

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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This document reproduces summaries of contributions submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

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 - Summaries of Contributions

This document contains summaries of the various written contributions received for the discussion on Challenges and co-ordination of leniency programmes (127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

The ACCC immunity and cooperation policy for cartel conduct (the Policy) offers conditional immunity to the first eligible party to disclose cartel conduct. Subsequent applicants who choose to cooperate under the Policy may have their cooperation recognised in a variety of ways, including a reduction in the penalty or fine.

In recent times, the main challenge that has arisen in the administration of the Policy is a concern about the level and timeliness of cooperation provided by immunity applicants. The ACCC's recent experience suggests that the imperative to cooperate diminishes after conditional immunity is granted. Also, applicants can be slow to provide information and access to witnesses, particularly in the context of international cartels where multiple jurisdictions are investigating.

The current review of the Policy proposes to address this challenge by clarifying the obligations of immunity applicants, and securing key evidence prior to granting conditional immunity.

The ACCC has consulted with international counterparts about the findings of the review. In particular the New Zealand Commerce Commission which is also currently undertaking a review of its immunity policy. Cooperation with the NZCC is particularly significant for the ACCC given the close similarities between Australian and New Zealand competition laws and the volume of trans-Tasman trade.

The ACCC has worked closely with the NZCC on several international cartel investigations. In some of these investigations, the ACCC and NZCC had a common immunity applicant and obtained a waiver from the immunity applicant allowing the two agencies to discuss confidential information submitted by the applicant, with each other. It has also been beneficial for the ACCC and NZCC to discuss how the materials provided by the applicant may give rise to contraventions and to identify potential gaps and possible further enquiries. This has allowed both agencies to take a coordinated and focussed approach in their requests for information from the applicant.

This relationship also allows both agencies to coordinate approaches to investigation outcomes through the sharing of case theories, investigation plans or proposed remedies, and in some cases to utilise specific legislative provisions to exercise compulsory powers to assist in progressing the other agency's investigation.

*BIAC**

An effective leniency program will encourage applicants to self-report. The significant costs of multi-jurisdictional applications, internationally inconsistent policies, and challenges created by the absence of an internationally integrated system for establishing a consistent priority date for leniency markers, will deter—rather than incentivise—such behaviour.

Participants in international cartels will likely not apply for leniency in only one jurisdiction—as one application might trigger a chain of investigations in other jurisdictions—but consider multi-jurisdiction leniency applications. However, for many companies, the cumulative cost of complying with the requirements of multi-jurisdictional leniency applications and the business disruption caused by the process may outweigh the expected benefits of securing leniency. BIAC notes that this complexity does not apply only in respect of major global cartels. Indeed, with the increasing globalization of economies, only a relatively small proportion of markets and hence potential cartels are purely domestic in scope.

To ensure that companies are not deterred from self-reporting, antitrust authorities should try to co-operate to eliminate currently incompatible and contrasting requirements and to mitigate the complexity and costs of multi-jurisdictional leniency applications as much as possible. A one-stop shop marker system would permit one or more designated agencies to become the “clearinghouse agency” for markers involving international cartel matters. Providing first-in leniency applicants with a one-stop shop option to report suspected cartel behaviour and obtain a marker would mitigate the system frictions that presently exist between different leniency programs and facilitate more effective international cartel enforcement.

Brazil

The Brazilian antitrust Leniency Programme was a milestone in the fight against cartels in the country. Since 2003, 83 agreements were signed (64% national cartels, 18% international cartels with global dynamics, 18% cartels with national and international effects). The success of the programme generated spillover effects in other fields as extensive as anticorruption law, financial, stock market regulation, and even criminal law enforcement.

The experience and evolution of CADE and other Brazilian institutions in this realm have fostered new challenges and opportunities for improvement. The main topics of nowadays agenda of the Brazilian authority are the cooperation with others authorities, the links between antitrust infringements and other kind of criminal and administrative conducts, strategies for medium and small companies applications, new incentives and private enforcement liability.

Canada

In Canada, cartel conduct is a criminal offence, representing one of the most egregious forms of anti-competitive conduct leading to higher prices, decreased product choice and less innovation. As such, preventing, detecting and halting both domestic and international cartels continue to be one of Canada's Competition Bureau's (the "Bureau") top priorities.

To address this priority, the most important tools the Bureau has at its disposal are its Immunity and Leniency programs (collectively, the "Programs"). Under the Programs, the Bureau may recommend to the Public Prosecution Service of Canada ("PPSC") that cooperating applicants be considered for immunity from prosecution, or in the case of applicants who are not eligible for a grant of immunity, lenient treatment in sentencing.

Given their importance, the Bureau has been reviewing the Programs with the overall objective of improving their efficiency and effectiveness as well as their predictability in light of recent legal and policy developments. Recently, the Bureau released a draft of the proposed revised Programs for public consultation.

