

# A new paradigm for counsel responding to international cartel investigations

By **GARY R SPRATLING & D JARRETT ARP**, Gibson, Dunn & Crutcher LLP in San Francisco and Washington, DC, respectively\*

The dramatic surge of worldwide cartel enforcement activity in the last decade has been striking and shows no evidence of ebbing. Perhaps the single most significant factor in this growth has been the adoption by the United States of its amnesty programme and the follow-on adoption of analogue programmes by the major jurisdictions most active in anti-cartel efforts. The growth of these programmes has led not only to a rise in criminal and civil prosecutions by government competition enforcers worldwide, but also to a rise in private civil damages lawsuits in the United States, Canada, and the United Kingdom.

The learning from these developments for counsel representing companies subject to such investigations and litigation is clear: anti-cartel enforcement is an increasingly global enterprise at both the government and private levels, and counsel for defendants involved in international cartel matters must think, and act, on a global basis. This article reviews the growth of international enforcement efforts and amnesty programmes, explores the increased complexity of representing companies that have been involved in international cartels, and sets forth several core guidelines for representing clients who have been involved in international cartels and face legal exposure in multiple jurisdictions.

## The rapid growth of amnesty programmes

Ten years ago, on 10 August 2003, the Antitrust Division of the US Department of Justice (DoJ) adopted its current Corporate Leniency Policy, a policy designed to increase certainty and transparency with respect to leniency given to cartel participants who are the first to report their misconduct to government authorities. Most significantly, the revised US policy adopted in August 2003 provided for the first time that amnesty is automatic for the first-reporting party if there

is no pre-existing investigation by the DoJ. That is, if a corporation comes forward prior to an investigation and meets the programme's requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion. In addition, the DoJ created an alternative amnesty, whereby immunity is available even if cooperation begins after an investigation is underway. Finally, the DoJ determined that if a corporation qualifies for automatic amnesty, then all directors, officers, and employees who come forward with the corporation and agree to cooperate also receive automatic amnesty.

The revised amnesty policy had a tremendous impact on antitrust enforcement in the United States and beyond, an impact that cannot be overstated. In many instances of hard-core violations, participating companies are literally racing each other to the Antitrust Division to seek amnesty, and they are doing so in numbers that have increased steadily, almost without stop, since the policy was announced 10 years ago. The amnesty programme and related policies have generated a significant number of new and often large cases, including the very largest, particularly in the international cartel arena. These new cases and the cooperation and information provided by amnesty applicants have, in turn, led to an enormous increase in the size of financial penalties levied on companies and individuals and in the number and length of prison sentences for individuals convicted of antitrust and related offences.

Available data illustrates this dramatic growth. Indeed a simple comparison of certain measures as they existed on 10 August 1993, when the revised DoJ policy was adopted, with 10 August 2003, a decade later, tells a compelling story. On 10 August 1993, in the United States there were only three sitting grand juries investigating suspected international cartel activity; on 10 August 2003, there were 49. In August 1993

the highest criminal fine to date relating to cartel conduct was US\$5 million; in August 2003 it was US\$500 million. Comparing the numbers of foreign defendants subject to criminal prosecution in the United States for cartel violations shows similar striking growth. From the passage of the Sherman Act in 1890 to August 1993, there were only eight foreign corporations and eight foreign individuals—for a total of 16—prosecuted for cartel activity in the United States. By August 2003, however, there had been 72 foreign corporations and 90 foreign individuals—for a total of 162 foreign defendants—subject to criminal prosecution by the US DoJ.

A similar pattern holds for leniency activity. As of August 1993, the average number of amnesty applications received annually by the DoJ was one. The annual average for the period August 2003 to September 2002 was 12 applications. For the six-month period October 2002 to March 2003, the US DoJ received an average of three applications per month—an annualised rate of 36 applications per year.

