

**American Bar Association
Section of Antitrust law
2003 Annual Meeting**

THE INTERNATIONAL LENIENCY REVOLUTION

**The Transformation Of International Cartel Enforcement During The First
Ten Years Of The United States' 1993 Corporate Amnesty/Immunity Policy**

By

Gary R. Spratling & D. Jarrett Arp

**San Francisco, California
August 12, 2003**

Gary R. Spratling

Gibson, Dunn & Crutcher LLP
One Montgomery Street
San Francisco, CA 94104
Tel: 415.393.8222
gspratling@gibsondunn.com

D. Jarrett Arp

Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
Tel: 202.955.8678
jarp@gibsondunn.com

Table of Contents

I. Introduction.....	1
II. History Of The United States Leniency Policy	2
A. The Initial Leniency Program.....	2
B. The 1993 Revisions: The New Corporate Leniency Policy	3
C. Convincing the Bar	4
D. Clarifying the Policy.....	5
1. Not the Leader or Originator	5
2. Disclosure to Foreign Authorities.....	6
3. Expanding the Scope of the Conspiracy.....	7
4. Model Amnesty Letter.....	7
III. The Impacts Of The Revised Amnesty Policy On Criminal Enforcement In The United States.....	8
A. The Race To The Prosecutor	8
B. Increase In The Number Of Applications For Amnesty.....	9
C. Increase In Caseload: The Amnesty Policy As A Significant Generator Of New Cases.....	9
1. Amnesty Plus And Penalty Plus: The Carrot And The Stick	9
2. The Omnibus Question	11
D. Increase In Penalties	12
1. Fines In Cartel Cases	12
2. Increase In Jail Sentences	13
E. International Prosecutions	14
IV. Impact Of The 1993 Amnesty Policy On International Cartel Enforcement: Leniency Fever & Convergence.....	15
A. Introduction.....	15
B. Canada	15
1. The Policy In Canada Prior To The Issuance Of The Current Immunity Bulletin	15
2. Canada's Immunity Bulletin	16
3. Remaining Differences	17
C. European Union.....	20
1. 1996 Leniency Notice.....	20
2. Draft Revisions	22
3. 2002 Leniency Notice.....	23

4. Remaining Differences	25
D. Enforcement and Leniency In Other Countries	26
1. The United Kingdom	26
2. Australia.....	30
3. Other Jurisdictions.....	33
V. Impact Of The 1993 Amnesty Policy On Civil Litigation	34
A. Growth In Cartel-Related Civil Litigation.....	34
1. Direct Purchaser Actions	35
2. Opt-Out Litigation	36
3. Indirect Purchaser Actions.....	36
B. Policy Issues Raised By Criminal And Civil Proceedings In Cartel Cases.....	37
C. Procedural Issues Raised By Amnesty Applications.....	39
1. Discovery Of Written Amnesty Submissions & A "Paperless" Process	39
2. Cooperation With The DOJ And Testimony	41
D. Extra-Territorial Civil Exposure In U.S. And U.K. Courts	42
VI. A New Paradigm For Counsel In International Cartel Matters	43
A. Rule No. 1: Speed Wins (No Tickets For Going Too Fast).....	43
B. Rule No. 2: If You Report In The U.S., You Likely Will Have To Promptly Report In The EU And Canada As Well.	44
C. Rule No. 3: You Cannot Avoid – And Therefore Must Not Fail To Consider – Amnesty Plus, Penalty Plus, And Omnibus Hell.....	45
D. Rule 4: Most Importantly, And Because Of The Foregoing, You Must Swiftly Engage In A Simultaneous Relational Analysis Of Opportunities And Risks In Diverse Jurisdictions.....	47
1. Immediately gather the facts, interview key witnesses and, where feasible, review significant documents.	47
2. Evaluate the scope of civil litigation exposure concurrent with assessing whether you can and/or should apply for amnesty.	47
3. Conduct a jurisdiction-by-jurisdiction analysis of the potential leniency application.....	48
4. Continually evaluate the potential "snowball" effects that flow from Amnesty Plus, Penalty Plus, and the Omnibus Question.....	48
E. Rule 5: Never Forget The Civil Litigation.	49
VII. Trends & Challenges For The Future.....	50
A. Continued Convergence.....	50

B. Increased Focus & International Cooperation With Respect To Interference With The Investigatory Process.....	51
C. Increasing International Cooperation	52
1. Assistance With Unilateral Investigations.....	53
2. Coordinated International Investigations.....	53
D. Civil Litigation Issues.....	53

THE INTERNATIONAL LENIENCY REVOLUTION

The Transformation Of International Cartel Enforcement During The First Ten Years Of The United States' 1993 Corporate Amnesty/Immunity Policy

by

Gary R. Spratling & D. Jarrett Arp*

I. Introduction

The dramatic surge of 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 program and the follow-on adoption of analogue programs by the major jurisdictions most active in anti-cartel efforts.

Ten years after the adoption of the U.S. Department of Justice's 1993 revisions to the Corporate Leniency Policy, this paper endeavors to review the evolution of that policy and its counterparts abroad, the consequences of the growth in leniency programs, and the remaining issues and challenges presented by the leniency revolution.

To that end, the paper reviews the following:

- The history of the United States Corporate Leniency Policy (Section II);
- The impacts of the 1993 revised policy on criminal enforcement in the United States (Section III);
- The impacts of the policy on international cartel enforcement (Section IV);
- The policy's impact on civil litigation (Section V);
- The new paradigm for defending companies in international cartel matters (Section VI); and
- Notable current trends and challenges for the future of cartel enforcement (Section VII).

* Mr. Spratling and Mr. Arp are partners at Gibson, Dunn & Crutcher LLP in San Francisco and Washington, D.C., respectively, and regularly represent companies and individuals in connection with U.S. and foreign cartel investigations and related litigation. They have represented parties involved in more than a dozen leniency matters and nearly twenty international cartel matters during the last three years. Mr. Spratling is Co-Chair of the firm's Antitrust Practice Group and, until January 2000, was Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, with responsibility for supervising all criminal investigations and prosecutions, domestic and international. The authors wish to acknowledge and thank our colleague, Alexandra Shepard, for her generous assistance in preparing portions of this paper.

II. History Of The United States Leniency Policy

A. The Initial Leniency Program

- The Antitrust Division's original Corporate Leniency Policy was initiated in October 1978 under then-Assistant Attorney General John Shenefield.¹
- Under this policy, amnesty was available only to organizations that came forward before the Division had initiated an investigation.
- The grant of amnesty was dependant on prosecutorial discretion and was not automatic. Instead, it was based on the Division's evaluation of a series of seven factors: whether the party was the first to come forward, whether the confession was a truly corporate act, whether the Division could have reasonably expected it would become aware of the activities in the near future if the corporation had not reported them, whether the corporation promptly terminated its involvement in the activities, the candor and completeness with which the corporation reported the wrongdoing and assisted the Division in its investigation, the nature of the violation and the party's role in it, and whether the corporation had made or intended to make restitution to injured parties.²
- The policy was far from an overwhelming success, despite attracting an initial flurry of interest.³ One commentator called the policy "perhaps the least well understood and most infrequently invoked criminal law policy of the Antitrust Division."⁴ In the first ten years of the policy, only four companies qualified for amnesty: two in 1978, one in 1983, and one in 1984/85.⁵ In the fourteen and a half years that the policy operated, a total of only 17 corporations even applied for amnesty.⁶ The Division granted amnesty

¹ See John H. Shenefield, *The Disclosure of Antitrust Violations and Prosecutorial Discretion*, address before the 17th Annual Corporate Council Institute (Oct. 4, 1978).

² See *Prosecutorial Amnesty – "Whistleblowing Conspirators"*, 4 Trade Reg. Rep. (CCH) ¶ 13,112 (Aug. 16, 1994).

³ Then-Assistant Attorney General Anne Bingaman, when announcing the revisions to the program in 1993, called it only "somewhat successful." Anne K. Bingaman, *Some Initial Thoughts and Actions, Address Before the ABA Section of Antitrust Law* (Aug. 10, 1993), at 65 ANTITRUST & TRADE REG. REPORT 250 (Aug. 12, 1993) (hereinafter "Some Initial Thoughts").

⁴ Robert E. Bloch, *Past Practice and Future Promise: The Antitrust Division's Corporate Amnesty Program*, ANTITRUST 28 (Fall 1993).

⁵ See *id.* at 29 (citing statistics from the Antitrust Division's Office of Operations).

⁶ See Gary R. Spratling, *The Experience and Views of the Antitrust Division*, address before the United States Sentencing Commission Symposium, "Corporate Crime in America: Strengthening the 'Good Citizen'"

[Footnote continued on next page]

to only ten of these applicants.⁷ Three additional corporations inquired about the program, but did not ultimately seek formal admission.⁸

B. The 1993 Revisions: The New Corporate Leniency Policy

- Ten years ago, at the August 1993 Annual American Bar Association meeting, then-Assistant Attorney General Anne Bingaman announced a new Corporate Amnesty Policy.⁹
- The Division had determined that the policy's lack of certainty and transparency was a disincentive for companies to report their activities. It felt that that the "pre-existing investigation" limitation sharply reduced the incentive for companies to come forward, because they often would not be in a position to know if the Division had started an investigation. The Division had also concluded that the policy's efficacy was reduced because counsel could not make any guarantees to their clients that they would receive amnesty, even after they bared their souls to the Division and satisfied the criteria in the amnesty policy.¹⁰
- In order to correct these problems and provide additional incentives for companies to come forward and cooperate, Assistant Attorney General Bingaman unveiled a policy that was revised in three major respects.
- **Three Principal Differences Between the Old and New Policies**¹¹
 - First, the policy was changed to ensure that amnesty is automatic if there is no pre-existing investigation. That is, if a corporation comes forward prior to an investigation and meets the program's requirements, the grant of amnesty is certain and is not subject to the exercise of prosecutorial discretion.¹²

[Footnote continued from previous page]

Corporation" (Sept. 8, 1995) (hereinafter "The Experience and Views of the Antitrust Division") <<http://www.usdoj.gov/atr/public/speeches/speech1grs.htm>>.

⁷ *Id.*

⁸ *Id.*

⁹ See Bingaman, *Some Initial Thoughts*.

¹⁰ *Id.*

¹¹ See Spratling, *The Experience and Views of the Antitrust Division*.

¹² See U.S. Department of Justice, Antitrust Division, *Corporate Leniency Policy*, August 10, 1993, Part A (hereinafter "DOJ Corporate Leniency Policy") <<http://www.usdoj.gov/atr/public/guidelines/lencorp.htm>>.

- Second, the Division created an alternative amnesty, whereby amnesty is available even if cooperation begins after an investigation is underway.¹³
- Third, 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. In addition, executives of a corporation seeking amnesty after an investigation has begun will be given serious consideration for lenient treatment – in the form of individual amnesty or individual immunity – in exchange for their full cooperation.¹⁴

C. Convincing the Bar

- Because the features of the revised program – automatic amnesty, post-investigation amnesty and complete protection for cooperating individuals – were such dramatic departures conceptually from traditional applications of corporate amnesty principles, many in the private bar initially took a wait-and-see approach to evaluate how the Division would apply the new program.¹⁵
- The Division seized every available opportunity to educate the bar and the business community on the merits of the program, and, more importantly, built a solid record of applying the program consistently and fairly.¹⁶

¹³ See DOJ Corporate Leniency Policy, Part B.

¹⁴ See DOJ Corporate Leniency Policy, Part C.

¹⁵ See, e.g., Gary R. Spratling, *The Corporate Leniency Policy: Answers to Recurring Questions*, address before the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998) (hereinafter "Answers to Recurring Questions") <<http://www.usdoj.gov/atr/public/speeches/1626.htm>>. The Practising Law Institute's course materials for its 35th Annual Antitrust Law Institute in the summer of 1994 cautioned, "Whether or not Bingaman's objectives of inducing more corporations to come forward and increasing the deterrence through the antitrust laws are accomplished remain to be seen. Much will depend not just on the number of corporations who attempt to take advantage of the new policy, but also on the practical application of the specific requirements of the policy by the Division." Stephen Squeri, *Government Investigation and Enforcement: Antitrust Division*, Practising Law Institute, 35th Annual Antitrust Law Institute (June-July, 1994). See also Bloch, *Past Practice and Future Promise*, at 30 (After examining the reasons why the old policy did not encourage more self-reporting, suggesting, "If the Division is really serious about getting more bang for its scarce bucks, it will implement this revised policy with greater flexibility in order to create more realistic incentives to come forward at a strategically meaningful time.").

¹⁶ Then-Deputy Assistant Attorney General Gary Spratling, one of the authors of this paper, gave a number of speeches that touted the policy. See, e.g., Anne K. Bingaman and Gary R. Spratling, *Criminal Antitrust Enforcement*, joint address before the Criminal Antitrust Law and Procedure Workshop, ABA Section of Antitrust Law (Feb. 23, 1995) <<http://www.usdoj.gov/atr/public/speeches/95-02-23.txt>>; Spratling, *The Experience and Views of the Antitrust Division*; Spratling, *Answers to Recurring Questions*; Gary R.

