

Developments in International Cartel Enforcement

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Cartel enforcement proceedings have increased exponentially in recent years due to the introduction of competition laws in new jurisdictions, greater cooperation and coordination among international competition law authorities and, most importantly, the proliferation of effective amnesty, leniency and immunity programs ("Leniency Programs"). Leniency Programs in particular are quickly becoming synonymous with anti-cartel enforcement to international authorities. Members of the International Competition Network are learning from the experience of other enforcement agencies and the lawyers who represent Leniency Program applicants in order to prevent conflicts and uncertainty and encourage the proliferation of both anti-cartel legislation and effective Leniency Programs worldwide.

In most industries, competition is increasingly global in scope, no longer localized to one region, state, or country.¹ For a small minority of market participants, global competition was viewed as a threat to survival and profitability, rather than an opportunity for growth in new markets. Instead of adjusting to the new reality of trying to survive in the global marketplace, this small minority of businesses was determined to maintain market share and profitability by dividing up the world market and agreeing to set the price for their products or services. For other businesses in that minority, globalization meant that cartels which had been in operation for years or decades in one country or one region spread their reach to new participants in new areas of the world.

International cartel participants may meet periodically in a number of different countries to exchange competitively sensitive information, allocate world markets and coordinate price increases. They can be sophisticated world travellers who speak in code, leave little or no documentary evidence of the discussions which take place at cartel meetings, and use the veil of valid industry association meetings and business ventures to disguise anti-competitive conduct. This can make it difficult for law enforcement agencies to detect and investigate

international cartel activity.

In recent years, international enforcement agencies have recognized the difficulties confronting each of the agencies individually in regard to international cartel detection and enforcement and have increased their level of cooperation. The proliferation and increased use of bilateral mutual legal assistance treaties, as well as Leniency Programs, have assisted the major enforcement jurisdictions such as the European Union, the United States and Canada. However, bilateral cooperation agreements can be time-consuming to negotiate and implement, secure only the cooperation between two enforcement agencies, and may be limited in scope depending upon whether cartel activity is considered a criminal offence or punishable by administrative (non-criminal) fines.

The formation and development of the International Competition Network (the "ICN") in 2002 extends international cooperation beyond the confines of bilateral mutual legal assistance treaties to a broader level, both in membership and in scope. The ICN is a group of national and multinational competition agencies which either have competition laws or are contemplating their introduction. One of the ICN's explicit objectives is to facilitate international cooperation by offering a forum for international enforcement agencies from both developed and developing jurisdictions to discuss policy and enforcement issues. Some members do not yet have competition laws in place and are seeking to implement legislation that is informed by the experience of other, more developed jurisdictions. Other jurisdictions have a well-developed competition law framework and are seeking to ensure a minimal amount of conflict among jurisdictions in order to increase the effectiveness of enforcement efforts. Although cartel enforcement is not the ICN's only focus, it has been successful in its first few years of existence in encouraging a proliferation of anti-cartel legislation and guidelines in many developing juris-

dictions and in identifying areas of conflict among more developed regimes.

In November 2004, the ICN held the first two-day Cartel Workshop under its banner in Sydney, Australia hosted by the Australian Competition and Consumer Commission ("ACCC"). As a sign of the importance to enforcement authorities of Leniency Programs in detecting and enforcing anti-cartel laws, members of the ICN met over an additional two days to discuss the key provisions of successful programs and to determine how to minimize conflict among existing and emerging programs.

Leniency Programs generally provide immunity from prosecution (or from the imposition of administrative fines) to the first cartel participant in the door of the enforcement agency who discloses evidence of anti-competitive activity. In exchange for amnesty, leniency or immunity, the applicant has an obligation to fully cooperate with the enforcement agency's investigation and prosecution of the other cartel participants. In most international cartel cases, this may be a significant burden and may include extensive documentary production, intrusive interviews with key employees, officers and directors and the prospect of providing testimony against other cartel participants in more than one jurisdiction. In most jurisdictions, the grant of amnesty, leniency or immunity may be revoked at any time if an applicant does not meet its obligations to fully cooperate or if there is evidence of obstruction which has not been disclosed to enforcement authorities.

Leniency Programs are recognized by enforcement agencies as one of the most important tools available to detect and deter cartel conduct. They encourage applicants to disclose evidence of international price fixing or market allocation cartels at the earliest possible stage—activity that may otherwise be difficult to detect through conventional investigative techniques. For enforcement agencies, Leniency Programs are viewed as important support for the enforcement of competition laws, promoting compliance by international industry participants and saving enforcement agencies time and resources. For Leniency Program applicants, these programs provide the security of immunity from prosecution for both the business entity and, in most cases, its present and former directors, officers and employees, saving the company and individuals from potentially debilitating fines, imprisonment for individuals, not to mention the adverse publicity and reputational damage of a criminal investigation and trial.