Canada's submission discusses the Bureau's current Programs and how the proposed revised Programs may improve upon them by:

- Being prosecution ready by implementing clear eligibility requirements to qualify under the Programs; stipulating how witness evidence will be captured; ensuring that the Bureau is able to provide all of the factual information required for the PPSC to complete disclosure to the accused in a prosecution; and, placing time constraints on the disclosure of information by the applicant.
- Obtaining full and timely cooperation from applicants by communicating the Bureau's expectations to applicants; setting the expectations for the applicant to inform the Bureau of factors which demonstrate a nexus of the conduct to Canada; and facilitating effective disclosure of relevant materials from the applicant.
- Maintaining the attractiveness of the Programs to applicants by proposing revisions to the manner in which the recommended fine is calculated in order to encourage earlier cooperation and disclosure in the leniency program; and ensuring that the identity of applicants and the information they provide under the Programs remain confidential until disclosure is required.

The submission also addresses and proposes ways in which the coordination of leniency programs between jurisdictions can be improved to help maximize scarce investigative resources and limit the burden of complying with the conditions of programs across different jurisdictions.

The Bureau suggests that improving the coordination of leniency programs among different jurisdictions can be achieved through: the requirement of full waivers; ensuring that the Bureau is in a position to conduct coordinated enforcement actions with its foreign counterparts; and coordinating witness evidence.

*Chile**

In order to effectively detect, sanction and deter collusion, articles 39 bis and 63 of the Chilean Competition Act establish and regulate a leniency program. The competition authority FNE published in October 2009 the first leniency guidelines (“2009 Guidelines”) which were updated in 2016 and 2017.

The FNE has encountered several challenges in implementing and applying its leniency programme. One important challenge is keeping the information provided by leniency applicants confidential. The FNE has implemented several measures to maintain the confidentiality of the information provided under a leniency process.

Another challenge is to maintain incentives to apply for leniency. Recent laws made cartels criminal, increased the maximum fines and created a new sanction for the members of a cartel (prohibition of contracting with governmental entities). It is also too soon to assess the effects of these new rules.

In order to address differences with other leniency programmes which could hinder international co-operation and following the comments received by international institutions (such as the American Bar Association and the International Bar Association), the 2017 Guidelines introduced the following changes to the Chilean leniency programme:

- Applicants may request the marker via telephone or e-mail, in addition to the online form available on the FNE’s website.
- Application meeting may be held through remote means of communication.
- In qualified cases, the applicant can submit its benefit request verbally in both Spanish and English.
- It is possible to make “hypothetical enquiries” before requesting a marker to know which benefit is still available, without disclosing the identity of the party interested in obtaining leniency.
- Right to withdraw the benefit request.
- Causes, procedure and effects of the revocation of the benefit.
- Inclusion of the “amnesty plus” benefit. This tool allows the second applicant, to obtain the maximum percentage of reduction of fine established by the law, if such applicant provides evidence of collusion related to a second market.

Regarding the experience of the FNE co-operating with other competition agencies, there have been few cases in which the leniency applicant has granted a waiver allowing other agencies and the FNE to share information obtained from a leniency application.

Chinese Taipei

The leniency programme of Chinese Taipei was added to the fair Trade Act (FTA) on November 23rd, 2011. The Fair Trade Commission enacted the “Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases” to provide specific items (qualifications, number of applicants, procedures, etc.) for implementing the leniency programme. Chinese Taipei’s leniency programme is for “fine exemption” and “fine deduction” only.

Up to now, The Fair Trade Commission has granted 3 applications on the leniency programme. The applicants of these cases are mainly multinational enterprises applied the leniency programme to competition authorities in different jurisdictions simultaneously for involvement in a cross-border cartel case.

The Challenges of implementing the leniency programme include: how to eliminate concerns that companies have when applying for the leniency programme, as well as communicating and promoting the leniency programme among lawyers and the business sector; how to coordinate with other competition authorities in a cross-border cartel case, and the use of waivers in the application.

Colombia

1. Legal framework

The leniency program in Colombia was established by Article 14 of Law 1340 of 2009. This law was regulated by Decree 2896 of 2010, which was updated by Decree 2153 of 2015. The program contemplates both complete and partial amnesty for undertakings and individuals who participate in cartels and provide timely and effective assistance to the Superintendence of Industry and Commerce (SIC) in exposing and prosecuting anticompetitive behaviours.

According to the program's regulation, complete amnesty is reserved for the first party who applies before the Deputy Superintendent for Competition Protection. For subsequent applicants are assigned roster positions in order of application. The Deputy Superintendent may suggest fine reductions for subsequent applicants by evaluating the quality of their cooperation, considering the following maximum reduction schedule: 30% to 50% reduction for the second applicant, and up to 25% reduction for the third and subsequent applicants.

The most important changes made by Decree 2153 of 2015 based on OECD recommendations are the following: (i) automatic amnesty for the first applicant; (ii) recognition of "amnesty plus", to enable leniency applicants who are not the "first in" applying for leniency benefits to earn an additional 15% reduction in their fine by disclosing the existence of a different cartel; (iii) extension of the gap between the benefits granted to the first and second applicant for the leniency program, and (iv) opportunities for employees of an infringer undertaking to apply to the leniency program regarding all anticompetitive practices.

