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Challenges and co-ordination of leniency programmes – Note by Brent Snyder

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm

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Challenges to Leniency Posed by the Proliferation of Leniency Programs and Private Enforcement

1. Introduction

1. In 1993, the United States Department of Justice Antitrust Division (US DOJ) revised what had been an ineffective and little used corporate leniency policy. In return for self-reporting a cartel, admitting the anticompetitive conduct, and providing full cooperation to the US DOJ's cartel investigation, a company and its officers, directors, and employees could receive full protection from criminal antitrust prosecution. At the time, those incentives were unprecedented and were later sweetened to include a reduction in U.S. civil damages liability.

2. The US DOJ corporate leniency program led to the successful detection and prosecution of egregious international cartels. That success led to the adoption of leniency programs in dozens of jurisdictions around the world. Today, more than 60 jurisdictions have some form of corporate leniency program, and such programs are considered the most effective tool in detecting and enforcement against anticompetitive cartels.

3. In recent years, however, concern has been expressed among some competition enforcers that the number of leniency applications,[1] particularly related to international cartels, has been declining. This concern may or may not be warranted. There are, however, some warning signals that should not be ignored.

4. For example, some prominent competition lawyers who have represented leniency applicants in the past have become more vocal in suggesting that the cost and disruption to a company's business operations from seeking leniency in multiple jurisdictions are so great that it may cause some companies to think twice about the value of seeking leniency. Moreover, the proliferation of aggressive private enforcement increases the civil damages exposure to which leniency applicants are exposed.

5. As a result, they argue it can fairly be asked by a company considering whether to self-report a cartel if the cost of leniency has become so great that it is no longer attractive. This raises a similar question for the enforcement community, which should consider whether it is possible that leniency has proliferated to its own detriment.

2. The effect of the proliferation of leniency programs and private enforcement

6. It can certainly be argued that the proliferation of cartel enforcement makes leniency more valuable than it has ever been despite the increased cost and civil exposure from seeking leniency in connection with international cartels. That is because the potential consequences of participating in a cartel and not securing immunity are

[1] For purpose of this paper, the term "leniency application" will refer to the immunity application in jurisdictions where more than one undertaking can obtain leniency.

increasing. More jurisdictions than ever before are effectively investigating and seriously punishing cartel offenses. As a result, companies are now exposed to a greater risk of detection and, if caught, greater monetary enforcement penalties around the world than in the past.

7. This risk and exposure can be entirely eliminated by being the first to self-report a cartel.[2] And, with a growing number of jurisdictions imposing criminal liability on individuals, leniency applicants give their officers, directors and employees the opportunity to earn protection from prosecution. For these reasons, a company should still have adequate incentives to seek first-in leniency.

8. Nonetheless, enforcers must be mindful of the costs to leniency applicants that could prove to be a disincentive to seeking first-in leniency. A leniency applicant in any cartel investigation incurs unavoidable costs: an internal investigation by legal counsel, demands for documents, witness interviews and, possibly, trial testimony. The costs include both monetary expenditures and the cost of disruption to business operations. These costs may increase exponentially if a leniency applicant applies for leniency in multiple jurisdictions.

9. Compounding these costs are the substantial civil damage claims to which a leniency applicant is likely to be exposed around the world. The legal fees and disruption to business operations from civil litigation may exceed those from the competition enforcement investigation. Moreover, leniency applicants in some jurisdictions, such as the United States, must pay restitution to victims in order to obtain leniency.

10. Civil damage claims may be the greatest disincentive to seeking first-in leniency because that is a consequence of participation in a cartel that cannot be avoided by seeking leniency. Rather, leniency is likely to lead to that consequence.

11. A successful leniency application in an international cartel is likely to lead to enforcement action by a competition enforcement agency that, in turn, is likely to lead to private damages actions to which the leniency applicant will be exposed in one or more jurisdictions. Some potential leniency applicants may decide that accepting the risk of detection if they do not seek leniency is preferable to the near certainty that they will be a party in civil damages actions if they do seek leniency.

