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Alternatives to Leniency Programmes

- Contribution from Poland -

1. Introduction

1. In this contribution prepared by the Polish Office of Competition and Consumer Protection (UOKiK), we share our experience in relation to reactive and proactive detection.

2. The contribution is divided into four parts: (a) section 2 contains basic information about our legal and institutional framework; (b) section 3 provides an outline on detection types: (c) section 4 discusses our experience with reactive detection methods; (d) section 5 discusses our experience with proactive detection methods.

2. Background

3. Our institutional model and legal framework for antitrust enforcement generally resembles that used by the European Commission.

4. We are an administrative antitrust agency and we do not share our antitrust powers with any other authorities (e.g. sectoral regulators). We impose administrative fines for antitrust infringements (Article 101-102 TFEU and their Polish equivalents), which can be appealed to a court. We are equipped with both investigatory and decision-making powers (we are responsible for collecting evidence, assessing case facts, and arriving at legal conclusions).

5. Apart from antitrust enforcement, we are also responsible for consumer protection. We are equipped with all powers listed in Directive ECN+, which requires all EU Member States to ensure that their national competition authorities have sufficient legal powers to investigate infringements of Article 101 and 102 TFEU.

6. Still, our powers differ to some extent in comparison to those of the European Commission. Our powers are also different in the area of antitrust and consumer protection. In further parts of this contribution, we outline these differences if relevant.

3. Types of detection

7. We believe there is a difference between (early) detection, i.e. detection *sensu stricto* (e.g. complaints, first-in leniency, general market screening, tip-offs) and detection *sensu largo* (e.g. second-in leniency, hearing witnesses etc.). The latter comes down to using investigative tools to "detect" (i.e. find) an infringement that has already been identified as a potential subject of investigation.

8. In our view, it is the early detection which is typically the hardest step.[1] Once there is some lead to focus on, further actions are easier.

[1] In para. 27, we provide an example of negative consequences of not recognising that there are various types of "detection".

9. Detection can take place reactively or proactively. Reactive deterrence can be easily criticised as it might imply passiveness; conversely, proactive deterrence can be lauded as it implies that the authority is engaging in some activity and pursuing cases on its own. We believe such a simplified conclusion would, however, be wrong, and in fact may even be dangerous from the point of view of creating an effective enforcement system.

10. Both reactive and proactive detection are important and complement each other.

11. Reactive detection is crucial, since given the number of markets that are subject to antitrust enforcement, it would be impossible for an antitrust authority to be active in all of them. Reactive enforcement can easily cover many markets and is cost-effective.

12. Proactive enforcement, however, is important, since otherwise the authority would be permanently reliant on outside actors when it comes to its investigations. Still, overinvestment in proactive enforcement means that there are less resources that can be allocated to e.g. prosecution or advocacy.

13. In consequence, an effective enforcement system requires a proper mix of reactive and proactive methods.

14. Cartel detection methods have been discussed broadly in e.g. the ICN's Anti-Cartel Enforcement Manual.[2] Since we tend to use a mix of most of the methods covered in the ICN's manual, we do not cover these issues in more detail here. We instead provide a brief overview of trends and developments in our jurisdiction.

4. Reactive detection

4.1. Leniency

4.1.1. Overview

15. Leniency programme(s) have been in use in Poland since 2004. As of today, we use three tools that can be looked at as three separate leniency programmes.

16. ***Corporate leniency***. Our corporate leniency programme resembles that used by the European Commission. However, our leniency programme covers all agreements (including vertical, like RPM), not just hardcore cartels. Immunity is available to first-in undertakings that provide us with information or evidence that allows us to initiate a dawn raid or find an infringement, provided that we had not been in possession of such information or evidence before obtaining the leniency application. Immunity is not available for undertakings that coerced other undertakings to take part in an anticompetitive agreement. We also grant leniency reductions that can amount up to 50%. Thus, the first undertaking that qualifies for a reduction may obtain a 30-50% reduction, the second one 20-30% reduction, and all other undertakings up to 20%.

