Discussion Points
Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3

Leniency for Subsequent Applicants

October 23, 2012

1. Introduction

1.1 BIAC appreciates the opportunity to contribute to Working Party No 3’s discussion of leniency for subsequent applicants, a topic of significance to business where there are opportunities to build on best practice internationally.

1.2 Leniency programmes have had a transformative effect in eradicating hard core cartels by improving the chance that they are uncovered and the efficiency with which they can be prosecuted. In BIAC’s view, a leniency programme which offers appropriate incentives for subsequent applicants can improve enforcement to the benefit of the enforcement authority, potential applicants and consumers. Such a programme will be most effective if it is transparent as to its scope and conditions and predictable as to its application and outcomes. An effective programme will offer appropriate benefits in terms of sanctions and provisions in respect of follow-on actions to encourage self-reporting and co-operation. In respect of international cartels, which may be subject to investigation in an ever-growing number of countries, leniency for subsequent applicants can play a particularly important role in improving the likelihood that leniency applications will be made if the terms on which leniency is available are reasonably attractive and reasonably consistent across the various jurisdictions potentially involved. BIAC is concerned by any element of a programme which may allow the authority to pick the winners in the race for leniency.

2. Benefits of leniency for subsequent applicants

2.1 BIAC recognises the value of leniency incentives for the first applicant (which may bring the infringement to the attention of the antitrust agency or enable that agency materially to progress its investigation); as well as for subsequent applicants (which may expand the scope of an existing case or further improve the efficiency of the investigation).

2.2 Many leniency regimes around the world provide the possibility of complete immunity for the first company to self-report a violation. Although many also provide an incentive for the second and subsequent applicants, whether as a formal part of the leniency programme or in

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1 For example, see Baker & McKenzie Global Cartels Handbook (Oxford University Press, 2011, eds Mobley and Denton) which cites 54 regimes.
practice as part of settlement arrangements, not all of even the major antitrust jurisdictions do so. 2

2.3 BIAC considers that a leniency regime offering the possibility of a measured incentive for a subsequent applicant brings a number of benefits for agency and potential applicants alike.

2.4 First, the second applicant's evidence may corroborate - or bring into question - the evidence already received from the immunity applicant. The evidence provided by a subsequent applicant therefore provides an essential check on the veracity of evidence provided by a company which may not be aware of the full facts - or might have misrepresented their own involvement and the operation of the alleged cartel in order to increase the chances of obtaining immunity, for example by omitting evidence of coercion. The subsequent applicant can therefore increase the robustness of an agency's investigation and ultimate decision, including by reducing the likelihood of appeals from other implicated companies who contest the account of a single party which obtained immunity.

2.5 Secondly, the very existence of a potential reward for subsequent applicants can strengthen the incentive for a company to apply for leniency in the first place since:

- companies that are concerned about whether or not they would be first-in (especially in countries that do not provide a marker or reliable information about a prospective applicant's place 'in the queue') may nevertheless apply for leniency in the knowledge that they stand a good chance of obtaining a reduction even if they are not first to apply. Companies will of course be even more inclined to apply for leniency in situations where the agency is able to provide a reliable indication in advance that a prospective applicant would be, at that particular time, in second place. Ideally, the agency would also be able to provide additional reassurance that the prospective applicant would meet other conditions such as the “significant added value” threshold.

- having a reward for subsequent applicants ensures that a company which knows it does not qualify for full immunity (e.g. because it is a coercer/ringleader) will nonetheless be incentivised to come forward and bring what it knows about an infringement to the attention of an agency.

2.6 Thirdly, the possibility of an incentive for subsequent applicants will provide for a smoother and quicker investigation of cases since an applicant obtaining immunity in one country but a reduction for being in second place in another is more likely to provide a waiver for the exchange of confidential information between those countries. In contrast, this is much less likely where the company has elected not to apply at all in one of the countries concerned where there was an unacceptable risk of not receiving any substantial leniency benefits.

2.7 Finally, since infringing practices often develop unknown to the top management, which discovers them only when they are revealed by the first-in applicant, leniency for subsequent applicants can be an incentive to launch internal investigations which may benefit the company's compliance efforts generally and may increase the likelihood of “amnesty plus” type leniency applications.

3. Transparency and predictability for second and subsequent applicants

3.1 An important hallmark of an effective leniency programme is transparency and predictability as to the programme’s applicability and outcomes. As regards subsequent applicants, it is BIAC's view that:

2 Those which do include most but not all EU Member States, Australia, Canada, Japan, Korea, New Zealand, India and Singapore. In contrast, jurisdictions whose leniency programmes do not reward subsequent applicants include Brazil, Ireland, Israel, South Africa and Ukraine. The US offers incentives informally by way of relaxing sentencing recommendations, but not as part of its formal leniency programme.
an antitrust agency should provide as much guidance as possible on the conditions which apply to leniency applicants. Conditions which involve substantial discretion in respect of subsequent applicants, such as a requirement that the applicant provide information of “significant added value” to the authority should be minimised and guidelines should clarify how the authority will exercise its discretion, e.g. by describing the types of evidence that are likely to add value to an investigation. For example, the guidelines could indicate that written evidence from the time of the infringement and directly relevant incriminating evidence will be given a high value (in contrast with evidence requiring corroboration from other sources). In BIAC’s view, an authority should have a working presumption that a second-in applicant’s information will always meet the relevant threshold given the vital corroborative role such evidence has (for the reasons outlined above in paragraph 2.4).

the extent of the reduction in sanctions and other benefits available to subsequent applicants should be clarified, so far as practicable, by guidelines and other published information on the authority’s practice. For example, some authorities publish the percentage range of the reduction available to the second applicant and to the third and subsequent ones. The actual value attributed to subsequent applicants’ cooperation must draw a careful line between being too generous – and so undermining the incentive to be first to self-report – and being an insufficient incentive for vital cooperation from subsequent applicants.

the antitrust agency's leniency guidance should clarify that a subsequent applicant's fine will not be increased as a result of any new evidence adduced by them which increases the scope/duration of the infringement under investigation. Failure to provide this confirmation or uncertainty in this respect erodes the incentive to apply for leniency and reduce the likelihood of uncovering the full extent of self-reported cartels.

