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LENIENCY FOR SUBSEQUENT APPLICANTS

-- Issues paper by Secretariat --

23 October 2012

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 23 October 2012.

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LENIENCY FOR SUBSEQUENT APPLICANTS

Issues paper by the Secretariat

1. Introduction

1. This paper discusses issues related to "Leniency for subsequent applicants" and identifies the main questions to help the discussion which will take place on 23 October 2012 in Working Party No. 3 (WP3). Today, all OECD countries have adopted leniency policies to ensure more effective detection and prosecution of cartels. In light of the considerable experience acquired with the application of such policies, WP3 considered it timely to discuss a particular feature that distinguishes the two major types of leniency policies: the treatment of subsequent applicants, i.e., applicants that are not the first to denounce a secret cartel or bring decisive evidence of its existence.

2. The terminology used in the context of leniency programmes varies from jurisdiction to jurisdiction. For example, the United States use the term "leniency" or "amnesty" to refer to full immunity from any sanctions. In Canada and the European Union, this is described as "immunity". These jurisdictions use the term "leniency" to describe any lenient treatment (both amnesty/immunity and the reduction of sanctions) or only a reduction in sanctions for subsequent applicants.[1] For the purposes of this paper, we will use the term "*leniency programme*" to refer to both an amnesty or a leniency programme; the term "*immunity*" describes the benefit of complete immunity from any sanctions; and the term "*leniency*" covers benefits in the form of any reduction in sanctions that would otherwise be imposed on applicants that do not qualify for immunity.

2. The origins of leniency in antitrust enforcement

3. Due to their generally acknowledged illegality, cartels usually operate under the cloak of secrecy. They are often accompanied by outright measures to enhance their concealment and prevent their detection. Competition authorities face significant obstacles in detecting and prosecuting cartels, given the shroud of secrecy under which they operate. Under the traditional investigative means and information sources, the detection of a cartel is normally the result of the observation of market anomalies, complaints from customers or competitors, leads from informants such as disgruntled employees or "fall-outs" from other investigations. The successful uncovering and prosecution of a cartel requires solid information and reliable pieces of evidence. Unfortunately, traditional methods of detecting cartels, and obtaining the evidence required to successfully prosecute and punish them, are limited both in their effectiveness and efficiency.

[1] Correspondingly, a leniency programme that rewards only the first in the door is sometimes denoted as an "amnesty programme" and a programme that rewards both the first in the door and subsequent applicants is denoted as "leniency programme".

4. In 1978 the US Department of Justice (US DoJ) adopted its first Corporate Leniency Policy in an attempt to overcome these limitations and enhance deterrence. The US DOJ introduced into antitrust enforcement the idea of reducing a criminal penalty in exchange for the criminal's co-operation in helping to convict its co-conspirators.[2] Under the 1978 policy, the US DoJ could grant full immunity to any corporation reporting the existence of a cartel before the start of an investigation. In 1993, the US DoJ revised its policy, introducing three significant changes. These changes are generally credited with a dramatic increase in the number of cartelists coming forward to take advantage of the policy. First, in the stage before the start of an investigation, prosecutorial discretion was removed from the granting of immunity. Second, immunity was also made available after the start of an investigation. Third, immunity was extended to include employees and directors coming forward along with the co-operating corporation. In addition, the US DoJ adopted a Leniency Policy for Individuals in 1994, thus putting together a leniency structure, which remains in place today. The most significant change since 1994, introduced in 2004,[3] limited amnesty recipients' civil liability to single damages, provided they co-operate with the plaintiffs, and severed the joint and several liability between the amnesty applicant and its co-conspirators.