In addition, the success of the DoJ's amnesty programme has led other countries to adopt leniency programmes—now viewed as a critical component of a modern, viable anti-cartel enforcement strategy. As a consequence, leniency policies are cropping up around the globe. In addition to the EU, Canada, the United Kingdom, and Australia, a growing number of countries have also developed or are in the process of developing their own leniency policies, including Switzerland, the Netherlands, Germany, Hungary, France, Ireland, the Czech Republic, Brazil and Korea. This reflects significant change since 1993. In August 1993, there was only one leniency policy existing outside the US, that of Canada. In August 2003 there were 13 adopted or proposed policies in addition to the DoJ's own programme.

The growth of leniency policies has been complemented by a growth in international cooperation. Indeed, international enforcers increasingly have joined together in coordinated multi-jurisdictional investigations, including conducting surprise searches around the globe at the same time. Recent coordinated investigations have included the US, Canada, the EU and Japan. As a consequence, counsel representing international cartel participants today must deal with a world of dramatically increased prosecutions, increased legal risk in more countries than ever before, significantly increased numbers—and therefore risk—of amnesty applications, and coordinated international investigations by enforcers throughout the globe.

### Increased complexity

These developments have of course increased significantly the complexity involved in representing companies that have been involved in cartel conduct. This increased complexity is compounded by a variety of additional considerations, including incomplete convergence with respect to amnesty programmes in diverse jurisdictions, certain policies of the DoJ that lead to—or require in some instances—disclosures of additional wrongdoing where it exists, and the prospect of civil litigation in the US and elsewhere involving, in the aggregate, potentially unbounded damages exposure.

### Incomplete convergence

While convergence in enforcement and amnesty policies has been on the rise, significant differences between amnesty policies remain. Although it is not surprising that leniency policies in different jurisdictions will and do vary in certain respects, there is a broad recognition that the policies need to be similar in material respects because the decision made by international cartel participants about whether to self-report and cooperate with enforcement authorities in a particular jurisdiction is only one element of an integrated international strategy played out in multiple jurisdictions. If the provisions of the leniency policy in one jurisdiction are sufficiently unattractive to dissuade a potential applicant from applying there, that potential applicant may not self-report or cooperate in any jurisdiction. In any event, counsel for a cartel participant must be able to swiftly assess the desirability and availability of amnesty in multiple countries in light of the particular facts presented and the differences in policies between the jurisdictions at issue.

### Three DoJ practices: Amnesty Plus, Penalty Plus and ‘the Omnibus Question’

A second cause of increasing complexity in these matters relates to three notable DoJ policies and practices that—perhaps as much, and possibly more, than the core amnesty policy—have significantly increased the Division’s effectiveness at uncovering additional anticompetitive activities: Amnesty Plus, Penalty Plus, and the Omnibus Question. Each of these operates effectively to force an amnesty applicant to go beyond the scope of its immediate amnesty application and disclose any other cartel-style conduct of which it is aware.

‘Amnesty Plus’ encourages subjects and targets of investigations to consider whether they may qualify for amnesty in other markets where they sell. Amnesty Plus results when a company is negotiating a plea agreement in a current investigation and seeks to obtain more lenient treatment in its plea agreement by offering to disclose the existence of a second, unrelated conspiracy. In such a case, the company that reports the second conspiracy and cooperates in the resulting investigation will receive amnesty for and pay no criminal fines in connection with the second offence, and none of its officers, directors, or employees who cooperate will be prosecuted criminally in connection with that offence. In addition, the company will receive a substantial additional discount (the ‘plus’) from the Division in the calculation of the fine for its participation in the first conspiracy.

If Amnesty Plus is the carrot, ‘Penalty Plus’ is the stick. The Antitrust Division now takes the position that, if a company has the opportunity for an Amnesty Plus disclosure and rejects it in favour of non-disclosure, and the Division subsequently learns of the company’s decision, the Division will seek a substantial increase in the penalty against the company for its knowing failure to report the second offence. This increases the incentive for each company in this situation to report the second offence and, therefore, enhances the risk that the cartel will be detected. For a company, the failure to self-report under Amnesty Plus circumstances, if later discovered by the DoJ, could mean the difference between no fine at all on the second product under Amnesty Plus, and a fine as high as 80 per cent of the volume of affected commerce under Penalty Plus. For the executives, it could mean the difference between no jail and a lengthy jail sentence.