2. Leniency cases

Although Colombia has a leniency program since 2009, the first leniency applications were received only in 2013. Since then, Colombia has successfully used the leniency program in four cases: (i) Baby diapers cartel, (ii) Soft Papers cartel, (iii) Scholar Notebooks cartel and (iv) Private Security services cartel. The first three cases ended up with the total exoneration (100%) of the fine for the first applicant and in significant reductions for the subsequent applicants. However, in the private security services case the applicant dismissed his application to the leniency program despite of having 100% of immunity in the administrative field, due to its exposition to criminal sanctions.

3. Ongoing concerns and challenges

In November of 2016, the General Secretariat of the Andean Community issued a statement of objections against the companies of the KIMBERLY business group and the companies of the FAMILIA business group, for allegedly incurring in price fixing and market allocation in the Andean region.

The origin of the community investigation was a complaint filed by the Ecuadorian Competition Authority (SCPM), in which such entity "declassified" information provided by leniency applicants in that country.

According to the SGCAN, there was a cartel that was created in Colombia and had effects in Ecuador, and because of those transnational effects a sanction in the community level should proceed. That conclusion goes against the findings of the Colombian authority, since the SIC established that there was no regional cartel but two national and different cartels –one in Colombia and another in Ecuador–, which is totally different.

Thus, for the SIC the activation of the Andean competition regime represents a major concern, since it can lead to conflicting decisions that affect the transparency of the leniency programs, the credibility on leniency, and the legal certainty of investigated parties in competition proceedings, especially if those parties have Andean presence.

*Croatia**

The first leniency programme was introduced in Croatia in 2009 and further elaborated in 2010. The programme is to a large extent based on the corresponding EU rules.

The Croatian leniency programme envisages both immunity and reduction of fines. There is no leniency for individuals, only undertakings can be granted immunity from fines or reduction in fines. Initiators or ringleaders are excluded from immunity. The Croatian leniency program also contains a marker system.

The leniency regulation was amended in 2017 with the purpose of aligning its legal terminology with the EU Damages Directive 2014/104 and of introducing summary applications in case the European Commission is well placed to deal with a case.

So far, Croatia received only two leniency applications. The reluctance to report in a small country and on a market with inevitable business partners is a major challenge. Also, the fact that most of the decisions of the competition authority CCA on cartels were not confirmed by High Administrative Court makes leniency less attractive; the undertakings do not have incentive to apply for leniency if there is a large probability that such decision will not be confirmed by the court.

Furthermore, the EU Damages Directive and the Croatian Law on damages claims might have a further deterrent effect on the willingness of potential leniency applicants to approach the CCA.

To make leniency more attractive an awareness raising campaign would help. On the international level, aligning the requirements for immunity and reduction of fines and procedures to the highest level possible would contribute to legal certainty of undertakings and individuals when deciding to apply for leniency.

European Union

The EU leniency programme offers full immunity from fines to the first company that discloses its participation in a cartel, which enables the Commission to start a cartel investigation or to establish an infringement. Subsequent companies applying for leniency are eligible for reductions of fines within specific ranges if they provide evidence that strengthens the Commission's ability to prove the infringement. All leniency applicants are under an obligation to cooperate fully and genuinely with the Commission in order to be granted immunity or reductions in fine when the infringement decision is issued.

The leniency challenges faced by the Commission are common to many other competition agencies worldwide. First among these challenges is the impact of private damages actions. Within the EU, this has been addressed by some of the conditions of the EU Damages Directive itself, which contains specific provisions to safeguard the incentives of companies to cooperate under leniency (e.g. protection of leniency statements from disclosure, limitation of liability of immunity applicants to the harm caused to their own customers). Second, due to the increasingly global nature of cartels, there is a well-established practice of cooperation among competition authorities regarding the first steps of an investigation after leniency but going forward such cooperation could be extended to other procedural and substantive matters. Third, appropriate protection from criminal or administrative sanctions for employees of corporate immunity applicants is necessary in order to avoid the establishment of disincentives to apply for leniency.

Convergence and coordination with respect to leniency regimes is an important area. This is evident within the European Competition Network (ECN) where the Commission and the national competition authorities (NCAs) enforce the EU competition rules in close cooperation. The ECN Model Leniency Programme, which harmonises the conditions for granting immunity or fines reductions and those for accepting summary applications, is an important instrument for ensuring coordination in leniency cases between the Commission and the NCAs. At an international level, convergence is important to avoid placing conflicting or incompatible requirements on leniency applicants across different jurisdictions.

Leniency programmes have traditionally been the most effective investigative source for authorities to detect cartels, but must be supplemented by a diversified detection system also based on strong ex officio capabilities. This creates a virtuous circle of deterrence as the increased risk of detection outside leniency serves to maintain the appropriate incentives for companies to report cartel conduct. With this in mind the Commission has improved its capacity to run non-lenieny cases by introducing a cartel whistle-blower tool that enables informants to contact the Commission in full anonymity. The Commission also intends to pursue its efforts to promote and increase the visibility of leniency programmes by reaching out to business stakeholders and trade associations at both the EU and national levels, in collaboration with NCAs and international fora such as the ICN and the OECD.

