



1. Under the Corporate Leniency Program of the Antitrust Division of the U.S. Department of Justice (“Division”), full immunity from prosecution for hard-core cartel violations is available only to the first qualified applicant. Subsequent applicants cannot qualify for immunity under the leniency program, but can enter into plea agreements with the Division that reward them for their cooperation. In contrast to the Division’s program, many other jurisdictions include favorable treatment for subsequent applicants within the rubric of their leniency programs. In any case, we are not aware of any jurisdictions that do not reserve full immunity to the first applicant, as in the U.S.

2. Consistent with the list of issues raised in the Chairman’s letter of July 24, this submission describes the Division’s leniency policy, the purposes of the policy and the rationale for rewarding only the first qualified leniency applicant, the benefits available to companies that are not the first-in through negotiated plea agreements, and the cooperation and timing conditions for companies that qualify for leniency or agree to plead guilty.

1. The Corporate Leniency Policy

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4. The company's confession is a truly corporate act, and not isolated confessions of individuals;

5. Where possible, the company pays restitution to injured parties; and

6. The company did not coerce its co-conspirators, and was not the leader or originator of the cartel.

7. For Type B leniency, which applies when the Division has prior knowledge of the cartel being reported, the company must have approached the Division before the Division had evidence likely to result in a sustainable conviction. Conditions 2-5 above for Type A leniency also apply, and the Division must determine that a grant of leniency would not be unfair considering the nature of the activity, the applicant's role, and the timing of the application for leniency (the burden on the applicant increases with time and the closer the Division is to possessing evidence likely to result in a sustainable conviction).

8. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), 15 U.S.C. § 1 note, de-trebled private damage liability for a corporate leniency applicant and its employees if they cooperate with civil plaintiffs in their lawsuits; liability extends only to actual damages attributable to the applicant's commerce in the affected market. Co-conspirators remain liable for treble damages on a joint and several basis for all damages caused by the cartel.

9. In 1994 the Division introduced an individual leniency policy, which applies only in Type A situations when the Division has no previous information about the cartel. Type B corporate leniency can be granted for a particular cartel after individual leniency in the same matter, but the reverse is not possible. Individual leniency acts to further destabilize cartels, as companies are aware that their employees could act on their own to seek a leniency application.

2. Purpose of the Leniency Program

10. As stated on the Division's *Leniency Program* webpage, the "Division's leniency program is its most important investigative tool for detecting cartel activity." Cartels by their nature are secretive and, therefore, hard to detect. Leniency programs provide enforcers with an investigative tool to uncover cartels that may otherwise go undetected. While the notion of letting hard-core cartel participants escape punishment was initially unsettling to many Division prosecutors, the Division recognized in 1993 that the grant of full immunity was necessary to induce cartel participants to turn on each other and self-report, resulting in the discovery and termination of the conduct, the successful prosecution of the remaining cartel participants, and damage recovery for victims. Moreover, the expectation was that the benefits of leniency would extend beyond the cartels it directly uncovered and that the very existence of the leniency policy would be viewed by executives as raising the risk of detection and punishment, leading to greater deterrence of cartel activity. This expectation has been shown to be justified.

11. Effective leniency programs create a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun, and quickly crack cartels that may have otherwise gone undetected. Effective leniency programs destabilize cartels. If cartel members have a significant fear of detection and the consequences of getting caught are severe, then the rewards of self-reporting become too important to risk losing the race for leniency to another cartel member, or perhaps to a firm's own employees if individual leniency is available. This dynamic literally creates a race to be the first to the competition agency's offices.

² <http://www.justice.gov/atr/public/guidelines/0092.htm>.

³ <http://www.justice.gov/atr/public/criminal/leniency.html>.

12. The leniency program provides enormous benefits to cartel enforcement. The leniency applicant will admit its conduct in some cases before an investigation is even opened, and then turn on its co-conspirators once the investigation is underway. The program provides critical cooperation of inside participants and access to documents, even when located outside the agency's jurisdiction, and access to witnesses regardless of their location or nationality. Finally, it may open up opportunities for covert investigative operations.

13. Leniency works by providing great incentives to be the first to self-report and implicate one's co-conspirators. No charges will be filed against the successful leniency applicant or its cooperating employees; there will be no criminal or administrative fines; and the Division promises confidentiality to the applicant. Importantly, *immunity is available only to the first company to self-report and meet the conditions of the program*. Subsequent applicants, even if, as has been the case, they arrive only minutes or hours after the first company, and their executives, face severe sanctions.

14. The winner-take-all approach creates distrust within the cartel and destabilizes it. In our experience, there is no "honor among thieves," and with the stakes so high, cartel members can no longer afford to trust one another, and so revert to competition. Thus the Division's leniency policy depends for its success on restricting its benefits to the first successful applicant, the only one to benefit from full and complete immunity. As discussed below, however, subsequent applicants that fail to qualify for the leniency program, but that do agree to plead guilty and cooperate with the Division, can expect significant benefits, even if they do not qualify for the leniency program.