5. In 1996, the European Commission (EC) adopted its first Leniency Notice, although in its previous practice it had already rewarded co-operating companies with fine reductions.[4] The 1996 Leniency Notice formally introduced the concept of rewarding companies' co-operation into the EC's enforcement practice with either full immunity from, or the reduction of, any fines that would otherwise be imposed. The EC has since revised its policy twice: first in 2002 and then again in 2006, introducing changes designed to increase certainty in the process and the effectiveness of the policy.[5]

6. There are three crucial differences between the US DoJ and the EC leniency programmes. First, successful immunity applicants under the US DoJ's programme receive amnesty from prosecution whereas the EC adopts a formal decision even against successful immunity recipients (although the fine is reduced to zero). Second, not having individual criminal liability for cartel behaviour, the EU, in contrast to the US, also does not have a leniency policy for individuals. Last, the US DoJ's leniency programme rewards only the first applicant, whereas the EC's programme rewards both the first applicant and all subsequent applicants, provided their co-operation contributes to the EC's investigation and prosecution.[6]

7. While the first two differences reflect the specific enforcement context within which the relevant leniency policies operate – administrative enforcement with sanctions on corporations in the case of the EU and criminal enforcement system with criminal liability of both corporations and individuals in the US – the third difference (treatment of subsequent applicants) has no such clear explanation. However, due to

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2 See, Wils, p. 14.

3 Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).

4 See Wils, p. 15. Faull & Nikpay, s. 8.108.

5 For example, the 2002 Leniency Notice introduced automatic immunity for the first company to inform the EC of a cartel it had not been aware of or to supply decisive evidence of its existence rather than a 75-100% band of reduction, as was the case under the 1996 notice. Also, in 2002, fine reductions for subsequent applicants were differentiated more firmly based on the time in which the applications were submitted. The 2006 notice introduced the possibility for immunity applicants to apply for a market, while at the same time increasing the demands on the cooperation that applicants have to provide to obtain leniency.

6 The US DoJ has the ability to reward cooperation of subsequent applicants, but, not through its leniency policy. Instead this is through the application of ranges in US Sentencing Guidelines in the process of plea bargaining. Another possibility of rewarding a subsequent applicant is a so-called "Amnesty Plus". Both of these possibilities are discussed in detail below.

the fact that the US DoJ has the ability to reward, and in its practice does reward, the co-operation of subsequent applicants outside its leniency program, the difference is rather one of form than substance.

Questions and issues for discussion

1. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

2. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

3. Rationale for rewarding subsequent applicants

8. The rationale for offering immunity to a cartelist who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing the co-operating corporation. These benefits include increased detection rate, destabilising effects on cartels, cost savings in investigation and prosecution as a result of the applicant providing evidence directly from within the cartel, litigation savings and so on. All these benefits combined result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment.[7] But what are the policy reasons for rewarding companies for their co-operation in an already on-going investigation? The majority of them largely overlap with the reasons for rewarding the first applicant, save for that relating to the unveiling of another cartel of which the authority was previously not aware. The majority of leniency programmes offer immunity to the first applicant who reports a cartel before the start of any investigation. Some leniency programmes also offer immunity to applicants who have reported a cartel after the start of an investigation if they can brings new evidence allowing the authority to prove the infringement.

9. Authorities are likely to find themselves in situations where, while aware of the existence of a cartel as a result of a leniency application by the first applicant, they are not yet in a position to prove the infringement. This is the case, for example, if they were not able to collect the necessary evidence in dawn-raids or through other investigative means. In such situations, co-operation from other cartel members is key to a successful prosecution. It is often the case that co-operation from the second applicant is of particular value because its testimony and other evidence it presents can be used to corroborate the evidence submitted by the first applicant. Co-operation of subsequent applicants may contribute to proving additional facts either in terms of duration, product or geographic scope or the composition of the cartel. This might be particularly useful in cases where immunity is obtained by a minor player in the cartel, who while being aware of the overall activities of the cartel may have not possessed direct evidence of contacts other than those in which it was directly involved. In such a situation, the co-operation of a company from the core of the cartel could allow the authority to effectively investigate all the cartels' members and practices.

10. In addition, co-operation of subsequent applicants generates efficiencies in terms of lower administrative costs, as agencies can obtain evidence without carrying out a full investigation. For example, subsequent applicants may come forward after initial down raids and either submit evidence that was not found by the authority, explain any ambiguous content in the evidence found, or provide access to individuals with inside knowledge of the cartel. This might be particularly relevant in jurisdictions where

[7] See, Kloub, p. 4, Wils, p.19, Faull & Nikpay, s. 8.105, Zingales, p. 7.

the authority does not have the power to compel individual testimony. The authority might eventually obtain this evidence or explanation otherwise, but only at the expense of going through a formal subpoena or information request process. In this sense, the co-operation of subsequent applicants lowers the authority's investigation and prosecution costs, allowing it both to proceed faster and possibly devote some of the saved resources to other investigations. Co-operation from subsequent applicants serves also as a pressure on the immunity applicant to submit all the evidence in its possession and accordingly carry out thorough internal reviews.

