

Leniency Program of the U.S. Department of Justice, Antitrust Division

José Ramón González-Magaz
Step toe & Johnson LLP



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Sanctions, Risk and Transparency

“These three major cornerstones – severe sanctions, heightened fear of detection, and transparency in enforcement policies – are the indispensable components of every effective leniency program.”

*Scott D. Hammond, Director,
U.S. DOJ Antitrust Criminal
Division (2004)*

Leniency Program - Organic Documents

- Leniency Program (1978)
- Corporate Leniency Policy (1993)
- Leniency Policy for Individuals (1994)
- “Frequently Asked Questions Regarding the Antitrust Division's Leniency Program” (2008)
- Model Leniency Letter
- Speeches and Presentations

Original Leniency Program (1978-1993)

- Established in 1978
- **Institutional genesis of leniency** in cases of horizontal anticompetitive conduct (for individuals to avoid jail and fines; corporations to avoid fines):
 - Price-fixing
 - Bid rigging
 - Restriction of production capacity
 - Market allocation (of consumers, sales)
- **Leniency at the DOJ's discretion**, even if the requirements were met
- Leniency conditioned on **request having been made prior to DOJ beginning its investigation**
- During this period, DOJ received only one request for leniency a year
 - The Program failed to uncover a single international cartel

Current Leniency Program (1993-Present)

- Program modified in 1993 for corporations; in 1994 for individuals
- **Guarantee of leniency** if the requirements and conditions are met
 - Leniency given by the DOJ (not by other agencies)
- The **Program has been very successful**
 - Number of reported cartels increased by 20 times
 - Increase in the quantity and amount of the fines
 - Fines to corporations commonly exceed USD\$100M
 - Since 1997:
 - >USD\$5B in fines due to the Program
 - Program has generated 90% of DOJ's cartel investigations
 - Annual average of 50 investigations (40% concerning cartels)

Current Leniency Program (Cont.)

2 Types of Leniency:

□ **Type A**

- DOJ still unaware of anticompetitive activity
- If disqualified for Type A leniency, may be eligible for Type B

□ **Type B**

- Applies after DOJ has received information on the anticompetitive activity

■ **Leniency as to the criminal charges against the corporation, and directors/officers/employees, who confess**

- Were the corporation not to qualify, or not comply with the conditions, its directors/officers/employees may apply for leniency separately (Type B)

General Requirements and Conditions for Leniency

1. The corporation/individual is the **first to apply for leniency** regarding the anticompetitive activity;
2. At the time of leniency application, **DOJ lacks sufficient evidence** against the corporation/individual to make its conviction likely;
3. The **corporation/individual terminated its/his participation** in the anticompetitive activity;
4. The **corporation/individual informs the DOJ regarding the anticompetitive** activity sincerely, truthfully, and completely;

General Requirements and Conditions for Leniency (Cont.)

5. The **corporation/individual cooperates with the DOJ** throughout its investigation;
6. For corporations, the **confession** for leniency **is a corporate act** (not of the directors/officers/employees individually);
7. If possible, the **corporation provides** restitution to the aggrieved parties; and
8. The DOJ determines that leniency for the corporation/individual **would not be unjust** to other parties.

Race to Apply for Leniency

- For each anticompetitive activity (each cartel), the **DOJ grants leniency to only one corporation or individual – whoever applies for it first.**
 - Incentive to complete audit and internal investigation ASAP
 - Incentive to apply for leniency in different countries simultaneously
- Original Program (1978): **Corporation/individual had to submit leniency application even without knowing all the facts.**
- Current Program (1993): **DOJ has discretion to allow the corporation/individual to set a placeholder on the list to receive leniency.**
- Prior to submitting the application for leniency to the DOJ, **lawyer may inquire “anonymously” whether leniency is available.**
 - But the client corporation/individual must be identified to apply for leniency.

Informing Regarding Other Cartels

- Corporation involved in more than one cartel.
- As incentive, DOJ offers “**Amnesty +**”
 - In the course of the investigation of a cartel, a corporation informs the DOJ about another cartel.
 - The corporation may receive amnesty pursuant to the Corporate Leniency Policy for the other cartel, plus a reduced penalty for the cartel originally investigated.
- **But** DOJ also imposes “**Penalty +**”
 - The corporation is the target of investigation for its participation in a cartel; has knowledge of its involvement in a separate cartel; but does not divulge that second cartel to the DOJ.
 - The corporation will be subject to more severe penalties.

