

Reporting A Cross-Border Cartel? Check The Guidance

By **Bryan Koenig**

Law360 (July 21, 2020, 2:41 PM EDT) -- Competition enforcers around the globe are increasingly adopting U.S.-inspired programs that encourage participants in illegal cartels to turn themselves in, along with their partners in corporate crime, in return for leniency.

But self-reporting carries risks, even when leniency is available, because leniency regimes differ from country to country and the consequences can still be harsh, especially from enforcement in other jurisdictions and follow-on private litigation.

To help enforcers design programs that encourage disclosure and to persuade hesitant lawbreakers to participate in leniency programs, U.S. and European antitrust enforcers have teamed up with some of their international peers to spell out their approaches, but the effort may highlight the challenges to cooperation as much as it offers comfort with participation.

The International Competition Network's "Guidance on Enhancing Cross-Border Leniency Cooperation" is supposed to be a blueprint for the agencies themselves, according to the U.S. Department of Justice. It was crafted over the course of a year by the DOJ in conjunction with its peers from Australia, Canada, Chile, Brazil, the European Commission, Hong Kong and New Zealand along with ICN cartel working group co-chairs hailing from Turkey and Hungary. The ICN is the global organization of international enforcers set up to facilitate cooperation and iron out differences in enforcement approaches.

Antitrust attorneys see in that blueprint a starting point, but only a starting point, to address some of the challenges that have beset international antitrust as more and more countries adopted their own competition regimes, in an expanding web of overlapping enforcement that some have blamed for declining global fines.

"Indeed some have questioned whether the ubiquity of leniency programs and severe cartel remedies might be deterring self-reporting due to the potential combined magnitude of the remedies," Abbott "Tad" B. Lipsky Jr., an FTC and DOJ alumnus who now heads the competition advocacy program at the Global Antitrust Institute at George Mason University's Antonin Scalia Law School, said in an email. "[A]lthough the guidelines have a kind of 'helpful hints' tone and provide a great deal of information that will be very helpful to less-experienced jurisdictions, there are still serious policy issues to be confronted as leniency practices — including international cooperation — are worked out in the future."

The guidance itself recognizes that the expanding web of enforcement and the near certainty of follow-on private litigation in the U.S. once word of a deal gets out may discourage companies from coming

forward to report anti-competitive conduct in exchange for leniency or consideration when tabulating fines.

"As cartels cross borders, competition agencies are often called upon to coordinate with other jurisdictions and prospective leniency applicants face an increasingly complex choice when evaluating whether, and where, to seek leniency," the guidance states.

"This guidance is intended to provide practical advice for competition agencies to assist them in engaging with other jurisdictions on matters involving multijurisdictional leniency applicants, with the two parallel aims of first, making international enforcement efforts more effective and second, helping to reduce disincentives for prospective leniency applicants," it continues.

Attorneys say the guidance is much more likely to help with the former than the latter. Its ability to reduce disincentives, they say, is limited by several factors, including a lack of participation by one of the world's most important antitrust enforcers, China, as well as the still-overhanging fear of follow-on private litigation, especially in the United States.

Also limiting the guidance is the fact that individual jurisdictions will continue handling their own leniency applications in their own way, creating the possibility that a company obtaining consideration from one enforcer may not get the same reception overseas.

"The guidance document identifies that as an issue but it does not solve that problem," said Colin Kass, a Proskauer Rose LLP partner who co-chairs the firm's antitrust practice.

What the guidance does do is encourage antitrust enforcers to build a regular rapport with their peers for general cooperation and on specific cases, including through specific information-sharing frameworks. Also addressed, among other topics, is the need to give companies a clear idea of what to expect when pursuing leniency and how it might vary between jurisdictions when reporting it across borders, as well as the importance of coordination and dialogue between different enforcers at different stages of an investigation.

The guidance may be most useful for countries who've only recently established their own antitrust enforcement regimes.