17. ***Individual leniency***. Managers in our jurisdiction face administrative (financial) liability for a number of types of anticompetitive agreements (in particular price-fixing and market-sharing). Leniency is available to them on a similar basis as for undertakings. There is one "queue" when it comes to corporate and individual leniency. It means that if a manager files a leniency before an undertaking (either the one for which he/she works, or a different one), the undertaking will be unable to obtain an immunity. At the same time,

[2] ICN, Anti-Cartel Enforcement Manual, Chapter 4 (Cartel Case Initiation). An overview of these methods was also provided by the Secretariat, see OECD, *The future of leniency programmes – Background Note*, para. 97-98.

however, corporate leniency applications (typically) cover individuals. In consequence, if an undertaking obtains an immunity, so do all managers associated with this undertaking (in consequence, it is better for board members and other top managers to opt/push for corporate leniency, since all board members/managers will be covered). Same applies to leniency reductions.

18. ***Leniency plus***. While technically our legislation does not envisage a separate "leniency plus" application, in practice our legislative framework allows obtaining an additional 30% reduction by any undertaking (or individual) that qualifies for a (general) leniency reduction. This is possible when the applicant manages to secure an immunity status with regard to another anticompetitive agreement.

4.1.2. Amendments

19. Our leniency programme was amended in 2014 and 2023.

20. The 2014 Amendment (effective since 2015) introduced individual leniency and leniency plus.[3] It also included a number of more technical changes with regard to how leniency is granted.

21. The 2023 Amendment was adopted to implement some of provisions of Directive ECN+. The amendment did not introduce far-going changes. However, it introduced a clear division into immunity and reduction leniency applications, included changes in relation to leniency markers, increased legal certainty with regard to applications filed by companies that belong to the same undertaking (single economic entity), and implemented the concept of "partial immunity" (undertakings who qualify for reductions may obtain "partial immunity" in relation to some parts of complex infringements). The ECN+ implementation also strengthened the protection of leniency applicants (and their employees) from criminal prosecution (which is relevant in our jurisdiction insofar bid rigging is concerned).

4.1.3. Assessment

General assessment

22. The introduction of leniency in Poland has not been considered highly successful. This is mostly due to the fact that the number of applications filed each year is low and the quality of cooperation with applicants is often unsatisfactory from our point of view.

23. However, assessing leniency is difficult. This includes the issue of an effective design of leniency provisions, as well as the overall environment in which leniency operates (i.e. factors which go beyond leniency provisions themselves, but which affect leniency nonetheless, e.g. reputation, trust etc.). In this contribution, we would like to make a number of comments that might be of use to other OECD authorities that are facing similar problems as we did/have been.

24. First, there appears to be a common narrative (at least in our jurisdiction, yet more on a "common knowledge" basis rather than research) that leniency is less successful in former Eastern Bloc (socialist) countries, as the level of trust towards government agencies in these countries is lower and the attitude towards "snitching" is particularly negative.[4] We are unable to confirm this claim in a scientific way – we have not conducted

[3] The amendment also introduced individual (administrative) liability for managers. Fines of up to approximately 500,000 USD can be imposed.

[4] The issue here is thus linked to a broader phenomenon discussed by the Secretariat in OECD, *The future of leniency programmes – Background Note*, para. 92-98.

sociological studies in that regard. It seems to us, however, that there are other alternative explanations of this problem. Leniency appears to be most successful in jurisdictions in which decision-making managers are located (e.g. US, EU, Germany, France).[5] Conversely, following the fall of communism, the economies of (some of) Eastern Bloc countries were strongly integrated into Western structures, including through mergers (insofar the economic level is taken into account). With most important business decisions being made outside the aforementioned jurisdictions, it might be that cartels which operate in these jurisdictions are part of larger infringements. Obviously, this is not to say that it is impossible to set up a cartel locally and/or without an approval of managers that hold top executive positions. Still, it might be of interest for the OECD (however, mostly in general terms, rather than in the context of this specific roundtable) to consider how macroeconomic factors and industrial organisation might impact anti-cartel enforcement and leniency (e.g. one might expect that in jurisdictions with more concentrated industries, which at the same time "host" top-level managers, leniency rates might be higher).

