THE EUROPEAN COMMISSION’S NEW Leniency Policy

In the last year, the EC levied fines against companies engaged in price-fixing and other cartel activity for more than €2 billion ($1.8 billion). Despite this success, the EC continues to explore ways in which it can be more effective at fighting cartels and removing from the European Union these “cancers on the open market economy.” To this end, on February 13, 2002, the EC promulgated a new corporate leniency program, which more closely mirrors the U.S.’s leniency policy. In the U.S., that policy has led to the discovery of numerous international cartels and the imposition of record fines, a success the EC hopes to duplicate in Europe.

THE U.S. EXPERIENCE

In the 1980s and early 1990s, the U.S. leniency policy did not provide companies complete or automatic amnesty from prosecution or monetary fines if they reported violations of the antitrust laws prior to the inception of an investigation. Rather, the provision of amnesty was left to “prosecutorial discretion.” Not surprisingly, the leniency policy resulted in “relatively few amnesty applications [in fact, no more than one a year] and did not lead to the detection of a single international cartel.”

In August 1993, the U.S. expanded its policy by, among other things, agreeing to provide complete amnesty if a company reported an antitrust violation before an investigation began or before the government had sufficient evidence to prosecute a case. Since then, the U.S. has experienced unprecedented success in uncovering price fixing cartels – such as the vitamins, graphite electrodes and citric acid international cartels – and extracting record fines. This success is evidenced by recently imposed fines: F. Hoffman-La Roche ($500 million), BASF ($225 million), SGL Carbon ($135 million), and Mitsubishi Corporation ($134 million). The U.S. Department of Justice has credited the new leniency policy for this success: “The Amnesty program has been responsible for detecting and prosecuting more antitrust violations than all of our search warrants, consensual-monitored audio or video tapes, and cooperating informants combined. It is, unquestionably, the single greatest investigative tool available to anti-cartel enforcers.”

THE EUROPEAN EXPERIENCE

Previous Policy

Like the U.S.’s leniency policy prior to August 1993, the EC’s policy did not provide for automatic and complete amnesty from monetary fines. Until now, EC guidelines provided that companies reporting competition rule violations prior to the inception of an investigation still may be fined up to 2.5% of their annual worldwide revenues (not just revenues stemming from the competition rule infringement). As it was in the U.S., the ultimate amount of the fine was left to governmental discretion. Thus, companies that “come in” first to the EC had no guarantee they would not receive a substantial fine. The Commission has admitted that the lack of certainty may have made it less attractive for companies to come forward with violations in the past.

New Policy

The EC’s new, more expansive leniency policy became effective on February 14, 2002. The primary change to the policy – assuring no fines to any party that reports a cartel before an EC investigation begins – will eliminate the uncertainty companies face with regard to the imposition of fines and mirrors one of the key changes the U.S. made to its policy in 1993. Given the dramatic effect this policy change had in the U.S., we expect it, as well as other notable changes being made to the EC leniency policy, will make it far more likely that companies will begin reporting undetected cartels or defecting faster from cartels once an investigation has begun. The changes in the EC policy include the following:
Zero Fine. The first company to inform the EC of the cartel will not be fined. Unlike the previous policy, the Commission will no longer have discretion in determining the size of the fine for parties “first in.”

Timing of Disclosure. The EC must be informed either of an undetected cartel or of a cartel about which it has enough knowledge to launch an investigation, but not enough to establish infringement (i.e., before the Commission makes an unannounced visit – a “dawn raid”). Commission knowledge of rumors of cartel activity or a U.S. investigation of alleged conduct will not disqualify a party from leniency consideration.

Substance of Disclosure. There are now two standards. If the cartel’s existence is unknown, the applicant need only provide information sufficient to enable the Commission to execute a “dawn raid” (that is, something similar to probable cause in the U.S.). However, if the Commission has enough information to launch an investigation, the applicant will need to provide enough evidence to establish an infringement (likely to be similar to the previous policy of requiring “decisive evidence”).

Prompt Commission Decision. The EC will tell a “first in” applicant whether it has been granted complete leniency prior to conducting dawn raids. Under the previous policy, an applicant is not told the amount it will be fined until the EC completes its investigation of the cartel activity, which can take years.

Protection of Corporate Identity. Counsel will be able to present information on a hypothetical basis during the first meeting with the EC and ask whether the information is sufficient to merit leniency. This process will allow corporations to remain anonymous until such time as the Commission acknowledges the applicant qualifies for leniency.

Priority Consideration. The Commission will not consider other applications while an application is pending, even if the second applicant has greater evidence of, or played a greater role in, the cartel. Thus, a fringe player’s application cannot be displaced by, a subsequent, more informed participant’s application.

No Written Admission Applicable to U.S. The Commission will not require leniency applicants to submit written admissions of cartel participation that could be used for any other purpose than the enforcement of EC anti-cartel law, in an attempt to ensure that such statements cannot be produced in civil treble damages or criminal proceedings in the U.S.

No Disqualification for Instigators. Contrary to the previous policy, the new policy will not disqualify companies that acted as an “instigator or played a determining role” in a cartel. Companies that “coerced” others to join a cartel, however, will, as before, be disqualified.

No Benefit for Silence. Under the revised policy, the Commission will no longer reduce fines for companies that do not contest the facts on which the Commission bases its allegations. Reductions will be available only to those companies providing the EC “significant added value” evidence.

In short, the first company through the EC’s door will receive a complete pass while the remaining members of the cartel may be left “picking up the bill.”

CONCLUSION

The EC has implemented a new leniency program close in substance, though not identical, to the U.S.’s policy. Based on the U.S. experience with its policy, the EC’s new policy probably will lead to increased numbers of EC cartel investigations. Companies with European operations should take steps to ensure they do not become the subject of such investigations. To do so, companies should consider implementing or updating their antitrust compliance programs for their European operations, to include conducting internal compliance reviews as well as employee training. These programs serve a number of valuable functions, such as (1) teaching employees how to avoid conduct that could be misconstrued as
anti-competitive, and (2) assisting in early detection of potentially problematic conduct, thereby creating
the opportunity, if needed, to seek leniency from the relevant authorities.

Based on our experience in Europe, we find such reviews and training to be indispensable because European operations and employees may have had less training on antitrust compliance and less exposure to the magnitude of potential liability than their U.S. counterparts. Thus, for example, European competitors may be less sensitive as to how their interactions with competitors may be interpreted and less likely to have experience with effective document management practices (critical to preventing the creation of potentially troublesome records).

In sum, a well-crafted and executed compliance program will help companies with European operations avoid allegations of misconduct, or, in the alternative, assist in identifying problematic situations that may be appropriate for taking advantage of the EC’s new leniency program.

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i Monti, Why should we be concerned with cartels and collusive behaviour?, 3rd Nordic Competition Policy Conference 2 (Sept. 11-12, 2000) (available at http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/00/295|0|RAPID&lg=EN).


x For example, in the vitamins cartel investigation, the EC granted Aventis full leniency as to some vitamins products even though the Commission already had gathered some information about the cartel and was well aware of the U.S.’s investigation.

xi Though this certainly appears to be the aim of the policy, it remains to be seen how this protection will operate in practice. Georgios Kiriazis, Directorate General Competition, Jurisdiction and cooperation issues in the investigation of international cartels 8 (June 20, 2001) (available at http://europa.eu.int/comm/competition/speeches/text/sp2001_010_en.pdf).