Leniency Considerations in Multi-Jurisdictional Investigations

ICN Cartel Working Group
SG 1 call series on Leniency

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Decision where and when to apply for leniency
## Whether/when? - elements companies consider

<table>
<thead>
<tr>
<th><strong>Advantage</strong></th>
<th><strong>Disadvantage</strong></th>
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<tbody>
<tr>
<td>• Prisoner’s dilemma: someone else may apply</td>
<td>• Leniency application may be unsuccessful in some countries?</td>
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<td>• Reduction or elimination of fines</td>
<td>• Significant exposure to damages in multiple countries and may accelerate proceedings</td>
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<td>• De-trebling of damages in the US</td>
<td>• If we are involved in subsequent cartels when we will be considered a recidivist (big uplift in fines)</td>
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<td>• (Lesser) reputational impact?</td>
<td>• Possible exposure to anti-corruption investigations</td>
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<td>• Greater visibility and influence over process</td>
<td>• Costs of ongoing co-operation</td>
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<td>• Settlement becomes easier in jurisdictions where available, leading to incremental fine discount</td>
<td>• Debarment in relation to future government concessions?</td>
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Where?

Identifying the countries where risk of investigation/penalty exists

- Dawnraid locations?
- Where customers are located? (cf. special consideration if ‘global market’)
- Where higher risks are?
  - authorities with stronger appetite for int’l cartel enforcement than others
  - authorities with history of significant fines
  - benefit of removing criminal risk

JFTC’s fining policy

- Much smaller discretion than other authorities
- Calculation basis of penalty is limited to Japanese sales
Conflicting requirements by different authorities
Japanese leniency rules

- Introduced in 2006
- Reduction rates

<table>
<thead>
<tr>
<th>Before investigation</th>
<th>After investigation</th>
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<tbody>
<tr>
<td>1st</td>
<td>30%</td>
</tr>
<tr>
<td>2nd</td>
<td>30%</td>
</tr>
<tr>
<td>3rd</td>
<td>30%</td>
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<tr>
<td>4th</td>
<td>30%</td>
</tr>
<tr>
<td>5th</td>
<td>30%</td>
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- Marker position available (completion within 20 calendar days) pre investigation
- Oral submission is available
- Criminal prosecution (company and individuals) is excused for 1st applicant
- Disqualified by coercive conduct to other parties (not just being a ringleader)
- Quality of evidence required for 4th and 5th, or after investigation started
- Only for cartel cases (not for unilateral conduct)
Language barriers

Documentations
- Submissions have to be in Japanese
- Translating evidence (cost, time, risk)

Issues with oral submission
- Difficult coordination between local counsels

More advantageous for Japanese applicant?
- Key evidence tends to be in Japanese
Treatment of joint venture

Would both parents also be covered in addition to the joint venture by a single leniency application?

- Japanese rules
  - Group companies can be covered by a single application
  - However, no concept of ‘joint control’
  - Only one parent can be covered?
- Some other more generous jurisdictions

Parent A
60% with ‘control’

Parent B
40% with ‘control’

Joint Venture

International Cartel Allegation

Who is covered by a single application?
Subject matters for leniency

Hybrid type cartel allegation

- Some countries more active in indirect information exchange through ‘hub-and-spoke’ structure
- In other countries, position is unclear for this new category of cartel – enforcement priority is to challenge each vertical conduct (e.g. resale price maintenance)
- In Japan, no leniency available for vertical conduct

If so, leniency available, but…
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