



## Using Leniency to Fight Hard Core Cartels

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### Introduction

It may seem odd but leniency by competition law enforcers can help fight the most egregious competition law violations. Hard core cartels – agreements among competitors to fix prices, restrict output, divide (or share) markets, and rig bids (submit collusive tenders) – waste society’s resources, create inefficiency, and cause billions of dollars of overcharges to consumers around the world.

The difficulty in stopping cartels is secrecy. Cartel activity, because it is clearly illegal (and, increasingly, a criminal act), is conducted in great secrecy. Conspiracy meetings might occur in a hotel room during a trade show, for example, or simply over the phone. Evidence is hidden away.

Leniency programmes can break the code of silence among cartel conspirators. The programmes that have been the most successful give complete amnesty to the first conspirator to come forward and reveal the inner workings of the cartel to competition law enforcers. That information and the conspirator’s continued co-operation in the subsequent prosecution are highly effective in convicting the other participants in the cartel.

One reason leniency programmes have become more successful recently is that the penalties for cartel agreements have increased in some OECD countries. When individuals or firms see that being caught has led to jail sentences for executives and a USD 500 million fine to a single firm, the incentives to come forward become substantial. In this way, an effective leniency programme and strong potential penalties provide powerful “carrot and stick” inducements to be the first to reveal a cartel. ■

## What are the reasons for leniency programmes?

The challenge in attacking hard-core cartels is to penetrate their cloak of secrecy. To encourage a member of a cartel to confess and implicate its co-conspirators with first-hand, direct “insider” evidence about their clandestine meetings and communications, an enforcement agency may promise a smaller fine, shorter sentence, less restrictive order, or complete amnesty.

Leniency programs uncover conspiracies that might otherwise go undetected and also make the ensuing investigations more efficient and effective.

Experience shows that these programs work. Since the US program was revised in 1993 to make the scope of amnesty clearer and somewhat broader, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and to fines totalling well over \$1 billion. In the US investigation of the vitamins cartel, the amnesty applicant's co-operation led directly to guilty pleas and fines of \$500 million and \$225 million against two other firms.

Several other jurisdictions also have leniency programs. The European Commission in 1996 announced conditions under which co-operation may lead to significant reductions or exemptions from fines, and leniency has been invoked in more than 20 cases so far. This year, the European Commission adopted new draft rules (a public consultation is underway as this brief goes to press) to maximise the Commission's ability to detect and prosecute cartels.

Canada and the UK have recently announced leniency programs, which are based in many respects on the US experience. Germany announced a program in May 2000,

while Sweden is considering legislation that would authorise programs. Korea, which has had a leniency program since 1997, is considering legislation to improve it further. France has recently revised its competition legislation to permit the Competition Council to grant leniency to firms which come forward with evidence of cartel conduct.

Leniency could mean any reduction in the penalty compared to what would be sought in the absence of full, voluntary co-operation. The clearest, most complete form of leniency is amnesty. In the US program, where cartels are subject to criminal sanctions, “leniency” means immunity from prosecution. In the EU program, leniency is described in terms of reductions in fines. Other enforcement agency decisions that could be considered lenient treatment include agreeing not to refer a matter for criminal prosecution, or not to pursue penalties against individuals. ■

## What are the characteristics of an effective leniency programme?

Clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the “best deal”, but also that the terms of the deal be as clear as possible at the outset.

A general offer to reduce penalties in exchange for information may not be enough to encourage firms to come forward. The benefits of remaining with the cartel may appear larger and more certain than

the unknown reward that would result from confessing. The original US leniency program, which made only a relatively general offer, produced only about one case per year. One of the critical 1993 changes that made the US program more effective was to make complete amnesty automatic to the first applicant if certain clearly specified conditions are met.

The EU leniency program sets out a schedule for potential reductions in fines, depending upon the stage of the proceedings and other factors. Experience gathered by the Commission to date shows that the effectiveness of the program would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines is to be granted. It would also benefit from a closer alignment between the level of reduction of fines and the value of a company's contribution to proving the case. The new draft rules address these issues. They provide for instance for complete immunity from fines for the first company that comes forward with information on undetected cartels that is sufficient to launch a spot inspection. They also increase the legal certainty provided to companies and enhance the overall transparency of the system.

The benefit of making the payoff for priority clear and substantial is already appearing. Firms have come in to apply for amnesty too late, less than a day after their co-conspirator secured its position as first in line. The size of the incentive to be first is illustrated by the US investigation of the graphite electrodes cartel, where the amnesty applicant received no penalty, the next firm to come in was fined \$32.5 million, the third company, \$110 million, and the last one, \$135 million. ■

## What does law enforcement gain from a leniency programme?

An applicant for leniency may provide information that the agency does not already have, or disclose a cartel that the agency might not otherwise learn of at all. In addition, leniency might also be granted to a firm whose confession makes the agency's proof easier. Thus, leniency or even amnesty might still be granted to a firm that comes in after an investigation is underway.

