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# **Risks and Rewards of Engaging With Authorities: Key Takeaways**

**Annual Compliance Conference**

# Initial Considerations



## Nature of the alleged conduct

- How serious is it? What type of potential exposure?



## Strength of the allegations

- Have they been verified? How plausible / specific are they?



## Detection risk

- Who else is aware? Any potential whistle-blowers (external or internal)?



## Geographic scope



## Composition of the investigation team

- Is recusal necessary?



## Consider litigation issues upfront

- Take care in deciding which documents to assert privilege over

# Planning



Speed is of the essence after discovering a potential competition law breach

- There may be a "race" for immunity / leniency



Put together an initial investigation plan

- Purpose: high level check of the facts
- Limited number of interviews may provide an initial steer (consider privilege rules for interviews and tip-off risk)
- Consider how to choreograph timing for interviews / document review
- Assess possible universe of relevant data and take preservation steps before any interviews
- Respect procedural expectations of authorities that might be in scope (e.g., CMA is demanding)
- Keep a comprehensive record of investigative steps



Balance speed with thoroughness

- Consider how much information you need for an immunity/leniency marker (varies by jurisdiction)

# Procedure



Engage data protection and employment law teams early on

- Where are the key custodians (individuals whose data will be reviewed) based and which data privacy laws will be relevant?
- Do you need consent from individuals / works council?



Engage eDiscovery experts to help with document review

- Ensures data is not compromised
- Helps to maintain a defensible record of steps taken (e.g., chain of custody)



Consider what data can be downloaded centrally / without notification or consent



Decide at what point document review is enough

- Use tech-assisted review to help define thresholds



Think about data privacy and employment issues now!

- Consider what is currently permitted in employment contracts / device policy / IT notices etc. regarding data monitoring
- Preparation now will result in a smoother and quicker process in an investigation

# Deciding Whether to Apply for Immunity

- Is immunity available for the type of conduct?
- How clear is the evidence? Is it historic or ongoing?
- Is there a risk of debarment for companies involved in public procurement?
- Are there external factors that could impact the decision?
  - E.g., proposed transaction / IPO where breach may come to light during due diligence
- Likelihood / consequences of damages claims
  - Class actions recovery in some jurisdictions
  - Damages claims may be wider than the scope of a regulatory decision
- Are there mandatory reporting obligations (e.g., in regulated sectors)?
- Is it possible to quantify the likely fine?
- **Detection risk is key – what is the likelihood of discovery and an investigation if you don't apply for immunity?**

# Deciding Where to Apply for Immunity



Which jurisdictions are primarily affected?

- location of customers?
- where conduct took place?



Which jurisdictions are key for other parties involved?

- location of headquarters / commercial and legal teams
- jurisdictions where those parties have ongoing or historic investigations
- history of enforcement in each jurisdiction



Is immunity available in the jurisdiction?

- Is it available for the type of anti-competitive conduct (e.g., cartels only, or vertical agreements as well)?
- Is it only available if you are the first to report the conduct?



Other considerations: (i) is there a marker system? (ii) how sophisticated is the regime? (iii) exposure for individuals? (iv) how onerous are the conditions for immunity; (v) sequencing of any approaches to the authorities.

# Living Through Immunity / Leniency and Settlement



For each jurisdiction, consider:

- the timeline and requirements for "perfecting" an immunity marker
- the extent to which the authority will direct investigative steps (including interviews and document review)
- whether steps that give rise to "tip-off" risk require close coordination with the authority (e.g., dawn raid training, attempting to cease the conduct)
- ongoing cooperation obligations will be significant; the need to crystallise a clear confession (e.g., in UK); do not underestimate the work involved



Weigh up the pros and cons of settlement, if it is available:

- Level of discount on fines
- Access to the authority's best evidence (ahead of a Statement of Objections)
- Opportunity to influence framing / scope of the case – engage early in pro-active advocacy
- Set against: the need to admit liability, and associated:
  - potential reputational damage (if you already applied for leniency, this may be less of an issue)
  - liability for follow-on damages (again, may be less of an issue if you already applied for leniency)
- Can stay in the process, obtain the best "offer" possible and then take a view on whether to continue to settle, or reject the settlement

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