

United States

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REGULATION

1. Please give a brief overview of the legislation that allows a leniency programme, the authority that administers it and details of any published guidance.

The Department of Justice Antitrust Division (DOJ) has two leniency policies:

- The Corporate Leniency Policy (also referred to as the amnesty policy or amnesty programme). The current version of this policy was introduced in 1993.
- The Leniency Policy for Individuals, issued in 1994.

Both policies can be found on the DOJ's website (*see box, The regulatory authority*). The DOJ can apply these policies at its discretion when deciding whether to grant immunity from prosecution to an undertaking or person voluntarily reporting their participation in a criminal violation of section 1 of the Sherman Act 1890. Leniency policies do not apply to civil enforcement by the DOJ or the Federal Trade Commission.

The DOJ's application and interpretation of these policies have also been discussed in speeches made by the DOJ officials, which can be found on the DOJ's website. (*See documents at www.justice.gov/atr/public/criminal/leniency.htm*.)

2. What infringements of competition law does the leniency programme cover?

The leniency policies apply to conduct treated as criminal under the anti-trust laws, such as price-fixing, bid-rigging and other conspiratorial conduct involving cartels that violate section 1 of the Sherman Act.

3. Please provide examples of notable recent cases in which the leniency programme has been applied.

Notable recent cartel investigations prompted by leniency applications are in the air transportation and LCD panel industries. According to recent press releases, the air transportation investigation has resulted in charges being brought against 21 airlines and 19 executives with fines of over US\$1.7 billion (as at

1 November 2010, EUR1 was about US\$1.4) being imposed. In the LCD panel investigation, eight companies and 21 executives have been criminally charged and US\$890 million in fines have been imposed. The DRAM (dynamic random access memory for personal computers and related products), rubber chemicals, vitamins and graphite electrodes investigations are other notable examples of investigations prompted by leniency applicants.

AVAILABILITY OF LENIENCY

4. Is full immunity from civil fines available and what conditions must be met for immunity to be granted?

Civil fines are not imposed for breaches of the US competition laws. The fines imposed are criminal in nature.

Undertakings that are first to apply and qualify are granted full immunity from criminal prosecution and fines under the Corporate Leniency Policy. This can be extended to the officers, directors and employees of that undertaking. Individuals can obtain full immunity from prosecution, fines and imprisonment under the Leniency Policy for Individuals. For applicable conditions, see *Question 7*.

A successful leniency applicant can also substantially reduce the exposure to civil damages claims brought by injured private parties (*Antitrust Criminal Penalty Enforcement Act of 2004*). Instead of potential liability for triple damages caused by the entire cartel, the maximum aggregate recovery in a private civil case against an undertaking granted leniency is the provable, single damages caused by the sales of that undertaking. This is provided that the undertaking co-operates with the injured parties in accordance with the statute.

5. Is there a sliding scale of available leniency from civil fines (for example, if full immunity is not available, are decreasing levels of leniency available for subsequent applicants)?

Fines imposed for breaches of US competition laws are criminal, rather than civil. There is no formal sliding scale of reduced fines available for those that are not the first to apply for leniency, but an undertaking that does not qualify under the Corporate Leniency Policy can still benefit from co-operation with the DOJ (*see Question 7*).

6. Is immunity or leniency for civil fines available to individuals (for example, managers and employees of an undertaking that has been granted immunity or leniency)? If so, what conditions apply?

Civil fines are not imposed. Co-operating individuals may obtain immunity or leniency from criminal liability that may include fines and imprisonment (see *Questions 7*).

7. Is immunity or leniency available for companies and/or individuals in relation to criminal prosecution? If so, please state:

- **The circumstances in which immunity or leniency from criminal prosecution is available.**
 - **Whether criminal proceedings can be brought against individuals of an undertaking that has been granted immunity or leniency (whether from civil fines or criminal prosecution).**
 - **How employees' interests can be protected when a company applies for leniency.**
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Circumstances

Leniency is available from criminal prosecution under the Corporate Leniency Policy and the Leniency Policy for Individuals (see *Question 1*).

Corporate Leniency Policy. For corporate applicants that are first to apply, leniency is available in two situations:

- **Part A.** Where an application is made before an investigation has begun and the DOJ has not yet received information about the activity from another source.
- **Part B.** Where an application is made after an investigation has begun and both:
 - the undertaking is the first to come forward; and
 - the DOJ does not yet have evidence against undertaking that is likely to result in a sustainable conviction.

