

Leniency Theory and Complex Realities

KEYWORDS: Leniency; Cartels; Deterrence; Competition Law; Compliance; Corporate Governance.

December 2014

Leniency
Theory and
Complex
Realities

BACKGROUND

- Leniency policies are now a standard feature of competition law enforcement regimes and have become the most important tool for detecting cartels. They are thought to both disrupt active cartels and deter future infringements from occurring. The fact they are a far less resource intensive way of uncovering cartels (as compared to alternative detection tools) makes the policy hugely attractive to competition authorities.
- Much of the existing literature makes three key assumptions about the way leniency programs operate.
 1. Firms as Rational Monoliths - A firm's decision to join or leave a cartel is rational, primarily determined by relative profit incentives, and is made at an institutional level.
 2. Predictability - Accurate information about the expected benefits of the cartel, as well as the likelihood of detection and the size and likelihood of punishment, is available to firms, to enable them to repeatedly weigh the expected costs and benefits as to inform their behaviour.
 3. Deterrent Penalties and Credible Threat of Detection - Leniency policies are underpinned by penalties of sufficient magnitude to disrupt and deter and by a credible threat of detection absent the leniency policy.

METHODOLOGY

- The paper employs a combination of empirical evidence from EU cartel decisions, responses to consultations and some anecdotal evidence.
- The paper assesses the robustness of the assumptions outlined above in a jurisdiction where there are no sanctions against the individual.

KEY FINDINGS

- Balancing the expected benefits of joining a cartel against the likely sanction and probability of detection may be very difficult in practice.
- The decision to form a cartel is not generally made by the firm, but by individuals operating outside its institutional framework, in a deliberate and clandestine manner.
- In the absence of sanctions against the individuals responsible, the deterrent effect of corporate fines, imposed some years after the infringement was committed, may be limited and may not outweigh the likely cartel gains to the firm.
- There is an apparent over-reliance on leniency as a method of detection, leaving only a weak credible threat of detection through investigations alone.
- Empirical evidence suggests leniency may largely be uncovering cartels that have ceased to operate or are close to detection - especially because of investigations in neighbouring industries.

W: www.competitionpolicy.ac.uk
T: +44 (0)1603 593715
A: UEA, Norwich, NR4 7TJ

- It may be misleading to describe the leniency process as a ‘race’ to the competition authority. Before making the decision to approach the competition authority, the firm must complete its own internal investigation in the face of increasingly sophisticated methods employed by individuals seeking to hide their activities. The decision is also fraught with uncertainties and dangers that must be balanced against the incentive to come forward.

POLICY ISSUES

- The findings lead the authors to identify three recommendations for the strengthening of leniency policies and cartel enforcement more generally:
- The need for individual sanctions - These are necessary to ensure leniency has a tangible deterrent effect on those responsible and should be applied as a complement to fines against the firm. These can either be criminal or civil sanctions and must be designed to incentivise co-operation within the framework of the leniency policy.
- Maintaining a credible threat - Governments must ensure that competition authorities have the necessary resources and powers to uncover a good number of active cartels without the use of leniency. This is especially important in ensuring enforcement has genuine reach throughout the economy rather than just focusing on clusters of cartels in particular industries.
- Helping firms strengthen compliance and detection - The ‘race’ for leniency, if it is to be so described, exists both between firms and within firms. More could be done to encourage and help firms set up internal mechanisms that allow them to detect transgressions by employees at an earlier stage or prevent them from occurring in the first place

THE CCP

The Centre for Competition Policy (CCP), at the University of East Anglia, undertakes competition policy research, incorporating economic, legal, management and political science perspectives, that has real-world policy relevance without compromising academic rigour.

FOR MORE INFORMATION

The full working paper 14-8 and more information about CCP and its research is available from our website: www.competitionpolicy.ac.uk

ABOUT THE AUTHOR

Andreas Stephan is a Professor of Competition Law and the Centre for Competition Policy and UEA Law School, University of East Anglia.

Ali Nikpay is a Partner of Global Antitrust and Competition at Gibson, Dunn and Crutcher.

Stephan wishes to acknowledge the contribution of the ESRC who supported their research through the Centre for Competition Policy funding (ref: RES-578-28-0002)

W: www.competitionpolicy.ac.uk

T: +44 (0)1603 593715

A: UEA, Norwich, NR4 7TJ