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**USE OF MARKERS IN LENIENCY PROGRAMS**

-- BIAC --

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# Time for a Global “One-Stop Shop” for Leniency Markers

BY JOHN M. TALADAY

**A**NTITRUST LENIENCY PROGRAMS may soon be a victim of their own success. Corporate leniency started as a single-jurisdiction experiment in creating a true “prisoner’s dilemma” and a race to the courthouse among cartelists to obtain a marker to secure their leniency position. But leniency is now going viral, with more than fifty jurisdictions having leniency programs on the books and a number of others in the works.<sup>1</sup> The impact of these programs on international antitrust enforcement has been immense: agencies worldwide have seen a major uptick in the number of cartel cases before them; the leniency option (or threat) has altered the way counsel advise their clients about suspected cartel activity; and slowly, but surely, the threat of detection brought about by these programs has acted as a deterrent to corporations.

For international cartels, this proliferation of leniency programs means that the complexity and cost of determining leniency status and seeking markers is ever increasing. This in turn creates disincentives for companies to step forward and admit their participation in illegal cartels, particularly in jurisdictions where the scope and effect of the cartel is unclear in the earliest stages of the investigation.

There is a simple step which would simultaneously help agencies to ease the burden of seeking leniency, incentivize wrongdoers to step forward, and help newer and less practiced regimes develop their cartel programs: the creation of a global “one-stop shop” for leniency markers. As discussed below, this would align the processes for securing a “first in line” status for leniency applicants. Because, however, marker policies typically are a matter of agency process rather than legislation, it would not require the sacrifice of sovereignty or independence of decision making by participating jurisdictions. This is a proposal for procedural convergence that would protect the tremendous advantages that leniency policies have gained for enforcers, while requiring only a modest degree of adjustment. It could be implemented by the

agencies themselves (rather than their governments) and developed under the auspices of the International Competition Network (ICN) or the Organization for Economic Cooperation and Development (OECD).

There is precedent in the international regulatory community for procedural vehicles that make it simple and efficient for parties to meet their legal needs. This is particularly so where those vehicles also have inherent benefits to the regulators. For example, the international patent regulatory community established the Paris Convention Treaty (PCT) among more than 140 countries, which is administered by the World Intellectual Property Organization (WIPO). The PCT allows patent offices in Europe, Asia, and elsewhere to share information and ease the strain on overburdened patent examiners worldwide. The system includes an international patent application that provides “first to file” protection to the first applicant under the PCT.<sup>2</sup> This means that the PCT applicant has protection as of the date of its international filing that is recognized by participating PCT jurisdictions. Importantly, participating jurisdictions do not cede sovereignty to the WIPO; the actual grant of a patent remains under the control of the national or regional patent offices in what is called the “national phase.”<sup>3</sup> But in order to provide protection to the first filer, the national authorities agree to relate-back to the filing date reflected in the international application.<sup>4</sup>

This article examines the potential for a similarly beneficial (though somewhat different) mechanism for leniency markers. It also considers how such a program would benefit antitrust authorities, leniency applicants, and consumers alike.

## The Rapid Evolution of Leniency Programs

### *The U.S. Puts the “Prisoner” in “Prisoner’s Dilemma.”*

The United States became the first country to adopt a leniency program with the announcement of the Department of Justice Antitrust Division’s Amnesty Policy in 1978. The 1978 program was limited by its terms and, partly as a consequence, resulted in an average of just one leniency application per year, none of which were international cartels.<sup>5</sup> In 1993, the policy underwent a major overhaul designed to eliminate the uncertainty and lack of transparency that hindered the original version.<sup>6</sup> It did so by adopting three major

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changes. First, leniency became automatic for corporations that met the policy's requirements, thereby eliminating the Division's discretion over whether to grant leniency to qualifying applicants. Second, the corporate leniency policy now protected all current officers, directors, and employees of a qualifying applicant, provided the individuals fully cooperated with the Division's investigation. And third, under certain conditions, leniency was now available even if the Division already had initiated an investigation.

Seeking to add further transparency to its program, the Division issued a set of *Frequently Asked Questions* in November 2008, intended to clarify implementation of the leniency policy.<sup>7</sup> The *Frequently Asked Questions* provided the first in-depth discussion of the program's marker system. Given the time pressures a leniency applicant faces in preparing a leniency application, the marker system enables a corporation to obtain first-in-line status by providing basic information about the suspected wrongdoing, even before conducting a thorough investigation. Upon securing a marker, the applicant has a limited timeframe in which to conduct an investigation and either (a) provide the Division with enough information to obtain conditional leniency, or (b) withdraw its marker if the investigation reveals that no illegal conduct in fact took place.

