Procedural and Substantive Conflicts in Multi-Jurisdictional Cartel Investigations

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The Issue

- Greater enforcement cooperation among agencies has led to an increase in coordinated immunity/leniency applications
- Leniency and immunity applicants are faced with:
  - Different timing of investigative steps
  - Different tests for marker/immunity/leniency
  - Different scope of proceedings, hence of immunity/leniency
  - "Leaks" from leniency to non-leniency jurisdiction
  - Risk of evidence "leaking" to third parties, such as plaintiffs
  - Conflicting demands on applicant's internal investigation
  - Difficulty of reconciling demands on witnesses
  - Inability to comply with strict confidentiality requirements in leniency regimes (such as the EU regime)
- The enforcement agencies are constrained by their legal systems and by their national courts

Why is this a concern?

- For immunity and leniency applicants
  - International enforcement is perceived to lack predictability
  - The uncertainty adds expense and complexity to procedures
  - Outcomes may be asymmetric between jurisdictions
  - Increased risk of losing leniency or immunity
  - Class action plaintiffs get better evidence, because applicants cannot control flow of information
- Overall, the conflicts affect the cost-benefit analysis undertaken when assessing whether to apply to leniency
- This undermines the incentives in leniency programmes

Understanding the problems

- Both agencies and leniency applicants must understand the issues in order to deal with them
- We must realise that some problems are real and others may be perceived,
- But, when a company is assessing whether to apply for leniency, perception is reality!
- The following slides set out examples of conflicts – not an exhaustive list, just the most obvious problems..

Case 1: Not all markers are created equal

- **Timing and requirements for markers differ considerably**
- **Substance for markers**
  - Some jurisdictions will grant marker with limited information
  - Others require documents and statement
  - How much "where, when, what and who" must be provided
  - Defining scope of conduct / different from scope of proceeding
  - Must one give information from outside the jurisdiction?
- **Duration of marker and requirements for perfecting**
  - Some frontload the investigation (all key witnesses/docs to perfect)
  - Others will perfect based on scope/time/geographic overview
  - Waivers will often be required before dawn raids and perfecting
  - .. and before immunity and scope is settled
- **Covert surveillance by enforcement authorities**
  - Differing powers, unclear instructions
  - Cross-border powers to authorise unlawful acts (UK/EU & US/EU)
  - Increased civil liability from continuing unlawful conduct
  - Data privacy? Can company turn over phone records w/out consent?

Case 2: Asymmetric scope of leniency and effect on communications between agencies

- Waivers at marker stage are the norm in immunity cases
- Where products are complex, it can be difficult to define the scope of the collusion and therefore the scope of immunity
- A narrow scope ruling leaves the applicant at risk
- In another jurisdiction, applicant may get broad scope, and have continuing cooperation obligation requiring statements/documents

- Problem: The authority which gives the narrow scope ruling may later get information from the applicant, via another authority that gave a wider scope of immunity
- Questions:
  - Must waivers be tailored (bilaterally) to suit the narrowest scope ruling?
  - No multilateral exchanges among authorities?
  - What about information provided by applicant before immunity scope was finally settled? (e.g., during marker period)

Case 3: The "closed circuit" of immunity

- Increasingly impossible to predict whether immunity will be available in all jurisdictions
  - Today, you get a mix of immunity, leniency or nothing
  - Even with 14 applications, quite a few were left out
- With this picture, immunity only works if agencies ensure that immunity information does not flow to leniency jurisdictions, or to jurisdictions that have no 2nd position
- Key issues are
  - Early disclosure in administrative process (Japan, Brazil)
  - Disclosure of evidence in court (Australia, UK)
- Are there solutions?
  - Restrictions on right to "export" documents disclosed to parties in case (as in EU)
  - Protective orders in court; enforceability

Case 4: Disclosure of leniency status

- All systems require immunity position to be kept confidential until investigative steps are taken
- Some systems require immunity position to be kept confidential for several years (EU until SO) in order to incentivise "late leniency applications"
- Some procedures (such as Brazil and Australia) may lead to early disclosure of an immunity applicant's identity
- The same issue arises in a UK criminal prosecution

- Problem: How is this reconciled with the EU's obligation to keep the leniency application confidential?

Case 5: Information "leaking" from enforcement agencies to civil plaintiffs

- One cannot avoid all documents provided in a leniency process from being disclosed in the course of proceedings
- But leniency incentives require that applicants are no worse off as a result of leniency application
- The real question is when and how much is disclosed, and what form it is in ("road map" to case)
- How does one balance the disincentive to apply for leniency and the encouragement of civil enforcement?
  - Public vs. private enforcement – choices differ by legal culture
  - A difference between documents and leniency statements?
  - Will witness interview records be released?

Case 6: Witness statements

- Enforcement agencies/courts use witnesses differently
- Some systems require a broad range of persons with knowledge to be listed to get immunity (Brazil, Australia)
  - This may imply that they should be prosecuted in other countries
  - Practice makes it more difficult to obtain cooperation of witnesses, or leads to witnesses "dropping out"
- In some cases, witnesses are exposed to statements by the company or other witnesses (Brazil)
  - This may contaminate them for other proceedings (UK)
- Requirement to make vague/collective statement of guilt
  - This can affect outcomes in systems where case may depend on whether witness admits "dishonest intent"

- Issue:
  - Is there a need for agency coordination? Is it possible?
  - How does one deal with incentive effects of naming persons (e.g., new Brazilian and Australian listing requirements)

Case 7: Conflicting demands on immunity applicants' internal investigations

- Differing evidence rules and disclosure requirements in criminal and administrative procedures are creating strains
- *British Airways* investigation in UK dropped because of failure to uncover/disclose documents to the defence
- Authorities seeking greater control over investigative steps:
  - Document searches and chain of custody
  - Witness interviews
  - Contaminating evidence and witnesses
  - Legal privilege and waiver of same in some jurisdictions; What effect for incentives and privilege elsewhere?

Are there solutions? What is the effect?

- Applicants can reduce exposure to conflicts by carefully crafting their immunity/leniency applications
- Enforcement agencies can cooperate to identify and address issues that affect leniency incentives, but some problems result from the very legal system (e.g., evidence demands in court)
- Applicants can carefully assess the risks and benefits in applying for immunity/leniency in all or only some jurisdictions
- Sometimes applicants will conclude that applying in a jurisdiction is not worth the risk, in particular if there is only a limited local presence
- This may mean that some authorities will increasingly face cases where it may be difficult to "reach" targets