"Often newer cartel enforcers, with little experience, don't realize the deterrent effect of certain demands they may impose, or how certain requirements regarding such things as written witness statements, or recorded depositions, could damage the ability of other enforcers to successfully build a case in their own jurisdiction," Morrison & Foerster LLP partner Lisa M. Phelan said in an email. "While each country has its own system of law and specific competition laws, within that framework a lot of actions are discretionary policy, and thus the guidelines can help newly active cartel agencies understand all of the implications of various actions and policies, and see the value of communication with other, more experienced, enforcers."

Phelan and others say that the guidance breaks little to no new ground. Instead, according to Phelan, the guidance particularly reflects the policies of the larger and more-well established antitrust enforcers, including in the U.S., Europe, Brazil, Japan and Canada.

Kass in turn describes the document as "cross-border coordination 101."

"But it is helpful to have, in one document in one place, something that identifies the significant complexities that do arise," he said.

While written from the perspective of the enforcers, Ingrid Vandendorre, the head of Skadden Arps Slate Meagher & Flom LLP's Brussels office, says the guidance can also be useful to companies by providing insight on the "practical issues" they would face when seeking leniency as part of a global probe.

"In addition to supporting agency coordination, they thus enable leniency applicants to anticipate issues. That is important because leniency applicants benefit directly from better coordination between the agencies," Vandendorre said in an email.

Even putting everything in one place has its limits however. Much depends, said John Roberti, an Allen & Overy LLP partner in charge of the firm's Washington, D.C., antitrust practice, on different participating regimes adopting the best-practices discussed in the guidance that comes with no binding commitments.

"There's just no teeth to it," said Roberti.

Diverging leniency programs are not the only issue identified by practitioners or the guidance itself. The drafters also sought to encourage inter-jurisdictional communications, but Kass noted that cross-border information-sharing is often dictated by statute that enforcers cannot change on their own.

"It becomes very difficult to achieve sort of complete transparency and complete convergence, even if there is a desire to do it," Kass said.

The guidance spends considerable energy on agencies safeguarding confidential information gleaned from leniency applications.

Leniency applicants concerned that the information they provide, and the very fact that they're providing it, may lose some of the incentive "to self-report and cooperate," the guidance warns, which could undermine investigations. The guidance states that company concerns about private litigation, enforcement actions in jurisdictions where they didn't seek leniency, and retaliation from other members of a price-fixing cartel could all help dissuade would-be leniency applicants afraid of the information they share getting disclosed.

"Companies fear a 'gotcha', where they come in and fully cooperate with several jurisdictions, their efforts at cooperation satisfy most enforcers, but one enforcer decides they didn't quite meet the demands of its leniency program, and they use the evidence obtained to fine or prosecute the company," Phelan said.

Leniency applicants need to trust that the information they turn over will be kept confidential, according to Johannesburg-based Baker & McKenzie partner Lerisha Naidu. That trust, she said, requires "clear guidance" for companies on how their information could be shared between enforcers and how it will be safeguarded.

"It is likely that agencies that show respect for this principle will receive better collaboration from leniency applicants, which will facilitate the agency's collaboration with other competition agencies in a particular investigation. This may result in better coordination of investigations," Naidu said in an email.

In trying to provide that guidance, the ICN document notes that some agencies will share confidential information gleaned from leniency applicants only with their permission, given by waiver. The guidance also discusses how issues with different waiver systems might be addressed, while additionally discussing information-sharing via "information gateways" or through bilateral cooperation agreements.

"The problem with the above-mentioned solutions is that not all jurisdictions have adopted information gateways or entered into bilateral agreements providing for information sharing," Naidu said.

Another important consideration in the guidance, Naidu said, is the case-by-case approach suggested for agencies with the power to share confidential information without first getting permission from the company.

Naidu also noted the guidance's discussion of coordinating punishment, with the document urging enforcers to discuss how they calculate fines and credit to be given to cooperating companies. Different agencies can however still come to different conclusions, she noted.

"The coordination of case outcomes will enable competition agencies to penalize cartel members in a consistent manner across various jurisdictions," Neidu said. "This may provide a further incentive for leniency applicants and other cartel members that have undertaken to cooperate with an agency, as they stand to benefit from the coordinated process of penalty calculation that agencies will adopt."

--Editing by Rebecca Flanagan.