Leniency: Assessing Cooperation in Leniency Applications

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Uncovering Cartel Activity

Disclosures from:

- Complaints and consumers
- Competitors
- Whistleblowers inside companies
- Government agencies
- Agency self-initiated investigations
- Leniency applications

*Leniency works because the best evidence comes from insiders.*

*Challenge: How to make leniency programs work.*
Outline of Presentation

• Predicates for Success:
  • Structure of the Leniency Program;
  • Knowledge about the value of the Leniency Program;
  • Clarity and trust building designed to encourage Leniency applications.

• Cooperation and how it applies to each step in the process: Formula for success or design for failure?

• Value of Cooperation and Reduction in Fines
  • How is cooperation valued?
  • How are reduction in fines determined?

• Case Studies and Examples
Structure of the Leniency Program

ICN Checklist for Efficient and Effective Leniency Programs

Core Principles

• Incentives and rewards clearly spelled out.
• No less advantageous position for being a leniency applicant.
• Clarity about the full scope of requirements for leniency.
• Clear definition of decision points by the agency and how cooperation will be assessed.
• Confidentiality.
• Clarity about the criteria the agency will use when exercising discretion under the program.
Awareness of the Leniency Program

• Key stakeholders who should be aware of Leniency
  • Public procurement officials and contracting officers
  • Government Officials and Ministers
  • Law enforcement officials
  • Trade associations
  • Individual businesses

• Presenting the Value Case for Leniency

• Compliance Programs - Talking about compliance programs, their value and benefits.

• Raising awareness about Competition laws, illegal agreements and collusive activities.
Encouraging Leniency Applicants

• Clarity about who can qualify for Leniency.
• Promoting the Prisoner’s Dilemma and race to be the first to apply for immunity;
• Agency designated Leniency Officer;
• Clear procedures for obtaining a marker;
• Clear procedures for perfecting the marker;
• Clear procedures for witness interviews;
• Document production requirements that are clear and encourage cooperation;
• Confidentiality protections.
Cooperation by Leniency Applicants

Four critical stages of cooperation by Leniency Applicants:

1. The Marker Stage;
2. The Evidence Producing Stage;
3. Investigation Stage;
4. Follow-on Stage.

Are the requirements for cooperation clear? Are they structured for success not failure?
Requirements to Obtain A Marker

• Anonymous inquiries and identification of the industry as a basis for obtaining a provisional marker;

• Attorney proffers as the basis for obtaining provisional marker;

• Removal of Anonymity to Identify Company, Cartel Members, Cartel Activities, Duration, and Key Company Participants.

• Time-frame for decision about the marker.
Admission Into the Leniency Program

• Steps required to be admitted into Leniency Program:
  • Interviews of key personnel
  • Production of key documents
• Negotiation of production of documents: Structuring production for efficient evaluation;
• Negotiation of additional witnesses for interviews;
• Outline of other cooperation that may be required.

*Timing and decision to grant admission to the program.*
Cooperation by Leniency Applicant

- Requirements for specific cooperation are stated and agreed in advance, with a timeline for cooperation;
- There is a system to give feed-back to the applicant about the value of their cooperation;
- On-going cooperation is spelled out in advance;
- The Agency has a process to effectively deal with less-than-full cooperation.
Investigative Stage

• Using evidence produced by the Leniency applicant to uncover other evidence and assist the investigation;

• Evaluating the Leniency evidence in relation to other evidence produced during the investigation;

• Clarifying the Leniency evidence where required.
Granting Leniency

• Certifying full compliance with the Leniency Program.
  • Timing and effect of certification.

• Determining the Degree of Leniency to be granted:
  • Definitional Terms: “Vital disclosure”

• Exercise of Discretion in the Reduction of Fines.
  • Guidelines for Agency Application of Discretion.
Tools that Complement Leniency

• Advocacy and Outreach;

• Whistleblower Protection Programs
  • *E.g.* Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (April 2018.);

• Strategies to encourage reporting of suspected cartel and bid rigging activity:
  • *E.g.* In Ireland there is an affirmative duty for procurement officers to report suspected bid rigging to the CCPC.