12. Although it can fairly and accurately be said that the costs of leniency and civil damages exposure are the necessary consequences and deterrent of illegal conduct and that a first-in leniency applicant still comes out far ahead of its co-cartelists that do not receive immunity, it would be mistake for enforcement agencies to turn a deaf ear to concerns being expressed by members of the defense bar about the high cost of leniency.

[2] As more competition agencies around the world target cartels for enforcement action and global competition reporting services, such as MLEX, publicize cartel cases brought by those agencies, it likely is not a viable option for a company to seek leniency in only some of the jurisdictions in which it engaged in an international cartel. The risk that the competition agencies in other affected jurisdictions will learn of the cartel and take enforcement action is prohibitively high.

3. Suggestions for greater logistical coordination

13. Enforcers operate in an increasingly complicated and crowded investigative environment. At any one time, not only may a half dozen or more competition enforcers be investigating the same cartel, but private parties in a number of jurisdictions may also be actively litigating over it. That being so, competition enforcement agencies can and should do more to coordinate not only dawn raids and searches but other logistical and substantive aspects of their investigations.

14. Such coordination makes good sense because it will not only benefit their investigations, but it will help minimize the overlapping and even contradictory demands enforcers sometimes place on leniency applicants. Such demands not only increase the cost to leniency applicants but often also slow down the pace of the competition enforcers' own investigations.

15. Among the reasonable steps enforcers can consider taking to better coordinate logistically are:

3.1. Greater convergence in leniency requirements and investigations

16. As the number of jurisdictions adopting leniency programs has proliferated, so have the different procedural, substantive, and enforcement practice requirements that leniency applicants must satisfy to obtain leniency. Greater convergence between competition enforcers on a variety of such issues will make leniency more transparent, predictable, efficient, cost-effective, and, thus, attractive for leniency applicants. A few representative examples follow.

3.1.1. Leniency Markers

17. There are a variety of standards applicants must satisfy to secure leniency markers in multiple jurisdictions. The time needed to research and satisfy the standard in each different jurisdiction in which leniency will be sought increases not just cost but also the potential that the leniency applicant will not be the first applicant in each jurisdiction in which it has exposure. The risk of potential exposure from not obtaining first-in leniency in each jurisdiction may be a disincentive for some companies to seek leniency.

18. This potential disincentive could be addressed by working toward greater convergence on the requirements to obtain a first-in leniency marker. One suggestion by the business community has been to create a "one-stop shop" for leniency markers. While interesting, this likely is not a practical solution for many jurisdictions. For example, jurisdictions in which cartels are prosecuted as crimes would be very reluctant (if not prohibited) to cede to a third party any aspect of decision making related to the exercise of their criminal powers, including the granting of immunity.

19. Nonetheless, such proposals are worthy of discussion, and competition enforcement agencies can do more to bring about greater alignment in this area. Enough jurisdictions should now have experience applying marker systems to be able to consider ways in which the systems can be harmonized and streamlined without compromising the efficacy of their programs.

3.1.2. Leniency Proffer Deadlines

20. Similarly, competition enforcement agencies could also consider greater flexibility in setting the deadlines typically imposed on multi-jurisdictional leniency applicants for initial marker proffers – often 30 days. This would give the applicants the time necessary to obtain markers in the affected jurisdictions and to undertake the internal investigation necessary to make an initial proffer. Overly rigid marker deadlines in one jurisdiction in which a prospective leniency applicant has exposure can act as a disincentive to seeking leniency in any jurisdiction given the risk of exposure in that jurisdiction in the event of a failed leniency application. This is especially the case in jurisdictions that require a marker to be perfected within a specified time period and do not allow for extensions.

