

A TEMPTING OFFER:

Immunity from Fines for Cartel Conduct Under the European Commission's New Leniency Notice

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THE EFFORTS OF ANTITRUST enforcers to identify, punish, and deter hard-core international cartels have been strengthened significantly by the use of so-called amnesty or leniency policies.¹ One such policy is the European Commission's leniency policy, which was substantially revised and reissued in February 2002. The European Commission's new leniency policy, like those in other jurisdictions, makes participants in secret cartels aimed at fixing prices, restricting output, dividing markets, or rigging bids a tempting offer. Cartel participants are offered the opportunity to trade their knowledge of the improper conduct, and their ability to assist antitrust enforcers in investigating and prosecuting such violations, for immunity from or a reduction in otherwise applicable fines or penalties arising from a government enforcement action related to the reported violations.

The U.S. Department of Justice (DOJ) was the first antitrust authority to adopt such a policy, in 1978. In 1993 the DOJ significantly expanded its Corporate Leniency Policy to guarantee complete immunity from criminal prosecution for the first company to report a cartel and cooperate in the resulting government investigation.² Based on the successes associated with the DOJ's policy, other competition law enforcers followed and adopted leniency policies of their own.³ They included the Commission of the European Communities (EC), which in 1996 adopted its Notice on the

Non-Imposition or Reduction of Fines in Cartel Cases (1996 Leniency Notice).⁴ The 1996 Leniency Notice, however, did not expressly provide guaranteed immunity from fines for qualifying leniency applicants who were the first in the door to report a violation, nor were many companies given complete reductions in their fines. These considerations, among others, led to perceptions that the 1996 Leniency Notice did not offer prospective applicants protections that were predictable and reliable.

The Commission decided recently to make a number of significant revisions to its policy, and it announced a new leniency notice on February 13, 2002. This article reviews the recent changes to the EC's leniency policy, the extent to which they represent meaningful convergence in EC and U.S. leniency policies, and several notable interpretive issues that the Commission may wish to clarify in the future.

The New EC Leniency Notice

Unlike the United States, where cartel conduct may give rise to criminal liability for companies or individuals, cartel-style violations of the EC antitrust rules do not create criminal exposure under EU law. Nevertheless, cartel activity can give rise—and has given rise—to substantial fines imposed by the European Commission. The EC's new policy, the Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases (2002 Leniency Notice),⁵ provides an incentive for voluntary disclosure of cartel conduct by offering full immunity from fines for the first qualifying party to report an infringement, as well as reductions in fines for later-reporting companies that provide certain cooperation with an EC investigation.

Immunity from Fines. To secure complete immunity from fines under the 2002 Leniency Notice, the immunity applicant must satisfy certain conditions. A threshold requirement is that the applicant be the first company to report and provide adequate evidence of the violation in question. Notably, this requirement can be met in one of two ways. First, the applicant company may qualify for immunity if it is the first company to submit evidence sufficient to enable the Commission to initiate an investigation into the alleged cartel and launch a search of co-conspirators' premises, a so-called dawn raid. 2002 Leniency Notice ¶ 8(a). Immunity under this provision will not be available if the Commission already has enough evidence to decide to exercise its formal investigative powers in the matter. *Id.* ¶ 9.

Second, if the company seeking immunity finds that the Commission has already commenced an investigation, it may nevertheless secure immunity from fines if it is the first company to submit evidence that enables the Commission to establish that there was an infringement of Article 81(1) of the EC Treaty (*id.* ¶ 8(b)), the EC analogue to Section 1 of the Sherman Act. Immunity will be available only if the Commission does not already have sufficient evidence to find an infringement and has not already granted conditional immunity to another party. *Id.* ¶ 10. As to either

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approach to immunity, the critical requirement is that the immunity applicant be the first in the door to report the violation and provide to the Commission evidence that it did not otherwise have that enables it to initiate an investigation and/or prove an infringement.

In addition to meeting one of these threshold requirements, under the 2002 Leniency Notice an immunity applicant must satisfy three additional conditions. First, the applicant must cooperate fully with the Commission's investigation. *Id.* ¶ 11(a). This means providing continuous and expeditious cooperation as the Commission's investigation proceeds. The immunity applicant is also required to provide the Commission with "all evidence that comes into its possession or is available to it relating to the suspected infringement." *Id.* The applicant must also remain "at the Commission's disposal to answer swiftly any request" that may contribute to proving the reported violation. *Id.* Second, and unsurprisingly, the immunity applicant must have ended its involvement in the improper competitor agreements. *Id.* ¶ 11(b). Third, the applicant must not have taken steps to "coerce other undertakings to participate in the infringement." *Id.* ¶ 11(c).

Reduction of Fines. If a company is unable to qualify for full immunity, it may nevertheless be able to secure a reduction in its fine. *Id.* ¶¶ 20–27. To do so, the company must have terminated its involvement in the reported violations and must provide evidence of the infringement that "represents significant added value with respect to the evidence already in the Commission's possession." *Id.* ¶ 21. The Commission has indicated that it will assess the added value provided by the cooperating party's evidence based on whether the evidence strengthens the Commission's ability to prove the reported violations. Written evidence that is directly relevant to and created contemporaneously with the collusive activity in question will be viewed by the Commission as having greater value than evidence that post-dates the key events in question and/or is only of indirect relevance to proving the violations. *Id.* ¶ 22.