25. Second, the success of leniency is difficult to measure, since the bare fact that there is leniency in place does (in terms of economic models) increase deterrence. In consequence, some cartels that otherwise would be formed are not formed. This is an important effect, but also one that can be easily overlooked, as it is common to focus on things that are clearly visible (number of applications), not those that are less tangible (number of cartels that were *not* formed).[6]

26. Third, for many years our jurisdiction envisaged limitation periods which were in fact "**enforcement killers**". Until 2015, the limitation period for antitrust infringements in our jurisdiction amounted to merely 1 year (currently it is 5 years). This meant that leniency might have not functioned well, since even if a cartel fell apart and/or was discovered through internal audits (compliance), it was not reported under leniency, since the limitation period had already lapsed or an antitrust investigation was expected to be time-barred soon enough to accept the risk of not reporting. The effects of this on enforcement and on creating competition culture are difficult to measure – it can be assumed, however, that "true" robust antitrust enforcement was much delayed in our jurisdiction, with possible effects going beyond the mere fact that up until 2015 the number of investigated cases might have been suboptimal, due to legal obstacles. Against this backdrop, it should also be recalled that since around 2015, there has been a worldwide trend of decreasing leniency rates.[7] In other words, a positive factor of extending limitation periods in our jurisdiction in 2015 coincided with a negative factor of a general decrease of leniency rates in OECD countries.

27. Fourth, our (early) leniency policy made it too easy to obtain a full immunity, even if we already had enough evidence to prosecute the case on our own (at least when it comes to most relevant facts). This might have removed incentives for pre-dawn raid leniency in favour of filing leniency after dawn raids were completed. This might have weakened the role of leniency as an early detection tool in our jurisdiction.

[5] The observation above and remarks that follow are not intended to suggest that this is the only reason for higher leniency rates in these jurisdictions. There are, obviously, other possible and important reasons as well – some of them were outlined by the Secretariat in OECD, *The future of leniency programmes – Background Note*, para. 28, 39.

[6] This issue, however, is rightly noted by OECD, e.g. in OECD, *The future of leniency programmes – Background Note*, para. 11, 33-34, 129.

[7] OECD, *The future of leniency programmes – Background Note*, para. 2.

28. Fifth, we believe that leniency expectations in our jurisdiction might have been too large, with too little conviction that energetic and proactive enforcement is needed to provide incentives to file leniency (“leniency as a magic wand”, “leniency as a cure for all problems”).

29. Aside from these issues, it has been speculated in our jurisdiction whether the availability of leniency in vertical cases is desirable. Admittedly, the availability of leniency in vertical cases resulted in leniency often being filed in RPM cases, with RPM investigations representing a large part of our workload, even before RPMs started to be (again) investigated by the European Commission.[8] Part of the concern has been that RPM investigations use resources that otherwise would be devoted to other types of investigations.[9] On the other hand, even in RPM investigations, vertical leniency was often filed (and to large extent still is, although this appears to be changing) after dawn raids, i.e. from our point of view it mostly serves a role of an investigative tool, rather than an early detection tool.[10]

30. All in all, while it might be that leniency should be limited to hardcore cartels, over years we started to see advantages associated with a broad scope of leniency (or at least having leniency available in vertical price-fixing and market-sharing cases) in terms of administration – when the structure of an infringement is complex, the division into horizontal and vertical infringements might prevent potential applicants from filing leniency.[11]

31. Effectiveness of our leniency might have also been affected by the fact that bid-rigging in our jurisdiction is subject to criminal sanctions. Up until 2023, when Directive ECN+ was implemented in our jurisdiction, there was no link between leniency cooperation (with leniency cooperation taking place in relation to us, i.e. an administrative agency) and criminal prosecution. In consequence, self-reporting on cases concerning bid-rigging and infringements that included bid-rigging (e.g. large scale market-sharing covering bids and ordinary sales) encountered serious disincentives.

