



COMPETITION
COOPERATION

EU - INDIA Partnership

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.