As with requests for full immunity, the order in which competing applicants for leniency provide the necessary cooperation will have an impact on the reduction in fine they enjoy. The first company to provide evidence constituting "significant added value" in the investigation will enjoy a reduction in fine of 30–50 percent. The second will receive a reduction in the 20–30 percent range. Later cooperating parties can expect a reduction in fine of up to 20 percent. *Id.* ¶ 23(b). Within each of these percentage reduction bands, the Commission's decision on a precise percentage will depend on when the evidence providing "significant added value" was submitted, the quality of the information, and the extent and continuity of the company's cooperation. If a party cooperating in this manner discloses evidence previously unknown to the Commission that bears directly on the gravity of the violations or the length of time over which they existed, it does so without prejudice to itself under the 2002

Leniency Notice. *Id.* In other words, if a cooperating company discloses that a cartel commenced earlier or ended later than the Commission was previously aware, the company will not be penalized with an increase in its fine to account for the expanded scope of the violation.

Convergence in North American and EU Leniency Policies

In several respects, the 2002 Leniency Notice reflects a material change of approach from that reflected in the 1996 Leniency Notice and offers much greater certainty for companies seeking immunity. It also represents a major step forward in the coordination and convergence of North American and EC leniency policies. Five areas of change and convergence stand out in particular.

1. Guaranteed Immunity. Under the 1996 Leniency Notice, 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 reduction of only 75 percent of the fine that would have been otherwise imposed.⁶ The 1996 Leniency Notice provided for the possibility of no fines for a successful applicant, but in practice the Commission never granted "full immunity" with the exception of three cases decided toward the end of 2001, shortly before the new policy was announced.⁷ As a consequence, the 1996 Leniency Notice, as written and implemented, did not provide prospective amnesty applicants with full protection from fines in return for disclosing violations, and this reduced incentives to apply for leniency under the EC policy. The 1996 Leniency Notice stood in sharp contrast to the applicable leniency policies in the United States and Canada, which provided and still provide today for automatic full immunity for qualifying first-in applicants.⁸ The 2002 Leniency Notice, with its guarantee of full immunity for qualifying applicants, appears to align the EC's policy with those of the United States and Canada.

2. Written Confirmation of Conditional Immunity. In addition to granting full immunity, the new EC leniency notice—like the analogue policies in the U.S. and Canada—provides for written confirmation of conditional immunity early in the amnesty process.⁹ The 2002 Leniency Notice commits the EC to grant 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.¹⁰ This is a significant change from the 1996 Leniency Notice, which 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.¹¹ Under the new policy, however, an amnesty applicant can apply simultaneously in the EU, the United States, and Canada, with assurance that if it is first in the door and meets the immu-

nity requirements, it can obtain full protection from government penalties and secure written confirmation of conditional protection promptly in all three jurisdictions. For government enforcers and counsel representing potential leniency applicants alike, this is a welcome development.

3. *Guaranteed Fine Bands for Later Reporting Companies.* There are other notable up-front guarantees in the new EC policy. For companies that are not candidates for full immunity but wish to reduce their fines through cooperation with the EC, the 2002 Leniency Notice makes an offer the 1996 Leniency Notice did not. Under the 2002 Leniency Notice, non-immunity applicants are assured 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. As noted above, the first qualifying non-immunity applicant will receive a 30–50 percent reduction in the otherwise applicable fine, and the second in the door will enjoy a 20–30 percent reduction in fine. Under the 1996 Leniency Notice, by contrast, parties who were second in the door behind the lead immunity applicant were promised only a reduction of somewhere in the range of 10–50 percent of the fine.¹²

By changing its policy to provide clear incrementally diminishing benefits for the parties who wait to be second, third, and fourth in the door behind the first-in immunity applicant, the EC has adopted in letter an approach similar to the one the DOJ generally follows in practice. The U.S. DOJ generally requires tougher relative punishment for a party that is third in the door vis-à-vis a party that is the second to report.¹³ Thus, under both DOJ practice and the EC's Leniency Notice, it is now clear that a leniency applicant may gain a significant advantage over other members of a cartel if it is the second party to cooperate, even if it knows it is too late to obtain full amnesty.

That said, the existing DOJ and EC policies remain different in two notable respects. First, the DOJ—unlike the EC—has not adopted clear written guidelines that are transparent and make affirmative percentage fine-reduction commitments. Nor is it clear that it would be practical for the DOJ to offer such concrete fine-reduction promises because the DOJ pursues cartel violations as criminal offenses, with a broader range of potential sanctions, such as imprisonment for individuals. In the United States, fines are only one part of a larger package of potential penalties. In addition, approval of plea agreements and attendant sentencing proceedings are controlled by an independent judiciary in the U.S. system. Needless to say, the DOJ cannot dictate to judges what sentences they will impose.