The results of providing certainty and transparency were dramatic. Over the years that followed, the number of leniency applications multiplied and ultimately led to a consistent flow of cartel prosecutions that brought down some of the most serious offenses in the history of antitrust.

***EU and Other Major Jurisdictions Adopt and Adapt Leniency.*** The European Union, home to another of the world's most-utilized leniency programs, first adopted a leniency program in 1996.<sup>8</sup> The European Commission issued a revised version in 2002,<sup>9</sup> and adopted its current policy in 2006.<sup>10</sup> Although the EC does not have the ability to impose criminal penalties for antitrust violations, its Leniency Notice affords first-in applicants the possibility of complete immunity from fines. In an evolution from the U.S. system, and consistent with the nature of the EC's authority and legal process, the EC also offers the possibility of "partial" leniency by way of a reduction of fines to later applicants that add significant value through their disclosures.<sup>11</sup>

One of the most significant aspects of the 2006 Leniency Notice is the EC's adoption of a marker system for "first-in" immunity applicants. To apply for immunity from fines, a business may either (1) initially apply for a marker that protects its first-in-line status for an agreed-upon period in order to allow for the gathering of information needed to perfect the marker; or (2) immediately proceed to making a formal application for conditional immunity, which requires significantly more evidence.

Thus, there are two main distinctions between the U.S. and EU marker systems. First, the Commission requires more detailed information to secure a marker than does the DOJ. Second, the EC has the discretion, on a case-by-case basis, to

grant or refuse the marker after receiving the detailed application. In the United States, on the other hand, qualifying applicants automatically receive a marker.

***Global Wave of Leniency.*** International cartel enforcement has continued to increase as more and more countries have stepped up enforcement efforts. The success of the U.S. and EU leniency programs, coupled with aggressive encouragement by the U.S. DOJ and such international organizations as the ICN and OECD, has led other jurisdictions to adopt or strengthen their own leniency programs.<sup>12</sup> When the United States adopted its modern leniency program in 1993, only one other country, Canada, had a leniency program. Now, almost twenty years later, more than fifty jurisdictions have a leniency program, most of which include a marker system. Many of the globe's active antitrust regimes, including some with criminal enforcement authority, have adopted leniency programs often modeled on the U.S. system, but each with their own individual take on the qualifications for leniency and the implementation of a marker system.<sup>13</sup> As a result, it is now possible to report international cartels and obtain immunity in numerous jurisdictions. But although the overall substantive systems are now largely aligned, the processes are still particularized to each jurisdiction, which can lead to undesired complications.

### **Complexities of the Current Patchwork System**

***Tension Between Speed and Accuracy of Internal Investigation.*** There are multiple objectives of an internal investigation into suspected cartel behavior. The first is to determine whether the company has actually engaged in wrongful conduct. This is not always a black-and-white assessment. Finding the dividing line between inadvisable communication with a competitor and an illegal agreement (or information exchange) often is an iterative process that entails multiple interviews, capture and review of a substantial number of documents, assessment of patterns of behavior, and other sound investigative techniques. If illegal conduct is detected, the next objective is to evaluate the scope and extent of that conduct. Was it an isolated incident? A limited series of agreements? A recurring pattern of conduct? Or an overarching, wide-ranging cartel?<sup>14</sup> The review of cases pursued by the DOJ and other government agencies might lead one to conclude that these issues are clear-cut. In fact, these cases reflect only those investigations which progress through the system to the point of prosecution. Moreover, since prosecutions are brought by the government, it is unsurprising that, in prosecuting a case, they take an unequivocal position.

The key point is that getting a comprehensive view of the facts—that is, gaining accurate information about the supposed illegal conduct, its geographic scope, and its impact on various jurisdictions—takes time, but deciding whether to seek a leniency marker is a race against time. The U.S. DOJ encourages parties to step forward and seek a leniency marker at the first hint of possible illegal conduct, and gives the party time to pursue its internal investigation, usually in a

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quite flexible manner, as long as the party is proceeding apace.<sup>15</sup> And a marker generally can be withdrawn without prejudice to the party prior to the DOJ’s issuance of a conditional leniency letter.<sup>16</sup>