Hungary

Since its introduction in 2003 in the form of a soft law measure, the Hungarian leniency programme has continuously been adapted to the needs of effective law enforcement. During this process utmost account has been taken of the ECN Model Leniency Programme. The incorporation of the leniency programme into the Hungarian Competition Act, the introduction of the marker-system, and the extension of the leniency programme to hard core vertical restrictions, represent the landmarks of the Hungarian leniency programme. Despite all of these efforts the leniency programme has not been particularly successful, perhaps as a result of the unfortunate cultural legacy of the former planned economy system in Hungary (not to be seen as a traitor) and the low level of competition law awareness (especially among SMEs). Nevertheless, due to the well-performing ex officio cartel detection activities of the Hungarian Competition Authority (hereinafter: GVH) it has dealt with a number of cartel cases.

The GVH faces certain challenges when operating its leniency programme. One of these relates to the use of the marker system, namely, whether to enable (again) a marker application to be submitted not only in respect of an immunity application relating to an infringement in respect of which the GVH has not yet initiated its proceedings, but also in respect of immunity applications submitted in ongoing cases and in respect of applications for a reduction of the fine to be imposed. Also, challenges arise in relation to the scope of the obligation to cooperate once conditional immunity has been granted to the applicant, namely, how situations should be handled where a party has false perceptions of the legal qualification of its conduct. Furthermore, the fact that in respect of decisions of associations of undertakings neither the association of undertakings nor its members can apply for leniency prevents potential applicants from coming forward. Last but not least, differences in the leniency programmes of potentially affected jurisdictions seem to discourage potential applicants from applying for leniency in cartels affecting several jurisdictions.

*Israel**

The Israel Antitrust Authority (IAA) has a formal leniency program since 2005 which offers immunity from criminal prosecution to the first applicant.

The IAA recently succeeded in obtaining a number of convictions in a case which began with a leniency application (“the tree pruning cartel”). However, in the 13 years which have passed since the publication of the program, relatively few applications have been made, and even fewer have led to investigation, prosecution and conviction. During this same period, many cartels were investigated, indictments were filed and the participants in the cartels convicted, all without any leniency application.

Possible reasons for the lack of success include the following: (i) the sentences imposed on cartel offenders may not be severe enough to motivate cartel participants to come forward and request immunity; (ii) the fines imposed on corporate defendants generally are not sufficient to create an incentive to apply for immunity; (iii) the leniency program offers immunity from criminal prosecution under the Antitrust Law only, but neither from civil damages actions nor from related offenses such as fraud and money-laundering; (iv) certain conditions may create legal uncertainty as to the outcome of an application for immunity, such as that immunity will not be granted to the leader of a cartel.

The IAA is considering several options for amending the program in order to improve its effectiveness, including

- (i) changing the timing requirement. The program presently requires application before an overt investigation is opened. This deadline could be moved up (application before the IAA knows of the cartel, or before it decides to open an investigation) or moved back (application even after an overt investigation is opened).
- (ii) Offering leniency (not full immunity) to second and subsequent applicants.
- (iii) Expanding the scope of immunity to cover related offenses.
- (iv) Removing the conditions which disqualify cartel leaders and repeat offenders from applying for immunity.
- (v) Decreasing immunity recipients’ exposure to civil damages.

Japan

Leniency programme in Japan has been successfully functioning as a tool for cartel detection and investigation since its introduction in January 2006. There are some key factors which make Japan's leniency programme effective and efficient as follows; marker system; leniency for subsequent applicants; substantial advantages for the first applicant; confidentiality of leniency information; transparent procedure; interaction with other enforcement policies; and proactive enforcement activities.

In the meantime, JFTC has also experienced difficulties in relation to companies' cooperation with its investigation and discussed for future improvement. The limitation to the number of successful leniency applicants and the application period and a rigidity of the leniency programme are considered as the obstacles to ensuring incentives for companies to cooperate with JFTC's investigation.

The following improvements are desired from the viewpoint of increasing incentives on companies to cooperate with JFTC's investigation; expansion of the limit of leniency applications; flexible reduction rates; obligation of continuous cooperation; and strengthening of potential surcharges. These improvements of the leniency programme are suggested in the Report released in April 2017 by "The Study Group on the Antimonopoly Act".

JFTC expects the improvement of the leniency programme from the standpoint of encouraging more cooperation of companies, aiming at more efficient investigation.

Korea

Since the introduction in 1997, leniency program has gone through several changes to enhance the predictability and transparency and prevent it from being abused. Currently, the leniency program has taken root as the most crucial and effective device for detecting cartels. The first applicant is eligible for the full immunity, being granted an exemption from administrative surcharges as well as referral to the Prosecutor's Office. The second applicant can receive a partial leniency with a 50% reduction in administrative surcharges along with waiver from criminal referral. Also, the KFTC has introduced treble damages trying to deter cartels through stronger private enforcement. However, to prevent companies from being discouraged to apply for leniency, the KFTC came up with a countermeasure where leniency recipients will only be responsible for the actual damage.