Assessment of amendments

32. The amendment introduced in 2014 did not lead to any significant changes in the number of applications.[12] While we have not conducted any broad research/studies on the utility of each specific change introduced by the amendment, we can share following experience.

33. Individual leniency and individual duty to cooperate increase the quality of cooperation with corporate applicants. Top-level managers targeted by investigations are more likely to ensure that their company will fully cooperate.

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[8] See cases AT. 40465 (*Asus*), AT. 40469 (*Denon & Marantz*), AT. 40181 (*Philips*), AT. 40182 (*Pioneer*).

[9] See OECD, *The future of leniency programmes – Background Note*, para. 30.

[10] For one of reasons of post-dawn raid leniency filings, see para. 27.

[11] While we arrived at this conclusion based on our own experience (mostly in the context of hub-and-spoke infringements), we welcomed that a similar issue was covered by the Secretariat, see: OECD, *The future of leniency programmes – Background Note*, para. 74-75.

[12] This is not to say that there are no changes at all with regard to leniency – our general assessment is that leniency cases in our jurisdiction are more frequent today than 10 years ago.

34. When it comes to leniency plus, our assessment of this policy is that in our case leniency plus is unsatisfactory, but this rather comes from the fact that we believe that in 2014 it was wrongly concluded that a solution to the problem of not high enough leniency rates might be “more leniency”, which in this case meant more options to file leniency.

35. As of today, our view is that leniency plus is an interesting tool, but one which might be most useful in jurisdictions where undertakings are more often active in multiple markets. Also, what might be important from the point of view of leniency plus is ensuring that parent-companies are always prosecuted (since if a parent-company A is prosecuted in case X, and files leniency, there is a greater chance that it will also file leniency plus with regard to case Y – in comparison to subsidiaries, parent-companies are more often responsible for multiple markets).

4.1.4. Further changes

36. As of today, we do not have any advanced plans of introducing further legislative changes to our leniency programme. This is mostly because it seems to us that solutions to leniency-related problems lie outside leniency itself (e.g. more proactive detection, non-leniency whistle-blowing, adjusting limitation periods etc.). However, there are certain elements that we might consider changing in future.

37. First, as it was mentioned above, we are not fully satisfied with the leniency plus branch of our programme. While we do not intend to drop this type of possible cooperation, we might introduce minor changes to leniency plus aimed at ensuring that new self-reported infringements are serious ones/equivalent to those already investigated.

38. Second, we might introduce further changes to how the duty of cooperation is phrased under our leniency programme. As of today, applicants mostly cooperate with us during our administrative proceedings, up to the point when we issue a decision and impose fines. However, our leniency applicants become overly passive during litigation (when other parties, e.g. those that did not file leniency, challenge our decision). It seems to us that this is in stark contrast to e.g. US experience, where immunity applicants and settling parties (i.e. those who entered into plea bargaining) agree to provide aid in case other suspects have their case heard in a full trial. Our leniency model was strongly based on the EU one, and EU courts rarely hear witnesses; this is different in our jurisdiction, with courts often being willing to conduct a broad review of all facts of the case. In consequence, we find it increasingly more relevant to ensure full cooperation of leniency applicants.

39. Third, we are aware that private enforcement might discourage undertakings from filing leniency. Taking into account the overall number of leniency filings in our jurisdiction, it is difficult to estimate the impact of private enforcement on leniency. However, we follow developments in this area and we do not exclude making changes in that regard.