11. Subsequent applicants may be rewarded for two kinds of co-operation. First, for the co-operation in the investigation of the case in which they lost the race for immunity by, for example, providing corroborating evidence or other information that helps the authority in the investigation and prosecution of that particular case. Or, second, for co-operation that does not relate to the case in which the applicant company lost the race for immunity but allows the authority to uncover and investigate another possible infringement. The reward for the second form of co-operation is usually called "amnesty plus".

4. Arguments against rewarding subsequent applicants

12. The main objection to granting leniency benefits to subsequent applicants concerns the lowering of sanctions and the resulting decrease in deterrence. Careful consideration should be given to what rewards are strictly necessary and proportionate to the benefits obtained by the authority from the co-operation.

13. The second argument is based on the proposition that, in theory, leniency programmes might stimulate the creation of cartels or at least create scope for strategic behaviour of cartel members towards the authority.[8] Cartels, as any secret organisations, are sophisticated and capable of learning. It is thus possible that cartels would seek to strategically exploit any feature of a leniency programme. For example, in a system that offers reductions to subsequent applicants, cartel members might, prior to their cartel being uncovered, design a system whereby they divide and allocate evidence between themselves to achieve the maximum reductions for each of them.[9] Competition authorities could minimise this particular risk by adopting a high threshold for any lenient treatment, in particular for immunity. Doing so would also reduce the likelihood that while immunity has been granted, the authority still does not have enough evidence to successfully prosecute the case.

14. Rewarding subsequent applicants may also raise the question as to whether immunity remains sufficiently attractive compared to reductions available to subsequent applicants. If the reductions offered to subsequent applicants are too high, cartelists might forego reporting the cartel in exchange for immunity, and decide to come forward to co-operate only once the cartel is uncovered. It is therefore important that reductions for subsequent applicants do not undermine the incentives to come in and denounce the cartel in the first place in exchange for immunity.[10]

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8 See Wils, p. 29.

9 Admittedly, this is a highly artificial theoretical construction but it is not excluded that such a system could be put in place, in particular in the case of cartels with just a few members where coordination is easier.

10 This risk is well illustrated on the example of the first EC leniency programme (the 1996 Leniency Notice), which offered 75-100% fines reduction to the first applicant and up to 50% to subsequent applicants. The concern was that undertakings waited to come forward to the Commission until they had no choice because an investigation was already on-going. By doing so, they could still obtain 75-100% reduction provided they were the first to come forward and submit decisive evidence of the infringement, or obtain a 50% reduction if they lost the race to the door. This was due to both the uncertainty as to the exact level of

5. The framework for rewarding subsequent applicants

15. It is generally acknowledged that the reasons for rewarding co-operation of subsequent applicants outweigh the arguments against doing so. For this reason, most jurisdictions with leniency programmes provide, in one way or another, incentives for subsequent applicants to co-operate with the authority's investigation even if they have lost the race for amnesty.

16. The majority of them do so within the framework of their leniency programme, with the treatment of immunity and leniency applicants being set out in one and the same instrument announcing and regulating the jurisdiction's leniency policy.[11] Other countries deal with the co-operation from the immunity applicant and from subsequent applicants in separate instruments.[12] Finally, some countries' leniency policies provide only for immunity for the first-in applicant, while subsequent applicants are rewarded either in the framework of other policies or under the relevant authority's prosecutorial discretion.[13]

17. It could be argued that a formalised framework for rewarding subsequent applicants provides added certainty and predictability (i.e. the two qualities that are generally seen as crucial to the success of any leniency programme). However, a public declaration accompanied by consistent application practice, as is the case in the US,[14] can be equally effective in fostering proper incentives for subsequent applicants. As with leniency in general, consistency, transparency and predictability of a competition authority's practice, are at least as important as its formal regulations and stated goals.

