

LENIENCY AND DAMAGE LIABILITY FOR CARTEL MEMBERS IN BRAZIL

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PINHA; Lucas Campio¹, BRAGA; Marcelo José²

RESUMO

In the 90s a new tool for fighting cartels was released by antitrust authorities in many countries, the so-called leniency programs. In Brazil, it was adopted in 2000 and became one of the most important tools in fighting anticompetitive behaviors. A recent debate on leniency policies is the interplay between the public and the private competition law enforcement. The lack of a well-established set of rules regarding damage claims may be harming the effectiveness of the Brazilian Leniency Program, either by discouraging the wrongdoers from applying for leniency in already formed cartels or by not being threatening enough to deter the cartel formation. The main objective of this paper is to analyze the best policies for leniency applicants regarding the damage liability and the consequences on the cartel behavior based on a microeconomic model. We conclude that the optimal policy is providing immunity from damage claims to the leniency applicant. The trend in Brazil is the encourage of damage claim lawsuits, including the Brazilian Senate legislative bill Nº 283/2016 that proposes double refund for harmed parties and limited liability for leniency applicants (direct purchasers, single and not jointly and severally liable). However, we show that stimulating damage claims without providing immunity for the recipient is not optimal in terms of deterrence, as it reduces the incentives to report. Extensions confirm the following: the immunity is even more effective when there is risk of betrayal; the immunity is the best policy in the case of ex-post leniency; the immunity is the optimal policy when there is no bankruptcy, otherwise the applicant liability should be the minimum necessary to avoid the bankruptcy; in case of criminalization, immunity regarding criminal sanctions is the optimal policy; the optimal policy for international cartels is a combination of immunity regarding damage liability in all jurisdictions. Despite that the model has been developed based on the Brazilian structure of antitrust law, the results may be helpful to other jurisdictions as well. The private enforcement of damage claims is a powerful channel of deterrence, but in a context of leniency it may discourage the applicant if there is a fear of being sued for damages. From the economic perspective, we find that the leniency applicant should to be protected from that.

PALAVRAS-CHAVE: collusion, leniency, damage claim, damage liability, infinitely repeated game

¹ UFRRJ, lucascpinha@gmail.com

² UFV, mjbraga@ufv.br