

Comparative Study on the Effectiveness of the Antitrust Leniency Program

Abstract

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Cartel, Collusion, Leniency, Incentive, Prisoner's Dilemma, Reward

Taiwan adopted the leniency policy in 2011 when the Fair Trade Law was amended. The Fair Trade Commission (TFTC) soon developed a leniency regime following the examples made by peer competition authorities in other countries. Just four years later, the Legislative Yuan added one more tool to crack down hard core cartels into the arsenal of the Fair Trade Law: a reward system for the whistle-blowing. The Legislative Yuan also asked the TFTC through its Committee of Economics three times about the effectiveness and efficacy of the leniency programme. TFTC's reply of only three approved cases among fifteen leniency applications was justified with explanations comparing a modest achievement of South Korea's adoption of leniency policy in early years.

This project is sponsored by the TFTC to find out the effectiveness and efficacy of the leniency programme in the eye of international comparison. The focus has been put on the leader of leniency policy in antitrust enforcement - the DOJ of the United States - , the German Competition Authority BKartA and the Competition Authority of South Korea KFTC. These three peer competition authorities were among ten more co-founders of the International Competition Network (ICN) who has been eagerly promoting leniency programme together with other instruments of strengthening anti-cartel enforcement.

In the recent years, ICN has been developing a document called "CHECKLIST FOR EFFICIENT AND EFFECTIVE LENIENCY PROGRAMMES" which provides a list of elements devised to assist in the introduction and implementation of an efficient and effective leniency programme. The document presupposes that the general preconditions for the establishment of a leniency programme are already in place, namely a high risk of cartel detection based on vigorous public enforcement practice as well as sufficiently deterrent penalties. According to the "CHECKLIST",

the following elements should be considered when designing or amending the leniency system of a competition authority or any other investigative body prosecuting competition law infringements:

1. Leniency programmes can be applicable:

a. to corporations (covering both a single legal entity or a group of legal entities) and/ or natural persons involved in anticompetitive conduct;

b. under civil, administrative or criminal competition law legal regimes.

2. Types of infringements covered by leniency: Cartels i.e. secret horizontal agreements or concerted practices that restrict competition through price fixing, market sharing, bid rigging or output restrictions, which may also sometimes involve certain ancillary vertical aspects.

3. Bifurcated leniency systems: If there is a system of corporate leniency and leniency for individuals and/ or parallel civil, administrative and criminal regimes, it is important to provide maximum certainty and predictability of the system as a whole. In order not to jeopardise the efficiency of the leniency programme it is important to ensure that:

a. leniency granted to individuals does not automatically preclude corporate leniency. It is therefore important to provide protection to both corporations and individuals (e.g. criminal immunity for individuals) applying for leniency.

b. legal sanctions of a different nature applying to the same conduct do not neutralize or counteract each other and that the interests and incentives of corporations and individuals involved are taken into account. It is important to provide protection to corporations and individuals applying for leniency from other potential administrative, regulatory (e.g. debarment by public procurement authorities) or criminal sanctions.

4. No less advantageous position: leniency programmes should be designed to avoid that the leniency applicants are placed in a less advantageous position than cartel participants who do not cooperate with the competition authority (see also point 10 below).

5. Immunity and/ or reduction of fines: an agency should decide whether to grant only full immunity or also reduction of fines.

A. Immunity: immunity from any fine or sanction which would otherwise have been imposed/ recommended for cartel participation. For immunity, a leniency

programme should include:

a. Definition of what the evidentiary threshold for immunity is (types of immunity):

● A submission that enables targeted inspections when the agency has no sufficient prior information to conduct that investigation: provision of evidence and detailed description of the cartel, such as:

- name/ address of entities involved;
- name/ position/ address of individuals involved;
- product scope;
- known duration;
- type of conduct, means;
- foreseeable meetings or contacts (if the cartel is on-going);
- information on other agencies with whom they have filed or plan to file similar submissions.

● A submission that enables the agency to establish the full extent of an infringement on the basis of the evidence and information provided⁸ when the agency has conducted inspections, or no other applicant has qualified for immunity under the first threshold: next to the level of information mentioned in the paragraph above, it should enable the agency to describe and prove the infringement against participants in it.

b. Exceptional circumstances excluding total immunity (depending on the role certain participants play in the illegal activity).

B. Reduction of fines: a reduction of up to a certain percentage of the fine which would otherwise have been imposed/ recommended, depending on the ranking of the leniency applicants concerned and the timing of their applications (e.g. submitted before or after inspections). It is highly recommended to make provisions establishing a race between applicants to provide their best cooperation as soon as possible. To that extent, any leniency programme with reduction of fines can include the following:

● The evidentiary threshold for reduction of fines: namely the provision of evidence contributing significant added value compared to the evidence already in the agency's possession at the time of the submission. Successful leniency applicants have

to provide evidence that strengthens by its very nature, quality and/ or its level of detail the agency's ability to prove the infringement, such as:

- direct evidence vs. indirect or circumstantial evidence;
- stand-alone evidence vs. evidence that requires corroboration;
- written, contemporaneous evidence vs. oral statement at the time of the procedure.

