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Roundtable on challenges and co-ordination of leniency programmes - Note by the United States

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More documentation related to this discussion can be found at

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United States

1. Introduction

1. The United States Department of Justice, Antitrust Division ("Antitrust Division") created the core concept of exchanging leniency for cooperation against other cartel members, and then revised and honed its leniency policy to exponentially increase the policy's effectiveness in cracking the world's largest cartels. Widely adopted around the world, leniency policies have transformed the way competition enforcers detect, investigate and prosecute cartels. The smoke-filled walls of restaurants and hotel rooms where executives reached secretive price-fixing agreements were previously impenetrable to competition enforcers, and many such agreements undoubtedly went undetected for decades. Leniency changed that, and while smoke-filled rooms may have given way to virtual meetings and email, leniency policies continue to be effective in uncovering even the most sophisticated cartels.[1]

2. Implementation of Corporate Leniency in the United States

2. The first version of the United States' Corporate Leniency Policy dates back to 1978. That original policy relied on the core concept of providing a complete pass from prosecution in exchange for self-reporting and cooperation against other cartel members in an effort to detect secretive cartels, but failed to provide the incentives necessary to incite self-reporting of large-scale hard core cartel conduct. For this reason, the original U.S. Corporate Leniency Policy was rarely utilized. The Antitrust Division, on average, received only about one leniency application per year under the original policy, and the policy did not result in the detection of even one international or large domestic cartel. In August 1993, the Antitrust Division revised its Corporate Leniency Policy to make the program more transparent and increase incentives for corporate cartel participants to come forward and cooperate. Three major revisions were made to the policy: (1) leniency became automatic for qualifying corporations if the Division had no pre-existing investigation; (2) under certain circumstances, leniency was still available even if cooperation began after an investigation was underway; and (3) all officers, directors and employees who came forward with the corporation to cooperate were protected from criminal prosecution.

3. The 1993 revisions provided unprecedented incentives for corporations to self-report cartel violations, and remain the core of the Antitrust Division's leniency program. These incentives were later increased to include a reduction in civil damages liability in the United States. The changes produced the desired results. The leniency application rate jumped from one per year prior to 1993 to an average of one per month by 2003. By

[1] For further reading, *see* the Department of Justice, Antitrust Division's Leniency Program policies, guidance documents, and public speeches *available at* https://www.justice.gov/atr/leniency-program. *See also* Ann O'Brien, "Leadership of Leniency," *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Caron Beaton-Wells and Christopher Tran eds., 2015).

2010, there was a nearly twenty-fold increase in the leniency application rate from the rate under the original policy.

3. Implementation Challenges and Lessons Learned

4. One of the early challenges to the Antitrust Division's Corporate Leniency Policy was addressing the sceptics within the United States' law enforcement community. The concept of a formalized immunity policy was unique, and no such voluntary disclosure program existed within the U.S. Department of Justice. Giving up prosecution of the first corporation to turn on its conspirators was initially unsettling to many prosecutors. The prisoner's dilemma presented by the leniency policy results in keeping the first cartelist to self-report out of prison, and that bothered those who were dedicated to bringing all criminals to justice. However, the grant of leniency with no criminal conviction, fine or prison sentences for antitrust violations was necessary to induce cartel participants to turn on each other and self-report. Ultimately, the Antitrust Division obtained leniency buy-in by convincing prosecutors that leniency policies uncover highly secretive antitrust cartels that would otherwise go undetected and unabated. The discovery and termination of the cartel conduct through leniency policies not only ends cartels and the ensuing harm to consumers, but because cartels are by definition conspiracies that involve more than one participant, leniency policies also provide the valuable insider information necessary to successfully prosecute the remaining cartel participants. This in turn may lead to recovery of damages for victims from all members of the cartel.

5. After decades of enforcement, the Antitrust Division has learned that there are three key factors that incentivize leniency applications, and these same factors create an enforcement program that deters cartel activity:

- Severe sanctions;
- Heightened fear of detection; and
- Transparency/predictability in enforcement policies.

