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Working Party No. 3 on Co-operation and Enforcement**Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat**

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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 documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm

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Challenges and Co-Ordination of Leniency Programmes

Background paper by the Secretariat*

For many competition authorities leniency has become the most important tool in detecting cartels. Currently, more than 60 jurisdictions have leniency programmes in place, including all OECD member countries, with the objectives of detecting old cartels, deterring new ones as well as reaching enforcement efficiency in prosecuting those cartels. This paper identifies various challenges competition authorities face with regard to their leniency programmes, the relationship between leniency and other enforcement policies as well as challenges in co-ordinating leniency programmes in international cartel cases.

A significant challenge of every leniency policy lies in the need to align with other enforcement policies, especially with private enforcement, criminal liability and settlement/plea bargaining. Public and private enforcement are essentially mutually reinforcing and private antitrust damage actions can complement public enforcement regimes by strengthening deterrence and empowering victims to tackle anti-competitive behaviour. However, private damage actions can also act as a disincentive for companies to apply for leniency as the applicant will need to provide information about the cartel in which it took part that not only incriminates other cartel members but also itself. This self-incrimination may have negative consequences for the applicant in other proceedings, especially in follow-on damage litigations in civil courts. Authorities need to secure that leniency applicants are not in a worse position than other cartel participants in these civil lawsuits. There is an ongoing discussion whether criminal sanctions for cartel infringements, including jail time for managers, and leniency are mutually reinforcing – or whether criminal sanctions might have a chilling effect on the number of applications submitted. Finally, leniency and settlement are complementary: while leniency is an investigative tool to obtain information and evidence to establish an infringement, settlement, in turn, will allow an authority to reach efficiencies in its procedures and thus free up resources.

Competition authorities also face the challenge of how to co-operate in international cartel cases efficiently without deterring leniency applications. Participants of international cartels will likely not apply only in one jurisdiction -as one application might trigger a chain of investigations in other jurisdictions- but consider multi-jurisdiction immunity/leniency applications. However, multijurisdictional applications might impose considerable costs on an applicant company. Also, applicants might have to comply with different, in extreme cases even conflicting, legal requirements imposed by the leniency systems of different jurisdictions. Finally, companies may face uncertainty concerning market systems, not being certain to secure first position in all jurisdictions.

Other challenges which are discussed in this paper are the strategic use of leniency by companies for their own purposes as well as how to secure full and continuous co-operation of applicants even after they have been granted immunity.

* This paper was written by Michael Saller, with comments from Antonio Capobianco, Despina Pachnou and Semin Park.

1. Introduction

1. Detection and punishment of hard core cartels has been a priority of antitrust enforcement since many years, as they represent one of the most serious violations of competition law, harming consumers and the economy as a whole alike. However, it is difficult to detect such cartels as they usually act in secret and are often accompanied by measures to conceal and to prevent detection. For many competition authorities leniency programmes have become the most important detection tool. According to a majority of respondents to a 2017 OECD Secretariat Survey on experiences with the OECD Recommendation concerning Effective Action against Hard Core Cartels (OECD Survey 2017), their leniency programme is the single most effective tool for detecting cartels. The percentage of cartel cases detected through leniency applications is reported in the survey to range between 45-55% for countries like Canada, Chile, Germany, Korea and New Zealand and up to 80% for the EU (OECD, 2017). In the US, over 90% of penalties imposed by the US Department of Justice (DOJ) were linked to investigations assisted by leniency applicants (Guttuso, 2015 with further references).

2. Leniency programmes around the world offer cartel members the opportunity to report their illegal conduct and provide information and evidence of the infringement in exchange for full immunity or a reduction of antitrust penalties. The terminology used in the context of leniency programmes, however, varies between jurisdictions (OECD 2014a). While some jurisdictions use the terms “leniency” or “amnesty” to refer to full immunity from sanctions, others describe this only as “immunity”, while “leniency” describes any lenient treatment and the reduction of sanctions or only the reduction of sanctions for subsequent applicants. This paper uses the term “leniency programme” to refer both to an amnesty and a leniency programme, “immunity” to describe the benefit of complete immunity from any sanctions and “leniency” to cover the benefits of any reduction in sanctions in exchange for information and co-operation that would otherwise be imposed on applicants that do not qualify for immunity. “Leniency policy” is used to describe the principles and conditions adopted by, or applicable to, a competition authority to govern the leniency process. A leniency programme includes agency processes, such as how competition authorities implement their leniency policy, including processes for conferring and/or refusing leniency or lenient treatment.

3. The first leniency programme was adopted by the DOJ in the US in 1978 and revised in 1993. The European Union introduced its own leniency programme in 1996, and revised it in 2002 and 2006. Triggered by the successes of the United States and the EU, leniency has become a standard feature of cartel enforcement regimes throughout the world. Starting with the British and German competition authorities in the year 2000, all OECD member countries have adopted leniency programmes -as well as all European Union (EU) Member States with the exception of Malta. Currently, there are more than 60 leniency programmes in place in various jurisdictions (Morgan Lewis, 2017).

4. Despite the fact that programmes differ from jurisdiction to jurisdiction, most programmes share some common features which *inter alia* include (ICN, 2014): a first through the door policy meaning that full immunity is only granted to the first member of the cartel who self-reports its involvement; lenient treatment (less than full immunity) for second and subsequent applicants;¹ a marker system that allows applicants to reserve the first place in the queue to finish a complete application; the requirement for full and frank disclosure of relevant information and evidence by the applicant; and the requirement for the applicant to co-operate fully and continuously.

5. When being challenged in courts, leniency policies have generally been upheld. For example, the European General Court found in relation the EU 2002 Leniency Notice that the Notice does not violate the parties' right against self-incrimination as co-operation under the Leniency Notice is a purely voluntary act, which cannot be held to be imposed by the wording of the Notice and to impede the applicant in its right to contest the facts and the inferences drawn by the Commission (T-138/07 *Schindler*; Faull and Nikpay, 2014: 8.212 with further references).

6. Different tendencies can be observed in different jurisdictions concerning the number of leniency applications submitted and whether this number is growing or shrinking. While, for example, the number of applications went up in France (from 8 in 2015 to 15 in 2016), Brazil (from 69 to 173) and Japan (61 to 102), it went down in Australia (19 to 12), Canada (51 to 37) and the EU (32 to 24) (Global Competition Review Enforcer Tracker²).

7. Some jurisdictions are currently assessing the effectiveness of their leniency programmes. For example, the US DOJ on January 17, 2017 clarified the scope of its programme, publishing an update of its "Frequently asked Questions"³ issued in 2008. In this new version the DOJ, *inter alia*, specified the conditions for granting "anonymous markers", short-term markers with the requisite information about the industry but without naming the company seeking the marker, and clarified the conditions under which current and former employees can receive immunity⁴. Canada is revising its Competition Bureau's Immunity and Leniency Programs and has published a Draft for Public Consultation in October 2017⁵. It is considering introducing a new step into its immunity process, an "Interim Grant of Immunity", which will be issued after the marker and proffer stage but before an immunity agreement will be concluded. In addition, it is envisaged to grant subsequent leniency applicants which do not qualify for immunity up to 50%, independently of their rank of application, based on the "value of its co-operation". Immunity should also be available for current or former employees of subsequent applicants. Finally, witness interviews shall take place under oath and be audio or video recorded (Boswell, 2017). Australia is investigating on how to maximise the benefits and incentives for parties to provide full and continuing co-operation during investigations (Sims, 2017). Japan is considering extending leniency to all persons providing relevant information and cooperating in the investigation, not just the first five applicants, and to increase or decrease fines according to how leniency applicants co-operate with the agency during the investigation. Finally, New Zealand is considering reinforcing the obligations of Individuals who are eligible for or who hold derivative conditional immunity under a corporate immunity application to ensure they provide greater cooperation.

8. This paper discusses "Challenges and co-ordination of leniency programmes" to support the discussion which will take place on 5 June 2018 in Working Party Number 3. It follows OECD roundtable discussions conducted on the Use of Markers in Leniency Programmes (OECD, 2014a) and on Leniency for Subsequent Applicants (OECD, 2012).