40. Fourth, we consider amending our soft law instruments (and leniency FAQ) to facilitate high quality cooperation – this, however, is not expected to be a game-changing initiative, rather fine-tuning based on our most recent experience. As a non-English jurisdiction that operates a leniency programme for individuals, we also plan to increase the accessibility and transparency of our leniency programme (and non-leniency whistle-blowing tools) to non-Polish speakers, as our recent experience shows that executives in Polish companies might have difficulties in understanding our legal framework (even if they live and work in Poland on a daily basis). Currently, we are also in the process of adopting a new (technical) regulation concerning the method of submitting leniency applications. This follows the ECN+ amendment to our competition act. Within the scope of our proposed regulation, we intend to remove some of the old methods of submitting

leniency (fax) and introduce new ones (e.g. doing so during a video conference instead of visiting our office).

41. Fifth, as we have indications that some enforcers are willing to address the problem of "strategic leniency", we started to look more carefully at this issue. Strategic leniency can take place when e.g. an undertaking prepares a leniency application, but makes a conscious decision to only file it when a strategic reason for doing so materialises (e.g. cartel is no longer profitable to this specific undertaking, there is too much "noise" about the market etc.). A requirement to file leniency "promptly" after the cartel becomes known to the board of the company or its compliance officers might counteract such strategic considerations. However, there are certain risks associated with this model: stricter conditions for leniency might reduce the number of possible applicants; also, it is not uncommon that the composition of company boards changes over time, and while one group of board members decided to engage in a cartel, a new board might be willing to file leniency. This makes such requirements more difficult to implement if they are part of legislative acts.

4.1.5. Leniency and settlements

42. Our leniency and settlements interact in a similar way as at the EU level. In other words, leniency reductions can be combined with settlement reductions. They can also be combined with leniency plus. In consequence, the maximum reduction in case of leniency combined with a settlement is 60%, and it is 90% in case of a "leniency-settlement-leniency plus" combination. Such a high reduction was never applied in any of our investigations. However, combinations of leniency and settlement (60%) did take place.

43. We are also aware of the problem of possibly too high settlement reductions that may discourage leniency.[13]

44. The 10% settlement reduction was criticised in our jurisdiction in a similar way as it was criticised when the European Commission was picking this level of reduction for its cartel settlement procedure in 2008.

45. Taking into account that the model of leniency immunity and leniency reductions is widely followed in Europe, we believe that settlement reductions should remain adjusted to how leniency works. Contrary to what is often claimed, a 10% reduction does not seem to be too low, in particular when the division of work between leniency and settlements is respected (with leniency being a place to cooperate with regard to evidence, and settlements playing a role in creating procedural gains). In our experience, undertakings that file leniency are generally also interested in obtaining a 10% settlement reduction. Settlements have advantages that go beyond merely fine discounts.

46. However, we also believe that in non-leniency cases settlement reductions might need to be higher to be attractive (in our jurisdiction, settlements are available in all types of cases, not just cartels – this is contrary to the EU model, which envisages just cartel settlements; the level of reduction is the same in all cases in our jurisdiction). We do not elaborate further on this subject, as it goes beyond the topic of anti-cartel enforcement.

[13] This issue is also discussed by the Secretariat in OECD, *The future of leniency programmes – Background Note*, para. 76-81.

4.2. Non-leniency whistle-blowing

4.2.1. Overview

47. Since 2017, we have been promoting non-leniency whistle-blowing (e.g. by former employees of cartel members).

48. We initially did so by merely recognising in our external (and internal) communication that non-leniency whistle-blowers do not belong to the same category of information sources as e.g. complainants. We also created (at first) separate channels of communication for whistle-blowers, e.g. a hotline and dedicated mailbox. We provided additional information on this type of whistle-blowing on our websites and communicated clearly to the public that reporting can be done on an anonymous basis (surprisingly, this was not clear to all stakeholders). Since news reports concerning our authority are relatively attractive to readers and journalists (partly due to the fact that we are also a consumer protection agency), the topic also received broad press coverage.

