

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 25 November 2014

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMMES

-- Note by the Secretariat --

16 December 2014

This document was prepared by the OECD Secretariat to serve as an issues paper for Item III at the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

JT03373030

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.



THE USE OF MARKERS IN LENIENCY PROGRAMMES

*By the Secretariat**

TABLE OF CONTENTS

Introduction.....	4
1. Hard core cartels and leniency policies	5
2. The rationale for a leniency policy	9
2.1 Deterrence and detection	9
2.2 Enforcement efficiency.....	10
3. Maximising co-operation from cartelists in leniency programmes	10
4. Marker systems in leniency programmes	12
4.1 Marker system availability and availability of policy guidance	14
4.2 Information requirements to obtain a marker	15
4.3 Anonymous approach available.....	20
4.4 Markers for subsequent applicants	20
4.5 Timelines to perfect the marker and possible extensions	21
5. Marker systems in a complex international regulatory environment.....	23
5.1 Proposal for a one-stop shop for leniency markers	25
5.2 Points for consideration on a one-stop shop for leniency markers	26
6. Conclusions.....	29
MAIN REFERENCES	30
ANNEX 1 INFORMATION ON LENIENCY PROGRAMMES AND MARKER SYSTEMS.....	33
1. Information on specific jurisdictions	33
2. International work	42

* This paper was written by Antonio Capobianco of the OECD Competition Division and Matthew Chiasson on secondment to the OECD Competition Division from the Competition Bureau of Canada.

Tables

Table 1.	Marker system availability	14
Table 2.	Information requirements to obtain a marker in jurisdictions that have marker systems	15
Table 3.	Availability of anonymous approach in jurisdictions with marker systems	20
Table 4.	Markers for subsequent applicants in jurisdictions with marker systems	21
Table 5.	Availability of an extension in jurisdictions with marker systems	23

Boxes

Box 1.	Effectiveness of leniency programmes.....	7
Box 2.	Fundamental features of a leniency programme	8
Box 3.	Arguments against rewarding subsequent applicants.....	12

Introduction

1. Hard core cartels are unanimously recognised, using the words of the 1998 OECD Council Recommendation concerning Effective Action against Hard Core Cartels,¹ as “*the most egregious violation*” of competition law and hence a principal focus of competition policy and enforcement. Because cartel behaviour is illegal, and even criminal in many jurisdictions, the participants take pains to conceal it. That secrecy makes discovering and proving violations much more difficult for enforcement agencies. It is for this reason that Governments face serious challenges when designing and implementing effective enforcement procedures to detect cartels.

2. Most jurisdictions today have developed programmes that offer leniency in order to encourage violators to come forward and confess the participation to the cartel and to implicate their co-conspirators with first-hand, direct “insider” evidence that provides convincing proof of the illegal conduct. By offering amnesty to the first conspirator who fully co-operates with a competition agency, or a more lenient treatment to subsequent applicants, amnesty/leniency programmes are intended to induce cartel members to come forward and disclose the existence of a cartel, and to provide evidence of their involvement in the conspiracy.²

3. The main objective of these programmes is to uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence is obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete amnesty. Amnesty/leniency programmes have increased significantly the number of detected cartels in many jurisdictions.³ They seem to have also facilitated the successful prosecution of cartel cases by providing competition agencies with hard evidence of the competition law infringement.⁴

4. The term “leniency” will be used here to describe all programmes that provide for any reduction in sanction in exchange for information and co-operation. The more precise term “amnesty” will be used to describe a programme that promises no penalty to the first party to come forward to the enforcement agency and comply with the agency’s requirements. Logically, amnesty is included within the more general concept of leniency. This distinction is adopted here for clarity. Public announcements of these programmes do not always make this distinction clearly, and some use the terms “leniency” and “amnesty” almost interchangeably.

5. This note will focus on a particular feature of some leniency programmes called a “marker”. A marker is the acknowledgement that records the date and time of an application to the leniency programme. The purpose of the marker is to establish the applicant’s position in line in relation to other applicants and to guarantee the applicant’s position in line, subject to meeting all of the other criteria of the leniency programme. The marker is awarded for a limited period of time to allow the applicant time to gather the additional information which is required to complete/perfect the leniency application.

¹ See OECD (1998).

² This general description of amnesty/leniency programmes is sufficient for the current discussion. Note, however, that while amnesty/leniency programmes are conceptually similar, their design and implementation may vary across jurisdictions (e.g. Spagnolo, 2008). For further details on different types of leniency programmes see OECD (2012).

³ E.g. Friederiszick and Maier-Rigaud (2008); Harrington and Chang (2012) and references therein.

⁴ ICN (2010).

6. The following points emerge from this paper:

- An inevitable time gap exists between the moment that a firm (or and individual) learns that it may be part of a cartel and decides to apply for leniency, and the moment that it has gathered sufficient information to make a complete leniency application. An inevitable tension arises because the prospective leniency applicant needs to apply as early as possible in order to qualify for the highest benefits under the leniency programme, but may only be able to report the cartel after it has investigated its conduct internally and gathered the information required to submit a successful leniency application. This inevitable time gap may be costly if others are faster to secure the leniency benefits.
- Marker systems ease this tension by providing a mechanism for prospective leniency applicants to approach the agency with initial information about their participation in a cartel in exchange for a commitment by the agency to hold their place in line for leniency, for a finite period. This grants the marker applicant time to gather additional information through an internal investigation to complete successfully the leniency application.
- Despite the common purposes and objectives of national marker systems there are many differences in national marker systems. These differences relate principally to the types and quantity of information that jurisdictions require for a successful marker application, the time that agencies grant to a successful marker applicant to perfect their leniency application, the automatic or discretionary nature of the marker, the point in the investigation up to when a marker is available, the availability of the marker for subsequent applicants, and the ability of applicants to apply for a marker on an anonymous basis.
- Marker systems try to achieve a balance between setting marker requirements high enough to filter out non-serious applicants and ensure that quality information is provided to the agency in a timely manner, but low enough that prospective leniency applicants are not discouraged from coming forward in the first place.
- The current system of separate national marker systems creates potential challenges for prospective leniency applicants that are part of multi-jurisdictional cartels and who wish to secure first-in status in a large number of jurisdictions. These potential challenges stem from the fact that markers requirements are not harmonised across jurisdictions, increasing the complexity of regulatory compliance, and from practical difficulties co-ordinating simultaneous marker requests across a large number of jurisdictions.
- The business community has suggested ways in which multiple leniency applications could be facilitated by the adoption of a one-stop shop marker system. These proposals have pros and cons that would benefit from greater discussion.

1. Hard core cartels and leniency policies

7. Hard core cartels are considered the most egregious violations of competition law. By artificially raising prices above the level that would prevail under competitive conditions, hard core cartels force purchasers to pay higher price than necessary or switch to less suitable alternatives. Whether cartels organise at the manufacturer or retail level, it is generally the final consumer that ultimately suffers, in one form or another, their harmful effects.

8. While it is very difficult to assess in economic terms the exact harm of cartels, it is generally estimated that each year they cause billions of dollars' worth of damage to the economy worldwide. Based on information on cartel activities reported in Prof. Connor's Private International Cartels (PIC) database⁵ at least USD 9.7 trillion worth of commerce⁶ has likely been affected by international private cartel activity over the period 1990-2013.⁷ For reference, global GDP in 2000 was USD 41.016 trillion⁸, of which OECD GDP was USD 28.567 trillion.⁹ These figures show that cartel activity is not only significant but that its hidden effects may be much more widespread and pernicious than previously appreciated.

9. Accordingly, competition authorities around the world have made the fight against cartels their enforcement priority, imposing ever more stringent sanctions on conspiring companies and, in some jurisdictions, on individuals as well. However, as mentioned above, modern cartels, aware of their illegality, operate in secrecy and oftentimes engage in elaborate efforts to conceal their existence from the authorities. They employ encoded language, encrypted telecommunication means, anonymous email accounts and other ways of maintaining secrecy.¹⁰

10. Due to these efforts, detecting the existence of a cartel is very difficult for competition agencies when relying on traditional investigative methods, such as market research or complaints from consumers and competitors, which are essentially sources of information outside the cartel. By contrast, leniency programmes target information sources within the cartel itself, capitalising on the inherent instability of an illegal conspiracy.

11. 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.¹¹ 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.

⁵ Private International Cartels database by John M. Connor, Purdue University, Indiana, USA. This note uses data from the 2013 edition of the database.

⁶ These figures exclude commerce from alleged or suspected collusion in selected financial products, notably credit default swaps, LIBOR and oil indices. Affected commerce in these areas could be about USD 1,046 trillion, suggesting that a remarkable 99% of allegedly affected commerce from collusion could come from financial products. In these markets, like some others in this study, investigations are ongoing and allegations of illegal collusion have not necessarily been made at the time of writing, though knowledge of investigations is public.

⁷ Private cartels are not considered to include agreements between states over product outputs, such as OPEC.

⁸ See DeLong and Bradford (2014).

⁹ Calculation from OECD statistics.

¹⁰ For an example of the means that cartels employ to conceal their existence see the press release accompanying the European Commission's decision against the Gas Insulated Switchgear in 2007, available at http://europa.eu/rapid/press-release_IP-07-80_en.htm.

¹¹ 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".

Box 1. Effectiveness of leniency programmes

There is little evidence on the relative importance of different cartel detection methods.¹² In a seminal paper, which pre-dates the adoption of the U.S. amnesty programme, Hay and Kelley¹³ identified at least twelve different detection methods in categories actually used by the U.S. DOJ between 1963 and 1972 to detect overall 49 cartels. However, in 70% of the cases, one of the following four methods was actually applied: Grand Jury investigation in another case (24%), complaint by competitor (20%), complaint by customer (14%) and complaint by a local, State, or Federal agency (12%).

The success of leniency programmes as an effective detection tool is undeniable, especially in the larger antitrust jurisdictions:

- In the United States, companies have been fined more than \$5 billion for antitrust crimes since 1996, with over 90% of this total related to investigations opened thanks to the US amnesty programme. The Antitrust Division at the U.S. Department of Justice has approximately 50 international cartel investigations open at a time, and more than half of these investigations have benefitted from information received from a leniency applicant.¹⁴
- The European Commission's leniency policy has proved to be an extremely successful tool for uncovering and dismantling cartels.¹⁵ Until the end of 2012, the European Commission received 166 applications for immunity under the 2006 leniency notice. Although cases based on leniency applications represent the majority of EC cartel cases today, the *ex officio* prosecution of cartels still plays an important role in EC's cartel enforcement. From 2005 to the end of 2010, 112 cartel investigations were started, out of which more than 1/3 were initiated *ex officio*.

More recently, ICN reported that complaints are still the most predominant method of cartel detection worldwide (with leniency applications the second most common).¹⁶ This despite the fact that complaints are not considered a very effective detection measure because they often do not provide competition agencies with sufficient grounds for initiating investigations, and because they are costly to handle as the sheer number of complaints lodged with competition agencies can be significant. Whistle-blowers and informants can also lead to cartel detection; however, it is quite typical for the information provided by said sources to be outdated or biased.

12. The practice of offering lenient treatment in exchange for disclosing the existence of a cartel was started by the US Department of Justice in 1978 when it adopted its first Corporate Leniency Policy. However, the policy began to yield significant results only after its revision in 1993, which introduced some of the elements now regarded as critical for the effectiveness of a leniency programme such as: (i) automatic full immunity if there is no pre-existing investigation, (ii) availability of full immunity even after an investigation has begun and, (iii) protection of all co-operating officers from criminal prosecution (essential in jurisdictions with criminal sanctions for individuals).¹⁷ While the 1978 Corporate Leniency Policy produced about one leniency application a year, the revised 1993 policy resulted in a surge of applications at an average rate of more than one per month and hence became a major generator of new cases, allowing the US Department of Justice to uncover and successfully prosecute large international conspiracies, such as the Vitamins or Lysine cartels.

¹² See OECD (2013).

¹³ Hay and Kelley (1974).