Latvia

First provisions to motivate those undertakings involved in infringements to report the relevant information and evidences of infringement by their own initiative in Latvia competition legislation was introduced in 1998. These provisions included also full reduction of fines (from 75% to 100%) but were not cartel specific and covered all infringements - also vertical agreements and abuse of dominance but there not applied in practice. With later changes in 2004 leniency provisions were specifically attributed to cartel infringements, also revised and amended in 2008 and 2013 to meet the requirements of the ECN (European Competition Network) Model Leniency Program.

Leniency program was constantly improved and updated to reach effective implementation of this program anyway the program faced significant challenges. But first leniency application Competition Council of Latvia (CCL) received only in 2013 that was also application for full immunity and enabled CCL to start new cartel investigation. Till now there were two more full immunity applications (one was received in the beginning of 2015 and case ended in 2017 with infringement decision¹) and 9 leniency application for the reduction of fines during investigation conducted by CCL.

In June 2016, new Competition law amendments came into force that included also new leniency package. Important that *Leniency Plus program* was introduced, empowering CCL to reduce a fine (up to 50%) at the cartel cases already investigated by CCL if the cartel participant provides evidence about separate cartel infringement meeting the same requirements as in the ordinary leniency applications.

Due to transposition of the EU Damages directive 2014/104/EU additional restrictions and derogations were introduced in national competition legislation concerning leniency applications. These amendments contained provisions to limit access to leniency applications (statements) for litigants and restrictions to the extent leniency applicant is jointly and severally liable. New amendments came into force in November 2017.

The CCL has the priority to maximize the effectiveness of leniency program by rising awareness through education activities and explanatory guidelines to motivate companies to come forward and self-report of prohibited agreement offences avoiding significant penalties and limitation to participate in public procurements. That includes 5 seminars already conducted in 2017 and at the beginning of 2018 with other partner institutions Corruption Combating Bureau, Procurement Monitoring Bureau, also 6 seminars further planned in 2018. There are separate seminars organized with Central Finance and Contracting Agency concerning transparent and fair use of EU funds.

Also, CCL explanatory Leniency guidelines were published in March 2018² explaining in more detailed the applicant rights and duties, procedure to receive sequence number and qualify for full immunity or a fine reduction, and summarizing of the current case practice of CC in relation to the application of leniency program.

¹ [Press release](#), 26.04.2017.

² [Leniency guidelines \(in Latvian\)](#), [press release \(in English\)](#).

Lithuania

The legal basis for the leniency program in Lithuania are the relevant legal provisions in the Lithuanian Law on Competition and the “Leniency Rules”. The latter were issued by the Competition Council in 2008.

Despite the amendments to the Law on Competition (in 2012), according to which not only horizontal, but also vertical agreements could be captured by leniency applications, a number of leniency requests has not increased in Lithuania. There is a total number of five leniency applications that have been submitted to the Lithuanian Competition Council since the adoption of the Leniency Rules. All of them relate to horizontal agreements. Nevertheless, one of such leniency applications has enabled the Lithuanian Competition Council to start the investigation in the case, which reached the European Court of Justice by way of the request for a preliminary ruling of the Lithuanian Supreme Administrative Court (the E-Turas case).

Despite the challenges of the leniency program, the Lithuanian Council puts efforts in advocating for it in order to encourage the undertakings to submit leniency applications. The Competition Council intends to update its Leniency Rules, but has, for the time being, suspended this process due to the proposal of the ECN+ Directive.

*Mexico**

Mexico's Leniency Program (the Program) was introduced in 2006. In 2018, the Federal Economic Competition Commission (COFECE) will revise the Program and its Guidelines. COFECE is also working on raising awareness on the existence of the Program, as there is a general lack of knowledge about its benefits.

A significant challenge to the effectiveness of leniency is the array of restrictions imposed by both the competition law and the Federal Criminal Code that prevent the Office of the Attorney General (agency in charge of criminal enforcement) and COFECE as well as the data that can be exchanged. This restrains the federal agencies from effectively enforcing criminal sanctions. The Program, which stipulates applicant's full and continuous co-operation, is limited to COFECE's procedures. This translates into harder criminal prosecution, as applicants are not compelled to co-operate with the Office of the Attorney General. Thus, COFECE must work closely with the Office of the Attorney General, to collect during the investigation procedure the evidence that will make possible both criminal and antitrust enforcement.

Co-operation amongst antitrust could also be strengthened agencies to increase the chances of detecting cartels and enforcing competition law. This could be achieved, to an extent and with the help of international bodies, by harmonizing the terms included in leniency programs, by introducing the principle of reciprocity in these programs and by ultimately creating a joint leniency program that would consolidate a detection-investigation international network.

*Peru**

Although Peru's antitrust enforcement formally began in the 1990s, it wasn't until 2008 with the entry into force of a new Competition Law that the application of competition rules gained a refreshed boost amongst Peru's main public policies.