The DOJ will not consider an application for leniency if the applicant coerced others to join, or was a leader in, the illegal activity.

The following conditions apply to leniency applications made under Parts A and B of the Corporate Leniency Policy:

- **Termination of illegal activity.** Upon discovery, an undertaking must take prompt and effective action to terminate its participation in the activity.

Termination can be accomplished by reporting the illegal activity to the DOJ and refraining from further participation in it, unless the DOJ approves continued participation. It is not necessary to announce withdrawal to the co-conspirators.

- **Complete co-operation and candour.** An undertaking must report the wrongdoing with candour and completeness and provide full, continuing and complete co-operation to the DOJ throughout the investigation. The confession of wrongdoing must be a corporate act, not merely isolated confessions of individual executives. In summary, the co-operation required by the DOJ's model leniency letter agreement includes:

- providing a full statement of all facts known to the undertaking relating to the reported activity;
- providing, promptly and without compulsion of a subpoena, all unprivileged documents or other items in its possession, custody or control, wherever located, requested by the DOJ;
- using its best efforts to secure the voluntary co-operation of current and former directors, officers and employees and facilitating their appearance for interviews or testimony;
- using its best efforts to ensure that current and former directors, officers and employees who co-operate with the DOJ respond to all questions completely, candidly and truthfully and without attempting to falsely protect or implicate any person or entity.

- **Restitution.** Where possible, the undertaking must make restitution to injured parties, which includes injured businesses, government entities and individuals, except for injuries independent of any effects on the US commerce. Failure to make restitution is excused only when it is not possible in practice.

There is no formal leniency policy for later corporate applicants. However, the DOJ can agree to ask a court to impose a fine below the level otherwise recommended by the Federal Sentencing Guidelines in exchange for co-operation and an agreement to plead guilty. The DOJ's Deputy Assistant Attorney General for Criminal Enforcement, Scott Hammond, provided guidance on the approach of the DOJ in those circumstances. (See, for example, Mr. Hammond's speech of March 2006 at www.justice.gov/atr/public/speeches/215514.htm.) In most cases, the DOJ will recommend the minimum fine under the Federal Sentencing Guidelines, minus a percentage discount, to be determined by the timing and value of the co-operation and whether the undertaking qualifies for Amnesty Plus (see *Question 13*).

Leniency policy for individuals. An application under the Leniency Policy for Individuals is only considered if both:

- At the time the individual comes forward to report the illegal activity, the DOJ has not yet received information on the illegal activity from another source.
- An investigation has not yet begun.

The only specific condition imposed under the Leniency Policy for Individuals is that the individual must report the wrongdoing with candour and completeness and provide full and complete co-operation throughout the investigation.



The DOJ can also decide that an individual who does not qualify for immunity under the Leniency Policy for Individuals can provide sufficient value to justify:

- Granting “use immunity” (which usually means non-prosecution for the violation).
- Recommending reduced criminal sanctions.

Proceedings against individuals

In addition to the possibility of an individual making his own application for leniency, where an undertaking qualifies for leniency under Part A of the Corporate Leniency Policy (*see above, Circumstances: Corporate Leniency Policy*), leniency and immunity from prosecution are also granted to officers, directors and employees of the undertaking who both:

- Admit their involvement in the illegal anti-trust activity with candour and completeness.
- Continue to assist the DOJ throughout the investigation.

If an undertaking qualifies for leniency only under Part B of the Corporate Leniency Policy (*see above, Circumstances: Corporate Leniency Policy*), the express terms of the Corporate Leniency Policy suggest that leniency is not automatically available to officers, directors and employees even if they are prepared to meet the requirements described in the preceding paragraph. The policy says that officers, directors and employees who come forward with the undertaking are considered for immunity from criminal prosecution on the same basis as if they had approached the DOJ individually. However, the practice has generally been to include an undertaking’s officers, directors and employees within the protection of the leniency agreement in exchange for their full co-operation.

Protection granted to current officers, directors and employees of an undertaking that is granted leniency continues if they leave their employment with that undertaking. An undertaking granted conditional leniency can also seek to have one or more of its former officers, directors or employees included in the grant of leniency.

Employees’ interests

An undertaking can seek to protect the interests of its employees by including them in the undertaking’s leniency agreement. At an appropriate time, depending on the facts and circumstances of the case, an undertaking’s lawyer may recommend that certain employees be represented by separate lawyers.

APPLICATION PROCEEDINGS

8. When should an application for leniency be made?

The initial contact of the DOJ should be made as promptly as possible after the violation is discovered. This is because leniency is available only to the first person or entity to apply and qualify for leniency.