While the decision whether to seek Amnesty Plus credit in appropriate

circumstances is a decision the cooperating company gets to make itself, there remains an important aspect of the Division’s leniency policy that is not discretionary—the now-standard practice of Antitrust Division attorneys asking the so-called ‘Omnibus Question’ at the conclusion of a witness interview (or grand jury interrogation). Division attorneys pose the Omnibus Question after examining a witness about anti-competitive activities in connection with a specific product(s) in the subject industry.

The question goes something like this: “Do you have any information whatsoever, direct or indirect, relating to [description of conduct: eg, price fixing, bid rigging, market allocation] with respect to other products in this industry or in any other industry?” The witness must answer the question, and must answer it fully and truthfully, or he/she not only would lose whatever protection he/she would otherwise have had for his/her statements under a conditional amnesty or plea agreement, but also would be subject to the penalties of perjury or making false statements or declarations. There is virtually no wiggle-room and no basis for not answering the question, no matter what the collateral implications are to the firm sponsoring the witness pursuant to the cooperation requirements of a conditional amnesty agreement or plea agreement.

As one would expect, the Omnibus Question—combined with Amnesty Plus and Penalty Plus—has contributed to fuelling the growth of amnesty applications and resulting investigations. The growth in investigations has led to more prosecutions and guilty pleas which, in turn, have resulted in the significant increase in the frequency and seriousness of follow-on civil litigation seeking monetary damages for cartel conduct. The trend toward increased litigation is particularly evident in the United States where the civil litigation picture can be complex, unpredictable, and largely unbounded with respect to scope of coverage and damages. This results in part from the fact that US civil litigation related to cartels comes in a variety of forms.

### ‘Direct purchaser’ civil litigation

First, a pleading party—and, in due course if not immediately, an amnesty applicant—is likely to face ‘direct purchaser’ class actions brought by direct customers in US federal courts alleging violations of §1 of the Sherman Act. If liability is found, and it invariably is found if the defendant has pleaded guilty and therefore is collaterally estopped from denying the violation, these

lawsuits impose treble damages as well as joint and several liability on each defendant for all damages caused by the conspiracy, regardless of whether its role in the conspiracy was limited. In addition, there is no right to demand contribution from co-conspirators. In recent years, the overall scope of such lawsuits—and the cost to settle them—has increased, often well beyond the bounds of the underlying criminal action. These actions may target companies or individuals who were not subject to criminal proceedings and allege conspiracies that are broader in product coverage and time period than those to which the defendants pled in the criminal proceedings. Defendants are also likely to have to litigate with so-called ‘opt outs’ who elect not to participate in any direct purchaser class action settlement. Although this varies from case to case, opt outs can account for 50 per cent or more of the relevant purchases, and they commonly file their own lawsuits in federal court.

In addition, recent developments suggests that the scope of the federal ‘direct purchaser’ cases may be growing, not narrowing. Recent decisions in the US—as well as in the UK—have opened the door to lawsuits asserting claims for cartel-related damages arising from wholly foreign sales. In the US there is now a series of inconsistent court decisions interpreting the Foreign Trade Antitrust Improvements Act (FTAIA), 15 USC § 6a, and addressing the limits of subject matter jurisdiction in US federal courts in connection with international cartels. The US Court of Appeals for the Second Circuit and the US Court of Appeals for the DC Circuit have interpreted the FTAIA to allow for damage claims arising from foreign sales between foreign suppliers and foreign purchasers to be brought under US law in US federal courts if the cartel at issue also had direct, substantial, and reasonably foreseeable anticompetitive effects on US purchasers. The US Court of Appeals for the Fifth Circuit reached a different conclusion, and other circuits have addressed related questions and hinted at differing responses to the FTAIA question.

The question of extra-territorial reach of laws providing for recovery of damages by cartel victims took a new twist earlier this year, when the English High Court determined that claims for price-fixing damages against certain participants in the Vitamins cartel could proceed to trial even though some of the plaintiffs and defendants were not domiciled in the UK. In the *Provimi* case, the English court determined, for

example, that it had jurisdiction to try a price fixing claim by a German customer against a German supplier—potentially opening the door to litigating Europe-wide cartels in English courts even if the transaction at issue in the particular claim for damages occurred elsewhere in Europe between non-UK entities.