9. The paper is structured as follows:

- **Section 2** sets out the theoretical foundations for a leniency programme as well as the key pre-conditions for a leniency policy to work.
- **Section 3** describes challenges of coordinating leniency programmes with other cartel enforcement policies, such as private enforcement, criminal sanctions and settlements.

- **Section 4** deals with challenges that companies and competition authorities face for international cartels, including costs of multi-jurisdictional applications, conflicting legal requirements imposed by different jurisdictions, and differences in marker systems that may create uncertainty.
- **Section 5** discusses the strategic use of leniency programmes by companies for their own purposes as well as how competition authorities can secure ongoing co-operation of leniency applicants throughout the cartel procedure.
- **Section 6** provides a conclusion.

2. The theoretical foundations of a leniency programme

2.1. The rationale of a leniency policy

10. There are three main objectives for introducing a leniency programme: Detection, deterrence and enforcement efficiency.

11. **Detection.** Probably the most important objective of every cartel enforcement policy is to detect hard core cartels. However, as perpetrators are generally aware of the illegality of their behaviour they make significant efforts to conceal their activities. A leniency policy increases the probability of detection and effective punishments of such hidden cartels. It helps to uncover cartels that would otherwise go undetected and destabilises existing cartels (ICN, 2014). Other tools for the detection of cartels such as screens to monitor markets⁶, taking into account publicly available information as well as the use of economic analysis of those data to detect infringements⁷, complaints by competitors and clients or non-participant whistle blowers might often not be sufficient for enforcers to become aware of the existence of a cartel, much less so to establish and prove the infringement to the required legal standard. The fact that collusion can potentially occur in thousands of different industries –which hardly can be all monitored at the same time– makes detection difficult and costly. Also, complaints are less likely for cartels in upstream industries, where prices are often passed down to be borne by final consumers (Stephan and Nikpay, 2014).

12. **Deterrence.** Companies when thinking about taking part in a cartel will consider the likelihood of being detected and sanctioned. They are likely to abstain if there is a high likelihood that a cartel will be detected and sanctioned with significant fines. Rational companies will consider if their expected cartel gains will be higher than the expected fine, i.e. the nominal amount of the fine discounted by the probability of that fine actually being imposed (Faull and Nikpay, 2014: 8.106)⁸. A functioning leniency programme creates a “prisoner’s dilemma” because all participants will fear that one of them will come forward and report the cartel to the authorities, securing immunity or at least a significant reduction of the fines for itself, at the expense of the other participants of the cartel who will suffer high(er) sanctions. It is also argued that the possibility of one cartel member applying for leniency makes collusion more difficult to sustain and increases uncertainty, making it harder for cartel participants to reach an agreement, diminishing trust among cartelists and increasing the need for costly monitoring by cartel members (Wils, 2016a). The deterrent effect of leniency programmes has been shown in various studies. For example, for the US, after the 1993 revision of the Corporate Leniency Policy, there was an initial increase in the number of cartel discoveries and then a sharp drop –a trend which would be consistent with a policy that enhances deterrence and reduces the numbers of cartels (Miller, 2007). Similar findings were reported for the EU leniency programme, namely that it led to the formation of fewer cartels and made those that did emerge less stable (Colino, 2017 with further references).⁹

Conversely, it has been pointed out that cartels might not be prevented if there is no or only a small deterrent effect of anti-cartel enforcement, e.g. because fines are only nominal or only a small number of cases is persecuted every year.

13. **Enforcement efficiency.** Leniency provides competition authorities with a cost-effective enforcement tool to detect and punish cartels. By having leniency applicants reporting themselves, authorities need to spend less time and investigative efforts to uncover the evidence needed for fighting cartel participants. Using leniency, a competition authority can reduce the difficulty, time and administrative costs of collecting information of cartel infringements through the co-operation of the leniency applicants throughout the administrative procedure. Cartel investigations may be completed faster and to a more extensive degree. Lower costs in turn allow the competition authority to detect and punish more cartels with the same resources. Finally, this increased probability of detection and punishment will increase the deterrence factor.

2.2. Key pre-conditions for an effective leniency policy

14. It is commonly assumed that there are three prerequisites for an effective leniency programme to work:¹⁰ A high risk of detection, significant sanctions as well as transparency and predictability of the programme (e.g. Hammond, 2004).

15. **High risk of detection.** Leniency will generally work well if the relevant competition authority has built up a sufficient level of credibility as to its capacity to detect and punish cartel infringements and if cartel members perceive a genuine risk that competition authorities might detect and establish a cartel infringement, even without recourse to a leniency programme. A high risk of detection will incentivise cartel participants to come forward before they might get caught. Thus, *ex officio* investigations not only help to find infringements but also strengthen leniency programmes by increasing the threat of detection. If authorities rely too much or even exclusively on a leniency programme, cartelists may start doubting the authorities' capacity to detect cartels on their own. Competition authorities have been careful to avoid this impression. In the EU, for example, the Commission recently increased resources for *ex officio* investigations by setting up an anonymous whistle blower online tool run by an external provider. This tool does not allow the Commission to identify the whistle blower but still lets it communicate with him/her (European Commission, 2017).¹¹ In the OECD Survey 2017 mentioned above, many competition authorities stressed the importance of *ex officio* investigations based on complaints from third parties, publicly available information, screening on available data such as procurement data, information from other investigations, and information from other agencies (OECD, 2017).

16. **Significant Sanctions.** As a second condition for a functioning leniency programme, sanctions for those cartel members that do not qualify for leniency must be significant. Such sanctions might be criminal sanctions, including jail time for individuals, or financial penalties for individuals and companies. Ideally, fines should outweigh the potential cartel yields so that they cannot simply be regarded as a "cost of doing business". Within the last 20 years, there has been a worldwide trend to increase fines against companies as well as against individuals (OECD, 2017).

17. **Transparency and predictability.** Finally, a leniency programme must be transparent and predictable so that potential applicants can anticipate how they will be treated and what the consequences of an application will be. A competition agency should, thus, ensure that its leniency policy is clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the

rewards that may be granted (ICN, 2014). Many authorities have clarified their leniency policies in order to fulfil this prerequisite and be more predictable. For example, the US DOJ revised its leniency policy in 1993, removing prosecutorial discretion from granting of immunity. Also, the European Commission revised its first Leniency Notice 1996 in order to increase its predictability. At that time cartelists rarely applied for leniency prior to the start of an investigation. It was claimed that widespread concern and uncertainty among companies on how their leniency applications would be treated resulted in this reluctance to come forward. Thus, in its 2002 Leniency Notice the EU Commission sought to introduce more legal certainty into the leniency system making immunity automatic once certain conditions were fulfilled. It offered to provide conditional immunity, immediately and in writing, to the first company to come forward with sufficient evidence to enable the Commission to decide a dawn raid, instead of having to supply “decisive evidence” as under the EU Commission Leniency Notice 1996. The Commission also undertook additional measures to promote legal certainty, such as adopting a restrictive definition of the notion of “ringleader of the cartel”¹². Finally, it created the opportunity for companies to check with the Commission on an anonymous basis and in hypothetical terms whether the kind of information companies wanted to provide in their leniency applications would qualify for immunity. In its revised 2006 Leniency Notice, the Commission further clarified what types of information and evidence the applicants must submit to qualify for immunity and which general conditions they must comply with (Faull and Nikpay, 2014).

3. Challenges in coordination of leniency programmes with other cartel enforcement policies

18. A significant challenge for all leniency policies lies in the need to be aligned with other enforcement policies, especially private enforcement, criminal liability or settlements (in the US: plea bargaining). Balancing a leniency programme with the overall cartel enforcement framework is crucial to its success (OECD, 2012).