But what about seeking a leniency marker in Brazil? Or Korea? Or Singapore? Or New Zealand? In the initial stages, a company may not have any idea whether the cartel behavior impacted those countries or any of the other increasingly numerous jurisdictions with leniency programs. Furthermore, since most global cartel cases initially are investigated principally by U.S. or EU counsel, seeking a leniency marker in jurisdictions which have a more remote nexus with the client’s business usually entails identifying qualified local counsel, working through potential conflict issues with them, bringing them up to speed on the substance of the investigation, understanding local leniency marker requirements, and executing on the unique procedures of that jurisdiction. This process requires an investment of time and money at a point where there often is little or no knowledge of whether the conduct in question has any connection or impact whatsoever on the remote jurisdiction. Moreover, it entails an increased risk that word of the cartel investigation will “leak.” For example, when seeking local law firms to represent a leniency applicant in a matter impugning the national champion(s) of those countries as cartelists, counsel should be prepared to contact multiple firms—each of which will have to be informed at least about the potential participants in the cartel—before finding a firm that is conflict-free. Despite the duty of the firms contacted to maintain confidentiality and the presumption that they are trustworthy, the fact remains that the more people who become informed of the suspected cartel, the more difficult it becomes to manage potential leaks.

Thus, the current system involves a trade-off between time and precision. The net result forces a would-be leniency applicant either to hold off on seeking “global” leniency markers at the risk of losing leniency in some jurisdictions or

to blanket the globe with leniency marker applications that may create risks of disclosure and end up being a waste of everyone’s time and resources.

***Conflict Resulting from Different “First In” Leniency Applicants.*** Some leniency applicants initially have opted to limit the number of marker applications. As a result, in at least several high profile cartel matters, it is well known (at least by the parties involved) that there are different “first in” leniency applicants in different jurisdictions. This division has sometimes resulted from uncertainty by the initial leniency applicant about the actual geographic scope of the cartel. In other cases, it has resulted from inaccurate information obtained in the internal investigation (as when an executive lies). And, in some cases, it has perhaps resulted from one party simply being outmaneuvered by another that was first to seek a marker. Regardless of the reason, having different first-in leniency applicants in different jurisdictions presents significant practical problems for regulators and cartel leniency applicants alike.

The conceptual underpinning of a leniency program is to remove liability concerns for the applicant so that it has no reservations about admitting wrongdoing and helping the agency to prosecute its case.<sup>17</sup> But where the admissions a defendant makes, or the information it provides in one jurisdiction might enhance its exposure in another, the incentives are rapidly blurred. The defendant may want to defend (or downplay) in one jurisdiction what it openly confesses in another. If civil damage actions exist in the other jurisdiction, this exacerbates the effect. Each time this occurs there are at least two cartelists with mixed motivations, which undermines effective enforcement.

Finally, because the first leniency applications are nearly always made in the United States and/or European Union, agencies in newer antitrust jurisdictions also may suffer from not having the original leniency applicant as their first-in leniency applicant. Although in theory they still may be able to prosecute the same number of wrongdoers, it may be more difficult to do so when their leniency applicant is pulling punches to protect its position in jurisdictions like the United States or European Union where it has much more at stake. Moreover, given the sequential adoption of leniency programs across the world, it is not uncommon to have several new leniency programs introduced over the course of a typical three-to-four-year cartel investigation, and lesser-developed antitrust jurisdictions may miss out entirely on a leniency application in some situations where there is in fact an impact in their country. New regimes could join the one-stop shop system and provide a mechanism for applicants to seek leniency, and avoid the conflict of another applicant becoming first to file in the new regime.

Thus, having different first-in leniency applicants in different jurisdictions is problematic on multiple fronts. It creates issues for the enforcement agencies involved, as well as conflicting incentives for the leniency applicant(s) in the various jurisdictions.

### Rationale for a One-Stop Shop

***How Could a One-Stop Shop Help?*** Providing leniency applicants with a one-stop shop option to report suspected cartel behavior would benefit agencies and leniency applicants alike. First, leniency applicants would have an efficient mechanism to report potential cartel behavior in a way that would preserve their place in line in all participating jurisdictions. Second, all jurisdictions—and most importantly, those developing jurisdictions whose procedures are still evolving—would learn of potential cartel violations at an early stage in order to maximize their potential to pursue antitrust wrongdoers. Third, it would limit the amount of information required to be shared about the investigation, and the number of people exposed to that information. Fourth, it would facilitate coordination among the agencies themselves, for instance, in conducting synchronized dawn raids. And for all of these reasons, ultimately it would benefit consumers.

