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# “Immunity/Leniency Programmes”

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支持中国可持续贸易和投资体系

# What is a Cartel?

- **Agreement/understanding between competitors to restrict competition**
- **Normally secret; often involve “enforcement” by the cartel (policing, fines for breaches)**
- **Examples of cartel arrangements:**
  - **Price-fixing**
  - **Market-sharing**
  - **Bid-rigging**

# Result of Cartel Activity?

➤ **Less innovation**

➤ **Less choice**

➤ **Higher prices**

# Detecting and investigating cartels

- **Secrecy makes detection difficult**
- **Evidence essential for decisions to be taken in specific cases**
- **Immunity/leniency programmes a key mechanism for detecting cartels and gathering evidence**

# Immunity/leniency programmes: objectives and means

- **Objective is to create a strong incentive to apply for immunity/leniency**
- **The means involves a combination of elements:**
  - **Effective enforcement: good detection record and significant sanctions**
  - **A programme that creates strong incentives for cartel participants to apply**

# Key elements of a successful immunity/leniency programme

- **Simple: minimal pre-conditions**
- **Limited availability: “the race for immunity”**
- **Clear rules (procedures; post-grant conditions; continuing incentives to cooperate)**

# The Programme: Preliminary Issues (1)



## **Immunity/Leniency distinction:**

- o Immunity: full exoneration from all sanctions; normally only available to first applicant**
- o Leniency: reduced sanctions for second (and possibly subsequent) applicants**

# The Programme: Preliminary Issues (2)

- **No one model: needs to be adapted to the legal regime in the particular country.**
- **Relevant factors include:**
  - **Are sanctions imposed by the agency or by the courts?**
  - **In the latter case, does the agency itself prosecute or is prosecution undertaken by an independent prosecutor?**
  - **Does the legal regime allow for plea-bargaining?**

# Outline of typical programme (1)

- **Initial approach: confidential; by lawyer; anonymous → “marker”**
- **Duration of marker; need for flexibility**
- **“Perfecting” the marker – what is required?**
  - Identity of applicant(s), products and territory
  - Nature of conduct
  - Duration
  - Normally, identity of other cartel participants
  - In some Programmes, acknowledgement of illegality
  - Undertaking to cooperate

# Outline of typical programme (2)



## **Possible grounds for exclusion:**

- o **Agency investigation already at an advanced stage**
- o **Evidence inadequate**
- o **Applicant was the coercer**

# Outline of typical programme (3)

- **Grant of immunity/leniency: by whom?  
Agency or prosecutor?**
- **Scope of grant: companies; individuals;  
products?**
  - Once granted,
  - Must normally end involvement in the cartel
  - Must not tell the other cartel participants of the application
  - Must not destroy evidence
  - Must provide, full, complete and continuing cooperation to the agency

# Obligation of full and complete cooperation

- **Provide all documentary and other (e.g., phone) evidence**
- **Provide witness statements: must be theirs – not prompted by the agency**
- **In some regimes, may be possible to provide evidence orally; but may provide only limited protection against disclosure**
- **Give evidence at trial if there is one**

# Outline of typical programme (4)

- **Revocation of grant:**
  - Failure to cooperate
  
- **Necessary as an incentive to cooperate, but must be used sparingly – could undermine the Programme**

# International cartels

- **In some countries, a very large percentage of immunity/leniency applications relate to international cartels**
- **The applicant is seeking immunity or leniency in several jurisdictions simultaneously**

# International cooperation

- **Cooperation with other agencies may be helpful, but laws and ethical rules relating to confidentiality may make this difficult; it may be possible to get a waiver of confidentiality from the applicant in such cases**
- **But there may be concerns about the protection of confidentiality in some countries; where such protection is weak, it may not be appropriate to share information**

# Existing models

- **USA, Canada, UK, Ireland: hardcore cartels are criminal offences but Immunity/Leniency Programmes not all the same**
- **European Commission: Leniency Programme is a protection against (significant) administrative fines on companies (not individuals)**
- **Europe: ECN Model Leniency Programme – designed for enforcement regimes with civil (not criminal) sanctions against companies**

# Concluding remarks

- **Immunity/leniency programmes - very successful in countries where there are significant penalties for cartel activity**
  - particularly the risk of imprisonment for individuals
- **Only one element in the cartel enforcement toolkit - but a very important one!**