



# DEPARTMENT OF JUSTICE

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## Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?

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Thank you to Northwestern Law School, Director Spitzer, and the Chicago Forum organizers for the invitation to be here today. It is a great privilege. Based on the panel topics and participants, I can see why the Chicago Forum on International Antitrust Issues has the outstanding reputation that it does.

I want to spend my time today talking about two issues of great importance to my work as Deputy Assistant Attorney General for Criminal Enforcement—leniency and cooperation in multi-jurisdictional investigations. As more jurisdictions begin or expand their efforts to go after cartels, more and more investigations involve enforcers from around the world. As a result, cartel participants that are considering whether to seek leniency or cooperate with investigations face a somewhat 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.

The Antitrust Division's Corporate Leniency Policy has been in place since 1993 and offered what were, at the time, unprecedented incentives for companies to self-report cartel violations. In return for admitting their wrongdoing and providing cooperation with the Division's cartel investigation, a company and its current officers, directors, and employees receive protection from criminal prosecution. Those incentives were later sweetened to include a reduction in civil damages liability in the United States.

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.

One of my predecessors—Gary Spratling—oversaw the adoption of the Corporate Leniency Program and has since been a proponent for the spread of leniency. So I sat up and paid attention when I saw comments from none other than Gary Spratling suggesting that the enormous cost and disruption to a company's business operations from seeking leniency in multiple jurisdictions may cause companies to think twice about the value of seeking leniency.

Has the cost of leniency become so great that it is no longer attractive? Is it possible that leniency has proliferated to its own detriment? Has leniency become too much of a good thing?

It will probably come as no surprise to you that I do not think it has. In fact, just the opposite.

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 before are effectively investigating and seriously punishing cartel offenses. The United States is now almost always joined in investigating and punishing international cartels by the European Commission, Japan, Brazil, Canada, Australia, and others. These jurisdictions investigate with vigor and impose tough sanctions. As a result, companies are now exposed to enormous monetary penalties around the world.

All of this risk and exposure, which is far greater than that faced by leniency applicants even ten years ago, can be entirely eliminated by being the first to self-report. Leniency

applicants also avoid the reputational harm and potential court oversight that come with a guilty plea.

And, 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. For these reasons, it should still not be a hard decision for a company to seek first-in leniency.

Cooperation by a leniency applicant entails costs, but those costs are unavoidable in any multi-jurisdictional investigation for any company that conspired to fix prices. Any company investigated for participating in a long-running global cartel faces the costs associated with that crime – demands for documents and witnesses, exposure to substantial fines and individual prosecutions, and the reputational hit of being found guilty of a serious felony.

The company that first self-reports earns the chance, through its cooperation, to limit some of those costs. It cannot eliminate them completely, but it can reduce them significantly. So it seems undeniable that the leniency applicant comes out far ahead and that it should still be an easy decision for companies caught up in cartel behavior.

Having said that, it would be a mistake for enforcement agencies to turn a deaf ear to concerns we have heard expressed. We operate in an increasingly complicated and crowded investigative environment. That being so, enforcement agencies can and should do more to coordinate not just our dawn raids and searches but other logistical aspects of our investigations.

Doing so makes good sense because it will benefit not only our own investigations, but will help minimize the overlapping and even contradictory demands we sometimes place on leniency applicants. Such demands not only increase the cost to leniency applicants but also slow down the pace of our own investigations.

This is not to say that enforcement agencies should not do what they must to prove cartel violations to the standard of proof required in their jurisdiction. As one who must prove a criminal cartel violation to the highest standard—proof beyond a reasonable doubt—I will not waver in requiring leniency applicants to cooperate in producing the evidence necessary to help us satisfy that burden of proof. Leniency applicants must earn their non-prosecution through full and complete cooperation.

But there are practical ways that enforcement agencies can work together to minimize the burdens and expense of our investigations on leniency applicants in ways that are meaningful to those applicants.

Among the reasonable steps we can take are:

- Coordinating, where requested by a leniency applicant, on deadlines and timetables for key tasks and witness interviews so that applicants are not forced to choose whose deadlines to meet and not meet;

- Focusing our respective 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 we place on leniency applicants. “Everything but the kitchen sink” document demands are enormously time-consuming and expensive for leniency applicants and, in my experience, can do more to impede than advance an investigation. We need to be more open to techniques like predictive coding being tried on the civil side of the Antitrust Division, which will produce benefits to leniency applicants and enforcement agencies 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. I know of witnesses whose sole job for years was to circle the globe to be interviewed in jurisdiction after jurisdiction, not to mention depositions in civil litigation. I have seen witnesses in their first interview and then years later. I have seen the toll that it takes on their effectiveness as witnesses. We can find ways of being more efficient. Our investigations will benefit from it.