***Permissible Under Most Laws.*** A one-stop shop for leniency markers should be readily adoptable for most jurisdictions. Unlike the substantive cartel laws, which would not need to converge to accommodate a one-stop shop mark-

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er system, the marker programs of nearly all jurisdictions are a matter of agency procedure rather than of law or regulation.<sup>18</sup> Many of these procedures could be modified informally with some advance notice to the antitrust and business community. Indeed, the DOJ Antitrust Division typically has announced policy changes to its cartel enforcement program through speeches or publications by the Deputy Assistant Attorney General for Criminal Enforcement.<sup>19</sup> In the European Union, the EC revised its leniency policy in December 2006 following two public consultations regarding the state of its leniency program. The new policy, which introduced a marker system for the first time, came into force once published in the EU *Official Journal*.<sup>20</sup> Similarly, other jurisdictions' leniency procedures typically are a matter of agency-developed policy rather than legislation or formal regulation. Some countries' laws may specify the marker procedures that are required, which may preclude them initially from participating in a one-stop shop system, but that should not be a deterrent, lest the perfect become the enemy of the good.<sup>21</sup>

***No Sacrifice of Sovereignty.*** In the past, some government officials and observers have equated the term “conver-

gence” with “sacrifice of sovereignty.” A one-stop shop marker system, however, is a convergence of process, not of legal substance or enforcement prerogative. The system proposed here is not one that would require any sacrifice of sovereign authority. It would not require any jurisdiction to sacrifice independence of decision making in granting—or choosing not to grant—leniency. It would not impact the ability of each jurisdiction to determine whether to prosecute any cartel that was notified under the one-stop shop, nor would it prevent a jurisdiction from prosecuting a cartel that was discovered in some other fashion. Rather, it would be a procedural means of coordinating and consolidating the information that the jurisdiction requires of applicants seeking a marker. A jurisdiction would participate in the one-stop shop only if it believed that the procedural mechanism for the one-stop shop was fully consistent with the cartel laws, regulations, and enforcement objectives it already has in place.<sup>22</sup> In essence, the one-stop shop could best be viewed as a mechanism that would give each jurisdiction a better opportunity to exercise its sovereign authority to prosecute cartels.

### Mechanism for One-Stop Shop Marker System

The differences between marker systems usually relate to timing and the degree of information required. The United States, for example, will sometimes grant a marker to an unnamed applicant based on a very limited proffer from the applicant's counsel,<sup>23</sup> but the EC will not.<sup>24</sup> Canada recently made its marker system more rigid, requiring parties in most instances to make a detailed proffer describing the conduct for which they are seeking immunity within no more than thirty days of obtaining their marker.<sup>25</sup> Despite the nuances of the many marker systems, none of the differences are so great as to prohibit the use of a one-stop shop for leniency markers. Some of the salient features of the proposed one-stop shop mechanism are discussed below.

***Administration of a One-Stop Shop Marker System.*** A one-stop shop marker system would be simple enough to administer. In practice, an agency's marker system requires an intake process and a coordinating point of contact. In the United States, for instance, the Antitrust Division's Deputy Assistant Attorney General for Criminal Enforcement reviews all requests for leniency, but applicants may contact any one of the Division's field offices or its National Criminal Enforcement Section in Washington, DC. To secure a marker, counsel for the applicant must: (1) state that they have discovered information or evidence suggesting their client possibly engaged in a criminal antitrust violation; (2) disclose the general nature of the suspected conduct (e.g., price fixing, bid rigging); (3) identify the relevant industry, product, or service with enough specificity to allow the Division to determine whether leniency is still available; and (4) in most cases, identify the client.<sup>26</sup> In the European Union, parties seeking leniency are directed to contact the EC via the telephone and fax numbers provided on the Commission's website.<sup>27</sup> To secure a marker, the applicant must provide somewhat more

detailed information than is typical in other jurisdictions, including the following: (1) the applicant's name and address; (2) the parties to the suspected cartel; (3) the products and territories impacted; (4) the nature of the illegal conduct; and (5) the duration of the illegal conduct.<sup>28</sup> The marker system in the European Union is discretionary, and the EC has the ability to determine whether to grant a marker to the applicant or to require the more thorough disclosure required to obtain conditional leniency status.<sup>29</sup>

