected if they apply for leniency with all authorities that could pursue a case against them (i.e. multi-leniency application). In such cases more than one authority may investigate the case and each authority would need the information for its respective investigations under its own rules. Respectively, obligation to cooperate applies to each antitrust authority concerned.

The threat of a penalty is not the only risk involved in cartel activity. In addition, a company’s image may be affected and the company may damage its reputation in the eyes of its customers, counterparties, and suppliers, and the company may now have a less favorable defense position in potential lawsuits. Filing an application is an admission of guilt. Reporting cartel activity can also have a detrimental effect on a company’s business relations with its competitors and contractors. Exposing co-operators in exchange for leniency may lead to a loss of trust in business circles. These issues are not without significance from a business perspective.

An application for leniency starts time-consuming proceedings that require much effort from the reporting company throughout the entire process. Not to mention that considerably more effort is required for a multi-leniency application. The reporting entity is required to present the incriminating facts and evidence and to fully cooperate with the authority. Besides providing all relevant information and evidence relating to the alleged cartel, it may involve (i) answering requests for additional information that may contribute to the establishment of the facts; (ii) making employees and directors available for interviews; and (iii) not destroying, falsifying, or concealing relevant information or evidence relating to the alleged cartel. Also, in most cases, the leniency applicant should put an end to its involvement in the cartel immediately following its application, except for what would, in the authority’s view, be reasonably necessary to preserve the integrity of the authority’s inspection.

Inconveniences for a company can arise also in connection with possible personnel changes in the company’s structure. For strictly PR reasons, or due to disciplinary actions, the company may terminate the contracts with senior managers involved in cartel activity. But what can be more severe for a company is that other managers not involved in anticompetitive

conduct might be prepared to change their jobs in order not to be associated with a company being a cartel participant.

By admitting cartel participation, the company also exposes itself to lawsuits of the entities injured by the cartel activity. In most leniency regimes, the leniency applicant is not protected from the civil law consequences of its cartel participation. Damages in private enforcement litigations may, however, exceed the amount of the fine that would be imposed by the authority. Therefore, as a result of the leniency application, a civil lawsuit may be brought by cartel victims seeking compensation. A crucial issue in the event of a follow-on action for damages is access to the evidence collected by the competition authority.

So far, some general rules established by the Court of Justice of the European Union (“CJEU”) have been applied in this area. Under settled case law any individual has the right to claim damages for a loss caused to him by anticompetitive conduct (see the *Courage and Crehan* or *Manfredi and Others* cases). In the *Pfleiderer* case, it was assumed that the person adversely affected by an infringement of competition law and seeking damages shall not be precluded from being granted access to documents relating to the leniency procedure, but it is for the national courts to determine the conditions under which such access must be permitted (*Pfleiderer AG v Bundeskartellamt*).

Finally, in most recent case law, the CJEU stated that cartel victims may bring an action before the courts of one single Member State against several defendants domiciled in various Member States (see *Hydrogen Peroxide SA v Akzo Nobel NV and Others*). This means that companies that have participated in an unlawful cartel must expect to be sued in the courts of a Member State in which one of them is domiciled.

New rules concerning actions for damages for infringements of competition law have been introduced by the Damages Directive.³ The new EU Directive intends to facilitate private damage claims—something of significance also for leniency applicants. Although the Damages Directive sets some rules protecting leniency applicants as it denies access to leniency statements for the purpose of actions for damages, and removes joint and several liability from the leniency applicant, its aim is mainly to introduce principles facilitating actions for damages.

The Damages Directive stipulates, among other things, that a final infringement decision of a national competition authority shall constitute full proof before the civil courts in the same Member State and that the victims shall be entitled to full compensation (i.e. compensation for actual loss and for loss of profit, as well as payment of interest). It establishes also a rebuttable presumption that cartels cause harm. The Damages Directive needs to be implemented by Member States by December 27, 2016. The European Commission has already updated its antitrust procedures to ensure effectiveness of the Damages Directive.

Last, but not least, a company applying for leniency must bear in mind that cartel activity may have consequences in terms of criminal liability of individuals. In many jurisdictions, cartel

³ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

activity of individuals, mainly members of senior management who decide to break the law, is sanctioned by fines or imprisonment. It is worth ensuring whether a leniency regime offers a release of criminal liability for individuals.

A separate issue to consider is whether in particular within a leniency regime an individual can apply for leniency. If so—which will be characteristic for jurisdictions where individuals can be fined by the given antitrust authority—it is worth examining the consequences of an individual's leniency application for the company and vice versa. This issue is very topical recently in Poland as, starting this year, individuals may be fined up to approximately EUR 500,000 and at the same time may apply for immunity separately from the company.