¹⁴ Hammond (2010).

¹⁵ See EU submission to OECD (2013).

¹⁶ ICN (2010).

¹⁷ Griffin (2003), Hammond (2010).

13. Inspired by the successes of the revised 1993 leniency programme, many other jurisdictions followed and adopted their own version of leniency policy, modelled on the US programme but modified to fit the specificities of each jurisdiction's enforcement framework. One of the most significant of these is the European Union leniency programme, which was adopted in 1996, and since revised twice, first in 2002 and again in 2006. Today a large number of countries operate leniency policies with varying degrees of success and many others are considering their adoption or amendments to existing programmes to enhance their effectiveness.

Box 2. Fundamental features of a leniency programme

Leniency policies vary across jurisdictions due to various factors, for example antitrust enforcement may be of administrative or adjudicative character. There are, however, basic features that are common to all of them.

- The basic principle of leniency is that a cartel member who first discloses the existence of an illegal cartel to the authorities is rewarded through full immunity from any pecuniary and criminal sanctions. An amnesty policy, a representative example of which is the US leniency programme, provides for rewards (usually full immunity) only to the first-in applicant.¹⁸
- Some systems take into consideration also co-operation from other cartelists (also called subsequent applicants) and rewarded them with a reduction in the level of the fine corresponding to the value of co-operation provided.
- There are generally no restrictions as to who is eligible for leniency except with respect to full immunity for those companies that initiated the cartel (instigators), significantly lead others in the course of its operation (leaders) or coerced others to participate therein (coercers). Some jurisdictions preclude granting full immunity to instigators, leaders and coercers while others exclude only coercers or leaders.
- Leniency policies generally impose three types of requirements on leniency applicants: (i) to terminate its involvement in the cartel,¹⁹ (ii) to maintain secrecy as to the fact that an immunity application was made, and (iii) to co-operate fully with the enforcement authority throughout the proceedings.
- The first-in applicant is generally required to supply sufficient evidence pointing at the existence of the cartel and its members, in addition to information of a logistical nature so as to enable the agency to effectively target its investigation.
- The demands on subsequent applicants are generally more fluid. However, as any reduction in sanctions that would otherwise be imposed is derived from the quality of co-operation and added-value of the information supplied, there is pressure for leniency applicants to provide as complete and comprehensive account of the facts as possible, supported by all available evidence, in a timely manner.
- Information and evidence can usually be provided both in oral and written form, depending on the evidentiary rules in different jurisdictions. With respect to information provided by leniency applicants most systems provide for a maximum protection against disclosure. This is to ensure that leniency applicants are not in a worse position than they would be had they not come forward.

¹⁸ However, cooperation from cartel members that lost the race for immunity may greatly contribute to the successful investigation and prosecution of a cartel. In jurisdictions that have an amnesty policy this is generally achieved through the use of early termination procedures (such as settlements or plea bargaining) whereby companies that did not qualify for immunity under leniency may obtain favourable treatment in exchange for admission of guilt (or non-contestation of the authority's case) and cooperation.

¹⁹ However, agencies have the discretion to authorise continued involvement for a reasonable time and only to the extent necessary not to jeopardise the investigation (i.e. to allow it to prepare and carry out inspections).

2. The rationale for a leniency policy

14. The cloak of secrecy under which cartels operate makes their detection and successful prosecution by traditional investigative means difficult. Therefore, inducing cartel members to self-report and provide information about the conspiracy and the involvement of fellow co-conspirators in exchange for more lenient treatment is of crucial importance for successful anti-cartel enforcement.

15. According to ICN 2010, “the overall objective of a leniency programme is to improve the level of compliance with antitrust and competition laws through the increased detection of cartels. The increase in competition resulting from identifying cartels ultimately leads to lower prices, better service and/or more innovative and efficient companies, which benefits consumers. This outcome is consistent with competition agencies’ objectives.” The rationale behind a leniency policy is generally two-fold: (i) increased deterrence and detection, and (ii) enforcement efficiency.²⁰ Due to these reasons, it is considered, on balance, in the public interest to entirely or partially forgo the punishment of someone who violated the law even, if considered in isolation, it may be contrary to the traditional notion of justice.

2.1 Deterrence and detection

16. Deterrence of cartel behaviour, one of the principal goals of antitrust enforcement, is achieved by the combination of two factors. The first is the level of sanctions (pecuniary or criminal) imposed on individual violators, which, in the case of pecuniary sanctions should be substantial.²¹ Second is the detection rate, as any potential violator will discount the expected sanction by the probability of being discovered. It is with respect to this factor that leniency policies yield the greatest benefits.

17. In jurisdictions with successfully functioning leniency programmes, cases started on the basis of a leniency application informing the authority of the cartel’s existence account for a large number of the overall case work, while the prosecution of many of those initiated without a leniency application benefit substantially from additional evidence brought by leniency applicants after the initiation of the case. Empirically, successfully functioning leniency policies therefore substantially add to the detection rate of a given antitrust authority and, in combination with sufficiently high sanctions imposed, contribute to the overall level of deterrence of cartel behaviour.²²

18. In addition, a leniency programme creates a prisoners dilemma for cartelists by providing a strong incentive for a member of a cartel to break ranks and escape punishment while the other members suffer high sanctions (this is the principle of “*divide at impera*”). This results in great uncertainty as none of the cartel members can be sure that another member will not report on their illegal activities, for example due to changes in management, thus maximising the inherent instability of secret cartels. Such a

²⁰ ICN (2010) also includes “cessation” as one of the objectives of leniency programmes. Leniency programmes cause cartels to cease operation because one or more of the participants terminates their participation, either because they have applied for leniency or because they are concerned that one or more of their co-conspirators has or will apply for leniency.

²¹ For further discussion of OECD members’ experiences with deterrent fining policies, see OECD (2002) in particular Part II; and OECD (2003), in particular Section V: Sanctions against cartel conduct.

²² Deterrence and effectiveness of leniency policies are very difficult to measure in the absence of information on the overall population of existing cartels. All we know is the number of discovered cartels. However, existing empirical studies show that it is important to ensure that leniency policies are well-designed and properly administered if they are to be effective at deterring cartels, rather than merely making it easier for competition authorities to detect and prosecute cartels. For an overview of this literature see Marvao and Spagnolo (2014), who conclude that there is a lack of strong evidence in favour or against the hypothesis that leniency policies are increasing cartel deterrence and with it social welfare.

risk, when viewed from the perspective of a would-be cartel member may thus provide an additional deterrent to engaging in cartel behaviour.²³

2.2 *Enforcement efficiency*

19. A leniency programme allows an antitrust authority to detect and prosecute cartels in a much more cost-effective manner than by using traditional investigative methods.²⁴ Obtaining information about the existence of a secret cartel directly from one of the cartel members as opposed to outside sources is already a great gain as the authority need not extend any effort in this respect. However, optimally set-up leniency programmes also require applying companies to provide information and evidence that will enable the authority to establish the existence of the violation to the requisite legal standard, resulting in successful prosecution.

20. In addition, companies are obligated to co-operate with the authority throughout the investigation and promptly answer any requests or questions the latter may have. Leniency also facilitates international co-operation in cartel investigations as many leniency programmes require the leniency applicant to state in which other jurisdictions leniency has been sought and provide a waiver allowing communication between those competition agencies. Lastly, there are substantial resource savings due to the fact that either the prosecution of amnesty recipients may not even have commenced (for example in the US) or the findings of an administrative enforcement agency may not be disputed under judicial review.

3. **Maximising co-operation from cartelists in leniency programmes**

21. The rationale for offering immunity to a cartel member 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.²⁵ 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.²⁶ The majority of leniency programmes offer immunity to the first applicant who reports a cartel before the start of any investigation.

²³ For further information and references on the effects of leniency policies on cartels see e.g. Aubert, Rey and Kovacic, (2006); Spagnolo (2003); Motta and Polo (2003).

²⁴ This is not to say that agencies should ‘wait by the phone’ and rely entirely on their leniency programme to uncover cartels. Indeed, the success of a leniency programme depends to a large extent on the existence of a credible threat of the cartel being detected through other means. As noted in ICN (2009), “[...] *no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and sanctioning.*”

²⁵ See, Kloub (2009); Wils (2007); Faull and Nikpay (2007); and Zingales (2008).

²⁶ An exception that proves the rule is when applicants too late to qualify for amnesty in respect of the known cartel apply for so-called “amnesty plus” by revealing their participation in a *separate* cartel not known to the authority. Agencies with “amnesty plus” policies may reward such an applicant by granting them amnesty for the separate cartel ‘plus’ a more lenient treatment than they otherwise would have received had they only cooperated with the investigation of the known cartel. The US Department of Justice notes that a large percentage of its investigations are initiated in this manner, <http://www.justice.gov/atr/public/criminal/239583.htm>.

Some leniency programmes also offer immunity to applicants who have reported a cartel after the start of an investigation if they can bring new evidence allowing the authority to prove the infringement.

22. 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.²⁷

23. 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 dawn 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 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.

24. 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".

²⁷

In addition, the possibility of obtaining cooperation from additional cartel members exerts further pressure on the first-in applicant to provide as full and truthful account of events as possible. This is because if it is subsequently established that the first-in applicant withheld any information available to it, the consequence may be the withdrawal of immunity. Similarly, in cases that were not started on the basis of a leniency application, a competition agency rarely manages to collect sufficient evidence through inspections or other traditional means. Therefore, it is crucial that leniency be available even after the case is initiated, either in the form of full immunity for the first applicant that provides information that allows for the establishment of the violation or partial immunity for applicants that supply information of sufficient value.

Box 3. Arguments against rewarding subsequent applicants

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.

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.²⁸ 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.²⁹ 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.

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.³⁰

4. Marker systems in leniency programmes

25. According to ICN (2009), “[a] “marker” system [is] the practice of reserving a place for a leniency applicant for a defined period of time whilst it conducts further internal investigation and attempts to perfect its application for leniency. The leniency applicant’s position is reserved for an agreed amount of time in the queue, usually on the condition that it provides further information or evidence within this time period. Therefore, the leniency applicant receives a “marker,” which provides certainty and clarity for potential leniency applicants and encourages a race to contact the competition agency.”

26. Marker systems are a rather recent development and have been introduced in most leniency programmes only in the last 5-10 years. They spur the ‘race to contact the competition agency’ by reducing the initial barriers to entry into the leniency programme and by providing transparency and predictability to parties as to their potential leniency status.³¹ They are not necessarily a way to ensure that the agency obtains more or better information about the cartel, although the fact that applicants have a short but

²⁸ See Wils (2007).

²⁹ 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.

³⁰ This risk is well illustrated by 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 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 and Nikpay (2007).

³¹ As Germany put it in their submission to OECD (2012), “Leniency programmes try to initiate a race among the cartel members. This race is more easily triggered if the thresholds for the first move are low.”

reasonable timeframe for perfecting their application ensures that applications are better substantiated and avoids incomplete or sketchy applications.³²

27. While the requirements to obtain a marker vary across jurisdictions, the requirements are typically significantly less than what is required to eventually complete the leniency application. The Business and Industry and Advisory Committee (BIAC) has noted, however, that there are divergences in marker policies across jurisdictions (with respect to availability, information requirements, timing and scope) that may reduce incentives of companies engaged in international hard core cartel matters from using the leniency programmes available to them.³³ Thus, they have suggested that this is an area where greater convergence could be beneficial, and have even proposed the creation of a “one-stop shop” international clearinghouse for leniency markers.³⁴ These considerations are arguably more relevant as more agencies adopt leniency programmes and marker systems, and as the need for international co-operation on cartel investigations grows.