#### ‘Indirect purchaser’ civil litigation

The risk of lawsuits from direct customers is not the only civil litigation issue that leniency applicants or other cartel participants must anticipate. Beyond the ‘direct purchaser’ lawsuits, defendants in cartel cases also routinely face ‘indirect purchaser’ class actions and other actions in US state courts. Indirect purchasers are entities or consumers who purchased a good or product for which the cartelised product was a component or some ingredient added upstream in the production and distribution process. Their claim of injury arises from the premise that cartel-facilitated overcharges on the primary product were somehow passed along in higher prices to intermediate producers, distributors or others in the stream of commerce for the product (or products derived from it), ultimately leading to a higher price for some downstream product bought by the plaintiff.

Indirect purchaser actions are now routinely filed in multiple states in which *Illinois Brick Co v Illinois*, 431 US 720 (1977), the US Supreme Court decision preventing indirect purchasers from suing under federal antitrust law, has been repealed by legislative action permitting indirect purchaser lawsuits in state courts. The most important practical consideration relating to indirect purchaser actions is that usually they cannot be removed or consolidated into a single multi-district litigation proceeding, as would often be the case in federal direct purchaser actions. Any coordination among the state courts—or between the state actions and the federal direct purchaser cases—is dependent on the voluntary cooperation of the counsel and judges involved.

#### Other aspects of civil litigation

Finally, there are some notable complicating factors relating to litigation that arise directly from the requirements of certain countries’ amnesty policies. In particular, civil plaintiffs pursuing claims against amnesty applicants have shown an interest in obtaining copies of written materials presented to the government by the party that received amnesty. In the US and Canada, experienced practitioners now make all ‘submissions’ on behalf of amnesty

applicants as oral presentations and typically provide knowledgeable witnesses for interviews by government prosecutors.

In the EU, however, written company statements describing and admitting to cartel activity were often required under the Leniency Notice adopted in 1996. That policy required an applicant wishing to obtain the most favourable treatment under the Notice to be the first party to “adduce decisive evidence of the cartel’s existence” and the EC required that evidence to be in documentary form. Unless a company had contemporaneous documents decisively evidencing the cartel, usually there was a need to submit a company statement that—in documentary form and in the company’s own words—provided the necessary proof of the activities being reported.

This has led to attempts by civil plaintiffs in the US to seek discovery of such submissions to the EC in Brussels, as well as some written submissions to the Competition Bureau in Canada. The EC and Canada have filed amicus briefs in an effort to prevent discovery of these statements and other communications with foreign enforcement officials. Results of those efforts have been mixed. Although the EC was successful in the *Methionine* litigation in the US District Court for the Northern District of California, precluding discovery of a leniency applicant’s submissions to the Commission, it failed to obtain the same result in the *Vitamins* litigation. In *Vitamins*, Judge Hogan of the US District Court for the District of Columbia permitted the discovery of a defendant’s submissions to the EC, as well as a variety of correspondence with Canadian enforcers.

The potential discoverability of written materials submitted to the EC and other authorities in connection with leniency applications raises significant issues with respect to how enforcers like the EC proceed in the future. It also presents an example of where a lack of complete convergence among government enforcers makes decisions on amnesty applications particularly difficult. The EC revised its Leniency Notice in 2002 and the new Leniency Notice does not directly address whether a written statement is required to secure immunity. This issue, among others, has been raised for potential clarification by EC, and the Commission staff has published a helpful response. (See D Jarrett Arp & Christof RA Swaak, ‘A Tempting Offer: Immunity from Fines for Cartel Conduct Under the European Commission’s New Leniency Notice’,

*Antitrust* 59 (Summer 2002) <<http://www.gibsondunn.com/practices/publications/detail/id/609/?pubItemId=6621>> and, in response, Bertus van Barlingen, Competition Directorate-General of the European Commission, 'The European Commission's 2002 Leniency Notice After One Year of Operation', *EC Competition Policy Newsletter* 16 (Summer 2003) <[http://europa.eu.int/comm/competition/publications/cpn/cpn2003\\_2.pdf](http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf)>.)

