

Leniency Programmes and Incentives: Is there room for improvement?

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Overview

- Focus on effectiveness of leniency programmes as enforcement becomes more mature
- Four broad categories of issues
 - Incentives in the investigation process
 - International interface issues
 - Interface with criminal enforcement systems
 - Disclosure resulting from private civil damages actions
- Do the leniency systems need improvement?
 - Do they work fine, so no need to fix anything?
 - More interface issues as leniency systems spread?

Incentives in the Investigation Process

Incentives in the Investigation Process

- Incentives key to success of leniency programmes
 - Incentive issues that arise from the design of a leniency system (internal issues)
 - Internal issues may have external effects (i.e., leniency systems compete for “customers”)
- Key incentive issues
 - The degree of cooperation required
 - The role of the 2nd, 3rd and 4th applicant
 - “Junk” applications
 - Certainty of remedies / sanctions policy
 - Amnesty plus increasingly relevant
 - Is it time for extra leniency reductions for compliance programmes?

What is “cooperation” ?

The duties of a leniency applicant

- **The issue:** Unclear as to what exactly a leniency applicant must do:
 - Admit the facts?
 - Admit the existence of a “cartel” or an infringement of the law?
 - Interview witnesses? Forebear from interviewing employees?
 - Required to produce documents from all jurisdictions worldwide to other agency?
 - Required to translate documents into language of jurisdiction granting leniency?
 - Applicant challenging the agency’s version of facts or legal qualification?
- **The effect:** Leniency applications are predicated on legal certainty and on net global benefits:
 - Where no legal certainty there are spill-over effects to other jurisdictions
 - Incentives are diluted by enormity of cumulative cooperation obligations
- **Possible solutions:**
 - Leniency applications should be expressly limited to admission of facts
 - Scope for compromise on factual issues
 - Production shall be required of only documents relevant to violation in jurisdiction granting leniency, and translations shall be required only as reasonably necessary
 - Scope for argument on sanctions / legal qualification only at settlement / plea
 - Imperfect cooperation should only result in loss of leniency in exceptional cases
 - No requests for privileged materials / no limits on companies’ or other authorities’ access to witnesses

The role of the second, third and fourth leniency applicant

- **The issue:**
 - Steep decrease in fine reductions (is it worth it?)
 - Uncertainty about level of decrease in fine reduction awarded
 - Query whether common law countries can ever provide certainty (where court imposes penalties)
- **The effect:** Subsequent applicants discouraged from cooperating
 - Reliance on immunity applicant (no corroboration) is risky
 - Successful prosecutions often require corroboration of at least 2nd
 - No pressure on immunity applicant to continue cooperation
- **Possible solutions:**
 - All leniency applicants should be granted an appreciable reduction if they fulfill relevant criteria (minimum 15-20%?)
 - Consider more generous partial immunity system (new facts disclosed)
 - Facilitating the practical equivalent of plea bargains where not permitted

“Junk” applications

- **The issues:** The race for leniency may (depending on the applicant’s global strategy) result in “junk” applications, with applicants submitting claims in the hope of securing its place in the leniency queue as a defensive or preemptive measure, without knowing enough about relevant conduct
- **The effect:** Parallel investigations in several jurisdictions, some with limited nexus to conduct. This results in potentially unnecessary burdens on applicants and wastes public resources if there is not a substantive or jurisdictional basis, or other sufficient nexus to proceed, causing the investigation to be dropped
- **Possible solutions:**
 - Early and better testing on whether conduct has sufficient nexus and quality to devote resources to investigation (prioritisation)
 - Clear agency policies on jurisdictional nexus / investigation comity
 - Consider early “no action” letters

“Amnesty Plus”

- **The issue:** The US “Amnesty Plus” policy has proven very effective in incentivising parties under investigation for a violation in one market, but too late to obtain immunity for that cartel, to report collusive agreements in other relevant markets. Most jurisdictions do not have Amnesty Plus
- **The effect:** Absence of Amnesty Plus in some jurisdictions may deter multimarket firms from submitting a leniency application for other product / service markets in those, or perhaps, *any* jurisdictions (in view of the numerous additional complications / risks involved in any application). Immediate benefit of new immunity application is less obvious
- **Possible solutions:** Amnesty Plus can be introduced without creating links between cases – e.g., by additional cooperation credit during a settlement or plea bargain procedure

Compliance efforts and extra leniency reductions

- **The issue:** Little recognition in sanctions policies of compliance and whistle-blower programmes. As cases become more complex and conduct less hard-core, should sanctions be reduced where the leniency applicant has made bona fide effort to prevent violations?
- **The effect:** Less compliance efforts? More uncertainty as to value of applying for leniency?
- **Possible solutions:** Consider “safe harbours” or extra leniency reductions

International Interface Issues

International Interface Issues

- Increased interplay between leniency systems
 - Choosing where to go, and where not to go
 - Conflicting demands on cooperating companies
- Key incentive issues
 - Aligning marker policies
 - Aligning scope of markers and leniency grants
 - Waiver policies and scope of investigation / leniency
 - Jurisdiction creep
 - International double jeopardy & comity

Aligning marker policies

- **The issue:** Authorities approach markers very differently – with differing duration, scope, information requirements – creating conflicts between systems for getting the marker, and later perfecting it
- **The effect:** Inconsistency adds uncertainty and operates as a disincentive
- **Possible solutions:** Aligning marker policies would give greater legal certainty and may increase leniency incentives as well as the quality of leniency applications