3.1. Leniency and private enforcement

19. Private enforcement refers to litigation initiated by an individual, a legal entity, an organisation or a public entity (such as local government or procurement agency in a bid-rigging case) to have a court establish an antitrust infringement and order the recovery of the damages suffered or impose injunctive reliefs. Public enforcement refers to enforcement of antitrust laws by a government, for example by the competition authority or a prosecutor, to detect and sanction violators of competition rules (OECD, 2015). Public and private enforcement are essentially mutually reinforcing and inter-related. Private antitrust damage actions can complement public enforcement regimes by strengthening the deterrence effect and empowering victims to tackle anti-competitive behaviour. Public antitrust enforcement also helps claimants to prove an antitrust violation in follow-on actions (OECD, 2015). As the European Court of Justice held in the case of *Courage and Crehan* (C-453/99), actions for damages before the national courts can make a significant contribution to the maintenance of effective competition.

20. Almost all respondents to the OECD Survey 2017 allow private enforcement to recover damages caused by cartels and have adopted measures to encourage harmed parties to bring legal actions. These measures include giving plaintiffs easier access to evidence, alleviating the burden of proof on the existence of illegal conduct and the quantification of the damages suffered, as well as the availability of collective redress mechanisms, such as class actions. However, responses to the OECD Survey 2017 also show that in practice private enforcement is still rare –with the big exception of the United States where private enforcement is very active (OECD, 2017).¹³ There is a trend for more actions in Japan,

Brazil and China, and, in recent years, jurisdictions like Germany, the Netherlands, the United Kingdom (UK) and the EU have adopted measures to promote more vigorous private enforcement, with positive results (OECD, 2015).¹⁴

21. Private damage actions can act as a disincentive for companies to come forward.¹⁵ Leniency applicants which provide information about a cartel in which they took part not only incriminate other cartel members, but also themselves. This self-incrimination may have negative consequences in follow-on damage litigations in civil courts. An applicant must consider the risk that plaintiffs might get hold of incriminating documents which were created and voluntarily submitted for the leniency application. Although an applicant will almost certainly obtain some reduction of the fine, at the same time, it opens itself to greater exposure for civil liability, should the content of the leniency application find its way into the hands of the plaintiff (MacCulloch and Wardhaugh, 2012). Civil courts, for example, might ask the competition authorities to transmit information voluntarily submitted as part of the leniency applications. Actually, if competition authorities readily grant access to leniency documents, plaintiffs might mainly target leniency applicants, which might lead to leniency applicants being disadvantaged in comparison to other cartel member who have not applied for leniency (OECD, 2015).

22. This danger is especially pronounced in jurisdictions which have discovery rules in the context of civil litigation. Mandatory pre-trial discovery is for example regulated in the United States, Sweden, the United Kingdom and Ireland. In other jurisdictions discovery during trial is generally subject to the requesting party being able to identify the specific documents which are requested (OECD, 2015). With regard to international cartels, it is discussed if the threat of damage claims has become the most influential determinant for global leniency application strategies -as a company that self-reports an international cartel will face near certain civil litigation in the US, in addition to an ever increasing number of jurisdictions (Obersteiner, 2013).

23. Competition authorities are aware of this problem and try to make sure that leniency applicants are, at least, not worse off in terms of damage claims compared to other companies that did not co-operate, especially in relation to the information provided by leniency applicants. In the US, the Antitrust Criminal Penalty Enhancement and Reform Act 2004 provides some protection to immunity applicants by enabling the de-trebling of damages and decoupling joint and several liability (Stephan, 2014). Thus, a civil defendant that has received leniency may, in a related civil antitrust action, limit its liability to single damages without joint and several liability, on condition that it co-operates with civil plaintiffs.¹⁶ In the EU, new rules concerning actions for damages and infringements of competition law have been introduced on 26 December 2014 by the Damage Directive 2014/104/EU.¹⁷ The Directive aims to remove the main obstacles of the process of claiming compensation before national courts, and sets forth common standards for disclosure of evidence, limitation periods, passing-on defence, standing of indirect purchasers, quantification of harm, joint liability, consensual dispute resolution and the effect of national decisions. At the same time, it limits the liability of undertakings that have received immunity under the leniency programme of the European Commission or a national competition authority in follow-on actions for damages to their own direct or indirect purchasers or providers.¹⁸ The Directive also exempts leniency statements and settlement submissions from disclosure. However, pre-existing information (documents which exist irrespective of the proceeding of the competition authority such as written agreements, emails or minutes of meetings) can be released.

24. Various courts have dealt with the discovery of leniency documents. The Court of Justice of the European Union (CJEU) held in the *Pfleiderer* case that it would be for national courts to decide, on a case-by-case basis, whether to order disclosure of leniency documents, weighing the interests in the protection of leniency programmes against the interests of victims of claim damages (C-360/09 *Pfleiderer v Bundeskartellamt*). In *Donau Chemie* the CJEU held that a national rule requiring the consent of all parties for the disclosure of material relating to judicial proceedings before the Austrian cartel courts breached the EU law insofar as it precluded the case-by-case balancing exercise mandated by *Pfleiderer* (C-536/11). In March 2017, the CJEU ruled that verbatim quotes from leniency applications cannot appear in non-confidential decisions of the Commission (DG COMP) decision. It especially held that the publication, in the form of verbatim quotations, of information from the documents provided by an undertaking to the Commission in support of a statement made in order to obtain leniency differs from the publication of verbatim quotations from the statement itself. Whereas the first type of publication should be authorised, subject to compliance with the protection owned, in particular, to business secrets, professional secrecy and other confidential information, the second type of publication is not permitted in any circumstances (C-162/15 P - *Evonik Degussa*, esp. paragraph 87)¹⁹.

3.2. Leniency and criminal offence

25. A separate challenge with regard to other cartel enforcement policies lies the relationship between leniency programmes and criminal offence. Following the US DOJ, a number of jurisdictions have introduced criminal sanctions for cartel conduct available for individuals as well as for companies. By 2014, more than 30 countries have criminalised cartels in some form or the other, over 20 of those since 2000 (Beaton-Wells, 2017: 126). 19 OECD jurisdictions provide for criminal sanctions against individuals, and an additional 10 have criminal sanctions for bid rigging cases (while punishing other cartels with administrative sanctions only), as they consider them to be a more serious risk. On the other hand, there are many jurisdictions, such as the European Union, which do not impose criminal sanctions. Other jurisdictions, such as Indonesia, New Zealand, Sweden or Belgium seriously considered the possibility to introduce criminalisation but decided against it and maintained administrative sanctions against cartels (Beaton-Wells, 2017; Stephan 2014).

26. Jurisdictions can be broadly split into three categories of enforcement in relation to hard core cartels (Stephan, 2014). First, there is the civil or administrative regime where infringement decisions relate to undertakings and result in corporate fines. Second is the fully criminalised regime against both undertakings and individuals involved in hard core cartel practices. The final category is a mixed regime in which a criminal liability engages individuals only, alongside a parallel civil procedure for undertakings.

27. There has been a long lasting debate on the relationship between leniency and criminal sanctions, not only in relation to the immunity applicant but also to subsequent leniency applications. Cartel criminalisation may, arguably, serve to enhance deterrence, thereby reducing the level of cartel infringements. Many competition authorities, notably the US DOJ, see cartel criminalisation and cartel leniency as mutually reinforcing. If a corporation is first to qualify, also its employees and directors are covered under its immunity as it is claimed that a leniency policy is unlikely to work unless it also provides immunity for the applicant's employees. In other jurisdictions, however, criminal liability is not covered by the leniency programmes for individuals, e.g. in Germany or Poland for bid rigging where individuals face criminal charges but only companies can benefit from

immunity for their offences (Trepka and Wurm, 2016).²⁰ Having criminal sanctions, and especially the threat of jail time for individuals, is regarded as essential to induce individuals to confess and provide crucial evidence and thus enhances the effectiveness of a leniency policy. Individual sanctions also increase the effectiveness of corporate leniency by discouraging individuals from going along with a corporate culture of cartel tolerance. They increase distrust within cartel organisations and the individuals within them. This tension makes it more difficult for a cartel arrangement to hold together (MacCulloch and Wardhaugh, 2012). Criminal sanctions might also deter cartels from forming. Finally, it is argued that the deterrent effect of corporate fines may be limited and may not outweigh the likely cartel gains, so that criminal sanctions are necessary for deterrence (Stephan and Nikpay, 2014).

