

Achieving an Efficient and Effective Leniency Program

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Subrata Bhattacharjee

Partner

Borden Ladner Gervais LLP – Toronto, Canada

sbhattacharjee@blg.com

T: +416 367 6371



Overview

- **Requirements of successful programs:**
 - Transparency
 - Predictability
 - Investigative commitment
- **Emerging challenges**
 - Marginal/“Protective” applications
 - Proliferation of programs – comity considerations ?
 - Costs/duplication

Requirements

- **Transparency**
 - Most jurisdictions have taken good steps in explaining key features of programs in easily accessible documents
 - *Lingua franca* versions of guidance particularly appreciated by foreign applicants and advisors
 - Explanation of key features clearly and in up to date media very useful

Requirements

- **Predictability**
 - Easy to say, hard to execute
 - Jurisdictions with bifurcated systems have to work extra hard at this
 - Canada as example
 - Working relationship between Competition Bureau and PPSC (independent prosecutor) critical
 - But tensions can lead to uncertainty for applicants
 - Sometimes unavoidable due to different mandates, but can be managed through cooperation

Requirements

- **Investigative Commitment**
 - Cooperants have to have reasonable expectation that agencies will follow through with investigation
 - In current environment, costs of leniency to applicants are high
 - Leniency becomes unattractive if agencies fail to pursue other cartel participants vigorously and in a timely fashion

Emerging Challenges

- **“Protective” Markers**
 - Applicants have to be disciplined in consideration of when and where to place markers
 - Reflexive markers followed by withdrawal not always ideal situation for applicants and agencies
 - Markers in marginal cases should be viewed with caution given potential consequences for agencies and private parties

Emerging Challenges

- **Cost**

- More leniency programs means more jurisdictions in play
- But consider whether makes sense for everyone to be in the same kitchen – double counting ? Resource allocation ?
- Canada – good effort to reach practical solution in recent auto parts case by accepting sufficiency of US DoJ plea (Nishikawa – body sealing)

Emerging Challenges

- **Proliferation**

- Exposure landscape (civil and agency) continues to evolve for applicants
- As more jurisdictions permit damage claims for cartel conduct, this complicates traditional leniency calculus
 - Consequences of leniency applications for civil exposure in multiple jurisdictions increasingly severe
 - Local preferences re paperless process, confidentiality, etc. often critical factors

Conclusion

- **Landscape post auto parts and financial services is now different for applicants**
 - Old defence paradigm of reflexively seeking markers everywhere at the same time is effectively dead
 - Combination of proliferation of regimes, increasing civil exposure and other factors makes the decision harder for applicants
 - Agencies cannot ignore these realities when administering their leniency programs

Questions ?

Subrata Bhattacharjee

Email: sbhattacharjee@blg.com

Phone: + 416 367 6371

www.blg.com