A reform in 2015 introduced the following: (i) a marker system; (ii) clarifications regarding the acceptance of a leniency application; (iii) more benefits for subsequent applicants (a reduction of up to 50% for the second applicant, up to 30% to the third and up to 20% for further applicants); and (iv) an applicant who exerted coercion on other members of a cartel could only be granted a reduction of fine but not full leniency.

The Leniency Program suffered a backlash from public opinion when the 'Toilet paper case' (only leniency case in Peru to date) was decided in March 2017. The cartel member that first reported the cartel received full immunity, while the other cartel participant that co-operated was granted a 50% fine reduction. When the decision became public, consumers' associations criticized the decision claiming that such benefits were detrimental to consumers. Two subsequent legislative bills threaten leniency's effectiveness: the first bill eliminated full leniency to the first applicant, allowing only a reduction of fine up to 80%; the second bill diminished that to 40%. Furthermore, the second bill expressly proscribed cartels that could have lasted more than one year since the submission of the application from receiving any benefit.

As a result, numerous activities such as academic events or debates were carried out with the goal to spread the advantages of the Leniency Program.

There are still issues that are subject of debate between the authority and law practitioners:

- the authority should confirm if the evidence provided is indeed all the evidence that the applicant could have obtained through its best efforts;
- Individuals might be reluctant to participate in a leniency application out of several concerns (some might fear to be considered as 'snitches', others fear to lose their jobs, their prestige or to be associated with an illegal conduct);
- Collecting evidence from international companies who don't have subsidiaries in Peru is a major hurdle;
- The competition authority could be compelled to reveal information related to a crime like bid rigging even though it was obtained through a leniency application;
- Neither the law nor the Leniency Guidelines expressly shield an applicant from being later sued for damages;
- The supranational legal framework related to the Andean Community (Bolivia, Colombia, Ecuador, Peru) does not foresee a leniency programme.

Poland

The Polish leniency programme has been in force since 2004. From the date it was introduced the programme has been changed twice in order to increase its efficiency and approximate it to some aspects of the ECN Model Leniency³. Despite all of the changes that have been done to make the leniency policy more attractive to undertakings, there are still some challenges we are facing.

First of all, the number of the applications filed to UOKIK is below the expectations. Another problem is that the leniency itself does not lead to discovery of illegal agreements. Most of the applications were submitted after the first procedural steps undertaken by UOKIK, e.g. during dawn raid. It seems also that the potential leniency applicants are not eager to come forward and report an infringement due to fines being constantly lowered by Polish courts. The next challenge is the clash between leniency and private enforcement. The Polish Private Enforcement Act provides for protection of leniency statements. However, despite these safeguards, the potential applicants can be discouraged from submitting leniency because of civil damages. Especially since there is still a low number of private enforcement cases in Polish courts and the potential amount of civil damages is difficult to estimate. Moreover, the leniency program offers no immunity from criminal sanctions, so it is less effective in relation to bid rigging, which in Poland is a criminal offence. Another caveat is the cooperation with the applicants which limits only to the antimonopoly proceedings. Leniency applicants are not willing to support the authority in court proceedings.

Undoubtedly, leniency policy is one of the most effective instruments in competition authority's toolbox to detect cartels and other illegal arrangements. However, it can be effective only if it provides clear, transparent rules to the companies and the threat of severe punishment is palpable. Therefore the Polish CA actively seeks new solutions that can reinforce the program and make it appealing to undertakings. Currently we are in a process of reviewing our legislation which may conclude in significant changes in Competition Act.

³ http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

Russian Federation

In the Russian Federation, leniency program for violation of the antimonopoly legislation has been in force since 2008. From the beginning of the program, a number of changes have been made to improve it, taking into account the best world practices. Over the past 10 years, the program has undergone some significant qualitative changes. The latest changes were made in April 2017. According to the amendments, imposition of a minimum fine for the second and third persons, who admitted to participate in a cartel, became possible both in respect of a person who voluntarily reported on an unacceptable agreement (cartel) to the competition authority, as well as of legal entities belonging to the same group of persons, if they are named in the application.

In Russia, leniency program is regulated by the Code of Administrative Offenses of the Russian Federation, by the Criminal Code of the Russian Federation and partially by the Federal Law No. 135-FZ of July 26, 2006 "On Protection of Competition", therefore it does not constitute a holistic document. Currently the FAS Russia has developed a package of amendments to the current legislation, which synchronizes these documents.

As part of the leniency program, information distribution on the possibility of filing an application to the competition authority is carried out through all available means of public communication.

The system of reporting to the competition authority about participation in the cartel - the system of markers - is a part of the leniency program.

Currently, the FAS Russia is actively formalizing the work of the system of markers.

For example, now in Russian legislation there is no marker that allows a member of a cartel to contact the competition authority anonymously and find out whether there is already an applicant for the leniency program, having received thus preliminary immunity.

Besides, it is notable that according to Russian legislation the antimonopoly body can decide to release only from administrative liability and only legal entities. This follows directly from the Notes referring to the Article 14.32 of the Code of Administrative Offenses of the Russian Federation.