Questions and Issues for Discussion

1. In your practical experience, what is the most compelling rationale for rewarding subsequent applicants' co-operation? If your jurisdiction does not reward subsequent applicants with any benefits, or no benefits other than "amnesty plus", what is the rationale for such an approach?

2. In your experience, what is the value of the co-operation of the second-in applicant? Have there been cases in your country where a case could not have been brought to a successful prosecution due to the lack of sufficient evidence in the absence of co-operation by the second-in applicant?

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reduction for the first-in and to the relatively small difference between the lowest possible reduction for the first-in (75%) and the maximum reduction for subsequent applicants (50%). See Faull & Nikpay, 8.123.

11 For example, the EU, Korea or Mexico.

12 In Canada, for example, immunity is dealt with in Bulletin on Immunity under the Competition Act, while leniency is set out in a separate Leniency Program Bulletin.

13 For example, Australia, the US or South Africa. The US DoJ's Corporate Leniency Policy contains no provisions on the treatment of subsequent applicants and rewarding them for their cooperation is a matter of prosecutorial discretion exercised by the US DoJ in the context of plea negotiations within the limits of the US Federal Sentencing Guidelines. The 1994 Individual Leniency Policy expressly states that individuals who fail to qualify for immunity will be considered for statutory or informal immunity from criminal prosecution as a matter of prosecutorial discretion, which puts them in a similar position as subsequent corporate applicants.

14 The treatment of subsequent corporate applicants in the US is set out in a public speech by Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement, presented at the 54th ABA Antitrust Section Spring Meeting in Washington DC on 29 March 2006, available at http://www.justice.gov/atr/public/speeches/215514.htm.

6. Incentives for subsequent applicants

18. Incentives for subsequent applicants to co-operate generally take the form of reductions in any sanctions to which applicants are potentially subject. This can mean either reductions in any imposed or recommended monetary sanctions or lower criminal sentence recommendations than would otherwise be the case in jurisdictions with criminal liability for cartel conduct.[15] The size and form of rewards vary from jurisdiction to jurisdiction but generally they reach on average a maximum of approximately 50% of the sanction that would be imposed in the absence of any co-operation.

19. Some countries differentiate the size of the rewards for subsequent applicants on the basis of criteria such as the value of co-operation provided and/or its timing.[16] By doing so they introduce a gradation that has the effect of introducing a "race for leniency", similar to the "race for immunity". This is particularly the case when the criterion is the time of co-operation. In order to qualify for the highest possible reward, companies seek to come forward, provide whatever evidence is available to them and co-operate with the authority as soon as possible. This has clear beneficial effects for the authority.

20. Access to the Amnesty Plus types of policies, which reward the disclosure of a cartel *different* from the one that was first reported, is another incentive that some countries offer to subsequent applicants.[17] However, this aims primarily at uncovering another cartel rather than obtaining co-operation helpful to the investigation and prosecution of an on-going case. As such it differs in its purpose and therefore its functioning should be seen accordingly.

21. Leniency programmes also provide for partial immunity in order to remove the disincentive on the side of the applicant to submit evidence that could be used against it. Therefore, if an applicant submits evidence that the authority uses to establish additional facts increasing the gravity or the duration of the infringement, such facts are generally not taken into account when setting the fine against that applicant.[18]

22. Contrary to immunity, markers that would secure a subsequent applicant's place in line for an applicable band are normally not available.[19] The race to be the first to provide evidence with significant added value is thus fierce and it often starts just hours after a dawn-raid.

7. Requirements on subsequent applicants

23. The requirements on subsequent applicants to qualify for lenient treatment are generally the same as the requirements on applicants for immunity. In addition to submitting evidence, making executives available for interviews and effectively co-operating with the investigation, applicants are generally required to end their participation in the cartel prior to making an application and to maintain secrecy of the fact that they have made an application. In order to justify the granting of leniency and to obtain the

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15 See, for example, points 25-26 of the EC 2006 Leniency Notice, Hammond, p. 3-10, Section 3.3. of the Canadian Leniency Program Bulletin.

16 Such as the EC (See points 25-26 of the EC Leniency Notice), the US DoJ (See Hammond, p. 5-6, 11), or the Canadian Competition Bureau (See section 3.3. of the Canadian Leniency Program Bulletin).