Another critical change in the US program in 1993, and a feature of the EU and other programs, is to make amnesty or leniency possible even after an investigation has begun. Even after there is a suspicion of a violation, the investigation can be aided greatly by a confession accompanied by detailed, first-person evidence. But conditions may be more stringent for granting leniency after the agency already has gotten wind of the violation. In addition, some degree of leniency might be given to firms that co-operate with the investigation, even though they are not the first to come in. To maintain the strong incentive to be first, leniency to those who come in later should be clearly less generous.

## How do tough penalties make a leniency programme work?

The seriousness of the possible penalties, and thus the significance of the relief that leniency can promise, is an important factor. In addition, the risk of personal liability could be a powerful motivator.

If penalties are too weak or are applied too infrequently, then firms may disregard an offer to relax them. An enforcement agency may see few results from a leniency pro-

gram before it has succeeded in imposing a significant penalty on a cartel; however, the example of penalties imposed in similar or neighbouring jurisdictions may give firms some incentive to come forward.

The opportunity to avoid individual liability or criminal penalty may be a significant factor in encouraging early co-operation. One of the important changes in the US program was to promise amnesty to officials and employees of the applicant who co-operate with the investigation. But the experience in the EU, where only firms are subject to the competition law, shows that the threat of individual liability may not be a necessary condition for a leniency program to achieve some results. ■

## How do countries administer leniency programmes?

Administering a leniency program requires procedures to verify the credibility of information offered and to ensure continued co-operation from firms and their officers and employees. Considerations of fairness may require refusing to grant leniency to a firm that was the cartel ringleader or that coerced other firms to enter it. And similar considerations call for requiring the leniency applicant to make good faith efforts to terminate and correct the violation, including making restitution to victims.

Leniency decisions are implemented at the end of the process, to ensure compliance with the usual condition that the applicant co-operate throughout the investigation. Final implementation may require action by other institutions, such as prosecutors and courts.

One unresolved issue is the extent to which leniency should depend on

the probative value of the evidence that the applicant proffers. The US and UK programs do not set an evidentiary burden requirement, such as the "decisive evidence" standard in the EC program.

One reason given for the difference in approach is the nature of proof required in different legal systems. Where the case must be shown entirely with documents, it may be particularly important that the amnesty applicant supply usable proof, even the "smoking gun". On the other hand, the US notes that promising amnesty to a party who can provide a critical link in obtaining decisive documentary evidence has made it possible to crack some cartels.

An objection sometimes raised to leniency is that law enforcement agencies should always take vigorous action against violations. But some prioritising and balancing of costs and benefits in the enforcement process is inevitable. Overall enforcement effectiveness and compliance is likely to improve, as leniency for a few participants makes it possible to apply the law more thoroughly to others. Permitting a violator to avoid the consequences of its action by confessing and shifting the burden to others may appear unjust, but for violations like cartels, where there will be several parties, considerations of enforcement effectiveness may outweigh that concern. ■

## What protections do witnesses get under a leniency programme?

Agencies with leniency programs promise strong protections against unauthorised disclosure. Confidentiality is important to leniency applicants, because informants can run serious risk of retaliation, as well as liability in other jurisdic-

tions. Too great a risk that information would be conveyed to other jurisdictions might decrease firms' incentives to come forward. On the other hand, thanks to increasing co-operation, a firm trying to tell an agency something it did not already know could be disappointed to find that the agency had already learned about it from another source. Agencies may make it clear that they will act independently, which should have the effect of causing firms to confess early and often. Already, companies are coming forward simultaneously in all the major

jurisdictions with leniency programs. ■

## In Summary

The key points of the report on leniency to stop hard core cartels can be summarised as follows:

- Leniency programmes are necessary to break the code of silence surrounding hard core cartel activity.
- Leniency programmes work best when they provide a clear and reliable promise of amnesty for the first conspirator to come forward.

- The risk of tough penalties provides the incentive for a conspirator to come forward and seek leniency.

- The continued co-operation of the conspirator in the prosecution is a necessary condition for leniency.

Strict confidentiality is needed to protect witnesses under leniency programmes. ■

## For further information?

More information about the report can be obtained from John Clark (email: [john.clark@oecd.org](mailto:john.clark@oecd.org), tel: (33-1) 45.24.78.60). ■

## For further reading

- Leniency Programmes to Fight Hard Core Cartels, 2001  
Free on Internet: [www.oecd.org/daf/clp/CLP\\_reports/Leniency-e.pdf](http://www.oecd.org/daf/clp/CLP_reports/Leniency-e.pdf)
- Hard Core Cartels, 2000  
Free on Internet: [www.oecd.org/daf/clp/CLP\\_reports/hcc-e.pdf](http://www.oecd.org/daf/clp/CLP_reports/hcc-e.pdf)
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