The issue of release from criminal liability of individuals (official persons) is within the competence of law enforcement bodies. In addition, under Russian legislation participation in cartel agreements may, in certain cases, entail criminal liability for individuals in accordance with the Article 178 of the Criminal Code of the Russian Federation. Thus, a person using the program, which is the first one to report on an anticompetitive agreement, is not relieved from criminal liability, which may be a certain deterrent for participants of a cartel, taking into account the greater severity of criminal sanctions.

The FAS Russia has prepared a draft law on amendments to the Criminal Code of the Russian Federation, proposing to specify the requirements for the first applicant in order to make the program more attractive for violators to use the program.

Singapore

From the outset of enforcing the Competition Act, the Competition and Consumer Commission of Singapore (“CCCS”) recognised the value a leniency programme could bring to its detection and enforcement of cartels. The leniency programme has been an important and effective tool to uncover and investigate cartels that prevent, restrict or distort competition in Singapore; with 41.6% of CCCS’s infringement decisions involving anti-competitive agreements being as a result of leniency.

The leniency programme was first published in 2005 with a set of guidelines on CCCS’s approach to interpreting and administering provisions of the Competition Act. Since then, CCCS has continually sought to improve and refine the programme, drawing on the practical experience it has gleaned from administering its programme as well as from international best practices. CCCS’s leniency guidelines were revised in 2009 and subsequently in 2016.

When first developing a leniency programme, CCCS faced the challenge of designing a leniency programme without having had practical experience in enforcing the Competition Act. It relied on the experience and practice of other jurisdictions as well as international best practice. In this context, to allow for sufficient flexibility, the first leniency programme in 2005 had broad parameters under which undertakings could apply for leniency and what reduction in penalties (if any) could be expected if an infringement was found (i.e. core incentives: immunity or a discount up to 100% or 50% for subsequent applicants).

The leniency programme was then revised in 2009 to include a marker system for cartel members who are the first to apply for leniency and a leniency plus system. Recognising that the leniency programme could be further enhanced by providing more transparency and certainty to applicants, the procedural steps within the leniency programme were further revised in 2016. The detail added to the procedural steps in the programme was a reflection of how in practice CCCS had applied its leniency programme and the experience it had accumulated. The greater detail sought to make applicants more aware as to what they could expect when applying for leniency.

In designing, refining and implementing the leniency programme, CCCS has sought to ensure that the programme is clear, transparent and provides certainty; is practical and accessible to applicants; does not impose an undue administrative burden on CCCS; and accords incentives that are balanced with other discounts/incentives e.g. for cooperation and CCCS’s fast track procedure (settlement). Balancing these considerations can be challenging. Other issues and challenges faced by CCCS include overcoming the lack of awareness of its leniency programme and optimising the level to which CCCS’s is able to co-operate with other jurisdictions in cross border leniency cases.

Spain

After the accumulated experience since its effective introduction in 2008, Spanish Leniency Programme has been confirmed as the single most effective tool for detecting cartels in Spain. Being aware of the need to keep the incentives of undertakings and also individuals in presenting Leniency applications, in 2016 the Spanish Competition Authority (CNMC) opened a public consultation, through a questionnaire sent to the law firms with richer experience with leniency applications at National and European level, to know in depth possible weaknesses and improvement elements. The responses received and discussed at working meetings with private practitioners confirmed the correct design of the Spanish Leniency Program and its reliable implementation in practice.

According to the CNMC practical experience, the opinion of different leniency stakeholders and jurisprudence derived from cases with leniency applications, a number of challenges and corresponding improvements has been detected. First, **leniency applicant's exposure to damage claims** has been correctly addressed by the national transposition of the Directive 2014/104/EU, in terms of protection from disclosure of the leniency statements and exceptions to the joint and several liability regime. Second, given the possibility, under Spanish Law, to sanction individuals and the option of a manager of a company to apply for leniency on an individual basis, there is a risk of ending up receiving leniency applications before from the manager that from its undertaking, which could also apply for reduction. Although the **leniency to individuals** is also a useful trigger to increase leniency applications, it could disincentive or hinder the presentations of leniency applications by its undertakings. Third, **disqualification from public tenders**, according to the new Spanish Public Procurement Act, may have a disincentive effect on potential leniency applicants if these one are not being exempted from this sanction. Finally, the **increasing predictability of fine setting** in Spain, after several decisions by the First Instance revision Court confirming the new calculation system adopted by the CNMC since 2015, probably would have an enhancing effect on leniency applications. As a final point, the CNMC identifies **coordination of leniency programmes at international level**, both on procedural and substantive issues (summary applications, case allocation, parallel cases, access to leniency statements, determination of the best-placed authority to deal with leniency applications submitted at EU level and so on), is a key piece to increase the efficiency of the Leniency Programmes.

*United Kingdom**

The UK's Competition and Markets Authority's (CMA) leniency programme provides protection for both civil cartel activity (by undertakings) and criminal cartel conduct (by individuals). Leniency protection includes immunity from, or reduction in, financial penalties for the undertaking, immunity from prosecution for the criminal cartel offence for co-operating individuals as well as immunity from director disqualification for co-operating directors.

