様　式　Ｃ－１９、Ｆ－１９－１、Ｚ－１９　（共通）

# 科学研究費助成事業　　研究成果報告書

平成　３０　年　　６　月　１５　日現在

機関番号：　１７１０２
研究種目：　基盤研究(C)（一般）
研究期間：　2015～2017
課題番号：　１５Ｋ０３１５２

研究課題名（和文）Anti-Cartel Enforcement: Towards a Holistic Understanding of Leniency Policies

研究課題名（英文）Anti-Cartel Enforcement: Towards a Holistic Understanding of Leniency Policies

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交付決定額（研究期間全体）：（直接経費）　　2,700,000円

研究成果の概要（和文）：リーニエンシー制度はカルテル捜査を容易にするために設けられたものである。長期的に見ればこの制度がカルテル形成の防止につながることも期待されている。この調査では、適切な評価につながるより広い政策の一部としてリーニエンシー制度の運用を研究する必要があると論じられている。調査の結果、制度が有効に機能するためには制裁の規模が重要であることがわかった。しかしながら、私的な執行力、執行機関による法解釈、規則の柔軟性、執行機関の能力、他の執行手段（調停、内部告発など）、企業のコンプライアンスに関する社風などについても見ていくことが必要である。

研究成果の概要（英文）：Leniency policies are implemented to facilitate the detection of cartels. In the long run, it is also hoped that the leniency policies will deter cartel formation. This research has argued that it is necessary to investigate the operation of the leniency policy in a broader policy setting to achieve a proper evaluation. The outcome of the research is that the height of the sanction is important to have an effective leniency policy. However, one needs also to look at how the private enforcement setting, the interpretation of the law by the enforcement authority, the flexibility of the rules, the capacity of the enforcement authority, the other enforcement tools (like settlement or whistle-blowing), and the corporate compliance culture.

研究分野：　competition law

キーワード：　leniency　cartels　compliance　civil remedies　due process　settlement

**１．研究開始当初の背景**

Cartel conduct is considered one of the most egregious violations of competition law. Anti-cartel enforcement has high priority. However, due to the illegal character of this conduct, cartels operate in a highly secretive environment. Cartels are therefore difficult to detect or, when detected, to prosecute due to the lack of evidence. To tackle these challenges, competition authorities have adopted a distinct enforcement tool: the leniency policy. The leniency policy has revolutionized the enforcement of anti-cartel law. A structure of incentives should induce the cartel participants to defect from a cartel. In the long run, the heightened chance of detection should lead to deterrence.

**２．研究の目的**

The early evaluations of leniency policies have often looked at the number of leniency applications or the number of decisions taken based upon leniency applications. Some studies have looked at the structure of sanctions. This research argues that it is necessary to investigate the operation of the leniency policy in a broader policy setting to achieve a proper evaluation.

**３．研究の方法**

The research has adopted a comparative law methodology. The research has compared the operation of leniency policies in the main Asian jurisdictions: China, Hong Kong, Japan, India, Korea, Malaysia, Singapore, Taiwan and Thailand. To achieve a good understanding of the environment, the research has also done an in-depth study to the adoption of competition laws in ASEAN+3 countries.

**４．研究成果**

The research has brought forward two main prongs: insights into competition law adoption in Asia and insights into the operation of leniency policies in Asia.

To do research on a specific element of competition law, being leniency policies, the research has first done a detailed study of the competition laws of ASEAN+3. The main finding of this research is that the content of the competition laws in Asia are inspired by the competition laws of the United States or Europe. However, each country has given its competition law a local twist, either to fit it with the political reality of the country, the economic constellation of the country or the development project the country chooses. It is impossible to say that there is a shared understanding or application of all competition law concepts across Asia. The study also provided the basis for understanding the environment in which leniency policies operate.

Among the ASEAN+3 countries, the research has further focused on the study of the leniency policies of China, Hong Kong, Japan, India, Korea, Malaysia, Singapore, Taiwan and Thailand. These countries either have a leniency policy in operation for a considerable time or made an explicit choice not to adopt a leniency policy. By studying the leniency policies in the environment in which they operate, we can draw the following conclusions:

*Sanctions and Leniency Policies*

The height of sanctions is a classical element to determine the success of a leniency policy. The higher the sanctions, the more attractive a leniency application will be. This has been included in the literature on leniency and embedded in the best practices adopted by, for example OECD and ICN. The height of the sanction and the certainty that the sanction will be applied is of importance for the application of the leniency policy. This basic rule seems to be confirmed in the Indian practice. The Indian competition law has relatively low sanctions. Furthermore, when these sanctions are imposed, they tend to be challenged in court. Courts tend to reduce the sanctions. Knowing the complex enforcement reality will have a result for the effectiveness of a leniency policy. If there is a tendency to relax the work of the enforcement authorities by the courts, a leniency policy may become less attractive. The Hong Kong competition law seems to have flows on this issue as well. With modest fines, the merit of self-reporting in Hong Kong may be less enticing for the cartelist.