Nevertheless, one would think the DOJ could consider a front-end written commitment to recommend reductions in otherwise applicable monetary fines in a manner somewhat similar to the 2002 Leniency Notice. The DOJ has considerable influence on sentencing proceedings, and often negotiates plea agreements pursuant to Federal Rule of Criminal

Procedure 11(e)(1)(C), agreements a court must accept or reject in their entirety. Although counsel who have monitored the DOJ's leniency record since the current Corporate Leniency Policy was adopted in 1993 have a good sense of what the incremental percentage fine reductions are likely to be for non-immunity applicants, were the DOJ to provide a public written commitment to agree to recommend a fine reduction within a certain percentage band based on order of reporting, this would increase transparency. Such increased transparency and the additional clarity it would offer to companies considering cooperation with the DOJ would tend to increase incentives to be second, rather than third, in the door at the DOJ.

Second, and perhaps more importantly, although both the EC and the DOJ approaches promise incrementally reducing fine reductions for later-reporting companies, it is not clear that those percentage increments are the same in the United States and the EU. Indeed, the DOJ's record in leniency cases suggests that the information provided by the second company to report a violation can be worth more than a 50 percent reduction in the otherwise applicable fine.¹⁴ Before the Commission, even under the new leniency notice, the very best that a second-in applicant can hope for is a 50 percent reduction in fine, the high end of the designated 30–50 percent range. The DOJ does not make up-front commitments regarding fine reduction bands in the public way that the 2002 Leniency Notice does, but once an application is made the DOJ may well offer larger reductions in fines for applicants who are second in the door.

4. *Role in the Infringement.* The 2002 Leniency Notice also has taken steps to reduce the subjectivity of the requirements an applicant must satisfy to receive immunity or a reduction in fines. This is particularly true with respect to how an immunity applicant's role in the cartel affects its candidacy for protection. Under the 1996 Leniency Notice, 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.”¹⁵ The terms “an instigator” and “played a determining role” were inherently subjective and potentially overbroad. For example, if two competitors agree to fix the prices or rig the bids at a particular common customer, both could be viewed as disqualified under the 1996 Leniency Notice. The company that initiated the contact with its competitor to propose the agreement could be treated as “an instigator,” and the other competitor would certainly have “played a determining role” in the agreement since the agreement would not have existed without its participation. As the Commission itself has 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.”¹⁶

The 2002 Leniency Notice seeks to provide a less subjective

tive, more predictable standard by requiring that a company seeking full immunity “did not take steps to coerce other undertakings to participate in the infringement.”¹⁷ 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 a material step toward eliminating subjectivity in the standards governing immunity. It is a change that the U.S. DOJ has welcomed.¹⁸

It bears noting that, with respect to this role-in-the-offense disqualification issue, the EC has taken a step to encourage and facilitate immunity applications that the DOJ has not been prepared to take. 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 another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity.”¹⁹ Recognizing that this language presented interpretive ambiguity and could be read to exclude a significant range of potential amnesty applicants, the DOJ has clarified that its policy disqualifies an amnesty applicant only if it is *the* singular organizer or *the* singular ringleader of the cartel activity.²⁰

Nevertheless, for any company that played an originating or organizing role in a reportable violation, the DOJ policy, even with the various policy clarifications, injects some element of uncertainty into the calculation each company must make about whether to apply for amnesty. Such a company must assess whether the DOJ might view it as the “organizer” or the “ringleader” of the cartel. In contrast to the DOJ policy, the new EC policy eliminates any subjectivity or uncertainty with respect to whether the company was *a* leader or *the* leader—setting aside such labels as “leader” or “originator” and committing to grant full immunity unless the applicant affirmatively coerced others to participate.²¹

5. More Flexible Evidence Requirement. There are other ways in which the 2002 Leniency Notice has altered the Commission’s approach in an effort to reduce the subjectivity of the applicable immunity standards and encourage the reporting of cartel activity. In particular, the 2002 Leniency Notice has eliminated the requirement in the 1996 Leniency Notice that, to qualify for the most favorable leniency treatment (non-imposition of a fine or a “very substantial” reduction in the fine under ¶ B) or even second-tier benefits (a “substantial reduction” under ¶ C), the applicant must be the first to “adduce *decisive* evidence of the cartel’s existence.”²² This standard, coupled with the Commission’s practice under the 1996 Leniency Notice of requiring that the “decisive evidence” be in documentary form,²³ created substantial uncertainty if not preclusive difficulties for a company that was considering reporting an infringement to the Commission, but did not have “smoking gun” documentary evidence of the cartel at issue. In recognition that the “decisive evidence” terminology left “room for interpretation and,

therefore, uncertainty as to what decisive information was,”²⁴ the EC eliminated this language in the 2002 Notice.