28. The following sections summarise comparative research conducted by the Secretariat on the types and characteristics of marker systems in OECD and non-OECD jurisdictions. This research was conducted with the aim of better understanding: (1) which jurisdictions have marker systems; (2) what are the conditions for obtaining a marker; and, (3) what are the main similarities and differences across regimes. The following methodology was used to conduct this background research:

29. Sources of information on leniency programmes and marker systems were identified for 56 jurisdictions, including each of the 34 OECD members and the European Union, plus 21 other jurisdictions³⁵ for which information was readily available.³⁶

30. Using these sources eleven aspects of markers systems were indexed across jurisdictions: (i) Is a **Marker System** available?; (ii) Are there **Guidelines**?; (iii) What are the **Information Requirements** to obtain a marker?; (iv) Are there **Other Requirements**?; (v) Is the grant of a marker **Discretionary or Automatic**?; (vi) Are **Oral** applications permitted?; (vii) Is a **Form** available?; (viii) Can applicants

³² Germany also notes in their submission to OECD (2012) that a marker system “offers the advantage that the immunity applicant is “hooked” by the Bundeskartellamt at a very early stage and that the Bundeskartellamt – now being in the driver’s seat- has an increased opportunity to steer the investigations in order to avoid destruction of evidence and leaks.”

³³ BIAC Submission to June 2013 Roundtable on International Co-operation [DAF/COMP/WP3/WD(2013)34].

³⁴ For an expanded discussion of this proposal, see Taladay (2012). Some of these suggestions will be discussed in the last part of this paper.

³⁵ Those jurisdictions are: Argentina, Belarus, Brazil, Bulgaria, China (People’s Republic of), Colombia, Croatia, Cyprus, Ecuador, Former Yugoslav Republic of Macedonia, India, Latvia, Lithuania, Pakistan, Romania, Russian Federation, Singapore, South Africa, Sri Lanka, Chinese Taipei and Ukraine.

³⁶ Sources included agency websites, OECD country contributions, and commercial sources including GCR, Lex Mundi, ICLG, and the Global Cartel Handbook. A full list of these sources is included in Annex 1. Note that information was gathered as of July 2014 (with the exception of Sweden for which information was updated to reflect significant changes introduced in December 2014) and therefore may not reflect current practice. Where agency policies were only available in a language other than English, best efforts were made to understand the policies using translation software. Where minor interpretational issues were encountered, a degree of subjective judgement was used. In the case of more significant ambiguity, the jurisdiction’s approach was coded as “unclear”. Importantly, competition authorities have not reviewed or vetted this work. The goal of this exercise, however, is to draw out some of the major similarities and differences in marker policies across a large number of jurisdictions, not to meticulously describe any particular regime(s).

approach the agency **Anonymously**?; (ix) Are markers available for **Subsequent Applicants**?; (x) What is the **Timeline** to perfect the marker?; and, (xi) Are **Extensions** possible?

31. Below is a summary of the principle findings of this research.

4.1 *Marker system availability and availability of policy guidance*

32. All 34 OECD members and the EU have leniency programmes in place, and at least 30 of them appear to have some form of marker system (see Table 1). Of the five jurisdictions that do not appear to have marker systems³⁷, in two cases the situation is simply unclear based on publicly available information.³⁸

Table 1. Marker system availability

Status	#	Leniency Programme		Marker System		
		Yes	No	Yes	No	Unclear
OECD Members, including the EU	35	35 (100%)	0 (0%)	30 (86%)	3 (9%)	2 (6%)
Non-Member	21	18 (86%)	3 (14%)	13 (62%)	8 (38%)	0 (0%)
TOTAL	56	53 (95%)	3 (5%)	43 (77%)	11 (20%)	2 (4%)

33. Perhaps not surprisingly, a lower incidence of leniency programmes, and marker systems, was found among the non-OECD jurisdictions examined. Three jurisdictions were found not to have leniency programmes at all,³⁹ and a further five were found to have a leniency programme but not a marker system.⁴⁰

34. All of the jurisdictions with marker systems have some form of guidance on their use, whether through agency guidelines (e.g., UK), frequently asked questions/FAQs (e.g., US) or, less commonly, through formal inclusion in the laws or regulations that the agency enforces (e.g., India). The level of detail contained in these guidance documents varies from jurisdiction to jurisdiction, with more experienced jurisdictions generally providing more detail (presumably due to greater experience implementing their marker system).

³⁷ Denmark, Estonia, Iceland, Israel, and Spain.

³⁸ In the case of Estonia, legal comparative guides such as ICLG and Lex Mundi suggest that Estonia does not have a marker system. Similarly, Estonia's website does not appear to contain any information on a marker system, but Estonia's submission to the OECD (2012) roundtable indicates that one exists. Similarly, Spain indicated in its submission to OECD (2012) that it does not have a formal marker system but that "*the Directorate for Investigations of the CNC may concede as an exceptional measure a "marker" upon reasoned request of the leniency applicant.* Further information would be required from these jurisdictions to assess whether a *bona fide* marker system exists and how the system operates.

³⁹ Argentina, Belarus, and Sri Lanka.

⁴⁰ China (People's Republic of), Ecuador, Former Yugoslav Republic of Macedonia, Pakistan and Russia.

4.2 Information requirements to obtain a marker

35. Requirements to obtain a marker vary across jurisdictions. However jurisdictions can be grouped into two categories: (i) jurisdictions that are non-prescriptive and allow for some flexibility in the types of information required to obtain a marker; (ii) jurisdictions which are more prescriptive about the information that should be included in a successful application for a marker.

36. Table 2 summarises the prevalence of various types of info requirements across the jurisdictions that have marker systems.

Table 2. Information requirements to obtain a marker in jurisdictions that have marker systems

Status	#	Non-Prescriptive	Prescriptive	Information Requirements within Prescriptive Systems							
				Name	Type/Nature Conduct	Prod./ Services	Geo. Areas	Time/ Duration	Other Parties	Other CAs	Justification/ Circumstances
OECD Member, including the EU	30	9 (30%)	21 (70%)	18 (86%)	20 (95%)	21 (100%)	19 (90%)	18 (86%)	19 (90%)	15 (71%)	10 (48%)
Non-Member	13	3 (23%)	10 (77%)	9 (90%)	10 (100%)	8 (80%)	8 (80%)	9 (90%)	10 (100%)	4 (40%)	3 (30%)
Total	43	12	31	27	30	29	27	27	29	19	13

4.2.1 Non-prescriptive systems

37. Some jurisdictions are more flexible about the types of information required to obtain a marker. This includes jurisdictions that explicitly acknowledge that they require only ‘sufficient information’ in terms ‘specific enough’ to determine whether a marker is available in respect of the alleged conduct (i.e., to assess whether the agency already has an open investigation, whether the applicant is the first to come forward in respect of the alleged cartel, etc.).⁴¹ These agencies acknowledge that the amount of information required to satisfy this requirement will vary from case-to-case but will ordinarily not be extensive. For instance, in some cases it may be sufficient for the applicant to simply disclose the industry where the conduct has occurred for the agency to know that a marker is available; in other cases the applicant may need to be more specific. The benefits of such a system come from the flexibility and minimal burden it affords the applicant. This may encourage more and earlier leniency applications (increasing cartel detection rates).⁴² However, it may also imply a somewhat greater administrative burden on the agency, as

⁴¹ This appears to be the case, for example, of Australia, Canada, New Zealand, Singapore, and United States. Note that agencies in these jurisdictions may nevertheless provide indicative examples of the sorts of information that will normally be expected when a marker is being requested, such as the applicant’s name, a general description of the market concerned, etc. This is not captured in Table 2 because of the flexibility with which these requirements can be met.

⁴² For example, the US DOJ leniency FAQs states that, “because companies are urged to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low.” See www.justice.gov/atr/public/criminal/239583.htm.

marker requests may be more of an iterative, back-and-forth discussion to get to the requisite level of detail. Some marker requests may even turn out to be “false alarms”.⁴³

38. This category also includes agencies that perhaps should be grouped in the subset above but whose guidelines are not specific enough to tell whether a ‘sufficient information’ standard is being applied.⁴⁴ For example, the Bulgarian competition authority notes that “[i]n case the undertaking needs additional time to complete the application for immunity from fines and reduction of fines with evidence, it shall submit a standard marker application and shall duly justify the reasons which make the granting of a period of time necessary”.⁴⁵ However, it is not evident whether particular information should be included in the ‘standard marker’ application or how the application will be assessed. Similarly, in Chile, the marker applicant must submit an electronic form that includes a “[g]eneral description of the collusive conduct”.⁴⁶

39. In many non-prescriptive systems, it appears that the applicant does not necessarily need to (at least initially) reveal their identity to obtain a marker; although Chile, Hungary, Mexico and Singapore specifically require applicants to do so, and the US only grants markers to anonymous applicants in limited circumstances and for a limited period of time (i.e., the applicant must reveal their identity within 2-3 days). This is dealt with in more detail in section 4.3 below.

4.2.2 Prescriptive systems

40. The majority of the jurisdictions that offer a marker system in their leniency programmes are more prescriptive about the information that the marker application should contain.⁴⁷ For example, many European competition authorities have adopted marker systems along the lines of the ECN Model Leniency Programme⁴⁸ which states that marker applications should contain all of the fields in Table 2 above, namely:

- **Name** – i.e., the applicant’s name and contact information;
- **Type / Nature of conduct** – e.g., price fixing, bid rigging, market allocation;

⁴³ For example, Scott Hammond, former DAAG of Criminal Enforcement for the US DOJ estimated in 2012 that one third of leniency applicants do not perfect their marker. He explained that the majority of leniency applicants have just learned of the reported conduct in the week or so prior to their application, and after a more thorough investigation, determine that no unlawful conduct occurred. See Taladay (2012), at footnote 16, citing Leah Nyman, *One in Three Leniency Applicants Drop Their Marker, DOJ Official Says*, MLEX (June 7, 2012), available at http://www.law.northwestern.edu/research-faculty/searlecenter/events/international/documents/leniency_chicago.pdf.

⁴⁴ This is the case for example of Bulgaria, Chile, Hungary, India, Ireland, Mexico, and Norway.

⁴⁵ See Bulgaria’s leniency policy (Section III) available at: www.cpc.bg/Competence/Leniency.aspx.

⁴⁶ See Chile’s leniency guidelines (Section IV.17) available at: www.fne.gob.cl/english/wp-content/uploads/2012/03/Guide_benefits.pdf.

⁴⁷ Some even include a template “form” (e.g., Austria, Chile, Cyprus, France, Hungary, Japan, Korea, Slovak Republic, Slovenia and Chinese Taipei). In some cases these forms can be submitted orally.

⁴⁸ See ECN Model Leniency Programme (Revised 2012) available at: <http://ec.europa.eu/competition/ecn/documents.html> (“18. To be eligible to secure a marker, the applicant must provide the CA with its name and address as well as information concerning: The basis for the concern which led to the leniency approach; The parties to the alleged cartel; The affected product(s); The affected territory (-ies); The duration of the alleged cartel; The nature of the alleged cartel conduct; and Information on any past or possible future leniency applications to any other CAs and competition authorities outside the EU in relation to the alleged cartel.”)

- **Product(s) / Service(s)** affected by the alleged cartel;
- **Geographic Area(s)** affected by the alleged cartel;
- **Time / Duration** of the applicant’s participation in the cartel;
- **Other Parties** involved in the alleged cartel;
- **Other Competition Authorities** – a list of the other jurisdictions where the applicant is, or will be, seeking leniency; and
- **Justification/Circumstances** – a justification as to why a marker should be granted, and/or a description of the circumstances which led to the leniency application.

41. Gathering the requisite information to satisfy these requirements may take more effort and internal investigation on the part of the applicant.⁴⁹ However, this discipline probably helps to avoid false positives (i.e., applicants approaching the agency for a marker before they are sure they participated in a cartel) and ensures that the applicant is serious.⁵⁰ Some agencies also see this as a way to encourage a race to provide ‘useful’ information to the agency rather than a race to enter the queue and provide such useful information at a later date.⁵¹ Of course, the shorter and stricter the time frame set by the agency to perfect the marker the less this distinction would matter in practice.⁵² Nevertheless, the trade-off between setting the marker threshold low to encourage more and earlier applications (which we can think of as the “discovery” rationale), and setting the threshold somewhat higher to filter out non-serious applicants or applicants lacking much useful information (the “investigation” rationale) appears to be a fundamental one.