In common with other competition authorities, a key challenge faced by the CMA is first, to raise awareness of competition law, so businesses and individuals know what cartel activity looks like, how damaging it can be, and that it is against the law; and second, to ensure that individuals and businesses are aware that they can apply to the CMA for leniency if they have been involved in unlawful cartel activity. In 2014, the CMA Board endorsed a compliance and awareness strategy which involved conducting benchmarking research to understand businesses' awareness and understanding of the law, then using the results to plan and deploy a targeted compliance strategy to run alongside the CMA's enforcement activity.

The CMA has been taking an increasingly proactive approach to cartel detection. Almost half of UK cartel investigations do not originate with a leniency application. The CMA has developed a cartel screening tool (using algorithms to spot unusual bidder behaviour and pricing patterns which may indicate that bid-rigging has taken place) which has been made freely available on the CMA's website. The CMA also operates a dedicated cartels hotline and an informant rewards programme, offering rewards of up to £100,000 for information about cartel activity.

The CMA works closely with sector regulators in relation to leniency, and has recently published an information note setting out the arrangements for the handling of leniency applications in the regulated sectors. This provides clarity as to the process that should be followed, and ensures the operation of a 'single queue' system for leniency applications in the UK.

The CMA (and its predecessor, the Office of Fair Trading) has a long history of co-ordination and co-operation with competition authorities internationally. The best known example of this is the 2008 Marine Hose case, which involved co-ordinated raids by the UK Office of Fair Trading, the US Department of Justice, the Japan Fair Trade Commission and the European Commission.

United States

The United States Department of Justice, Antitrust Division (“Antitrust Division”) created the core concept of exchanging leniency for cooperation against other cartel members, and then revised and honed its leniency policy to exponentially increase the policy’s effectiveness in cracking the world’s largest cartels. Widely adopted around the world, leniency policies have transformed the way competition enforcers detect, investigate and prosecute cartels. The smoke-filled walls of restaurants and hotel rooms where executives reached secretive price-fixing agreements were previously impenetrable to competition enforcers, and many such agreements undoubtedly went undetected for decades. Leniency changed that, and while smoke-filled rooms may have given way to virtual meetings and email, leniency policies continue to be effective in uncovering even the most sophisticated cartels.⁴

⁴ For further reading, *see* the Department of Justice, Antitrust Division’s Leniency Program policies, guidance documents, and public speeches *available at* <https://www.justice.gov/atr/leniency-program>. *See also* Ann O’Brien, “Leadership of Leniency,” *Anti-Cartel Enforcement in a Contemporary Age: Leniency Religion* (Caron Beaton-Wells and Christopher Tran eds., 2015).

Ukraine

There is a legal framework for the Ukrainian leniency programme, namely Article 6 of the Law of Ukraine «On Protection of Economic Competition» (hereinafter – the Law) that explicates general conditions for release of undertakings from liability for anticompetitive concerted practices (i.e. cartel agreements) in case their co-operation with the AMCU is important to prove the existence of the cartel. According to this Article an undertaking, who had participated in anticompetitive concerted actions and voluntarily informed AMCU or its territorial office earlier than other participant(-s) of such actions and submitted information essential for taking a decision in the case, is discharged from liability for anticompetitive concerted actions.

At the same time, conditions of release from liability are limited due to a number of reasons. An undertaking is not entitled to immunity from liability if this undertakings:

- failed to take effective measures to cease anticompetitive concerted actions upon notification thereof to the AMCU;
- was the initiator of or directed anticompetitive concerted actions;
- failed to submit all evidence or information on the infringement committed by the undertaking that it was aware of and had an easy access to.

Under the existing law, only the first applicant can benefit from leniency immunity; no immunity (even partial) is afforded to subsequent applicants who thus have no incentive to cooperate. This does not conform to international standards and best practices and shall be changed.

Ukrainian competition law is expected to be gradually brought in conformity with the EU standards, in particular with regard to:

1. extending leniency rules to subsequent applicants (currently, only the first applicant is exempt from liability; no subsequent applicants enjoy any exemption or reduction of fines);
2. relaxing requirements with regard to documents submission required from the applicants (currently Ukrainian law requires leniency applicants to provide full body of evidence which often effectively means impossibility to comply with the very high standard of proof to enjoy the exemption).

Amongst the challenges that the Antimonopoly Committee of Ukraine (hereinafter – AMCU) has experienced in the functioning of amnesty/leniency programme there are: low awareness of leniency options and procedures; absence of satisfactory guarantees for applicants; heavy burden of collecting and submitting evidence of a cartel which is imposed by the law on the applicant; cultural reluctance to report to and cooperate with the competition authority with regard to competitors' infringements as being against traditional understanding of 'doing business correctly'.

As a result, AMCU has received very few leniency applications. This situation definitely calls for revision of the legislative framework in order to increase efficiency of amnesty/leniency programme.

Currently, there is a draft law which has already passed the first reading at the Parliament and is being prepared for the final reading which aims inter alia at considerably improving the leniency programme legal framework, in particular by introducing reduction of liability for subsequent applicants (75 % to 25 % discount, depending on the sequence) and by improving leniency application procedures.