The new policy adopts different language, but it does not exactly reduce the subjectivity of the evidence standard. 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 (under ¶ 8(a)) or find an infringement of Article 81(1) of the EC Treaty (under ¶ 8(b)).²⁵ Nevertheless, the new language appears to be a more flexible, presumably easier-to-meet standard that is unlikely to present the same hurdle in qualifying for immunity as did the decisive evidence requirement under the 1996 Leniency Notice. In addition, the new policy allows an applicant that does not have the evidence to establish the existence of an infringement to qualify for full immunity under ¶ 8(a) by providing enough evidence for the EC to launch a dawn raid.

Even with the reduced evidentiary hurdle, the EC approach continues to chart something of a different course from the U.S. policy, which does not incorporate an explicit evidentiary standard in its leniency criteria. The DOJ simply requires accurate reporting of the violation and full, continuing, and complete cooperation.²⁶ Nevertheless, the 2002 Leniency Notice does narrow the differences in EC and DOJ amnesty policies. And the EC’s new language is likely to encourage additional reporting under the leniency notice since it suggests that a prospective applicant can qualify for leniency even if it does not possess documents proving irrefutably the existence of a cartel.

Interpretive Issues Under the 2002 Leniency Notice

Although the 2002 Leniency Notice reflects a material change in the EC’s approach to leniency for cartel-style infringements, and a change that is likely to create greater incentives to apply for immunity or leniency under the policy, how the Commission interprets and implements the policy will be instructive for companies considering seeking leniency in the EU. Interpretation and application of the EC’s new policy will also be important to companies that are considering seeking amnesty for international cartels in the United States or in Canada, because an application in North America for activity spanning North America and Europe likely requires the same party to apply for leniency with the EC²⁷ and possibly elsewhere²⁸ as a matter of course. If the EC policy is viewed as lacking transparency or predictability, that can have a negative impact on a company’s willingness to apply for amnesty in the United States or Canada.²⁹ Thus, it is no surprise that the U.S. DOJ has welcomed the newly strengthened EC policy, describing it as the most significant development affecting U.S. cartel enforcement in the last year.³⁰

At the same time, the DOJ has noted a fact of which the private bar is acutely aware: “While the new program on paper is a tremendous improvement in terms of the level of transparency that it provides to potential leniency appli-

cants, the real test is how it is implemented”³¹ In this connection, the 2002 Leniency Notice states that “[t]he Commission is aware that this notice will create legitimate expectations on which [applicants] may rely when disclosing the existence of a cartel to the Commission,” but the 1996 Leniency Notice contained the very same assurance and full immunity was rarely granted.³² Needless to say, if the Commission appears inclined to deny full immunity to otherwise qualifying candidates in close cases based on subjective interpretive issues, the EC policy—and in turn the analogue policies of other jurisdictions—will not be as successful as they could be. Although it appears that the Commission is administering the new policy in a forthright, transparent manner that favors awarding immunity to applicants who are first in the door to report an infringement, in the end only Commission decisions published in the EC’s *Official Journal* will provide the necessary public guidance with respect to what applicants can expect from the leniency notice in practice.

In implementing the new notice, there are certain interpretive issues that will arise and the Commission’s approach to them could affect the program’s success. Four issues in particular merit note and could benefit from further policy statements by the Commission.

1. Non-Prejudicial Immunity Inquiries. Under the 2002 Leniency Notice, it appears unclear whether the EC is going to adopt the U.S. DOJ’s approach of permitting anonymous initial inquiries as to whether immunity remains available in a particular industry or with respect to a specific area of economic activity without taking the more significant step of applying for immunity or disclosing—even in hypothetical terms—the existence of an infringement. If the Commission insists on requiring detailed factual presentations, even if they are ostensibly hypothetical, before indicating whether immunity may be available with respect to a particular industry, product, or market, this raises the stakes for a prospective applicant and may serve to deter some applications. If anonymous inquiries about immunity availability cannot be made, potential applicants will have to (1) identify themselves and (2) disclose on a “hypothetical” basis sufficient details regarding an infringement such that, in the minds of most companies and their counsel, they will have handed over to the Commission a roadmap to investigate them without any assurance going in that they are going to obtain conditional immunity.

2. Written and Oral Evidence. Another question is whether the Commission will receive and consider other-than-documentary evidence offered by an immunity or leniency applicant. Under the 1996 Leniency Notice the EC required an applicant to provide decisive evidence of an infringement, but that evidence could be presented only in documentary form. This typically required a party to produce documents from its files that, on their face, provided decisive evidence that a cartel had existed. Applicants also filed “company statements,” which were written statements describing

the infringements at issue. Both were often necessary because the Commission did not consider or receive oral testimony, statements, or other non-written information.³³ Applicants that wanted to establish their first-in bona fides had to submit hastily prepared company statements that might not give the Commission the most complete accounting of the cartel and were not interactive in the way an in-person oral presentation with questions and answers could be.

In contrast to the Commission’s practice under the 1996 Leniency Notice, the 2002 Leniency Notice does not appear to restrict the ways in which “evidence” may be provided. For a company applying for a reduction in fine through an offer of evidence that, as the new policy requires, provides significant added value, the Commission has indicated it views “written evidence originating from the period of time to which the facts pertain” as having greater value than other forms of evidence.³⁴ Whether in connection with an application for a reduction in fine or full immunity, the new EC policy does not indicate in an express way what other forms of evidence may be accepted as applicants seek to meet their evidentiary requirements.