[Footnote continued on next page]

- Over time, the antitrust bar's reservations have been replaced with a continually growing recognition of the program's merits and a respect for the Division's good faith in granting amnesty applications. As time passed, it was frequently members of the private bar, rather than government representatives, who raised the advantages of the Division's Amnesty Program at continuing education programs.¹⁷ The program also gained attention in the national media, and high-profile stories in publications like *Forbes* and *USA Today* spread the message even further.¹⁸

D. Clarifying the Policy

- During the first few years of the policy's operation, however, defense counsel and their clients raised a number of questions about how the policy would be applied in certain circumstances. In some instances, misplaced concerns or misinterpretations resulted in companies delaying their applications for amnesty or even refraining from applying at all. Because any delay at all could cost a company a criminal conviction and tens or even hundreds of millions of dollars in fines, it became obvious that certain aspects of the policy needed clarification. Then-Deputy Assistant Attorney General Gary Spratling gave two major speeches that provided further details on the Division's approach to these issues.¹⁹

1. Not the Leader or Originator

- Under the U.S. Corporate Leniency Policy, to obtain amnesty before an investigation has begun one must show that "[t]he corporation did not coerce

[Footnote continued from previous page]

Spratling, *Making Companies An Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy – An Update*, address before the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999) (hereinafter "Corporate Leniency Policy Update") <<http://www.usdoj.gov/atr/public/speeches/2247.htm>>. Assistant Attorney General Anne Bingaman also promoted the policy. See, e.g., *Interview: Anne K. Bingaman*, ANTITRUST 8 (Fall 1993); Anne K. Bingaman, *Report from the Antitrust Division, Spring 1994*, address before the American Bar Association Antitrust Spring Meeting (Apr. 8, 1994) <<http://www.usdoj.gov/atr/public/speeches/94-04-08.txt>>; Anne K. Bingaman, *The Clinton Administration: Trends in Criminal Antitrust Enforcement*, address before the Corporate Counsel Institute (Nov. 30, 1995) <<http://www.usdoj.gov/atr/public/speeches/speech.n30.txt>>.

¹⁷ See Spratling, *Answers to Recurring Questions*.

¹⁸ See, e.g., Janet Novak, *Fix and Tell*, FORBES, May 4, 1998, at 46; Jayne O'Donnell, *Company Turncoats Race To Justice For Corporate Amnesty*, USA TODAY, June 1, 1999, at 1B.

¹⁹ See Spratling, *Answers to Recurring Questions*; Spratling, *Corporate Leniency Policy Update*.

another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity."²⁰

- Recognizing that this language presented interpretive ambiguity and could be read to exclude a significant range of potential amnesty applicants, the DOJ clarified that its policy disqualifies an amnesty applicant only if it is the singular organizer or the singular ringleader of the cartel activity.²¹

2. Disclosure to Foreign Authorities

- The Division found that almost invariably, when a company was considering whether to report their involvement in international cartel activity, they raised a concern as to whether the Division would disclose the information it learned to any foreign governments in accordance with the U.S.'s obligations under bilateral antitrust cooperation agreements.
- The Division weighed the policy concerns on both sides of this issue, and made a determination that it would not disclose to foreign antitrust agencies information obtained from an amnesty applicant unless the amnesty applicant agreed to the disclosure. They felt that such a policy was in everyone's interest. The DOJ had no doubt that amnesty applications would dry up if they disclosed such information, and, consequently, that large numbers of international conspiracies would go unreported. Moreover, amnesty applications led the Division to other conspirators and to additional evidence provided by them – information that the Division would

²⁰ DOJ Corporate Leniency Policy ¶ A(6). The role-in-the-offense standard for obtaining amnesty under the alternative provisions of Part B of the DOJ policy, which covers situations such as when the DOJ has already initiated an investigation, is more subjective and discretionary. One of the seven conditions that must be met in order to receive amnesty under this Part is that: "The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward." *Id.* at ¶ B.7. In making that assessment, "the primary considerations will be how early the corporation comes forward and whether the corporation coerced another party to participate in the illegal activity or clearly was the leader in, or originator of, the activity. The burden of satisfying condition 7 will be low if the corporation comes forward before the Division has begun an investigation into the illegal activity. That burden will increase the closer the Division comes to having evidence that is likely to result in a sustainable conviction." *Id.*

²¹ See Spratling, *Answers to Recurring Questions*; Scott D. Hammond, *A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program*, address before the ABA Antitrust Section's 50th Annual Spring Meeting (Apr. 24, 2002) (hereinafter "Hammond 2002 Spring Meeting Address"), at 14 ("[U]nder the Division's program, applicants will only be disqualified from obtaining total amnesty if they are clearly the single organizer or single ringleader of a conspiracy"); *id.* at 14 n.9 ("[I]f there are two ringleaders in a five-firm conspiracy, then all of the firms, including the two leaders, are potentially eligible for amnesty. Or, if in a two-firm conspiracy, each firm played a decisive role in the operation of the cartel, both firms may qualify for amnesty.").

and did share with foreign government agencies, and that was not protected by the amnesty applicant's agreement with the Division.²²

3. Expanding the Scope of the Conspiracy

- The Division found that companies frequently applied for amnesty before completing their internal investigations in order to ensure their place at the front of the line. As a result, their ongoing internal investigation might uncover anticompetitive activity that was more extensive than the conduct originally reported and that fell outside of the protection of the conditional amnesty letter. For example, they might discover evidence showing that the anticompetitive activity involved more products than originally reported. Defense counsel raised questions about whether a company's amnesty protection could be expanded to include the newly discovered conduct.
- The Division determined that the amnesty coverage would be expanded to include newly discovered conduct, assuming that the company was providing full, continuing, and complete cooperation, and that the company could meet the criteria for amnesty on the newly discovered conduct.²³

4. Model Amnesty Letter

- In the interest of transparency and predictability, the DOJ created a model conditional amnesty letter that is publicly available for prospective applicants to review.²⁴ The letter states the particular obligations of an amnesty applicant, including the specifics of what precise cooperation is necessary and a requirement that the applicant make restitution to victims of the cartel. The initial model conditional amnesty letter has been tweaked over the years, and the current version is contained in the materials for today's program.
- The letter also binds the government in certain respects beyond the obvious commitment to provide immunity if the applicant meets the letter's conditions. For example, the DOJ agrees in the model letter that disclosures made to the DOJ by counsel for the amnesty applicant in furtherance of the amnesty application will not constitute a waiver of the attorney-client privilege.²⁵

²² See Spratling, *Corporate Leniency Policy Update*.

²³ *Id.*

²⁴ See Spratling, *Answers to Recurring Questions* (introducing and attaching Model Amnesty Letter).

²⁵ *See id.*

III. The Impacts Of The Revised Amnesty Policy On Criminal Enforcement In The United States

The revised amnesty policy has had a tremendous impact on antitrust enforcement in the United States, an impact that cannot be understated. 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 ten years ago. The amnesty program and related policies have generated a significant number of new and often very large cases, 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 offenses.

A. The Race To The Prosecutor

- Under the amnesty policy, the extremely beneficial prizes awarded to the first amnesty applicant in the door, in combination with the fact that the most important of those prizes – no criminal conviction, no fines, no jail time – are unavailable to the second arrival, have made getting in first the top priority for companies who decide to self-report (or who believe a co-conspirator is likely to self-report).
- The Antitrust Division has made no secret – indeed officials of the agency have broadcast – that its objective has been to create a race to the prosecutor.²⁶ The Division emphasizes that only the first in the door gets amnesty, cites the adverse financial consequences of not being first in the door, and discloses that the difference between being first and second is often only a few days, and sometimes only a few hours.²⁷ In one matter the authors are familiar with, the difference was less than 10 minutes.
- Members of the private bar have heard this message and responded to it with intense efforts to be first in the door when their clients decide to investigate and report violations.²⁸

²⁶ See Scott D. Hammond, *Lessons Common To Detecting And Deterring Cartel Activity*, address before the Third Nordic Competition Policy Conference (Sept. 12, 2000) (hereinafter "Lessons Common to Detecting and Deterring") <<http://www.usdoj.gov/atr/public/speeches/6487.htm>>; Spratling, *Corporate Leniency Update*; Novack, *Fix and Tell*.

²⁷ See Hammond, *Lessons Common To Detecting And Deterring*; Spratling, *Corporate Leniency Update*; James M. Griffin, *A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, address before The American Bar Association Section of Antitrust Law Annual Meeting (Aug. 12, 2003) (hereinafter "Summary Overview") at 8.

²⁸ O'Donnell, *Company Turncoats*; Novak, *Fix and Tell*.

B. Increase In The Number Of Applications For Amnesty

- As word of the policy's benefits spread, more and more corporations came and continue to come forward, reporting their activities, and seeking amnesty. In the first year of the revised amnesty policy, an average of one corporation per month sought amnesty, compared to one per year under the old policy.²⁹
- The number of amnesty applicants has continued to increase each year, and now averages over one per month.³⁰ In the first six months of fiscal year 2003 (October 2002 to March 2003), the rate surged to three per month.³¹

C. Increase In Caseload: The Amnesty Policy As A Significant Generator Of New Cases

- One of the major fruits of the amnesty policy is the increase in the Division's criminal caseload. The Division has repeatedly stated that the amnesty program is its most significant generator of new criminal investigations.
- The Division has developed three notable 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.

1. Amnesty Plus And Penalty Plus: The Carrot And The Stick

- One of the ways in which the Division encourages the reporting of information about additional cartel activities is by rewarding those who report under certain circumstances and significantly penalizing those who do not.

a) Amnesty Plus.

- As the Antitrust Division gained experience in international cartel investigations and developed a docket of international prosecutions in the last half of the 1990s, a pattern emerged: roughly one-half of the investigations were initiated as a result of evidence developed during an investigation of a completely separate market. The pattern remains, as the

²⁹ Griffin, *Summary Overview*, at 8.

³⁰ *Id.*

³¹ *Id.*

Division continues to initiate approximately one-half of its international cartel investigations as spin-offs of ongoing investigations.³²

- This pattern, and the potential for generating even more spin-off investigations, led the Division to take a proactive approach to attracting amnesty applications by encouraging subjects and targets of investigations to consider whether they may qualify for amnesty in other markets where they sell. The Division established and implemented a program referred to as “Amnesty Plus.”³³
- 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 offense, and none of its officers, directors, or employees who cooperate will be prosecuted criminally in connection with that offense. Plus, the company will receive a substantial additional discount from the Division in the calculation of the fine for its participation in the first conspiracy. Many of the Division’s international cartel investigations have resulted from such Amnesty Plus spin-offs of ongoing investigations of international cartels.³⁴

b) Penalty Plus.

- The Antitrust Division now takes the position that, if a company has the opportunity for an Amnesty Plus disclosure and rejects it in favor of nondisclosure, it will seek a substantial increase in the penalty against the company for its failure to report the second offense. This increases the incentive for each company in this situation to report the second offense and, therefore, enhances the risk that the cartel will be detected.
- This increase in penalty is referred to as “Penalty Plus,” and results when a company has knowledge of a second offense but elects not to report it, and the Antitrust Division later detects the second offense, discovers the

³² *Id.* at 9.

³³ See Spratling, *Corporate Leniency Policy Update*; see also Gary R. Spratling, *Characteristics of the International Cartel Enforcement Environment: The United States – 2002*, address before The New York State Bar Association's Antitrust Law Section Annual Meeting 2003 (Jan. 23, 2003) (hereinafter "International Cartel Enforcement Environment").

³⁴ Griffin, *Summary Overview*, at 9.

company's nondisclosure election, and successfully prosecutes the company for that offense.

- Under Penalty Plus, the Division will urge the sentencing court to consider the company's and any culpable executive's failure to report as an aggravating sentencing factor. The Division will request that the court impose a term and conditions of probation and will pursue a fine or jail sentence at or above the upper end of the Guidelines range.
- For a company, the failure to self-report under amnesty-plus circumstances could mean the difference between no fine at all on the second product under Amnesty Plus, and a fine as high as 80 percent 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.³⁵

2. The Omnibus Question

- The Amnesty Plus program's efforts to leverage off of existing leniency applications to discover other violations are bolstered by another notable practice within the Antitrust Division – the now-standard practice of Antitrust Division attorneys to ask the so-called “omnibus question” at the conclusion of a witness interview (or grand jury interrogation).³⁶
- Division attorneys pose the omnibus question after examining a witness about anticompetitive 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: e.g., price fixing, bid rigging, market allocation] with respect to other products in this industry or in any other industry?”
 - The question as posed varies somewhat in practice, but it is often framed in very broad terms, without regard to the limits of extra-territorial jurisdiction and the applicable five-year statute of limitations.
 - The witness must answer the question, and must answer it truthfully, or he/she not only would lose whatever protection he/she would otherwise have had for

³⁵ See discussion of Penalty Plus in Scott D. Hammond, *When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put A Price On An Individual's Freedom?*, address to the National Institute On White Collar Crime (Mar. 8, 2001), at 7 (hereinafter "Calculating the Costs and Benefits") <<http://www.usdoj.gov/atr/public/speeches/7647.htm>>; Spratling, *International Cartel Enforcement Environment*, at 25.

³⁶ See Spratling, *International Cartel Enforcement Environment*.

his/her statements, but also would be subject to the penalties of perjury or making false statements or declarations.

- In the international cartel context, the omnibus question comes up most commonly in three situations: (i) a cooperating director, officer, or employee being interviewed pursuant to the Antitrust Division's conditional amnesty agreement with his/her firm; (ii) a cooperating director, officer, or employee being interviewed pursuant to the cooperation provisions of the Antitrust Division's plea agreement with his/her firm; or (iii) an executive being interviewed pursuant to the cooperation provisions of his/her separate plea agreement with the Antitrust Division.³⁷
- Conditional amnesty agreements and plea agreements have iron-clad, unambiguous requirements regarding a director's, officer's, or employee's obligation to respond fully and truthfully to all inquiries of the United States.
- 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.