Leniency Programs have been credited by enforcement agencies with overwhelming success in anti-cartel enforcement, leading to a surge in criminal proceedings and guilty pleas, administrative fines, and in some jurisdictions, civil damage actions with very large potential damage awards. In their present form, Leniency Programs are relatively new to the landscape of cartel enforcement. The first Leniency Program recognized as effective for international cartel enforcement was the United States Department of Justice's revisions to its corporate amnesty program in 1993 which provided more certainty to applicants, and less discretion to prosecutors than its prior corporate Leniency Program.² Canada followed with the introduction of its *Immunity Program* under the *Competition Act* in September 2000³ which closely resembles the U.S. amnesty program. More recently, the European Union issued its *Notice on Immunity from Fines and Reduction of Fines in Cartel Cases* in February 2002.⁴ Other leniency policies have been implemented in the United Kingdom⁵ and Australia.⁶ In addition, many individual European states, as well as Japan and Korea, have developed or are in the process of developing their own Leniency Programs.

Due to their success in enforcing against international cartels, jurisdictions which are contemplating the introduction of anti-cartel laws are simultaneously considering the introduction of Leniency Programs as an important element for effective enforcement of those laws. Without a Leniency Program, enforcement agencies have determined that international cartel activity would be less likely to be detected, making anti-cartel legislation less effective in and of itself.

In recognition of the importance of Leniency Programs for enforcement purposes, the ICN's first Leniency Workshop sought input and advice from both member enforcement agencies with experience in administering Leniency Programs as well as several non-governmental advisors ("NGAs") recognized for their experience in representing applicants to Leniency Programs in leading jurisdictions. Member organizations provided their perspective on the prerequisites for an effective Leniency Program, implementation issues, the practical administration of an application for leniency, and how to use information gathered from the immunity or leniency applicant to coordinate raids or other investigative measures in several jurisdictions. As one of the five NGAs from the United States, the European Commission, Canada, Korea, and Australia invited to participate, it was evident that enforcement authorities are keenly interested in the issues confronting potential applicants that could dissuade them from approaching one or more jurisdictions.

Different models of Leniency Programs exist which raise many issues for the potential applicant involved in an international cartel. For all Leniency Programs, the most important thing is to be "first in" with evidence of the anti-competitive activity and to determine early in the process which jurisdictions ought to be approached, and in which order. An applicant could be "first in" in some jurisdictions, but not in others, and could be granted leniency in some jurisdictions, but not others, depending upon whether the enforcement agency has commenced an investigation, whether the applying party is considered the instigator of the cartel activity, and whether another party has beat them to the authorities' door. Most Leniency Programs provide that if the enforcement agency has not commenced an investigation at the time a company or individual first contacts them, they will be eligible to receive immunity or leniency from prosecution. Where an investigation has been commenced, it may be within the discretion of the enforcement authority whether or not to grant immunity or leniency. In some jurisdictions, if the applicant for whom immunity or leniency is not available with respect to one product is the first to disclose evidence of cartel activity in a second product, the applicant may receive immunity or leniency on the second product and more favourable treatment with respect to the recommended punishment for the first product (i.e. amnesty plus). This encourages cartel participants to disclose all of the evidence with respect to any anti-competitive conduct of which they become aware. In addition, once an applicant has made it "first in" the door, the terms of the Leniency Program must be clear in terms of the required level of cooperation with authorities so that the Leniency Program applicant is confident that those conditions can be met from the outset,

decreasing the risk that their amnesty, leniency or immunity could be revoked by authorities down the road.

For an applicant who has been the member of an international cartel, grappling with the issues that can arise in determining in which jurisdictions to seek immunity and/or if immunity or leniency is available in one jurisdiction but not in another can be difficult, especially in an era of increased cooperation and sharing of information among enforcement authorities. For enforcement authorities, although it may be useful on a case by case basis to have such cooperation, the more uncertainty that surrounds applications for leniency in different jurisdictions, the less effective Leniency Programs will be at detecting international cartel activity. Applicants will not intentionally expose themselves to the risks arising from assisting an investigation in a jurisdiction in which amnesty, leniency or immunity is not available. For this reason, consistency in Leniency Programs is viewed as important from both the perspective of the enforcement authorities and potential leniency applicants.

Members of the ICN appear to be determined to implement effective and consistent Leniency Programs in numerous jurisdictions in order to try to close the perceived gap between the level of sophistication of cartel participants and enforcement authorities. For the Leniency Program applicant who is "first in," this presents an opportunity to minimize exposure to large fines and reputational damage. For enforcement agencies, it encourages full and early disclosure to all jurisdictions implicated by the cartel activity and ensures that anti-cartel laws can be effectively and consistently enforced.

¹ See www.internationalcompetitionnetwork.org.

² U.S. Department of Justice, "Corporate Leniency Policy," issued August 10, 1993. Available online: www.usdoj.gov/atr/public/guidelines/0091.htm

³ Government of Canada, Competition Bureau, "Immunity Program under the Competition Act," September 2000. Available online: www.competition.ic.gc.ca/epic/internet/incb-bv.nsf/en/ct01990e.html.

⁴ European Commission, "Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases." Available online:

www.europa.eu.int/eurlex/pri/en/oj/dat/2002/c_045/c_04520020219en000300005.pdf.

⁵ Office of Fair Trading, "Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty." Available online: www.offt.gov.uk.

⁶ Australian Competition and Consumer Commission, "ACCC Leniency Policy for Cartel Conduct," June 2003. Available online: www.accc.gov.au/fs-pubs.htm.

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