On the question of written materials, the Commission staff's answer appears to be that they prefer written submissions and wish that US courts would decline to treat them as discoverable. Until and unless the US courts do so, however, the EC will accept oral applications in cases where the applicant would face negative consequences in US litigation from a written submission. That said, in such cases the Commission transcribes the oral presentation and, at least to date, requires that the transcript be reviewed and certified by counsel for the applicant. The EC staff apparently intends for the transcript to remain in the Commission's possession as, in their view, an official Commission document—not a company document.

While creative, the Commission's present oral presentation-plus-certified-transcript approach has raised a variety of concerns from counsel representing immunity applicants, because giving the company access to the transcript and requiring it to certify the transcript as accurate increases the chances that the document will be discoverable by private plaintiffs in the US. It also departs from the practice followed by the US and Canada, which currently offer a 'paperless' process so that companies that self-report do not find themselves in a worse position in follow-on civil litigation than the members of the cartel that provided less or no cooperation to the enforcement authorities. To their credit, the Commission staff have shown some flexibility and have undertaken further examination of this issue in response to concerns on this point raised by a variety of outside counsel representing leniency applicants—and this remains an area in which further convergence would be highly desirable.

### **A new paradigm for counsel in international cartel matters**

As anyone who represents companies subject to international cartel investigations knows, the world has changed. Increased enforcement efforts, the growth of amnesty

programmes around the globe, and a variety of complicating considerations set forth above require a new and different response from inside and outside counsel. In the authors' experience, this has given rise to a new paradigm for counsel in international cartel matters. The new rules of the road in cartel matters are reasonably simple to understand, but a daunting challenge to implement. Chief among them are the following five points:

#### **Rule 1: Speed wins (no tickets for going too fast).**

The US DoJ's amnesty policy awards the greatest benefits—immunity for the company and its employees with respect to any sanction under federal criminal law arising from the reported antitrust violation—to the first party in the door to report an offence. That said, there is also a significant value in being second in the door, as opposed to third or fourth. Regardless of whether amnesty is available or not, if a company with criminal exposure for cartel-style collusion learns of a government investigation or has reason to believe another member of the cartel is evaluating whether it could or should turn itself in, moving fast is critical.

If there is a reportable violation and at least one member of the cartel has a compelling reason to report it, it will be reported. With the United States' and Canada's practices of allowing companies to put down a 'marker' claiming their spot first in line once they have enough information to confirm they will report a criminal violation, 'speed wins' because the fastest party will claim all of the protections offered by the amnesty policies in these jurisdictions.

Thus, companies and their counsel have to be capable of responding swiftly on short notice, collecting the relevant facts and making a decision on how to proceed on a potentially global scale in a matter of days—and sometimes hours—to maximise a client's interests if a decision is taken to report a violation to the government. In the case of at least one cartel matter in recent years, the difference between the marker call from the party who received amnesty and the party who was awarded the runner-up position (and, as a consequence, a corporate guilty plea and jail exposure for some of its employees) was less than 10 minutes.

#### **Rule 2: If you report in the US, EU or Canada, you likely will have to promptly report in all of these jurisdictions.**

When evaluating how to advise a company

with respect to exposure arising from an international cartel, the first issue to consider is normally how to proceed in the US, assuming the company has exposure in the US, because of the severe corporate and individual criminal sanctions the US imposes. That does not end the analysis, however. If a company involved in international collusion with multinational competitors regarding a particular product decides to apply for amnesty in the US pursuant to the DoJ's amnesty policy, it will almost always—assuming, of course, that it has significant exposure in other candidate jurisdictions and can qualify for immunity/amnesty there—make sense to do the same in Canada, the EU, and possibly other jurisdictions.

The reason is simple: if you turn yourself in to the US DoJ, you can do so on a confidential basis, but the DoJ is still going to go forward with an investigation in the US. In moving its investigation forward, the DoJ will serve grand jury subpoenas on your competitors. Antitrust Division lawyers and the FBI may also conduct home residence drop-in visits with your competitors' senior management. In due course, that investigation and/or prosecutions flowing from it will become public, potentially drawing the interest of foreign enforcers who see the same competitors present in their countries.