Either of these systems could be adapted to permit either the DOJ or EC (or both) to become the "clearinghouse agency" for markers involving international cartel matters. As discussed below, this would be a relatively simple matter. The applicant would contact the clearinghouse agency. The clearinghouse agency would ensure that the requisite information (discussed below) was gathered and then send an "alert" to all participating agencies with an official date and time of the one-stop shop application. Any agency that had received a prior marker request with respect to the same conduct could reject the one-stop shop application as untimely (or not first-in) in its own jurisdiction but could not void the one-stop marker application as to any other jurisdiction. The applicant would then hold the marker for the prescribed period. After that period expired, because the granting of conditional or formal leniency is a matter of individualized law and procedure, the marker would have to be perfected according to the separate laws or regulations of the various individual jurisdictions. In other words, *only* the granting of the marker would be the subject of the one-stop shop, *not* the granting of conditional or formal leniency status.

**Opt-In for Agencies.** No agency would be required to participate in a one-stop shop marker system. The system could be established with a baseline group of jurisdictions, and individual jurisdictions could elect to participate or not.<sup>30</sup> Any jurisdiction electing to participate would make no assurance to an applicant that they would receive conditional leniency. The sole assurance would be that the one-stop shop applicant would be the first in line to have the *opportunity* to meet the individual jurisdiction's requirements for conditional leniency. To accomplish this, the applicant would still have to meet the individual conditions of each jurisdiction's leniency program, unless the applicant informed the jurisdiction (through the clearinghouse) that it was not seeking leniency, effectively withdrawing the marker.

**Opt-In for Marker Applicant.** Likewise, an applicant would not be required to apply for a marker in every jurisdiction participating in the one-stop shop program. For example, if there were thirty jurisdictions that had opted-in to the program, an applicant could indicate that it wished to request a marker for twenty specified jurisdictions. This might be the case, for example, if the applicant did not operate on certain continents and was not capable of committing an offense in some jurisdictions. The twenty relevant jurisdictions (and only those twenty) would then be notified of the marker application by the clearinghouse agency and of all

relevant information provided by the applicant. The applicant would be first in line in the twenty identified jurisdictions, but the "first in line" slot for the other ten jurisdictions would remain open. The same applicant could later approach the ten remaining jurisdictions to seek leniency and *might* be first in line but would bear the risk that another cartel member might apply first in those jurisdictions. In other words, the failure to use the one-stop shop system as to any particular jurisdiction should not prejudice the applicant from seeking leniency in that jurisdiction, either as first-in applicant or as a secondary leniency applicant.

**Limited to First-In Applicant.** There is a split among jurisdictions, some of which offer immunity only to the first leniency applicant and some which offer reduced penalties (partial leniency) to later applicants. In some jurisdictions, consideration is given to second-in cooperators but is not formalized, with few guarantees.<sup>31</sup> But because of these distinctions, and because many of the tensions described above apply only with respect to having different "first-in" leniency applicants in different jurisdictions, the one-stop shop proposed would apply only to first-in applicants. Subsequent applicants would be informed that the one-stop shop system was not available with respect to the "next-in" applicant's request. That next-in applicant could still seek a marker or "partial" leniency separately with each individual jurisdiction.

**Minimum Time Frame.** One material distinction among different jurisdictions' approaches to markers is the amount of time provided to the marker applicant to "perfect" the marker and obtain conditional leniency. For example, the United States is normally quite flexible, with a typical initial marker period of at least thirty days and extensions frequently granted, sometimes totaling several months, to parties that are actively advancing their investigation. The EC, by contrast, provides no set period, opting instead for a more flexible approach based on the circumstances of each case. The EC makes clear, however, that the period necessarily will be brief, so as not to disadvantage other potential applicants or to risk leaks.<sup>32</sup>

In order for a one-stop shop for markers to work, there would have to be a common "initial" period agreed to by the participating members. As a practical matter—and remembering the complexities of gaining accurate information about a complex and (necessarily) international cartel in myriad jurisdictions in a short period of time—the initial marker period would have to be at least thirty to forty-five days. Reaching a consensus over the initial marker period might require some agencies to alter their existing procedures. But it should be recognized that the one-stop shop is likely to promote more complete reporting of cartels, eliminate a source of potential leaks, and avoid situations of conflicting "first-in" applicants. So any concession to the time allotted to the initial marker period would be balanced by a likelihood of better outcomes for all participating agencies.

Of course, there may be instances where an applicant is not able to perfect a marker within the initial period. In

those cases, after that initial period, there could either be an agreement among participating members to permit extensions under certain specified conditions or it could be left to the applicant to seek any required extensions from each individual jurisdiction. This might well be a factor that evolves over time. But it should not be necessary to reach consensus on extensions in order for a one-stop shop to be established in the first instance.