2004 Amendments – More Severe Penalties

- Increased the maximum jail sentence for individuals for anticompetitive conduct from 3 to 10 years
 - Policy that criminal conviction requires incarceration

- Minimum fine to corporations for anticompetitive conduct increased from USD\$10M to USD\$100M (for individuals, from USD\$1M to USD\$10M).
 - Vitamins Cartel - F. Hoffmann-La Roche fined USD\$500M
 - LCD Cartel - LG fined USD\$400M
 - Price-fixing for air travel - Air France and KAL fined USD\$300M each (coordinated with European investigation)

Leniency Requires Confessing to the Crime

- **DOJ requires the corporation's confession of its anticompetitive conduct as illegal to qualify for leniency.**
- **If the corporation does not provide its directors/officers/employees for their cooperation with the prosecuting authorities, the DOJ will infer the corporation has not confessed.**

Risks of Leniency

- Restitution to the parties damaged by the anticompetitive conduct
 - **May include damages caused outside the U.S.**
 - In 2007, the DOJ conducted 33 investigations (>USD\$473M in fines)
 - But the restitution imposed was <USD\$2M
- Continuation of the criminal investigation
 - By state authorities
 - By the competition authorities of other countries
 - Regarding a separate anticompetitive activity

Risks of Leniency (Cont.)

- Civil Litigation
 - **For violation of U.S. antitrust laws**
 - Actions by directors and/or shareholders

- Loss of market position
 - Additional scrutiny by antitrust authorities
 - Reputational harm
 - e.g., purchasers/clients will know of the anticompetitive conduct
 - Hostility by employees

- Limited risk of revocation of leniency

Risks of Leniency (Cont.)

- The **DOJ maintains the confidentiality** of an application for leniency, and of the information provided per a leniency agreement, but:
 - The **DOJ may try to get authorization** from the corporation/individual receiving leniency, **to share the information**, especially with international competition authorities.
 - The DOJ shares with other agencies (domestic and international) the information that results from its investigations.
 - **Upon receipt of "FOIA" production request, the DOJ may have to provide the information**, unless the divulagation: (i) interferes with the implementation of the leniency agreement; or (ii) may compromise a "confidential source."
 - U.S. corporations may have a legal obligation to report the investigation to the public.

- Applying for leniency is a voluntary act.
 - The DOJ usually does not require divulagation of privileged information.
 - But risk of **waiver of attorney-client privilege**.

Limitations of the Leniency

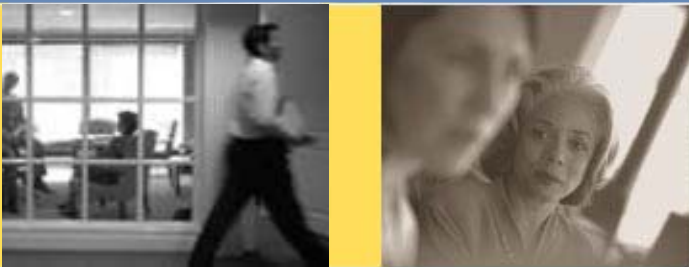
- **Leniency** by the DOJ regarding an anticompetitive activity **does not provide leniency from other federal or state agencies, or from the authorities of other countries**
- The **DOJ's leniency does not extend to:**
 - **Illegal activity unrelated to the confessed anticompetitive conduct;**
 - **Other anticompetitive activities; or**
 - **civil litigation filed by private parties.**

Risk of Civil Litigation

- The **corporation that confesses** to the DOJ its involvement in an anticompetitive activity to receive leniency, **risks being sued in a civil action.**
 - **The plea bargain for leniency in the criminal proceeding may be inculpatory evidence in the civil litigation.**
- Civil litigation commenced by parties injured by the anticompetitive conduct.
 - **“Treble damages”** - Triple compensation to the parties injured by the anticompetitive conduct (automatic penalty; not discretionary)
 - But, statutorily, **if the corporation obtained leniency** from the DOJ in the criminal proceeding, its **liability may be limited** in the civil litigation **to actual damages caused** (no treble damages).

Obrigado.

José Ramón González-Magaz
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, DC 20036-1795
Tel.: +1.202.429.8110
Cell.: +1.240.277.1112
Fax.: +1.202.261.0598
jrgonzalez@steptoe.com



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steptoe.com

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