6. The issues of detection and deterrence are closely related because the foundational principles that apply to effectively preventing cartels are also at the core of implementing a successful leniency program for detecting cartel activity once it does occur.

3.1. Sanctions

7. In order to create deterrence, antitrust laws must provide the threat of stiff sanctions for those who participate in hard core cartel activity. With that in mind, over the last two decades, the Antitrust Division has obtained steadily increasing corporate fines and longer jail sentences for individuals. Criminal violations of the Sherman Act became a felony in 1974, with a maximum of three years' imprisonment. Fine levels were initially set at $1 million for corporations and $100,000 for individual defendants in 1974. Fines were increased gradually in 1984 and 1990,[2] with the 1984 modification

[2] The maximum individual fine for criminal Sherman Act violations was increased to $250,000 in 1984 through a combination of the Comprehensive Crime Control Act, Pub L No 98-473, 98 Stat 1976 (1984) and the Criminal Fine Enforcement Act, Pub L No 98-596, 98 Stat 3134 (1984),

allowing for fines in excess of the statutory maximum – up to twice the gain derived by, or twice the loss caused by, the cartel – to be imposed pursuant to Title 18 of the United States Code Section 3571(d). In June 2004, recognizing the rising threat to U.S. businesses and consumers posed by cartels, Congress significantly raised the maximum penalties for criminal Sherman Act violations by increasing the statutory maximum corporate fine to $100 million, the statutory maximum individual fine to $1 million, and the maximum jail term to 10 years.[3] Since the late 1990s, the Antitrust Division has emphasized deterrence through individual accountability, and statistics demonstrate that individuals who violate U.S. antitrust laws are being sent to jail with increasing frequency and for longer periods of time.

3.2. Risk of Detection

8. The second prerequisite to building an effective leniency program is instilling a genuine fear of detection. Corporations must perceive a significant risk of detection by competition enforcers if they engage in cartel activity. If corporations perceive the risk of being caught by competition enforcers as very small, then stiff maximum penalties will not be sufficient to deter cartel activity. Likewise, if cartel members do not fear detection, they will not be inclined to report their wrongdoing to enforcers in exchange for leniency. Therefore, competition enforcers must cultivate an environment in which business executives perceive a significant risk of detection by competition enforcers if they either enter into, or continue to engage in, cartel activity. Effective leniency programs help create such an environment and destabilize cartels. The Antitrust Division's use of traditional criminal enforcement tools such as search warrants, subpoenas, consensual monitoring and wiretaps to crack cartels further instils a fear of detection in corporative executives.[4] If cartel members have a significant fear of detection, and the consequences of getting caught are severe, then the rewards of self-reporting become too important for a corporation to risk losing the race for leniency to another cartel member, or perhaps to its own employee if individual leniency is available. The dynamic creates a race to be the first to the prosecutor's office.

3.3. Transparency/predictability

9. Competition enforcers must provide transparency, to the greatest extent possible, throughout the anti-cartel enforcement program, including in leniency programs, so that prospective cooperating parties can predict with a high degree of certainty their treatment following cooperation. The Antitrust Division's original 1978 leniency program lacked transparency and predictability and retained considerable prosecutorial discretion, leading to a low number of applications. For a number of reasons, it was difficult for

and the maximum corporate fine remained $1 million. In 1990, the Sherman Act was amended to raise the statutory maximum fines to $10 million for corporations and $350,000 for individuals. *See* Antitrust Amendments Act, Pub L No 101-588, 104 Stat 2880 (1990).

[3] *See* Antitrust Criminal Penalty Enhancement and Reform Act, Pub L No 108-237, § 215, 118 Stat 661, 668 (2004).