28. Conversely, it is argued that criminal offences may have a chilling effect on leniency applications (Stephan, 2014). Most jurisdictions with criminal sanctions only grant immunity to the first applicant and there is no “second prize” for further applicants. However, often the value of the information provided by the second, third and following applicants can still be crucial for establishing an infringement. This might be undermined by allowing criminal sanctions, or only partial reductions of criminal sanctions, for further applicants in exchange for their co-operation. Companies cannot be sure that immunity is still available and that coming forward may not actually expedite the successful prosecution of their employees. It is suggested that criminal sanctions may reduce the number of applications under a leniency policy (Beaton-Wells, 2017: 134 with further references). It is also pointed out that a criminalisation might not only hinder companies from applying for leniency if they are not sure to qualify for immunity but also prevent applicant firms from gathering evidence for its leniency application as employees facing prosecution may be less likely to co-operate with on-going leniency investigations. If involved in a cartel, they may actually seek independent legal representation and refuse to co-operate with their employers at all (Stephan and Nikpay, 2014). Additionally, it is argued out that criminalisation of cartels will increase the level of complexity of the system, increasing the risk and reducing predictability for potential co-operators as in most countries criminal enforcement rules are subjected to very stringent procedural and formalistic requirements, often much more so than in civil or administrative antitrust laws (Calliari, 2015). In the case of cross-border cartels, having jurisdictions with and without criminal sanctions may pose a threat to leniency effectiveness. Facing criminal sanctions in some jurisdictions, companies might decide not to apply for leniency at all, and may be reluctant to co-operate even in countries where there are no criminal sanctions.

29. Several jurisdictions have experienced problems in relation to criminalisation of cartel law. For example, in Australia, it was assumed that criminal reform would bolster leniency, arguing that by adding clout to the “stick” (criminal prosecution), the “carrot” of immunity from prosecution would be more attractive. However, at least in the early years after criminal sanctions were introduced, the numbers of markers and proffers under the competition authority’s leniency policy actually fell (Beaton-Wells, 2017 with further references). Similar results were reported for the UK: When the criminal cartel offence was adopted, it was expected that the UK would become the most active criminal competition enforcement regime outside the US and was envisaged that the offence would yield six to ten convictions a year. However in practice, very few cases were actually prosecuted with the first criminal case (the *British Airways* case) actually collapsing in court (Stephan, 2014).

Box 1. The British Airways Case

The British Airways (BA) case arose out of an investigation by the then British Office of Fair Trading (OFT) into alleged price fixing of fuel surcharges for long haul passenger flights by BA and Virgin Atlantic Airways (VAA). Following an application for immunity by VAA, the OFT began criminal investigations directed at individuals alleged to have been involved in the alleged cartel (“Project Condor”). Four former BA employees were charged in August 2008. A number of VAA employees admitted involvement and were granted immunity from prosecution.

In the first weeks of the trial taking place in 2010 large volume of VAA electronic material was discovered which neither the OFT nor the defendants had previously been able to review. “In view of the quantity of material, the court’s ruling about disclosure and the timing of witness hearings, the OFT accepted that it would potentially be unfair to continue the trial and the defendants were acquitted” (OFT, 2010).

The case was followed by an extensive OFT review leading to a number of recommendations, including a review of its leniency guidelines (OFT, 2010).

Commentators mainly criticised that the BA case concerned only two firms, the immunity applicant VAA and BA. This meant that half of those responsible companies were faced with losing their freedom, while the other half of the cartel not only enjoyed immunity but continued working in the industry. It was said that the defendants and witnesses were essentially as culpable as each other, the only thing separating them being the speed at which they made it to the authorities with an immunity application (Stephan, 2014; MacCulloch and Wardaugh, 2012).

Sources:

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3.3. Leniency and settlement

30. Many competition authorities possess powers to use negotiated procedures for closing and settling cartel cases, such as settlements or plea bargaining²¹ (the term “settlement” will be used for both) whereby companies acknowledge their antitrust liability in exchange for a reduced penalty. 27 OECD members have procedures for settling cartel cases. Settlements are picking up, and becoming an essential aspect of cartel enforcement.

31. Often companies will both qualify for leniency as well as benefit from a settlement. Leniency and settlements are therefore not mutually exclusive concepts: parties often agree to co-operate under leniency and later settle to receive an additional reduction of the fine.²² Reductions of fines for settlements tend to be much smaller than those for leniency, though (in the EU, for example, they can go up to 10% only). This aims to maintain the attractiveness of leniency and incentivise companies to come forward and actively assist the competition authority in an investigation, rather than just wait to see whether the authority can prove the case and then accept liability.

32. Leniency programmes and settlements generally pursue different objectives. While leniency is a tool aimed at cartel detection, deterrence and the facilitation of the investigation against cartel conduct, a settlement policy serves to achieve procedural efficiencies once an investigation has started. Leniency is an investigative tool to obtain information and evidence to establish an infringement. A settlement will conversely generally only be discussed after the relevant competition authority opens an investigation for an infringement. However, in the OECD Survey 2017, several authorities also mentioned settlement as a tool to receive early insider evidence, obtain the parties' co-operation throughout the investigation and make cases more robust (OECD, 2017). In so-called hybrid cases where some companies do settle while others do not, settlement declarations of the co-operating companies might be used as evidence against non-settling companies. This is the case, for example, in Germany, as well as in the US where plea bargaining might include the obligation of a party to provide evidence.

33. An undertaking applying for leniency must co-operate on a continuous basis during a cartel procedure. Its co-operation during the settlement process can have an impact on the assessment of its co-operation under the leniency programme. The Commission, for example, will take into account the company's behaviour during the settlement procedure when assessing whether a leniency applicant has complied with its duty for co-operation. It might regard certain actions as a lack of co-operation, such as disclosing to any other third party the content of the settlement talks or documents the company had access to (Faull and Nikpay, 2014: 8.232). Not filing a settlement submission is, however, generally not seen as a lack of co-operation under leniency. Also, the CJEU found that a subsequent submission by an undertaking seeking legal qualification of the facts would not be considered a retraction as long as the facts themselves were not contested (e.g. T-15/02 *BASF*; Faull and Nikpay, 2014: 8.119 with further references).

4. Challenges in co-operation of leniency programmes

34. International cartels consist of companies who co-operate with the goal of fixing prices or allocating markets in more than one jurisdiction. Examples of well-known worldwide cartels are the Lysine Cartel, the Vitamin Cartel, the Citric Acid Cartel, the Graphite Electrode Cartel or the Liquid Crystal Display (LCD) Cartel.²³

35. As more and more jurisdictions adopt leniency programmes, potential applicants face increased regulatory complexity due to differences in leniency systems. A company that detects and wants to report an international cartel has to bear in mind that there is no one-stop shop, meaning that applying for immunity with one antitrust authority will not automatically grant immunity in any other jurisdiction. Many jurisdictions encourage leniency applicants to approach in parallel other relevant jurisdictions that have leniency policies. According to ICN, it is good practice for a competition agency to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred (ICN, 2014).

36. Leniency programmes rest on the premise that a firm that decides to apply for immunity is not subject to antitrust liability. However, when a company is involved in an international cartel and applies for leniency to one national competition authority, it faces the risk of being investigated and punished by one or more other cartel authorities. This risk has grown in the last years as there are more competition regimes around the world, allowing investigating and punishing cartels, and as international co-operation among competition authorities in cartel investigation has been significantly enhanced, *inter alia* through the adoption of the Recommendations of the OECD Council on International Co-

operation in Competition Investigations and Proceedings (OECD, 2014b). There have been simultaneous dawn raids in parallel investigations and co-ordination of enforcement activities and decisions (OECD, 2017). Even within the European Union, when applying for leniency to the European Commission, an applicant still has no guarantee that it will not be investigated by the national competition authorities of EU member countries –because it cannot be sure that the Commission will actually initiate proceedings with the consequence of other national authorities being relieved of their competence.²⁴

37. A potential applicant can try to identify all competition authorities which might have jurisdiction in relation to the infringement and apply to each of those authorities, at least with a summary application, at best simultaneously. Each authority will then perform its respective investigation under its own rules.