3. Policy advantages and disadvantages of rewarding subsequent applicants

15. As noted, the winner-take-all approach, which limits the benefits of the immunity program to the first qualified applicant, provides strong incentives to upset the agreement among cartel participants. In order to attract leniency applicants and uncover otherwise secret cartels, there should be a clear contrast between the benefits of leniency – no criminal charges against the applicant or its employees, reduced civil damages, confidentiality of the application – and the consequences of failing to be a successful leniency applicant – severe penalties, including criminal sanctions in the U.S., for the firm and its employees, with full exposure to civil damages, trebled in the U.S.

16. Granting full immunity to a subsequent applicant would negate this incentive – why rush to be the first when you can achieve the same benefit by applying after the first applicant? Distinguishing the leniency program from the benefits available to companies and individuals that enter into negotiated plea settlements helps to emphasize the unique attraction of the leniency program to cartel participants, thereby reinforcing the program's utility as a tool to destabilize and uncover cartels. At the same time, however, competition agencies may wish to provide incentives for companies that fail to qualify for leniency to plead guilty and cooperate with the agency as part of a settlement, as discussed below.

4. Treatment of subsequent applicants in the U.S.

17. Subsequent applicants – those that arrive after the first qualified leniency applicant – receive no benefits under the Division's leniency program. Because of the extraordinary value of obtaining full immunity, and the possibility that cartel members might decide to seek leniency at roughly the same time, the Division created a marker system, to allow a company to secure a place at the front of the line and ensure its status as the first-in, giving it a finite period of time to complete its internal investigation and prepare its leniency application. Companies realize they must rush to secure the marker even before they complete their internal investigation; a second-in company will not be permitted to jump ahead while the first-in company is completing its application.

18. Companies and individuals that do not qualify for full immunity, but do offer timely and valuable cooperation, can still obtain significant benefits, including a substantial reduction in fines and more

the calculation of the fine under the U.S. Sentencing Guidelines (“Guidelines”), but they also include the possibility of securing more favorable treatment for culpable executives, a greater likelihood that the company will be in a position to qualify for Amnesty Plus credit or the benefits of “affirmative” amnesty.

23. The rewards for second-in companies are not uniform, because the value of a second-in corporation’s cooperation can vary dramatically from case to case. The value to the Division of a company’s cooperation varies because what the particular defendant brings to the table (e.g., credible witnesses, compelling documents, previously undisclosed information), and what the Division can already prove, is not a constant and varies from case to case. While a second-in company’s cooperation typically will significantly advance an investigation, there are times when the cooperation is either cumulative or no longer needed.

24. As noted, in a negotiated plea agreement, the Division typically agrees to recommend to the federal district court a sentence more favorable to the defendant than what the Guidelines recommend, based on the cooperation offered by the defendant. Where full immunity is no longer available, second-in or early cooperators can still obtain substantial discounts below their Guidelines fine and incarceration

7.2. Plea agreements

27. For negotiated plea agreements, the defendant's cooperation is the primary benefit that the Division receives from entering into a plea agreement. Therefore, a commitment by the defendant to provide full, continuing, and complete cooperation is virtually always required in Division plea agreements. <http://www.justice.gov/atr/public/speeches/219332.htm> - N 78. As discussed above, the amount of the substantial assistance reduction in the fine or period of incarceration below the Guidelines range that the Division will recommend is directly tied to the timeliness and quality of the cooperation that the defendant is able and willing to provide.

28. The specific types of cooperation that a defendant is required to provide to the Division are specified in the plea agreement, including providing the Division with all non-privileged documents and information, wherever located, in the possession, custody, or control of the defendant, and appearing for interviews, grand jury appearances and trials. For corporate defendants, the defendant and any related entities covered under the plea agreement must also use their best efforts to secure the cooperation of current, and sometimes also former, corporate employees covered under the plea agreement, including making employees (even when located outside the U.S.), available at the defendant's expense for interviews and testimony.

29. Corporate employees covered by the plea agreement are also bound to cooperate with the Division. If a covered employee fails to comply with his/her cooperation obligations, the Division's agreement not to prosecute that person will be rendered void. The Division is then free to prosecute the non-cooperating employee and use information provided by that individual against him/her in a criminal trial. <http://www.justice.gov/atr/public/speeches/219332.htm> - N 81. In rare situations, the Division's non-prosecution promise with the company may be specifically tied to the full cooperation of certain executives, where the company's cooperation is essentially meaningless without the full cooperation of those executives.

30. It is important to note that the cooperation requirements contained in a plea agreement are ongoing obligations and the plea agreement may be voided by the Division for failure to comply with the cooperation obligations contained in the plea agreement even after acceptance of the plea and imposition of sentencing.

8. Timing issues for leniency applications and negotiated plea agreements
