ALLEN & OVERY

June 2013

Whither amnesty?

Uncertainty in U.S. antitrust enforcement

Since its formalization in 1993, the corporate leniency policy of the U.S. Department of Justice's Antitrust Division has achieved remarkable results. Companies that discovered anti-competitive behavior in their ranks rushed to report their wrongdoing to the Antitrust Division, hoping to be first in the door and thereby receive near-certain amnesty for the company and all cooperating employees. There was reason to hurry. The twin hallmarks of the policy—transparency and predictability—provided assurance that those who lost the race for leniency were almost always subject to criminal penalties.

But a strange thing happened on the way to record corporate fines and hefty jail sentences for individual violators: the wave of recent enforcement actions against LIBOR-submitting banks brought with it a destabilizing undertow of new realities, and the clear all-or-nothing incentives gave way to complexity. A successful leniency applicant may still be exposed to significant criminal penalties from other law enforcement or regulatory agencies, diluting the obvious benefits of being first-in while increasing the potential risks. At the same time, a cooperating late-comer, which ordinarily would not qualify for leniency, may still be able to avoid criminal penalties. Thus, for companies weighing whether or not to report possible U.S. antitrust violations, these cases and other developments have replaced clear incentives for being first in the door with newfound uncertainty. While these trends thus far have been confined to antitrust enforcement in the banking and financial services industry, the animating factors suggest the possibility of similar outcomes in other highly regulated and concentrated sectors.

ANTITRUST LENIENCY AND DEFERRED PROSECUTIONS

The Antitrust Division historically had operated under a different set of enforcement principles than those employed by DOJ prosecutors for other corporate crimes. Under its leniency program, the Division agrees not to prosecute criminally any company that is first to report anti-competitive behavior not already subject to investigation, provided that it quickly halts its role in the scheme, fully cooperates with the Division's inquiry, compensates injured parties and was not the clear leader of the illegal conduct.[1] Alternatively, a company may qualify for leniency even after the Division has begun an investigation, provided that the company is first to come forward at a point at which the Division does not yet have sufficient evidence against the company to result in a sustainable conviction.[2] Companies (and their cooperating employees) who obtain leniency escape criminal prosecution entirely, while the co-conspirators to the scheme are almost always subject to criminal enforcement penalties. In addition, the treble damages normally available to private plaintiffs under the antitrust laws are unavailable in civil suits against leniency recipients.[3] The clarity and certainty of these incentives led leniency applicants to flock to the program, and over ninety percent of fines imposed for Sherman Act violations since 1996 involved cases advanced by cooperation from leniency applicants.[4]

By contrast, in the past decade criminal enforcement actions for other substantive federal crimes have become progressively less "all-or-nothing" in terms of the punishment meted out to corporate defendants. Prosecutors investigating corporate wrongdoing have grown increasingly reliant on two forms of resolution that are neither declinations nor prosecutions: Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs). Under NPAs and DPAs, the DOJ agrees not to prosecute a company, provided that in return the company acknowledges wrongdoing, pays a fine, continues to cooperate with the ongoing investigation and accedes to any other conditions that prosecutors may require. The only difference between an NPA and a DPA is that under a DPA the government files a criminal information in court, which is later dismissed. The U.S. Attorneys' Manual describes these forms of settlements as a "third option" that "can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement."[5] According to Lanny Breuer, former Assistant Attorney General in charge of the DOJ's Criminal Division, DPAs and NPAs are now "a mainstay of white collar law enforcement."[6]

The use of NPAs and DPAs allowed prosecutors to avoid a repeat of the Arthur Andersen debacle. In June 2002, a federal jury in Texas convicted Arthur Andersen of obstructing justice because of its destruction of documents relating to its accounting work for Enron Corporation. Arthur Andersen thereafter agreed to stop auditing public companies, and by the end of the following year largely all of its 85,000 employees had left the firm. Two years later, in May 2005, the U.S. Supreme Court reversed the conviction, citing erroneous jury instructions given by the trial judge.[7] The risks of an imprudent indictment of a corporation, together with the potentially devastating collateral consequences of corporate criminal conviction, have cast a grim pallor over the prosecution of business organizations in the years that followed.

MUNICIPAL BONDS SETTLEMENTS

Prior to 2010, the Antitrust Division almost never resolved cases through DPAs or NPAs. That changed in 2010 and 2011, when the Division entered into a series of NPAs in the municipal bonds cartel investigation. The investigation, centered on the financial industry, involved collusive agreements to manipulate the bidding process and rig bids on tax-exempt municipal bond derivatives. The Antitrust Division led the investigation, which also involved a number of state and federal regulators, including the Securities and Exchange Commission, the Internal Revenue Service, the Office of the Comptroller of Currency and numerous state Attorneys General.