Given the 2002 revisions to the leniency notice, one would expect the EC to accept oral presentations by counsel for an immunity applicant in determining whether to grant conditional immunity in writing, and this would be a positive development that will parallel the approach taken in the United States and Canada. What may be less clear is whether the EC will also consider interviewing witnesses or otherwise accepting oral presentations in connection with an applicant company’s obligations to provide sufficient evidence and ongoing full cooperation.

For applicants applying under ¶ 8(a) of the 2002 Leniency Notice, which provides immunity in return for producing evidence sufficient to permit the EC to launch a dawn raid, the precision and quality of information that can be conveyed orally by counsel or witnesses is likely to be vastly superior to documents that are found in the applicant company’s files. In addition, with the increased prominence of cartel enforcement in recent years, today’s and tomorrow’s cartel participants are far less likely than their historic counterparts to create an incriminating paper trail. With potential reductions in the amount of “smoking gun” written evidence enforcers can expect to find, the importance of oral statements and testimony will grow. The United States and Canada, which regularly interview relevant employees of cooperating companies and may use them as witnesses in court if prosecutions ensue, place substantial value on evidence and information delivered orally. Historically, the Commission has not done so.

Material differences between the EC and the North American enforcement agencies in what evidence they accept in satisfaction of immunity obligations can lessen the effectiveness of all of the jurisdictions’ leniency strategies. When an international cartel is at issue, potential leniency applicants must evaluate whether the evidence they have to offer—often predominately oral statements—will lead to predictable

qualification for conditional and, ultimately, final immunity (or for non-immunity reductions in penalties) in both North America and Europe. If their best evidence will not be accepted by one jurisdiction, potentially compromising their immunity in that jurisdiction, that may reduce the likelihood they will apply for amnesty in any jurisdiction.

For these reasons, a clear indication by the EC that it will in the future accept oral information by an applicant in whole or partial satisfaction of its evidentiary obligations under the 2002 Leniency Notice would be a welcome clarification that would promote the enforcement objectives of the notice. Given that the cartel prohibition of Article 81(1) of the EC Treaty is directed principally toward companies and not individuals—such as the employees, officers, or directors of such companies—any interviews or other oral presentations the EC elects to pursue under the leniency notice should probably only take place through the auspices of, and in coordination with, the employer/leniency applicant company.

3. Model Immunity Agreement. Although the EC has committed to provide written assurance of *conditional* immunity under the 2002 Leniency Notice,³⁵ it remains to be seen precisely what the stated conditions of immunity in that document will be. This is an important observation because experience with the DOJ Corporate Leniency Policy—which, as noted above, also uses a written letter addressing conditional immunity—suggests that many of the precise obligations and burdens attendant to satisfying the conditions of immunity are only set forth in the conditional immunity document itself. Recognizing that these conditions are material components of the bargain an amnesty applicant strikes with the government, the DOJ has in the interest of transparency and predictability created a model conditional amnesty letter that is publicly available for prospective applicants to review.³⁶ The letter states what the particular obligations of an amnesty applicant are, including the specifics of what precise cooperation is necessary and a requirement that the applicant make restitution to victims of the cartel. 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.

In light of the DOJ experience, now that the EC has announced it will be issuing written confirmation of conditional immunity, the Commission could further increase transparency and legal certainty by adopting a model letter that is publicly available. As with the DOJ policy, much of what cooperation under the 2002 Leniency Notice will actually require may be found in that written document. For that reason, what the EC written confirmation of conditional immunity says will dictate the precise contours of the cooperation under the 2002 Leniency Notice. Creating a

model letter would be a welcome addition and provide a fuller, more complete picture of what the 2002 Leniency Notice will require in practice.

4. Confidentiality with Respect to Cooperating Parties. Finally, in view of the potential trend toward criminalizing violations of certain antitrust rules within certain EU Member States,³⁷ it may also be worthwhile for the Commission to confirm and further clarify in public its practice of generally not revealing the identity of any individual cooperating with it by excluding names of cooperating individuals in the text of the Commission's final decision published in the *Official Journal*. Needless to say, if cooperation with the EC pursuant to the 2002 Leniency Notice leads inevitably to criminal exposure for individuals under Member State laws, individuals with potential criminal exposure under Member State laws will not cooperate with leniency applications by their employers. Without the cooperation of individuals, it will be difficult for companies considering cooperation under the 2002 Leniency Notice to be sure they can provide the documentation and other information necessary to secure immunity or a reduction in fine. And without that assurance, they are much less likely to apply for leniency with the EC unless their employees have already obtained leniency protection with the relevant Member State antitrust enforcers. For these reasons, a public commitment not to disclose the names of participating individuals affiliated with successful applicants under the 2002 Leniency Notice would strengthen the new leniency notice.³⁸ In this connection, the Commission has recently taken affirmative steps to oppose the disclosure in U.S. civil litigation of written submissions made to the Commission in connection with the 1996 Leniency Notice.³⁹ That effort and other indications by the Commission⁴⁰ suggest it is firmly committed to taking appropriate steps to maintain the confidentiality of information provided to it pursuant to the leniency notice.