38. International cartel cases raise various challenges for companies, ranging from costs of multi-jurisdictional applications, managing different and maybe conflicting regulatory requirements and dealing with differences in national marker systems. As the ability of potential leniency applicants to apply for leniency is made more burdensome by the complexity of navigating multiple regulatory regimes, incentives to apply for leniency might be affected. Competition authorities should thus try not to disincentivise cartellists to apply for leniency and consider ways to make multi-jurisdictional applications more attractive.

4.1. Costs of multi-jurisdictional applications

39. Multi-jurisdictional applications may impose considerable burdens on a company. Even one leniency application is a time-consuming process that requires significant commitment from the reporting company throughout the entire cartel proceeding. The commitment is multiplied in cases of parallel applications.

40. The following tasks give a brief overview of the level of additional effort required by a multi-jurisdictional applicant in providing the incriminating facts and evidence, and fully co-operating with the relevant authorities:

- Provide timely answers to requests to all investigating authorities for additional information that may contribute to the establishment of the facts;
- Make employees and directors available for interviews all over the world;
- Translate documents;
- Make sure that no employee destroys, falsifies or conceals relevant information or evidence related to the alleged cartel as the actions of one rogue employee in any of the jurisdictions investigated could jeopardise the applications in all other jurisdictions.

41. Multi-jurisdictional applicants also face the risk of being “tagged back”, i.e. being pushed out of immunity if another applicant proves that the reporting company was the ringleader of the cartel or if the applicant is not able to provide sufficient evidence to qualify for immunity in all jurisdictions. This can leave a company exposed to substantial fines. Sometimes, applicant companies may have difficulties providing sufficient evidence for all jurisdictions where they applied especially if their employees involved in the cartel knew that they were infringing the law and intentionally tried not to leave any evidence. The applicant company must thus secure the co-operation of current and former employees who participated, in the cartel in spite of the temptation to terminate contracts with them, may it be for reputational reasons or disciplinary actions²⁵.

42. A company considering applying for leniency for having participated in a cross-border cartel is likely to decide not only on the basis of the leniency programme of one country but of the cumulative costs and benefits of the programmes of all the jurisdictions affected by the cartel conduct (Oberhauser, 2013). The cost and disruption to a company's business operations from seeking leniency in multiple jurisdictions may even cause companies not to apply at all if the cumulative costs are greater than the expected benefits. Factors which might be taken into account when making the decision would be the nature and size of potential sanctions, the particular terms of the authorities' leniency programmes, and the costs of making a leniency application to those authorities (Faull and Nikpay, 2014: 8.244).

43. Others (e.g. Snyder, 2015) claim that leniency is more attractive now than ever, exactly because of the increasing number of jurisdictions pursuing companies and individuals for cartel violations. With more jurisdictions having leniency, and a growing number of jurisdictions additionally providing criminal liability to individuals, companies have incentives to seek first-in leniency, especially if the leniency applicant can protect its officers, directors and employees from prosecution.

44. Competition authorities should try to co-operate to rationalise the costs for multi-jurisdictional leniency applicants as much as possible. For example, they should try to coordinate in dealing with leniency applications. Each authority could, for example, focus only on the harm a cartel has inflicted on their particular jurisdiction and ask for documents and data specifically related to that country –instead of asking for “everything and the kitchen sink” (Snyder, 2015). Other possibilities for improvement might be co-ordinating deadlines and timetables for key tasks and witness interviews. Competition authorities may also be able to ease the burden of the applicant by allowing oral testimony from participants instead of only requiring written documents. This would help applicants who have found written evidence for one jurisdiction but not for another to rely on witness testimony in those critical jurisdictions.²⁶ By better coordination, competition authorities might not only be able to minimize the company's expenses, but also their own.

4.2. Managing conflicting legal requirements

45. For competition authorities, the prosecution of an international cartel is likely to be more challenging than the prosecution of domestic cartels, as incriminating evidence, witnesses or documents may be located across different jurisdictions and be difficult to obtain. Companies also encounter significant challenges, as leniency programmes in different jurisdictions may impose requirements which are not only burdensome but may be even conflicting, making it hard to comply with at least some.

46. For example, some competition authorities require that all cartel activities must have stopped before an application is submitted, while other authorities tell companies to continue their cartel conduct until the applicant receives an order from the competition authority, in order for the competition authority to have time to prepare itself and/or conduct a dawn raid. In case of such diverging orders it is impossible for a company to comply with both.

47. Other examples of conflicting requirements would be that different timeframes for complying with data requests collide (in particular if some of these deadlines are shorter than the internal investigation is likely to last) or that several competition authorities simultaneously ask for information with very short deadlines making it impossible to meet all those demands in time. Finally, if competition authorities make audio recordings of proffers and witness interviews and require applicants to disclose facts and information

collected during internal investigations –including notes generated by in-house and external counsel– these may then be sought to be discovered in other jurisdictions.

48. Even the boundaries of what constitutes a cartel might differ from jurisdiction to jurisdiction; and with it the question if leniency is available. While, for example, some leniency programmes cover vertical agreements, others do not.

49. Competition authorities should try to avoid conflicting requirements whenever possible by communicating with their peers and, where possible, deciding on a common line, such as on whether to allow the continuation of cartel conduct to enable agency preparation of the case and/or on-site inspections, or aligning deadlines, or having a common approach on protection of information included in a leniency file. Giving companies more certainty and helping them to fulfil their duties of co-operation will increase the attractiveness of multi-jurisdictional applications.

4.3. Differences in marker systems

50. Most competition authorities have adopted marker systems as part of their leniency programmes. A marker is the acknowledgement that records the date and time of an application to the leniency programme. Its purpose is to guarantee the applicant's position in relation to other applicants. The marker is awarded for a limited period to allow the applicant time to gather additional information required to complete the leniency application (OECD, 2014a). If, during that period, the internal investigation by the leniency applicant fails to provide sufficient evidence, the marker may be withdrawn, revoked or lapsed by the competition agency (ICN, 2014).

51. The national marker systems are autonomous and independent of each other. Their differences might relate to the types and quantity of information required for a successful application, the time agencies grant to a successful marker applicant to perfect its leniency application, the automatic or discretionary nature of a 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 (OECD, 2014a).

52. Due to differences in national marker systems, a company that asks for a marker in one system has no guarantee to receive a marker with the same rank in other jurisdictions. It has been argued that due to differences and restrictions in the marker systems, companies may have reduced incentives to apply for leniency in international cartel cases at all (Obersteiner, 2013).

53. To ease this problem, a one-stop shop for leniency markers has been suggested, e.g. by the International Chamber of Commerce (ICC, 2016). An application for a marker in such a system would secure the place in the queue in all participating jurisdictions. The possibility of a one-stop shop for the European Union was also discussed, with the Commission as an “application sorting centre”, allowing applicants to interact only with the Commission and not have to manage multiple and simultaneous applications (Volpin, 2017, with further references).

54. The potential advantages of the one-stop shop marker system were discussed in the OECD background paper on the Use of Markers in Leniency Programmes (OECD, 2014b). They comprise reducing the complexity of dealing with multiple marker requests as well as reducing the risk of jurisdictions with onerous, unclear or unrealistic marker requirements affecting the cartelists' decision to report the cartel in other jurisdictions. Agencies, it is claimed, might receive additional leniency applications through a one-stop shop system. It is also argued that the one-stop shop system would improve the quality of information

provided by the applicants, and the quality of international co-operation between enforcers as well as the effectiveness of investigations would be improved as co-ordination between case teams across multiple jurisdictions would be easier. The one-stop shop marker would expose cross-border cartels to a higher number of jurisdictions and reduce the risk of under-enforcement.

55. However, since the discussion of a one-stop shop for markers at the OECD roundtable in 2014, almost no progress has been made to introduce such a system through agreements. Such agreements would be necessary, even within the EU as the CJEU recently reaffirmed that the leniency programmes of the Commission and of the various European national competition authorities are autonomous and independent of each other (C-428/14, DHL; Volpin, 2017). Currently, the EU Network Notice clearly states that an application for leniency to a given authority is not to be considered as an application for leniency to any other authority (Commission Notice on Co-operation within the Network of Competition Authorities, Network Notice).