D. Increase In Penalties

- According to the Division, cooperation from amnesty applicants has been the foundation for the conviction of "scores" of individuals and corporations and the imposition of over \$1.5 billion in fines since it began tracking these numbers in fiscal year 1997.³⁸

1. Fines In Cartel Cases

- Since the beginning of fiscal year 1997, the Antitrust Division has obtained over \$2 billion dollars in fines from criminal defendants.³⁹ As noted above, the Division

³⁷ The omnibus question is also asked in grand jury interrogations, but to date that has been a less common method of developing evidence of cartel activity in the subject investigation and in spin-off investigations.

³⁸ Griffin, *Summary Overview*, at 8; *see also* Pate, *Anti-Cartel Enforcement* (noting that the amnesty policy has given rise to "an increase in the quality and quantity of the evidence of a cartel and a corresponding increase in the rates of conviction in our cases."). Just this year, the Division used the testimony of an amnesty witness at trial for the first time. Pate, *Anti-Cartel Enforcement*. In the Division's successful price-fixing prosecution of Alfred Taubman, the former chairman of Sotheby's auction house, one of the critical witnesses was the CEO of its co-conspirator, the auction house Christie's, who was protected by Christie's conditional amnesty agreement with the government. Following Taubman's conviction at trial, he was sentenced to serve one year in jail and pay a \$7.5 million fine, one of the highest individual fines ever imposed in a Division matter.

³⁹ *See* Griffin, *Summary Overview*, at 6.

has stated that assistance from amnesty applicants has been the foundation for the imposition of over \$1.5 billion of that \$2 billion in fines.

- The largest of these fines, the \$500 million fine levied against Hoffman-La Roche in 1999 for its involvement in the vitamins cartel, is the largest fine ever imposed in a criminal prosecution of any kind anywhere in the world.

2. Increase In Jail Sentences

- In recent years, the Division has highlighted another success in its cartel enforcement program that has often been overshadowed by the increasing size and number of corporate fines: individual jail sentences.⁴⁰
- In FY 2002, the Division secured over 10,000 jail days against individual defendants in domestic and international cases, an average of 18 months per defendant.⁴¹ That figure includes the longest jail sentence ever imposed on a defendant in connection with antitrust offenses: a ten-year sentence for Austin "Sonny" Shelton for his role in a bid-rigging, bribery, and money laundering scheme in Guam. It also includes one of the longest sentences imposed in connection with a case involving an amnesty applicant. In May 2002, Elmore Roy Anderson was sentenced to serve three years in prison and pay a \$25,000 fine after being convicted at trial for his role in an international conspiracy to rig bids on U.S. government-funded construction contracts. The government's investigation into this conspiracy, which also led to the conviction of four companies and over \$140 million in fines, was advanced through the assistance of an amnesty applicant.⁴²
- Since FY 1999, courts have imposed over 75 years in prison on individual defendants in connection with antitrust and related offenses, and more than 30 defendants have received terms of one year or longer.⁴³

⁴⁰ See Pate, *Statement* (citing "a recent trend toward more certain and longer prison terms for individual antitrust offenders."); Hammond, *Calculating the Costs and Benefits* ("In the past two years, the stakes have increased for individuals. While many observers have focused on the record corporate fines over the last few years, fewer have recognized the recent dramatic increase in the length and incidence of individual jail sentences."). For a further discussion of this issue, see Gary R. Spratling, *New Trends Create An Even Riskier Target Zone For International Cartel Participants*, address to the National Institute On White Collar Crime (Mar. 8, 2001) ("Trend #1: The United States Is Now Seeking To Obtain Jail Sentences More Frequently Against Foreign Individuals Involved In International Cartels").

⁴¹ Griffin, *Summary Overview*, at 2.

⁴² *Id.* at 9.

⁴³ *Id.* at 2-3.

- Like the rise in corporate fines, there can be no doubt that some of this increase can be credited to the quality and quantity of evidence generated by the amnesty program.

E. International Prosecutions

- Prior to the introduction of the revised amnesty policy, the Antitrust Division had no international cartel program to speak of. In the early days of the amnesty policy, however, the Division identified detection and prosecution of international cartels as a top priority. The amnesty policy has come to play a very significant role in carrying out what has turned out to be a blockbuster program for the Division, and the Division has stated that the amnesty program is its most effective generator of international cartel cases.⁴⁴
- Just a year ago, the Division had over 30 sitting grand juries investigating cartel activity that was international in scope.⁴⁵ By mid-May of 2003, that number had risen to 40.⁴⁶ As of the beginning of this month, August 2003, there were approximately 50 sitting grand juries investigating international cartel activity.⁴⁷
- The overwhelming majority of large fines imposed on antitrust defendants have been against organizations involved in international cartels. For example, in every case where the U.S. Department of Justice has secured a fine above \$20 million for cartel activity, the cartel has been international in scope, as opposed to domestic. In 18 of the 22 instances in which the fine was \$20 million or greater, and in 33 of the 39 instances in which the fine was \$10 million or greater, the organizations were foreign-based.
- The expansion of the Division's international cartel program has also led to the prosecution of individuals from thirteen different nations outside of the United States: Germany, Belgium, the Netherlands, England, France, Switzerland, Italy, Canada, Mexico, Japan, Sweden, South Africa, and Korea. Defendants from Canada, Germany, Switzerland, Sweden, and France have been sentenced to prison terms in the U.S.⁴⁸

⁴⁴ *Id.* at 8.

⁴⁵ U.S. Department of Justice, Antitrust Division, *Antitrust Division Status Report: International Cartel Enforcement* (Feb. 2002), cited in Spratling, *International Cartel Enforcement Environment*, at 2.

⁴⁶ See Pate, *Anti-Cartel Enforcement*.

⁴⁷ Griffin, *Summary Overview*, at 2.

⁴⁸ *Id.* at 3.

IV. Impact Of The 1993 Amnesty Policy On International Cartel Enforcement: Leniency Fever & Convergence

A. Introduction

- The success of the DOJ's 1993 Amnesty Program has led other countries to adopt leniency programs – 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 (discussed in detail below) a growing list of countries have also developed or are in the process of developing their own leniency policies, including The Netherlands, Germany, Hungary, France, Ireland, the Czech Republic, Brazil, and Korea.
- As set forth below, most of the policies have either been patterned after the DOJ policy or eventually gravitated toward the DOJ approach in most respects. This convergence in policies has been critical to encouraging the reporting of international cartels.
- Although different jurisdictions will and do vary in certain aspects of their leniency policies, there is a broad recognition that they need to be similar in material respects because decisions made by international cartel participants about whether to self-report and cooperate with enforcement authorities are global decisions. 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.
- With these considerations in mind, this section assesses the current status of convergence in the leniency area. To do so, it reviews and compares a selection of immunity policies, focusing on Canada and EC, unquestionably the two most important jurisdictions in addition to the U.S.

B. Canada

- Canada's immunity policy, Immunity Program Under the Competition Act, ("Immunity Bulletin"), closely mirrors the U.S. policy, and like the U.S. policy, has been highly successful in encouraging cartel participants to come forward.

1. The Policy In Canada Prior To The Issuance Of The Current Immunity Bulletin

- Canada has had some form of leniency since 1991. Early on, the policy was laid out in speeches and other statements by senior officials of the Bureau of Competition, rather than in a formal written policy. As a result, the policy was difficult to fully grasp or to rely upon. One aspect of the policy that was relatively clear was that it

provided an opportunity for leniency (*i.e.*, lenient treatment short of immunity), but not full immunity.⁴⁹

- Like the original U.S. policy, the initial leniency policy in Canada was not a great success. In the period 1991 to 2000, the Bureau probably received no more than 12 applications, and those applications generated only a small number of cases.⁵⁰ However, as the number of requests for immunity grew and the need for a more transparent policy became obvious, the Bureau issued two draft policies, one in 1999 and a second in 2000.
- The May 1999 version of the leniency policy gave the Attorney General significant discretion in determining leniency, a marked contrast to the U.S. policy of automatic conditional amnesty to the first applicant in the door. Recognizing the need for further change, Canada revised the policy. A draft revised policy was issued in February 2000 and, after a period of public comment, the Bureau issued its final Immunity Bulletin on September 21, 2000.⁵¹

2. Canada's Immunity Bulletin

- The Immunity Bulletin, which adopts virtually all of the core elements of the U.S. policy, reflects a recognition by Canada that the U.S. policy was working well and that, while Canada could have elected to take a divergent approach, the larger objective of encouraging the reporting of cartel affecting North America was best served by complementary policies that are largely consistent.
- As in the U.S., under the Canadian policy immunity is available to the first party to disclose an offense when the Bureau is either unaware of the activity, or is aware of the activity but does not have sufficient evidence to warrant a referral of the matter to the Attorney General.⁵²

⁴⁹ For a fuller discussion of the original leniency policy in Canada, known as the "Cooperating Parties" policy, see Martin Low, *Canada's Immunity Program: One Year Later*, address before the CADE Seminar on Competition Law (Dec. 2001), at 4 (hereinafter "One Year Later") <<http://www.mcmillanbinch.com/AboutUs.aspx?Section1=AboutUs&Section2=Publication>>; Martin Low, *The Competition Bureau's Immunity Program: A View of Policy and Practice in Canada*, address before IBRAC 7th International Competition Conference (Nov. 23, 2001) at 1-2 (hereinafter "A View of Policy and Practice").

⁵⁰ See Low, *One Year Later*, at 4-5.

⁵¹ Competition Bureau Information Bulletin, Immunity Program Under the Competition Act (Sept. 21, 2000) (hereinafter "Immunity Bulletin") <[http://cb-bc.gc.ca/epic/internet/incbc.nsf/vwGeneratedInterE/ct01990e.html](http://cb.bc.gc.ca/epic/internet/incbc.nsf/vwGeneratedInterE/ct01990e.html)>.

⁵² Immunity Bulletin ¶ 13.

- The applicant then must meet certain requirements that are very similar to the requirements in the U.S. amnesty policy: the applicant must have terminated its participation in the illegal activity, must not have been the instigator or leader of the activity, nor the sole beneficiary of the activity in Canada, it must provide full, continuing, and timely cooperation, it must provide all information known or available to it, including the identification of any and all offenses in which it may have been involved, and it must make restitution.⁵³
- Although it is not stated directly in the document, the Immunity Bulletin also provides for an "Immunity Plus" that is very similar to Amnesty Plus in the United States.⁵⁴ If a party is not the first to report on activities in one cartel, but is the first to report on another (or more than one other), it may qualify for immunity in the second (or more) cartel(s) and also reduce the fine it receives in connection with the first cartel.
- The Bulletin is very careful to distinguish leniency in Canada from that of any other jurisdiction: it states clearly that the Bureau will not give any special treatment to an immunity applicant simply because it has been granted immunity or leniency in another jurisdiction.⁵⁵
- Even with this last caveat, there is no doubt that the convergence between the two policies is a great boon to anti-cartel enforcement in North America and the world. In many product areas, activities that impact competition the U.S. are highly likely to have some impact in Canada, and parties that seek amnesty in the United States will frequently, unless strategic reasons dictate otherwise, want to seek immunity in Canada. The similarities in the two policies make it easy for counsel to move into both jurisdictions quickly and with a minimum of extra effort, which benefits both the applicant and the enforcers – and provides even greater peril for the cartel participants that get left behind in one or both jurisdictions.

3. Remaining Differences

- Although the two policies are quite similar, the Canadian and U.S. policies differ in at least three respects.

⁵³ Immunity Bulletin ¶ 14.

⁵⁴ Competition Bureau, *Immunity Program – Frequently Asked Questions*, ¶ B (hereinafter "Immunity Program FAQ") < <http://cb-bc.gc.ca/epic/internet/incb-bc.nsf/vwGeneratedInterE/ct02312e.html> >.

⁵⁵ Immunity Bulletin ¶ 31.

a) "Any and all offences."

- The Bulletin requires that a party "must reveal any and all offences in which it may have been involved."⁵⁶ This provision, which was first introduced in the February 2000 draft of the Immunity Bulletin, has been one of the most controversial parts of the Canadian policy. On paper, it differs quite sharply from the U.S. policy, but in application very little from U.S. practice.
- The provision raises two issues. First, it appears to apply to literally any and all offenses, from offenses under the Competition Act to environmental violations to nonpayment of parking tickets. Second, it requires such information up front, at the outset of the investigation, when many counsel are still in the process of ferreting out even the most basic details of the specific conduct at issue. Finding out the additional details of any other offenses presents a practical and legal challenge that is enormous, making the immunity bulletin less a clear stand-alone policy than a mandatory program of unbounded disclosures to the Canadian government.
- In the United States, the Division does expect that amnesty applicants will report additional behavior as appropriate, and it creates compelling incentives (Amnesty Plus and Penalty Plus) and requirements (answering the omnibus question) that generally lead to that result. However, the Division does not expect that amnesty applicants will reveal, or even know of, any and all offences at the outset of an investigation, nor do they expect that amnesty applicants will reveal information about non-antitrust offenses.
- Before the final Immunity Bulletin was issued, current and former U.S. antitrust enforcers, as well as former Canadian officials and other commentators, advised the Competition Bureau that such a requirement would discourage potential applicants from coming forward.⁵⁷
- The Bureau ultimately included this provision in the final Immunity Bulletin in order to protect the credibility of the immunity applicant as a witness at any trial of other cartel members by airing, in advance, any offenses that might otherwise prejudice the applicant's credibility, and because such a

⁵⁶ Immunity Bulletin ¶ 16.a.

