LATHAM & WATKINS LLP

Procedural and Substantive Conflicts in Multi-Jurisdictional Cartel Investigations

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The challenges of more cooperation

- Greater enforcement cooperation among agencies has led to an increase in coordinated immunity/leniency applications
- Leniency and immunity applicants, but also other parties, are faced with many of the following issues:
  - Different timing of investigative steps
  - Different tests for marker/immunity/leniency
  - Different scope of proceedings, hence of immunity/leniency
  - "Leaks" from leniency to non-leniency jurisdiction
  - Risk of evidence "leaking" to third parties, such as plaintiffs
  - Conflicting demands on applicant's internal investigation
  - Difficulty of reconciling demands on witnesses
  - Inability to comply with strict confidentiality requirements in leniency regimes (such as the EU regime)
- The enforcement agencies are constrained by their legal systems and by their national courts

Why is this a concern?

- For immunity and leniency applicants
  - International enforcement is perceived to lack predictability
  - The uncertainty adds expense and complexity to procedures
  - Outcomes may be asymmetric between jurisdictions
  - Increased risk of losing leniency or immunity
  - Class action plaintiffs get better evidence, because applicants cannot control flow of information
- Overall, the conflicts affect the cost-benefit analysis undertaken when assessing whether and where to apply to leniency
- This undermines the incentives in leniency programmes

Understanding the problems

- Both agencies and leniency applicants must understand the issues in order to deal with them
- We must realise that some problems are real and others may be perceived,
- But, when a company is assessing whether to apply for leniency, perception is reality!
- The following slides set out examples of conflicts – not an exhaustive list, just the most obvious problems..

What are the issues to look out for?

1. In immunity, symmetric and similar markers give certainty
2. Where leniency scope is asymmetric, information waivers are unlikely to be granted, or will be asymmetric
3. Applicants rarely get immunity in all jurisdictions, so governments must respect the "closed circuit" of immunity information
4. The risk of government disclosure of statements (to civil plaintiffs and third parties) is a disincentive to cooperation/leniency applications in some jurisdictions
5. Criminal / civil procedures differ between jurisdictions; witnesses will be guided by criminal exposure – be aware of what you ask!
6. All enforcers benefit from the internal investigations of the immunity applicant – Don't hobble the investigation!

Case 1: Not all markers are created equal

- **Timing and requirements for markers differ considerably**
- **Substance for markers**
  - Some jurisdictions will grant marker with limited information
  - Others require documents and statement
  - How much "where, when, what and who" must be provided
  - Defining scope of conduct / different from scope of proceeding
  - Must one give information from outside the jurisdiction?
- **Duration of marker and requirements for perfecting**
  - Some frontload the investigation (all key witnesses/docs to perfect)
  - Others will perfect based on scope/time/geographic overview
  - Waivers will often be required before dawn raids and perfecting
  - .. and before immunity and scope is settled
- **Covert surveillance by enforcement authorities**
  - Differing powers, unclear instructions
  - Cross-border powers to authorise unlawful acts (UK/EU & US/EU)
  - Increased civil liability from continuing unlawful conduct
  - Data privacy? Can company turn over phone records w/out consent?

Case 2: Asymmetric scope of leniency and effect on communications between agencies

- Waivers at marker stage are the norm in immunity cases
- Where products are complex, it can be difficult to define the scope of the collusion and therefore the scope of immunity
- A narrow scope ruling leaves the applicant at risk
- In another jurisdiction, applicant may get broad scope, and have continuing cooperation obligation requiring statements/documents

- Problem: The authority which gives the narrow scope ruling may later get information from the applicant, via another authority that gave a wider scope of immunity
- Questions:
  - Must waivers be tailored (bilaterally) to suit the narrowest scope ruling?
  - No multilateral exchanges among authorities?
  - What about information provided by applicant before immunity scope was finally settled? (e.g., during marker period)

Case 3: The "closed circuit" of immunity

- Increasingly impossible to predict whether immunity will be available in all jurisdictions
  - Today, you get a mix of immunity, leniency or nothing
  - Even with 14 applications, quite a few were left out
- With this picture, immunity only works if agencies ensure that immunity information does not flow to leniency jurisdictions, or to jurisdictions that have no 2nd position
- Key issues are
  - Early disclosure in administrative process (Japan, Brazil)
  - Disclosure of evidence in court (Australia, UK, EU?, US?)
- Are there solutions?
  - Restrictions on right to "export" documents disclosed to parties in case (as in EU)
  - Protective orders in court; enforceability

Case 4: Information "leaking" from enforcement agencies to civil plaintiffs

- One cannot avoid all documents provided in a leniency process from being disclosed in the course of proceedings
- But leniency incentives require that applicants are no worse off as a result of leniency application
- The real question is when and how much is disclosed, and what form it is in ("road map" to case)
- How does one balance the disincentive to apply for leniency and the encouragement of civil enforcement?
  - Public vs. private enforcement – choices differ by legal culture
  - A difference between documents and leniency statements?
  - Will witness interview records be released?

Case 5: Witnesses and their incentives

- Enforcement agencies/courts use witnesses differently
- Some systems require a broad range of persons with knowledge to be listed to get immunity (Brazil, Australia)
  - This may imply that they should be prosecuted in other countries
  - Practice makes it more difficult to obtain cooperation of witnesses, or leads to witnesses "dropping out"
- In some cases, witnesses are exposed to statements by the company or other witnesses (Brazil)
  - This may contaminate them for other proceedings (UK, and less the US)
- Requirement to make vague/collective statement of guilt
  - This can affect outcomes in systems where case may depend on whether witness admits "dishonest intent"
- Issue:
  - Is there a need for agency coordination? Is it possible?
  - How does one deal with incentive effects of naming persons (e.g., new Brazilian and Australian listing requirements)

Case 6: Conflicting demands on immunity applicants' internal investigations

- Differing evidence rules and disclosure requirements in criminal and administrative procedures are creating strains
- *British Airways* investigation in UK dropped because of failure to uncover/disclose documents to the defence
- Authorities seeking greater control over investigative steps:
  - Document searches and chain of custody
  - Witness interviews
  - Contaminating evidence and witnesses
  - Legal privilege and waiver of same in some jurisdictions; What effect for incentives and privilege elsewhere?

Are there solutions? What is the effect?

- Applicants can reduce exposure to conflicts by carefully crafting their immunity/leniency applications
- Enforcement agencies can cooperate to identify and address issues that affect leniency incentives, but some problems result from the very legal system (e.g., evidence demands in court)
- Applicants can carefully assess the risks and benefits in applying for immunity/leniency in all or only some jurisdictions
- Sometimes applicants will conclude that applying in a jurisdiction is not worth the risk, in particular if there is only a limited local presence
- This may mean that some authorities will increasingly face cases where it may be difficult to "reach" targets

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