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## Amnesty: If you can't be first, at least be second

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# ammesty

IF YOU CAN'T BE FIRST,

// BY GAIL DUTTON

AT LEAST BE SECOND

**It is said** that confession is good for the soul. It can also be good for the pocketbook when the charge is antitrust violations. Last spring (February 2007), Otis BV saved itself €190 million in fines when it became the first to provide evidence against a Dutch elevator and escalator installation and maintenance cartel. Competitor Kone did the same in Belgium and Luxemburg, gaining total immunity in both countries and a substantial reduction of its German fines, for a total savings of €138 million.

In 2004, Indiana concrete company Shelby Materials gained amnesty from criminal prosecution in an Indiana concrete antitrust suit. Its co-conspirators weren't so fortunate. Irving Materials paid \$29.2 million in fines—a new U.S. record for domestic antitrust cases. Four executives were sentenced to five months in prison plus five months of house arrest. Before that case was finished, six other companies were fined and 10 executives imprisoned. Civil suits, filed when the criminal suit concluded, may result in an additional \$252 million in fines, based upon a formula of treble damages for overcharges (typically averaging 21 percent of total sales in the United States since 1991, according to Purdue University research).

Antitrust violations are a serious business. The United States and, more recently, the European Union are cracking down with a carrot-and-stick approach. While the stick delivers a solid whack in terms of fines and prison time, the carrot induces a race to confession that can be onerous but extremely worthwhile.

### GAINING AMNESTY

The deal offered by the U.S. Department of Justice (DOJ) is simple: Tell the prosecution everything you know about the antitrust violation and the companies involved in exchange for amnesty from criminal prosecution for the corporation, its officers, directors and staff.

Deciding to apply for amnesty can be a tricky decision, though. One repercussion to applying for amnesty is that the act becomes public, thereby increasing the probability that the entity will face civil or even class action lawsuits, which may cost dearly in terms of financial damages and a ruined reputation. However, if a company is granted



amnesty in the government investigation, it may experience some limited protection from civil prosecution as well. In those cases, restitution tends to be limited to damages actually inflicted.

Despite the public exposure, "amnesty is a huge incentive," emphasizes Robert W. Ray, a former federal prosecutor, now a partner at Pryor Cashman in New York. But complete amnesty from criminal prosecution is granted only to the first company that cooperates fully. To win it, you have to act fast.

Being the second company to apply for amnesty has some benefits, too. Although the second company to apply for amnesty isn't granted full protection, prosecutors may show leniency. The second company to apply for amnesty in the Indiana concrete cartel, for example, received amnesty from prosecution in certain geographic markets. "That's still a significant incentive," Ray says. If the company were convicted, it could amount to a "50 to 80 percent discount off sentencing or fines." There's also the possibility that the first to apply for amnesty won't fully cooperate, leaving the second company in a better position to negotiate. The decision of whether to charge a company is always discretionary, he says.

## FULL COOPERATION



The "full cooperation" on which the government insists is, however, up for interpretation. "There's no one set of rules as to what takes place," explains Bob Goldman, partner and co-chair of the white collar compliance and defense group at Fox Rothschild's Philadelphia office. "Qualifying [for amnesty] presupposes you've been completely truthful and forthcoming," detailing all of your wrongdoing to avoid any factual disputes. There's also an argument that full cooperation may mean waiving attorney client privilege and turning over

privileged materials. "The act of self-reporting—or accepting amnesty—ostensibly turns your compliance team into an arm of the DOJ," adds Alexandra Wrage, president of TRACE International in Annapolis, MD. Full cooperation "is a very invasive and expensive process."

Not cooperating fully, however, has a greater risk—losing amnesty. In 2005, tobacco processor Deltafina lost its conditional amnesty in an Italian tobacco cartel case because it tipped off other cartel members. In the end, its information was valuable enough to earn the company a reduction in fines. Nonetheless, it paid €30 million—the highest of all the cartel members.

In a March 2006 case involving an international parcel tanker shipping cartel, the DOJ used evidence from Stolt-Nielsen to convict other cartel members, but later revoked amnesty. The reason was that the firm continued its antitrust violations for six months after telling the DOJ they had ceased.

## SHOULD YOU SELF-REPORT?

The question of whether a company should self-report a violation is not easy to answer. The legal community hasn't reached a consensus regarding the value of self-reporting, but many say that throwing yourself on the mercy of the Department of Justice isn't always in a corporation's best interest. In fact, sometimes it can be worse than doing nothing, Ray says.