**Information Required.** There are variations among jurisdictions on the amount of information required to seek a leniency marker. Most of these variations are subtle, but suffice it to say that those jurisdictions that require less information would not object to gaining more information. This does not mean that the one-stop shop should default to the most onerous reporting mechanism required among participating members (which might defeat the purpose), but it does suggest an approach that would satisfy the majority of the participating jurisdictions' current requirements.

On that basis, one could look to the European Competition Network's "Model Leniency Programme" and its recommendations on "markers for immunity applicants," which requires the applicant to provide:<sup>33</sup>

- The Applicant's name and address;
- The basis for the concern which led to the leniency approach;
- The parties to the alleged cartel;
- The affected product(s);
- The affected territory (-ies);
- The duration of the alleged cartel; and
- The nature of the alleged cartel conduct.

This is more information than is required to obtain a marker in the United States, for example, but is a reasonable

amount of information to ask of an applicant seeking a leniency marker in a one-stop shop system, particularly where the applicant would have to provide the same amount of information to obtain a marker in some key jurisdictions even absent the one-stop shop.

**Discretionary Marker Systems.** Some marker systems, such as the EC's and some of the European Union's Member States, are discretionary. This fact should not undermine the potential for a one-stop shop marker system. In practice, an agency utilizing a discretionary marker system should be able to evaluate the information provided by the marker system and decide whether to issue a marker. In other words, a jurisdiction that has opted-in to the one-stop shop system could still inform an applicant that, in its discretion, it would not issue a marker on the basis of the information provided. Hopefully, applicants would take pains to provide all required information and the participating agencies would take comfort in the knowledge that an applicant was serious enough about its cooperation to have undertaken the one-stop shop approach, but the exercise of discretion would be fully preserved.

## Conclusion

National leniency programs can no longer be viewed in isolation. To maintain the incentives that have allowed authorities to prosecute cartels successfully over the past two decades, a mechanism should be put in place to align marker systems and reduce the burden on parties to seek leniency markers. More than four dozen jurisdictions have followed the leaders in recognizing the capacity of leniency to destabilize cartels. The next logical step is for agencies to coordinate in the marker application process. ■

<sup>1</sup> See Scott Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Evolution of Criminal Antitrust Enforcement over the Last Two Decades, Address at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010) available at <http://www.justice.gov/atr/public/speeches/255515.pdf> (noting that the number of jurisdictions with leniency programs jumped from one in 1990 (the United States) to more than fifty by 2010). This list is no longer limited to jurisdictions with longstanding track records in antitrust enforcement, but increasingly includes newer antitrust regimes. For example, among the most recent countries to enact a leniency policy was Cyprus in 2011, only three years after adopting its competition law.

<sup>2</sup> The United States, which awards the patent to the first to invent, as opposed to the first to file, has been one of the few holdouts to this widely accepted approach. That will change on March 16, 2013, when the enactment of the America Invents Act, signed into law in September 2011, becomes effective. Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284.

<sup>3</sup> See <http://www.wipo.int/pct/en/faqs/faqs.html>.

<sup>4</sup> In fact, this same "first to file" approach is another alternative to establishing a one-stop shop for leniency markers. Under this scenario, the first applicant to file with the one-stop shop would be granted a marker date that would be respected by other jurisdictions. This proposal is not elaborated in this article because it would require mechanics (e.g., a mechanism to incentivize the leniency applicant to move rapidly) that are beyond the scope of this proposal.

<sup>5</sup> Scott Hammond, Cornerstones of an Effective Leniency Program, Address Before the ICN Workshop on Leniency Programs 3 (Nov. 22, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.pdf>.

<sup>6</sup> U.S. DEP'T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), available at <http://www.justice.gov/atr/public/guidelines/0091.pdf>. The following year, the Division announced its Leniency Policy for Individuals, available at <http://www.justice.gov/atr/public/guidelines/0092.pdf>.

<sup>7</sup> Scott D. Hammond & Belinda A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (Nov. 19, 2008) [hereinafter U.S. FAQs], <http://www.justice.gov/atr/public/criminal/239583.pdf>.

<sup>8</sup> Commission Notice on the Non-Imposition or Reduction of Fines in Cartel Cases, 1996 O.J. (C 207) 4.

<sup>9</sup> Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3.

<sup>10</sup> Commission Notice on Immunity From Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17 [hereinafter 2006 Leniency Notice].