Joint interviews with other enforcers, for instance, may never be workable for the United States because of the possible implications for criminal discovery. But we can try to better coordinate on the time and location of interviews. We can resist the temptation to interview, reinterview, and reinterview witnesses yet again.

But 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. This is not always the case.

- Finally, better coordination of witness interviews may also allow better coordination among those jurisdictions that proceed on written proof, thereby limiting the number of separate written statements witnesses are required to give.

While all of these things require more coordination by enforcement agencies throughout an investigation, that coordination has the potential to make our investigations more efficient and effective. This can be achieved not only by talking to our common leniency applicant but to each other.

Enforcement agencies also need to think about the burdens we place on other early cooperators—companies that don’t get leniency but cooperate with our investigations in return for reduced penalties. Obtaining the cooperation of these companies is also extremely important to our investigations, and the expense of that cooperation to those companies is far greater given the accompanying criminal penalties.

Almost all of the things that enforcers can consider doing to make our investigations more efficient and cost-effective for leniency applicants apply to our early cooperators as well.

More engagement and coordination among enforcers about our fine methodologies is another area of understandable interest for our cooperators. Each jurisdiction can and should impose penalties that reflect the harm to its consumers, and I have yet to see any credible proof that cartels are being over deterred. But, ultimately, the punishment should fit the crime and greater discussion among enforcers about our fine methodologies in specific investigations will help us minimize the risk of inconsistent approaches and overlapping fines.

Finally, as I first stated in a speech last fall, the Antitrust Division is willing to consider compliance efforts in reaching a fine recommendation in cases where a company makes extraordinary efforts not just to put a compliance program in place but to change the corporate culture that allowed a cartel offense occur.

It is important here to distinguish between “backward looking” and “forward looking” compliance efforts. I do not mean that we are now willing to credit “backward looking” compliance efforts—preexisting compliance programs that failed to deter or detect the illegal cartel conduct. The U.S. Sentencing Guidelines sets out how earlier compliance efforts should be credited. A compliance program that fails to deter or detect cartel behavior cannot qualify for that credit.

I also do not mean that we are going to credit companies that, after coming under investigation, put into place or nominally improve an antitrust compliance program. That is not extraordinary. That is mandatory under the Sentencing Guidelines. The credit for doing so is to avoid probation – which is not an insignificant benefit in itself.

Only compliance efforts that go further, that reflect in some way genuine efforts to change a company’s culture, will receive consideration in calculating a company’s fine.

Paper compliance programs do not bring about culture change. Senior executives who lead by example and hold themselves and others accountable bring about culture change. Senior executives who create a zero tolerance compliance environment bring about culture change. And companies that make responsible personnel decisions about culpable employees—those who will be carved out of the company’s plea agreement and do not accept responsibility—bring about culture change. That is what we will be looking for.

Two weeks ago, the Department prosecuted four financial institutions for their roles in a collusive conspiracy to manipulate foreign exchange rates in violation of the Sherman Act. A fifth financial institution had a non-prosecution agreement voided and a wire fraud charge instated related to the LIBOR investigation.

The Department recommended that one of the financial institutions—Barclays—receive a modest reduction in its fine because of its compliance efforts. As you might expect in a matter like this, corporate defendants and their counsel often seek to show the steps taken to assure us that there will be no recurrence. It can be challenging to separate rhetoric from real commitment.

But here we are persuaded that there were demonstrable differences in the way that Barclays substantiated what it did to improve its compliance and corporate culture as compared to the other banks that were charged with violating the Sherman Act.

The efforts were not merely prospective—they had already been made in the aftermath of the LIBOR investigation, and we saw results from those efforts during the course of the foreign exchange investigation. Under those circumstances, we decided, in consultation with our colleagues in the Criminal Division, that it was a factor that should be considered in sentencing.

Where we see similar efforts that result in real remediation and changes in a company's compliance culture, we will consider them in making our sentencing recommendations. But credit will require action and results, not mere promises of future action.

In closing, the benefits of leniency and cooperation remain great even in a multi-jurisdiction investigation. Those benefits may be greater than they have ever been because of the real risk of global exposure. This is the case even for companies that do not receive leniency and must accept responsibility for their criminal conduct.

But that does not mean that enforcement agencies should take for granted that leniency applicants and cooperators will continue to come forward when faced with the prospect of investigations by enforcers around the world. Enforcers can 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 companies need to come forward, self-report, cooperate, and change the culture that allowed a cartel to occur.

Thank you.