56. A one-stop shop system would have to be assessed against the costs and requirements for setting it up (OECD 2014). Also, a one-stop shop system may not benefit enforcement in all jurisdictions involved or, at least, raise some practical challenges. If, for example, a company provides information that is sufficient to receive a marker in some jurisdictions but no information for others – either deliberately or by not having information for those jurisdictions yet –, the company will still obtain a marker for all jurisdictions although the granting of a marker currently requires that the applicant provides at least some basic information for the jurisdiction it applies for. Thus, other companies willing and able to provide information about the cartel in those critical jurisdictions where no evidence has been found yet might be unwilling to do so, as they could not be the first in line to receive full immunity. This might actually stifle the race between leniency applicants and work against effective enforcement. Consequently, participating competition authorities would need to have the possibility to ask for additional information as well as the power to withdraw the marker if basic information for a specific jurisdiction is not provided. A further problem might be confidentiality of information. Often a marker to one competition authority is immediately followed by a dawn raid if the competition authority regards the initial information as sufficient to justify a search (and, if necessary, get a search warrant). However, in a one-stop system, all participating national authorities would be informed of each marker and every participant would need to secure confidentiality, as otherwise dawn raids would be compromised in all jurisdictions. Also, dawn raids would need to be co-ordinated.

57. Competition authorities have recently appeared more cautious to grant markers, especially in relation to determining the breadth of immunity. The US DOJ, for example, historically has given anonymous markers for whole industries, which allowed for counsel to secure a short term marker for a client if it disclosed the requisite information but needed more time to verify additional information before providing the client's name. The revised FAQs 2017, however, add, "In some cases, an identification of the industry may be sufficient for the Division to determine whether leniency is available. In many cases, however, it is necessary to identify specific products or services, other companies involved in the conspiracy, or the identity or location of affected customers, for the Division to determine whether leniency is available and the proper scope of the marker." (FAQ, 2017, at 3).

Box 2. CASE C-428/14, DHL, Judgement of the Court of Justice of the Europe Union (CJEU) on January 20, 2016, on multi-jurisdictional leniency application

Facts of the case: On 5 June 2007, DHL Express S.r.L and DHL Global Forwarding S.p.A. (“DHL”) submitted an application for an immunity marker to the Commission in connection with cartel behaviour in the international freight forwarding sector, including maritime, air and road transit. At the national level, on 12 July 2007, DHL lodged a summary application for immunity with the Italian competition authority Autorità Garante della Concorrenza e del Mercato (AGCM) under the national leniency programme. At that moment, immunity was available for the first qualifying undertaking. However, AGCM subsequently clarified that the national summary application exclusively concerned DHL’s behaviour in the sea and air freight transport sector, and did not cover road freight forwarding services. Later on, on 24 September 2007, the Commission granted DHL conditional immunity for its cartel behaviour in the entire international forwarding sector, including sea, air and road sectors. Nonetheless, the Commission decided to pursue only the part of the cartel concerning international air freight forwarding services, leaving the infringements in relation to the sea and road freight forwarding services to the national competition authorities. Meanwhile, in December 2007 and May 2008 respectively, two other participants of the cartel, Schenker Italiana S.p.A. and Agility Logistics S.r.l., submitted summary applications for leniency to the AGCM, providing information in respect of road freight forwarding services in Italy. DHL, after having been informed that its previously submitted summary application had been considered only to cover sea and air transport, submitted an additional summary application for immunity to the AGCM, also covering the road transit sector. This application was submitted after Schenker and Agility had submitted their applications.

In its decision of June 15, 2011, the AGCM identified the relevant market as the market for international road freight forwarding and granted full immunity to Schenker as the first applicant, a 50% reduction of the fine to Agility and a 49% reduction to DHL. DHL appealed the decision to an Italian court which sought a preliminary ruling from the CJEU.

Background to the legal framework of the decentralized anti-cartel enforcement system in the EU: There is no harmonised EU system for applying for leniency at the EU level and it is up to the undertaking to assess *ex ante* whether to file for leniency in each jurisdiction where the cartel took place. According to the (non-binding) European Competition Network Model Leniency Programme, where the Commission is particularly well placed to deal with a case, the applicant that filed an application with the Commission may only need to file summary applications to the National Competition Authorities (NCAs).

Decision of the Court: The ECJ in its decision, *inter alia*, held that the relationship between the EU leniency programme and the leniency programmes of the different Member States is one of reciprocal autonomy: their independence is a reflection of the system of parallel competences between the EU Commission and the NCAs. No legal link and no hierarchy exist between an application for immunity submitted by an undertaking to the Commission and a summary application for immunity submitted to an NCA for the same cartel. The Court explained that this would be the only interpretation in line with i) the principle of autonomy of leniency systems and ii) the duty of co-operation of leniency applicants which is one of the pillars of any leniency programme. The Court also explained that there is no obligation for a NCA to contact the Commission or the undertaking in cases

where the material scope of a summary application and of an immunity application do not fit together exactly. Thus, the risk of losing part or all of the leniency status at the national level exists. Information provided after the filling of the summary application cannot alter the material scope of the application and cannot have an impact on the order of arrival of (other) leniency applications. When an application of leniency is made to a NCA, an insufficient description of the cartel in all of its aspects leaves scope for other participants in the cartel to be first to disclose to that NCA relevant details and apply for leniency, even if they were not first in line at the EU level.

5. Other challenges

58. In this section, this paper will discuss two more challenges competition authorities might face with regard to their leniency programmes: the strategic use of leniency programmes by companies for their own purposes and the task of securing co-operation of the immunity applicant throughout the whole cartel procedure.

5.1. Strategic use of leniency

59. Cartels have been described as sophisticated organisations which are capable of learning and adapting their behaviour (Wils, 2016a). Some commentators have argued that these sophisticated organisations would be able to exploit leniency policies to facilitate the creation and maintenance of cartels (e.g. Sokol, 2012). This discussion has often appeared in connection with recidivism, a situation where an undertaking continues or starts an infringement after having been addressee of a decision finding a similar infringement or imposing a fine for a similar cartel infringement (Wils, 2012).²⁷

60. Possible scenarios for a strategic use of leniency might be that cartel participants take turns to apply for leniency every time one of the cartels is about to be detected by a competition authority²⁸ or that leniency would be used as a mechanism to punish deviations from a cartel agreement (Marshall and Marx, 2015). Also, it is claimed that companies learn the “rules of the game” becoming experts in obtaining leniency, repeatedly colluding and reporting the cartel (Spagnolo and Marvão, 2015b: 55). Once a cartel breaks up, its former participants might seek to gain a competitive advantage over their competitors, using leniency to raise their rivals’ costs in the period following the break-up of the cartel (Stephan and Nikpay, 2014). Finally, it is claimed that so-called Amnesty Plus programmes²⁹ might be strategically abused to actually make cartels more stable (Martyniszyn, 2015, with further references).

61. It has been pointed out that implementing such strategic use of leniency might be difficult in practice as only the first co-operating cartel participant will receive immunity.³⁰ There are usually many companies involved in a cartel, and it would be difficult to see how one of them should be able to control the strategic use of leniency at the cost of the others (Wils, 2016a: 341 *et seq.*). The fact that recidivists are statistically better represented among immunity applicants does not necessarily need to be a bad thing. A company having been convicted of an antitrust infringement might take measures to avoid continued or new violations, including by establishing effective compliance programmes. Such measures might lead to additional infringements being detected and reported in the course of the investigation (Wils, 2012).

62. Competition authorities have not reacted a lot to those allegations of strategic behaviour, with very few exceptions. Until 2011, the leniency programme of the Greek

competition authority excluded recidivists from immunity fines in order to avoid the leniency being unfairly exploited by large multinational companies operating in multiple markets. In 2011, however, the Greek competition authority changed the provision, and recidivists can now also obtain immunity from fines. The Korean Fair Trade Commission (KFTC) has amended its leniency policy to prevent a company from receiving immunity more than once in five years. Still, such a policy might come at a cost. Companies who will be excluded from seeking immunity/leniency will be less willing to give evidence or intelligence of a cartel to a competition authority. In the extreme case where the same group of companies were all found to have participated in a cartel and subsequently started a new cartel, none of those companies would have any incentive to apply for leniency, making the new cartel even more stable and more difficult to detect and punish (Wils, 2012).