42. Many of the information requirements above occur in more or less equal proportions across prescriptive systems. However, two are deserving of special attention:

⁴⁹ The ABA in its comments on the EU’s 2006 draft leniency notice (see ABA 2006), states that “(t)he eligibility requirements for a marker in the Draft Notice require an applicant to complete a pre-race obstacle course before beginning the race for the marker. It often requires days or even weeks in an internal investigation to develop accurate information in the categories required for marker eligibility.” http://ec.europa.eu/competition/cartels/legislation/files_leniency_consultation/aba.pdf.

⁵⁰ This is one of the benefits cited by the EU in its leniency FAQs (“*This information is necessary to ensure that this is a serious application*”) available at: http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html.

⁵¹ For example, the EU’s leniency FAQs (ibid) state that, “(i)t is in the public interest to maintain the race between companies to provide the information and evidence required to meet the conditions for immunity and thereby to facilitate the detection and termination of infringements, and not in the race to simply get a place in the queue. Nevertheless, there can be various circumstances that would justify the granting of a marker. Therefore, the decision to grant a marker will need to be made on a case by case basis, taking into account the specificities of each situation and the justifications that the applicant presents for its request to get a marker.”

⁵² Although in the cartel context agencies are often worried about destruction of evidence even over short windows of time. Thus, in theory, a marker system with a low information requirements but with a short time period to perfect the marker may still be considered worse than a system with a higher information requirements if there is sufficient probability of the other cartelists learning about the fact of the marker application and destroying evidence before the marker is perfected (potentially compromising searches and the investigation, etc.). However, most regimes require marker applicants to keep their applications confidential, and there is arguably also a risk of ‘leaks’ in regimes that set a higher threshold to obtain a marker because some (initial) internal investigations may need to be conducted to gather the requisite information, which expands the number of people aware of the prospective leniency application within the company, etc. This may be especially true if the applicant is trying to gather information to satisfy stringent marker requirements in several jurisdictions.

1. *The list of other jurisdictions where the applicant is or will be seeking leniency.* It is worth noting that this requirement occurs with less frequency than the other factors, and this drop-off is especially pronounced in non-OECD jurisdictions. One possible explanation for this is that this requirement does not necessarily speak to the substance of the alleged infringement (i.e., whether or not an infringement may have occurred in the jurisdiction where the application is being made, and whether or not the applicant may qualify for leniency); instead, it has more to do with facilitating co-ordination/co-operation among reviewing jurisdictions.⁵³ Thus, it may be that some agencies place less emphasis on this as a threshold requirement for granting a marker, and it may be that non-OECD countries place even less emphasis on this to the extent that they have less experience participating in multi-jurisdictional cartel investigations.
2. *A justification for the marker request and/or an explanation of the circumstances which led to the application.* While there is some variation in how it is worded across jurisdictions, it seems that this requirement is designed to give some additional discretion to the authority to deal with requests/requestors it does not deem appropriate to reward with a marker notwithstanding the information requirements may otherwise be met. For example, the EU in its submission to OECD (2012) states that, “[m]arker system caters for the needs of those immunity applicants who, for legitimate reasons (e.g. when a new management realised upon its appointment that the company was involved in a cartel) are not in the position to submit all necessary evidence and information at a given time, but are able to perfect their application within a certain specific time span.” Similarly Belgium’s Leniency Notice notes that the “seriousness and the credibility of the reasons given by the applicant” are taken into account by the competition prosecutor in deciding whether to grant the marker.⁵⁴ In Croatia and in Slovak Republic the applicant must justify why they are not able to submit a complete leniency application at that time. South Africa requires the applicant to “justify the need for a marker”.⁵⁵ In contrast, Germany operates a “lean and automatic” marker system that does not contain a justification requirement.⁵⁶

Presumably the benefit of this type of justification requirement is that it gives agencies discretion to not reward companies that have ‘sat on information’ or waited for the cartel to dismantle before coming forward (and therefore, it promotes early reporting). However, given the potential uncertainty of whether an applicant’s rationale or explanation will be accepted, this may also have the effect of discouraging prospective applicants from applying at all, or cause them to delay applying until a legitimate reason arises (e.g., change of management), which could in theory negatively impact cartel detection.⁵⁷

⁵³ Interestingly, however, it appears that only the UK expects applicants to grant confidentiality waivers (rather than simply a list of other jurisdictions) at the marker request stage. See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf

⁵⁴ Belgium Leniency Notice (para 33) available at: http://economie.fgov.be/en/binaries/Leniency_Note_tcm327-28533.pdf

⁵⁵ South African leniency policy (section 12) available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/CLP-public-version-120520081.pdf>

⁵⁶ See Germany’s submission to OECD (2012) (“*The Bundeskartellamt has had good experience with a lean and automatic marker system. [...] Fears that the authority could receive a great number of markers with no real basis for the suspicion, which had been raised in discussions prior to the leniency programme, have proved to be unfounded. The Bundeskartellamt’s burden of managing markers is not very high and it is clearly outbalanced by the system’s positive effects. Furthermore, a lean marker system offers the advantage that the immunity applicant is “hooked” by the Bundeskartellamt at a very early stage and that the Bundeskartellamt – now being in the driver’s seat – has an increased opportunity to steer the investigations in order to avoid destruction of evidence and leaks.*”).

⁵⁷ The ABA noted in respect of the EU draft leniency notice (see ABA 2006) that “*the Draft Notice deviates substantially from the recent trend in leniency policies around the world by re-introducing a substantial*

4.2.3 Other requirements to obtain a marker

43. Some jurisdictions do not specify particular additional requirements but use language such as “at least” when describing what the applicants is required to provide.⁵⁸ This may be a means of signalling that the agency retains discretion to deny the marker request or request further information in specific cases.

44. Two common categories of “other requirements” were found in several regimes:

1. *Status of the investigation.* Some jurisdictions will not grant a marker (or not grant leniency, and therefore by extension a marker) depending on the status of their investigation. Examples of time periods when a marker is available include:
 - **Before agency is aware of the cartel:** Austria;
 - **Before searches conducted:** Japan;
 - **Before sufficient evidence to commence proceedings/intervene:** Australia, Finland;
 - **Before statement of objections issued:** Belgium, EU, Luxembourg, UK;
 - **Before case filed with the courts/Tribunal:** Chile.
2. *Description of evidence/documents.* Some jurisdictions require the marker applicant to provide a descriptive list of the evidence it intends to provide at a later date. This is the case, for example, of Lithuania. Ukraine asks for a list of documents to be attached to the marker application. The UK asks for a description of the evidence uncovered to date (both form and substance) sufficient to give a “concrete basis” for suspicion of cartel activity. Norway asks for “a clear description of the nature and content of the evidence” and will later assess (when the marker is being perfected) whether “the later submitted evidence corresponds to the description”.⁵⁹

level of unpredictability, discretion, and lack of clarity into the program. The negative consequences of these changes likely will be felt not only in Europe but in other major anti-cartel enforcement jurisdictions as well. Because the Commission is one of the major anti-cartel enforcement authorities in the world, any undertaking, and its counsel, faced with the prospect of developing a multi-jurisdictional leniency strategy must consider the consequences in Europe. The lack of clarity and increased discretion provided for in the Draft Notice invariably will introduce delay and indecision for parties considering applications in multiple jurisdictions, and in some cases may result in decisions not to self-report at all due to the inability to predict outcomes in Europe.”

⁵⁸ For example, Netherlands, Poland, and Slovak Republic.

⁵⁹ In the case of Ukraine and especially Norway it is unclear whether these ‘marker’ requirements are so high that they are tantamount to completing a full leniency application. Ukraine’s guidelines appear to acknowledge that the purpose of the marker system is to give the applicant time to gather the necessary information, so presumably its documentary expectations are not high at the marker request stage. Norway’s guidelines (see sections 5 and 9) available at: www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines/. Ukraine’s guidelines (see sections 2.4-2.12) available at: www.amc.gov.ua/amku/control/main/uk/publish/article/90082 (in Ukrainian only).

4.3 *Anonymous approach available*

45. Some agencies allow prospective leniency applicants to approach them on a no-names/anonymous basis. However, there appears to be a wide spectrum of what can be gained from such an approach ranging from: 1) non-binding guidance on the leniency programme generally and how it works; 2) non-binding guidance on whether the leniency programme may apply to the applicant's hypothetical fact set (without disclosing anything about whether there is an investigation or whether the applicant would be first-in, etc.); 3) guidance on whether a marker is available given the applicant's hypothetical fact set; or, 4) a grant of a marker to the applicant (assuming the other requirements are satisfied). In some cases it is not clear which category(ies) are offered by the authority. Where it appeared that scenario 3) or 4) was applicable, the agency was considered to be a "Yes" in Table 3 below.

Table 3. Availability of anonymous approach in jurisdictions with marker systems

Status	#	Availability of anonymous approach		
		Yes	No	Unclear
OECD Member, including the EU	30	16 (53%)	14 (47%)	0 (0%)
Non-Member	13	3 (23%)	8 (62%)	2 (15%)
Total	43	19 (44%)	22 (51%)	2 (5%)

46. Notably, there is a roughly 50/50 split among OECD members regarding the availability of an anonymous approach, whereas, this option is far less common among non-members. The reason for this is not clear.

47. Generally, offering a no-names approach may make it more attractive for prospective leniency applicants to make initial contact with the agency. Presumably it may lower the risk (actual or perceived) of subsequent disclosure of the applicant's identity, or of the agency pursuing them, if the applicant determines that there has been no infringement and decides to withdraw the application. In this sense, it could be thought of as a means of reducing the "barriers to exit" at the initial stages of the leniency application process. Presumably this benefit needs to be balanced against the risk of applicant's 'gaming the system' by providing anonymous information simply to check whether there is an open investigation – although the risks of this may be low when applicants are being represented by credible antitrust counsel.

4.4 *Markers for subsequent applicants*

48. Some jurisdictions also grant markers to subsequent applicants (e.g., to preserve second-in status, third-in status, etc.). Naturally, this depends on the standing of subsequent applicants in the leniency programme. Sometimes such applicants, while not eligible for full immunity may be eligible for fine reductions. Sometimes the order of the subsequent applicants is a determinative factor (e.g., Canada or Japan), sometimes it is a factor that is considered along with the quality of the information provided (e.g., UK), and sometimes it is irrelevant. In the first two cases, markers may be granted to preserve the applicant's place in line. However, as Table 4 summarises, the majority of agencies do not offer such possibility. OECD members that do offer markers to subsequent applicants appear to include Canada, France, Germany, Japan, Korea, Mexico, Switzerland, Turkey, and United Kingdom. Non-OECD members that offer them appear to include Brazil and Lithuania.

Table 4. Markers for subsequent applicants in jurisdictions with marker systems

Status	#	Availability of markers for subsequent applicants		
		Yes	No	Unclear
OECD Member, including the EU	30	9 (30%)	19 (63%)	2 (7%)
Non-Member	13	2 (15%)	9 (70%)	2 (15%)
Total	43	11 (26%)	28 (65%)	4 (9%)

49. Agencies that offer markers for subsequent applicants appear to do so to give predictability and certainty of process to subsequent applicants, increasing the incentives for them to come forward and co-operate.⁶⁰ It may also provide added pressure on applicant's higher in the queue to co-operate. The 2012 OECD roundtable⁶¹ presents contrasting perspectives on this with Canada noting that *“that the business community places a very high value on predictability and certainty, which is one of the reasons that the Canadian Competition Bureau chose to include a marker system for subsequent applicants”*; and the EU noting that *“markers are not available to the subsequent applicants, as the element of the ‘race to the regulator’ between the subsequent applicants would otherwise be compromised.”*

4.5 Timelines to perfect the marker and possible extensions

50. Agencies generally grant a period of time for the applicant who has successfully obtained a marker to complete their leniency application. Many agencies set this time frame on a case-by-case basis; whereas other provide a set time-frame or at least provide directional guidance on what a “normal” or “usual” timeframe would be. This is summarised below:⁶²

- **Case by case:** Belgium, Bulgaria, Colombia, Croatia, Cyprus^{63 64}, Czech Republic, EU*, Finland, Greece*, Hungary, Ireland, Italy, Latvia, Mexico*, Netherlands*, Norway, Poland, Romania, Singapore, Slovak Republic, Slovenia, South Africa, Switzerland*, Chinese Taipei, United Kingdom*;
- **2 weeks:** Japan, Sweden;

⁶⁰ For example, ICN (2009) notes that *“[s]ome agencies extend the marker beyond those first-in under their program and provide for the queuing of potential applicants and consider that having such a queue assists in securing cooperation and information from other parties to the cartel.”*

⁶¹ See OECD (2012).