49. In 2019, we decided to move our non-leniency whistle-blower programme to another stage. We contracted an external service provider that operates for us an online whistleblowing platform that allows reporting in an anonymous way (IP addresses of whistle-blowers cannot be tracked, document metadata are automatically deleted etc.).

50. We are aware that some observers argue that non-leniency whistle-blowing might undermine leniency, because once an authority obtains information from a non-leniency whistle-blower, there are weaker incentives for potential leniency applicants to do so.[14]

51. We find those arguments highly unpersuasive. It seems to us that they are at least partly based on a false premise that the number of leniency applications is the goal itself. Still, the actual goal of enforcement is to achieve a sufficient level of deterrence and prevent cartel formation. Cartel-reporting by non-leniency whistle-blowers that allows to conduct dawn raids might serve as an important tool of deterrence – cartel members might be unable to exercise sufficient control over such reporting and/or such reporting may increase the cost of operating cartels. Furthermore, it can also be argued that non-leniency whistle-blowing can exert more pressure to file leniency (e.g. if during an internal audit it is revealed that an undertakings takes part in a cartel, and a decision needs to be made whether to file a leniency or not, incentives to file leniency might be stronger when there is a risk that otherwise a disgruntled employee might blow the whistle on his/her own).

52. We also encountered arguments that non-leniency whistle-blowing might negatively impact compliance programmes (since employees would report to antitrust authorities, rather than to internal compliance officers). Likewise, we do not find these arguments persuasive – there is nothing that prevents companies from creating environments which are sufficiently attractive to first report internally. In fact, public non-leniency whistle-blowing programmes might exercise a form of “competitive constraint” on corporate compliance programme, and incentivise undertakings to create effective compliance programmes.

53. Overall, while non-leniency whistle-blowing tends to generate large numbers of irrelevant reports, tip-offs that are relevant tend to lead to highly successful cases, without the need to rely on leniency as an early detection tool.

[14] The fact of this argument being made was also noted by the Secretariat, see: OECD, *The future of leniency programmes – Background Note*, para. 121.

4.2.2. Further prospects

54. When we decided to focus more on non-leniency whistle-blowing, we considered the possibility of introducing rewards for non-leniency whistle-blowers. We are aware that such reward schemes operate in a number of European (UK, Slovakia, Hungary, Lithuania) and non-European (South Korea) jurisdictions. So far, we have not decided to propose legislative changes that would make this possible (without legislative changes, this is not possible in our jurisdiction).

55. There are certain elements with regard to rewarding whistle-blowers that need to be taken into account.

56. First, we are aware that there used to be an argument circulating in discussions that paid non-leniency whistle-blowers are not a good development, since witness statements (especially anonymous) made by individuals who may hope to be rewarded could be easily attacked by defendants. The credibility of whistle-blowers might be thus at stake. In our view, much depends on how non-leniency whistle-blowers are used, i.e. as an early detection method (mostly intelligence), or late detection method (trial evidence or evidence in an administrative decision). In our view, non-leniency whistle-blowers might be a better tool for early detection, especially as a source of information to initiate dawn raids. “Hard evidence” found during dawn raids (or through surveillance if such tools are available to a given authority) are preferable to any witness statements, anonymous or not. Since dawn raids merely consist in looking for evidence, the risks associated with relying on anonymous submissions are also lower, especially if one combines anonymous information with data collected through e.g. proactive methods, i.e. corroborates it.