4. A factor to be considered in establishing the conditions for the award of leniency to second and subsequent applicants, particularly a requirement for added value evidence, is the need for fair and proportionate treatment for cartel members who come forward to self report. One potential distortion of making a leniency award to subsequent applicants conditional upon added value evidence is that this may place a comparatively less guilty co-cartelist (e.g. one whose participation in the cartel was more peripheral) at a disadvantage compared with that of a ‘more guilty’ cartelist who is likely to have more contemporaneous and complete evidence about the cartel. To avoid such a distortion, the agency should address the value of the information provided by the subsequent applicant by reference to what was, in fact, available to that applicant and taking full account of the value of corroboration even where the subsequent applicant’s evidence is not new.

5. The international dimension

5.1 As more jurisdictions introduce and enforce antitrust laws, the multiplication of possible sources of investigation and sanctions can make it more difficult for a company which discovers that it has been involved in a cartel to self-report by applying for leniency. For many years after the scope and benefits of the 1993 US amnesty programme were first revealed, the balancing of risk -- i.e., risking criminal sanctions versus applying for amnesty -- effectively drove the leniency decision in favour of self-reporting in almost any case involving US jurisdiction. The situation is no longer necessarily so clear as the international landscape has developed with increasing risks and sometimes less clear and consistent benefits. Indeed, the current international landscape has been described “as a jigsaw puzzle

where not even the number of pieces - let alone the overall picture to be achieved - is apparent.\(^4\) Such a situation is sub-optimal from both the agency and business perspectives.

5.2 The incentives to self-report will be maintained if the programmes applicable to subsequent applicants are internationally consistent, to the extent possible given the different legal, procedural and sanctions regimes. BIAC strongly supports the development of arrangements to assist a company which has decided to self-report to receive appropriate and consistent benefits internationally. One proposal along these lines has been the creation of a global “one-stop shop” whereby applicants would apply for leniency markers through an international clearinghouse of sorts. Each participating jurisdiction would then apply its own policies and procedures to determine whether the applicant successfully perfects its marker.\(^5\)

6. **Confidentiality considerations and Impact on damages actions**

6.1 BIAC favours the adoption of safeguards designed to ensure that any leniency applicant is not worse off than non-cooperating co-cartelists as result of applying for leniency. For example, BIAC advocates the use of paperless leniency application procedures so as to reduce the availability of evidence (which would not exist absent a leniency application) to support a follow-on action for damages.\(^6\) Safeguards are also important in order not to deter potential applications in countries where individual criminal sanctions are non-existent or rarely applied and which may create concerns regarding an extension of the procedure to jurisdictions where such sanctions apply.

6.2 To ensure that the incentive to apply for leniency remains attractive, BIAC considers that agencies should provide successful leniency applicants (including second and subsequent applicants) with some benefit as regards the increasingly inevitable exposure in multiple jurisdictions to follow-on civil damage actions. For example, the option of reducing otherwise punitive damages or removing any joint and several liabilities for the leniency applicants should be explored thoroughly by the agency and appropriate incentives for a prospective immunity applicant should be provided.

7. **'Amnesty plus' and subsequent applicants**

7.1 BIAC notes that the availability of a system of ‘amnesty plus’ such as that used by the US authorities can have the effect of increasing the likelihood that an agency’s leniency system will be used by subsequent applicants. The incentive for a subsequent applicant to apply is greater because a company that is aware of a second infringement may be more inclined to apply for leniency in relation to the first infringement in the knowledge that it might obtain a benefit in respect of both violations even if it only managed to achieve second place in connection with the first infringement.


\(^5\) John Taladay, *Time for a Global "One-Stop Shop" for Leniency Markers*, ANTITRUST, (forthcoming Fall 2012). While this particular proposal focuses on first-to-file status, the underlying logic could be expanded to include subsequent applicants as well.

\(^6\) In order to guarantee the protection of the leniency applicant, third party access to any authority’s file relating to leniency applications should, in BIAC’s view be prohibited by law, including by specific legislation where necessary.
8. **Genuine self-reporting should be rewarded**

8.1 BIAC’s view is that leniency programmes should encourage genuine self-reporting and not serve as a basis for the authority to ‘pick winner(s)’ to whom rewards will be given. Any provision of a programme which gives or appears to give the authority a discretion to pick the companies which will benefit from leniency, such as the possibility for an agency to award "affirmative amnesty" (which describes a situation where the agency becomes aware, in the context of one investigation, of an infringement in another market and approaches an implicated company inviting it to apply for amnesty) will lead to at least the appearance of inappropriate favouritism. In the context of international cartels there may be particular concerns that local companies will be best known and trusted by the local agency and so more likely to be inappropriately favoured.

9. **Conclusion**

9.1 BIAC looks forward to participating in these discussions and to contributing to the elimination of hard core cartel behaviour by assisting in the development of best practice for leniency programmes. In BIAC’s view an effective leniency programme will be transparent and ensure that all potential leniency applicants, whether or not first to apply, will have the incentive of being in a better position as a consequence of applying for leniency than otherwise. Internationally, best practice should aim for consistent policies and would ideally incorporate a one-stop-shop for the initial notification of leniency applications.