*Civil Remedies and Leniency Policies*

Civil remedies could add to deterrence. IN the end, the damages could add to the administrative fine or criminal sanction and so increase the cost of infringing the law. Private enforcement could hamper leniency if the private parties can easily get access to the documents of the leniency application. Hong Kong, for example, requires a written application. This may hamper the effectiveness of the leniency policy as it may guarantee access to the documents in a court proceeding. Taiwan, for example, has therefore included a paperless application. However, in Asian jurisdictions private enforcement tends to

be limited. Therefore, the potential access to the leniency documents is less of a problem in Asia compared to, for example, Europe (where this issue has been thoroughly discussed) and the United States. Hong Kong

*Compliance, Corporate Culture, and Leniency Policies*

Much of the enforcement in competition law is built on the neoclassical theory of law enforcement. This means that it is believed that people act rational who violate the law as the result of a cost-benefit analysis. The costs are determined by the sanction, the likelihood of the sanction being imposed and the probability of detection. Leniency policies are adopted with the idea of increasing the likelihood of detection and of imposing the sanction. Behavioral law and economics scholarship is challenging this view. This scholarship does not argue that it is not important to have or maintain high sanctions or that enforcement authorities should not engage in every possible effort to uncover cartel activities. These elements are essential in an enforcement policy. However, it is important to improve the corporate compliance culture. To curb the negative attitude towards the competition law, William Kolasky advocates for compliance programs to establish a culture of competition. The compliance programs, however, need to be an expression of the values of the senior management and being communicated to the employees. Japan, for example, has an increase of compliance manuals and compliance sessions. This has been documented by the JFTC. However, the research has identified what may make compliance ineffective. A first weakness is that the existing compliance programs lack detail. A second weakness is related to the compliance training sessions. Of all the training sessions that were being organized, most of the training sessions were orientated to newly employed staff.

*Tweaked Implementation of Leniency Policies*

Enforcement authorities may tweak the implementation of leniency policies. Seemingly easy and clear leniency policies may so be turned into a policy that is harder to comply with. Eventually, 1) it may affect the attractiveness to apply for leniency and/or 2) decrease the deterrent effect of the leniency policy. This has been exemplified by the application of the leniency policy in Japan.

There is a tendency to separate the cartels per product, per customer or per geographical area. This kind of practice could have a tremendous impact on the attractiveness of the leniency policy. The Japanese leniency policy is clear and obvious. Applicants need, in principle, only to inform the enforcement authority of a good cartel story and then cooperate with the further investigation to obtain, for example, immunity. However, when the enforcement authority fragments the cartel, potential defectors need to be more careful in their leniency application. One good cartel story may not suffice anymore.

A leniency applicant needs to be fully aware when applying and, eventually, submit multiple application to guarantee immunity across the different cartels fragmented based upon customers, products or geographical area. This complicates the leniency procedure. A further effect of the fragmentation is to inflate the number of cartel decisions. This could give a sign to cartel participants that the enforcement authority is active and create so a deterrent effect. However, it is easily understood that the number is artificially inflated. Artificial inflation may reduce the deterrent effect.

The Taiwanese enforcers apply a similar practice as in Japan in the hope to incentivize more leniency applications. However, as mentioned above, it may have the opposite effect.

*Flexibility, Due Process and Leniency Policies*

Leniency policies have often included flexible rules or attributed flexible competences to the enforcement agencies. Early examples of such leniency policies were the 1978 Leniency Policy of the US and the 1996 Leniency Notice of the EU. Both policies have been heavily criticized. Too much flexibility would be the cause of ineffective leniency policies. In the case of the US 1978 Leniency Policy the small number of leniency applications was referred to as proof for the failure. The small number of leniency applications that were first submitted to the EU Commission, and had thus no investigation or leniency submission in the US, had to proof the failure in the EU.

Despite these experiences, NDRC and SAIC, when devising their respective leniency policies, incorporated lots of flexibilities. The flexibility relates to the timing of the leniency application, the

granting of immunity, the level of reduction, the order of application, the required evidence and the competent enforcement agency. Seen the experience in the US and the EU, doubt could be casted as to the effectiveness of the Chinese Leniency Policies. Based upon the enforcement practice, the ineffectiveness of at least the NDRC's Leniency Policy seems not to go in the direction of the 1978 Leniency Policy. With 7 decisions based upon leniency applications, the NDRC's Leniency Policy has done relatively well. SAIC has not been able to attract any application, but that may have been due to circumstances beyond the leniency policy.

This is not to say that there is no problem at all with the NDRC's Leniency Policy. Almost all the leniency applications, even the ones for immunity, have been submitted when it was obvious that the NDRC was taking investigative steps into their industry. It is even being said that NDRC is offering leniency as an incentive to further their investigations. This is not only noticeable in domestic, but also in international cartels. All in all, the result is the same: delayed leniency applications. Based upon previous experience elsewhere, suggestions have been made to make the leniency policies more certain and transparent. If these changes create more trust, it is likely that, and this will become apparent in international cartels, firms will come forward much earlier with their information. Based upon the Japanese experience, the use of the Chinese Leniency Policy will not necessarily precede leniency applications in other jurisdictions.