[4] For a full discussion of the investigative tools used in U.S. cartel investigations, *see* Gregory Werden, Scott Hammond, and Belinda Barnett , "Deterrence and Detection of Cartels: Using All the Tools and Sanctions" (The 26th Annual National Institute on White Collar Crime, Miami, March 1, 2012), *available at* www.justice.gov/atr/public/speeches/283738.pdf.

corporations to predict with much certainty whether they would receive leniency if they chose to apply. Specifically, (1) the policy gave "serious consideration" to refraining from prosecuting a corporation that confessed its wrongdoing before the Antitrust Division began investigating the cartel, but no guarantee; (2) there was no written policy, adding to the lack of transparency; and (3) leniency was not available once an investigation had begun. Further, in many cases, a corporation's authoritative representatives for legal matters may not have even been aware of the need for leniency until an investigation was under way.

10. As a consequence of the unpredictable nature of the policy and lack of availability of leniency once an investigation had begun, the Antitrust Division had roughly one leniency application per year from 1978 until the policy was revised in 1993. Under the revised policy, the Antitrust Division increased the transparency of the program and created an alternative leniency for corporations that come forward after an investigation has begun. Under Part A (Type A) of the policy, which applies before an investigation has begun, leniency is automatic if the applicant can meet six objective criteria.[5] If an applicant cannot meet the Type A factors, it might be able to qualify for leniency under the alternative Type B leniency in the revised 1993 policy. In addition to issuing a written policy, the Antitrust Division further has clarified the application of the policy by publishing several speeches to address questions that have arisen regarding the policy, including a Frequently Asked Questions paper.[6]

4. Challenges to Leniency Incentives

4.1. Challenges to leniency arising from interaction between competition enforcers and other domestic enforcement and regulatory agencies

11. Effective leniency policies incentivize corporations to come forward quickly to report cartel conduct, but when internal investigations uncover possibly illegal conduct that goes beyond traditional cartel conduct, counsel have to decide whether, when and how to bring that conduct to the attention of enforcers, often in different agencies and jurisdictions. This issue can take on a special urgency when other agencies are involved in parallel investigations with the Antitrust Division, and counsel must carefully analyse how to handle such situations. The Antitrust Division has made clear that the Corporate Leniency Policy binds only the Antitrust Division, not other prosecuting agencies.[7] Thus, other domestic enforcement agencies could prosecute the leniency applicant for additional offenses, whether or not the offenses were committed in connection with the criminal antitrust violation.

[5] *See* Antitrust Division, Corporate Leniency Policy, *available at* https://www.justice.gov/atr/leniency-program.

[6] *See* "Frequently Asked Questions About the Antitrust Division's Leniency Program and Model Leniency Letters" (originally published November 19, 2008; update published January 26, 2017), *available at* https://www.justice.gov/atr/page/file/926521/download.

[7] *See* Scott Hammond, "Recent Developments Relating to the Antitrust Division's Corporate Leniency Program,"

(The Twenty-Third Annual National Institute on White Collar Crime, San Francisco, March 5, 2009), *available at* www.justice.gov/atr/public/speeches/244840.pdf.

12. With recent investigations involving coordination among numerous enforcement and regulatory agencies within the United States, questions about whether leniency incentives to report cartel conduct still outweigh potential uncertainty for non-antitrust conduct are even more in focus for members of the bar and the business community. Competition enforcers are faced with the delicate balance of maintaining leniency incentives while coordinating with multiple other enforcers. When illegal conduct potentially goes beyond conduct prohibited by antitrust laws, and violates laws or regulations enforced by other agencies, such situations require close coordination to ensure incentives for leniency self-reporting remain intact, while other conduct not covered under the leniency policy does not go unaddressed.[8]

4.2. Challenges to leniency arising from proliferation of private enforcement

13. Competition law in the United States authorizes the award of treble damages, plus attorneys' fees, to private litigants.[9] The increase in the availability of private rights of action in antitrust cases in other jurisdictions has added a new element to the cost/benefit analysis in which corporate counsel engage when deciding to seek leniency. The level of exposure a corporation faces in private damages actions, often in multiple jurisdictions, can be a significant disincentive to seeking leniency. In the United States, a legislative fix was introduced to reduce the effect of this disincentive. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, also referred to as ACPERA, limits the liability for civil damages claims in private state or federal antitrust actions for a qualifying leniency applicant.[10] For claims against a corporation that (1) enters into a leniency agreement with the Antitrust Division; and (2) provides satisfactory cooperation to the claimant in the private action, a claimant cannot recover damages exceeding the "portion of the actual damages sustained by such claimant which is attributable to the commerce done by the applicant in the goods or services affected by the violation." Thus, by satisfying the cooperation requirements of ACPERA, a leniency applicant can avoid joint and several treble damages liability.

