

# Immunity in Criminal Cartel Investigations: A US Perspective

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## Introduction

The United States Department of Justice Antitrust Division's Leniency Program is widely considered a tremendous success in the history of criminal antitrust enforcement. The Leniency Program is by far the Antitrust Division's most successful tool in the detection and prosecution of criminal cartel conduct. Its use has led to a dramatic increase in the number of cartels uncovered, criminal fines obtained, and prison sentences served. The Leniency Program's success is also demonstrated by the widespread adoption of similar immunity programs around the globe. In 1990, the United States was the only country in the world to provide complete immunity to the first corporation to report its involvement in cartel conduct. Today, more than fifty countries do so.<sup>2</sup>

Despite the Leniency Program's success, no government policy is perfect. On the one hand, the Leniency Program has been instrumental in detecting and uncovering massive worldwide cartel conspiracies, most of which likely would not have been uncovered without it. It is only by securing the cooperation of cartel insiders that the Antitrust Division has been able to effectively prosecute cartels and secure multimillion-dollar criminal fines over the last fifteen years. On the other hand, the wholesale grant of immunity to every employee at the leniency applicant's company has resulted in challenges for the Division at trial, where jurors may view the immunized witness as far more culpable than the charged defendant and refuse to convict. This is a perennial problem in criminal cases in the United States, where the government frequently relies on cooperating witnesses who have been granted immunity or a favorable sentence in exchange for cooperation. The situation for the

***The current leniency program may be analogous to Winston Churchill's description of democracy: "[i]t has been said that democracy is the worst form of government except all the others that have been tried." The Leniency Program by definition lets admitted criminals escape punishment. However, in the view of the Antitrust Division, the alternative is far worse.***

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<sup>2</sup> See, Scott D. Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Address Before 24th Annual National Institute on White Collar Crime (Feb. 25, 2010) available at <http://www.usdoj.gov/atr/public/speeches/255515.htm>

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Antitrust Division is particularly acute because of its unique use of company-wide immunity for the corporate leniency applicant. At the end of the day, the Antitrust Division is not likely to alter its current policy given the huge benefits of the Leniency Program. Moreover, the Leniency Program would be far less attractive to companies if their executives did not receive immunity. According to the Antitrust Division, the benefits of the Leniency Program substantially outweigh any tactical disadvantage the government may encounter at trial.

This paper will describe the history and structure of the Antitrust Division's Leniency Program and some of its strengths and weaknesses.

### ***History of the U.S. Department of Justice, Antitrust Division's Leniency Program***

The Antitrust Division first implemented a leniency program in 1978 and substantially revised the program with the issuance of the Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.<sup>3</sup> Through the Antitrust Division's Leniency Program, a corporation can avoid criminal convictions and fines and individuals can avoid criminal convictions, prison terms, and fines, by being first to confess participation in illegal cartel conduct, by fully cooperating with the Division, and by meeting other specified conditions.

There are two types of leniency provided by the Antitrust Division: (1) Type A Leniency where the illegal conduct is self-reported before a government investigation has begun; and (2) Type B Leniency where the illegal conduct is self-reported after an investigation has been initiated. The requirements for qualification under Type A or Type B are similar, with a few important distinctions.

Type A leniency applicants must meet the following six conditions: (1) at the time the corporation comes forward to confess criminal behavior, the Division has not yet received information about the activity from any other source; (2) upon the corporation's discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity; (3) the corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation; (4) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (5) where possible, the corporation makes restitution to the injured parties; and (6) the corporation did not coerce another party to participate in the activity and clearly was not the leader in, nor the originator of, the activity.<sup>4</sup>

Type B Leniency is available to the first company to come forward and qualify for leniency after an investigation has already been initiated and requires many of the same conditions as Type A Leniency, with the additional requirements that: (1) at the time the Corporation confesses its behavior, the Division does not yet have evidence against the company that is likely to result in a sustainable conviction; and (2) the Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and the time at which the corporation comes forward.<sup>5</sup>

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<sup>3</sup> The Division's Corporate Leniency Policy and Leniency Policy for Individuals, *available at* <http://www.usdoj.gov/atr/public/criminal/leniency.htm>.