Flexibility is also an element that comes back in the Hong Kong leniency policy. Leniency applicants that are not the first one to report can be given *ad hoc* compensation. A system that can change from case to case is not following due process and, further, is not transparent. Therefore, it could negatively affect the effectiveness of the leniency policy.

*Whistleblowing and Leniency Policies*

Whistleblowing and leniency policies serve a common good: the detection of unwanted behavior with the aim of discontinuing it. Leniency policies grant benefits to the undertaking violating the law, whistleblowing does not. In the best case, the whistleblower can get a financial benefit (like in Korea), but that is not always the case (like in Malaysia). Due to the difference in beneficiary, whistleblowing and leniency policies could complement each other. However, whistleblowing requires a separate set of elements to be successful. The whistleblower needs protection from the wrongdoer, who is most likely the employer. The protection could be given in in the form of a financial benefit, with which Korea has experimented. Even though the reward is not extremely high, the system has been used in a few occasions. If this benefit is not available, whistleblowing will not contribute to extra enforcement activity. To the contrary, leniency policies may facilitate the operation of whistleblowing by providing information to check the reliability of the whistleblower's information.

*Settlements and Leniency Policies*

A settlement allows a competition law infringer to be granted a reduced fined when, seen the evidence the enforcement authority has, the infringer admits to the wrongdoing. This is done through a simplified and shortened proceeding. It is thus an efficiency instrument. Leniency policies are focused on gathering evidence. Due to this different nature, leniency may still be complementary to a leniency policy. In Thailand, though, the government has thoroughly investigated the benefit of a leniency policy. The result of the investigation has been to reject the leniency policy for the new Thai competition law. To compensate, the new law allows the commission to settle the case. Even though the details are not provided, it could be argued that this allows for the necessary flexibility of rewarding firms defecting a cartel and reporting it to the enforcement authority. In return, the settlement could incorporate lenient treatment in relation to the fine.

*Enforcement Agencies' Capacity and Leniency Policies*

Leniency policies will, intuitively, lead to a better enforcement result. The enforcement authorities get a better picture of the composition of the cartel and its evidence. To the extent the evidence exists, a leniency policy will provide also better access to the evidence.

Increased access to evidence may overburden an enforcement authority. Japan has a clear example of a backlog. The number of application tremendously outnumbers the decisions taken. This could create the negative impression of impunity. Cartels are being exposed to the

enforcement authorities, but are not further investigated. This could give the impression that leniency applications are not necessarily worthwhile to make.

Better access to documents may create another problem. Better access means more documents, so increasing the workload of the enforcement authorities. The enforcement authority needs further decent training to deal with these documents, so that any future appeal in court will stand. In Korea, for example, this has been proven a problem. Many of the recent cases KFTC decided based upon leniency applications did not withstand the test in court. Enforcement authorities need to have institutional safeguards to prevent hasty conclusions regarding submitted leniency documents, especially when a leniency policy has open ended provisions regarding evidence or cooperation with the enforcement authorities.

*Leniency and Enforcement Authority's Power*

Taiwan has encountered a capacity problem. Whereas the leniency policy attracted lots of application just after its adoption, the enforcement authority did not report any case decided based upon leniency applications since 2016. One of the reasons is the lack of competence to engage in dawn raids. Public prosecutors seem to object to the plan to change the competence.

*The Future of Cartel Formation and Leniency*

Recent scholarship is pointing out that competition law theory as we know it may soon end due to the introduction of algorithms in the pricing strategies of the firms. It is argued that these algorithms may facilitate collusion. This collusion is classified as tacit collusion because the lack of any contact between employees of any of the firms. There is still considerable discussion on whether algorithms will eventually lead to tacit collusion. The current research has not focused on whether tacit collusion may be the result of the utilization of algorithms. This is not necessary seen that the literature on algorithms and competition law does not exclude the possibility of happening in the future. The research has looked at what the result of this evolution will be for leniency. Three elements have been stressed. First, the most drastic measure could be to implement regulatory sandboxed allowing the operation of algorithms to study its effects. Second, like in the early days of the EU enforcement in which the Commission required transparency of agreements, the enforcement authorities may require *algorithm transparency*. This way, the enforcement authorities could prevent the conceptualization of algorithms that are prone to end in collusion. Third, rather than putting all emphasis on the enforcement authorities, the solution for this kind of tacit collusion could be found in technology. Just like sellers could rely on algorithms, buyers may rely on counter-algorithms. These algorithms may be used to trump the sellers' algorithm in finding a colluded outcome. It should be stated that the research on algorithmic collusion is still in an embryonic stage. Further research is required to fully understand this new evolution on price setting strategies and collusion.

**５．主な発表論文等**

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## ６．研究組織

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