⁵⁷ See, e.g., Calvin S. Goldman and Mark Katz, *A Canadian Perspective on International Cartel Investigations and Prosecutions*, address before the American Bar Association Advanced International Cartel Workshop (Feb. 15-16, 2001) (hereinafter "A Canadian Perspective").

requirement is an obvious source of information about related and other offenses.⁵⁸

- In oral statements and in practice, however, the Bureau has not insisted on a cathartic cataloguing of all possible violations. Instead, they only expect that the immunity applicant will share information about Competition Act offenses. The Bureau has now stated this expectation in writing, referring to the obligation to report "all criminal anti-competitive behavior contrary to the Competition Act relating to the product for which immunity is sought."⁵⁹

b) Not the sole beneficiary in Canada.

- The Immunity Bulletin also requires that the immunity applicant not be the sole beneficiary of the activity in the Canada.
- This requirement raises potentially troubling issues. It leaves open the question of whether a participant in the cartel, simply by virtue of being the largest player in Canada in a particular market, could be considered the sole beneficiary.⁶⁰ In practice, however, the Bureau has not followed this interpretation.

c) No absolute guarantee of immunity.

- Because the Attorney General has exclusive authority to grant immunity in competition cases,⁶¹ the Competition Bureau's recommendation of immunity is not legally binding on the Attorney General.
- On paper, this kind of uncertainty is somewhat discomfoting. In practice, however, the Attorney General has consistently followed the recommendations of the Commissioner, and it is generally understood that the Attorney General has never rejected a recommendation for immunity in a competition case.
- This kind of practice demonstrates that, as with the United States' policy, certainty lies not just in the way the policy is written, but in the manner in which the enforcement agency interprets and carries it out.

⁵⁸ See Goldman and Katz, *A Canadian Perspective*.

⁵⁹ *Immunity Program FAQ* ¶ B.

⁶⁰ For a discussion of the purposes behind including this provision in the policy, see Low, *A View of Policy and Practice*, at 6-7.

⁶¹ Immunity Bulletin ¶ 11.

C. European Union

- The European Commission is the enforcement agency with the most significant recent changes to its leniency program. The EC's new Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (the "2002 Leniency Notice") issued in February 2002⁶² represents another major step toward convergence in U.S., Canadian, and EU amnesty programs, and it has led to striking results.
- Notably, the Commission received 20 applications in the first year of the new policy – a larger number of applications than it received in total during the six years under its prior policy.⁶³
- This reflects the fact that the 2002 Leniency Notice offered increased transparency and certainty for immunity applicants – and included many of the material provisions contained in the DOJ Corporate Leniency Policy and Canada's Immunity Bulletin. As developed below, this represented a substantial change from the EC's original leniency notice, but it does not fully align the EC policy with those of the U.S. and Canada.

1. 1996 Leniency Notice

- In 1996, the EC adopted its first Notice on the Non-Imposition or Reduction of Fines in Cartel Cases (the "1996 Leniency Notice").⁶⁴ The 1996 Leniency Notice, however, failed to provide some of the guarantees and procedures that were central to the U.S. and Canadian policies.
 - First, the Commission did not guarantee complete immunity, even if a company was the first to report a violation. Under the 1996 policy, a first-reporting company that satisfied all other requirements of the Notice was guaranteed a

⁶² Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, 2002/C45/03, 2002 O.J. (C45) 3 (hereinafter "2002 Leniency Notice") <http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf>.

⁶³ Bertus van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation*, ANTITRUST 84 (Spring 2003) (hereinafter "Bertus van Barlingen") (republished by the EC at EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003) <http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf>).

⁶⁴ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 96/C807/04, 1996 O.J. (C 207) (hereinafter "1996 Leniency Notice") <http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html>.

reduction of only 75 percent of the fine that would have been otherwise imposed.⁶⁵

- Second, the 1996 Leniency Notice provided for no up-front commitments by the Commission regarding whether an applicant would receive the favorable treatment it sought – or any favorable treatment at all. That issue was not addressed until the EC's entire investigation was concluded and the ultimate decision of the Commission was announced.⁶⁶
- Third, parties who were second in the door behind the lead immunity applicant were promised only a reduction of somewhere in the range of 10 to 50 percent of the fine – much less than what has been granted under the U.S. and Canadian policies.⁶⁷
- Fourth, an applicant for a fine reduction of 75 percent or more qualified only if it had "not compelled another enterprise to take part in the cartel and [had] not acted as an instigator or played a determining role in the illegal activity."⁶⁸ The terms "an instigator" and "played a determining role" were inherently subjective and potentially overbroad.⁶⁹
- These considerations, among others, led to perceptions that the 1996 Leniency Notice did not offer prospective applicants protections that were predictable, reliable, and sufficiently attractive to merit cooperation with the Commission.

⁶⁵ 1996 Leniency Notice ¶ B. The Notice provided for the possibility of no fines for a successful applicant, but in practice the Commission simply did not grant "full immunity" – with the exception of three cases decided toward the end of 2001, shortly before the new policy was announced. The three companies were Rhone-Poulenc (vitamins cartel), Interbrew subsidiary Brasserie de Luxembourg (Luxembourg brewers cartel), and Sappi (carbonless paper cartel). See European Commission, *Question & Answer On The Leniency Policy* (Feb. 13, 2002) (Memorandum – MEMO/02/23) (hereinafter "EC 2002 Memorandum") <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/02/23|0|RAPID&lg=EN>; Press Release, European Commission, *Commission Adopts New Leniency Policy For Companies Which Give Information On Cartels* (Feb. 13, 2002) <http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/247|0|RAPID&lg=EN>.

⁶⁶ 1996 Leniency Notice ¶ E(2).

⁶⁷ 1996 Leniency Notice ¶ D(1).

⁶⁸ 1996 Leniency Notice ¶ B(3).

⁶⁹ As the Commission itself later noted, "[e]xperience to date has shown that the notion of 'instigator' is somewhat vague (it is rarely clear-cut if and who the instigator of a cartel is: Who is a leader in a cartel of two or three? How many leaders can you have?) and to a certain extent jeopardized the effectiveness of the programme." EC 2002 Memorandum.

2. Draft Revisions

- In July 2001, the EC released its draft revised Leniency Notice ("Draft Notice").⁷⁰ The Draft Notice made substantial changes to the 1996 Leniency Notice, most of which were ultimately incorporated into the 2002 Leniency Notice (summarized below). Most of the changes reflected significant convergence with the U.S. and Canadian policies.
- That said, there were some notable omissions in the Draft Notice, and the Commission received a variety of comments. They included the ABA Antitrust and International Law Sections' comments,⁷¹ which focused on the importance of transparency and predictability for potential leniency applicants who must consider whether to make application in the U.S., Canada and the EU simultaneously. As the ABA Comments explained,

[w]hile counsel for a corporation involved in wrongdoing will certainly advise the Board of Directors that illegal behavior must cease, the practical reality is that a high level of certainty in outcome is critical to encouraging self-reporting and cooperation by the corporation. Because of the global nature of many antitrust conspiracies, a Board of Directors must consider not only the EU's position on immunity and fine reductions, but also the policies in the United States, Canada, and elsewhere. In the Board's multi-faceted analysis of whether it is in the best interests of the corporation to notify the various authorities and voluntarily provide significant evidence of the existence of (and its participation in) a cartel, the Board must have an understanding of the economic benefits to be received from such cooperation, as well as the risk that full or partial immunity will be denied. Increased transparency and certainty in the immunity process facilitates the Board's determinations, thereby likely increasing the frequency and quality of cooperation.⁷²

⁷⁰ Notice Of The Commission Relating To The Revision Of The 1996 Notice On The Non-Imposition Or Reduction Of Fines In Cartel Cases (July 18, 2001).

⁷¹ THE OBSERVATIONS AND COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW AND PRACTICE ON THE DRAFT COMMISSION NOTICE ON IMMUNITY FROM FINES AND REDUCTION OF FINES IN CARTEL CASES (Sept. 2001) (hereinafter "ABA Antitrust Comments") <<http://www.abanet.org/antitrust/commentseu.html>>.

⁷² *Id.* at 3.

- To that end, the ABA proposed additional clarifications or changes to the Draft Notice to increase convergence with the U.S. and Canadian policies. Among its recommendations designed to align the EU with the U.S. and Canada were the following:
 - Provide an opportunity for immunity to entities that come forward and cooperate even after the Commission has commenced an investigation if another applicant has not already secured immunity;
 - Do not hinge the granting of conditional immunity on the quality of the information initially provided by the applicant (since the objective is to encourage applicants to come in as soon as possible) and give the entities more than a mere five days to present their evidence;
 - Eliminate the practice of requiring formal written submissions by immunity applicants (and instead permit oral presentations); and
 - Increase the potential fine reduction for second-reporting companies to greater than 50 percent.

3. 2002 Leniency Notice

- The 2002 Leniency Notice, issued in February 2002, adopted a number of the ABA suggestions and, as a general matter, made substantial steps toward a leniency policy that is more transparent, predictable, and aligned with the U.S. and Canadian approaches.⁷³
- The key provisions of the new policy include the following:
 - Like Canada and the U.S., the 2002 Leniency Notice provides a guarantee of full immunity for qualifying applicants.⁷⁴

⁷³ For a full discussion of the new policy and interpretive issues the EC needed to address, see D. Jarrett Arp & Christof R.A. 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>>. For the Commission staff's response to this article and their elaboration on the policy, see Bertus van Barlingen, *A View From the Inside: The European Commission's 2002 Leniency Notice After One Year of Operation*, ANTITRUST 84 (Spring 2003). The van Barlingen response to Arp & Swaak has now been republished by the Commission in its Competition Policy Newsletter. See Competition Directorate-General of the European Commission, EC COMPETITION POLICY NEWSLETTER 16 (Summer 2003) <http://europa.eu.int/comm/competition/publications/cpn/cpn2003_2.pdf>.

⁷⁴ 2002 Leniency Notice ¶ 8.

- The 2002 Leniency Notice, like the analogue policies in the U.S. and Canada, provides for written confirmation of conditional immunity early in the amnesty process.⁷⁵ It commits the EC to granting a qualifying applicant conditional immunity in writing as soon as the applicant has shared its evidence with the Commission or has described the evidence in hypothetical terms.⁷⁶
- For companies that are not candidates for full immunity but wish to reduce their fines through cooperation with the EC, the 2002 Leniency Notice provides that a certain range of percentage fine reduction will be forthcoming from the Commission based on how quickly they report their involvement and provide the required cooperation as compared with other non-immunity applicants. The first qualifying non-immunity applicant will receive a 30-50 percent reduction in the otherwise applicable fine; the second in the door will enjoy a 20-30 percent reduction in fine.⁷⁷
- The role-in-the-offense disqualification standard in the 2002 Leniency Notice seeks to provide a less subjective, more predictable standard by requiring that a company seeking full immunity "did not take steps to coerce other undertakings to participate in the infringement."⁷⁸
- In addition, the 2002 Leniency Notice has adopted a less demanding standard with respect to the information an applicant must provide to secure immunity – eliminating the requirement to "adduce *decisive* [written] evidence of the cartel's existence."⁷⁹ Under the 2002 Leniency Notice, the applicant must be the first to "submit evidence which in the Commission's view may enable" the Commission to proceed with a dawn raid or find an infringement of Article 81(1) of the EC Treaty.⁸⁰

⁷⁵ The U.S. DOJ customarily issues a conditional amnesty letter. *See* Spratling, *Answers to Recurring Questions* (including a sample conditional amnesty letter). The Canadian authorities issue a Provisional Guarantee of Immunity. *See* Immunity Bulletin ¶ 22.

⁷⁶ 2002 Leniency Notice ¶¶ 13 & 15.

⁷⁷ *Id.* ¶ 23

⁷⁸ *Id.* ¶ 11(c). In other words, short of affirmative coercion of other competitors to participate in a cartel, an immunity applicant need not worry that it will be disqualified from full immunity because it was in some sense an organizer or leader of the activity. This is a significant change for the EC, and one that the U.S. DOJ has welcomed. *See, e.g.,* Hammond 2002 Spring Meeting Address.

⁷⁹ 1996 Leniency Notice ¶ B (emphasis added).

⁸⁰ 2002 Leniency Notice ¶ 8.

4. Remaining Differences

- Despite the notable changes and convergence reflected in the 2002 Leniency Notice, some differences remain between the EC, on the one hand, and the U.S. and Canada, on the other.
- These differences include the following:
 - The U.S. and Canada permit an applicant to explore whether immunity is available without identifying itself. The 2002 Leniency Notice does not address anonymous inquiries, but the Commission staff has stated that the Commission declines to permit them.⁸¹
 - The EC has declined to adopt the U.S. and Canadian practices of allowing applicants to place first-in "markers," which they then later perfect.⁸²
 - Although it has reduced the evidentiary hurdle necessary to obtain immunity, the EC continues to incorporate an evidentiary standard in its leniency criteria. The U.S. DOJ, by contrast, simply requires accurate reporting of the violation and full, continuing and complete cooperation.⁸³
 - Although the Commission staff have indicated they will accept oral applications for leniency,⁸⁴ the viability of a "paperless" application process, common in the U.S. and Canada, has become subject to question based on the Commission staff's demand that they record oral presentations by counsel for leniency applicants and that the applicants later review and endorse the transcript of such presentations.
 - The U.S. and Canada provide second-reporting applicants with fine reductions above 50 percent in appropriate cases.⁸⁵ The EC has declined to give itself that flexibility.

⁸¹ Compare *Arp & Swaak* at 63 (raising the issue) with *Bertus van Barlingen* at 85 ("The short answer to this is 'no.'").