3.1.3. Guidance on internal investigations

21. Competition enforcement agencies can also consider seeking greater convergence on the procedures and criteria for an effective internal investigation by counsel for a leniency applicant or non-leniency cooperator. This is an under-examined aspect of leniency. Effective internal investigations are very important to the success of a leniency applicant and any resulting enforcement efforts, and greater convergence and guidance on how those investigations should be conducted would benefit leniency applicants, non-leniency cooperators, and competition enforcement agencies.[3]

3.2. Eliminating mandatory waivers by leniency applicants and improving confidentiality protections for leniency materials

22. Mandatory confidentiality waivers, which require a leniency applicant to authorize a competition enforcer to share the applicant's confidential leniency information with other jurisdictions in which the applicant has applied for leniency, should be reconsidered. Although leniency applicants very often grant waivers,[4] there at times may be understandable reluctance on their part to do so. In such circumstances, mandatory waivers may be a significant disincentive for a company to seek leniency in any jurisdiction, not just those requiring mandatory confidentiality waivers.

[3] A lack of convergence regarding internal investigations can lead to contradictory demands on leniency applicants. As one example, some competition enforcement agencies require counsel for a leniency applicant to interview knowledgeable employees and proffer the information to the agency before it interviews the employees. Other jurisdictions, by contrast, prohibit counsel for the leniency applicant from interviewing employees prior to the employees being made available to the competition enforcement agency for interviews. This conflicting demand can make it difficult for a leniency applicant to know how to proceed and can prejudice and delay its internal investigation and the efforts of the competition enforcement agencies to advance their respective investigations.

[4] And, as a practical matter, it will generally be necessary for a leniency applicant to do so in order to obtain efficiencies from the types of coordination among enforcers proposed in this note.

23. For instance, leniency applicants may be unwilling to grant waivers to share leniency information with enforcers that have limited ability to protect, or a poor track record of protecting, the confidentiality of leniency information. The disclosure of a leniency applicant's information in that jurisdiction may have adverse consequences not only in that jurisdiction but also in other jurisdictions where, for instance, civil damages actions are pending.

24. Eliminating mandatory waivers and also continuing to strengthen confidentiality protections for leniency materials can address this disincentive to seek leniency. Doing so will also increase the likelihood that leniency applicants will provide voluntary waivers to competition enforcers to share leniency materials and coordinate more closely.

3.3. Coordinating on deadlines and timetables for key tasks and witness interviews imposed on leniency applicants

25. Doing so will alleviate the need for leniency applicants to choose whose deadlines to meet and not meet. For this to be successful, however, leniency applicants must be proactive in keeping enforcement agencies apprised of potentially conflicting and overlapping demands.

3.4. Focusing investigations on the conduct and effect in their respective jurisdictions

26. In some cartel investigations, competition enforcers explore aspects of a cartel far removed from their borders and that do not threaten their citizens. While enforcement agencies must and should develop the understanding and evidence necessary to prosecute a cartel, they should be mindful that unnecessarily broad investigations have attendant costs for leniency applicants and other cooperators, which may create a disincentive to coming forward.

3.5. Being more economical and strategic in the document demands placed on leniency applicant

27. Overly broad document demands are time-consuming and very expensive for leniency applicants and can do more to impede than advance an investigation. Enforcement agencies should explore and be more open to techniques and technologies that can streamline searches and result in more focused productions, which will produce benefits to leniency applicants (and other respondents) and enforcement agencies alike.

28. Likewise, phasing requests for production, thereby delaying requests for certain categories of documents until it is clear there is a need for them, can also reduce costs and create efficiencies that will benefit the enforcement agency as well as the leniency applicant and other respondents.

3.6. Being more selective regarding witness interviews and coordinating interview logistics with other competition enforcers

29. Perhaps the greatest disruption to a leniency applicant's legitimate business operations comes from interview demands placed on the applicant's executives and employees. There have been leniency witnesses whose almost sole job for years was to

circle the globe to be interviewed in jurisdiction after jurisdiction, not to mention being deposed in civil litigation.

30. These interviews can take a tremendous toll on witness effectiveness and also prevents witnesses from performing their work for their employers, to the detriment of the leniency applicant, especially when the witness is a senior executive. Enforcement agencies can find ways of being more efficient in the demands made on witnesses, and their investigations will not suffer from it.

