

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON LENIENCY FOR SUBSEQUENT APPLICANTS

-- United States --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 23 October 2012.

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1. Under the Corporate Leniency Program of the Antitrust Division of the U.S. Department of Justice (“Division”), full immunity from prosecution for hard-core cartel violations is available only to the first qualified applicant. Subsequent applicants cannot qualify for immunity under the leniency program, but can enter into plea agreements with the Division that reward them for their cooperation. In contrast to the Division’s program, many other jurisdictions include favorable treatment for subsequent applicants within the rubric of their leniency programs. In any case, we are not aware of any jurisdictions that do not reserve full immunity to the first applicant, as in the U.S.

2. Consistent with the list of issues raised in the Chairman’s letter of July 24, this submission describes the Division’s leniency policy, the purposes of the policy and the rationale for rewarding only the first qualified leniency applicant, the benefits available to companies that are not the first-in through negotiated plea agreements, and the cooperation and timing conditions for companies that qualify for leniency or agree to plead guilty.

1. The Corporate Leniency Policy

3. Pursuant to the Division’s Corporate Leniency Policy, corporations that are the first to report their illegal antitrust activity and meet the other conditions of the program will not be charged criminally for the activity being reported. The policy is also known as the corporate “amnesty” or corporate “immunity” policy.

4. The Division adopted its first Corporate Leniency Policy for hard-core cartel cases in 1978. Under the 1978 policy, leniency was available only to companies that came forward before the Division had opened an investigation, and the Division retained broad discretion in deciding whether to allow an applicant the benefits of the program. In the first ten years of this policy, only four companies qualified for leniency.

5. In order to make our policy more effective, the Division introduced three major revisions in 1993 to its corporate leniency policy in order to enhance transparency and certainty from the perspective of a possible applicant: (1) leniency was automatic if the Division had no previous knowledge of the cartel and certain objective conditions were met (“Type A leniency”); (2) leniency was available even if the Division had knowledge of the cartel (“Type B leniency”); and (3) corporate executives were covered as well as corporations by a grant of corporate leniency.

6. The leniency policy in effect today¹ still applies only when applicants report criminal antitrust violations (conduct that is prosecuted as a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1: price fixing; bid rigging; capacity restriction; or allocations of customers, products, market shares, territories, or production or sales volumes). There are 6 conditions for Type A leniency (which applies when the Division has no previous knowledge of the reported cartel):

1. At the time the company reports the cartel, the Division has no information about the activity;
2. Upon discovery of the cartel, the company took “prompt and effective” action to terminate its participation in the cartel;
3. The company reports the conduct with candor and completeness, and provides full, continuing, and complete cooperation;

¹ <http://www.justice.gov/atr/public/guidelines/0091.htm>.

4. The company's confession is a truly corporate act, and not isolated confessions of individuals;
5. Where possible, the company pays restitution to injured parties; and
6. The company did not coerce its co-conspirators, and was not the leader or originator of the cartel.

7. For Type B leniency, which applies when the Division has prior knowledge of the cartel being reported, the company must have approached the Division before the Division had evidence likely to result in a sustainable conviction. Conditions 2-5 above for Type A leniency also apply, and the Division must determine that a grant of leniency would not be unfair considering the nature of the activity, the applicant's role, and the timing of the application for leniency (the burden on the applicant increases with time and the closer the Division is to possessing evidence likely to result in a sustainable conviction).

8. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), 15 U.S.C. § 1 note, de-trebled private damage liability for a corporate leniency applicant and its employees if they cooperate with civil plaintiffs in their lawsuits; liability extends only to actual damages attributable to the applicant's commerce in the affected market. Co-conspirators remain liable for treble damages on a joint and several basis for all damages caused by the cartel.

9. In 1994 the Division introduced an individual leniency policy,² which applies only in Type A situations when the Division has no previous information about the cartel. Type B corporate leniency can be granted for a particular cartel after individual leniency in the same matter, but the reverse is not possible. Individual leniency acts to further destabilize cartels, as companies are aware that their employees could act on their own to seek a leniency application.

2. Purpose of the Leniency Program

10. As stated on the Division's *Leniency Program* webpage,³ the "Division's leniency program is its most important investigative tool for detecting cartel activity." Cartels by their nature are secretive and, therefore, hard to detect. Leniency programs provide enforcers with an investigative tool to uncover cartels that may otherwise go undetected. While the notion of letting hard-core cartel participants escape punishment was initially unsettling to many Division prosecutors, the Division recognized in 1993 that the grant of full immunity was necessary to induce cartel participants to turn on each other and self-report, resulting in the discovery and termination of the conduct, the successful prosecution of the remaining cartel participants, and damage recovery for victims. Moreover, the expectation was that the benefits of leniency would extend beyond the cartels it directly uncovered and that the very existence of the leniency policy would be viewed by executives as raising the risk of detection and punishment, leading to greater deterrence of cartel activity. This expectation has been shown to be justified.