In December 2010, the Division announced that Bank of America had been the "first and only entity" to report its illegal activity in the municipal bonds market, had fully cooperated with the investigation and would be admitted into the leniency program.[8] As a condition to leniency, Bank of America was required to pay over $137 million in restitution to state and federal agencies, including the SEC.

Over the following year, three large banks (Wachovia Bank N.A. (now Wells Fargo Bank N.A.), UBS AG, and JPMorgan Chase & Co.) and GE Funding Capital Market Services Inc. each admitted similar conduct pursuant to an NPA with the Antitrust Division and related settlements with state and federal regulators. In each case, the Division's press release cited the company's admission of guilt, cooperation, monetary and non-monetary commitments to other federal and state agencies, and remedial efforts as the reasons the Division declined to prosecute.[9] Notably, in only two of the four cases (JP Morgan Chase (which paid a total of $211 million) and Wachovia (which paid a total of $148 million)) did the NPA defendants pay a combined settlement that exceeded that paid by Bank of America, even though these settlements included penalties and disgorgement in addition to restitution. Beyond the four NPAs, the investigation also resulted in criminal prosecutions and/or plea agreements for 20 individuals, and one non-financial institution defendant.

Thus, the municipal bonds bid-rigging cases appear to have undermined one half of the prisoners' dilemma that had served antitrust prosecutors so well for so long—the certainty of criminal penalties for companies who weren't first to disclose collusive conduct to the government. While publicly unstated, it is likely that the Antitrust Division recognized that the collateral consequences of criminal sanction for a highly regulated financial institution could be disastrous, especially in the harsh aftermath of the 2008 financial crisis. That two entities without leniency received lower monetary sanctions than Bank of America also began to erode the clear rationale for being first in line for leniency. In the wake of these cases—the Antitrust Division's first significant use of "middle ground" forms of resolution—commentators wondered whether the result was merely an aberration or the beginning of a trend.

RATE-RIGGING SETTLEMENTS

The transparency and predictability of the leniency process was further undermined—at least for large financial institutions—by the subsequent LIBOR and EURIBOR rate-rigging cases. LIBOR, or the London Interbank Offered Rate, is an interest rate benchmark that is set daily in a number of currencies based upon submissions by LIBOR panel banks. EURIBOR is an analogous benchmark based in Brussels. The rate-rigging enforcement actions involved allegations that traders at various panel banks colluded to move these benchmark rates in order to benefit their derivatives trading positions. Unlike the municipal bonds investigation, the rate-rigging investigation was initiated by fraud investigators—the Commodity Futures Trading Commission and the SEC. DOJ's Fraud Section was the first arm of the DOJ to become involved in the investigation, and Antitrust Division involvement followed.

Barclays Bank, a leniency recipient for collusion regarding EURIBOR,[10] was the first bank to resolve rate-rigging allegations in a $360 million settlement with U.S. authorities announced on June 27, 2012. As part of the settlement, the Fraud Section announced that it had entered into a two-year NPA with Barclays for manipulation of U.S. dollar and Japanese Yen LIBOR and EURIBOR, under which Barclays agreed to pay a $160 million penalty. Barclays also entered into a contemporaneous $200 million settlement with the CFTC. In the NPA, the Fraud Section praised Barclays for its cooperation, noting that "Barclays was the first bank to cooperate in a meaningful way" and that its "cooperation has exceeded what other entities have provided in the course of this investigation."[11] Although Barclays admitted collusive behavior with respect to U.S. dollar LIBOR (for which it did not have leniency) in addition to EURIBOR, the Antitrust Division neither brought criminal charges for this conduct nor joined the Fraud Section's NPA. As the first to settle, Barclays bore the brunt of public outrage over the rate-rigging allegations, which ultimately caused the resignation of its Chairman, CEO and COO.[12]

On December 19, 2012, UBS AG, an amnesty recipient for Yen LIBOR, settled allegations that its traders had engaged in a scheme to manipulate LIBOR in several currencies. Although the Antitrust Division did not take any action against the bank, UBS's Japanese subsidiary pled guilty to one count of wire fraud and paid a $100 million fine, and UBS AG was forced to pay $1.1 billion in fines to settle with the CFTC and Fraud Section. This was the first time in more than 20 years that an affiliate of any major investment bank had been criminally prosecuted in the United States. The fact that criminal liability rested with a Japanese subsidiary, however, all but eliminated the risk of any Arthur Andersen effect.[13]