Conclusion

Efforts toward convergence in North American and European policy and practice with respect to leniency policies have served and no doubt will serve to increase the effectiveness of enforcement efforts in both regions. In the global effort to identify, punish, and deter hard-core collusion among competitors, the 2002 Leniency Notice is a welcome notable strengthening of EU enforcement policy, and one that has significantly increased predictability and transparency for cartel participants who consider seeking immunity or reduced fines. Counsel advising companies with respect to the new policy have reason to believe that the new policy indicates a shift in practice, not just in words, by the EC. Clarification by the Commission of the issues identified in this article—anonymous inquiries regarding the availability of immunity, the use of oral evidence, the precise provisions of the written confirmation of conditional immunity, and confidentiality of individuals' names—could contribute to ensuring the success of the new policy.

U.S.-EU convergence should be a two-way street based on the merits of various proposals. There are areas in which the language of the 2002 Leniency Notice offers an additional measure of transparency and reduced subjectivity that the *written* DOJ Corporate Leniency Policy does not offer, such as with respect to reduced subjectivity in the role-in-the-offense disqualifiers and up-front commitments regarding percentage fine reduction bands. This is not to say that the DOJ's amnesty program lacks predictability with respect to interpretation or application of the policy. Unlike the 2002 Leniency Notice, the DOJ policy enjoys a nearly decade-long record of rewarding leniency applicants who disclose cartels. Nevertheless, the 2002 Leniency Notice incorporates some new ideas that will contribute to encouraging cartel participants to trust the government and step forward to apply for immunity or a reduction in penalty, and they merit consideration by the DOJ. ■

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⁴ Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 96/C207/04, 1996 O.J. (C 207) [hereinafter 1996 Leniency Notice], http://europa.eu.int/comm/competition/antitrust/legislation/96c207_en.html.

⁵ Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002/C45/03, 2002 O.J. (C45) 3, http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/c_045/c_04520020219en00030005.pdf [hereinafter 2002 Leniency Notice].

⁶ 1996 Leniency Notice, *supra* note 4, ¶ B.

⁷ 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), http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=MEMO/02/23|0|RAPID&lg=EN [hereinafter EC 2002 Memorandum]; European Commission, Commission Adopts New Leniency Policy for Companies Which Give Information on Cartels (Feb. 13, 2002) (Press Release—IP/02/247), http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/247|0|RAPID&lg=EN.

⁸ DOJ Corporate Leniency Policy, *supra* note 2; Canada Immunity Program, *supra* note 3, ¶¶ 12–18.

⁹ The U.S. DOJ customarily issues a conditional amnesty letter, see Spratling, Corporate Leniency Policy, *supra* note 2 (including a sample conditional amnesty letter); and the Canadian authorities issue a provisional guarantee of immunity. Canada Immunity Program, *supra* note 3, ¶ 22.

¹⁰ 2002 Leniency Notice, *supra* note 5, ¶¶ 13 & 15. Notably, the EC's 1996 notice did not provide for hypothetical initial disclosures. As noted, the 2002 Leniency Notice does, see *id.* ¶ 13(b), and in this respect is similar to the Canadian policy, which also explicitly provides for a hypothetical presentation of facts pending confirmation that a provisional written guarantee of immunity will be forthcoming from the government. Canada Immunity Program, *supra* note 3, ¶ 21.

¹¹ 1996 Leniency Notice, *supra* note 4, ¶ E(2).

¹² *Id.* ¶ D(1).

¹³ See Gary R. Spratling, Characteristics of the International Cartel Enforcement Environment: The United States—2002, Address to the ABA's 16th Annual National Institute on White Collar Crime 2002 (Feb. 28, 2002) (noting that 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).

¹⁴ See *generally* 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 6 (Sept. 2001), <http://www.abanet.org/antitrust/commentseu.html> ("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.").

¹⁵ 1996 Leniency Notice, *supra* note 4, ¶ B(e).

¹⁶ EC 2002 Memorandum, *supra* note 7.

¹⁷ 2002 Leniency Notice, *supra* note 5, ¶ 11(c).

¹⁸ See, e.g., Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program, Address at 2002 Antitrust Conference: Antitrust Issues in Today's Economy 12–16 (Mar. 7, 2002), <http://www.usdoj.gov/atr/public/speeches/10862.htm> [hereinafter Hammond 2002 Spring Meeting Address].