11. Effective leniency programs create a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun, and quickly crack cartels that may have otherwise gone undetected. Effective leniency programs destabilize cartels. 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 to risk losing the race for leniency to another cartel member, or perhaps to a firm's own employees if individual leniency is available. This dynamic literally creates a race to be the first to the competition agency's offices.

² <http://www.justice.gov/atr/public/guidelines/0092.htm>.

³ <http://www.justice.gov/atr/public/criminal/leniency.html>.

12. The leniency program provides enormous benefits to cartel enforcement. The leniency applicant will admit its conduct in some cases before an investigation is even opened, and then turn on its co-conspirators once the investigation is underway. The program provides critical cooperation of inside participants and access to documents, even when located outside the agency's jurisdiction, and access to witnesses regardless of their location or nationality. Finally, it may open up opportunities for covert investigative operations.

13. Leniency works by providing great incentives to be the first to self-report and implicate one's co-conspirators. No charges will be filed against the successful leniency applicant or its cooperating employees; there will be no criminal or administrative fines; and the Division promises confidentiality to the applicant. Importantly, *immunity is available only to the first company to self-report and meet the conditions of the program*. Subsequent applicants, even if, as has been the case, they arrive only minutes or hours after the first company, and their executives, face severe sanctions.

14. The winner-take-all approach creates distrust within the cartel and destabilizes it. In our experience, there is no "honor among thieves," and with the stakes so high, cartel members can no longer afford to trust one another, and so revert to competition. Thus the Division's leniency policy depends for its success on restricting its benefits to the first successful applicant, the only one to benefit from full and complete immunity. As discussed below, however, subsequent applicants that fail to qualify for the leniency program, but that do agree to plead guilty and cooperate with the Division, can expect significant benefits, even if they do not qualify for the leniency program.

3. Policy advantages and disadvantages of rewarding subsequent applicants

15. As noted, the winner-take-all approach, which limits the benefits of the immunity program to the first qualified applicant, provides strong incentives to upset the agreement among cartel participants. In order to attract leniency applicants and uncover otherwise secret cartels, there should be a clear contrast between the benefits of leniency – no criminal charges against the applicant or its employees, reduced civil damages, confidentiality of the application – and the consequences of failing to be a successful leniency applicant – severe penalties, including criminal sanctions in the U.S., for the firm and its employees, with full exposure to civil damages, trebled in the U.S.

16. Granting full immunity to a subsequent applicant would negate this incentive – why rush to be the first when you can achieve the same benefit by applying after the first applicant? Distinguishing the leniency program from the benefits available to companies and individuals that enter into negotiated plea settlements helps to emphasize the unique attraction of the leniency program to cartel participants, thereby reinforcing the program's utility as a tool to destabilize and uncover cartels. At the same time, however, competition agencies may wish to provide incentives for companies that fail to qualify for leniency to plead guilty and cooperate with the agency as part of a settlement, as discussed below.

4. Treatment of subsequent applicants in the U.S.

17. Subsequent applicants – those that arrive after the first qualified leniency applicant – receive no benefits under the Division's leniency program. Because of the extraordinary value of obtaining full immunity, and the possibility that cartel members might decide to seek leniency at roughly the same time, the Division created a marker system, to allow a company to secure a place at the front of the line and ensure its status as the first-in, giving it a finite period of time to complete its internal investigation and prepare its leniency application. Companies realize they must rush to secure the marker even before they complete their internal investigation; a second-in company will not be permitted to jump ahead while the first-in company is completing its application.

18. Companies and individuals that do not qualify for full immunity, but do offer timely and valuable cooperation, can still obtain significant benefits, including a substantial reduction in fines and more favorable treatment for culpable executives. Sentencing discounts for these cooperators are handled outside of the Division's leniency program. These benefits are conferred through the negotiation of plea agreements whereby the defendant is obligated to plead guilty and provide full and continuing cooperation to the Division. In exchange, the Division commits to making a specific sentencing recommendation to the court, which, experience shows, the courts are very likely to follow. Therefore, in most cases, the defendant knows what the Division's sentencing recommendation will be and what sentence the court is likely to impose at the time the defendant enters into a plea agreement with the Division. Since the Division negotiates, signs, and publicly files plea agreements throughout the course of its investigations, most corporate defendants do not have to wait until their cooperation is complete, or until the investigation is over, before they learn the value that the Division places on their cooperation.