5.2. Securing full and continuous co-operation of immunity applicants

63. An immunity applicant generally needs to fully co-operate until the end of the investigation (depending on the enforcement system, this might be the end of the administrative procedure, see EU Leniency Notice para. 12a, or the end of a criminal trial such as in the US). This on-going co-operation requirement aims to enable the competition agency to complete its investigation.

64. Often, (conditional) immunity is granted to an undertaking early on before a final decision is taken against all cartel participants. In this situation, several competition authorities have experienced that once a party has been granted immunity, its enthusiasm for further co-operation and its efforts to provide further evidence and intelligence waned. This does not come as a surprise: if a company has decided to apply for leniency, it will try to provide sufficient evidence to gain an assurance of immunity. Once that goal has been reached, the company might consider withholding certain types of evidence for strategic reasons, for example to stay off expected follow-on damage claims. Several antitrust authorities find that once companies receive immunity, they restrict their co-operation in order to protect themselves against civil lawsuits. The same holds true for individuals in criminal systems. Though the “immunised witness” wants immunity, he/she will only go so far as it is necessary to secure that goal. His or her interest is not to assist the prosecutor in more than what is necessary (MacCulloch and Wardhaugh, 2012).

65. Competition authorities are aware of this problem and try to ensure that companies which have applied for immunity still have an incentive to co-operate. They have adopted a number of approaches to secure ongoing co-operation, such as the clear description of the requirements for full co-operation to be communicated to the leniency applicant (ICN, 2014). Another approach currently discussed in the US is to grant additional incentives to companies for ongoing, fulsome co-operation even after they have been granted immunity, introducing a similar provision as Rule 35 of the Federal Rules of Criminal Procedure. This rule allows the government to grant further reductions, even cutting a sentence below the statutory minimum, within a year of the sentencing when defendants provided substantial assistance in investigating or prosecuting others (Global Competition Review, 5.5.2017).

66. Finally, competition authorities might also consider revoking a marker or withdrawing immunity. However, leniency revocation is rare and the threat may not be regarded by applicants and their advisors as real (Harding et al., 2015: 253).

Box 3. The Stolt-Nielsen case

One of the few cases in which immunity was withdrawn was the US Stolt-Nielsen case. Stolt-Nielsen had applied for a marker to secure first place in the line for immunity in December 2002, and entered into a leniency agreement with the DOJ in January 2003. Following the agreement, Stolt-Nielsen provided a large amount of incriminating evidence regarding customer allocation against its co-conspirators. However, in April 2003, the DOJ withdrew the immunity as it had found evidence that Stolt-Nielsen had continued operating the cartel in breach of the agreement. The DOJ then sought to enter into plea agreements with other members of the cartel who were initially implicated by Stolt-Nielsen. In the end, the DOJ's attempt to remove the grant of immunity was overturned on appeal.

Source: United States v. Stolt-Nielsen S.A., 524 F. Supp. 2d 609, 610 (E.D. Pa. 2007). See also Hammond, S., Interview on Stolt-Nielsen, Global Competition Review, 1 May 2008, available at <https://globalcompetitionreview.com/benchmarking/may-2008/1038279/scott-hammond-on-stolt-nielsen2008>, and MacCulloch, A. and B. Wardhaugh (2012), "The Baby and the Bathwater - The Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy", available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089369, with further references.

67. To keep immunity applicants co-operating the authority may consider offering the leniency applicant only conditional immunity and requiring on-going co-operation throughout the course of the investigation and any subsequent enforcement action. Canada, for example, is considering introducing an "Interim Grant of Immunity" (IGI) - a stage between marker/proffer and the immunity agreement with companies and individuals being covered under the corporate IGI. During the IGI the applicant shall disclose records and relevant witnesses can be interviewed. Full immunity will only be granted once the competition authority is satisfied that no further assistance is required by the applicant (Boswell, 2017).³¹

68. The threat of withdrawing immunity or only granting conditional immunity until co-operation is no longer needed might indeed encourage companies to fully co-operate and provide evidence at all stages of the investigation. However, such policies might also come at a cost, as they might keep companies from applying for immunity at all. Certainty and predictability of the discounts on offer are critical conditions for the success of a leniency programme. As described above, one of the main reasons of the US reform 1993 and the EU reform 2002 on their respective leniency programmes was to give applicants more certainty and predictability. Companies might be reluctant to apply for immunity and create an evidentiary record that could be used against them if they are not sure to receive or keep immunity. In the US, for example, although the US DOJ lost the Stolt-Nielsen and afterwards stressed that revocation was an exceptional case and that it wanted to stay as transparent and predictable as possible (Hammond, 2008), some commentators claimed that the withdrawal of immunity in this case might have changed the internal calculus of co-operation within companies and that individuals might have been less likely to come forward to in-house counsel with information (Sokol, 2012).

6. Conclusion

69. A majority of OECD member countries regards leniency as the most important tool for detecting cartels. Starting with the US DOJ in 1978 and the EU Commission in 1996, by

now all OECD member countries have introduced such programmes. However, leniency does not work in all jurisdictions and competition authorities will have to work hard to keep their leniency programmes attractive for potential applicants, keeping in mind the main requisites for a functioning leniency programme: a high risk of detection so that cartelists perceive a genuine risk to be caught; significant sanctions; as well as transparency and predictability so that leniency applicants know what they can expect. Competition authorities should additionally develop their possibilities for *ex-officio* investigations (e.g. screening), complementary to leniency, because a high risk of detection will incentivise cartel participants to come forward before they might get caught.

70. Leniency programmes do not exist in a vacuum and will have to be coordinated with other enforcement policies. Authorities should secure that leniency applicants are not worse off than other cartel participants in private enforcement actions. With regard to criminal sanctions, it is debatable whether sanctions for individuals including jail time actually support or hinder leniency programmes, with good arguments pointing in both directions. Finally, having settlement procedures in place will support leniency programmes, allowing the authority to process cases more efficiently and freeing up resources for other cases.

71. Concerning to the increasing number of international cartels, competition authorities should try to efficiently co-operate in order not to prevent participants of international cartels from applying for leniency. They should attempt to ease the burden of multijurisdictional applications, co-ordinate their investigations as much as possible and try to avoid conflicting requirements on the applicants. They should also be aware that there are differences in the marker systems of the national jurisdictions as no harmonisation has taken place in this area.

72. Finally, authorities might face the challenge that companies could abuse their leniency programmes strategically or fail to co-operate once they have been granted immunity. Relating to the latter, they might consider granting additional incentives, withdrawing immunity or only granting conditional immunity until the co-operation of the applicant is no longer needed. However, they need to be aware that predictability and certainty are prerequisites of leniency programmes without which companies might not apply at all.

Endnotes

¹ Immunity is generally only given to the first applicant while lenient treatment may be available for second and subsequent applicants depending upon the quality of the evidence provided to the competition authority, the speed of the subsequent application, and the degree of co-operation. In the United States, second and subsequent applicants cannot qualify for reduced sanctions under the leniency programme, but they can enter into plea agreements with the DOJ that reward them for their co-operation (Wils, 2016). While it is sometimes claimed that ideally only one firm should be granted leniency (Spagnolo and Marvão, 2015b: 53 with further references), the International Competition Network (ICN) actually states that it is good practice to provide for lenient treatment for subsequent co-operating cartel participants (ICN, 2014). Ideally, a leniency programme will create a race between cartel participants to be the first to apply and others that may be eligible for lenient treatment. The effective detection and punishment of cartels might require that the competition authority grants not only immunity from fines to the first cartel participant co-operating with its investigation but also reductions to other co-operating parties. Cartelists often avoid leaving written traces of their activities. To convict participants that do not co-operate, competition authorities frequently need not only the immunity application but also leniency statements from further applicants (Wils, 2016a).

² <https://et.globalcompetitionreview.com/>.

³ www.justice.gov/atr/page/file/926521/download.