¹⁹ DOJ Corporate Leniency Policy, *supra* note 2, ¶ A(6). The role-in-the-offense standard for obtaining amnesty under the alternative provisions of Part B of the DOJ policy covering such situations as where the DOJ has already initiated an investigation is more subjective and discretionary: "The Division determines that granting leniency would not be unfair to others, considering

¹ See, e.g., Organization for Economic Co-operation and Development, REPORT ON LENIENCY PROGRAMMES TO FIGHT HARD CORE CARTELS (Apr. 27, 2001) (DAFFE/CLP(2001)13—JT00106784), <http://www.oecd.org/pdf/M00020000/M00020228.pdf>. Although these policies are praised in many quarters, see, e.g., *In Praise of Whistleblowers*, THE ECONOMIST, Jan. 10, 2002, http://www.economist.com/displayStory.cfm?Story_ID=930052, some still question whether worldwide cartel enforcement is as effective as it could be. See, e.g., Brandon Mitchner, *OECD Survey Calls for Sanctions on Cartels to Be Made Tougher*, WALL ST. J. ONLINE (May 15, 2002), <http://online.wsj.com/article/0,,SB1021409221520850320-search,00.html?collection=wsjie/30day&vqlstring=%28cartels%29%3Cin%3E%28article%2Dbody%29>.

² U.S. Department of Justice, Antitrust Division Corporate Leniency Policy (Aug. 10, 1993), <http://www.usdoj.gov/atr/public/guidelines/lencorp.htm> [hereinafter DOJ Corporate Leniency Policy]. Specifically, to secure complete immunity from criminal exposure for a company and its employees, an applicant under the DOJ policy must (i) be the first source of such information for the DOJ, (ii) have terminated its participation in the reported cartel, (iii) provide full and complete information regarding the cartel as well as ongoing cooperation with the DOJ, (iv) admit its wrongdoing as a truly corporate act, (v) make appropriate restitution to injured parties, and (vi) not have coerced another party or served as the leader or originator of the activity. *Id.* ¶ A. The policy also provides amnesty for companies that are the first to report even though the DOJ has already commenced an investigation if (a) the DOJ does not yet have evidence against the company that is likely to result in a sustainable conviction, (b) the company satisfies items (ii)–(v) above, and (c) the DOJ determines that granting amnesty would not be unfair to others. *Id.* ¶ B. A number of these criteria are subject to interpretation, and since announcing this policy in 1993 the DOJ has clarified certain of these requirements, generally doing so in a manner that gives prospective amnesty applicants increased assurances that they will not be disqualified if they apply for amnesty. See Gary R. Spratling, *The Corporate Leniency Policy: Answers to Recurring Questions*, Address at the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), <http://www.usdoj.gov/atr/public/speeches/1626.htm>; Gary R. Spratling, *Making Companies an Offer They Shouldn't Refuse: The Antitrust Division's Corporate Leniency Policy—An Update*, Address at the Bar Association of the District of Columbia's 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), <http://www.usdoj.gov/atr/public/speeches/2247.htm>.

³ See, e.g., Canada Competition Bureau, Immunity Program Under the Competition Act (Sept. 21, 2000), <http://strategis.ic.gc.ca/SSG/ct01990e.html> [hereinafter Canada Immunity Program]; UK Office of Fair Trading, Competition Act of 1998: Leniency, <http://www.oft.gov.uk/business/legal+powers/ca98+leniency.htm>. By way of example, other countries with leniency or similar policies include Brazil, Australia, France,

the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward." *Id.* ¶ 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.*

²⁰ See Hammond, *supra* note 18, 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."); Spratling, Corporate Leniency Policy, *supra* note 2 ("Issues have arisen as to what it means to be 'the leader in, or originator of, the activity.' The Amnesty Program refers to 'the' leader and 'the' originator of the activity, rather than 'a' leader or 'an' originator. Accordingly, in situations where the corporate conspirators are viewed as co-equals or where there are two or more corporations that are viewed as leaders or originators, any of the corporate participants will qualify under this part of section A6 and may qualify under the more discretionary section B7.").

²¹ Notably, the DOJ has indicated a favorable view of these changes to the EC policy, even though the DOJ has not to date taken the pro-amnesty step of formally eliminating the "leader" and "originator" disqualifiers:

Fortunately, the EC's new program narrows the class of cartel members which would be ineligible under the program and makes it easier for companies to predict with certainty whether they qualify for full immunity. The revised program does not exclude from full immunity those cartel members that played an instigating or determining role, rather it simply requires that the leniency applicant not have taken steps [to coerce participation.] This change eliminates the uncertainty that existed in the old program and creates greater opportunity for companies to qualify for full immunity.

Hammond, *supra* note 18, at 14.

²² 1996 Leniency Notice, *supra* note 4, ¶ B (emphasis added).

²³ See Julian M. Joshua, *Leniency in U.S. and EU Cartel Cases*, ANTITRUST, Summer 2000, at 19, 22 (Then-Deputy Head of the EC Cartel Unit noting that "[p]roviding 'decisive evidence' . . . normally requires the production of contemporaneous cartel documentation.").

²⁴ European Commission, Commission Adopts New Leniency Policy for Companies Which Give Information on Cartels (Feb. 13, 2001) (Press Release—IP/02/247), [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/247\[0\]RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/02/247[0]RAPID&lg=EN).