17 Such as the US (See Hammond, p. 9), Canada (Section 3.5. of the Canadian Leniency Program Bulletin), Israel (Section 3 of Israel Antitrust Authority's Leniency Program) or New Zealand (Points 3.41-3.44 of the New Zealand Commerce Commission's Cartel Leniency Policy and Process Guidelines).

18 See point 26 of the 2006 EC Leniency Notice, Hammond, p. 3.

19 Canada is one of the few countries that offer markers to subsequent leniency applicants (See section 3.7.1. of the Canadian Leniency Program Bulletin).

greatest value for doing so, competition authorities also place great importance on applicants providing timely and effective co-operation.

24. To ensure that applicants comply with the relevant requirements, the grant of leniency is usually made at the end of any proceedings before the competition authority.[20] Indeed, the granting of any reduction to a subsequent applicant should be made only at a point where the competition authority has brought the case to a stage at which it can no longer benefit from any further co-operation. This normally is either the formal finding of an infringement by the authority or formal recommendation to a judge or the filing of charges. As such, the promise of reduction can be withdrawn if the applicant fails to genuinely and effectively co-operate throughout the duration of the investigation.

25. It is a common feature of leniency programmes that cartel ringleaders or those who coerced others to participate or remain in a cartel cannot qualify for immunity. It is less frequent that such companies would be disqualified from obtaining a reduction of sanctions.[21] This reflects a balance between the undesirability to let companies that orchestrated a cartel completely off the hook against the fact that such companies might often be able to provide the best evidence due to their position at the centre of the cartel.

26. The timing of co-operation is usually one of the decisive factors in determining the amount of any reduction that may be granted,[22] since earlier co-operation is of greater value for the investigating agency than co-operation provided later in the procedure. It is for this reason that leniency policies sometimes provide for a cut-off point after which leniency is no longer available.[23]

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20 In the case of the EC, the fact whether the Commission considers that an applicant qualifies for leniency and within what band is communicated in a statement of objections while the granting of any reduction in a final decision is made subject to the requirements being met until the end of the procedure.

21 See Hammond, p. 7.

22 In the case of the EC, time determines both the applicable reduction band and the precise reduction within that band.

23 See e.g. point 29 of EC 2006 Leniency Notice, according to which the EC may disregard any application made after the statement of objections has been issued. On the other hand, as the EU General Court recently ruled in *Fuji* (Case T-132/07, *Fuji Electric Corporation v Commission*) cooperation provided after the statement of objections can be of significant value as well, especially if it provides corroboration of certain elements disputed by the parties.

Questions and issues for discussion

1. Please describe the treatment reserved to subsequent applicants in your country. In particular, focus on the incentives and requirements with respect to subsequent applicants and the evaluation of the degree of co-operation provided by them.

2. If your leniency programme includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be "first in the door" of potential applicants. Are markers also available to subsequent applicants?

3. Please explain if your leniency programme is always available during the proceedings, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore?

4. Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons?

5. If your leniency programme does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining)?

8. Interaction between leniency and other policies

27. Leniency policies do not operate in a vacuum. They interact with other legal instruments and as such produce frameworks specific to each jurisdiction. Criminal rules, enforcement procedures, privacy protection rules, and so on, all interact with leniency policies and the incentives they provide. Their careful balance with respect to the overall legal framework is consequently crucial to their success. Below are the three main competition policies which can directly affect the optimal functioning of a leniency programme.

28. First, *criminal liability of individuals*. A leniency policy in a jurisdiction with criminal liability is unlikely to work unless it provides for immunity/leniency for the applicant corporation's employees. Some jurisdictions, most notably the US, also operate leniency programmes for individuals, thus introducing a race for immunity between the corporation and its employees. If the corporation is first to qualify, its employees and directors are covered under its immunity. However, if it fails to report a cartel that an employee reported, it is only the employee who benefits from the immunity. Likewise, co-operating individuals (as subsequent applicants) under the Individual Leniency Program may obtain benefits subject to the US DoJ's prosecutorial discretion, as discussed above.