Inevitably, your competitors will learn of the US investigation. If the cartel was international in nature, your competitors will assume the US amnesty applicant has also self-reported with the EC and Canada at a minimum—with the EC because of the potential fine exposure and with Canada because, even if the Canadian sales involved are small, Canada criminalises cartel conduct. They will likely move quickly to self-report in those jurisdictions in order to reap the remaining benefits for cooperation—and if you, in fact, have not reported in those jurisdictions, they will reap the full benefits of immunity or leniency, leaving you out in the cold. If the UK proves to be active in prosecuting cartels under the Enterprise Act, one may add the UK to the list of presumptive must-apply venues if there is relevant trade and conduct relating to that jurisdiction.

It bears noting that even if a company's collusion with multinational competitors was largely segmented—that is to say, for example, there was an agreement related to North America and a separate, different agreement among different representatives of some of the same companies relating to Europe—the company probably still has to

report in all relevant jurisdictions. Co-conspirator competitors are likely to assume that the amnesty applicant in the US applied in the EU with respect to the European conduct or, if it has not yet done so, it will soon, and will therefore report their own conduct as expeditiously as they can, leaving the US amnesty applicant at risk in the EU if they do not report, or wait to report.

**Rule 3: If you report in the United States, you cannot avoid—and therefore must not fail to consider—Amnesty Plus, Penalty Plus, and the Omnibus Question.**

The typical requirement of applying for leniency in multiple jurisdictions is not the only irreversible expansion of what, in effect, is near-mandatory additional cooperation with enforcers when one decides to report an offense to the US DoJ. Three important aspects of the DoJ amnesty programme that were discussed above—Amnesty Plus, Penalty Plus, and the Omnibus Question in connection with witness interviews—will in many cases inexorably lead to the disclosure of additional cartels or similar violations.

*Amnesty Plus.* As described above, Amnesty Plus allows a cooperating party that has not obtained amnesty related to a given product to better its situation, whether lessening its fine or reducing the penalties applied to its officers and employees, by applying for amnesty in connection with a second, unrelated product. For a company that has not qualified for amnesty in the first product because it contacted the DoJ too late, exploring the possibility of Amnesty Plus related to a second product is an option many consider and pursue. This is also true in Canada, which has a similar ‘immunity plus’ policy.

Amnesty Plus drives the decision-making of the initial amnesty applicant as well. This is true because, as an amnesty applicant, you can assume that if any of the co-conspirators you are turning in joined you in other collusion and could report that other activity to the DoJ in search of Amnesty Plus credit, they are highly likely to do so. As a consequence, the amnesty applicant needs to evaluate and seriously consider whether to turn in any other cartel activities that its co-conspirators in the first product could themselves elect to turn in shortly. Going ahead and turning in the second product allows one to obtain amnesty for the second product and, just as importantly, avoids the consequences of Penalty Plus.

*Penalty Plus.* The DoJ’s Penalty Plus policy, described above, builds on Amnesty Plus and increases incentives to report with respect to other improper collusion that may not implicate the amnesty applicant’s co-conspirators in the immediate cartel. Amnesty applicants in the US might assume that none of their competitors in the reported cartel know about and are in a position to tell the DoJ about separate cartel conduct. Because of Penalty Plus, however, if the DoJ later learns of this separate conduct through the DoJ’s own investigatory efforts or the amnesty application of another competitor, the amnesty applicant will suffer special, additional pain if it knowingly failed to turn in the separate conduct at the time of the earlier amnesty application.

*The Omnibus Question.* The aspect of applying for amnesty with perhaps the most direct and unpredictable potential for forcing an amnesty applicant to report additional conduct to the authorities is the so-called ‘Omnibus Question’ that the DoJ often puts to witnesses in interviews in connection with granting conditional amnesty or entering a plea agreement.

As described above, the DoJ regularly asks witnesses whether they know of other collusive conduct. The question is usually not limited to conduct plainly within the five-year statute of limitations. Normally the DoJ limits the question to conduct affecting US commerce, but that is not always clear from the particular phrasing of the question (or as the question is processed in the mind of a witness for whom English may be a second language).