19. The vast majority of the Division's major international cartel investigations involve the cooperation of a corporate leniency applicant. Moreover, over the last 25 years, well over 90 percent of the corporate defendants charged with an antitrust offense have entered into plea agreements with the Division where they admitted guilt and cooperated with the Division's criminal investigations. This system of negotiated plea agreements benefits the Division, cooperating defendants, the judicial system, the victims, and the public at large by encouraging early cooperation and acceptance of responsibility by cartel members through the promise of a transparent, proportional, expedited, certain and final plea disposition.

5. The purpose of negotiated plea agreements

20. From the Division's perspective, the goals of cartel settlements are to: 1) obtain timely and valuable cooperation from cartel participants; 2) create and sustain momentum in its investigations; and 3) resolve cartel cases relatively quickly without the need for litigation. For the Division, the early cooperation of a defendant, pursuant to a public plea agreement, often leads to the swift prosecution of other cartel members. After the first company or individual pleads guilty in open court, there is tremendous momentum gained in an investigation. Other cartel members, knowing that one of their own has pled guilty and can provide information inculcating them, frequently race to the Division's door to begin plea negotiations with Division staff. If the Division is required to pursue litigation against any holdout firms, then the cooperating defendant and its employees, along with any leniency applicant, become key witnesses in providing the insider evidence that is critical to securing a conviction.

21. Cooperation provided pursuant to a plea agreement often leads to the detection of other previously unidentified cartels relating to different products or in different geographic markets. Through the Division's Amnesty Plus Policy, the pleading company's decision to tell the Division about an additional previously undisclosed cartel can lead to a substantial sentencing benefit as to the first offense and complete immunity for the newly reported conduct. Amnesty Plus is a win-win situation for the defendant and the Division, and has itself become an increasingly important cartel-detection and case-generation tool.

6. Incentives for subsequent applicants

22. There are many incentives for a company to cooperate with the Division at an early stage, even if the company cannot benefit from being the first-in to qualify for leniency and full immunity. The potential rewards and incentives available for second-in companies are described in detail in the Division's paper, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*.⁴ Many of them relate to

⁴ Scott D. Hammond, *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), available at <http://www.usdoj.gov/atr/public/speeches/215514.htm>.

the calculation of the fine under the U.S. Sentencing Guidelines (“Guidelines”),⁵ but they also include the possibility of securing more favorable treatment for culpable executives, a greater likelihood that the company will be in a position to qualify for Amnesty Plus credit or the benefits of “affirmative” amnesty.⁶

23. The rewards for second-in companies are not uniform, because the value of a second-in corporation’s cooperation can vary dramatically from case to case. The value to the Division of a company’s cooperation varies because what the particular defendant brings to the table (e.g., credible witnesses, compelling documents, previously undisclosed information), and what the Division can already prove, is not a constant and varies from case to case. While a second-in company’s cooperation typically will significantly advance an investigation, there are times when the cooperation is either cumulative or no longer needed.

24. As noted, in a negotiated plea agreement, the Division typically agrees to recommend to the federal district court a sentence more favorable to the defendant than what the Guidelines recommend, based on the cooperation offered by the defendant. Where full immunity is no longer available, second-in or early cooperators can still obtain substantial discounts below their Guidelines fine and incarceration ranges. The amount of the substantial assistance reward, commonly referred to as the “cooperation discount,” that the Division will recommend to the sentencing court is within the discretion of the Division.

7. Cooperation obligations for leniency applicants and under negotiated plea agreements

7.1. Leniency

25. As described above, leniency applicants must provide “full, continuing and complete cooperation to the Division throughout the investigation.” The model corporate conditional leniency letter describes specific cooperation obligations of the applicant, such as provision of documents, information, and materials wherever located, and using its best efforts to secure the cooperation of its current directors, officers, and employees.

26. In the Division’s leniency program, there is no particular standard for the quantum or quality of evidence provided by the applicant. In some cases, a leniency applicant’s cooperation will provide sufficient evidence to convict all of the remaining cartel members. In other cases, however, the applicant’s full cooperation will not, in and of itself, amount to decisive evidence of the existence of the cartel, but it may nonetheless *lead to* such evidence. For example, in one case an amnesty applicant was a peripheral player that did not attend the key cartel meetings, but it provided the Division with information that allowed us to obtain warrants to search the offices of several of the cartel members. The execution of the warrants, demonstrating the existence of an insider’s cooperation, quickly led to the cooperation and guilty pleas of the remaining six conspirators and nearly \$300 million in fines. So, while an amnesty applicant’s cooperation alone may not always add up to decisive evidence, it can provide us with leads and opportunities that will take us to additional evidence and, ultimately, result in successful prosecutions. For this reason, and to avoid what might be perceived as a subjective standard of sufficiency that might deter potential leniency applicants, the Division has not required a particular level or quality of evidence as a condition of granting leniency.