²⁵ 2002 Leniency Notice, *supra* note 5, ¶ 8 (emphasis added).

²⁶ DOJ Corporate Leniency Policy, *supra* note 2, ¶¶ A(3) & B(4).

²⁷ If a company applies for amnesty in the United States related to an international cartel, in due course the DOJ's grand jury investigation, or a guilty plea or indictment flowing from the investigation, is likely to become public. That in turn could lead the EC to begin its own investigation of the same activity, especially if any of the parties involved are based in the EU. In addition, other cartel members that receive U.S. grand jury subpoenas and learn that they have become the targets of a DOJ investigation are, for the reasons stated immediately above, likely to assume that the U.S. amnesty applicant probably also reported the violation with the EC and then consider offering their own cooperation to the EC. Either way, the EC is likely to learn of the cartel. As a consequence, an international cartel participant that applies for amnesty in the U.S. typically must proceed to do the same in the EC and Canada.

²⁸ Disclosure of cartel activity to the U.S. DOJ or the EC may also require a company to seek leniency pursuant to the leniency policies of individual EU Member States. This is particularly true if cartel activity gives rise to potential criminal sanction under Member State laws, as it may shortly in the UK. For a discussion of the UK criminalization initiative and potential difficulties in the interface between EC and UK cartel enforcement and leniency policies, see Julian M. Joshua & Donald C. Klawiter, *Step Forward or Another*

Complication? The UK "Criminalization" Initiative, *infra* this issue. It bears mentioning that European competition authorities have agreed upon some common principles for their leniency programs. See, e.g., European Competition Authorities, Principles for Leniency Programmes, Directors' General of European Competition Authorities Meeting in Dublin (Sept. 3–4, 2001).

²⁹ See, e.g., Hammond 2002 Spring Meeting Address, *supra* note 18, at 11 ("The adoption of effective leniency programs by foreign antitrust enforcers has a direct impact on the Division's efforts to prosecute international cartels, because the existence of an effective leniency policy in another jurisdiction may influence whether an organization comes forward under the leniency program in the United States."); William J. Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. and EU Competition Policy: Cartels, Mergers, and Beyond, Address to the Council for the United States and Italy Bi-Annual Conference (Jan. 25, 2002), <http://www.usdoj.gov/atr/public/speeches/9848.htm> (noting prior to the announcement of the 2002 Leniency Notice that "[a] continuing impediment to more companies coming forward . . . is that the leniency programs of other jurisdictions, where they exist at all, often leave companies stepping forward in jeopardy, thus discouraging voluntary cooperation.").

³⁰ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Division, A Review of Recent Cases and Developments in the Antitrust Division's Criminal Enforcement Program, Address at the ABA Antitrust Section's 50th Annual Spring Meeting (Apr. 24, 2002) (oral remarks).

³¹ Hammond, *supra* note 18.

³² As previously noted, there were only three instances in which the Commission granted full immunity under the 1996 Leniency Notice. In the largest, most important of the three, the *Vitamins* matter, the Commission granted "full immunity" to Rhone-Poulenc, but the aggregate result was arguably mixed for the leniency applicant. In the *Vitamins* matter, the Commission dissected the competitor arrangements vitamin by vitamin, giving Rhone-Poulenc immunity from fines for two vitamins, but nevertheless fining it for its "passive participation" in agreements related to a third. European Commission, Commission Imposes Fines on Vitamin Cartels (Nov. 21, 2001) (Press Release—IP/01/1625), [http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1625\[0\]RAPID&lg=EN](http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/1625[0]RAPID&lg=EN).

³³ See Julian M. Joshua, *supra* note 23, at 21–22.

³⁴ 2002 Leniency Notice, *supra* note 5, ¶ 22.

³⁵ *Id.* ¶ 15 (once preliminary requirements are satisfied, the EC "will grant the undertaking conditional immunity from fines in writing").

³⁶ See Spratling, Corporate Leniency Policy, *supra* note 2 (introducing and attaching Model Amnesty Letter).

³⁷ See *supra* note 28.

³⁸ This is not to say that there are not other means by which Member State competition authorities enforcing criminal laws, such as the UK if it criminalizes cartel conduct, could obtain evidence of cartel activity by individuals from the EC—evidence that an individual's employer may have provided to the EC in connection with cooperation under the 2002 Leniency Notice. While outside the scope of this article, it is worth noting that the sharing of information between the EC and national authorities could put individuals at risk, a concern that should be addressed. Some of these issues, including their relationship to the EC's modernization initiative, are identified and discussed in Joshua & Klawiter, *supra* note 28.

³⁹ See Brief of the Commission of the European Communities, Appearing as *Amicus Curiae*, In Opposition to Plaintiffs' Joint Motion to Compel Bioproducts to Produce Its Governmental Submissions, *In re Vitamins Litig.*, No. 99-197 (D.D.C.) (May 16, 2002).

⁴⁰ See, e.g., Alexander Schaub, Director-General, DG Competition, European Commission, Co-operation in Competition Policy Enforcement Between the EU and the US and New Concepts Evolving at the World Trade Organisation 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.")