<sup>4</sup> U.S. Department of Justice, Antitrust Division, Corporate Leniency Policy (issued August 10, 1993), *available at* <http://www.justice.gov/atr/public/guidelines/0091.htm>

<sup>5</sup> *Id.*, see also, Scott D. Hammond, Dep'y Ass't Att'y Gen., "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters" (Nov. 19, 2008) *is available at*

In 2004, Congress increased the incentives for cartel members to apply for leniency with the passage of the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"). Under ACPERA, leniency applicants are only required to pay "actual damages" in follow-on civil damage claims, instead of the treble damages and joint-and-several liability ordinarily imposed under the antitrust laws. In order to take advantage of the "de-trebling" provision the leniency applicant, in addition to cooperating with the government, must also provide "satisfactory cooperation" to the private plaintiffs in their civil damage claims.<sup>6</sup> Satisfactory cooperation "shall include . . . a full account to the claimant of all facts known to the applicant . . . that are potentially relevant to the civil action," as well as "all documents or other items potentially relevant."<sup>7</sup> ACPERA was originally subject to a five-year sunset provision but was renewed in 2009 and 2010 and has been extended to 2020.<sup>8</sup>

### ***The Effectiveness of the Corporate Leniency Program***

By several measures the Corporate Leniency Program has been enormously effective. It has resulted in a greater number of amnesty applications, a dramatic increase in criminal fines, and an increased number of individual prosecutions and jail sentences for antitrust violations.

One of the virtues of the leniency program, and the reason for its success, is the element of certainty it provides to corporations that want to resolve their criminal liability. If a corporation meets the requirements of the Leniency Program, the Antitrust Division has virtually no discretion to deny the request. The Antitrust Division has developed an almost two-decade-long record of honoring leniency agreements, which provides comfort to potential applicants. There is only one reported instance in which the Antitrust Division tried to rescind a leniency agreement.<sup>9</sup> Moreover, the pre-1993 leniency program, with its absence of certainty, provided a natural experiment demonstrating the benefits of the current program. The original leniency program gave the Antitrust Division broad discretion on whether to provide an applicant with immunity. This created great uncertainty for a company that was considering whether to report its participation in criminal antitrust conduct. In addition, the original leniency policy did not provide company-wide immunity for all cooperating employees. As a result, during the pre-1993 period the Antitrust Division received approximately one amnesty application a year.<sup>10</sup> Moreover, the original leniency program failed to produce a single prosecution of an international or large domestic cartel.<sup>11</sup> By 2005, with the new Leniency Program in place, the application rate increased to approximately two each month.<sup>12</sup> According to the Antitrust Division, the increase in the number of applications and the overall success of the program was the result of three major changes to the Corporate Leniency Program in 1993: (1) amnesty became automatic if there was no pre-existing investigation; (2) amnesty was still available even if the cooperation begins after the investigation is underway; and (3) all officers, directors, and employees who cooperate are protected from criminal prosecution.<sup>13</sup>

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<http://www.justice.gov/atr/public/criminal/239583.htm>

<sup>6</sup> P.L. 108-237 § 213(b); 15 USC § 1 note.

<sup>7</sup> *Id.*

<sup>8</sup> 124 Stat. 1275, P.L. 111-190, § 1.

