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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Making It Easier To Whistle While You Work

Law360, New York (February 16, 2012, 2:00 PM ET) -- Cartel detection and prosecution are top priorities for the Antitrust Division of the U.S. Department of Justice, regardless of which political party occupies the White House. Given the often secretive nature of cartels, however, they can be hard to detect. As such, the Antitrust Division relies on its Corporate Leniency Program to encourage self-reporting of cartel activity, by offering immunity and/or reduced sanctions.

Leniency programs worldwide have been instrumental in assisting antitrust authorities to detect, investigate and deter cartel activity by increasing cartel reporting. The Antitrust Division has noted that the "single most significant development in cartel enforcement is the proliferation of effective leniency programs" worldwide.[1]

The United States pioneered the development of this innovative cartel enforcement mechanism by developing the leniency program in the late 1970s. For many years after, however, foreign jurisdictions resisted adopting similar programs.[2] Today, approximately 50 foreign jurisdictions have leniency programs in place, most of which are based on the U.S. model.[3]

Limitations of Corporate Leniency Programs

As important as leniency programs are, they are limited. Given their narrow focus on those at the heart of the cartel, corporate leniency programs fail to incentivize people who are aware of, but not complicit in, cartel activity. This potentially leaves much cartel activity unreported.

In addition, leniency programs provide no protections to whistleblowers who are uninvolved or are on the periphery of the cartel. Therefore, even if these whistleblowers were to report cartel activity, they would likely face retaliation at work, risk losing their jobs or may even be blacklisted in the industry in which they work.

Over the past 10 years, four jurisdictions — South Korea, Pakistan, the United Kingdom and Hungary — have addressed the limitations of their respective corporate leniency programs by adding an antitrust informant or whistleblower rewards program. Each jurisdiction noted that the aim of adding a rewards program was to increase reporting from those who are either uninvolved in or are on the periphery of a cartel.

The U.S. has not yet added an informant or whistleblower reward program. Once at the forefront of innovative antitrust enforcement, is it the U.S. that is now resisting innovation?

Foreign Whistleblower Reward Programs

Despite the cultural, social and political differences among the jurisdictions, the antitrust informant rewards programs are relatively similar. Common among all is, of course, the incentive — a substantial monetary reward — and, recognizing the inherent risks of being an informant, protecting the whistleblower's identity from disclosure.

South Korea

The Korea Fair Trade Commission (KFTC) was the first antitrust authority to add a whistleblower rewards program to its antitrust enforcement regime. Introduced in 2002, the Cartel Information Reward Program was initially considered unsuccessful because the monetary reward was small and the fear of retaliation was great.[4]

Recognizing these drawbacks, the KFTC amended the program to provide greater monetary rewards and

strict protection of the informant's identity.[5] The amount of the maximum reward has increased over the years from 20 million won (approximately \$18,000 USD) to 1 billion won (close to \$1 million USD). The size of the reward is based on the seriousness of the violation and the quality of evidence provided.[6]

Pakistan

In 2007, the Competition Commission of Pakistan (CCP) was formed to replace the antiquated, ineffective Monopoly Control Authority.[7] The aim of the CCP is to modernize competition law in Pakistan.[8] As part of its modernization efforts, the CCP introduced a Reward Payment to Informants Program to uncover cartel activity.[9]

The rewards available under the program range from 200,000 to 5 million rupees (approximately \$2,200 to \$55,000 USD).[10] The rewards are calculated according to:

1. The usefulness of the information;
2. The seriousness of the cartel;
3. Efforts made by the informant; and
4. The level and nature of the informant's involvement in the cartel.[11]

The United Kingdom

In 2008, the U.K.'s Office of Fair Trading (OFT) enacted its whistleblower rewards program. The reward available under the program is up to 100,000 pounds (approximately \$157,000 USD).[12] The amount of the award depends on a variety of factors, including:

1. The value of the information;
2. The amount of harm to the economy and consumers;
3. The effort undertaken in order to provide information; and
4. The risk taken in order to provide information.[13]

Hungary

Finally, as of April 2010, the Hungarian Competition Authority (Gazdasági Versenyhivatal, or GVH) introduced its Informant Rewards Program. Under the program, an informant who provides "indispensable information" about cartel activity to the GVH may be entitled to receive a reward of 1 percent of the fine levied, up to 50 million forints (approximately \$225,000 USD).[14]

The type of information qualifying an informant for a reward includes "written evidence qualifying as indispensable in connection with hardcore cartels" or, under specified conditions, "information qualifying as indispensable substantiating the basis for the on-spot inspections."[15]

The Hungarian model makes rewards available to participants and nonparticipants in the cartel activity, from the "executor of the cartel" to the "secretary who organizes appointments."[16] The whistleblower cannot, however, take advantage of both the leniency program and the whistleblower reward program.