⁶² Agencies with a * also explicitly provide for the possibility of extensions.

⁶³ Footnote by Turkey: The information in this document with reference to « Cyprus » relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the “Cyprus issue”.

⁶⁴ Footnote by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

- **15 days:** India, Korea*, Lithuania, Portugal;
- **28 days:** Australia*, New Zealand;
- **30 days/1 month:** Brazil*, Canada*, Turkey*, Ukraine*, United States*;
- **8 weeks:** Austria, Germany;
- **2 months:** France*;
- **90 days:** Chile*;
- **Unclear:** Luxembourg.

51. Some agencies will indicate when they may be prepared to grant longer initial timeframes. For example, Sweden may grant a longer initial timeframe if the undertaking can show that circumstances will not reasonably allow for the information to be provided within two weeks. Japan indicates that it may grant a longer time frame (1-2 months) in complex cases or cases involving foreign applicants, taking into account the difficulties in communicating internationally and the time necessary for translation. Similarly, Portugal takes into account whether the applicant needs more time because they are also co-operating with other agencies in the EU. The US DOJ notes that while 30 days is common, the length of time an applicant is given to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the US DOJ already has an ongoing investigation at the time the marker is requested (in which case the time period will presumably be shorter).

52. Generally it appears that agencies try to strike a balance between giving parties a reasonable period of time to gather the requisite information, and keeping the timeframe relatively short so as not to compromise the investigation. For example, the EU notes that the *“time period to be granted to perfect a marker [...] will need to be decided based on the circumstances of each case. But it is clear that the time period will necessarily be short so as not to disadvantage other potential applicants and to ensure that an investigation in the case can be launched swiftly. The longer the time period is, the higher the risk of leaks on the application become, which may ultimately jeopardise a Commission investigation into the case.”*⁶⁵

53. Table 5 summarises the availability of an extension of the initial time period for perfecting the leniency application. Sometimes an extension must be explicitly requested (e.g., Canada) and the applicant must demonstrate that it is making a ‘good-faith effort’ to complete its application in a timely manner (e.g., US).⁶⁶ Also, in many cases, while the possibility of an extension is not explicitly mentioned in the agencies guidelines, it may be available in practice.

⁶⁵ See EU leniency FAQs available at: http://europa.eu/rapid/press-release_MEMO-06-469_en.htm?locale=en

⁶⁶ ICN (2009) notes that a leniency applicant may seek an extension of its marker if it is unable to perfect its application. This may occur for a number of reasons, particularly if aspects of the investigation are outside the leniency applicant’s control, documents, information or evidence are outside the jurisdiction or the conduct is broader than originally thought. Inflexible timeframes regarding markers may reduce the incentives for early self-reporting and may impact on the efficacy of a leniency programme.

Table 5. Availability of an extension in jurisdictions with marker systems

Status	Total	Availability of extensions		
		Yes	No	Unclear
OECD Member, including the EU	30	13 (43%)	11 (37%)	6 (20%)
Non-Member	13	2 (15%)	3 (23%)	8 (62%)
Total	43	15 (35%)	14 (33%)	14 (33%)

54. ICN (2009) recommends as a good practice to “*use markers in the leniency application process because time is of the essence in making a leniency application*” and “*to grant extensions to marker periods where a leniency applicant is making a good faith effort to complete its application in a timely manner*”. Concerning the particular issue of the extension of the marker period ICN (2009) recommends that it is a good practice “*to ensure that markers and extensions to marker periods maintain the incentives on cartel participants to self-report their involvement in a cartel.*”

5. Marker systems in a complex international regulatory environment

55. A growing number of countries now have leniency programmes. According to Borrel, Jiménez and Garcia (2012) until 1999 only three jurisdictions had a leniency programme (US, the EU and Korea). Between 1999 and 2011 at least 44 jurisdictions have adopted a leniency programme.⁶⁷ This proliferation of leniency programmes has been probably one of the most important developments in global competition enforcement of the last decade. The success of leniency policies has allowed cartel enforcement to become the most important item on the enforcement agenda of most competition authorities around the world.⁶⁸ It changed firms’ approach to cartel compliance and to co-operation between agencies and businesses involved in cartel investigations. As more jurisdictions adopt leniency programmes, firms and their counsels face increased regulatory complexity due to the fact that leniency regimes -although aligned in objective and purposes- differ procedurally and in the requirements for entering the programme. This may pose important challenges to businesses who wish to self-report and benefit of the amnesty treatment in multiple jurisdictions. In particular, increased regulatory complexity exacerbates the tension between time and accuracy. On the one hand, there is the need of companies to react quickly to the realisation that they might be involved in a cartel in order to beat others in the race to report the cartel first. On the other hand, companies need to meet the requirements for a successful leniency application in all jurisdictions possibly affected by the conduct, and this may take time.

⁶⁷ See Borrel, Jiménez and Garcia (2012) and discussion in OECD (2013).

⁶⁸ In the United States, for example, “[o]ver ninety percent of fines imposed for Sherman Act violations since 1996 can be traced to investigations assisted by leniency applicants, and prosecutions assisted by leniency applicants accounted for over ninety percent of the total commerce affected by all the cartels prosecuted by the Division since 1999” (Werden, Hammond and Barnett, 2012). In the EU, as a consequence of the adoption of its leniency programme in 1996, the European Commission received many leniency applications (approximately 188 between 1996 and 2002) and 46 out of 52 cartel decisions (88%) from 2002 through 2008 were triggered by a leniency application (see European Parliament, Parliamentary questions: Joint answer given by EU Commissioner Kroes on behalf of the European Commission to written questions : E-0890/09 , E-0891/09 , E-0892/09, 2 April 2009).

56. As the ability of potential leniency applicants to apply for leniency is slowed by the complexity of navigating multiple regulatory regimes, incentives to apply for leniency might be affected.⁶⁹ Leniency programmes rest on the premise that a firm that decides to admit participation in a cartel is not subject to antitrust liability. If this certainty is weakened (or even removed) because the leniency status varies across jurisdictions due to the inability of the firm to apply for leniency simultaneously in every jurisdiction⁷⁰ potentially affected by the conduct, incentives to apply in the first place might be affected. In other words, the cost/benefit analysis that a firm does when deciding to enter a leniency programme may be different depending on whether the firm is considering applying for leniency in one jurisdiction or in more than one. As the number of these additional jurisdiction increases, the risk of not being the first-in applicant in some of these jurisdictions will be higher and may therefore carry more weight in the decision.

57. If one accepts the premise that the prospect of securing the first place in the queue is the only decisive factor in a cartelist's decision to apply for leniency, a cartelist may choose not to report the cartel if that prospect is weakened or removed. This is because the expected benefits from reporting the cartel would be diminished relative to not reporting. This outcome will likely depend on many factors including the risk of the cartel being detected, the level of sanctions in the jurisdiction, the cost of applying for a marker and the probability of it being granted, the probability that if the marker is not granted the information the firm provided will be used against it, the probability that if the marker is granted that leniency will be granted, the leniency discounts available, etc. While such an analysis of incentives to apply or not apply for leniency is complex and to a large extent speculative, one can assume that the uncertainty of obtaining full immunity in each jurisdiction affected by the cartel will affect in one way or another the company's decision as to whether to apply for leniency in the first place. While a marker system is just one element of this multi-jurisdictional calculation, one can at least imagine a circumstance whereby a marker system in *one* jurisdiction that imposes onerous, unclear or unrealistic requirements may discourage a cartelist from reporting a cartel in *any* jurisdiction because it does not provide adequate certainty with respect to the applicant's leniency status in that one jurisdiction. This may be particularly true if the jurisdiction is an important one from the perspective of possible sanctions the firm might face should leniency not be granted there.

58. In addition, having different first-in applicants in different jurisdiction might affect the degree of firms' co-operation with the investigating authorities. There may be instances where a company might not be willing to co-operate fully and unconditionally with one jurisdiction if that will increase its exposure to antitrust liability in other jurisdictions. How can a company rebut in one jurisdiction what it has confessed in another?

59. From the perspective of competition authorities, the tension in potential leniency applicants between speed and accuracy may have consequences in terms of (i) the quality of applications received by agencies, as the need to win the race to the door might affect the value and extent of the information provided by applicants; (ii) the relevance of some leniency applications, insofar as some applicants might decide to apply for leniency also in jurisdictions where they are uncertain about the presence of the cartel; (iii) a potential loss of applications, if some companies will not be prepared to co-operate in some jurisdictions if that will increase their overall exposure in other jurisdictions.

⁶⁹ See Taladay (2012).

⁷⁰ It is not uncommon that the leniency applicant benefitting from amnesty in one jurisdiction does not enjoy the same status in all jurisdictions reviewing the cartel. This may be due to the fact that amnesty was not available anymore in the jurisdictions where it applied for leniency after having obtained amnesty in the first jurisdiction. This diversity in the status may affect incentives of the company to co-operate fully and unconditionally in all the jurisdictions where it is under investigation.

60. In previous OECD discussions BIAC has submitted that “[i]nconsistent approaches to leniency programs, including divergent marker policies (with respect to availability, information requirements, timing and scope) and differing standards respecting safeguards on the use and disclosure of information, create an added burden and complexity for companies engaged in hard core cartel matters to utilize the leniency programs available to them.”⁷¹ In response to this concern, BIAC suggested that the OECD should consider “a “one-stop shop” marker policy that would preserve applicants’ place in line across jurisdictions, and would stimulate and encourage the use of leniency programs.”⁷²

5.1 Proposal for a one-stop shop for leniency markers

61. The proposal for a one-stop shop for marker is discussed in detail in Taladay (2012). Under the system proposed, a successful marker applicant would be granted the first place in the queue in all the jurisdictions which participate to the system by applying for a one-stop shop marker either in a pre-defined jurisdiction(s) (that would act as clearinghouse(s) for the system⁷³) or in *any* of the jurisdictions participating to the system. Once the applicant has made a valid marker request (i.e. that satisfies the information requirements under the system) the agency that has received and cleared the marker application would immediately notify all the other participating jurisdictions that the one-stop shop marker has been granted. Any marker application made subsequently in any of the participating jurisdictions would then have to be rejected because it would not be available anymore.⁷⁴ The successful marker applicant would then have to perfect its leniency applications in all the affected jurisdictions under the substantive standard required by each of these jurisdictions within the time period provided for under the one-stop shop system.

62. In other words, the system would ensure that a successful first-in applicant would be in a position to reserve its place in the queue in all the participating jurisdictions by applying for the one-stop shop marker in only one of these jurisdictions. It is important to emphasise that under the proposed system only the grant of the *marker* would be subject to the one-stop shop mechanism, not the grant of the *leniency* status. Each jurisdiction would continue to operate its leniency programme and would continue to grant or reject conditional leniency treatment under the rules established in its own jurisdiction.

63. The main features of the proposed one-stop shop mechanism are:

- The system would be **voluntary for agencies**. No agency would be required to join the system, which would be operational only between the agencies that have *opted in* to the system.
- The system would be **voluntary also for applicants**, who could well decide not to use the one-stop shop marker and apply separately to jurisdictions of their choice, or to use the one-stop shop marker system only for a subset of the jurisdictions which have opted in the system.
- The one-stop shop system would be **available only to the first-in applicant**. Subsequent applicants would be informed of the fact that the one-stop shop marker is not available anymore, and depending on how the leniency programme is structured they could apply for leniency as subsequent applicants on a country-by-country basis.