⁸² *Bertus van Barlingen* at 85.

⁸³ DOJ Corporate Leniency Policy ¶¶ A(3) & B(4).

⁸⁴ *Bertus van Barlingen* at 87.

⁸⁵ See, e.g., *ABA Antitrust Comments*, at 6 (Sept. 2001) ("The experience of the members of the Sections is that the value added by the information provided by subsequent cooperators, particularly the second cooperator, is frequently worth more than a 50 percent reduction in the actual fine that otherwise would have been imposed.").

- The Antitrust Division has elected to be transparent with regard to the terms of its conditional amnesty letters and has made its model letter publicly available.⁸⁶ In response to an invitation to do the same, the Commission staff has declined.⁸⁷

D. Enforcement and Leniency In Other Countries

- Serious cartel enforcement activity around the world is growing, as more and more countries initiate or step up their enforcement efforts and create or strengthen leniency policies. A review of enforcement activities in some of the critical and/or increasingly active jurisdictions demonstrates that other jurisdictions around the world are largely adopting the U.S. leniency model.

1. The United Kingdom

- In Europe, the United Kingdom has moved to the forefront of anti-cartel enforcement. It developed a corporate leniency policy modeled on the United States policy several years ago, and recently introduced criminal sanctions and a related immunity policy for individuals involved in certain cartel activities.

a) The U.K. Leniency Program

- The United Kingdom introduced a corporate leniency program modeled on the U.S. policy in the Competition Act 1998, which took effect in March of 2000.
- Like the U.S. policy, the U.K. leniency program provides total immunity from fines for the first member of a cartel to come forward with relevant information. Immunity is automatic when the Office of Fair Trading ("OFT") has not yet begun an investigation and does not yet have sufficient information to establish the existence of the cartel. In a change from the U.S. policy, however, immunity is discretionary if the cartel member comes forward after the OFT has already begun an investigation, but before the Director General of the OFT has given written notice of his or her proposal to make a decision that the Chapter 1 prohibition against anticompetitive agreements has been infringed.⁸⁸

⁸⁶ See Spratling, *Answers to Recurring Questions* (introducing and attaching Model Amnesty Letter).

⁸⁷ Compare Arp & Swaak at 84 (proposing that the EC publish a model immunity agreement) with Bertus van Barlingen at 88 (declining "at least in this relatively early stage of application").

⁸⁸ Office of Fair Trading, *Director General Of Fair Trading's Guidance As To The Appropriate Amount Of A Penalty*, §§ 3.3-3.7 (hereinafter "OFT Penalty Guidance") < <http://www.offt.gov.uk> >.

- In both instances, as in the U.S., Canada, and other jurisdictions, the entity reporting its conduct must meet several conditions: it must cease participation in the cartel, provide all information, documents and evidence available to it regarding the existence and activities of the cartel, cooperate fully and continuously throughout the investigation, and it must not have been the instigator or leader of or compelled another entity to participate in the cartel.⁸⁹
- The policy also provides for reductions in fines for entities who are not the first to come forward or who do not meet all of the conditions above.⁹⁰
- The U.K. also has a "Leniency Plus" policy based on, and very similar to, the Amnesty Plus policy in the United States.⁹¹ A party who has received 50 percent leniency or less in one matter, and who informs the OFT of additional cartels or price fixing arrangements and qualifies for 100 percent leniency in the new matter, can increase its leniency in the first matter.⁹²
- Since the Competition Act 1998 went into effect in March of 2000, the OFT has granted some level of leniency to at least one party in no less than 19 cases.⁹³

b) New Criminal Sanctions and Leniency Policy for Individuals.

- In the Enterprise Act 2002, the U.K. took its enforcement efforts one step further by creating criminal penalties for individuals who "dishonestly" engage in horizontal, but not vertical, price-fixing, bid rigging, market share agreements, and agreements to limit the production or supply of goods or services.⁹⁴ The potential penalties for the new criminal offenses are steep.

⁸⁹ *Id.* at § 3.4.

⁹⁰ *Id.* at § 3.8.

⁹¹ *Id.* at §§ 3.10 – 3.11; *see also*, Margaret Bloom, *Key Challenges in Enforcing the Competition Act*, COMPETITION LAW JOURNAL (2003), at 86-87 (hereinafter "Bloom").

⁹² *OFT Penalty Guidance* §§ 3.10 – 3.11.

⁹³ Bloom, at 86.

⁹⁴ Enterprise Act 2002 §§ 188-191 <<http://www.hmso.gov.uk/acts/acts2002/20020040.htm>>; *see also*, Office of Fair Trading, *The Cartel Offence, Guidance On The Issue Of No-Action Letters For Individuals* (April 2003) (hereinafter "OFT Guidance on No-Action Letters") <<http://www.offt.gov.uk>>. The OFT has stated that "dishonestly" is a concept that is "well-understood in criminal law," and refers to a test for dishonesty in the case of *R. v. Ghosh* [1982] 2 All E.R. 689.

Individuals who are convicted of these crimes can face up to five years in prison and/or an unlimited fine.⁹⁵

- The new criminal offense is intended to be a companion to the civil penalties imposed on companies who violate the Competition Act's Chapter 1 prohibition on anticompetitive agreements, creating an enforcement scheme that provides penalties for both corporations and individuals who participate in cartel activities.
- The Enterprise Act also created a related immunity, in the form of no-action letters, for individuals who have engaged in such conduct. This immunity is only available to an individual if the OFT believes that it does not already have, or is not in the process of gathering, sufficient information to successfully prosecute that individual.⁹⁶
- Individuals who come forward must meet virtually the same conditions as companies: they must admit their participation in the offense, provide the OFT with all information available to them regarding the existence and activities of the cartel, maintain full and continuous cooperation throughout the OFT's investigation and through the conclusion of any related criminal proceedings, not have coerced another company to take part in the cartel, and cease participation in the cartel at the time they disclose their activities to the OFT.⁹⁷ Once an individual applicant has met these criteria, the OFT will issue no-action letters that provide immunity from prosecution in England, Wales, and Northern Ireland.⁹⁸
- Some commentators assert that the new policy, as written and as explained by the OFT in the various guidance and consultation documents that it has issued, does not provide the same certainty or clarity as the policies in the U.S. and other jurisdictions.⁹⁹ The corporate and individual policies taken

⁹⁵ Enterprise Act 2002 § 190.

⁹⁶ Enterprise Act § 190; *see also*, *OFT Guidance on No-Action Letters*, at § 3.4.

⁹⁷ *See OFT Guidance on No-Action Letters*, at § 3.3.

⁹⁸ The same guaranty cannot be provided against prosecution in Scotland, but the Act provides that cooperation by individuals will be reported to the Lord Advocate in Scotland, who can then take such cooperation into account when determining whether or not to prosecute the individual. *OFT Guidance on No-Action Letters*, at § 3.2.

⁹⁹ *See, e.g.*, Julian M. Joshua and Donald C. Klawiter, *The U.K. "Criminalization" Initiative: Step Forward or Another Complication?*, *ANTITRUST* 67 (Summer 2002); Julian M. Joshua, *The U.K.'s New Cartel Offence*

[Footnote continued on next page]

together, for example, still do not provide guaranteed immunity from prosecution for all cooperating directors and employees of a company that receives leniency under the Competition Act.¹⁰⁰ However, this portion of the Enterprise Act only took effect on June 20, 2003, and the enforcement community has high hopes that the OFT will enforce the system in a way that complements enforcement efforts in the United States, the EU, and other jurisdictions.

c) Recent Enforcement Efforts.

- The OFT has imposed significant penalties on cartel participants in recent months, aided by the cooperation provided by leniency applicants.
- In early August 2003, OFT announced that it had imposed fines of £18.6 million against ten companies for their role in several agreements to fix the prices of replica football (soccer) memorabilia.¹⁰¹ Three of the corporations received full or partial leniency under the OFT's leniency policy; one of those companies, Sportetail Ltd., received full immunity after providing "crucial evidence" and meeting the conditions for full immunity.¹⁰²
- In February 2003, the OFT imposed record fines of £22.65 million against toy manufacturers Argos and Littlewoods for fixing the prices of toys and games.¹⁰³ The OFT granted full leniency to a third competitor, Hasbro, acknowledging that it provided critical evidence that led to the initiation of the investigation.¹⁰⁴

[Footnote continued from previous page]

and Its Implications for EC Competition Law: A Tangled Web, EUROPEAN LAW REVIEW, publication forthcoming; *but see*, Margaret Bloom, *A Significant Step Forward: The U.K. Criminalization Initiative*, ANTITRUST 59 (Fall 2002).

¹⁰⁰ However, the OFT has indicated that it will normally provide no-action letters to employees, directors, ex-employees, and ex-directors of a company that receives 100 percent leniency from either the U.K. or the EU, when the company seeking leniency either under the U.K. policy or the EU Notice has made an approach under the individual policy to the OFT on these individuals' behalf. *OFT Guidance on No-Action Letters*, at § 3.6.

¹⁰¹ See Press Release, Office of Fair Trading, *Large Fines For Replica Football Kit Price-Fixers* (Aug. 1, 2003).

¹⁰² *Id.*

¹⁰³ See Press Release, Office of Fair Trading, *Record Fines For Toys Price Fixing* (Feb. 19, 2003).

¹⁰⁴ *Id.*

2. Australia

- Like the U.K., Australia also recently introduced a new leniency policy designed to detect and deter cartel activities.

a) The Australian Leniency Policy.

- In June 2003, the Australian Competition & Consumer Commission ("ACCC") issued a leniency policy that is similar in many respects to, but as noted below, different in several key respects from, the U.S. policy.¹⁰⁵ In announcing the policy, the ACCC acknowledged its reliance on the successful policies already in place in the U.S., Canada, the EU, and the United Kingdom.¹⁰⁶
- Like the U.S. policy, the Australian program provides for an offer of conditional leniency from ACCC-instituted court proceedings and penalties to the first company or individual to come forward when the ACCC is either unaware of the existence of a cartel or is aware of the cartel but has insufficient evidence to institute court proceedings. A grant of leniency to a corporation also applies to its officers, directors and employees.
- The applicant must meet several requirements, which are virtually identical to the requirements of the U.S. policy: it must provide the ACCC with all evidence and information available to it relating to the suspected cartel, cooperate fully, continuously, and expeditiously throughout the ACCC's investigation and any ensuing proceedings, make admissions and cooperate as a truly corporate act, cease its involvement in the cartel activities,¹⁰⁷ not have been the clear lead of the cartel or coerced other corporations to participate, and, where possible, make restitution to injured parties."¹⁰⁸

¹⁰⁵ *ACCC Leniency Policy For Cartel Conduct*, June 2003 (hereinafter "ACCC Leniency Policy") <<http://www.accc.gov.au/fs-pubs.htm>>.

¹⁰⁶ Press Release, Australian Competition and Consumer Commission, *ACCC Launches Leniency Policy to Expose Hard Core Cartels in Australia* (June 27, 2003) (hereinafter "ACCC Leniency Press Release").

¹⁰⁷ The policy provides for the possibility that the ACCC will ask the leniency applicant to "act in a manner which does not disclose ACCC awareness of the cartel" – that is, perhaps, to continue to participate in the cartel – in order to gather evidence against other cartel participants for the ACCC. ACCC Leniency Policy § 3.10.

¹⁰⁸ *Id.* at § 2.1, Part A.2.

- Subsequent parties or individuals that seek leniency from the ACCC are governed by a cooperation policy that pre-dates the new leniency policy.¹⁰⁹ This policy allows the ACCC, at its discretion, to reduce the penalties for parties that meet certain conditions that are similar to the conditions in the leniency policy.
- The new policy differs from the U.S. leniency policy in several key respects.
 - Written applications. Unlike the United States and Canada, the Australian policy appears to require applicants to submit their applications for leniency in writing, via facsimile. The applications must contain the applicant's name, an outline of the conduct for which they are seeking leniency, information about the product, industry and market in question, the names of the parties involved, and details about when the conduct occurred. This is a striking difference from U.S. practice, where for years DOJ officials and amnesty applicants have been perfecting a paperless process, and from the EU practice, which is moving in the direction of the U.S.
 - Only one applicant per cartel. Unlike the U.S. policy, the Australian policy only provides one free pass per cartel – only the first entity in the door, corporation or individual, will receive full immunity from prosecution.¹¹⁰ This is different from U.S. policy, which provides the opportunity for one corporation and one individual – an employee of a different company – to receive amnesty.
 - Restitution versus civil damages. The policy requires applicants to make restitution to injured parties located in Australia, and specifically distinguishes this restitution from civil damages that may be sought by the same injured parties.¹¹¹ It is not clear yet whether the ACCC will allow, as the U.S. does, civil litigation damage awards (or civil litigation settlements) to satisfy the restitution requirement.

¹⁰⁹ Australian Competition and Consumer Commission, *ACCC Co-Operation Policy For Enforcement Matters* <http://acc.gov.au/pubs/publications/corporate/Coop_policy_July02.pdf>.

¹¹⁰ ACCC Leniency Policy § 3.5; *see also* ACCC Leniency Press Release.

¹¹¹ ACCC Leniency Policy § 3.12.

b) Criminal Sanctions.

