

Breakout Session 5 – Making a leniency application: triggering factors and strategy

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What factors impact on the decision to seek leniency and the strategic management of applications, particularly in the multi-jurisdictional context

- Breakout session panellists and format
- The concept, scope and role of leniency mechanisms
- Benefits to enforcement agencies and applicants
- Impediments and risks
- Strategic and practical considerations regarding application for leniency
- Specific complexities for multi-jurisdictional applications

Practical considerations: how to manage multiple jurisdictions?

- Different timing from authorities and different levels of cooperation required.
- Lack of coordinated processes among jurisdictions.
- Confidentiality issues: reactions needed.
- High level of coordination required: impact on costs.
- Lack of predictability.

Jurisdictional differences in leniency qualifications

- Predictability also involves the types of requirements applicable in each jurisdiction.
- Types of violations: only hardcore cartels or other violations?
- Time-barred violations in some jurisdictions and not in others.
- Benefits to ringleaders: full immunity or limited?
- What is the level and quality of evidence required?
- Different cooperation levels required.

Is multiplication of parallel proceedings at global level a negative leniency incentive?

- Increased multi-jurisdictional risks; More enforcers want part of the action
 - Cases are opened by marginally or indirectly affected jurisdictions years after the main markets affected
 - Many of the “late openers” are jurisdictions with limited enforcement practice, and therefore higher likelihood of case going to courts for procedural clarifications
 - Some new enforcement jurisdictions lack predictability
- Infinite jeopardy and the problem of indirect effects
 - Indirect effects where downstream products are traded
 - Not just a double counting issue, but an applicant cannot judge ultimate consequences and exposure from making an immunity application *anywhere in the world*
- What is a cartel – mission creep for agencies increasingly pursuing “atypical cartels” with tools that were designed for hard-core price fixing of the type we all recall from the movie *The Informant*
 - Is this really appropriate for information exchange cases? Leniency a tool where risk of an “effects case”?
 - Hub and spoke cartels – visibility of each is limited and leniency reporting is by definition very imperfect
- Follow-on damages in increasingly remote jurisdictions
- Increased criminal and/or individual prosecution or exposure across the globe
 - From the US to the UK is one thing, Australia, NL and Germany another, Brazil a third...

Predictability of Penalties – remedy considerations

- Companies place considerable weight to the “penalty predictability” when deciding whether to apply or not / Lack of predictability usually means default: not to cooperate
- Unpredictability usually comes from:
 - Not knowing exactly how administrative penalties will be calculated (most countries in LA lack sentencing guidelines or doctrine; few past cases to rely on, or too much discretion for sentencing)
 - If jurisdiction prosecutes cartels criminally, how will leniency play into the equation - Automatic immunity? May individuals be prosecuted for other criminal infringements? Most countries in LA now grant automatic immunity.
 - What is the effect of a leniency application in connection with exposure to civil damages claims – class actions. Several countries in LA have class actions in the law, but few cases are brought; in LA Courts seem to have wide power to order disclosure of evidence, which exposes leniency applicants to actions

Jurisdictional differences in exposure of executives and individuals

➤ Considerations

- 1) In case of amnesty position:
- 2) In case of non-amnesty position:
 - Possibility of amnesty-plus application
 - Internal investigation
 - Diary business operations
 - Cost
- 3) Other points
 - ✓ Cooperation with the DOJ etc. as well as the JFTC
 - Business Area
 - Sanctions
 - Information exchange by authorities
 - ✓ Handling of the individuals
 - ✓ Local legal issues (e.g., Shareholder derivative actions (Japanese companies))

➤ Examples: Japan and US

Use of information and control of confidentiality in leniency process

- Types of information required to be produced
- Variable disclosure obligations
- Uses of information provided
- Waivers and dissemination of information between agencies
- Agency control of information and third party access to leniency information
- Implications and strategic considerations for multi-jurisdictional leniency applications

Leniency risks for third party claims

- How does the risk of third party compensation claims affect strategies around leniency applications?
- Risk of third party claims – increasing?
- Risk that leniency applications lead to/trigger third party claims
- Risk that leniency material becomes available to third party claimants
 - Attitude of the enforcement agency to protect leniency information
 - Capacity of the enforcement agency to restrict third party access
- Cross-jurisdictional spill-over effects, access to information disclosed in another jurisdiction
- Can concerns around third party litigation be addressed?
- Do these risks shift the balance in seeking leniency or are they just a cost/risk of the process?

Conclusion and Wrap Up

- What is working well
- What could work better
- Ideas for improvement