<sup>9</sup> See, *Stolt-Nielsen S.A. v. United States*, 352 F. Supp. 2d 553, 568 (E.D. Pa. 2005)

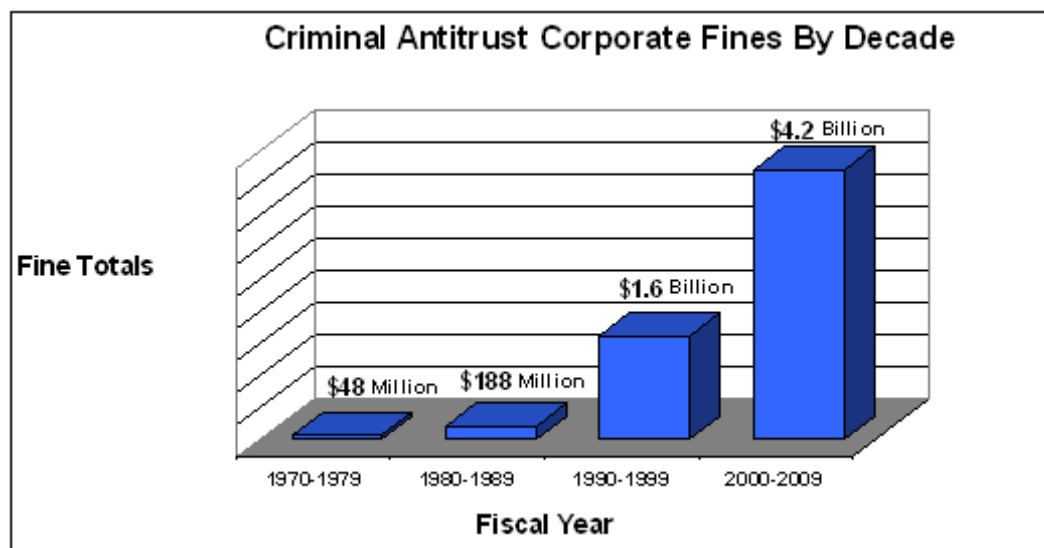
<sup>10</sup> See, Scott D. Hammond, An Overview of Recent Developments in the Antitrust Division's Criminal Enforcement Program, Address Before ABA Midwinter Leadership Meeting (Jan. 10, 2005) available at <http://www.usdoj.gov/atr/public/speeches/207226.htm>

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

With regard to obtaining criminal fines, the program's success has been dramatic. Comparison of criminal fines before and after the adoption of the current Leniency Program shows a spectacular increase in criminal fines. In fiscal year 1991 the average corporate fine for an antitrust offense in the United States was a little less than \$320,000 and the largest corporate fine ever imposed for a single Sherman Act count for price fixing was \$2 million. After adoption of the 1993 Leniency Program the largest fine obtained by the Antitrust Division was \$500 million, in a case that was uncovered through the cooperation of a leniency applicant.<sup>14</sup> Since fiscal year 1996, companies have been fined in the United States more than \$5 billion for antitrust crimes, with over 90 percent of this amount tied to investigations assisted by leniency applicants.<sup>15</sup> The graph below illustrates how fines have increased exponentially since the advent of the current Leniency Program.



The current Leniency Program has also led to an equally dramatic increase in the number of individuals prosecuted and the length of prison sentences imposed for antitrust crimes. It has also resulted in a substantial number of foreign executives agreeing to come to the United States and serve jail sentences in this country for cartels that affected U.S. commerce.

### ***Weaknesses in the Leniency Program***

Despite its achievements, the Leniency Program has its detractors. Some have claimed that the all-or-nothing nature of the Leniency Program is not fair to less-sophisticated companies that are not well advised by experienced antitrust counsel, leading to disparate treatment and unfair results. Others have complained that it allows highly-culpable executives to go free while less-culpable executives are subject to prosecution. While some of this criticism may be true, it is difficult to see how the attractiveness of the leniency program, such as transparency, certainty, and immunity for all employees, can be altered without diminishing the incentives to self-report. For example, if the Leniency Program were modified to allow only for corporate immunity, without individual immunity, the Antitrust Division would find it harder to get the full cooperation from company

<sup>14</sup> See, Scott D. Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Address Before 24th Annual National Institute on White Collar Crime (Feb. 25, 2010) available at <http://www.usdoj.gov/aatr/public/speeches/255515.htm>

<sup>15</sup> Id.

employees that it expects under the current system. Executives facing potential prosecution might not come forward and cooperate. In addition, it would create disincentives for companies to self-report if they know their executives will be subject to prosecution.

