A VIEW FROM WASHINGTON DC: LESSONS FROM THE US ON CARTEL ENFORCEMENT

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The US model of cartel enforcement and its leniency programme have extended well beyond its own shores, impacting on international cartel operations and increasingly on Europe's own legislation and regulatory actions, says Bob Bloch of Mayer Brown LLP.

Over the past 15 years, the Antitrust Division of the United States Department of Justice – the principal competition authority in the US – has placed enormous emphasis on detecting and prosecuting cartels organised to fix, raise, or stabilise prices, rig bids, limit output and divide markets.

La división de protección de la competencia del Departamento de Justicia de los Estados Unidos –la principal autoridad competente en los EE. UU. – ha
tenido un éxito
enorme en la lucha
contra los cárteles,

como resultado de la
flexibilidad de su
Programa de
Clemencia, comenta
Bob Bloch, socio de
Mayer Brown en Washington DC. Setrata de un programa
del que hay elementos
que están siendo asimilados por las autoridades europeas y con las cuales se está ampliando la cooperación transatlántica.

From an enforcement perspective, the Division has achieved stunning success: it has collected billions of dollars in fines, obtained jail sentences for scores of executives and put an end to cartels that have affected commerce in a wide variety of industries.

During the fiscal year 2007 the Division obtained more than $630m in criminal fines, much of which derived from its investigation of the air transportation industry. Including $300m criminal fines imposed on both British Airways and Korean Air Lines in August 2007 for respectively seeking to fix the price of passenger and cargo flights. By summer 2008, the Division had already obtained $697m in fines for the fiscal year.

At the close of 2007, the Division had 135 pending grand jury investigations – the highest number since 1992 – including over 50 investigations of suspected international cartel activity. As of August 2008, it had obtained 13,785 jail days for the fiscal year, with the longest individual prison sentences imposed on non-US executives, the 20, 24 and 30-month sentences handed down to three British executives participating in a marine hose cartel.

Not surprisingly, given the highly globalised nature of business, many of these cartels have operated internationally and involved companies with operations on both sides of the Atlantic. The European Commission (EC) regularly now carries out "dawn raids" in coordination with the US Antitrust Division, although the Directorate General-Competition of the EC has clearly become a major anti-cartel enforcer in its own right.

Without a doubt, the driving force behind the enforcement agencies' ability to detect these cartels and impose huge fines and jail sentences has been their respective leniency programmes.

The current US leniency programme, which took shape in 1993, has prompted an explosion of anti-cartel enforcement. Companies seeking to be "first in the door" and to avoid prosecution under the leniency programme's guidelines have provided information enabling the Division to identify cartel members, obtain documents and testimony demonstrating the existence of cartels and extract both corporate guilty pleas (resulting in fines) and individual pleas (usually resulting in jail time).

Among the measures the US has taken to increase the incentives for cooperation, include the use of "Amnesty Plus" and "Penalty Plus" programmes and, more recently, the development of an "Affirmative Amnesty" programme, under which the Division discloses its knowledge of a cartel with an insider in exchange for their participation in exposing its inner workings.

In the past decade, many elements of the US programme have been adopted internationally, including by the EC and its Member States. But while the competition agencies have had success using their respective leniency programmes, important differences remain between the US and the EC models of enforcement.

In the US, after the initial leniency applicant is given immunity from prosecution, the Division will aggressively pursue its investigation but is also willing to negotiate separate plea agreements with individuals and companies while the investigation is ongoing. This approach often provides the Division with maximum investigative leverage in both resolving cases and developing evidence

against other potential defendants who do not wish to plea bargain.

In Europe, by contrast, the EC conducts its entire investigation before reaching a decision and imposing fines, a system that some have criticised as slow and inefficient.

That difference may be alleviated in part by the Commission's new settlement procedure for cartels, announced in June this year. That procedure permits, but does not require, the EC to negotiate settlements after it has conducted its investigation but before it has brought charges against one or more companies. Competition authorities are continuously revising their enforcement policies and borrowing each other's best practices. The result is a general convergence of enforcement policy across the Atlantic – and while differences continue to exist they are though narrowing.

Bob Bloch is a senior partner with Mayer Brown LLP in Washington, DC, specialising in antitrust law and complex litigation before both the Antitrust Division and the Federal Trade Commission. He previously served in the Antitrust Division of the Department of Justice for almost 18 years.