⁷¹ BIAC (2013).

⁷² BIAC (2013).

⁷³ This option has the advantage of reducing the risk of potential conflicts between almost simultaneous applications for the one-stop shop marker made by difference applicants in different jurisdictions.

⁷⁴ Although, as explained below, they may still be granted a marker for second-in or lower status depending on the jurisdictions’ approach to subsequent applicants.

64. Proponents of such a system acknowledge that its establishment would require a minimum harmonisation of existing marker systems, in the sense that jurisdictions that would opt in the system would have to agree on (i) the *minimum timeframe for perfecting the leniency applications* in the affected jurisdictions once the one-stop shop marker is successfully granted;⁷⁵ and (ii) the *information requirements that the applicants must satisfy* to obtain the one-stop shop marker. As discussed earlier in this paper, existing marker systems differ sometimes significantly with respect to both elements.

5.2 *Points for consideration on a one-stop shop for leniency markers*

65. This paper does not intend to take a position on the feasibility and desirability of a one-stop shop system for leniency markers. It hopes, however, to provide a framework for a constructive discussion on the pros and cons of such a mechanism.

- Potential advantages for businesses – The potential advantages for businesses are clear. The one-stop-shop marker would offer companies an efficient system to report cartel behaviour preserving, if not increasing, incentives to enter into leniency programmes in multiple jurisdictions. It would reduce the risk of one jurisdiction with onerous, unclear or unrealistic marker requirements acting as a bottleneck on the cartelists’ decision to report the cartel in other jurisdictions (to the extent that that jurisdiction’s requirements would be relaxed by being harmonised with other systems). The system would also reduce the regulatory complexity of having to deal simultaneously with multiple marker requests.⁷⁶ If the reduction of regulatory costs for companies is to some extent a less important point, the system can offer increased certainty to companies which would be in a position to secure the one-stop shop maker. Security will derive from the fact that companies will be able to take the time necessary to perfect their leniency application in multiple jurisdictions without risking of losing the place in the queue in the meantime. This will eventually increase incentives to enter in leniency discussions in multiple jurisdictions. From the companies’ perspective, the one-stop shop marker will ease the tension between the need to go in for leniency as soon as possible in order to secure the highest possible benefit from stepping forward and the need to take the time necessary for the internal investigations required to meet the information requirements for a successful application under multiple leniency systems.
- Potential advantages for agencies – At the moment, there is not sufficient empirical evidence to state that a one-stop shop marker system would be beneficial because agencies would receive leniency applications that they would not have otherwise received under the *status quo* “patchwork” of independent national marker systems. In other words, it is unclear whether or to what extent there are cartelists that are currently discouraged from reporting their participation in a cartel solely because of their inability to secure a marker simultaneously in several

⁷⁵ Extensions of this initial time period could either be defined within the one-stop shop system or be left to separate discussions between the applicant and the agencies in those jurisdictions where the applicant was not in a position to perfect the leniency application within the initial time period.

⁷⁶ In the absence of a one-stop shop, cartelists face various practical/logistical issues that arise from coordinating simultaneous marker requests in a potentially large number of jurisdictions. These issues might include time-zone/office-hour constraints that make it impossible for a firm to contact two agencies at the exact same time without sending an e-mail/voicemail/fax (which may be considered an undesirable method of reporting a cartel in certain circumstances), language constraints (which might require firms to retain local counsel), etc. These issues should not be minimised, and may be significant for a large multinational company seeking to report a cartel in a large number of jurisdictions.

jurisdictions.⁷⁷ However, from the agencies' perspective, there may be several advantages from joining the one-stop shop mechanism.

- *First*, the system would likely improve the quality of the information provided by leniency applicants. Once obtained the one-stop shop marker the applicant would be in a position to focus on the internal investigation and fact-gathering without having to decide whether to go in a jurisdiction with the bare minimum set of facts to secure the leniency benefits.
- *Second*, the advantage of the one-stop shop system is that once a successful marker application is made all jurisdictions participating to the system would be alerted of the existence of the cartel. This is likely to offer a possibility to jurisdictions which in the current system might not be necessarily among the first to be contacted for leniency discussions to become aware of the cartel at an early stage.⁷⁸
- *Third*, it would allow better aligning the timings of the cartel investigations of the agencies involved as they would all become aware of the conduct at the same moment. This will also improve the quality of international co-operation between enforcers and the effectiveness of the investigations as it will facilitate co-ordination between case teams across multiple jurisdictions. This in turn will facilitate co-operation and co-ordination of investigations between the affected agencies.
- Potential impact on the overall cartel enforcement system – From the broad point of view of the global cartel enforcement system, the one-stop shop mechanism would certainly bring a degree of administrative rationalisation. Only one agency would have to handle and assess the application for the one-stop shop marker freeing other agencies from having to perform the same task. The system might also strengthen the enforcement efforts against cross-border cartels and reduce the risk of under-enforcement against cross-border cartels since the one-stop shop marker will expose (at least potentially) the cartel to a higher number of jurisdictions. This will increase overall cartel deterrence and consequently increase incentives to make use of leniency programmes.
- Potential costs – Potential advantages from the introduction of a one-stop shop marker system have to be assessed against potential costs for setting up the system. The proponents of the mechanism recognise that the establishment of a one-stop shop marker would require jurisdictions to agree on the information requirements that an applicant has to meet to obtain the

⁷⁷ A potential counterpoint is that even a very small improvement in global cartel detection rates could potentially justify a significant investment in a one-stop shop system because of the enormously harmful impact of cartels on the global economy. For example, if the harm caused by cartels is accepted to be in the billions of dollars per year, even if a one-stop shop system resulted in the detection and cessation of 1 additional average-sized cartel for every 100, it could generate tens of millions of dollars in incremental “savings” per year, more than the annual budget of a medium-sized competition authority. While this is an admittedly stylised calculation, the point remains that benefits need to be assessed relative to costs, comparing absolute figures to absolute figures.

⁷⁸ The system would benefit especially jurisdictions where to date the leniency programme has not delivered the expected results. As noted in OECD (2013) leniency programmes are not successful in every jurisdiction where they have been implemented. The reasons for this more limited success can vary and can related either to the enforcement record of the agency (here younger agencies can be limited by the lack of experience and cartel enforcement tradition) or to the size of the economy (in small economies corporate links between competitors can be more prominent, or many businesses are still family-owned making the threat of retaliation more substantial). These jurisdictions are likely to benefit most from a one-stop shop mechanism as they would indirectly benefit of the incentive that companies have to report cartels in the larger jurisdictions.

one-stop shop marker and the timeframe that the successful marker applicant has to perfect the market and obtain leniency in all the jurisdictions affected. While this may require some convergence of existing differing standards, this would not need a legislative change in most jurisdictions. Under most existing leniency regimes, the grant of a marker is a procedural matter which can be modified informally by the agency itself. The cost of the system relate to developing and agreeing on a framework, implementing and administering it, and dealing with possible disputes or issues that may arise from it. Notably, there would need to be a timely and secure means for recipient jurisdictions to share marker request information with all of the other relevant jurisdictions subscribed to the one-stop shop system. The confidentiality of this information is paramount as any breach could compromise all investigations. Agencies may understandably be reluctant to subscribe to a one-stop shop system that includes other agencies who are unable to provide adequate confidentiality assurances, or who would not be prepared to co-ordinate key investigative steps such as searches.⁷⁹ This is a challenge faced by international co-operation generally, however, and presumably could be dealt with by starting with a small network of agencies for which there is mutual bilateral trust, and working towards expanded membership over time.

⁷⁹

A counterpoint is that this risk already exists under the current system where leniency applicants are approaching each of the agencies separately and independently at different times.

6. Conclusions

66. This paper discusses the extraordinary role that leniency programmes play today in ensuring an effective cartel enforcement programme in most jurisdictions with an active competition enforcement. Many jurisdictions have introduced features in their programmes to increase incentives of firms to enter into the programme, or to reduce uncertainties as to the benefits available to the applicant at the moment of the application. Leniency markers are one such feature, and they are the subject of this paper. The purpose of marker systems is to allow applicants to reserve their place in the leniency queue (and the benefits attached to it) for a fixed period of time so that the applicant can gather the necessary information to complete a successful leniency application. The purpose of markers is to ease the tension between the need to apply as soon as possible for leniency status to qualify for the largest possible benefits, and the need to conduct a thorough internal investigation to provide the quality and quantity of information required by agencies for a successful leniency application.

67. This paper finds that markers are available in the large majority of OECD jurisdictions, and that they are common also in non-OECD jurisdictions. It also finds that despite the common purposes and objectives of national markers there are many differences across existing marker systems. These differences relate principally to the types of information that jurisdictions require for a successful marker application, the time that agencies grant to a successful marker applicant to perfect the leniency application, to the automatic or discretionary nature of the marker, to the point in the investigation up to when a marker is available, to the availability of the marker for subsequent applicants, or to the ability of applicants to apply for a marker on an anonymous basis.

68. It is undeniable that cartel enforcement has greatly benefitted from the proliferation of leniency programmes around the world and that markers are an important feature which contributed to this success. This very positive development, however, has increased the regulatory complexity that companies face when deciding if to apply for leniency in multiple jurisdictions. It is unclear if the increased complexity of navigating multiple leniency regimes has had an impact on companies' incentives to apply for leniency in some jurisdictions. Businesses, however, have raised the question of convergence of leniency programmes as the next step to ensure continued success of this tool.

69. In particular, the business community has suggested ways in which multiple leniency applications could be facilitated by the adoption of a one-stop shop marker system. This mechanism would allow a successful applicant to reserve the place in the queue in all jurisdictions opting in the system. This would avoid that applicants might have different leniency statuses in different jurisdictions as they were not able to secure simultaneous marker applications in all the jurisdictions potentially affected by the cartel conduct. From the agencies' perspective, the system has the potential to expose the existence of the cartel to a wider set of agencies, as all jurisdictions participating to the system would be alerted of the marker application, potentially decreasing the risk of under-enforcement against global cartels. It has also the potential to align the timing of cartel investigations, favouring a more effective co-operation between the agencies involved, to increase the quality of the evidence provided by the leniency applicant and to avoid superfluous leniency applications. At the same time, adoption of such a system is not without costs including those associated with developing and agreeing on a framework, implementing and administering it, and dealing with possible disputes or issues that may arise from it.

