

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

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**Roundtable on challenges and co-ordination of leniency programmes - Note by the
European Union**

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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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European Union

1. The EU leniency programme

1. Cartels by their very nature are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. The EU leniency programme is a cartel investigation tool within the EU's system of administrative sanctions for antitrust offences. The EU leniency programme is set out in the 2006 Leniency Notice¹ and applies to secret cartels affecting the EU².
2. The EU leniency system is a corporate leniency system whereby fines are waived or reduced³ for companies that disclose their participation in a cartel, put an end to their participation and cooperate with the Commission throughout the procedure. In this context, the term 'leniency' means a system of immunity and reduction of fines that would otherwise be applicable to a cartel participant.
3. The collaboration of companies with the Commission in a cartel investigation has an intrinsic value: Companies applying for leniency are able to conduct internal corporate investigations and therefore to help the Commission to detect a cartel or to put forward evidence enabling it to prove a cartel.
4. The EU leniency system establishes a 'race' between leniency applicants, creating incentives for them to come forward and provide a sufficient level of evidence as soon as possible in order to secure the maximum available benefit. In this context, both the timing and the content of the applications are important.

1.1. Immunity from fines

5. Under the Leniency Notice, the first company to submit information and evidence which in the Commission's view will enable it to carry out a targeted inspection in connection with the alleged cartel or establish a cartel infringement is eligible for immunity from fines in a cartel investigation. However companies that took steps to coerce other companies to join the cartel or to remain in it are not eligible for immunity from fines but only for a reduction of the fine⁴.
6. The Leniency Notice allows the Commission to grant a marker to an immunity applicant, in order to secure that applicant's position in the leniency queue during the

¹ Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298 of 8 December 2006, pp. 17-22; see also the ICN Anti-Cartel Enforcement Template, European Union, Section 6 (Leniency Policy) <http://ec.europa.eu/competition/international/multilateral/template.pdf>.

² Under EU law, a cartel is an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition.

³ See the ICN Anti-Cartel Enforcement Manual Chapter 2: Drafting and Implementing an Effective Leniency Policy: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf>.

⁴ See point 13 of the Leniency Notice.

time necessary for it to perfect the information and evidence required to qualify for immunity⁵.

7. Companies may also file hypothetical and anonymous applications for immunity⁶. Once the Commission has verified that the conditions for granting immunity are met, it adopts a decision that confirms in writing to the company that it has received conditional immunity from fines.

1.2. Reduction of fines

8. The subsequent companies applying for leniency are eligible to obtain a reduction of fines within specific ranges: between 30% and 50% for the first reduction of fines applicant, between 20% and 30% for the second, and up to 20% for any company afterwards.

9. The evidentiary threshold for reductions of fines requires applicants to provide evidence with significant added value compared to the evidence in the Commission's possession at the time of the submission. Leniency applicants must provide evidence that strengthens, by its very nature, quality and its level of detail, the Commission's ability to prove the infringement⁷.

10. If an applicant qualifying for a reduction of fines is the first to submit compelling evidence on additional new facts that extend the gravity or duration of the cartel under investigation, it may also qualify for immunity regarding the portion of the fine resulting from these facts⁸.

1.3. Process

11. Leniency applicants must provide the Commission with corporate statements that provide all relevant details known to the applicant at the time of the submission as well as evidence relating to the cartel (in particular contemporaneous evidence). In practice, such statements are very often made orally at the Commission's premises.

12. Leniency applicants have a duty of full and genuine cooperation with the Commission throughout the administrative procedure. This is an important feature of the success and efficiency of the leniency programme. The Commission may withhold granting leniency if the application and cooperation of the company does not meet the requirements⁹.

13. Immunity from fines or reductions of fines are granted at the end of the Commission's investigation of a case (be it under standard procedure or settlement), at the moment when the Commission adopts a decision finding companies liable for participation in a cartel.

⁵ See point 15 of the Leniency Notice.

⁶ See point 16(b) of the Leniency Notice.

⁷ See point 25 of the Leniency Notice; see also the ICN Checklist for Efficient and Effective Leniency Programmes http://ec.europa.eu/competition/cartels/icn/index_en.html.

⁸ See point 26 of the Leniency Notice, last paragraph.

⁹ See, for example, Commission Decision of 24 June 2015 in Case AT.39563 – Retail Food Packaging, recitals 1083-1086.

14. In terms of the fine methodology, the leniency reductions are applied once all other potential reductions have been applied (e.g. adjustments for mitigating or aggravating circumstances, capping of the fines at 10% of worldwide turnover).

1.4. Transparency and predictability

15. In the EU, clear rules are in place for rewarding the cooperation of companies. These rules are subject to the scrutiny of the European Courts (General Court and Court of Justice). The practice of the Commission and the case-law of the European Courts have created legal certainty and predictability for the application of the leniency programme in the EU.