[8] *See* Frequently Asked Questions, *supra* n. 6; from Question #6: It has been the Antitrust Division's experience that other prosecuting agencies do not use other criminal statutes to do an end-run around leniency. At the same time, leniency applicants should not expect to use the Leniency Program to avoid accountability for non-antitrust crimes. Not every conspiracy among competitors amounts to an antitrust crime. And not every fraud that an applicant commits while engaged in an antitrust crime is committed in furtherance of that crime. Leniency applicants with exposure for both antitrust and non-antitrust crimes should report all crimes to the relevant prosecuting agencies. Under the Department's Principles of Federal Prosecution of Business Organizations, self-reporting is one factor that federal prosecuting agencies consider when making charging decisions. A list of factors that will be weighed in deciding whether to prosecute a corporation can be found at U.S. Attorneys' Manual 9-28.300, also referred to as the U.S.A.M.. These Principles recognize special policy goals and incentive programs regarding antitrust violations, among other offenses, and note the Antitrust Division's "firm policy . . . that amnesty is available only to the first corporation to make full disclosure to the government."

[9] *See* Clayton Act, 15 U.S.C. § 15(a) and Sherman Act, 15 U.S.C. § 1.

[10] Pub. L. No. 108-237, Title II, §§ 211 to 214, 118 Stat. 661, 666-68 (2004), as amended Pub. L. No. 111-30, § 2, 123 Stat. 1775 (2009) and Pub. L. No. 111-190, §§ 1 to 4, 124 Stat. 1275, 1275-76 (2010) (set out as a note under 15 U.S.C. § 1).

4.3. Proliferation of leniency programs worldwide and effect on leniency incentives

14. The Corporate Leniency Program revolutionized cartel enforcement, led to the successful prosecution of many long-running and egregious international cartels, and served as a model for leniency programs subsequently adopted in dozens of jurisdictions around the world. As more jurisdictions begin or expand their efforts to prosecute cartels, more investigations involve enforcers from around the world. As a result, cartel participants considering whether to seek leniency face a more complex decision-making process than they did two decades ago, when leniency was still a new concept and cartel enforcement was far less widespread than it is today.

15. The proliferation of leniency programs around the world has led some to question whether leniency is still an attractive incentive for cartelists. The Antitrust Division believes leniency is more valuable than it has ever been because the consequences of participating in a cartel and not securing leniency are increasing: more jurisdictions than ever are effectively investigating and seriously punishing cartel offenses. Today, the United States frequently joins in investigating and punishing international cartels also under scrutiny by the European Commission, Japan, Brazil, Canada, Australia and others. These jurisdictions investigate with vigour and impose tough sanctions. As noted above, the proliferation of private damage actions around the world has also increased the risk of monetary exposure. All of this risk and exposure, which is far greater than that faced by leniency applicants even ten years ago, can be greatly reduced by being the first to self-report. Leniency applicants also avoid the potential court oversight that comes with a guilty plea. Additionally, with a growing number of jurisdictions imposing criminal liability on individuals, leniency applicants have the ability to give their officers, directors and employees the opportunity to earn protection from prosecution. All of these factors mitigate in favour of a decision to seek leniency once a corporation uncovers potentially illegal cartel conduct.

16. Cooperation by a leniency applicant entails costs, but once the conduct is uncovered, those costs – demands for documents and witnesses, exposure to substantial fines and individual prosecutions and claims for damages – will be unavoidable for any corporation that conspired to fix prices.