● The potential number of rewarded applicants and the level of reductions available: agencies can provide reduction of fines to the second and subsequent successful leniency applicants in the range of up to a certain amount (e.g. 50 per cent) depending on the ranking of the company.

● Partial immunity: If a party (already qualifying for a reduction of fines) is the first to disclose facts previously unknown by the agency that extend the gravity or duration of the conduct under investigation, it will also qualify for immunity regarding that resulting portion of the sanction.

6. Behavioural conditions for awarding the leniency: applicants should comply with certain conditions in order to obtain leniency, for example:

a. on-going duty of sincere cooperation until the investigation and prosecutions are complete (e.g. reporting the relevant facts, submitting documents, having the concerned individuals cooperate with the authority's investigation. All the cooperation should be made promptly available upon the authority's request);

b. providing full and frank explanations throughout the process to the best of their ability;

c. ending the participation in the cartel (or continuing under agency direction/ agreement);

d. not destroy, falsify or conceal evidence;

e. disclosing/ admitting participation in the cartel; and

f. confidentiality duty of the applicants.

7. Discretionary reward system: In systems where leniency is granted/ recommended only with respect to the first successful applicant and the leniency programme does not set out reduction bands, it may be appropriate to have discretion to reward subsequent cooperation and incentivize or acknowledge parties' previous or parallel initiatives of:

- a. restitution or disgorgement of ill-gotten gain where appropriate; and
- b. cooperation in private litigation and/ or other related investigations (e.g. state or other government agency).

8. Procedural aspects of successful leniency programs, may include several of the below elements:

- a. availability of anonymous approaches/ hypothetical applications;
- b. availability of a marker (protection of an applicant's place in the queue for immunity or reduction of fines);
- c. procedures for revoking leniency if necessary;
- d. summary applications;
- e. form of applications (written or oral, ability to make oral submissions known as proffers) (see also 10a. below);
- f. protection to private plaintiffs from disclosure of self-incriminating statements provided under leniency (see also 10b. below);
- g. procedures for handling information on closely related leniency applications; and
- h. handling information in the case of withdrawal/ refusal of the application.

9. Incentives for cooperation - additional elements may include:

- a. leniency plus: companies not qualifying for immunity or reductions but revealing a second cartel can benefit from the disclosure by receiving reduction of fines for the first infringement; and
- b. penalty plus: if a company that applied for leniency or was found to have participated in the cartel also participated in another cartel but did not report it, this could be an aggravating circumstance when imposing a fine for this second infringement.

10. Protection of confidentiality - appropriate measures to protect the confidentiality of the leniency applications that enhance trust of leniency applicants in the agencies:

- a. Setting-up safeguards such as the possibility for oral leniency applications in order to protect leniency applicants from information leaks and disclosure.

b. Establishing rules and administrative practices ensuring protection of self-incriminating statements contained in leniency applications both inside and outside the agency (e.g. towards other agencies, bodies and third parties).

11. Leniency in the global competition law environment - additional measures to ensure the compatibility:

a. Exchange of leniency information between competition authorities through leniency waivers of confidentiality enabling the cooperation of competition authorities.

b. Equal protection for the information exchanged in other jurisdictions: agencies should have safeguards to ensure that potential information exchanges with other agencies do not violate legal protections afforded to individuals in those countries.

c. Flexibility concerning different leniency conditions/ requirements around the world (in exceptional situations): leniency programmes sometimes set out different or contradicting conditions, which in certain situations may lead to uncertainty for leniency applicants; agencies should have the ability to treat such situations with flexibility.

d. Maximum certainty and predictability of the system compared to global partners:

● Agencies should look to other well-established programmes in comparable enforcement systems to ensure that the rules governing their leniency policies (e.g. laws, decisions, notices) are clear, comprehensive, regularly updated, coherent and sufficiently attractive.

● In addition, once an applicant has met the conditions of the leniency programme, there should be no discretion left to the agency whether or not to grant the leniency on other grounds.

12. Effectiveness of a leniency policy - non-legislative supportive measures (assuming that a clear prohibition on cartels is established in the law):

a. Education and awareness-raising of the illegality of cartels in general.

b. Promotion of leniency programmes and compliance programmes:

i. publications, papers, speeches, presentations on the availability of leniency, in all relevant fora;

- ii. dedicated advertising campaigns;
 - iii. consultations on the programme, its adoption or modifications;
 - iv. dedicated websites for leniency;
 - v. promoting the results of leniency; and
 - vi. supporting and encouraging the adoption of efficient compliance programmes.
- c. A clear contact point for leniency applications in the internal organisation of a competition authority.
- d. Consistent, predictable and transparent implementation of the leniency programme.

After checking the design and implementation of TFTC's leniency programme and comparing the experiences of DOJ, BKartA and KFTC, this project explores the incentive-mechanism built on the game theory and verifies some presuppositions of the leniency programme, such as clarity, transparency as well as confidentiality. To the TFTC as follower this project suggests that the advocacy of leniency programme and reward system shall be improved, the accessibility and consultation shall be more "user-friendly", and some elements of TFTC's leniency regime shall be modified according to the ICN's advices after being implemented for more than 6 years.