29. Second, *early case termination policies* (such as settlements or plea bargaining) whereby companies acknowledge their antitrust liability in exchange for a reduced sanction. In the last ten years, an increasing number of competition authorities have adopted early case termination policies, allowing them to achieve procedural efficiencies, which translate into increased deterrence. Plea bargaining in the context of US DoJ's investigations is probably the most well known example of an early termination policy. The recently introduced EC settlement procedure in cartel cases is an example of an early termination policy operating in the context of an administrative enforcement system. A company willing to enter into an early case termination procedure and accept liability for a cartel in exchange for a reduced penalty, is also highly likely to be willing to co-operate. As such, it is possible to imagine that a company might qualify, or wishes to qualify for both a leniency benefit and a "settlement" benefit. In the EU the benefits for leniency and settlement (10% fine reduction) are cumulative, so as to create incentives for companies to both co-operate with the investigation in terms of helping the EC to prove the infringement and to co-operate with

it in achieving quicker adjudication by accepting liability for an infringement in a simplified procedure. The two policies, while pursuing separate aims, thus complement each other.

30. Irrespective of how leniency and early case termination policies operate in practice, it is generally accepted that there should be a sufficient difference between the benefits under leniency and settlement benefits. This is to maintain the attractiveness of leniency, as well as strong incentives for companies to come forward and actively assist the authority in an investigation rather than just wait to see whether the authority can prove the case and then simply accept liability. The EU considered a settlement reduction of 10% to be both sufficiently high to incentivise companies to enter into the settlement procedure and small enough in comparison to leniency discounts so as not to undermine the incentives to come and co-operate under the leniency program. This calculation appears to have been correct as attested by the number of EC settlement cases in the past years. In all of these, the EC also awarded significant leniency discounts.

31. Third, *private damage actions* can affect the incentives to apply for leniency. Leniency policies can be used to stimulate the compensation of victims, as is the case for example in the US, where successful applicants can obtain the benefit of de-trebling of damages. There is, however, no such requirement or benefit in relation to subsequent applicants. On the other hand, private damage actions can act as a disincentive for companies to come forward and co-operate under a leniency programme. In order to minimise these disincentives, competition authorities strive to make sure that leniency applicants are not worse off in terms of damage claims compared to the companies that did not co-operate. This is particularly relevant with respect to the information provided by leniency applicants.[24] Were this information to make it into the hands of potential plaintiffs, the relevant leniency applicants would certainly be worse off than if it had chosen not to co-operate. Therefore, competition authorities strive to ensure that the information provided to them under leniency is and can be used only for the purpose of their proceedings.[25]

Questions and issues for discussion

1. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

2. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

9. Conclusion

32. Hard core cartels are one of the most serious violations of competition law, harming consumers and the economy as a whole. Discovering and prosecuting them, however, is complex because of the secrecy under which they operate. Traditional investigative means are not always sufficient to this purpose. Hence, competition authorities have introduced enforcement policies, such as leniency programmes to

24 This information usually consists of self-incriminating testimonies, direct evidence of the infringement and sometimes even evidence relating to the damage caused by the infringement to the applicant's customers.

25 For example, the 2006 EC Leniency Notice provides for oral submissions of corporate statements in a procedure designed to limit the amount of discoverable material that leniency applicants have in their possession as a result of having applied for leniency. Likewise, in civil damage proceedings the US DoJ regularly argues investigative privilege of any amnesty related material, hence generally successfully resisting, or helping leniency applicants to resist, discovery motions aimed at that particular material.

make discovery easier. Leniency programmes provide incentives for cartel members to break ranks, report the existence of the cartel and co-operate with the investigation. Such co-operation is rewarded by immunity from or reduction of sanctions that could otherwise be imposed to the co-operating company or individual.

33. Leniency programmes represent the most effective tool in the fight against cartels. However, their optimal design is crucial for their success. This paper addresses the importance of co-operation from subsequent applicants for investigating authorities and the different ways in which jurisdictions reward such co-operation. This can be done either in the leniency programme itself, buy offering a lenient treatment to the first in the door and to subsequent applicants; or by rewarding co-operation from subsequent applicants through other policies, e.g. early case termination policies or the fining policy itself. Careful balancing of these policies is therefore necessary to ensure an effective enforcement action, and to maintain the appropriate incentives for companies and individuals to access the leniency programme.

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