<sup>11</sup> *Id.* at 24.

<sup>12</sup> The OECD's 1998 Hard Core Cartel Recommendation helped raise the awareness in both OECD and non-OECD member governments about the importance of investigating and prosecuting cartels, and cartel enforcement has since become a key priority. As a result, procedural reforms in many countries introduced leniency programs and strengthened the investigatory powers of competition authorities worldwide. OECD Global Forum on

- Competition, Improving International Co-operation in Cartel Investigations—Background Note, DAF/COMP/GF(2012)6, ¶ 33 (Feb. 13, 2012), available at [http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/GF\(2012\)6&docLanguage=En](http://search.oecd.org/officialdocuments/displaydocumentpdf/?cote=DAF/COMP/GF(2012)6&docLanguage=En).
- <sup>13</sup> In Ireland, for example, the Competition Authority investigates the alleged violations and the Director of Public Prosecutions grants immunity, whereas in the United States, the DOJ fulfills both functions. See THE COMPETITION AUTHORITY OF IRELAND, CARTEL IMMUNITY PROGRAMME (Dec. 20, 2001), available at <http://www.tca.ie/images/uploaded/documents/Cartel%20Immunity%20Programme.pdf>. In Germany, an applicant has up to a maximum of eight weeks to perfect its marker. See Notice No. 9/2006 of the Bundeskartellamt on the Immunity from and Reduction of Fines in Cartel Cases—Leniency Programme (Mar. 7, 2006), available at [http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06\\_Bonusregelung\\_e\\_Logo.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf).
- <sup>14</sup> See, e.g., ABA SECTION OF ANTITRUST LAW, HANDBOOK ON ANTITRUST GRAND JURY INVESTIGATIONS § 2(C)(6) (3d ed. 2002) (“Counsel conducting the internal investigation should consider expanding it to related markets, or those markets that are under the jurisdiction of the individuals responsible for the product that is subject to the investigation. Experience indicates that individuals who have engaged in anticompetitive activity in one market often do so in other markets or products. It may be very important for counsel to obtain this information prior to the government’s own expansion of the investigation.”).
- <sup>15</sup> A 30-day marker period is common, but the Division may extend the period provided the applicant is showing a good-faith effort to complete its application in a timely fashion. U.S. FAQs, *supra* note 7, at 3–4 (“Because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low. . . . A marker is provided for a finite period. The length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested.”).
- <sup>16</sup> With the Antitrust Division’s emphasis that “time is of the essence in making a leniency application” comes its recognition that the leniency applicant “may not be able to confirm that it committed a criminal antitrust violation when it seeks and receives a marker.” *Id.* at 2, 6. In a recent panel discussion, DAAG Scott Hammond estimated that one third of leniency applicants do not perfect their marker. He explained that the majority of leniency applicants have just learned of the reported conduct in the week or so prior to their application, and after a more thorough investigation, determine that no unlawful conduct occurred. Leah Nylan, *One in Three Leniency Applicants Drop Their Marker, DOJ Official Says*, MLEX (June 7, 2012), available at [http://www.law.northwestern.edu/searlecenter/conference/inter-national/leniency\\_chicago.pdf](http://www.law.northwestern.edu/searlecenter/conference/inter-national/leniency_chicago.pdf).
- <sup>17</sup> Indeed, the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) is a further inducement designed to achieve the same objective: removing uncertainty (by way of eliminating joint and several liability) and reducing exposure (by way of eliminating treble damages) to encourage a defendant to be forthcoming with information. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, § 213(b), 118 Stat. 665 (codified as amended at 15 U.S.C. § 1 note). See also Antitrust Criminal Penalties Enforcement and Reform Act of 2004 Extension Act of 2010, H.R. 5330, 111th Cong. § 3(a) (2010) (Extension Act).
- <sup>18</sup> See, e.g., AUSTRALIAN COMPETITION AND CONSUMER COMM’N, ACCC IMMUNITY POLICY FOR CARTEL CONDUCT (2009), available at <http://www.accc.gov.au/content/item?itemId=879795&nodeId=f66a352b170982e5308039195ba68521&fn=Immunity%20policy%20for%20cartel%20conduct.pdf>; COMPETITION COMM’N SINGAPORE, CCS GUIDELINES ON LENIENT TREATMENT FOR UNDERTAKINGS COMING FORWARD WITH INFORMATION ON CARTEL ACTIVITY CASES (2009), available at <http://www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/GuidelineLeniencyProgramme220109final.pdf>; SOUTH AFRICAN COMPETITION COMM’N, CORPORATE LENIENCY POLICY (2008) available at <http://www.compcom.co.za/corporate-leniency-policy/>.