MAIN REFERENCES

- ABA, Comments of the ABA Section of Antitrust Law and Section of International Law in Response to the United Kingdom Office of Fair Trading's Request for Public Comment on the Draft Detailed Guidance on the Principles and Process for Applications for Leniency and No-Action in Cartel Cases, 2012
www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_uk_20120125.pdf
- ABA, Comments to the Commission of the European Communities regarding the Commission's Draft Notice on Immunity From Fines and Reduction in Fines in Cartel Cases, 2006
www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_ec-leniency.pdf
- ABA, Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Criminal Justice, and Section of International Law on the Irish Competition Authority's Cartel Immunity Programme Review, 2010
www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments_2010_ica.pdf
- Aubert, Rey and Kovacic, The impact of leniency and whistle-blowing programs on cartels, 2006, 24(6) International Journal of Industrial Organization, pp. 1241-1266.
- Borrell, Jimenez, and Garcia, Evaluating Antitrust Leniency Programs, XREAP (2012). ECN Leniency Model Program.
http://ec.europa.eu/competition/ecn/model_leniency_en.pdf
- Connor, Latin America and the Control of International Cartels, prepared for delivery at the Latin American Competition Policy Conference (São Paulo, Brazil, April 4, 2008), available at <http://ssrn.com/abstract=1156401>
- DeLong and Bradford, Estimating World GDP: One Million B.C. to Present, Department of Economics, UC Berkeley.
<http://holtz.org/Library/Social%20Science/Economics/Estimating%20World%20GDP%20by%20DeLong/Estimating%20World%20GDP.htm>, accessed 25 July, 2014.
- Faull and Nikpay, The EC Law of Competition, Oxford University Press (2007).
- Friederiszick and Maier-Rigaud, Triggering Inspection Ex Officio: Moving Beyond a Passive EU Cartel Policy, in Journal of Competition Law and Economics, 2008, 4(1), pp. 89-113.
- Griffin, The modern leniency program after ten years: "A summary overview of the antitrust division's criminal enforcement program", presented at ABA section of antitrust law annual meeting at the Ritz-Carlton Hotel, San Francisco, California, August 12, 2003.
- Hammond, Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations, speech presented at the 54th ABA Antitrust Section Spring Meeting in Washington DC on 29 March 2006.
<http://www.justice.gov/atr/public/speeches/215514.htm>.
- Hammond, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Presented by the ABA Criminal Justice Section and the ABA Center for Continuing Legal Education, February 25, 2010.
<http://www.justice.gov/atr/public/speeches/255515.pdf>

- Harrington and Chang, Endogenous Antitrust Enforcement in the Presence of a Corporate Leniency Program, 2012.
- Holmes and Girardet, The International Comparative Legal Guide to: Cartels and Leniency 2012, Global Legal Group (2011).
- IBA, Comments on the Competition Commission of South Africa Discussion Paper: Corporate Leniency Policy Review, 2007.
www.ibanet.org/Document/Default.aspx?DocumentUid=78C14F83-7F53-43F1-BBF6-C6D3600D1E29
- IBA, Comments on the proposed amendments to the Leniency Guidelines of the Competition Commission of Singapore, 2008.
www.ibanet.org/Document/Default.aspx?DocumentUid=A317B836-5845-45A5-B51D-F28F190C50D8
- IBA, Submission to the European Commission on the Commission Leniency Notice, 2006.
www.ibanet.org/Document/Default.aspx?DocumentUid=1A7E0707-03BC-4016-939C-F04CF9E24B80
- IBA, Submission to the New Zealand Commerce Commission on Revised Draft Leniency Policy, 2009.
www.ibanet.org/Document/Default.aspx?DocumentUid=8D727600-C074-49A9-BD55-3B3D125C3E16
- ICN overview of Leniency Programs (Leniency Promotion).
<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx>
- ICN, Anti-Cartel Enforcement Manual, Chapter 2 Drafting and Implementing an effective Leniency Policy, 2009.
<http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf>
- ICN, Anti-Cartel Enforcement Manual, Chapter 4 Cartel Case Initiation, 2010.
<http://www.internationalcompetitionnetwork.org/uploads/library/doc628.pdf>
- Kloub, Using Leniency to Fight Hard Core Cartels – Leniency as the Most Effective Tool in Combating Cartels, paper presented at the OECD LACF 2009.
<http://www.oecd.org/dataoecd/40/2/43420031.pdf>
- Leslie, Antitrust Amnesty, Game Theory, and Cartel Stability. *Journal of Corporation Law*, Vol. 31, pp. 453-488, 2006.
- Marvão and Spagnolo, What Do We Know about the Effectiveness of Leniency Policies? A Survey of the Empirical and Experimental Evidence, SSRN Working Paper Series.
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2511613
- Mobley and Denton, *Global Cartel Handbook – Leniency: Policy and Procedure*, Oxford University Press (2011).
- Motta and Polo, Leniency Programs and Cartel Prosecution, 2003, *International Journal of Industrial Organization* 21, 347-379.

OECD Council Recommendation concerning Effective Action against Hard Core Cartels, 25 March 1998, C(98)35/FINAL.

<http://www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainsthhardcorecartels.htm>

OECD Policy Brief, Using Leniency to Fight Hard Core Cartels (2001), OECD Policy Brief.

<http://www.oecd.org/corporate/corporateaffairs/1890449.pdf>

OECD Report, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs (2002).

<http://www.oecd.org/competition/cartelsandanti-competitiveagreements/1841891.pdf>

OECD, Ex-officio cartel investigations and the use of screens to detect cartels, 2013.

<http://www.oecd.org/daf/competition/exofficio-cartel-investigations.htm>

OECD, Hard Core Cartels: Recent challenges and progress ahead, 2003.

<http://www.oecd.org/daf/competition/cartels/hardcorecartels-recentprogressandchallengesahead.htm>

OECD, Leniency for Subsequent Applicants, 2012.

www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf

Sandhu, The European Commission's Leniency Policy: A Success?, E.C.L.R., Vol. 28, Issue 3, March 2007.

Spagnolo, Divide et Impera: Optimal Deterrence Mechanisms Against Cartels and Organized Crime, University of Mannheim, March 2003.

Spagnolo, "Leniency and Whistleblowers in Antitrust", in Handbook of Antitrust Economics, 2008, pp. 259-303.

Taladay, Time for a Global 'One-Stop Shop' for Leniency Markers, ANTITRUST, Vol. 27, Fall 2012.

Wils, Leniency in Antitrust Enforcement: Theory and Practice, (2007) 30 World Competition 25-64.

http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087

Zingales, European and American Leniency Programs: Two Models Towards Convergence?, (2008) 5(1) ComLRev.

ANNEX 1

Information on Leniency Programmes and Marker Systems

Information on Specific Jurisdictions (Non-OECD jurisdictions are indicated by an *)

Jurisdiction	Sources of Information
ARGENTINA*	<p>ICLG – Cartels and Leniency 2014 (Argentina): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/argentina</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Argentina): www.lexmundi.com/Document.asp?DocID=6464</p>
AUSTRALIA	<p>ACCC immunity policy for cartel conduct and interpretation guidelines (July 2009) www.accc.gov.au/publications/accc-immunity-policy-for-cartel-conduct</p> <p>ICLG – Cartels and Leniency 2014 (Australia): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/australia</p>
AUSTRIA	<p>Leniency Program Handbook: www.en.bwb.gv.at/CartelsAbuseControl/Leniency/Documents/Handbook%20leniency_english%20version.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Austria): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/austria</p>
BELARUS*	<p>ICLG – Cartels and Leniency 2014 (Belarus): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/belarus</p>
BELGIUM	<p>Leniency Program of the Belgium Competition Authority http://economie.fgov.be/en/entreprises/competition/restrictive_practices/leniency_program/</p> <p>Leniency Notice (describes marker policy): http://economie.fgov.be/en/binaries/Leniency_Notice_tcm327-28533.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Belgium): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/belgium</p>
BRAZIL*	<p>Programa de Leniência (Portuguese only) www.cade.gov.br/Default.aspx?3cfc3fc14ecc4feb78d971</p> <p>ICLG – Cartels and Leniency 2014 (Brazil): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/brazil</p> <p>GCR Know-How: Immunity, Sanctions and Settlements (Brazil) http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/6/brazil/</p>

BULGARIA*	<p>Leniency Policy (see Section III): www.cpc.bg/Competence/Leniency.aspx</p> <p>Decision regarding leniency programme (Bulgarian only) http://reg.cpc.bg/Decision.aspx?DecID=300028274</p> <p>ICLG – Cartels and Leniency 2014 (Bulgaria): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/bulgaria</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Bulgaria): www.lexmundi.com/Document.asp?DocID=6464</p>
CANADA	<p>Immunity Program Bulletin (June 2010): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03248.html</p> <p>Immunity Program FAQs: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03594.html</p> <p>Leniency Program Bulletin (September 2010): www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03288.html</p> <p>Leniency Program FAQs: www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03593.html</p> <p>ICLG – Cartels and Leniency 2014 (Canada): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/canada</p>
CHILE	<p>Guide on Benefits of Immunity and Reduction of Fines in Collusion Cases (2009): www.fne.gob.cl/english/wp-content/uploads/2012/03/Guide_benefits.pdf</p> <p>Contribution from Chile (FNE) to Latin American Competition Forum: Using Leniency to Fight Hard Core Cartels (2009): www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2009)26&docLanguage=En</p> <p>Latin Lawyer Cartel Regulation (Chile) (November 2013): http://latinlawyer.com/reference/topics/68/jurisdictions/3/chile/</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Chile): www.lexmundi.com/Document.asp?DocID=6464</p>
CHINA (PEOPLE'S REPUBLIC OF)*	<p>ICLG – Cartels and Leniency 2014 (China): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/china</p> <p>China New Leniency Procedure - Legal Commentary (2011): www.jonesday.com/china_new_leniency_procedure/</p>
COLOMBIA*	<p>Decree 2896 of 2010 (Spanish only)(see Articles 5-6 for description of marker system): www.sic.gov.co/drupal/sites/default/files/normatividad/Decreto2896_2010.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Colombia): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/colombia</p>
CROATIA*	<p>Guideline on Immunity From Fines and Reduction of Fines: www.aztn.hr/uploads/documents/eng/documents/legislation/Regulation_on_immunity_from_fines_and_reduction_of_fines_CCA.pdf</p>

CYPRUS*	<p>Cyprus Anti-Cartel Enforcement Template (Aug 2013) www.competition.gov.cy/competition/competition.nsf/c56b596d59ff01fec22571a800370453/5b91784e080d9195c22571a800370be2/\$FILE/Cyprus_20130805.pdf</p> <p>Cartel Immunity and Reduction of a Fine Program (Greek only) www.competition.gov.cy/competition/competition.nsf/All/746B72D3C58F1C11C2257A28002FDFAC/\$file/K.A.PI%20463-2011-ImmunityProg.pdf?OpenElement</p> <p>ICLG – Cartels and Leniency 2014 (Cyprus): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/cyprus</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Cyprus): www.lexmundi.com/Document.asp?DocID=6464</p>
CZECH REPUBLIC	<p>Leniency Programme Homepage: www.uohs.cz/en/competition/antitrust/new-leniency-programme.html</p> <p>Leniency Programme Notice (describes marker policy): www.uohs.cz/download/Legislativa/legislativa_EN/Leniency_programme_2013.pdf</p>
DENMARK	<p>Practical Considerations for Leniency Applications (Danish only) www.kfst.dk/Konkurrenceforhold/Straflempelse/Ansoegningsprocessen</p> <p>Guidelines on leniency for cartel cases (does not appear to be available on Danish Competition Authority website, but available at link below): www.docstoc.com/docs/35893639/Guidelines-leniency</p>
ECUADOR*	<p>Latin Lawyer Cartel Regulation (Ecuador) (November 2013): http://latinlawyer.com/reference/topics/68/jurisdictions/32/ecuador/</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Ecuador): www.lexmundi.com/Document.asp?DocID=6464</p>
ESTONIA	<p>Leniency Application and Conditions: www.konkurentsiamet.ee/index.php?id=15112</p> <p>Estonia submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Estonia): www.lexmundi.com/Document.asp?DocID=6464</p>
EUROPEAN UNION	<p>Leniency Homepage (see 2006 Notice and FAQs): http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html</p> <p>ABA Comments on Draft Leniency Notice: http://ec.europa.eu/competition/cartels/legislation/files_leniency_consultation/aba.pdf</p> <p>ICLG – Cartels and Leniency 2014 (EU): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/european-union</p>
FINLAND	<p>FCA Guidelines on Immunity From and Reduction of Fines in Cartels Cases (see Section 5): www.kilpailuvirasto.fi/tiedostot/Suuntaviivat-2-2011-Leniency-EN.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Finland): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/finland</p>

