



Leniency: Observations from a UK perspective

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Issues

- General observations
- Recent hot topics in the UK (and across the EU)
 - Admission of liability
 - Reliability of evidence
 - Scope of cooperation requirement
 - Residual exposure risks
 - Interaction with settlements

Leniency in the EU (1)

- Legitimate initial concerns
 - Fundamental natural justice objections
 - ‘Cultural tradition’ concerns
 - Problematic connotations of collaboration with state prosecutions, eg France, Germany and also Spain
 - Strong collaborative corporate culture, eg Germany, Italy and Japan
 - “Snitching” unacceptable at school, eg UK
- But ... compelling detection, punishment, civil redress and deterrence dynamics

Leniency in the EU (2)

- ECN Leniency Working Group
 - Key concern
 - Lack of a one-stop shop for leniency in Europe
 - Key objectives
 - Encourage closure of ‘leniency gaps’
 - Create a benchmark for soft harmonisation
 - Reduce burden on applicants and authorities in relation to multiple filings

Leniency in the EU (3)

- Principal areas of debate within the ECN Leniency Working Group in 2005/06
 - Availability of temporary markers
 - US and UK experience
 - DG COMP concerns
 - Significance of EU alignment
 - Requirement for ‘secrecy’
 - Practical focus of all policies is “secret cartels”
 - But UK experience was that a requirement for ‘secrecy’ was in practice a distraction
 - See disputes about what amounts to “public information” in many EC cases

Leniency in the EU (4)

- Exclusion of applicants from immunity
 - Common minimum denominator: “coercer”
 - Narrow definition (eg UK guidance)
 - Exceptions in Italy and Finland
 - Lower exclusion thresholds, eg:
 - “Sole ringleader” (Germany and Greece)
 - “Recidivist” (Greece)
 - “Initiator” (Czech, Lithuanian, Latvian and Slovak policies)
 - US: “coercer”, “leader” or “originator”
 - Never relied on to date
 - OFT Leniency Conference in 2006

Recent hot topics in the UK

1. Admission of liability
2. Reliability of evidence
3. Scope of cooperation requirement
4. Residual exposure risks
5. Interaction with settlements

1. Admission of liability

- Policy and legal tensions:
 - Cooperation inconsistent with denial of wrong-doing but (i) the applicant's primary task is to provide facts; and (ii) the burden of proof rests with the Authority
- Diverging international practice
 - US: “confession” of “illegal activity” required
 - EC: “detailed description of the alleged cartel arrangement” (ie facts and not a confession)
- UK's position is developing
 - Initially limited to the provision of all relevant facts but OFT's position has hardened over time
 - Applicant must now demonstrate that they have a “genuine intention to confess”

2. Reliability of evidence

- Concerns about the evidential robustness of self-serving self-incriminatory corporate statements
 - Tactical submissions to secure immunity
 - “Talk is cheap ...”
- A real concern in the increasingly frequent “information exchange” based cases, eg
 - DG COMP’s *Bananas* case
 - OFT’s civil *Dairy* case
 - OFT’s criminal *BA* prosecutions

3. Cooperation requirement (1)

- When does it start?
 - From ‘application in contemplation’ point (EC, UK, ECN Model Programme)
- When does it cease?
 - EC: “throughout the Commission’s administrative procedure”
 - UK: “throughout the OFT’s investigation and any subsequent proceedings”
- Reasonable and proportionate efforts
 - Forensic electronic document reviews
 - Scope of required reviews?
 - Risks of DIY investigations, eg *BA / Virgin*
 - Making former employees available for interview
 - Dealing with ‘rogue’ employees

3. Cooperation requirement (2)

- Requests for ‘privilege waivers’
 - Notes of internal investigations
 - Notes of internal interviews
 - UK: if “necessary” to protect the rights of defence of third parties
- Requests for ‘information sharing waivers’
 - Routinely requested and provided
 - But always consider (i) factual relevance, (ii) privilege issues and (iii) civil damages disclosure risks
- Ability critically to respond to the SO
 - UK: Submissions must be made “in the spirit of cooperation”

4. Residual exposure risks (1)

- Individual sanctions
 - Importance of seamless protection of company and its individuals
 - EC: Strict limits on the exchange of information to avoid use against individuals
 - UK: Immunity from OFT / SFO in England, Wales and NI but no automatic protection in Scotland
 - Other: Issues remain, eg Germany and France

4. Residual exposure risks (2)

- Civil damages exposure
 - US: “Detrebling” of civil damage claims if the company: (i) benefits from the DOJ’s Corporate Leniency Program; and (ii) cooperates with private plaintiffs’ action against others
 - UK: OFT recommended to the UK Government in 2007 to confer a power on the Government to:
 - exclude corporate statements from use in litigation
 - to remove joint and several liability for immunity recipients so that they are only liable for the harm they caused

4. Residual exposure risks (3)

- EC:
 - ‘White Paper on Damages Actions for Breach of the EC antitrust rules’, April 2008
 - Minimum level of *inter partes* disclosure, subject to the protection of corporate leniency statements
 - Limits to civil damages exposure to be further considered
 - Commissioner Almunia ordered a full review of approach, incl. exceptionality of competition claims

5. Interaction with settlements (1)

- Growing use of settlement and similar ‘early resolution’ procedures in cartel cases
 - Policy aim is to protect effectiveness of leniency regimes
- Diverging approaches across the EU
 - EC: Formal and restrictive policy
 - UK: Pragmatic case-by-case approach
 - Other examples in Germany, France and the Netherlands

5. Interaction with settlements (2)

- In the UK there is no published policy document
 - Targeted admissions of liability or non-contest agreements required
 - Limited access to file and limited submissions in response to the SO
 - Discounts of generally up to 30% available
- Case track record produced mixed results so far
 - *Independent Schools case (2006)*
 - Innovative resolution with restitutionary element



5. Interaction with settlements (3)

- Cases (cont'd)
 - *Bid-Rigging in Construction* case (2009)
 - OFT lost judicial review on the fairness of its settlement offer
 - *Dairy* case (2010)
 - OFT had to re-open its initial settlement and had to reverse £50 million of fines
- Potential alternative to ‘second in’ type leniency
 - Allows ‘wait and see’ strategy in multi-party cases
 - No need to ‘create’ evidence, eg corporate and witness statements
 - Significant reductions in fine still available (if offer is made)

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