31. Enforcement agencies that are able to do so should consider conducting joint interviews with other enforcers in a common location. The witness could be interviewed on the key aspects of the conspiracy by a designated lead interviewer, and then each participating enforcer could follow up as necessary to ask questions specific to their jurisdiction. This approach would result in many enforcement agencies getting earlier access to key witnesses than they otherwise would, would minimize inconsistent witness statements across numerous interviews that can become a basis for cross-examination at trial, and would reduce witness fatigue that can compromise witness memory and trial performance.

32. Even if joint interviews are not feasible for some jurisdictions,[5] they can coordinate with other jurisdictions on the time and location of witness interviews. For instance, multiple enforcement agencies could arrange for a key witness to be interviewed on consecutive days at the same location. This will benefit the leniency applicant by reducing the number of times a witness needs to be prepared by legal counsel to answer similar questions and the amount of travel time necessary to attend interviews with various competition enforcers around the world.

33. Finally, enforcement agencies should resist the temptation to interview witnesses numerous times. Multiple interviews (especially by multiple enforcement agencies) not only speed witness fatigue but also significantly increase the cost to the leniency applicant and the risk of inconsistent statements by the witness.[6]

34. But, leniency applicants can also greatly aid their own cause by making thorough and *reliable* attorney proffers so enforcement agencies can trust what a particular witness can and cannot provide, which will make some witness interviews more efficient and eliminate the need for others. It is often the case that proffers by leniency applicants cannot be entirely trusted by competition enforcers.

[5] The United States, for example, is unable to conduct joint witness interviews because of the implications for its disclosure obligations in criminal cases. In particular, conducting joint interviews with another jurisdiction in the past resulted in a court order requiring the United States to seek materials in the investigative files of the other enforcement agency that participated in the joint interview.

[6] When it is necessary to re-interview a witness, consider whether it is necessary to retread the ground covered in the first interview and also whether it is possible to conduct the subsequent interview by video, rather than in person.

3.7. Better coordination among those jurisdictions that proceed on written proof, thereby limiting the number of separate written statements witnesses are required to give

35. As is the case when a witness is interviewed multiple times, there is a risk that a witness will make inconsistent written statements when providing statements to multiple jurisdictions. There is also the fatigue that results from travel to each jurisdiction, as necessary, to complete the statement.

36. Rather than each jurisdiction obtaining a bespoke written statement from a witness, thought should be given to whether a generic statement is possible on the key aspects of the witness's testimony with jurisdiction-specific additions as necessary.

37. While these logistical steps require more communication between enforcement agencies throughout an investigation, those communications will permit strategic coordination and collaboration that have the potential to make investigations more efficient and effective in ways that benefit leniency applicants, non-leniency cooperators,[7] and competition enforcers.

4. Two more suggestions for consideration: limitation of civil liability for leniency applicants and whistleblower rewards

38. Two other approaches could also be considered by competition enforcers to increase the incentives for leniency. Leniency benefits could be expanded to eliminate or reduce the successful first-in applicant's liability for civil damages to victims, and monetary rewards could be offered to individual whistleblowers who come forward with evidence of a cartel violation. Both of these approaches are currently utilized by at least some competition enforcement agencies.

4.1. Limitation of civil liability

39. In the United States, for instance, cartelists are exposed to treble damages and joint and several liability in private enforcement actions. As an additional incentive to leniency, a successful leniency applicant can mitigate this exposure, de-trebling damages and decoupling joint and several liability, by providing timely cooperation to plaintiffs'

[7] Almost all of the things that competition enforcers can consider doing to make investigations more efficient and cost-effective for first-in leniency applicants also apply to other companies that cooperate in return for a reduced sanction. Obtaining the cooperation of those companies is extremely important to investigations, and the expense of that cooperation to those companies is often far greater than for first-in leniency applicants given the accompanying monetary fines and penalties.
Although it is beyond the scope of this note, more engagement and coordination among enforcers about their fining methodologies in specific investigations is another area of understandable interest for non-immunity cooperators. While each jurisdiction can and should seek the imposition of penalties that reflect the seriousness of the conduct and the harm to its consumers, greater discussion among enforcers about fining methodologies in specific investigations is worthwhile to minimize the risk of inconsistent approaches and overlapping fine recommendations.

lawyers in the civil cases.[8] Similarly, the EU's Damages Directive[9] provides some limitations on joint and several liability and contribution for first-in leniency applicants.