As David Rosenfield, former assistant U.S. attorney and now a white collar defense practitioner with Herrick, Feinstein in New York, points out, "The main reason why a company may not wish to utilize the amnesty program is that the self-reporting of criminal activity to the government must occur before any investigation has even begun, and there is always the possibility that a government investigation will never occur. Additionally, once the company self-reports its potentially criminal conduct, it can't take the evidence back—the cat is out of the bag. Finally, as part of its deal with the company, the government may require that costly and burdensome controls or oversight mechanisms be put in place."

Another reason to remain silent is that it is not always clear that a legal violation has actually occurred. In these cases, companies may be able to handle the matter internally. When there's a clear case of wrongdoing, though, the issue changes somewhat. As counsel, "when you represent an individual or corporation in a particular matter, that matter is what you're addressing," Goldman says. "If you become aware of other infractions, how do they relate to this? You don't necessarily lean into the punch," he says. In other words, if it's unrelated, it may be in your best interests not to report the infraction. "Each situation is different."

## Europe Cracks Down on Cartels

In the European Union, word is spreading that amnesty has been "a very valuable enforcement tool," according to Robert Ray, partner at Pryor Cashman. It has been successful in breaking up cartels. German specialty chemicals manufacturer Degussa AG was among the first to take advantage of the EU leniency program. Involved for six years in a plan to fix hydrogen peroxide prices, the company reported itself in 2002 under the new leniency guidelines and avoided a €130 million fine.

Since then, dozens of companies have come forward in hopes of reducing fines by as much as 40 percent. Compare the number of cartel cases: in only five years since the amnesty program was instituted, the European Union Commission handled 35 cases, compared to 85 cases from 1969 through 2002. With the carrot of reduced fines and amnesty before them, companies are coming forward in increasing numbers.

This new aggressiveness is the direct result of European Competition Commissioner Neelie Kroes' determination to uncover cartel activity in Europe. As part of her strategy, she has created a cartel directorate with about 60 offices and is refining and clarifying the rules governing leniency to enhance transparency, provide greater certainty to companies applying for immunity and let companies know what they need to provide to qualify for the program, according to Neil Ray, antitrust attorney with Sheppard Mullin in San Francisco.

Although the EU and U.S. antitrust laws are similar, there are a few differences, Neil Ray says. In the European Union, the rules of first-in apply to the first company to make a statement. In the United States, the first-in rule applies to the first to report a cartel and may be revised later if adequate information is not forthcoming.

In the United States, companies charged with antitrust violations often enter a plea bargain before the case goes to trial. "The EU doesn't have a system like that," Neil Ray says. Instead, Kroes said in a speech last June at the College of Europe Conference in Brussels that the Commission was considering a form of direct settlements, in which companies admitting to cartel involvement "could under certain circumstances, benefit from a shorter procedure and reduced fines—and thereby save some of their reputation."

Such caution develops partly because the fallout from antitrust cases involves not only the criminal aspects of an antitrust case, but civil components through potential lawsuits by shareholders as well. Self reporting opens the company to scrutiny by the DOJ and, eventually, by the media. That public scrutiny may cause substantial damage to the corporation's reputation. Additionally, "Companies that self-disclose are getting the biggest fines in history," Wrage elaborates. The DOJ, she explains, assumes the problem eventually would have been found.

The alternative to self-reporting, Wrage says, is "fixing the problem, hunkering down and riding out the statute of limitations." That approach is not simply to sweep the issue under the rug but to fire the culprits, audit the company to uncover the extent of the problem, fix it, monitor it and then remain quiet. She says it's a tricky issue, but officers must make the right decision for the company and take firm steps to do the right thing and fix the underlying problem.

The European Union Commission on Competition does present a preliminary version of its case to defendants in a statement of objections, to which companies may reply before final proceedings begin. Those not challenging the facts of the objections may receive reduced fines. Notably, repeat offenders can be fined significantly more than the guidelines stipulate for first offenses. The European Union has dedicated competition cooperation agreements with the United States, Canada and Japan and is in talks with China.

If you decide not to self-report and misjudge the situation, the risks are high. By the time a case is brought, someone else will have talked. "In the typical case, the government generally has more familiarity with what took place than the corporation has," Goldman says. Although the corporation

presumably has identified the problem and is remediating it, the government will form its own investigation and, once it starts, has trusted insiders.