- <sup>19</sup> See, e.g., U.S. FAQs, *supra* note 7 (providing clarification on several features of the Division’s leniency policy and offering the first detailed discussion of its marker system); Gary R. Spratling, Making Companies an Offer They Shouldn’t Refuse, The Antitrust Division’s Corporate Leniency Policy—An Update, Remarks at the Bar Association of the District of Columbia’s 35th Annual Symposium on Associations and Antitrust (Feb. 16, 1999), available at <http://www.justice.gov/atr/public/speeches/2247.pdf> (detailing DOJ policy to refrain from sharing with other antitrust enforcement agencies any information obtained from an amnesty applicant without the applicant’s prior approval); Gary R. Spratling, The Corporate Leniency Policy: Answers to Recurring Questions, Remarks at the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), available at <http://www.justice.gov/atr/public/speeches/1626.pdf> (clarifying DOJ’s interpretation of the Leniency Policy requirement that the applicant must not have been the leader or originator of the reported conduct).
- <sup>20</sup> Press Release, European Comm’n, Competition: Commission Adopts Revised Leniency Notice to Reward Companies that Report Cartels (Dec. 7, 2006) (IP/06/1705), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/1705&format=HTML&aged=0&language=EN&guiLanguage=en>.
- <sup>21</sup> François-Marie Arouet (Voltaire), *La Bégueule* (Contes, 1772) (“*Le mieux est l’ennemi du bien.*”).
- <sup>22</sup> For a small number of jurisdictions, agreeing to participate in the one-stop shop might require the acceptance of slightly less information than the jurisdiction normally would require of a marker applicant. This typically would fall within the discretion of the authority, and seems a small concession in light of the other benefits described herein.
- <sup>23</sup> Under limited circumstances it is possible to secure an “anonymous” marker for a very brief period when counsel wants to secure first-in-line status for their client but needs time to confirm certain information prior to revealing the client’s identity. U.S. FAQs, *supra* note 7, at 3.
- <sup>24</sup> 2006 Leniency Notice, *supra* note 10.
- <sup>25</sup> While the Competition Bureau indicated that the 30-day period is not an inflexible deadline in cases where, for example, the matter is complex and involves multiple jurisdictions, it provides no guarantee that a party which requests additional time will receive it. Competition Bureau, *Immunity Program Responses to Frequently Asked Questions* (Oct. 2007), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02482.html>, at question 18.
- <sup>26</sup> U.S. FAQs, *supra* note 7, at 2–3.
- <sup>27</sup> See <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.
- <sup>28</sup> 2006 Leniency Notice, *supra* note 10, ¶ 15.
- <sup>29</sup> See Press Release, European Comm’n, Competition: Revised Leniency Notice—Frequently Asked Questions (Dec. 7, 2006) (MEMO/06/469) [hereinafter EC FAQs], available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/469&format=HTML&aged=0&language=EN&guiLanguage=en>.
- <sup>30</sup> As a practical matter, a one-stop shop marker system could not function without the participation of the U.S. and EC authorities, as well as at least several other jurisdictions that might include a number of jurisdictions that were the founding members of the ICN. Those founding members include Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia. See Press Release, U.S. Dep’t of Justice, Antitrust Division, U.S. and Foreign Antitrust Officials Launch International Competition Network, Oct. 25, 2001, available at [http://www.justice.gov/atr/public/press\\_releases/2001/9400.pdf](http://www.justice.gov/atr/public/press_releases/2001/9400.pdf).
- <sup>31</sup> Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Remarks Before the ABA Section of Antitrust Law Spring Meeting (Mar. 29, 2006), available at <http://www.justice.gov/atr/public/speeches/215514.pdf>.
- <sup>32</sup> EC FAQs, *supra* note 29.
- <sup>33</sup> EUROPEAN COMPETITION NETWORK, ECN MODEL LENIENCY PROGRAMME ¶ 18, available at [http://ec.europa.eu/competition/ecn/model\\_leniency\\_en.pdf](http://ec.europa.eu/competition/ecn/model_leniency_en.pdf). The recommendation also would require “Information on any past or possible future leniency applications to any other competition authorities and competition authorities outside the EU in relation to the alleged cartel,” but this condition would not be necessary in a one-stop shop system because such disclosure is inherent in the system itself. *Id.*