C. Opportunities

The main benefit of self-reporting is gaining market advantages over a competitor who, if the infringement is proved, will be punished with a huge fine (amounting e.g. in the case of fines imposed by the European Commission to a maximum of 10 percent of the overall annual turnover in last financial year). This is also one of the key cornerstones of effective leniency regime, i.e. severe sanctions for the members of the cartel who do not report to the authority as well as high degree of likelihood that those cartel members will be discovered and punished. Applying for immunity also enables a company to have some influence on the ongoing investigation.

Moreover, many antitrust regimes foresee a solution called amnesty/leniency plus, which allows a cartel member who did not obtain full or part immunity in one case to obtain an additional reduction of a fine in exchange for cooperation with respect to another cartel activity.

Also, obtaining immunity means a significant reduction of costs of legal fees at the appeal proceedings stage as such business will, obviously, not appeal the authority's decision.

D. Threats

There are several risks in applying for leniency. First, the company's application does not have to be accepted by the competition authority. A leniency applicant, in order to get an award of immunity or fine reduction, has to earn it by providing the competition authority with the relevant information. A company has to submit the information and evidence that meet the relevant threshold. In cross-border cartel cases this applies to all antitrust authorities concerned. For instance, in the case of proceedings before the EC, the submitted information has to enable the organization to carry out an inspection or find an infringement in connection with the alleged cartel.

There is always a considerable uncertainty with a leniency application as to whether another cartel member has not already blown the whistle. A subsequent applicant in most leniency regimes would be granted only a fine reduction, usually a reduction amounting up to 20-50 percent. In order to qualify for a reduced fine, a company must provide the antitrust authority with new evidence with respect to the information already possessed by the authority.

Most leniency regimes enable companies to protect their place in a leniency queue (i.e. "marker") for the given period of time needed to submit the necessary evidence and information. If a company does not provide the required information, its application will be rejected and the company will forego its place in the queue.

III. CONCLUSION

Leniency has one significant advantage—immunity from an antitrust fine, which, if the application is successful, will probably outweigh all the weaknesses and difficulties of the mechanism. On the other side, from the antitrust authority point of view an attractive leniency program is a powerful preventive tool in a fight against cartels, notably because it implants a permanent fear among cartel members that one of them will report the cartel to the antitrust authorities (so-called prisoner dilemma). This makes the cartel instable and discourages companies from engaging in cartel behavior in the first place.

As presented above, obtaining immunity is not as easy as it may seem. In order to be granted immunity from a fine, the undertaking has to meet many conditions, including full cooperation with the authority throughout the whole proceedings. One should also not ignore the consequences of an application for leniency for the company's image and business relations. There is also a risk of not being the first in the queue and then qualifying only for a fine reduction, after which of course providing information and evidence representing "significant added value" with respect to materials already possessed by the authority may turn out to be even more difficult.

Depending on certain circumstances, including among others the scope and scale of the infringement, type of business, branch, business relations, strength of the company's brand, and financial stability of the company, different emphasis would be put on the above-mentioned advantages and disadvantages. A business decision concerning an application for leniency should include at least consideration of the above-mentioned aspects.

On the basis of the above-mentioned general SWOT analysis of leniency policy it seems that the weaknesses and threats still score high. Business entities, when considering an application for leniency, are specifically interested in (i) clear information on the consequences of such application, (ii) what exactly may be demanded from them before and after the granting of full immunity, and (iii) what are the procedural frameworks for leniency mechanisms. The problem of transparency is particularly crucial in leniency applications for cross-border activities and behaviors, since there is no clear rule on how to assess the scope of jurisdictions competent to investigate and decide on the existence of a given cartel. The problem is additionally compounded by the non-existence of a one-marker system or an alternative system of foreign markers' endorsement.

An improvement in these issues might cause quite a change on the SWOT analysis chart. Work is already in progress towards convergence of the EU's and Member States' leniency programs. One such initiative is the Model Leniency Programme prepared by the European Competition Network ("ECN"), which offers fair perspectives to facilitate multiple filings as well as safeguards and protection standards pertinent for the functioning of leniency programs throughout the whole of the ECN. The other entity is the International Competition Network.

Irrespective of the conclusions of the analysis provided in this article there is fairly widespread agreement that leniency programs should be transparent and predictable so that firms can clearly understand the workings of the application process of the competition authority. Creation and introduction of a one-marker system to facilitate international cooperation among competent authorities and increasing the legal safety of applicants for

leniency perfectly embodies this idea. One of the key priorities of the ICC Competition Commission Cartels & Leniency Task Force is to play a key role in making this happen.