## NEGOTIATING AMNESTY

"When the government believes criminal activity took place, prosecutors have a lot of discretion regarding whom they select to cooperate," Goldman says. As a prosecutor, he continues, "You're evaluating who should get immunity." It may be offered to the least culpable, to the most helpful or to the first to cooperate.

Because granting leniency to companies affects the government's ability to prosecute, any deal depends upon how sorely the government needs information. "The government gives up a lot," Ray says, but granting amnesty allows antitrust violations to be uncovered that otherwise may go undetected. It helps the government catch and prosecute other players, because antitrust never involves just one company. "You can't be everywhere," he says.

Negotiating amnesty or leniency usually "is a type of dance," Goldman explains. "You try to buy some time and see where the other companies stand. Are we first?" he asks. "Do we have the luxury of time?" With time, in-house counsel can investigate the situation, identify the company's exposure and then weigh the risks of a trial versus full cooperation.

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## The Indiana Concrete Case

The Indiana concrete industry was upended in 2004 when the U.S. Department of Justice raided the homes and offices of executives from six of the industry's key companies. To the concrete execs involved, price fixing was business as usual. It had been arranged quietly since the 1960s, in one-on-one discussions. Now, the stakes were higher. Deep discounting from outside companies was threatening the livelihood of some companies, triggering large meetings to fix the prices, and the extension of pressure to other companies to cooperate with this cabal.



Gary Matney, then of Prairie Material Sales, was one of those pressured. He refused. When cartel members went to his boss, he went to the DOJ. During the next year, he taped phone conversations at the behest of the FBI, eventually agreeing—with FBI permission—to join the cartel. In less than a year, a strong case was made against six companies: Industry leader Irving Materials, Builder's Concrete & Supply, Beaver Materials, Carmel Concrete Products, Shelby Materials and Lees Ready Mix & Trucking. Together, those companies controlled the Indianapolis concrete and aggregate market, selling at least \$400 million in that area alone between 2000 and 2004, when the FBI's early morning raids brought cartel activities to a screeching halt.

By the morning of the raids, the government had strong reason to believe that the companies were in collusion. The raids and executive interviews strengthened the case. To make it incontrovertible, the DOJ offered amnesty to the first company to cooperate fully with the government. Shelby Materials was the first, winning complete amnesty against criminal prosecution and fines. Irvine Materials was second, gaining amnesty for its actions in markets other than Indianapolis. The remaining companies are repenting at their leisure.

The two cartel leaders received prison terms of 14 months each, one exec received nine months in prison and five executives were sentenced to five months in prison plus five months home detention. The only two executives who refused to settle the cases and actually went to trial each received 27-month prison terms. In addition to fines totaling \$35 million, the companies also faced nearly 20 civil suits from customers to recover overcharges. Banks responded by calling in some companies' debts and freezing bank accounts. One spin-off firm, headed by a cartel leader, has filed for bankruptcy and others have new management.

The repercussions have been felt throughout the state, especially within Indiana's concrete industry. "It heightened the awareness of people... frightened some people to some degree, and brought them closer, too," according to Pat Kiel, executive director for the Indiana Ready Mixed Concrete Association (IRMCA). "We got a lot of requests to clarify what constitutes price fixing." This was a gray area for many execs. To help clear up questions, the IRMCA has antitrust compliance training at its annual meetings. The bottom line, Kiel says, is to make certain you understand the issues. The stakes are too high to do otherwise.

### **GOOD FOR THE GOVERNMENT, GOOD FOR THE COMPANY**

The carrot-and-stick approach, so far, is working. "It's a good way to break up a cartel," Ray says, because antitrust violators know "one person could rat them out, and the whole thing will come crashing down." Consequently, the amnesty program reduces that concern for the first company to come forward.

Such actions thus help uncover antitrust cases the DOJ otherwise may have missed. Testifying to that success before Congress last March, Thomas Barnett, Assistant Attorney General in the Antitrust Division of the U.S. DOJ, said that during fiscal 2006, the DOJ levied the second highest amount of fines in its history, obtaining more than "\$473 million in criminal fines from 20 corporations and 20 individuals. The fiscal year also yielded 5,383 jail days imposed for price fixing, bid rigging, fraud and related anticompetitive behavior."

The DOJ's amnesty policy seems to be working for companies too, making the benefits of seeking amnesty and reporting their own antitrust violations greater than the risks of not coming forward and possibly being caught. In 1993, when the DOJ instituted the amnesty process, "we got one amnesty application per year," Ray says. Now, the average is 21, and private attorneys have an incentive to encourage their clients to 'fess up.

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