57. Second, some argue that rewards might paradoxically *decrease* incentives to report infringements. This would be contrary to ordinary economic reasoning (holding other things equal, monetary rewards should provide *more* reasons to report and thus *strengthen* incentives for reporting). Still, while somewhat convoluted, the counter reasoning to the standard economic argument is that (at least) some whistle-blowers may see monetary rewards as changing the rules of the game: the reporting is not done for “noble” reasons and under moral imperatives, rather it moves towards materialistic considerations; thus, it is better not to report rather than being accused of “snitching” and of doing so “for money”. To what extent this might be the case can be subject to debate, yet it should be stressed that rewards can be optional or can be paid only on request. Also, we are not aware of any economic or sociological research that would confirm such effects of rewards on non-leniency whistle-blowers.

58. To constitute a real incentive, rewards should be paid as soon as possible (rewards that are deferred in time have less utility than rewards paid immediately, under standard economic reasoning). This leads to at least two issues that require consideration: (a) should rewards be paid before the authority or court finds an infringement?; (b) how to finance such rewards?

59. Various models are possible, e.g. rewards can partly be paid immediately (for instance, if provided information is sufficient to obtain a court warrant for a dawn raid), and partly when infringement is duly established. While direct financing from authority’s budget might be difficult for some agencies, it is possible to pay them from collected fines (this introduces the issue of deferred payments). It is also possible to e.g. establish a fund that can be used to pay rewards (and possibly cover also other activities, like outreach) – the fund can be financed from fines imposed in all antitrust cases (rather than merely cases in which a non-leniency whistle-blower reported an infringement). This way one can be sure that there is going to be a relatively steady stream of funds to ensure reward payments.

60. All in all, however, those technical issues require significant legislative and conceptual work, especially in jurisdictions where the legislature needs to authorise payments and needs to create sufficiently clear legal bases for the actions of the executive branch.

61. When it comes to reward schemes, it should also be clear that paying rewards is not without impact on anonymity. Anonymous whistle-blowing provides the highest level of safety to the whistle-blower. Rewards, on the other hand, can hardly be paid to anonymous individuals. Since rewards create higher risks for whistle-blowers, one should assume that an attractive reward should not only be “generally attractive”, but also include a premium to offset less anonymity.

4.3. Complaints and tip-offs

62. When it comes to anti-cartel enforcement, complaints and tip-offs are generally less useful than leniency and non-leniency whistle-blowing. The reason is simple: outside actors typically have less reliable information about the existence of cartels.

63. Before moving further, a short explanation on what we mean by “complaints” and “tip-offs” seems appropriate. Contrary to e.g. the European Commission, in our jurisdiction there are no “complaints” that can be appealed. Such complaints were possible in the past, but this system was abandoned in 2007, as it proved to be highly inefficient and resulted in tying our resources to cases that were weak, and to litigating against complainants rather than prosecuting undertakings that infringed competition rules. Our negative experience in that regard discourages us strongly from any formal complaint systems.

64. Still, our competition act specifies that “complaints” can be filed and should include certain elements. Taking into account that our decisions on complaints cannot be appealed, all complaints are in a way “tip-offs”. Yet, for our internal purposes, we define “complaints” as more substantiated claims and “tip-offs” as mere indications that something might be wrong.

65. As indicated earlier, complainants and individuals submitting tip-offs are often not in a position to provide reliable information on cartels. This, however, is not to say that we are not interested in such information, rather that even if moderately useful information becomes available to us from this source, it requires far more resources (e.g. proactive analysis) to result in an investigation. Still, such information may constitute a lead that indeed justifies investments under proactive detection.

66. Generally, however, we observe that complaints (both in anti-cartel and general antitrust enforcement) in our jurisdiction are of low quality.. To mitigate this problem, we might consider in the future publishing clearer information on what complainants should pay attention to in their complaints, so that the process becomes swifter, more goal-oriented, and with higher chances for the compliant to have his/her case resolved and for us to successfully pursue a case.