If defence counsel involved in cartel matters suffer nightmares, there is a good chance the nightmares involve the response to an Omnibus Question. One Omnibus Question posed to one witness can single-handedly open up an unexpected new investigation—possibly because a new violation was revealed, but it may also be because a witness reported activity in another jurisdiction (which the Omnibus Question may, but usually does not, require), reported activity that ceased more than five years ago (conduct for which the applicant did not need, and, therefore, did not seek amnesty) or even is stretching in an effort to gain favour with the government. Even if the answer points to conduct that does not appear to be actionable in the US, the Division may elect to conduct at least a preliminary investigation into the matter. For an amnesty applicant, this can be a costly detour in its cooperation with the DoJ that does not lead to any reportable conduct.

Thus, in evaluating the consequences of making an amnesty application in the US, a company should endeavour to assess which individuals the DoJ is likely to interview and whether they have awareness of other conduct—whether bearing on the US or elsewhere—that the company needs to assess. This is extraordinarily difficult at the earliest stages of an internal investigation—particularly if the company is in a race to put down a marker. Regardless of counsel’s foresight, preparation and investigation, there will always remain an element of uncertainty relating to the Omnibus Question.

**Rule 4: Never forget the civil litigation.**

Every amnesty or leniency application with the US DoJ and in other jurisdictions has a cost in the form of future civil litigation settlements. Responsible prospective amnesty applicants with a desire to cooperate with the government and to make restitution to injured customers (as conditional amnesty requires) will nevertheless need to evaluate as best they can the settlement costs that will flow from moving forward with an application for immunity.

If a cartel investigation moves forward and the existence of the investigation becomes public, civil litigation will follow, even if the investigation proves to have been unfounded. (Indeed, the authors are aware of one matter in which reports of an investigation led to the filing of over 80 lawsuits, all of which continued to proceed despite the fact that the DoJ closed its investigation without bringing any charges.)

Because civil litigation is highly likely once a government cartel instigation is initiated, if a company applies for leniency it must conduct all of its leniency activities in multiple jurisdictions at all times with an eye to how its actions—large and small, substantive and procedural—could impact the inevitable civil litigation. Thinking about the downstream civil litigation effects of each and every action in the amnesty application and cooperation process can help reduce excessive civil litigation exposure.

**Rule 5: Most importantly, and because of the foregoing, counsel must swiftly engage in a simultaneous relational analysis of opportunities and risks in diverse jurisdictions.**

Because of the time pressure (Rule 1), the all-or-nothing nature of multi-jurisdictional reporting in most cases (Rule 2), the combined effects of Amnesty Plus, Penalty Plus and the Omnibus Question (Rule 3), and the significance of potential follow-on

civil litigation (Rule 4), responding to an actual or potential government cartel investigation presents enormous challenges to companies and counsel who advise them. It is almost always impossible to compartmentalise an investigation to a single product area if there is more to be discovered and, even where it is possible to limit exposure, one does not know that until a thorough analysis has been conducted.

The modern reality is that to respond to a cartel matter in an intelligent manner that maximises the interests of the company and its employees, counsel for the company must have the resources, experience, and ability on a highly expedited basis to engage in a simultaneous relational analysis of the criminal and civil risks and opportunities for the company in multiple jurisdictions. Counsel must be prepared to act quickly, and then, in fact, act quickly to conduct a careful assessment of (a) whether there was a violation in one or more jurisdictions, and, if so, (b) whether the aggregate risk, costs, and benefits of cooperation with the government indicate that the company should apply for leniency in one or more jurisdictions. While far from a complete listing, this assessment includes the following:

First, one must immediately gather the facts, interview key witnesses and, where feasible, review significant documents. Second, one must conduct a jurisdiction-by-jurisdiction analysis of the potential leniency application. Counsel must evaluate whether the information collected affects different jurisdictions in different ways. If an amnesty application appears likely, counsel must make an initial determination of whether it has enough information to support leniency applications in all of the relevant jurisdictions. As noted above and below, convergence in amnesty policies has been striking, but material differences remain. For instance, while one can put down a ‘marker’ and gain amnesty in the US and Canada based on relatively limited information, the EC requires a more fulsome presentation of facts at the front end.