16. The Leniency Notice is applied by the Commission in its cartel prohibition decisions, in full transparency. The Commission assesses the value added of the evidence submitted by each applicant in relation to the evidence the Commission had in its possession at the moment when each item of evidence was submitted. The leniency assessment forms part of the published decision and therefore allows companies to know how the leniency notice is applied. Leniency applicants found liable for the cartel may challenge the Commission's leniency assessment before the General Court.

2. Leniency challenges

17. The Commission shares several of the challenges faced by other competition agencies worldwide. Over the years¹⁰ the Commission's rules and practices regarding leniency have been adapted to face some of the challenges linked to the greater probability of follow-on actions for private damages, the globalisation of cartels and the increasing risk of sanctions imposed on individuals for cartel behaviour.

2.1. Private damages

18. With the implementation of the EU Damages Directive¹¹, the basic conditions for claiming private damages have been established across the EU. The right of victims to compensation is an important principle of EU policy, but it must be ensured that leniency applicants do not have a higher exposure in private damages proceedings than non-cooperating parties. The Directive therefore contains specific provisions to safeguard the incentives of companies to cooperate under leniency. Leniency statements are self-incriminating submissions specifically prepared for the Commission's procedure and are therefore fully protected from disclosure in private damages proceedings. Member States shall ensure that, for the purpose of actions for damages, national courts cannot at any time order a party or a third party to disclose leniency statements¹². This is because the disclosure of leniency statements would harm the effectiveness of the enforcement of the

¹⁰ The EU leniency programme has evolved since its inception in 1996, with the introduction in 2002 of conditional immunity and the introduction in 2006 of markers and the protection of corporate statements made for the purposes of leniency.

¹¹ Directive 2014/104/EU of the European Parliament and the Council of 26 November on certain rules governing action for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, p.1).

¹² See Article 6(6) of the Damages Directive.

EU competition rules by the Commission or the national competition authorities of EU Member States by deterring undertakings from cooperating with the Commission or the national competition authorities of EU Member States in the framework of their leniency programmes.

19. In addition, the Commission has a long-standing practice of allowing leniency statements to be made orally to protect them against disclosure requests originating outside of EU jurisdictions. Oral statements are recorded and transcribed at the Commission's premises. The Commission will not permit private damages claimants to access statements made by leniency applicants.

20. The Directive also limited the liability of immunity applicants¹³. The immunity applicant may not be held jointly and severally liable with other cartel participants for the entire harm caused by the cartel, but only for the harm caused to its own customers.¹⁴ This mitigates potential additional burdens stemming from the fact that the cartel decision often becomes final for the immunity applicant before it becomes final for other parties (which lodge an appeal). This protection is intended to provide a further incentive for companies to be the first to apply for leniency with the Commission.

2.2. Global nature of cartels

21. The increasingly global nature of cartel activity has prompted the need for more effective cooperation between competition authorities. At international level, there is already a well-established practice of cooperation regarding the first investigatory steps following a leniency application with a number of authorities in international cases. In many cartel cases the Commission has engaged in such cooperation, a recent example being the Maritime Carriers cartel¹⁵. Cooperation should also, where and to the extent possible, cover procedural and substantive aspects, such as the rights and obligations of the leniency applicants in each jurisdiction, the scope of the cartel, the definition of the single and continuous infringements, which have possible repercussions on leniency and fining methodology. The Commission also engages in this more far reaching cooperation, for example in the car part cartel investigations.

22. Cooperation is facilitated by the so-called 'leniency waivers of confidentiality' provided by the leniency applicants in multi-jurisdictional cartel investigations. A waiver of confidentiality enables a competition agency to share a variety of confidential information submitted by a leniency applicant with another competition agency dealing with the same cartel.¹⁶

23. The European Commission encourages leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred and to provide a waiver that allows it to discuss the application with the counterpart agencies and cooperate on parallel investigative processes.

¹³ See Article 11(4) of the Damages Directive.

¹⁴ This is subject to an exception in cases where injured parties other than the immunity applicant's own direct or indirect customers cannot receive full compensation from other participants in the cartel. See Article 11(4)(b) of the Damages Directive.

¹⁵ http://europa.eu/rapid/press-release_IP-18-962_en.htm

¹⁶ ICN leniency waiver template and explanatory note, <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/waiver.aspx>

2.3. Sanctions on individuals

24. The threat of custodial sanctions for individuals or fines imposed on individuals for infringements of competition rules may affect the willingness of those individuals and their companies to apply for leniency. Sanctions such as disqualification from managerial positions for individuals found guilty of cartel offences may have similar effects. It is important that criminal and administrative sanctions on individuals do not undermine corporate leniency programmes by reducing incentives for key individuals to come forward or for companies to rely on these individuals when filing for leniency. In the proposal for ECN+ Directive, the Commission therefore foresees rules to ensure appropriate protection of employees of corporate immunity applicants, provided that both the company and the employees cooperate with the relevant authorities, and if the criminal proceedings against the employees do not precede the corporate immunity application.¹⁷

25. The protection of individuals is also an important element to be considered across jurisdictions. Corporate leniency programmes in other jurisdictions can be affected if individuals are not granted corresponding immunity from prosecution.