- Currently, the Trade Practices Act creates only a civil enforcement scheme for antitrust violations. Change may be on the horizon, however. A committee convened by the Prime Minister of Australia to review the Trade Practices Act, informally known as the Dawson Committee, issued a report in January 2003 (released to the public in April 2003) recommending that the TPA include criminal sanctions – fines for corporations and fines and imprisonment for individuals – for hard core cartel behavior.¹¹² The Report noted, however, that the Australian government needs to address certain issues before it introduces any criminal sanctions: in particular, it needs to develop a satisfactory definition of the hard-core behavior to be subject to criminal sanctions, and "a workable method of combining a clear and certain leniency policy with a criminal regime."¹¹³
- The Dawson Report also recommended that the maximum penalty for corporations involved in hard-core cartel activity be raised from \$10 million (Australian), to the greater of \$10 million or three times the gain from the violation, or, where the gain cannot be easily ascertained, 10 percent of the corporation's turnover.¹¹⁴ A similar alternative fine provision (providing for two times the gain) has been used to tremendous success by the Antitrust Division in the United States, accounting for the 39 fines greater than \$10 million (U.S.) – including a fine of \$500 million – discussed earlier in this paper.
- The Dawson Report did not make any recommendations with respect to a leniency policy, but said that "[a] leniency or amnesty policy that provides clear and certain incentives to give evidence is a potent means of uncovering cartel behavior."¹¹⁵ The leniency policy recently issued by the ACCC applies only to the existing civil regime, but the ACCC has indicated that it will reconsider the policy should Australia adopt the criminal penalties recommended by the Dawson Committee.¹¹⁶

¹¹² *Review of the Competition Provisions of the Trade Practices Act* (Jan. 31, 2003), at 164 (hereinafter "Dawson Report") <<http://tpareview.treasury.gov.au/content/report.asp>>.

¹¹³ *Id.* at 164.

¹¹⁴ *Id.* at 164-65.

¹¹⁵ *Id.* at 163.

¹¹⁶ See ACCC Leniency Policy §3.2; see also ACCC Leniency Press Release.

3. Other Jurisdictions

- As noted above, other countries around the world have also developed or are in the process of developing their own leniency policies, often in consultation with the U.S. Department of Justice, including the Netherlands, Germany, Hungary, France, Ireland, the Czech Republic, Brazil, and Korea. Hungary, for example, is accepting comments until September 30, 2003, on its draft leniency policy.¹¹⁷
- These and other jurisdictions large and small are also stepping up their enforcement efforts. A sampling of recent enforcement actions around the world demonstrates the seriousness of this undertaking and the growing international scope of cartel enforcement:
 - Japan. The JFTC has increasingly become a significant presence in antitrust enforcement. On July 29, 2003, it raided the offices of a number of companies suspected of rigging bids in auctions for public contracts to install sewage pumps.¹¹⁸ A week earlier, the Public Prosecutor General indicted four companies for allegedly rigging bids on a tender for water meters purchased by the Tokyo Metropolitan Government, on the recommendation of the JFTC.¹¹⁹ On February 17, 2003, the JFTC participated in coordinated raids with authorities from the U.S., Canada, and the EU against manufacturers of heat stabilizers suspected of fixing prices, the first such four-jurisdiction coordinated raid by antitrust enforcers.
 - Italy. In March of 2003, the Italian Competition Authority fined five Philip Morris companies and Ente Tabacchi Italiano SpA, the leading participants in the cigarette market in Italy, a total of € 70 million for fixing prices in the market for cigarettes.¹²⁰
 - The Netherlands. In April 2003, The Netherlands Competition authority fined four road construction companies a total of over € 1.2 million for agreeing in

¹¹⁷ See Hungarian Competition Authority, *Draft, The Use of a Leniency Policy to Promote the Detection of Cartels*, Notice No. 3/2003 Of The President Of The Office Of Economic Competition And The President Of The Competition Council Of The OEC <<http://www.gvh.hu/index.php?id=3001&l=e>>.

¹¹⁸ Mariko Sanchanta, *Japanese Companies Raided Over Bid-Rigging*, FIN. TIMES, July 30, 2003, at 6.

¹¹⁹ *Id.*; see also Press Release, Japan Fair Trade Commission, *JFTC Filed An Accusation With Prosecutors Office In Relation To A Bid Rigging Case On Purchase Of Water Meters By Tokyo Metropolitan Government* (July 2, 2003).

¹²⁰ Press Release, Italian Competition Authority, *Pricing Conduct on the Cigarette Market* (Mar. 28, 2003).

advance on the winning bidder and the price for tenders issued by the Municipality of Scheemda.¹²¹

- South Africa. South Africa's Competition Tribunal recently confirmed a consent decree negotiated by the Competition Commission with the Pretoria Association of Attorneys, in which the Association admitted contravening the Competition Act by issuing guidelines for recommended fees, which the Commission found had the effect of indirectly fixing prices.¹²² The Commission also recently announced that an investigation had uncovered price-fixing activity among three healthcare associations, and that it would seek an order from the Competition Tribunal barring this behavior and would also recommend that administrative penalties be imposed on all parties.¹²³
- Ireland. In July 2003, two Irish dairies agreed, in a settlement with the Competition Authority, to refrain from fixing retail prices on milk.¹²⁴

V. Impact Of The 1993 Amnesty Policy On Civil Litigation

The growth of international enforcement efforts and leniency programs throughout the world is not the only notable result of the DOJ Corporate Leniency Policy.

A. Growth In Cartel-Related Civil Litigation

- As one would expect, with the DOJ's amnesty policy leading to an increase in the number of criminal cartel cases and attendant guilty pleas, there has been a similar rise in cartel-related civil litigation. In the U.S., 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 U.S. civil litigation related to cartels comes in a variety of forms.

¹²¹ See Press Release, Netherlands Competition Authority, *NMa Fines Road Construction Companies for Cartel Agreement* (Apr. 25, 2003).

¹²² See Press Release, South Africa Competition Commission, *Competition Commissioner Says Confirmation Of Pretoria Attorneys' Association Consent Order Could Have Consequences For Other Professional Associations* (July 30, 2003).

¹²³ See Press Release, South Africa Competition Commission, *Competition Commission Exco Recommends Health Care Investigation Be Referred To Tribunal* (July 17, 2003).

¹²⁴ See Press Release, Competition Authority, *Competition Authority Reaches Settlement With Glanbia And Sligo Dairies Over Alleged Fixing Of Retail Prices Of Milk* (July 29, 2003).

1. Direct Purchaser Actions

- First, a pleading party – and, in due course if not immediately, an amnesty applicant – is likely to face direct purchaser class actions in federal court alleging violations of §1 of the Sherman Act. If liability is found, and it invariably is found if the defendant has pled guilty and therefore is collaterally estopped from denying the violation, these lawsuits impose joint and several liability on each defendant, regardless of whether its role in the conspiracy was limited. In addition, there is no right of contribution.
- In recent years, the overall scope of such lawsuits has increased, often well beyond the bounds of the underlying criminal action. They 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.
- Settlement demands have also increased. Whereas in the 1970's and 1980's publicly reported settlements generally reflected a 2-4 percent overcharge for a four-year or shorter time period (consistent with the applicable four-year statute of limitations),¹²⁵ today double-digit percentage overcharge settlements are common (before other costs like attorneys fees) and plaintiffs may reach back beyond four years (based on claims that the statute of limitations was tolled because the defendants concealed their conspiracy).

¹²⁵ See *Closing Remarks of Michael L. Denger*, ABA Remedies Forum n.6 (2003), citing *In re Plastic Tablewares Antitrust Litig.*, 1995 WL 678663 (E.D. Pa. 1995) (approving settlement of 3.5% of sales over a four and one half year conspiracy period); *Fisher Bros. v. Mueller Brass*, 630 F. Supp. 493, 499 (E.D. Pa. 1985); *Fisher Bros. v. Cambridge-Lee Industries*, 630 F. Supp. 482, 489 (E.D. Pa. 1985); *Fisher Bros. v. Phelps Dodge Industries*, 604 F. Supp. 446, 451 (E.D. Pa. 1985) (approving four settlements in a class action alleging an eight-year conspiracy among copper pipe manufacturers to fix prices which, as a percentage of sales during the four-year period prior to the tolling of the statute of limitations, ranged from 2.43% to 0.21%); *In re Shopping Carts Antitrust Litig.*, 1984-1 Trade Cas. (CCH) ¶ 65,823 (S.D.N.Y. 1983) (defendants settled for 6% and 3% of total sales during four-year period); *In re Armored Car Antitrust Litig.*, 472 F. Supp. 1357, 1368 (N.D. Ga. 1979) (3.88% of sales during two-year period), *aff'd in relevant part*, 645 F.2d 488 (5th Cir. 1981); *In re Anthracite Coal Antitrust Litig.*, 79 F.R.D. at 711 (3.08% of defendants' total sales over three-year period); *In re Fine Paper Antitrust Litig.*, 1987 WL 10110, *6 & n.1 (E.D. Pa. 1987) (settlement representing "less than one-tenth of one percent of annual fine paper sales" of the settling defendants), *aff'd without opinion.*, 841 F.2d 1118 (3d Cir. 1988); M. Cohen & D. Scheffman, *The Antitrust Sentencing Guidelines: Is The Punishment Worth The Costs?*, 27 AM. CRIM. L. REV. 331, 345 (1989) (study of seven class action cases settled between 1971 and 1976 involving the bread industry demonstrated that the average settlement was 2.87% of defendants' annual sales).

2. Opt-Out Litigation

- Defendants are also likely to have to litigate with opt outs from any direct purchaser class action settlement. Although this varies from case to case, opt outs can account for 50 percent or more of class purchases, and they commonly file their own lawsuits in federal court.
- Settling with opt-out direct purchasers can be very difficult. It is not uncommon for direct purchaser plaintiffs – particularly sophisticated claimants – to hold out in an effort to obtain higher percentage settlements. They typically demand a most favored nations clause, which then may bind the defendant in settling with other opt-out direct purchasers or prolong the litigation process (until the most favored nations clause expires).

3. Indirect Purchaser Actions

- Defendants in cartel cases also routinely face indirect purchaser and other actions in U.S. state courts. Indirect purchaser actions are now routinely filed in multiple states in which *Illinois Brick*, the Supreme Court decision preventing indirect purchasers from suing under federal antitrust law,¹²⁶ has been repealed by legislative action permitting indirect purchaser lawsuits in state courts.
- The most notable practical point about 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.
- An additional complexity in indirect purchaser cases relates to the scope of the causes of action and available defenses. Under state law, these are often unsettled areas of law and vary from state to state. The different proceedings can lead to application of different discovery rules and procedures in each state. Of course, defendants must also hire separate counsel in each state and then coordinate those counsel going forward.
- A final complicating consideration is the fact that state attorneys general may also file separate *parens patriae* actions to recover on behalf of their citizens for indirect purchaser damages in parallel with private counsel.

¹²⁶ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In a later decision, *California v. ARC America Corp.*, 490 U.S. 93 (1989), the Supreme Court clarified that states could provide for indirect purchaser actions under state law.

B. Policy Issues Raised By Criminal And Civil Proceedings In Cartel Cases

- Although few would dispute the importance and value of enhanced criminal enforcement against cartels wrought by the DOJ amnesty program and the right of injured parties to sue for redress under applicable laws, some have questioned whether the unbounded damages exposure in the U.S. is appropriate and whether there needs to be an affirmative coordination or melding of the criminal and civil enforcement systems to achieve a rational, efficient whole.¹²⁷
 - Among the concerns raised is the fact that sentencing in criminal cases is wholly divorced from the assessment and imposition of damage awards in civil litigation. Criminal fines are based on a variety of assumptions and adjustments that start with a baseline 20 percent presumed estimated "loss" suffered by victims,¹²⁸ and civil litigation settlements – addressing the same losses by victims – are now routinely based upon double-digit assumed overcharges as well. It is also important to note that the civil exposure often arises in connection with multiple, uncoordinated classes of civil litigation that typically proceed simultaneously in different courts throughout the country (as described above).
 - As a result, the aggregate civil damages exposure faced by a defendant is subject to no limiting principle and arises from diverse lawsuits in varied jurisdictions applying different laws. The aggregate fines and damages paid may have little relationship to actual damages and can amount to a number in excess of trebled actual damages.
 - There are, of course, also costs and inefficiencies imposed on the judicial system and defendants (and thus, indirectly, on consumers) which result from the multiplicity and diversity of lawsuits filed when news of a DOJ grand jury investigation or plea agreement leaks out.
 - Regardless of what one thinks about whether cartels are over-deterred or under-deterred, the disconnect between the criminal and civil processes is a topic particularly worthy of attention. As the 2001 ABA Antitrust Section Task Force on the Federal Antitrust Agencies noted,

¹²⁷ See, e.g., Michael L. Denger & D. Jarrett Arp, *Criminal and Civil Cartel Victim Compensation: Does Our Multifaceted Enforcement System Promote Sound Competition Policy?*, ANTITRUST 143 (Summer 2001); *Report of ABA Section of Antitrust Law Task Force on the Federal Antitrust Agencies – 2001* (January, 2001) (hereinafter "ABA Antitrust Report on Federal Antitrust Agencies") <<http://www.abanet.org/antitrust/antitrustenforcement.pdf>>.

¹²⁸ See U.S.S.G. § 2R1.1(d)(1). The 20 percent figure is simply an assumption made to avoid the time and cost of calculating the actual overcharge. See *id.*, comment n.3 ("The purpose for specifying a percent of volume of commerce is to avoid the time and expense that would be required for the court to determine the actual gain or loss.").