9. Please set out how an application for leniency must be made. In particular:

- To which authority should an application be submitted?
- Who should make the application (for example, the company itself, its legal adviser or an individual employee)?
- Is it possible to obtain informal guidance on a confidential basis before submitting an application, to determine whether an undertaking will qualify for full immunity or leniency?
- What form of application is used?
- Can a marker be obtained to secure a certain level of leniency until all conditions can be met?
- What type of information or evidence are applicants expected to provide?
- Are oral statements accepted?
- Are short-form applications in accordance with the European Competition Network (ECN) Model Leniency Programme accepted?

- **Relevant authority.** An application for leniency must be made to the DOJ.
- **Applicant.** Initial contact should be made orally by a lawyer representing the potential application (*see below, Form of application*).
- **Informal guidance.** Informal guidance regarding the availability of leniency in relation to a particular industry or set of circumstances can be obtained from the DOJ on an informal, confidential basis and without identifying the potential applicant.
- **Form of application.** There is no particular form of application. Initial contact should be made orally by a lawyer representing the potential applicant.
- **Markers.** An applicant can obtain a marker to allow it reasonable time to complete its own investigation, gather relevant evidence, and otherwise take the steps required to prepare itself for making an application.
- **Information/evidence.** The applicant should initially supply information on the industry involved in the conspiracy and the general nature of the conspiracy sufficient to allow the DOJ to determine whether it is already investigating the conduct in question or whether another leniency candidate is ahead of the undertaking. If leniency is available, the applicant is expected to provide complete co-operation and candour (*see Question 7, Circumstances: Corporate Leniency Policy*).
- **Oral statements.** Oral statements are in fact expected (*see above, Form of application*), and the DOJ does not treat statements made by the applicant’s lawyer as a waiver of the attorney-client privilege.
- **Short-form applications.** Not applicable.



10. Please set out the procedure and timetable.

There is no specified timetable or procedure. An application for leniency might be expected to proceed as follows:

- The applicant contacts the DOJ to determine whether leniency is available in relation to the conspiracy in question.
- The applicant completes its investigation, identifies and secures the co-operation of witnesses within the organisation, and prepares itself to provide complete co-operation.
- A series of meetings take place between the applicant's representatives and the DOJ, along with possible interviews of witnesses.
- If the DOJ is satisfied that the applicant qualifies for leniency, the applicant is given a letter advising it that it is conditionally accepted into the Corporate Leniency Program, meaning that the applicant must satisfy certain obligations over time (see *Question 7, Circumstances: Corporate Leniency Policy*).
- After the obligations in the conditional leniency letter are met, usually after the investigation is concluded, a final letter confirming that the leniency application has been granted is provided to the applicant.

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants (for example, could full immunity become available again)?

Leniency can be withdrawn if the party granted leniency fails to meet the conditions set out in the leniency letter agreement (see *Question 7, Circumstances: Corporate Leniency Policy*). General principles of contract law apply. Once conditionally granted, leniency is rarely withdrawn. In one noteworthy but unique case, the DOJ revoked the leniency granted to the London-based company of Stolt-Nielsen S.A., certain of its affiliated companies and their executives because Stolt-Nielsen had allegedly misrepresented that it had taken prompt and effective action to terminate the alleged unlawful conduct. The DOJ's revocation of Stolt-Nielsen leniency became the subject of substantial litigation which ultimately resulted in the reinstatement of Stolt-Nielsen's leniency grant.

Although the withdrawal of one applicant's leniency may present an opportunity for another to apply for leniency, the DOJ may conclude that it already has sufficient evidence to proceed with a criminal prosecution and declare leniency unavailable.

SCOPE OF PROTECTION

12. What is the scope of leniency protection after it has been granted (for example, does it apply only insofar as the infringing activities are revealed in information provided by the applicant to the competition authority, or also where the authority collects further evidence of infringement)?

The leniency applies only to the conduct disclosed by the applicant. If the investigation by the DOJ leads to evidence of illegal activity not covered by the conditional grant of leniency, the undertaking can be prosecuted for that conduct.

THE REGULATORY AUTHORITY

**United States Justice Department - Antitrust Division,
Criminal Enforcement**

Head. Scott Hammond (Deputy Assistant Attorney General)

Contact details. 950 Pennsylvania Avenue, NW
Washington DC 20503

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W www.usdoj.gov/atr

Responsibilities. Criminal enforcement of US anti-trust laws.