⁴ Under leniency Type B, conduct where the DOJ already has information about illegal acts, the DOH “may exercise its discretion to exclude from the protection that the conditional leniency letter offers those current directors, officers, and employees who are determined to be highly culpable.” (FAQ, 2017, 21) Also, the revised FAQ 2017 state that “Former directors, officers and employees are presumptively excluded from any grant of corporate leniency.” (FAQ, 2017, 18)

⁵ http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04316.html#sec_f.

⁶ In 2013, the OECD held a roundtable on Ex-Officio Cartel Investigations and the Use of Screens to Detect Cartels (OECD, 2013).

⁷ Workshop on Cartel Screening in the Digital Era (2018) www.oecd.org/competition/workshop-on-cartel-screening-in-the-digital-era.htm.

⁸ Commentators have questioned the assumption of a rational cost/benefit analysis by a company. They have pointed out that cartels are often not formed due to a rational choice at institutional level but by individuals with objectives not aligned with the company. Also, they have emphasised that calculating sanctions and detection probabilities and performing an accurate cost/ benefit analysis before building a cartel will be very difficult to impossible in practice, see Stephan and Nikpay, 2014.

⁹ Those results are not uncontested. Critics (e.g. Spagnolo and Marvão, 2015b) claim that it is unclear whether leniency policies are actually increasing welfare by generating a strong deterrent effect, or whether they are reducing welfare through the larger administration and prosecution costs they generate, without any compensating increase in deterrence.

¹⁰ In the OECD Survey 2017, 56% of the participants evaluated their leniency programme as effective, 10% even as very effective. However, there were also 29% of the participants which thought that their programme was not effective. Mentioned challenges included lower-than-hoped number of leniency applications, poor awareness of competition and leniency procedures, inefficient and opaque procedural steps to apply for and receive leniency, and low incentives to co-operation with competition authorities (OECD, 2017).

¹¹ Many competition authorities have similar tools. For example, in 2012, the German Bundeskartellamt set up an electronic system which allows it to receive anonymous tip-offs of cartel law infringements, see http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2012/01_06_2012_BKMS.html.

¹² The 1996 EU leniency programme excluded an applicant from first position if it had compelled another enterprise to take part in the cartel or had acted as an instigator or played a determining role in the illegal activity. Since the 2002 revision, however, ringleaders are generally eligible for immunity in the EU (with the exception of so called coercers- companies which took steps to coerce other undertakings to join the cartel or to remain in it). In other jurisdictions, notably in the US and Germany, sole ringleaders are excluded from immunity and can only apply for a reduction in fine in the range of up to 50% (Wils, 2016; Bos and Wandschneider, 2011)

¹³ Approximately 95% of antitrust cases in the United States are private actions (Wils, 2016b: 14 with further references). The US private antitrust enforcement system is based on actions for treble damages, opt-out class actions, jury trials, contingency fee agreements, an extensive discovery system and exclusion of the passing-on defence. The number of private claims has however fluctuated over time with fluctuation correlating with the attitude of the courts towards private antitrust claims and the level of government enforcement (OECD, 2015).

¹⁴ Developments in Cartel Enforcement Following the Adoption of the Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (DAF/COMP/WP3(2016)7)

¹⁵ In a recent survey of 30 practitioners with extensive leniency experience, 83% of participants indicated that they sensed a decrease in interest from their clients and in incentives for their clients to apply for leniency. The factor most often mentioned as explaining this sensed decrease was the increased exposure in civil damage claims (Wils, 2016b: 42 with further references).

¹⁶ Frequently Asked Questions about the Antitrust Division's Leniency Program and Model Leniency Letters Update Published January 26, 2017 www.justice.gov/atr/page/file/926521/download.

¹⁷ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014.

¹⁸ Some commentators have gone further and asked for cartels receiving immunity from private damage claims by giving them the right to full contribution from their co-infringers (e.g. Kersting, 2014).

¹⁹ This Judgement sets aside the judgement of the General Court (GC) in the Evonik Degussa case of 28 January 2015 (T-341/12; OECD, 2015 discusses the parallel case 345/12 Akzo Nobel). In 2006, the Commission fined several participants in a hydrogen peroxide cartel. Evonik had provided the Commission with information on the arrangements in its leniency application. The disputed issue before the GC and the CJEU was the refusal by a Commission hearing officer to review Evonik's request that information which was supplied as part of its leniency application be excluded from the Commission's public decision. The CJEU concluded that the hearing officer is not limited to reviewing the disclosure of specifically confidential matters (such as business secrets and personal data) but must also examine any claim of confidentiality based on general principles of EU law.

²⁰ Individuals can benefit from a reduced sentence for their co-operation, though.

²¹ There are significant differences between the US plea bargaining system and the EU settlement procedure though. In the EU the settlement is provided in recompense for shortening the standard procedure, while in the US plea bargaining is a tool whereby a reduction of penalty is given in exchange for evidence or the surrender of a procedural position, see Faull and Nikpay, 2014, 8.723.

²² For the EU, it is claimed that leniency and settlement are interrelated as the introduction of the settlement policy was a result of the success of leniency policy, translating it into more cases being opened than the EU could realistically proceed with at any time (Guttuso, 2015).

²³ See for the European Commission: Case COMP/E-1/37.512 Vitamins; Case No COMP/E-1/36 604 Citric acid; Case COMP/E-1/36.490 Graphite electrodes; COMP/39.309 LCD - Liquid Crystal Displays. For the Lysine Cartel, see the DOJ press release available at https://www.justice.gov/archive/atr/public/press_releases/1996/1030.htm.

²⁴ Council Regulation (EC) 1/2003 of 16 December 2002 introduced a system of parallel competences, meaning that the EU Commission as well as National Competition Authorities (NCAs) are competent to investigate cartel cases under Art. 101 TFEU. The opening of proceedings by the Commission under Art. 11 (6) of Regulation 1/2003, however, deprives the NCAs of their competence to investigate a case, not only under Art. 101 TFEU but also under their national competition law.

²⁵ For that reason law firms usually advise investigated companies not to lay off rogue employees at least for the time of the investigation going on.

²⁶ At the same time, authorities need to be aware of the limitation of oral testimony, and that especially subsequent applicants might stretch or alter the facts to justify leniency.

²⁷ According to this definition of recidivism, the second infringement will need to start or continue after the date on which the competition authority finds the first infringement. However, a different definition defines recidivism as the situation when a company is convicted for a second time for cartel conduct. This second definition would lead to a higher number of cases of recidivism (Wils, 2012).

²⁸ A scenario which is more likely to work in systems where there are no criminal sanctions for individuals.

²⁹ Amnesty Plus programmes create incentives for companies under investigation in one market to report a cartel in a different market. A company under Amnesty Plus can receive leniency for its role in the undetected cartel and a substantial additional discount for its role in the detected cartel. The instrument was developed in the United States where it is highly successful and where it is sometimes promoted as a tool having “the potential to bring a series of cartels tumbling down like a house of cards”. In recent years amnesty plus has been introduced to a number of additional jurisdictions (Martyniszyn, 2015). Half of the DOJ’s international cartel investigations start as a result of Amnesty Plus (Sokol, 2012). The flipside of Leniency Plus, the so called Penalty Plus policy, provides that if a company pleads guilty to an antitrust offence but fails to report an additional crime it was involved in, the company forgoes credit under the Leniency Plus policy and the Antitrust Division will seek a more severe punishment for the additional crime. The DOJ has included its Penalty Plus policy in its FAQ 2017 (FAQ, 2017, 11). This was, however, no change in policy as Penalty Plus was used by the DOJ in its practice before. The European Union has not introduced an amnesty plus programme (Fullarton and Singh, 2016).

³⁰ This makes it impossible, for example, for all cartel members to apply at the same time for “collective immunity” and thus to avoid punishments.

³¹ The new Canadian draft law of 2017 states that “While each case will be weighed on its own merits, the DPP ordinarily will not issue the immunity agreement prior to: 1. the lapse of the statutory period to file a notice of appeal, when no party seeks to appeal the trial court decision in the event of a criminal prosecution; or 2. when the Commissioner and DPP have no reason to believe that further assistance from the applicant could be necessary.” See http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04316.html#sec_f.

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