Legislative Outlook for Whistleblower Rewards in the United States

The U.S. is no stranger to whistleblower rewards programs. In particular, the False Claims Act has been a hugely successful tool in bringing fraud to the government's attention — and in recovering billions of dollars for the U.S. treasury.

The recently enacted Dodd Frank Act is another example of a strong whistleblower law. Despite these and other successful whistleblower laws, the U.S. does not have any whistleblower reward program for reporting cartel or other anti-competitive activity. But it has been considered.

In 2004, Congress enacted the Antitrust Criminal Penalty Enhancement Act (ACPERA) to enhance the U.S. Corporate Leniency Program. In 2010, as part of ACPERA's proposed extension, Congress commissioned the Government Accountability Office (GAO) to evaluate whether it was appropriate to amend ACPERA to include a whistleblower rewards program or anti-retaliation provisions.

The GAO Report

On July 25, 2011, the GAO issued its report recommending that Congress add anti-retaliation provisions to ACPERA to protect whistleblowers who report criminal antitrust violations.[17] The GAO noted that there was wide support among key stakeholders for the addition of anti-retaliation provisions.[18]

With respect to whistleblower rewards programs, the GAO noted that there was no consensus among key stakeholders and concluded that it is "difficult to determine whether the benefits of a whistleblower reward provision in the antitrust setting would outweigh the disadvantages."[19]

The GAO reported that among the potential disadvantages were that a reward may undermine witness credibility at trial, and that the number of noncredible or fraudulent claims would increase.[20]

Put into a more procedural context, however, neither of these concerns should prevent adding such a program. As to the former concern, cartel prosecution would not proceed on the word of the antitrust informant alone. The Antitrust Division would conduct a complete investigation and, if the allegations were corroborated, the informant's credibility need not be an issue.

Moreover, a fixed reward independent of the fines or penalties levied would remove the potential bias that may arise where the witness is financially interested in the outcome of the case.

As to the latter concern, a simple amendment imposing sanctions for lying to antitrust investigators could ameliorate the potential for a substantial increase in noncredible or fraudulent claims.

Despite the GAO's recommendations, Congress has yet to add an anti-retaliation provision to ACPERA. It is unlikely, however, that an anti-retaliation provision would be widely invoked without a corresponding rewards program.

In other words, given the risks involved, few whistleblowers may be willing to risk their standing in the industry or professional relationships to report cartel activity absent a monetary reward. Still others may simply need a monetary push in order to report cartel activity, even where the risk of retaliation or fear of exposure is nonexistent.

Given the ambivalence noted by the GAO regarding a rewards program, Congress should enact a no-frills reward scheme similar to the rewards schemes in South Korea and the other jurisdictions. The scheme could offer fixed but substantial rewards depending on the value of the information, and guarantee anonymity. Pending its success, this simple whistleblower rewards scheme could eventually develop into a full-fledged whistleblower law similar to the hugely successful False Claims Act.

Conclusion

Cartel detection and enforcement are crucial to promote fair and open competition. Important cartel reporting may come from those at the heart of the cartel as well as those on the periphery.

Like the foreign jurisdictions discussed above, modern, aggressive cartel enforcement in the U.S. should include a whistleblower reward program for those uninvolved in or on the periphery of a cartel. This fairly simple measure has the potential to detect and deter cartel activity to the same or even greater degree as the corporate leniency program.

--By Marlene Koury, Constantine Cannon LLP

Marlene Koury is an attorney in the New York office of Constantine Cannon.

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[3] Id.; see also, Hammond, The Evolution of Criminal Antitrust Enforcement, *supra* note 1.

[4] Byongbae Kim, Dr. General, Competition Bur., Korea Fair Trade Comm'n, Measures to Improve Cartel Detection (Other than Leniency,) Remarks Before the ICN Cartel Workshop (Nov. 8, 2005), available at www.internationalcompetitionnetwork.org/uploads/library/doc681.pdf

[5] Id.

[6] Id.

[7] Challenges in Implementing a Modern Competition Regime in Developing Countries: The Case of Pakistan, Remarks at World Bank Conference "From Privilege to Competition – Fostering Innovation and Competitiveness in MENA" (June 20, 2011), available at siteresources.worldbank.org/INTMENA/Resources/Challenges_in_implementing_Modern_competition_law_-_updated.pdf

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[11] Id.

[12] Office of Fair Trading, Rewards for Information About Cartels, available at www.oft.gov.uk/OFTwork/competition-act-and-cartels/cartels/rewards

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[14] Gazdasagi Versenyhivatal, Regular Questions about the Cartel Informant Reward, available at www.gvh.hu/gvh/alpha?do=2&st=2&pg=154&m129_doc=6429

[15] Id.

[16] Id.

[17] U.S. Gov't Accountability Office, GAO-11-619, Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection 15 (2011).

[18] Id.

[19] Id.

[20] Id.

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