40. Given the significant disincentive to first-in leniency applicants posed by the proliferation of private damages, other jurisdictions could consider a similar approach or go even further by eliminating or capping civil liability for a successful first-in leniency applicant. This is more viable in jurisdictions where other cartelists can be held jointly and severally liable for the harm caused by the cartel, leaving the leniency applicant's victims with recourse. A civil damages cap or immunity would also reduce or eliminate the temptation some leniency applicants have to minimize the effect of their cartel misconduct to better position themselves in civil damages litigation. Indeed, a civil damages cap or immunity could be conditioned on the leniency applicant providing full and complete cooperation to the victims of the cartel in their civil damages actions.

4.2. Whistleblower rewards

41. Another approach would be to offer financial rewards to individual whistleblowers who come forward and report cartels to competition enforcement agencies.[10] Such programs are currently offered by some law enforcement agencies.

42. One well-known and successful whistleblower rewards program is offered by the U.S. Securities and Exchange Commission (US SEC). The US SEC allows a whistleblower who provides "high-quality original information" that leads to a successful securities fraud enforcement action to obtain between 10% and 30% of sanctions over USD $1 million. Since 2011, the SEC has awarded more than USD $250 million in actions that have resulted in the imposition of more than $1 billion in sanctions.

43. A number of competition agencies currently have such programs. The Korea Fair Trade Commission's whistleblower rewards program appears to have been the most successful, with rewards being paid in 15 cases in 2016 alone. The Competition Commission of Singapore, the Competition and Markets Authority, and the Competition Commission of Pakistan, among others, also offer a whistleblower rewards program.

44. One argument against such programs is that they can undermine leniency. An employee who becomes aware of his or her employer's participation in a cartel may decide to report the cartel directly to the competition enforcement agency in order to obtain a financial reward rather than reporting it to his or her employer, which could then seek leniency.

45. A counterargument to this concern is that a company that becomes aware of its involvement in a cartel will have a greater incentive to immediately come forward to seek

[8] Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (ACPERA), Pub. L. No. 108-237, §213, 118 Stat. 666, 667 (2004).

[9] *See* Article 11(4)-(6) of the Directive 2014/104/EU of the European Parliament & of the Council of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law of the Member States and of the European Union.

[10] Typically, only whistleblowers who are not participants in the cartel are eligible for financial rewards.

leniency if a whistleblower reward program exists. Any delay in doing so exposes the company not only to the risk that a co-cartelist will seek leniency but also that its own employees will seek a whistleblower reward. Just as the intention of a leniency program is to create a race between potential applicants to obtain immunity as the first-in leniency applicant, a whistleblower rewards system intensifies the race by pitting potential leniency applicants and whistleblowers against each other to expose the cartel.

46. Perhaps a future OECD roundtable on alternatives and complements to corporate leniency programs in the detection and prosecution of cartels could examine the efficacy of whistleblower rewards programs based on the experience of competition agencies with them to date.

5. Conclusion

47. Leniency programs remain the most effective tool for detecting and prosecuting hard core international cartels, and they should still provide strong incentives for companies involved in such cartels to come forward and self-report. Nevertheless, competition enforcement agencies should not take for granted that first-in leniency applicants will continue to come forward to report international cartels when faced with the high costs of cooperating with investigations by enforcers around the world and ever increasing civil exposure.

48. Warning signals suggesting that the incentives to seek leniency are not as great as they once were should be taken seriously. Competition enforcers should work together to assess whether reasonable steps can be taken to strengthen and improve incentives for companies to continue to self-report cartels. These include working together to ensure that investigations are conducted more efficiently and cost-effectively and to consider whether other benefits for, or alternatives to, leniency will strengthen incentives that companies need to come forward, self-report, and cooperate.