5. Proactive detection

67. Proactive detection is more complex than reactive detection insofar it can be implemented at various stages of the detection process and in various forms. This is because proactive detection depends by definition on authority’s actions. In consequence, proactive detection can e.g. take place on a standalone basis, may constitute a follow-up step to reactive detection, or may include various types of proactive actions in the same case (e.g.

a wide market screen gives reasons for industry monitoring, or industry monitoring gives reasons for a narrow market screen).

68. Since proactive detection illustrates better how an authority operates on an internal basis, how the detection process works, and what are the capabilities of an authority with regard to detection, we typically do not discuss our proactive actions at length in public and semi-public discussion frameworks.

5.1. Outreach and education

69. When it comes to outreach, we are mostly active in relation to public procurement officials. Our staff have conducted trainings for procurement officers in the public sector to increase their responsiveness to potential bid rigging indications.

70. We are also aware of arguments that competition authorities should promote “competition culture” by providing more incentives to create compliance programmes, more specifically that fine guidelines should include alleviating circumstances for undertakings that did have or intend to implement compliance programmes. The link with “outreach and education” is that compliance programmes are often the first source of information about antitrust for lower-level employees and for small and medium enterprises (top-management in large undertakings is often more acquainted with antitrust due to tenure and professional experience).

71. We are highly sceptical when it comes to rewarding undertakings for just having compliance programmes or for plans to implement them. In our view, an undertaking that infringed competition rules, and was fined for doing so, does already have proper incentives to implement a compliance programme. When it comes to undertakings that merely contemplate implementing a compliance programme, we understand that a “compliance programme alleviating factor” in fine guidelines may work as a “selling point” for external lawyers (i.e. it might be easier for an external lawyer to persuade his/her client to create a compliance programme and it might be easier for the board to justify expenses in that regard). However, we also believe that a proper incentive that can be offered by antitrust authorities in that regard is vigorous enforcement, steady number of dawn raids, and other actions aimed at increasing antitrust awareness.

5.2. Intelligence and industry monitoring

72. Intelligence and industry monitoring is a common type of activity at our authority. Intelligence gathering may take place in response to complaints or tip-offs, following clues found in other investigations, meetings with stakeholders, or general market research.

73. Intelligence gathering may take various forms. Our capabilities in that regard have grown considerably over years: first to simply increase effectiveness of our investigations when it comes to case facts, and subsequently also to support our dawn raid activities.

74. Since leniency rates in our jurisdiction are low, a considerable number of our cases have been either possible due to industry monitoring, or was moved to further stages of investigation because of our own intelligence gathering (e.g. we receive a complaint or tip-off which taken alone is insufficient to pursue a case, but following our further intelligence gathering provides enough indicia to justify further investments in the case).

5.3. Market screening

75. Market screening may take place in various forms. Screens can be specifically designed to test collusion-hypotheses in a given case that has already drawn enforcer’s

attention, or may be used to as a first step in the detection process. Generally, market screens that are used in relation to broad ranges of cases are less accurate, as they need to be more general. Market screening can be done manually by case handlers, or based on algorithmic and electronic systems.

76. Electronic market screening offers important opportunities as data and AI capabilities allow reaching more accurate conclusions on a more cost-effective basis. We are engaged in activities aimed at developing an automatic market screening system in relation to bid rigging.

77. This is not to say that market screening can be implemented easily. While the theory of market screening is straightforward, there is also a practical side to it. In practical terms, the quality of data might be a problem in designing an effective screening system, especially taking into account that it depends on outside actors (procurement officers).

6. Conclusion

78. Our recent experience in the area of detection methods indicates that:

1. there is an ongoing need to improve detection methods;
2. a proper mix of proactive and reactive detection is crucial;
3. non-leniency whistle-blowing is an important development. Non-leniency whistle-blowing should not replace leniency, but it has potential to generate leads and probable cause to conduct dawn raids. In other words, non-leniency whistle-blowing might be an important instrument at early stages of investigations. We believe it would be of much use to conduct a broader research/study on the effects of monetary rewards for non-leniency whistle-blowers.