The harsh punishment dealt UBS by the Fraud Section notwithstanding its Antitrust Division leniency status appears to have been caused by its view that UBS had engaged in "far-reaching" and "astonishing"[14] misconduct and had been late to cooperate. On the latter point, the Fraud Section's NPA stated that the bank's "self-disclosure and cooperation commenced after the Fraud Section had obtained certain evidence implicating UBS and, in particular, efforts to manipulate Yen benchmarks."[15] Thus, while the Antitrust Division credited the timeliness of UBS's self-disclosure, the Fraud Section appears to have been more skeptical. It is unclear why the Antitrust Division would have granted UBS leniency for Yen LIBOR if the DOJ had already received significant information about Yen benchmark manipulation from another source. One possible explanation would be if the Fraud Section had obtained such information as part of its pre-existing investigation into benchmark manipulation, but failed to share it with the Antitrust Division. Clearly, in this instance antitrust leniency did not protect UBS from massive repercussions from other regulators, or even from another arm of the DOJ.

On February 6, 2013, in the most recent rate-rigging settlement, the DOJ announced that the Royal Bank of Scotland would pay a total of $425 million in settlements with the Fraud Section, the Antitrust Division and the CFTC to resolve allegations that RBS had engaged in LIBOR manipulation and collusive Yen LIBOR price-fixing. Unlike Barclays and UBS, RBS did not receive leniency from the Antitrust Division and entered a DPA with both the Fraud Section and the Antitrust Division. While RBS admitted that its employees had colluded with other banks to set Yen LIBOR, the bank's Japanese subsidiary pled guilty only to wire fraud, not antitrust violations, and its fine of $50 million was half that paid by the Yen LIBOR leniency recipient, UBS Japan.

Viewed from the antitrust enforcement perspective, the results of the rate-rigging investigation are problematic. Although the Antitrust Division made some attempt to provide the promised "carrot" by declining to formally charge Barclays and UBS with antitrust violations, leniency did not stop the Fraud Section and the CFTC from demanding enormous settlements from these banks and a highly unusual guilty plea by UBS Japan. The Antitrust Division also failed to use the full power of its "stick" against RBS, the one settling bank without leniency, which admitted collusion but avoided criminal antitrust liability and paid less than half the monetary sanctions imposed on UBS for similar conduct. Indeed, these settlements make sense only when viewed as driven almost entirely by the Fraud Section and the CFTC, who appear to have extracted settlements based on their perceptions of the banks' relative degrees of fault and overall cooperation, without regard to who was "first in" to report wrongdoing. It may be that the most tangible benefit of leniency for Barclays and UBS is the chance to avoid the trebling of civil damages in the many antitrust lawsuits brought by private plaintiffs in the wake of the settlements.

WHAT'S NEXT?

Although the municipal bonds and rate-rigging investigations have sown confusion as to what companies should expect from the leniency program, there are two clear lessons to be drawn.

First, the Antitrust Division's carrot may not protect companies from another prosecutor's stick. U.S. regulatory agencies—and even other arms of the DOJ—are unlikely to decline to pursue enforcement actions merely because a company has received antitrust leniency. This risk is most pronounced in sectors, like the financial industry, that are subject to overlapping regulatory and law enforcement regimes and represent an enforcement priority beyond the Antitrust Division. After the financial crisis, for example, prosecutors would likely be subject to intense public scrutiny for allowing a bank that has admitted criminal conduct to escape unscathed.

Second, companies that violate antitrust laws may be able to escape the worst of the stick, even without leniency. Prosecutors, including within the Antitrust Division, have become increasingly cognizant of the unintended consequences of corporate criminal liability on innocent employees and shareholders, particularly where a company operates in a highly regulated industry and would be unlikely to survive a criminal charge. Notwithstanding the recent LIBOR-related wire fraud charges, the government's reluctance to prosecute is perhaps greatest with respect to large financial institutions. As Attorney General Eric Holder recently told the U.S. Congress, the DOJ considers many financial institutions "too large" to indict because the collateral consequences would threaten the stability of the entire financial system. [16]

Still, certain concrete benefits of leniency cannot be lightly disregarded. An award of leniency permits a path to amnesty in non-U.S. jurisdictions (likely foreclosed without full antitrust cooperation in the United States) and avoids the prospect of treble damages in satellite civil litigation.

The practical implications of these developments for companies considering a leniency application remain uncertain. In cartel cases where there is no existing government investigation and the conduct implicates other law enforcement regimes, the possibility that control of the investigation will be wrested from the Antitrust Division may heighten risks associated with coming forward and reduce a company's incentives to make a hasty disclosure. It is also possible, however, that the chance of obtaining an NPA or DPA from the Division (instead of an indictment) will incentivize all cartel members to cooperate, even where there may already be a leniency applicant. Finally, the leniency program may simply cease to be a primary motivation for entities, like banks, that are simply "too big to jail" and subject to oversight by multiple regulators. Only one thing is certain: for companies in the financial industry or other highly-regulated sectors considering whether to apply for leniency, a once-straightforward set of choices has become infinitely more complex.