FRANCE	<p>Procedural Notice related to French Leniency Programme (March 2009): www.autoritedelaconurrence.fr/doc/cpro_clemence_uk_2_mars_2009.pdf</p> <p>ICLG – Cartels and Leniency 2014 (France): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/france</p>
FORMER YUGOSLAV REPUBLIC OF MACEDONIA “FYROM”*	<p>Laws on the protection of competition (see article 65) www.kzk.gov.mk/images/LPC%20eng%20final%20version%20145%2010.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Macedonia): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/macedonia</p>
GERMANY	<p>Leniency Homepage: www.bundeskartellamt.de/EN/Banoncartels/Leniency_programme/leniencyprogramme_artikel.html</p> <p>Leniency Notice: www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Notice%20-%20Leniency%20Guidelines.pdf?__blob=publicationFile&v=5</p> <p>ICLG – Cartels and Leniency 2014 (Germany): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/germany</p>
GREECE	<p>The HCC adopts a revised leniency programme press release and FAQ (Nov 2011): www.epant.gr/news_details.php?Lang=en&id=89&nid=378</p> <p>ICLG – Cartels and Leniency 2014 (Greece): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/greece</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Greece): www.lexmundi.com/Document.asp?DocID=6464</p>
HUNGARY	<p>Leniency Policy Homepage (see Explanatory notes para 35-43 and “II.1.C Non-final application for immunity from fines” of Application Form): www.gvh.hu/en/for_professional_users/leniency_policy</p> <p>ICLG – Cartels and Leniency 2014 (Hungary): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/hungary</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Hungary): www.lexmundi.com/Document.asp?DocID=6464</p>
ICELAND	<p>Competition Rules – Collusion – Reduction or cancellation of fines: http://en.samkeppni.is/competition-rules/collusion/reduction-or-cancellation-of-fines/</p>
INDIA*	<p>CCI (Lesser Penalty) Regulations, 2009 (see Section 5(1)): www.cci.gov.in/May2011/Home/regulation/regu_lessor.pdf?phpMyAdmin=NMPFRahGKYeum5F74Ppstin7Rf00</p> <p>ICLG – Cartels and Leniency 2014 (India): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/india</p>
IRELAND	<p>ICA Leniency Homepage: www.tca.ie/en/Enforcing-Competition-Law/Cartel-Immunity-Programme.aspx</p>

ISRAEL	<p>IAA Leniency Program http://eng-archive.antitrust.gov.il/files/168/Leniency%20Program.pdf</p> <p>OECD Report, Israel Accession Report on Competition Law and Policy (2011) www.oecd.org/competition/50104572.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Israel): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/israel</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Israel): www.lexmundi.com/Document.asp?DocID=6464</p>
ITALY	<p>Notice: www.agcm.it/en/competitionagreements-and-abuse-of-dominant-positions/leniency-program/1887-notice-on-the-non-imposition-and-reduction-of-fines-under-section-15-of-law-no-287-of-10-october-1990-.html</p> <p>ICLG – Cartels and Leniency 2014 (Italy): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/italy</p>
JAPAN	<p>Japan submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>Leniency Program in Japan and how to make it workable, presentation by Toshiyuki NAMBU Deputy secretary General for international Affairs JFTC (March 2013) www.ikk-2013.de/pdf/Nambu.pdf</p> <p>GCR Know-How: Immunity, Sanctions and Settlements (Japan) http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/36/japan/</p> <p>ICLG – Cartels and Leniency 2014 (Japan): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/japan</p>
KOREA	<p>Notice (August 2009) (see Article 8): http://eng.ftc.go.kr/files/static/Legal_Authority/Notification%20on%20Implementation%20of%20Cartel%20Leniency%20Program(2009).pdf</p> <p>GCR Know-How: Immunity, Sanctions and Settlements (Korea) http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/35/korea/</p> <p>ICLG – Cartels and Leniency 2014 (Korea): www.iclg.co.uk/practice-areas/cartels-and-lenieny/cartels-and-lenieny-2014/korea</p>
LATVIA*	<p>Leniency Programme www.kp.gov.lv/en/leniency-programme</p> <p>Marker Procedure (Latvian only) www.kp.gov.lv/documents/aefd03bc9e281b799d943a8a14199964be1e97e5</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Latvia): www.lexmundi.com/Document.asp?DocID=6464</p>
LITHUANIA*	<p>Leniency Rules (Feb 2008): http://kt.gov.lt/en/index.php?show=antitrust&antitrust_doc=res1s27</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Lithuania): www.lexmundi.com/Document.asp?DocID=6464</p>

LUXEMBOURG	<p>Procédure de clémence (January 2014) (French only) www.concurrence.public.lu/fr/regles-concurrence/procedures-negociees/index.html</p>
MEXICO	<p>Guía del Programa de Inmunidad y Reducción de Sanciones (Spanish only) www.cfc.gob.mx/images/stories/Documentos/guias/cfcguia.pdf</p> <p>Mexico submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>GCR Know-How: Immunity, Sanctions and Settlements (Mexico) http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/16/mexico/</p> <p>Latin Lawyer Cartel Regulation (November 2013) (Mexico) http://latinlawyer.com/reference/topics/68/jurisdictions/16/mexico/</p> <p>Mexican Competition Law aligned incentives for effective cartel Enforcement, by Omar Guerrero Rodríguez, Alan Ramírez (Oct 2012) www.competitionpolicyinternational.com/assets/Uploads/Cartel-Oct2012-Omar3.pdf</p>
NETHERLANDS	<p>Beleidsregels voor boetes en clementie (Aug 2013) (Dutch only)(see section 2.32) www.acm.nl/nl/download/publicatie/?id=11888</p> <p>ICLG – Cartels and Leniency 2014 (Netherlands): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/netherlands</p>
NEW ZEALAND	<p>Cartel Leniency Policy: http://comcom.govt.nz/the-commission/commission-policies/cartel-leniency-policy/</p> <p>FAQs: http://comcom.govt.nz/the-commission/commission-policies/cartel-leniency-policy/cartel-leniency-faq/</p> <p>ICLG – Cartels and Leniency 2014 (New Zealand): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/new-zealand</p>
NORWAY	<p>Regulation on the calculation of and leniency from administrative fines (see sections 5 and 9) www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines-/</p> <p>ICLG – Cartels and Leniency 2014 (Norway): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/norway</p>
PAKISTAN*	<p>Competition (Leniency) Regulations (2013): www.cc.gov.pk/images/Downloads/regulations/competition_leniency_reg_2013.pdf</p>
POLAND	<p>Leniency Program Guidelines: http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/awareness/occp leniencyprogramguidelines.pdf</p> <p>Estonia submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p>

PORTUGAL	<p>Leniency Program Homepage (see Notice regarding Regulation no. 1/2013) www.concorrenca.pt/vEN/Praticas_Proibidas/Leniency_Programme/Pages/Leniency-Programme.aspx</p> <p>ICLG – Cartels and Leniency 2014 (Portugal): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/portugal</p>
ROMANIA*	<p>Romania Leniency Guidelines (Romanian only)(see section 26-32) www.consiliulconcurrentei.ro/uploads/docs/items/id1040/ordin+instructiuni.pdf</p> <p>Romania submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Romania): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/romania</p> <p>Lex Mundi Global Practice Guide - Leniency Programs: www.lexmundi.com/Document.asp?DocID=6464</p>
RUSSIA*	<p>Russian Federation submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>Practical Law – Cartel Leniency in Russian Federation: Overview http://uk.practicallaw.com/6-528-0790?q=&qp=&qo=&qe=</p>
SINGAPORE*	<p>Leniency Guidelines: www.ccs.gov.sg/content/dam/ccs/PDFs/CCSGuidelines/GuidelineLenienceProgramme220109final.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Singapore): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/singapore</p> <p>Lex Mundi Global Practice Guide - Leniency Programs (Romania): www.lexmundi.com/Document.asp?DocID=6464</p>
SLOVAK REPUBLIC	<p>Leniency Program: www.internationalcompetitionnetwork.org/uploads/cartel%20wg/awareness/srzeniency_en.pdf</p>
SLOVENIA	<p>Leniency Homepage (see Decree, Article 12 and Annex 4) www.varstvo-konkurence.si/en/leniency/</p> <p>ICLG – Cartels and Leniency 2014 (Slovenia): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/slovenia</p>
SOUTH AFRICA*	<p>Corporate Leniency Policy: www.compcom.co.za/assets/Uploads/CLP-public-version-12052008.pdf</p> <p>ICLG – Cartels and Leniency 2014 (South Africa): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/south-africa</p>

SPAIN	<p>Comunicación sobre el Programa de Clemencia (Spanish only) www.cnmc.es/Portals/0/Ficheros/Competencia/clemencia/ComunicacionClemenciaAnexo2013.pdf?timestamp=1397478388740</p> <p>Spain submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>ICLG – Cartels and Leniency 2014 (Spain): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/spain</p>
SRI LANKA*	<p>Lex Mundi Global Practice Guide - Leniency Programs (Sri Lanka): www.lexmundi.com/Document.asp?DocID=6464</p>
SWEDEN	<p>The General Guidelines of the Swedish Competition Authority on immunity from fines and reduction of fines (see paras 59-63 and 78) http://www.kkv.se/globalassets/english/competition/kkvfs-2015_1-english-version.pdf</p>
SWITZERLAND	<p>Ordinance on Sanctions imposed for Unlawful Restraints of Competition (see in particular Article 9) www.admin.ch/ch/e/rs/251_5/index.html</p> <p>Switzerland submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p> <p>GCR Know-How: Immunity, Sanctions and Settlements (Switzerland) http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/29/switzerland/</p> <p>ICLG – Cartels and Leniency 2014 (Switzerland): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/switzerland</p>
CHINESE TAIPEI*	<p>Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases (2012) (see Article 11) www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1302&docid=12223</p> <p>Chinese Taipei submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf</p>
TURKEY	<p>Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulation) www.rekabet.gov.tr/File/?path=ROOT%2fDocuments%2fRegulation%2fyonetmelik10.pdf</p> <p>Regulation 2009 (Turkish only) http://www.resmigazete.gov.tr/eskiler/2009/02/20090215-2.htm</p> <p>GCR Know-How: Immunity, Sanctions and Settlements (Turkey) http://globalcompetitionreview.com/know-how/topics/79/jurisdictions/54/turkey/</p> <p>ICLG – Cartels and Leniency 2014 (Turkey): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/turkey</p>

UKRAINE*	Leniency Application Procedure (see sections 2.4 to 2.12)(Ukrainian only) www.amc.gov.ua/amku/control/main/uk/publish/article/90082 Ukraine submission to OECD Roundtable on Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf
UNITED KINGDOM	Leniency Homepage (see Applications for leniency and no-action in cartel cases): www.gov.uk/cartels-confess-and-apply-for-leniency ICLG – Cartels and Leniency 2014 (United Kingdom): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/united-kingdom
UNITED STATES	Leniency Program Homepage: www.justice.gov/atr/public/criminal/leniency.html FAQs (describes marker policy): www.justice.gov/atr/public/criminal/239583.htm ICLG – Cartels and Leniency 2014 (USA): www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014/usa

2. International Work

Organisation	Source of Information
Baker & McKenzie	Global Cartels Handbook: Leniency, Policies and Procedure
European Competition Network (ECN)	ECN Model Leniency Programme (see IP/06/1288 and MEMO/06/356) http://ec.europa.eu/competition/ecn/documents.html
GCR	GCR Know-How: Immunity, Sanctions & Settlements (see Q's 17-25 and 45) http://globalcompetitionreview.com/know-how/topics/79/immunity-sanctions-settlements/
International Comparative Legal Guides (ICLG)	ICLG Cartels and Leniency (2014)(see Q4 in particular) http://www.iclg.co.uk/practice-areas/cartels-and-leniency/cartels-and-leniency-2014
ICN	Drafting and implementing an effective leniency policy (2014): www.icnmarrakech2014.ma/pdf/Intl-ICN-Anti-cartel_enforcement_manual.pdf Links to agency leniency program materials: http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx
Lex Mundi	Leniency Program Global Practice Guide (2013) www.lexmundi.com/Document.asp?DocID=6464
OECD	OECD Report, Leniency for Subsequent Applicants (2012): www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf OECD Report, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs (2002): http://www.oecd.org/competition/cartelsandanti-competitiveagreements/1841891.pdf
UNCTAD	The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries (August 2010): http://unctad.org/en/docs/trbpconf7d4_en.pdf