[t]here are many enforcers of the American antitrust laws – federal antitrust agencies, state attorneys general, and multiple private attorneys general. Each can extract penalties of various kinds, ranging from criminal fines to civil damage judgments to the most recent innovation (at least in antitrust) – disgorgement. Each of these actors has its own set of incentives and motivations, and there is very little attempt – and little opportunity – for coordination. As a result, our systems generates large administrative costs, large legal fees, and haphazard results in terms of victim compensation. The transaction costs are very high, and the results are at best uneven. Obviously, it is difficult to generate any enthusiasm for reform in this area, since it is so easily characterized as an attempt to weaken the antitrust laws, or benefit wrongdoers. No one condones cartel behavior, but in fact, the prime beneficiary of the current system is the private antitrust bar, both plaintiff and defendant, and thus it is appropriate that we be the source of the call for reform. This problem deserves serious attention.¹²⁹

- Although recognizing the value and importance of further study with respect to the specifics of a reform proposal, study that is ongoing within the ABA's Antitrust Section, the 2001 Task Force report itself recommended that a solution may be found through legislation (or federal/state agreement) to require consolidation of all federal and state court actions related to a cartel – the criminal proceeding, direct and indirect purchaser class actions, and state attorney general claims – in the federal district court in which the original criminal (or civil) action was filed. The criminal trial, if any, would proceed first, followed by any necessary civil trial to assess whether the defendants violated the antitrust laws (subject to the collateral estoppel effect of the defendants pleas or any guilty verdicts). Once criminal and civil liability are determined, the court would assess aggregate damages from the conspiracy at the direct purchaser level, and then, in a final step, allocate the damages amount between and among direct and indirect purchasers as well as other claimants.¹³⁰
- Although generally framed as a broader policy issue, this matter is not without specific real-world implications for the continued success of the DOJ's amnesty program.
- As anyone who has represented companies considering self-reporting under the DOJ's Corporate Amnesty Policy knows, the relationship between applying for amnesty (or otherwise seeking leniency) and the criminal proceedings that follow, on the one hand, and the inevitable follow-on civil litigation and open-ended

¹²⁹ *ABA Antitrust Report on Federal Antitrust Agencies*, at 4-5. See also *id.* at 21-26. For a discussion of the policy problems raised by state indirect purchaser cases, see *Report of the Indirect Purchaser Task Force*, 63 ANTITRUST L.J. 993 (1995).

¹³⁰ See *id.* at 23-24.

damages exposure, on the other, is a matter of intense focus for prospective amnesty applicants.

- A responsible company that identifies and halts collusive activities within its ranks must decide whether then to apply for amnesty.
 - Should it report the violation to the government or should it stay quiet, ending the collusion but waiting to see if the statute of limitations runs before the activity is discovered?
 - For management of a company that is assessing whether to report an offense while also being mindful of its obligations to the company and its owners, the disconnect between criminal and civil enforcement policy and the unpredictable damage exposure arising from today's federal and state-by-state civil litigation situation are deterrents to cooperation with antitrust enforcers.

C. Procedural Issues Raised By Amnesty Applications

- While the criminal and civil litigation systems in the U.S. may warrant change that would further encourage the filing of amnesty applications, it bears noting that leniency programs themselves present some notable issues with respect to civil litigation (and vice versa).

1. Discovery Of Written Amnesty Submissions & A "Paperless" Process

- For civil plaintiffs pursuing claims against amnesty applicants, there has been interest in obtaining copies of written materials presented to the government by the party that received amnesty. In the U.S. and Canada, experienced practitioners 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 1996 Leniency Notice. That policy required an applicant wishing to obtain the most favorable treatment under the Notice to be the first party to "adduce *decisive* evidence of the cartel's existence,"¹³¹ and the EC required that evidence to be in documentary form.¹³² 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

¹³¹ 1996 Leniency Notice ¶ B (emphasis added).

¹³² See Julian M. Joshua, *Leniency in U.S. and EU Cartel Cases*, ANTITRUST 19, 22 (Summer 2000) (Then-Deputy Head of the EC Cartel Unit noting that "[p]roviding 'decisive evidence' . . . normally requires the production of contemporaneous cartel documentation.").

company's own words – provided the necessary proof of the activities being reported.

- This has led to attempts by civil plaintiffs in the U.S. to seek discovery of such submissions to the EC in Brussels, as well as 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 U.S. 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 U.S. 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.¹³³
- 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. The EC's revised 2002 Leniency Notice does not directly address whether a written statement is required to secure immunity. This issue has been raised for potential clarification,¹³⁴ and the Commission staff's answer appears to be that they prefer written submissions and wish that U.S. courts would decline to treat them as discoverable.¹³⁵ Until and unless the U.S. courts do so, however, the EC will accept oral applications in cases where the applicant would face negative consequences in U.S. litigation from a written submission.¹³⁶ That said, in such cases the Commission will transcribe the oral presentation and require that the transcript be reviewed and certified by counsel for the applicant. The transcript will remain in the Commission's possession and, in its view, is an official Commission document and not a company document.¹³⁷

¹³³ On the other hand, Judge Hogan declined to permit plaintiffs to discover certain documents related to the plea negotiations in Canada, including the executed plea agreement and drafts of the plea agreement, the agreed statement of facts, the indictment, the prohibition order, and the immunity letter. *See In re Vitamins Antitrust Litig.*, No. 99-197 (TFH) (December 18, 2002) (Memorandum Opinion Re: Bioproducts' Rule 53 Objection).

¹³⁴ *See* Arp & Swaak at 63-64.

¹³⁵ Bertus van Barlingen at 85-87.

¹³⁶ *Id.* at 87.

¹³⁷ *Id.*

- 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 U.S. It also departs from the practice followed by the U.S. and Canada, which presently 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. This remains an area in which further convergence would be highly desirable.

2. Cooperation With The DOJ And Testimony

- Another amnesty-related issue that can arise in connection with civil litigation is requests for testimony and certain other discovery served on a civil litigation defendant who is also an amnesty applicant, and thus pledged to cooperate in the DOJ's investigation and prosecution of the reported offense. Needless to say, Antitrust Division prosecutors generally would prefer not to have their cooperating witnesses deposed or otherwise called upon to testify before their criminal investigation and prosecution is complete. Yet, due to the lack of coordination between or formal sequencing of criminal and civil litigation, this can become a real risk.
- In such cases, it has become increasingly common for the DOJ to attempt to negotiate a limitation or stay of discovery with the parties to the private litigation and, barring that, to intervene in the civil action and move to stay or limit discovery. Such stays are frequently, but not consistently, granted.¹³⁸
- The situation of an amnesty applicant can become even more delicate when the applicant – who has an obligation to make restitution under the DOJ's conditional amnesty agreement – has settled with a customer or a direct purchaser class and the settlement includes an obligation to cooperate in the plaintiff's continuing litigation against other defendants. If, for example, the plaintiff requests an opportunity to depose or interview a knowledgeable employee of the amnesty applicant pursuant to the applicant's cooperation commitments in the settlement agreement while the criminal investigation is still ongoing, the amnesty applicant may find itself facing potentially contradictory cooperation obligations. As with regular discovery, in such circumstances the DOJ has on occasion intervened in the civil litigation to seek to block cooperative depositions or even informal witness interviews by plaintiff's counsel.

¹³⁸ For an excellent discussion of these issues, see Niall E. Lynch, *Parallel Proceedings: The Government Perspective*, ABA Antitrust Section 51st Annual Spring Meeting Course Materials 455 (Apr. 3, 2003).

D. Extra-Territorial Civil Exposure In U.S. And U.K. Courts

- Recent decisions in the U.S. and the U.K. have opened the door to lawsuits asserting claims for cartel-related damages arising from wholly foreign sales.
- In the U.S. there is now a series of inconsistent court decisions interpreting the Foreign Trade Antitrust Improvements Act (FTAIA), 15 U.S.C. § 6a, and addressing the limits of subject matter jurisdiction in U.S. federal courts in connection with foreign cartels.¹³⁹ The Second Circuit (*Kruman*) and the D.C. Circuit (*Empagran*) have interpreted the FTAIA to allow for damage claims arising from foreign sales between foreign suppliers and foreign purchasers to be brought under U.S. law in U.S. federal courts if the cartel at issue also had direct, substantial, and reasonably foreseeable anticompetitive effects on U.S. purchasers. The Fifth Circuit (*Den Norske*) reached a different conclusion, and other circuits have addressed related questions and hinted at differing responses to the FTAIA question. For a superb summary and analysis of recent U.S. developments in this area, see Ronald W. Davis, *The Mystery Deepens: U.S. Antitrust Treatment of International Cartels*, ANTITRUST 31 (Summer 2003).¹⁴⁰
- The question of extra-territorial reach of laws providing for recovery of damages by cartel victims gained 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 U.K.¹⁴¹ 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 – 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-U.K. entities.

¹³⁹ See *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836 (7th Cir. 2003); *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) (en banc); *Empagran S.A. v. F. Hoffman La-Roche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003); *Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293 (3d Cir. 2002); *Dee-K Enterprises, Inc. v. Hevafil Sdn. Bhd.*, 299 F.3d 281 (4th Cir. 2002), cert. denied, 123 S. Ct. 2638 (2003); *Kruman v. Christie's International PLC*, 284 F.3d 384 (2d Cir. 2002); *Den Norske Stats Oljeselskap As. v. Heermac Vof*, 241 F.3d 420 (5th Cir. 2001).

¹⁴⁰ See also H. Stephen Harris, Jr. & Jack P. Smith, III, *Recent Fourth Circuit Decision Clarifies Extraterritorial Reach of U.S. Antitrust Law*, ABA ANTITRUST SECTION, INTERNATIONAL ANTITRUST BULLETIN 4 (Fall 2002); Ronald W. Davis, *International Cartels: Who's Liable? Who's Not? Tracking a Moving Target*, ANTITRUST SOURCE (May 2002) <<http://www.abanet.org/antitrust/source/may02/violations.pdf>>.

¹⁴¹ *Provimi Ltd. v. Aventis Animal Nutrition S.A.*, 2003 EWHC 961 (COMM), High Court of Justice, Queens Bench Division (May 6, 2003).

- As a consequence of these developments in the U.K. and the U.S., the global civil litigation picture is uncertain. All else equal it would appear that, for example, if a German customer purchased a price-fixed product from a French supplier for delivery in Germany *and* the underlying cartel related to and directly affected competition for the same product in the U.K. and the U.S., the German customer may well be able to bring an action against the French supplier not only in French or German courts, but in U.S. federal courts in New York or Washington, and/or before English High Court in London. This uncertainty and multiplicity of possible venues for lawsuits resulting in potentially redundant damage awards operates to reduce incentives to report cartel conduct under applicable leniency policies.

VI. 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 programs across the globe, and complex civil litigation exposure 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:

A. Rule No. 1: Speed Wins (No Tickets For Going Too Fast).

- The 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 offense. That said, there is also a significant value in being second in the door, as opposed to third or fourth.¹⁴² Regardless of whether amnesty is available or not, if a company with criminal exposure for cartel-style collusion learns of a DOJ investigation or has reasons 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 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 policy.

¹⁴² For an elaboration on this point, see Spratling, *International Cartel Enforcement Environment* (noting that the second company to report typically receives large financial advantages as compared with later finishers and that parties that are third, fourth, or fifth to cooperate may pay an additional 10-20 percent of their volume of affected commerce as a criminal fine).

- 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 in a matter of days – and sometimes hours – to maximize 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 ten minutes.

B. Rule No. 2: If You Report In The U.S., You Likely Will Have To Promptly Report In The EU And Canada As Well.

- 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 U.S., because of the severe corporate and individual criminal sanctions the U.S. 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 U.S. 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 U.S. DOJ, you can do so on a confidential basis,¹⁴³ but the DOJ is still going to go forward with an investigation in the U.S. 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. More immediately, however, 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. Either way, your competitors will learn of the investigation. If the cartel was international in nature, your competitor will assume you have 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 criminalizes cartel conduct. They will likely move quickly to self-report in those jurisdictions in order to reap the remaining benefits for

¹⁴³ The U.S. will not (and neither will the EU or Canada) disclose the identity of the amnesty applicant, nor the content of information it provides in support of its application, to any other person, including any other enforcement authority, without a waiver from the applicant authorizing such disclosure. *See* Spratling, *Corporate Leniency Policy Update*. *See also*, Alexander Schaub, *Co-operation in Competition Policy Enforcement Between the EU and the US and New Concepts Evolving at the World Trade Organization and the International Competition Network*, Address at the Mentor Group 13 (Apr. 4, 2002) <http://europa.eu.int/comm/competition/speeches/text/sp2002_013_en.pdf> ("[O]ur cooperation with the US authorities in [the cartel] area is a little more difficult than in the case of mergers, since there are legal impediments for us to exchange confidential information. This means, for instance, that information submitted to one side by a company under a leniency programme cannot be transmitted to the other side.")

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 U.K. proves to be active in prosecuting cartels under the Enterprise Act, one may add the U.K. to the list of presumptive must-apply venues if there is relevant trade and conduct relating to that jurisdiction. If Australia adopts criminal sanctions and resolves the paperless process issue, one may also want to add Australia to that list as well.

- It bears noting that even if a company's collusion with multinational competitors was largely segmented – that is to say, 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 U.S. did apply 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 U.S. amnesty applicant at risk in the EU if they do not report, or wait to report.

C. Rule No. 3: You Cannot Avoid – And Therefore Must Not Fail To Consider – Amnesty Plus, Penalty Plus, And Omnibus Hell.