The one area where the Leniency Program may attract some legitimate criticism is in the context of criminal trials. Over the past twenty-five years, more than 90% of the corporate defendants charged with an antitrust offense have entered negotiated plea agreements with the Antitrust Division.<sup>16</sup> That still leaves a small minority of companies and individuals who choose to fight the government and go to trial. For those cases that go to trial, the government's reliance on immunized witnesses under the Leniency Program can make convictions more difficult to achieve. In criminal trials the Antitrust Division must often rely on the testimony of witnesses who were involved in the conspiracy and were given complete immunity under the Leniency Program. Relying solely on immunized witnesses can create difficulties in a criminal trial. Standard jury instructions in criminal antitrust cases require a separate jury instruction for witnesses who have immunity and testify pursuant to a leniency agreement. This special jury instruction states: "[y]ou should bear in mind that testimony from such a witness is always to be received with caution and weighed with great care."<sup>17</sup> Such an instruction read by the judge places a cloud of doubt over the government witnesses and may cause jurors to distrust them. If the government is not able to secure convictions against companies and individuals who chose not to cooperate, it could adversely impact the Antitrust Division's ability to secure guilty pleas from cooperators in the future.

The Division has met with mixed results when trying cases relying on the testimony of immunized witnesses. There are several high-profile cases where the government relied on immunized witnesses and successfully won convictions, including the lysine price-fixing trial against Mick Andreas, which relied on immunized witnesses but no amnesty applicant, and the Sotheby/Christies art auction price-fixing trial against Alfred Taubman, which relied on the testimony of a key witness who received immunity under a leniency agreement.<sup>18</sup> However, other cases that relied heavily on immunized witnesses under a leniency agreement have led to unsuccessful results, including the prosecution of Gary Swanson in the DRAM price-fixing investigation, resulting in a hung jury, and the prosecution of Stora Enso, which ended in an acquittal.<sup>19</sup> In other instances the Antitrust Division chose not to call any witnesses who had been immunized under the leniency agreement; this occurred in the prosecution of two individuals in the Marine Hose price-fixing investigation and ended in acquittals.<sup>20</sup>

Despite these setbacks, the Antitrust Division is likely to continue to embrace the Leniency Program due to its record of success and simply try to do a better job of convincing juries that immunized leniency witnesses are credible. The current leniency program may be analogous to Winston Churchill's description of democracy: "[i]t has been said that democracy is the worst form of government except all the others that have been tried." The Leniency Program by definition lets admitted criminals escape punishment. However, in the view of the Antitrust Division, the alternative is far worse.

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<sup>16</sup> See, Scott D. Hammond, Dep'y Ass't Att'y Gen., The U.S. Model of Negotiated Plea Agreements: A Good Deal With Benefits For All, presented to the OECD Competition Committee Working Party No. 3 (October 17, 2006) available at <http://www.justice.gov/atr/public/speeches/219332.htm>

<sup>17</sup> ABA Section of Antitrust Law, Model Jury Instructions in Criminal Antitrust Cases (2009), Alternative Instruction for 4.C.3. - C.7. p. 126.

<sup>18</sup> *United States v. Andreas*, No. 96-762 (N.D. Ill.); *United States v. Taubman*, No. 01-cr-429 (S.D.N.Y).

<sup>19</sup> *United States v. Swanson*, No. CR-06-0692-PJH (N.D. Cal.); *United States v. Stora Enso N. Am. Corp.*, No. 3:06CR323-CFD (D. Conn.)

<sup>20</sup> *United States v. Northcutt & Scaglia*, No. 0:07-CR-60220 (S.D. Fla.)