---

1. *See* U.S. Dep't of Justice, Corporate Leniency Policy, *available at* http://www.justice.gov/atr/public/guidelines/0091.htm.
2. *See id.*
3. See the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, H.R. 1086, 108th Cong., 150 Cong. Rec. H3656, Title II, Section 201, *et seq*.
4. Gregory J. Werden, Scott D. Hammond and Belinda A. Barnett, "Deterrence and Detection of Cartels: Using all the Tools and Sanctions," presented at the 26th Annual National Institute on White Collar Crime (Mar. 1, 2012).
5. United States Attorneys' Manual, Title 9, Chapter 9-28.1100, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.1000.
6. Assistant Attorney General Lanny A. Breuer, Address to the New York City Bar Association (Sept. 13, 2012).
7. See Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).
8. Press Release, U.S. Dep't of Justice, Bank of America Agrees to Pay $137.3 Million in Restitution to Federal and State Agencies as a Condition of the Justice Department's Antitrust Corporate Leniency Program, *available at* http://www.justice.gov/opa/pr/2010/December/10-at-1400.html.
9. See Press Release, U.S. Dep't of Justice, UBS AG Admits to Anticompetitive Conduct by Former Employees in the Municipal Bonds Investments Market and Agrees to Pay $160 Million to Federal and State Agencies (May 4, 2011), *available at* http://www.justice.gov/opa/pr/2011/May/11-at-567.html; Press Release, U.S. Dep't of Justice, JPMorgan Chase Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $228 Million to Federal and State Agencies (Jul. 7, 2011), *available at* http://www.justice.gov/opa/pr/2011/July/11-at-890.html; Press Release, U.S. Dep't of Justice, Wachovia Bank N.A. Admits to Anticompetitive Conduct by Former Employees in the Municipal Bond Investments Market and Agrees to Pay $148 Million to Federal and State Agencies (Dec. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-at-1597.html; Press Release, U.S. Dep't of Justice, GE Funding Capital Market Services Inc. Admits to Anticompetitive Conduct by Former Traders in the Municipal Bond Investments Market and Agrees to Pay $70 Million to Federal and State Agencies (Dec. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/December/11-at-1706.html.
10. *See* Press Release, Barclays Bank Plc, Barclays Bank PLC Settlement with Authorities (Jun. 27, 2012), *available at* http://group.barclays.com/news/news-article/1329925891776/navigation-1330349053975.
11. Letter from Denis McInerney, Chief of the Fraud Section, Dep't of Justice Crim. Div., to Steven R. Peikin, Esq., Sullivan & Cromwell LLP (Jun. 26, 2012), *available at* http://www.justice.gov/iso/opa/resources/337201271017335469822.pdf.
12. *See* Sara Schaefer Munoz and Max Colchester, *Top Officials at Barclays Resign Over Rate Scandal*, Wall Street Journal (Jul. 4, 2012), *available at* http://online.wsj.com/article/SB10001424052702304299704577503974000425002.html.
13. See Peter J. Henning, *UBS Settlement Minimizes Impact of Guilty Plea*, N.Y. Times, Dec. 20, 2012, *available at* http://dealbook.nytimes.com/2012/12/20/ubs-settlement-minimizes-impact-of-guilty-plea/.
14. Assistant Attorney General Lanny A. Breuer, Remarks at the UBS Press Conference (Dec. 19, 2012), *available at* http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-121219.html.
15. Letter from Denis J. McInerny, Chief of the Fraud Section, Dep't of Justice Crim. Div., to Gary R. Spratling, Esq., Gibson, Dunn & Crutcher LLP (Dec. 18, 2012), *available at* http://www.justice.gov/iso/opa/resources/1392012121911745845757.pdf.
16. See Andrew Ross Sorkin, Realities Behind Prosecuting Big Banks, N.Y. Times (Mar. 11, 2013), available at http://dealbook.nytimes.com/2013/03/11/big-banks-go-wrong-but-pay-a-little-price/.

KEY CONTACTS

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

David Esseks

Partner
Litigation – New York

Tel +1 212 610 6326
david.esseks@allenovery.com

Todd Fishman

Partner
Litigation – New York

Tel +1 212 756 1130
todd.fishman@allenovery.com

Sarah Cox

Associate
Litigation – New York

Tel +1 212 756 1185
sarah.cox@allenovery.com

Allen & Overy LLP

1221 Avenue of the Americas, New York, NY 10020 United States
Tel +1 212 610 6300

www.allenovery.com

DP1305013 - DOC42066(2)