Aligning scope of markers and leniency

- **The issue:**
 - Scope of conduct can be difficult to ascertain in early days, and different jurisdictions may approach product / service scope differently
 - Different scope of markers or immunity may leave applicant exposed in Jurisdiction A (narrow scope), as he may be required to cooperate and deliver evidence in Jurisdiction B (broad scope)
- **The effect:** If too great uncertainty, immunity applicants are disincentivized. Legal certainty requires immunity applicant to be covered and to know what conduct / product is covered
- **Possible solutions:** Be more open re coverage early on / state of play meetings? Favour the immunity applicant and presumption in favour of wider product scope, possibly to be narrowed as an investigation proceeds, subject to legitimate interests of immunity applicant

Information exchange waivers

- **The issues:**

- Timing of information exchange waiver (before / after conditional immunity granted?); where different jurisdictions are at different stages in the process; where conduct relates to different products / timeframes
- Scope of information exchange waiver: Exchange of information v exchange of documents?
- Interplay between waiver and statutory powers of regulators to exchange information between each other
- Concern about information flows between regulators where immunity is available only in some jurisdictions

- **Possible solutions:**

- No waivers sought between any two jurisdictions before scope and protection is settled in each of those jurisdictions? (And no adverse inference)
- Consider early immunity decisions (or later waiver requests)
- Consider also accepting partial scope waivers where scope of immunity is asymmetric between jurisdictions

International double jeopardy

- **The issue:** Executives subject to jail sentences in multiple countries. Companies subject to sanctions based on same turnover or conduct (e.g., inward / outward freight in multiple jurisdictions)
- **The effect:** Leniency (not immunity) incentives reduced
- **Possible solutions:**
 - Consider comity / agency “best placed” to sanction
 - Avoid double counting and ensure coordinated approach of agencies to “effects” analysis

Interface with Criminal Enforcement

The Interface with Criminal Enforcement

- New criminal enforcement regimes have complicated leniency incentives
 - Criminal procedures are very rigorous
 - The role of witness testimony on the increase
 - The role of “unused” materials (exculpatory and impeachment evidence in common law systems)
- Key incentive issues
 - Dual (civil and criminal) immunity assured?
 - What is the effect of requiring disclosure of privileged witness interview records? Is it necessary?
 - Witness testimony: Collecting, protecting, and using it

Effect of disclosure rules in criminal cases

- **The issue:** Criminal prosecutions may require prosecutor to divulge exculpatory evidence. Certain agencies require leniency applicant to disclose
 - a) materials relating to conduct in other jurisdictions to test credibility of witnesses and
 - b) privileged witness interview records prepared by lawyers of corporate immunity applicant
- **The effect:** Disclosure of (a) and (b) may undermine statements by corporate defendants; (b) gives strong disincentive to conducting internal investigations and undermines ability to file for leniency in any jurisdiction
- **Possible solutions:**
 - Establish policy that leniency applicant is not the agent of the prosecution
 - The better the investigation, the less need for disclosure by immunity applicant (prosecutor will find inconsistencies and therefore exculpatory evidence)

Witness Testimony

- **The issue:** Criminal prosecutions require witness testimony and some jurisdictions have concerns about contamination of witness testimony (or want inconsistent testimony in the prosecution's own files). The agency wants to assume control of the interviews, but witnesses are required for leniency applications and parallel investigations in other jurisdictions
- **The effect:** Conflict between enforcement agencies. Applicant may need to choose between cooperation requirements. Reduces leniency certainty
- **Possible solutions:**
 - Understand the nature of the internal investigation (without seeking disclosure of privileged materials)
 - Ensure witness interviewed in presence of lawyer, and is duly prepared
 - No limitations on company's or other authorities' interviews of witnesses

Leniency Incentives & Private Civil Damages

Disincentives Resulting From Exposure to Civil Damages

- Inherent tension between incentivising leniency applicant to report all details, and applicant's desire to protect against civil damages claims
- How far should the agencies go to protect the statements and materials of leniency applicants?
- Key incentive issues
 - How can agency protect the evidence?
 - “Broad infringements” and joint & several liability

Access to Leniency Statements / Materials: Exposure to Private Civil Damages

- **The issue:** Uncertainty about agencies' ability to prevent disclosure of statements and materials provided by leniency applicants:
 - different statutory regimes on access by third parties
 - tension between efficacy of leniency regime and compensation of those suffering loss
 - civil law vs. common law countries
- **The effect:** Disincentive to seeking leniency at all (because increase in private civil damages may be greater than cumulative decrease in fines in all jurisdictions)
- **Possible solutions:**
 - Agencies to assist each other in courts to protect leniency materials from disclosure?
 - Prioritise enforcement (leniency) over compensation?
 - ACPERA type reduction of damages exposure?
 - Restrictions on “export” of materials disclosed during defence / effective protective orders

Is there a need to improve?

- Predictability is the key to success of leniency programme – companies ask their lawyers to evaluate the net benefits of cooperation
- Even if a leniency system works now, with more parallel investigations, conflicts between enforcement systems will increase
- Solutions can already be identified
- Avoid future enforcement actions collapsing, or that leniency applicants bypass a jurisdiction

Thank you