5. Ensuring the success of leniency programs

17. While the Antitrust Division believes that leniency is more valuable than ever, it would be a mistake for competition enforcers to turn a deaf ear to concerns that have been expressed. A lack of convergence in leniency policies around the world can create disincentives for leniency applications or difficulties in investigations. Competition enforcers also operate in an increasingly complicated and crowded investigative environment, and should do more to coordinate logistical aspects of investigations.

5.1. Lack of convergence

18. As discussed earlier, transparency is a key ingredient of a successful leniency program. If potential applicants cannot predict whether they will be accepted into a leniency program or what their treatment will be if accepted, they will be deterred from applying for leniency. Also, some jurisdictions may have disqualifiers that aren't present

in other jurisdictions that may disincentivize leniency applications. Examples of lack of transparency or disqualifiers that may disincentivize leniency applications include:

- Sliding scale fine reductions that don't provide upfront certainty about the treatment of an applicant;
- Disqualification for any "leader," rather than just the sole ringleader; and
- Disqualification for continuation of conduct following detection when another jurisdiction is seeking the covert cooperation of the applicant, including at times consensually recording cartel meetings or conversations. In the United States, under agency principles, when a co-operator is acting at the Antitrust Division's behest, the co-operator is no longer considered a co-conspirator. Prohibitions against continued participation in a cartel at the request of another competition enforcer can present hurdles to the Antitrust Division's investigative efforts.

5.2. Increased Coordination

19. Working to better coordinate among competition enforcers makes sense because it will benefit not only an enforcer's own investigation, but will help minimize the overlapping and even contradictory demands that are sometimes placed on leniency applicants. Such demands not only increase the cost to leniency applicants, but also slow down the pace of investigations. Competition enforcers still must do what is necessary to prove cartel violations to the standard of proof required in their respective jurisdictions, but there may be ways to streamline those efforts with respect to leniency applicants.

20. There are practical ways that competition enforcers can work together to minimize the burdens and expense of investigations on leniency applicants in ways that are meaningful to those applicants. Among the reasonable steps are:

- Coordinating, where requested by a leniency applicant, deadlines and timetables for key tasks and witness interviews, so that applicants are not forced to choose which deadlines to meet;
- Focusing investigations on the conduct and effect in our respective jurisdictions rather than exploring aspects of the cartel far removed from our borders that do not threaten our citizens;
- Being more strategic in the document demands placed on leniency applicants. Expansive document demands are enormously time-consuming and expensive for leniency applicants and can do more to impede than advance an investigation. Enforcers need to be more open to using new tools like predictive coding, which is being tried in the Antitrust Division's civil enforcement program, which will produce benefits to leniency applicants and competition enforcers alike;
- Perhaps the greatest disruption to a leniency applicant's legitimate business operations comes from interview demands placed on the applicant's executives and employees. Competition enforcers may be able to find ways of being more efficient. Joint interviews with other enforcers, for instance, may never be workable for the United States because of the possible implications for criminal discovery. But competition enforcers may be able to better coordinate on the time and location of interviews. Leniency applicants can also greatly aid their own cause by making thorough and reliable attorney proffers so prosecutors can trust what a particular witness can and cannot provide.

21. Competition enforcers should not take for granted that leniency applicants and co-operators will continue to come forward when faced with the prospect of investigations by enforcers around the world. Competition enforcers should work together to ensure that investigations are conducted more efficiently and cost-effectively and that the benefits of cooperation and compliance continue to provide the incentives that corporations need to come forward, self-report, cooperate, and change the culture that allowed a cartel to form.

6. Conclusion

22. Leniency policies have proliferated around the world and have succeeded in cracking cartels and ending harm to consumers. No other investigative tool has done more to revolutionize cartel enforcement. As leniency policies have proliferated, jurisdictions around the world have also strengthened sanctions and added investigative tools to support effective leniency policies. Today, the principles of an effective leniency policy are practiced around the world in many different legal contexts. Other jurisdictions face new challenges, and are adjusting in innovative ways to meet those challenges, while remaining grounded in core consensus leniency principles. As competition enforcers continue to share their learning in pursuit of the ultimate goal of more effective cartel enforcement, leniency programs will continue to play an integral role in the detection and dismantling of cartels.