



**Asia-Pacific
Economic Cooperation**

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Agenda Item: 9

Cornerstones of an Effective Leniency Program

Purpose: Consideration
Submitted by: United States



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Cornerstones of an Effective Leniency Program

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*The views expressed herein do not purport to be those of
the United States Department of Justice.*

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Criminal Cartel Prosecution in U.S.

- Compulsory process for documents and witness testimony
- Large majority of cases are resolved by plea agreements (uncontested)
- Indictments returned by Grand Jury based on probable cause to believe offense occurred
- Standard of Proof at Trial = Beyond a Reasonable Doubt
- Witness testimony critical to case; corroborating documents are very helpful



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U.S. Cartel Penalties

- Maximum criminal penalties:
 - Corporations
 - \$100 Million fine OR
 - Twice the gross financial loss or gain resulting from the violation (*Alternative fine provisions of 18 U.S.C. § 3571*)
 - Individuals
 - 10 years in prison
 - \$1,000,000 fine (alternative fine provisions also apply)

U.S. Sentencing Guidelines used by court to determine sentence



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Challenges in Antitrust Investigations

- Detecting Secretive Cartels
- Obtaining Sufficient Evidence to Prosecute
- Evidence and Witnesses Often Located Outside U.S.
- Most Evidence Subject to False but Plausible Innocent Explanation
- Resource Intensive Investigations



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Most Effective Investigative Tool - Division's Corporate Leniency Policy

Corporate Leniency Applicants = Best Source

Insider Evidence

- Opportunity to see inside the cartel

Motivated Cooperation, including:

- Access to Documents Regardless of Location
- Access to Witnesses Regardless of Country of Residence



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Leniency Benefits to Enforcers

- Uncovers cartels that might not otherwise have been detected
- Conspirator often admit conduct before known to Government
- Provides critical cooperation of inside participants
- Access to documents and witnesses wherever located
- Saves resources
- Ends harm to consumers



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Antitrust Division's Original Leniency Program Ineffective

The Antitrust Division's Leniency Program was originally adopted in 1978 but resulted in few applications because:

1. Sanctions were not significant
2. Cartelists did not fear detection
3. Uncertainty about how they would be treated made cartelists and their counsel hesitant to apply



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1993 Revision of Antitrust Division's Leniency Program = Success

The U.S. Corporate Leniency Policy was revised in August 1993. Three important changes were made to the original program:

1. Leniency automatic before the Division has received any information about the cartel, as long as the applicant meets all criteria.
2. Alternative leniency available even after the Division has received information about the cartel, if the criteria are met.
3. Corporate executives are covered by the grant of corporate leniency if they fully cooperate.



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Types of Corporate Leniency

Two types of corporate leniency are available:

1. Part “A” Leniency: This type of leniency is granted before the Division has received any information about the cartel.
2. Part “B” Leniency: This type of leniency is available if an applicant cannot meet all requirements of Part “A” leniency (e.g., the applicant reports the activity after the Division has received information about the cartel).

Conditions for each spelled out in Division’s Corporate Leniency Policy, widely distributed and available on DOJ website.



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The Carrot



- Huge incentives to be the first to self report and implicate the other conspirators
 - No criminal conviction of the company
 - No criminal conviction of cooperating employees
 - No criminal or administrative fine
 - Promise of confidentiality



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The Stick

- Leniency is only available to the first company to self report and meet the conditions of the program
- The second company - even if second by only a matter of hours as has sometimes been the case - and those that follow (as well as their executives) face severe sanctions



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The Race



- The winner-take-all approach creates distrust and panic within the cartel and *destabilizes* it
- There is no honor among thieves
- With the stakes so high, the cartel members can no longer afford to trust one another
- The “empty seat at the table” scenario
- Individual exposure creates a race between the company and its own employees



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The Obligation: Leniency Cooperation

U.S. Leniency Program requires:

- Obligation To Cooperate Throughout Investigation
- Motivated Cooperation - Ensure The Company Remains In Program
- Failure To Cooperate Fully =Removal From Program
 - Subject To Prosecution
 - All Evidence Provided May Be Used Against Company



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Leniency Pitfalls

- The stick is too little (insufficient sanctions)
- Too stingy with the carrot
- The bar is too high
- The waters are too murky to dive in
- No track record
- Fear of being first and last



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Cornerstones of an Effective Leniency Program

Leniency Applicant will only Apply and Leniency Programs will only be Effective to Combat Cartels if:

- ✓ Significant Sanctions
- ✓ Fear of Detection
- ✓ Transparent Enforcement Policies
- ✓ Dedication to Enforcement



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Leniency Pitfall: Insufficient Sanctions

If sanctions are not severe enough, cartelists will simply weigh the large benefits of successful cartel conduct against minimal sanctions and continue the cartel conduct.

- Non-deterrent sanctions become a cost of doing business



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Leniency Pitfalls: No Fear of Detection

If companies perceive the risk of being caught by competition authorities as very small, then even stiff maximum penalties will not be sufficient to deter cartel activity.

- If cartel members do not fear detection, they will not be inclined to report their wrongdoing to authorities in exchange for leniency.

Competition authorities must cultivate an environment in which business executives perceive a significant risk of detection by antitrust authorities if they enter into, or continue to engage in, cartel activity.



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Creating a Fear of Detection

Cartel Awareness

- Send public message that cartel enforcement is a priority
- Educate government and private procurement officials
- ICN resources:
- <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness.aspx>

Bring hard core cartel cases with strong facts

Publicize cartel enforcement efforts

- Press conferences, press releases, newspaper and TV interviews

Engage with Bar and Business community about cartels



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Creating a Fear of Detection: Cartel Awareness Examples in Brazil

National Anti-Cartel Day

Nationwide marketing campaigns: brochures, post cards, comic books,
invitations for leniency letters to CEOs of Top 1000 companies

See: <http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/awareness/cartelaware-brazil.pdf>

“Companies that participate in cartels get dirty”



Leniency Pitfalls: Uncertainty

Prospective leniency applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate reporting, our experience suggests that it is far less likely to report its wrongdoing.



Creating Certainty

- Written Policy
- Guidelines or Frequently Asked questions
 - See
 - <http://www.justice.gov/atr/file/810001/download>
- Follow the policies you lay out and build a track record with leniency applicants
- Bring strong cases based on leniency
- Create a marker system so leniency applicants can come in quickly and hold their place in line



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Cartel Awareness: Leniency Films and Comic Books

Mexico: <https://www.youtube.com/watch?v=nDjZ5kZTkSI>

Netherlands: <https://www.youtube.com/watch?v=5diFAaJdwel>

<https://www.youtube.com/watch?v=fXraJlIKAJ0> (Spanish subtitles)

Sweden: https://www.youtube.com/watch?v=_r99qzC8aHA

Australia: <https://www.youtube.com/watch?v=louVP9VvFlg>

Spain: <http://www.cnmec.es/es-es/competencia/programadeclemencia.aspx>

Singapore:

<https://www.ccs.gov.sg/~media/custom/ccs/files/education%20and%20compliance/educational%20resources/manga/freed.ashx>



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