A related and more nuanced question is how the time period of the reportable activity may affect the company’s overall strategy. This alone can be a critical issue since different jurisdictions have varying statutes of limitations. The US and EU limitations periods are five years, but Canada has no statute of limitations. Something that might be reportable in Canada may no longer be reportable in the US and Europe.

Similarly, something that is reportable in all jurisdictions may lead to prosecutions of differing periods, a fact that can directly impact the cost of civil litigation settlements. A 20-year period of fragmented stop-and-start collusion may lead to a reportable violation covering the last five years in the US and the EC, and the last 20 years in Canada.

Third, counsel must evaluate the scope of civil litigation exposure in all relevant jurisdictions concurrent with assessing whether you can and/or should apply for amnesty. Among other important questions are the following: What are the total direct sales likely subject to civil litigation and overcharge calculations? Are the direct customers large or small—and thus likely or unlikely to remain in (or opt out of) the inevitable direct purchaser class action lawsuit? Are major customers likely to be receptive to settlement offers? Looking at the facts and the locations where the company is present in the US, does it appear likely that a claim for damages arising from purely foreign sales may succeed? Is the product in question susceptible to indirect purchaser claims on behalf of consumers?

Fourth, one must continually evaluate the potential ‘snowball’ effects that flow from Amnesty Plus, Penalty Plus, and the Omnibus Question. This means that one must explore everything that company witnesses know, not just their knowledge of the immediate product. If a company finds that there is possible additional indirect exposure from anticipated reporting by a competitor or a witness, the possible ‘snowball’ effects have to be analysed. This can be a complicated analysis and one that has to be performed quickly and updated throughout the investigation.

The analysis should track by amnesty-product competitors, by company witnesses, and by jurisdictions (in which items are reportable) what disclosures of additional collusive activity could flow from reporting the present matter. This will allow counsel to look ahead and answer important questions, such as the following, for example: If you turn in Competitor A on Product X, can Competitor A seek Amnesty Plus credit on Product Y? If yes, in what jurisdictions and for what periods? If other activities with Competitor A reportedly involved collusion in one jurisdiction, such as the EU, but not in another, such as the US, to cite a not-uncommon pattern, what risk is there that Competitor A, under pressure because of its criminal exposure in the immediate investigation, could discover some connection to the US that your company

witnesses have not identified to date? Non-amnesty witnesses facing jail time in the US may manage to recall statements and connections that others do not. Individuals facing prison will have no lack of motivation in searching their memories for a telephone call, a meeting, or some other contact that—while incidental in the minds of other participants—might form the basis of an arguable violation.

Evaluating second-tier ‘snowball’ effects may also be necessary. If, for example, a witness would respond to the Omnibus Question by reporting collusion on new Product Z with Competitor F and one assumes the company will therefore need to apply for amnesty on Product Z, what is the Amnesty Plus-related potential for Competitor F turning in yet another product?

Evaluating just a few of these questions makes it abundantly clear why Amnesty Plus, Penalty Plus, and the Omnibus Question have led to an exponential growth in reported violations.

## Conclusion

For these reasons, representation of clients who have been involved in hard-core competition law violations remains an enormous challenge and one that requires speed, careful analysis, and familiarity with the enforcement and amnesty policies of multiple jurisdictions. Where this challenge arises from inconsistent amnesty policies among different countries, further coordination and convergence is warranted and should continue to be explored. In addition, limiting the US civil litigation exposure of amnesty applicants could also dramatically increase the reporting incentives and simplify the decision to cooperate. Recently US Assistant Attorney General Pate has signaled an openness to evaluating doing exactly that, indicating that the DoJ is considering supporting a proposal to amend the US competition laws to limit the civil damages exposure of amnesty applicants to non-trebled actual damages arising from their own sales to customers. Such a change would remove a hurdle to self-reporting cartel conduct in certain cases. In addition, and perhaps most notably for inside and outside counsel, it would speed up—not slow down—the race to the prosecutor in cartel cases. ●

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