⁵ United States Sentencing Commission, Sentencing Guidelines, *available at* <http://www.ussc.gov/guidelin.htm>.

⁶ Under affirmative amnesty, when the Division on its own uncovers cartel conduct in an unrelated market, staff may elect to approach one of the subject companies with information about the suspected cartel and provide it with an opportunity to cooperate in a covert investigation in return for amnesty.

7.2. *Plea agreements*

27. For negotiated plea agreements, the defendant's cooperation is the primary benefit that the Division receives from entering into a plea agreement. Therefore, a commitment by the defendant to provide full, continuing, and complete cooperation is virtually always required in Division plea agreements. <http://www.justice.gov/atr/public/speeches/219332.htm> - N 78. As discussed above, the amount of the substantial assistance reduction in the fine or period of incarceration below the Guidelines range that the Division will recommend is directly tied to the timeliness and quality of the cooperation that the defendant is able and willing to provide.

28. The specific types of cooperation that a defendant is required to provide to the Division are specified in the plea agreement,⁷ including providing the Division with all non-privileged documents and information, wherever located, in the possession, custody, or control of the defendant, and appearing for interviews, grand jury appearances and trials. For corporate defendants, the defendant and any related entities covered under the plea agreement must also use their best efforts to secure the cooperation of current, and sometimes also former, corporate employees covered under the plea agreement, including making employees (even when located outside the U.S.), available at the defendant's expense for interviews and testimony.

29. Corporate employees covered by the plea agreement are also bound to cooperate with the Division. If a covered employee fails to comply with his/her cooperation obligations, the Division's agreement not to prosecute that person will be rendered void. The Division is then free to prosecute the non-cooperating employee and use information provided by that individual against him/her in a criminal trial. <http://www.justice.gov/atr/public/speeches/219332.htm> - N 81. In rare situations, the Division's non-prosecution promise with the company may be specifically tied to the full cooperation of certain executives, where the company's cooperation is essentially meaningless without the full cooperation of those executives.

30. It is important to note that the cooperation requirements contained in a plea agreement are ongoing obligations and the plea agreement may be voided by the Division for failure to comply with the cooperation obligations contained in the plea agreement even after acceptance of the plea and imposition of sentencing.

8. **Timing issues for leniency applications and negotiated plea agreements**

31. A company cannot qualify for leniency after the Division has obtained evidence elsewhere that is likely to result in a sustainable conviction. In addition, to qualify for leniency, the company must demonstrate that "upon its discovery of the illegal activity being reported, [it] took prompt and effective action to terminate its part in the activity." The Division generally considers the corporation to have "discovered" the illegal activity at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) were first informed of the conduct at issue. Thus, the fact that top executives, individual board members, or owners participated in the conspiracy does not necessarily bar a corporation from eligibility for leniency. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters -- the board or counsel representing the corporation -- are advised of the illegal activity, they take action to cease that activity.

32. Timing issues for "subsequent applicants" are different. They will never qualify for leniency. However, the same cartel participant that has lost the race for full immunity may immediately initiate plea

⁷ The Division's Model Corporate Plea Agreement is available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.pdf.

negotiations with the Division to resolve its culpability and be rewarded for the cooperation it can provide. A cooperating cartel participant can reach a settlement with the Division at any time, from very early in the Division's investigation until after formal charges are brought. A series of plea agreements individually entered over time are the norm in Division cartel investigations, and the Division regularly negotiates, signs, and publicly files plea agreements throughout the course of its investigations. In addition, a plea agreement can be entered as soon as an agreement is reached and sentencing can take place immediately. As noted above, the timeliness of a company's plea agreement is one of the primary factors determining the size of the settlement discount it can expect.

9. Conclusion

33. The Division's corporate leniency policy, along with the system of negotiated plea agreements in criminal cases, continues to play a vital role in cracking cartels and swiftly advancing the Division's investigation and prosecution of cartel members. The leniency program, with its prize of full immunity only to the first qualified applicant, remains by far the most effective tool for detecting cartel activity. Plea agreements provide enormous benefits to the Division, cooperating defendants, the courts, victims, and the public at large by persuading cartel members to cooperate early and accept responsibility for their criminal conduct. The policies are balanced and work together to provide an efficient system for detecting, punishing, and deterring harmful cartel conduct.