- The typical requirement of applying for leniency in multiple jurisdictions is not the only irreversible expansion of what, in effect, is mandatory additional cooperation with enforcers when one decides to report an offense to the U.S. DOJ. Three important aspects of the DOJ amnesty program will in many cases inexorably lead to the disclosure of additional cartels or other hard-core per se violations: Amnesty Plus, Penalty Plus, and the omnibus question in connection with witness interviews.
- Amnesty Plus.
 - As described above, Amnesty Plus allows a cooperating party that has not obtained amnesty to better its situation, whether lessening its fine or reducing the penalties applied to its officers and employees, by applying for amnesty with respect to other cartel activity. For a company that has not qualified for amnesty because it contacted the DOJ too late, exploring the possibility of Amnesty Plus is an option many consider and pursue.
 - Amnesty Plus, however, drives the decision making of the 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, in order to obtain amnesty for the second product and, just as importantly, avoid 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.
 - Penalty Plus effectively tells an amnesty applicant that, while it may appear that none of your competitors in the reported cartel know about and are in a position to tell the DOJ about separate cartel conduct, if the DOJ later learns of it through the DOJ's own investigatory efforts or the amnesty application of another competitor, you are going to suffer special, additional pain if you knowingly failed to turn it in at the time of the earlier amnesty application.

- Omnibus Hell.
 - The aspect of applying for amnesty with perhaps the most coercive 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 individuals 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 U.S. commerce, but that is not always clear from the particular phrasing of the question (or as the question is processed in the mind of witness for whom English may be a second language).
 - If defense counsel suffer nightmares, there is a good chance the nightmares involve the response to an omnibus question. Needless to say, witnesses, not lawyers, answer the 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 foreign witness misunderstood the question, 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 favor with the government. Even if the answer points to conduct that does not appear to be actionable in the U.S., 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, a company should endeavor to assess who the likely DOJ interviewees are going to be and whether they have awareness of other conduct – whether bearing on the U.S. or elsewhere – that the company needs to assess. Regardless of counsel's preparation

and investigation, there will always remain an element of uncertainty relating to the omnibus question.

D. Rule 4: Most Importantly, And Because Of The Foregoing, You 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), and the combined effects of Amnesty Plus, Penalty Plus and the omnibus question (Rule 3), 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 compartmentalize 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 maximizes 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. If not, the company loses. While far from a complete listing, some of the steps that must be taken are set forth below.
- 1. Immediately gather the facts, interview key witnesses and, where feasible, review significant documents.**
 - 2. Evaluate the scope of civil litigation exposure 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 the inevitable direct purchaser 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 U.S., does it appear likely that a *Kruman*-style claim for damages arising from purely foreign sales may succeed?
 - Is the product in question susceptible to indirect purchaser claims on behalf of consumers?

3. 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, an initial question is whether one 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 U.S. 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 U.S. and EU limitations periods are 5 years, but Canada has no statute of limitations. Something that might be reportable in Canada may no longer be reportable in the U.S. 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. If one is evaluating a 20-year period of fragmented stop-and-start collusion, reporting activity within the last five years to the U.S. and the EC may then lead to having to secure immunity going back 20 years in Canada.

4. Continually evaluate the potential "snowball" effects that flow from Amnesty Plus, Penalty Plus, and the Omnibus Question.

- This means that one must explore everything 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 analyzed. This can be a complicated analysis and one that has to be performed quickly and updated throughout the investigation.
- The analysis (or schematic diagram of the snowball fight) 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 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 U.S., 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 U.S. that your company witnesses have not identified to date? Non-amnesty witnesses facing jail time in the U.S. may manage to recall statements and connections that others do not.
- What would the likely company interviewees for the current product say about other activities in response to the omnibus question?
- 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.

E. Rule 5: Never Forget The Civil Litigation.

- Every amnesty application with the U.S. DOJ 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 incremental settlement costs (that is to say, settlement payments beyond what is necessary to make victims whole) in making a decision on whether to seek amnesty. Different companies may draw different conclusions from their relative criminal v. civil litigation risks – but the civil litigation costs have to be examined and factored into the threshold decision of whether and where to apply for amnesty.
- If a cartel investigation moves forward, civil litigation will of course follow, even if the investigation proves to have been unfounded. The relationship between the criminal and civil processes can be an awkward one, as discussed above – but a company can lessen some of the difficulty encountered with civil litigation by thinking ahead as the government investigation proceeds.
 - An example relates to submissions to the government. As discussed above, civil litigation plaintiffs will seek to obtain relevant written submissions made to the government. They have been successful in connection with the vitamins litigation with respect to certain written communications with the EC and the Canadian Bureau of Competition. For defense counsel, it is thus important to pursue a "paperless" process wherever feasible.

- 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.

VII. Trends & Challenges For The Future

A. Continued Convergence

- The U.S., Canada, and the EU have made substantial progress in increasing the consistency in their leniency policies. The most critical step in this regard was the EC's 2002 Leniency Notice, which granted full immunity to the first reporting party and aligned its policy with that of the U.S. and Canada in many respects. This opened the flood gates for new applications in *all three* jurisdictions.
- Convergence, however, has shown its limits, and there are still some important differences that continue to diminish incentives to apply for immunity with respect to international cartels. International enforcers, with appropriate input from the private bar, should continue to address notable disparities in their respective policies. The International Competition Network may be the right forum in which to do so.
- Whatever the forum, the agenda for further discussion should include at least the following items:
 - Developing a truly paperless process in all jurisdictions. Recording the statements of lawyers, as the EC presently does, encourages lawyers to be more formal, more abbreviated, and more lawyerly. The EC risks depriving itself of the detail and assistance that the U.S. and Canada regularly enjoy and which a more informal exchange with the Commission staff would facilitate. Australia, if it wishes for its program to thrive, should eliminate the requirement for written submissions.
 - Establishing a procedure for proactive coordination between jurisdictions on fines and priority assignments for jail with respect to individual defendants.
 - Adoption of a consistent policy on whether an immunity applicant "must reveal any and all offences in which it may have been involved" at the time of application. That requirement is unrealistic and deters, rather than encourages, immunity applications. Instead, an Amnesty Plus-style policy is more practical and its pro-reporting impact on parties seeking leniency is well documented.
 - Permitting hypothetical applications and anonymous inquiries with respect to whether immunity is available.
 - Permitting parties to place first-in "markers," which they then later perfect, instead of having to delay reporting while assembling enough background facts to make a full presentation to the EC. A basic description of the collusion and a commitment to accurately report further details of the violation and cooperate with the government on a fulsome and continuing basis should suffice to secure conditional protection.

B. Increased Focus & International Cooperation With Respect To Interference With The Investigatory Process

- A notable trend and issue for the future is the growth in prosecutions or amnesty withdrawals based on conduct that interferes with the Antitrust Division's investigatory process. Although obstruction of justice prosecutions related to witness tampering or destroying, changing, or removing documents should surprise no one, this has become an area of increased enforcement focus for the Antitrust Division.¹⁴⁴
- In the last year and a half, the DOJ appears to have revoked or denied the amnesty of a senior executive of an amnesty applicant¹⁴⁵ and has prosecuted companies who took steps to destroy documents, influence witnesses, or remove relevant documents from the U.S. Notably, the DOJ has pursued foreign companies criminally for improper document destruction or document tampering – even if the company did not directly participate in any other alleged wrongdoing.
 - In March 2002, Toho Tenax Co. Ltd. (Toho Japan) of Tokyo, Japan, was indicted for obstruction of justice because it caused incriminating documents to be secretly removed from the headquarters of Toho USA in Menlo Park and to be sent to Tokyo while a grand jury investigation was active. The documents were later discovered by Japanese law enforcement agents who found them during a search of the Toho Japan headquarters *at the U.S. DOJ's request*.
 - In November 2002, the Morgan Crucible Company plc of Windsor, England, was charged with witness tampering for attempting to persuade a witness to destroy documents relevant to the DOJ's investigation of Morgan's U.S. subsidiary. Morgan Crucible agreed to plead guilty and to pay a \$1 million criminal fine. In an indication of the importance the Antitrust Division presently places on pursuing such matters, Assistant Attorney General R. Hewitt Pate described the Morgan Crucible prosecution in some detail in a recent speech:

¹⁴⁴ See, e.g., R. Hewitt Pate, *The DOJ International Antitrust Program – Maintaining Momentum*, Address Before The American Bar Association Section of Antitrust Law 2003 Forum on International Competition Law (Feb. 6, 2003) <<http://www.usdoj.gov/atr/public/speeches/200736.htm>> (expressing the Antitrust Division's "firm resolve to prosecute conduct that interferes with our cartel investigations, regardless of the nationality of the firm involved or where the acts of obstruction took place. With increased frequency, the Division is uncovering evidence of obstruction of justice, and we will aggressively investigate such conduct. In the last two and one-half years alone, the Division has brought five cases charging obstruction of justice - a high number by historical standards. There are a number of other cases where we have not brought obstruction charges separately but instead obtained sentencing enhancements based on the obstruction.").

¹⁴⁵ See, e.g., James Bandler, *Stolt-Nielsen Official Is Charged In Global Price-Fixing Inquiry*, WALL ST. J. (June 25, 2003), at A3.

In one recent investigation, we uncovered an elaborate plot to obstruct not only our investigation of price fixing in the carbon brush industry but also a potential EC investigation. Executives of Morgan Crucible gave the Division false information in an attempt to convince us that their price-fixing meetings with competitors were legitimate business meetings. They provided their co-conspirator with a written "script" containing this false information, requested that it follow the script when questioned by the Division, and warned its co-conspirator that if the U.S. investigation proceeded, the price-fixing investigation would spread to the EC. The Division charged The Morgan Crucible Company PLC, a British firm, with obstruction of justice arising from this witness tampering. Morgan Crucible pled guilty to the obstruction charges and its U.S. subsidiary, Morganite, Inc., pled guilty to price fixing. The companies were fined a total of \$11 million.¹⁴⁶

- This increased focus on obstruction of justice is complemented by passage of the Sarbanes-Oxley Act of 2002, which increases the penalties for actions taken to frustrate a U.S. government investigation.
 - The Sarbanes-Oxley Act makes it a crime – subject to fines and *imprisonment for up to 20 years* – to knowingly alter or destroy any document with the intent to impede, obstruct, or *influence* the investigation of any matter within the jurisdiction of a department or agency of the United States or “*in relation to or contemplation of any such matter.*” 18 U.S.C. § 1519.
 - While the sanction for violating this statute is clearly severe, the phrases "*influence*" and “*in relation to or contemplation of any such matter*” leave much to interpretation.
 - There is a wide range of views on how broad §1519 actually is, and it is unclear how courts will interpret it. However, there is abundant clarity that the Antitrust Division will pursue parties that interfere with its investigatory process.

C. Increasing International Cooperation

- As described above, there has been a marked increase in inter-agency coordination and assistance.

¹⁴⁶ Pate, *Anti-Cartel Enforcement*.

1. Assistance With Unilateral Investigations

- This has included cooperation from foreign authorities in the form of searches in Germany and Japan in aid of U.S. obstruction of justice investigations. One would assume that the DOJ would reciprocate in assisting their foreign counterparts in a similar manner if so requested.
- Similar assistance has occurred with respect to unilateral cartel investigations conducted by the U.S. For example, in one investigation, at the DOJ's request German authorities deployed over 100 German police officers to conduct multiple searches throughout Germany.¹⁴⁷

2. Coordinated International Investigations

- Perhaps more notably, 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 U.S., Canada, the EU, and Japan.
- The JFTC recently indicated that it is in the process of completing cooperation agreements with the United States, Canada, and the European Union to allow information exchanges and broader cooperation on antitrust investigations.¹⁴⁸ The fact that Japan has taken these steps, as much as anything, indicates that international cooperation is increasingly the norm, not the exception, in international cartel investigations.
- Worldwide coordinated investigations are clearly the wave of the future.

D. Civil Litigation Issues

- As discussed above, significant concerns have been raised with respect to the way the criminal and civil litigation systems in the U.S. remain disparate processes with nothing other than ad hoc, occasional coordination. Fines and civil damages amounts are not correlated. The Antitrust Division wastes time and effort intervening in civil cases to avoid compromising ongoing grand jury investigations. And, as counsel advising potential amnesty applicants know, the uncapped aggregate civil damages exposure faced by a defendant greatly complicates the assessment of incentives to report violations.

¹⁴⁷ *See id.*

¹⁴⁸ *See JFTC To Form Antitrust Network With United States, Canada, Europe*, ANTITRUST AND TRADE REG. DAILY (Aug. 8, 2003).

- In addition, the present conflict between the U.S. federal circuits regarding subject matter jurisdiction over cartel-related claims arising from wholly foreign sales between foreign parties needs to be resolved by the U.S. Supreme Court. When the Court eventually addresses this issue, its holding will have a significant impact on civil litigation and the DOJ's amnesty program. Indeed, the DOJ has recognized this and filed amicus briefs arguing that the courts should decline subject matter jurisdiction over wholly foreign sales. As Assistant Attorney General Pate has acknowledged:

[A]n overly broad reading of the FTAIA could adversely affect the Division's leniency program and hence adversely affect U.S. criminal law enforcement against foreign cartels. Permitting suits for treble damages by foreign plaintiffs whose injuries arise from foreign conduct could well create a disincentive for corporations and individuals to report antitrust violations and seek leniency from the Antitrust Division, out of a fear that voluntary disclosure of wrongdoing would expose them to unbounded and unpredictable civil liability. We say this not out of sympathy for the cartelists. To the contrary, we use leniency grudgingly. But we are also realistic about the considerations that make our program work. Our leniency program is a critical component of our criminal enforcement program and our greatest source of leads regarding international cartels. We appreciate the additional deterrent value provided by civil lawsuits. But we must guard against the possibility that broader civil remedies might diminish the effectiveness of our public mission of detection and enforcement.¹⁴⁹

¹⁴⁹ *Id.*