

LENIENCY AND PRIVATE ENFORCEMENT

19/09/2018

ICN Webinar Incentives
and Disincentives to
Leniency Agreements –
Private Enforcement

Private Enforcement (?)

Leniency Agreement Ordinary Content

CARTEL LENIENCY CORNERSTONES (Hammond)

- a) Severity of punishment;
- b) Probability of Detection;
- c) Transparency and legal certainty about the agreement

INTERNATIONAL BENCHMARKS

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UNITED STATES

Mature system (*95% of antitrust cases are private actions*)

Key points:

- Treble damages (economic incentive – dominant deterrence effect over the compensation effect);
- Joint and several liability;
- Exclusion of passing-on defence (in favour of direct purchaser(s))
- Class actions and follow-on actions

EUROPEAN UNION

Directive 104/2014

Key Points:

- Only full compensation (refuse of punitive damages)
- Possible for defendants to invoke passing-on of overcharges
- SME and immunity recipient: joint and several liability limited to direct and indirect purchasers, others: subsidiary. Compensation Settlements: asymmetric regimes
 - Binding effect of public enforcement decisions

Table

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Private actions are possible?	Yes.	Incentive to apply to leniency to undermine potential consequences
	No.	Incentive to apply to leniency because of legal certainty
Private actions are usual/likely? (if possible)	Yes	Incentive to apply to leniency to undermine potential consequences
	No.	Potential applicants should be almost indifferent based precedents rather the law
Immunity to Treble Damages (if likely)	Yes	Incentive to apply to leniency to undermine potential consequences
	No	Potential applicants should consider a disincentive
Exclusion of joint and several liability to immunity recipient (or limited to direct and indirect purchasers)? (if likely)	Yes	Incentive to apply to leniency to undermine potential consequences
	No	Potential applicants should consider a disincentive
Disclosure of evidences provided by the immunity recipient (if likely)	Yes	Potential applicants should consider a disincentive (adjustable, according to the moment)
	No	Potential applicants should consider a incentive (adjustable, according to the moment)

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Thank You!

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