Person/department to apply to. Scott Hammond (see above, Head).

Procedure for obtaining application documents. Not applicable.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

The DOJ has introduced a concept called Amnesty Plus. Even if an undertaking does not qualify for leniency for its involvement in an illegal activity involving a product in one market, the DOJ will recommend a substantially reduced fine for that violation if the same undertaking qualifies for leniency by disclosing evidence of an illegal activity involving a product in another market.

CONFIDENTIALITY AND DISCLOSURE

14. In relation to confidentiality:

- **Is the identity of a leniency applicant disclosed during an investigation or in a final decision?**
- **Is information provided by a leniency applicant passed on to other undertakings under investigation?**
- **Can a leniency applicant request anonymity or confidentiality of information provided?**

- **Identity disclosure.** The DOJ policy is not to disclose the identity of a leniency applicant unless ordered by a court or with the applicant's consent.
- **Information disclosure.** The DOJ can use the information in connection with the investigation of others but does not disclose such information to others, except at a possible criminal trial of other defendants, when ordered by a court, or with the undertaking's consent (see above, *Identity disclosure*).
- **Confidentiality requests.** An applicant can expect that the DOJ will favour a request for confidentiality, but subject to any future court order requiring disclosure.



15. In relation to statements made in support of a leniency application:

- Can information submitted in your jurisdiction be made subject to discovery orders in the domestic courts?
- Can information submitted in your jurisdiction be made subject to discovery orders in foreign courts?
- Can information submitted in foreign jurisdictions be made subject to discovery orders in the domestic courts?

- **Domestic submissions and domestic discovery.** This has not become an issue in the US litigation because the DOJ expressly discourages the making of written submissions in connection with a leniency application, and they generally are not made. However, evidence and knowledge of the alleged violation in the possession, custody or control of a person or undertaking is subject to discovery in US court proceedings.
- **Domestic submissions and foreign discovery.** Written submissions are generally not made to the DOJ in connection with a leniency application. Evidence or knowledge concerning the alleged offence may be subject to discovery orders of a foreign court depending on the law applicable in that court, assuming the parties and evidence are subject to the jurisdiction of that foreign court.
- **Foreign submissions and domestic discovery.** Although statements made in support of leniency in foreign jurisdictions are not automatically protected from a US court's discovery order, courts that have considered the issue have applied principles of comity and afforded some level of deference to the views of the foreign authority. In two cases, *In Re Rubber Chemicals Antitrust Litigation*, 486 F.Supp. 2d 1078 (N.D. Cal. 2007) and *In Re Methionine Antitrust Litigation* (No. C-99-3491 CRB (SCS) (N.D. Cal. 29 July 2002), the US district court deferred to the opposition asserted by the European Commission (Commission) and denied a request for the discovery

of a leniency application made to the Commission. However, a similar request for a discovery order was allowed in *In Re Vitamins Antitrust Litigation* (Misc. No. 99-197 (TFH) (D.D.C. 18 December 2002), notwithstanding the opposition of the Commission and the application of comity principles.

INTER-AGENCY CO-OPERATION

16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

The DOJ has said that, without a court order or an applicant's consent, it will not disclose the identity of a leniency applicant or information provided by a leniency applicant to a foreign government. However, the DOJ will co-operate with a leniency applicant in co-ordinating its submissions to regulatory authorities in other jurisdictions. In addition, the DOJ frequently seeks waivers from leniency applicants to share information with foreign regulatory authorities from which an applicant has also sought and obtained conditional leniency. The DOJ relies on treaties and other agreements negotiated with those authorities (or their home countries) to obtain information from abroad. The DOJ also routinely participates in international forums (for example, the Organisation for Economic Cooperation and Development and the International Competition Network) in which it discusses anti-cartel enforcement policy and its enforcement experience with other authorities.

PROPOSALS FOR REFORM

17. Please summarise any proposals for reform.

There are no pending proposals to reform or revise the US leniency policies.

CONTRIBUTOR DETAILS



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Areas of practice. Anti-trust litigation (criminal and civil); complex business litigation.

Recent transactions

- Ongoing representation of confidential Japanese corporate client in major multi-national cartel investigation conducted by Antitrust Division of the US Department of Justice.
- Ongoing defence of Baptist Memorial Healthcare Corp. in anti-trust class action alleging collusion with respect to the compensation paid to registered nurses.
- Representing confidential US corporate client targeted for indictment by Antitrust Division of the US Department of Justice for alleged bid-rigging and obtaining a decision not to prosecute the client.