

# Putting a Value on Leniency Applications

## 5 critical considerations

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# The issues

- Globalised markets and global enforcement – agency cooperation makes this an area ripe for global strategic counselling
- Objective is to pre-empt the “domino effect” (whether dawn raided or immunity applicant)
- The “Amnesty Plus” factor - covering other markets and the golden “catch-all” question
- Leniency, settlements and contesting the facts
- Effects on follow-on litigation
- Submit in haste; repent at leisure

# Forewarned is forearmed

- Importance of an antitrust compliance programme
- Understand authorities' powers
- Internal investigations and legal privilege
- Where do you create and hold documents?
- Understand leniency concept and its implications
- If search and seizure happens
  - Assess strength of evidence/leniency options immediately
  - Consider (and assess) other potential targets. Knock-on cases?
  - Build in litigation scenarios
- Know how to handle implicated employees
  - Enforcing policy vs. ensuring cooperation (NB litigation can be many years later)
  - Timing: allow time to complete all investigations

**Global leniency  
applications: five  
crucial considerations**

## First: Assess the facts

- The arrangement's scope:
  - product
  - geography
  - duration
- Nature and extent of infringement: e.g. 'pure' information exchange, or was there also bid-rigging?
- Who are the participants: company's specific role and participants. Note personal liability
- Effect on the market? Which ones?
- Terminate any ongoing infringement - and consider next steps...

## Second: Should you apply for immunity?

- Whether or not you cooperate with the competition agencies is a critical issue
- Is there a credit for whistle-blowing or cooperation?
- Immunity = 100% - leniency / cooperation = less than 100% (often considerably less)
- What does it apply to? Administrative only? Criminal as well?
- Other benefits? e.g. precursor for settlement in EU which may promise greater financial benefit
- Are you admitting liability on civil damages?

## Third: What factors to consider (1)

- Strength of Evidence
  - Clear, contemporaneous evidence of infringement?
  - Beware of exaggeration/misinterpretation/distortion of evidence
- Risk of Detection
  - Counsel need for compliance with applicable laws; consider extrication strategy
  - Individual criminal exposure
  - Customer/other suspicions/allegations
  - Will others go in for leniency?
  - Industry scrutiny

## Third: What factors to consider(2)

- Exposure
  - Criminal/high fines
  - Reputation
  - Limitation periods
  - Follow-on damages actions
  - Recidivist impact (e.g. EU)



## Fourth: Consider where to apply (1)

- Effect of infringement
  - Level of sales (NB “allocation” cartels)
  - Location of customers (including potential/declined customers)
  - Unsatisfied demand (for “allocation” or “output” cartels)
  - Pricing impact analysis
- Nexus Countries
  - Location of co-cartelists
  - Same factors as above (for co-cartelists)
- International cooperation between agencies

## Fourth: Consider where to apply(2)

- Active enforcers
  - Always check (e.g. EU, US, Canada, Korea, Japan, Australia, Brazil) Procedure/prospect of leniency in those countries
  - Clarity of leniency policy, and “lock in”
  - Availability (e.g. coercer/ring-leader condition)
  - Marker system
  - Oral statements
- Up-front comfort/do you trust agency?

## Fifth: Consider how to apply (1)

- Global coordinator: keep everyone informed; manage strategy and timing
- Prioritise key jurisdictions vs. apply to all simultaneously
- If immunity applicant, cooperate actively with authorities
  - Provide information
  - Ceasing infringement v. “tipping off”

## Fifth: Consider how to apply (2)

- FACTS are FACTS - keep them simple and consistent
- Localise applications, where necessary
- Interpretation of facts
  - Admissions of liability (leniency and settlements) - consider knock-on effects on
    - Other investigations
    - Follow-on damages claims
    - The dilemma: Immunity applicant (tendency towards being over-inclusive) v. Defendant (desire to narrow exposure)
- Do not speculate on effects

# What about litigation exposure?

- Litigation exposure
  - decision on whether to apply for leniency
  - scope of leniency application
  - settlement decision - how much detail
- Document management
- Managing employees/witnesses

# Conclusions

- Immunity is the first best option
- If you apply for immunity in one country, you should apply everywhere (that you can reasonably manage)
- Global coordination is vital: there is no downside to this

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