

DOJ Antitrust Division Endorses International Cooperation in Cartel Investigations

In July 2020, the Antitrust Division of the U.S. Department of Justice (Antitrust Division) applauded the International Competition Network (ICN) initiative on cross-border leniency cooperation to fight international price fixing cartels. Following a year-long effort undertaken by the ICN, the ICN released the “Guidance on Enhancing Cross-Border Leniency Cooperation” (guidance) in June 2020. According to the Antitrust Division, “[t]he guidance document is designed to assist competition agencies around the globe in engaging and cooperating with their international counterparts when dealing with leniency applicants and other cooperating companies in cross-border investigations.”¹

The ICN is an international membership organization of government competition authorities that provides an informal venue for collaboration and benchmarking about practical competition regulation and enforcement. From this perspective, the guidance offers practical recommendations for antitrust enforcement authorities to administer their leniency programs in a manner that first, maximizes the effectiveness of international enforcement efforts and second, reduces disincentives for prospective leniency applicants to report violations.

Key recommendations from the guidance include:

1. each agency should request a waiver for all jurisdictions where a leniency applicant has submitted a leniency application;
2. cooperating jurisdictions should discuss: (i) possible differences in each jurisdiction’s legal framework, (ii) the scope of the conduct and the participants, and (iii) the stage of their respective investigations;
3. agencies should keep in regular contact and proactively notify foreign counterparts at key milestones of the investigation or enforcement action; and
4. agencies should coordinate their investigations, especially during the covert stage of investigations such as dawn raids.

While the guidance is presented as a positive step toward ensuring consistent treatment of leniency applicants among various agencies, it is primarily aspirational at this stage, with no binding commitments for enforcers. Instead, it largely memorializes current established practices and represents a starting point to help enforcers design programs that encourage self-reporting and bring consistency to treatment of leniency applicants. Nevertheless, as the guidance acknowledges “differences in leniency policies can reduce predictability for applicants and competition agencies” that “may create disincentives for both competition agencies and applicants.”

One significant example of these differences is the level of cooperation required to satisfy various enforcers and obtain leniency. Self-reporting applicants may receive leniency in some jurisdictions and as part of their cooperation provide documents and information that can be used to fine or prosecute them in others. Similarly problematic are the widely divergent methodologies among jurisdictions in calculating fines and credits. The guidance acknowledges these concerns without solving them. Risks related to differences between parallel enforcement regimes, along with fears of collateral civil litigation (especially in the United States), remain powerful disincentives to self-reporting. Separately, there remains the vexing problem of how closely jurisdictions can cooperate without being deemed joint investigations that carry with them — at least in the United States — burdensome discovery obligations and potential constitutional issues to which U.S. enforcement authorities are particularly alert. The guidance acknowledges this concern expressly but, again, does not resolve it.



J. Bruce Maffeo

Senior Counsel

jbmaffeo@cozen.com
Phone: (212) 883-4951
Fax: (917) 521-5866



Nicole H. Sprinzen

Vice Chair,
White Collar
Defense &
Investigations

nsprinzen@cozen.com
Phone: (202) 471-3451
Fax: (202) 861-1905



Thomas Ingalls

Member

tingalls@cozen.com
Phone: (202) 471-3411
Fax: (202) 861-1905

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Nevertheless, the guidance provides a first stab at establishing best practices in cross-border cooperation. Likewise, the guidance may be useful for countries with newer antitrust enforcers. The Antitrust Division's endorsement of the guidance also continues the Department of Justice's trend toward fostering cooperation among international enforcement agencies more generally, picking up on the Criminal Division's stated policy in favor of coordination among enforcers and against piling-on of fines and penalties.