3. Promoting the convergence of leniency regimes

26. Since 2004, the national competition authorities of the EU Member States are empowered by Regulation 1/2003 to apply the EU competition rules alongside the Commission. For more than a decade, both the Commission and the NCAs have enforced the EU competition rules in close cooperation in the European Competition Network. Close cooperation and work sharing arrangements in the ECN underpin the coherent application of these rules, in the context of a flexible case allocation system and parallel competences. The Commission typically investigates anticompetitive practices or agreements that have effects on competition in more than three Member States or where it is useful to set a Europe-wide precedent. The Commission and the national competition authorities, however, each apply their own procedural rules and their own leniency programmes. Accordingly, effective convergence and legal certainty in relation to the application of leniency programmes is particularly important as, in the case allocation framework used in the ECN, an immunity applicant may not know up-front which authority (or authorities) will ultimately take up the case.

27. The ECN Model Leniency Programme is an important instrument for ensuring coordination between the Commission and the national competition authorities in leniency cases. It harmonises certain aspects such as the conditions for granting immunity and reduction of fines and the conditions for accepting summary applications. Further convergence on leniency is sought through the proposal for the ECN+ Directive, which aims to make national competition authorities more effective enforcers.¹⁸ Differences in

¹⁷ See COM Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, Article 22, available at http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf.

¹⁸ COM Proposal for a Directive to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market http://ec.europa.eu/competition/antitrust/proposed_directive_en.pdf.

leniency programmes within the ECN can have effects on incentives for companies to come clean, for example, if they would be eligible for leniency in one country, but not in another. Without such harmonisation it would also not be possible to establish a link between full leniency applications at EU level and summary applications at the level of national competition authorities, which help to secure the applicant's leniency status across all relevant jurisdictions. Companies which take the required legal steps should have certainty that their eligibility for immunity from or reduction of fines is equally safe under the different leniency programmes, irrespective of which ECN authority ultimately takes action.

28. At an international level convergence on leniency is equally important. Whilst it is necessary to respect the different legal traditions, it is important to ensure that conflicting or incompatible requirements are not placed on leniency applicants across different jurisdictions. Continuing work on convergence within international fora such as OECD and the ICN is of paramount importance going forward.¹⁹

4. Upholding a strong level of deterrence and raising awareness

4.1. Improving the detection of cartels

29. Leniency programmes contribute to the destabilisation of cartels and have, for the last two decades, represented the main successful investigative source for authorities to detect cartels. Nevertheless, to achieve an effective and efficient cartel enforcement strategy it is essential to implement a detection system also based on strong ex officio capabilities. Finding the right balance in cartel detection between leniency cases and cases of own initiative, allows authorities to maintain the appropriate incentives for companies involved in a cartel to report this conduct.

30. In general, diversifying the detection sources increases the level of deterrence of the cartel enforcement by creating a virtuous cycle: the more ex-officio cases are opened and successfully prosecuted, the more leniency applications will be submitted. This approach addresses the possible risk that undertakings might develop the perception that authorities are not sufficiently able to detect illegal conduct by themselves and, therefore, that they are better off by not reporting such conduct and instead simply continuing it.

31. With this in mind the Commission has improved its capacity to run non-leniency cases with the introduction of a new whistle-blower tool²⁰. This whistle-blower tool enables informants to contact it by phone, email or through a dedicated web platform. The tool ensures full anonymity through an encrypted messaging system that allows two-

¹⁹ See e.g., the ICN Checklist for Efficient and Effective Leniency (2017), which identifies common challenges, denominators and good practices for competition agencies wishing to introduce or implement leniency programmes; and the Background Note of 27 April 2018 by the OECD Secretariat "Challenges and Co-Ordination of Leniency Programmes" as well as accompanying notes by participating authorities, available at <http://www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm>. In addition, there is ongoing work of the ICN Cartel Working Group on leniency incentives and disincentives, and on the interaction between leniency and issues such as private enforcement, ex-officio investigations, criminal sanctions or settlements.

²⁰ <http://ec.europa.eu/competition/cartels/whistleblower/index.html>

way communication, but informants can nevertheless also contact the Commission directly through a dedicated phone number and email address.

4.2. Enhancing communication on leniency

32. The Commission intends to continue its efforts to promote and increase the visibility of the EU leniency system. Outreach to business stakeholders and trade associations is an effective means of increasing awareness of the leniency tools and spreading knowledge of its benefits among potential targets in the business community. Such initiatives could be targeted at both the EU and national levels, in collaboration with national competition authorities and international fora such as the ICN and OECD.

5. Conclusions

33. The Commission is facing a number of the challenges that affect other competition authorities worldwide, but has also to respond to certain challenges that are specific to the design of the EU leniency programme and to the Commission's role in the EU cartels enforcement context.

34. As regards issues of coordination around leniency, the Commission aims to intensify its collaboration with other competition authorities at the wider international level, to continue to inform each other on ongoing concurrent investigations, to expand cooperation on leniency matters and to adopt coordinated responses to new issues confronting leniency policy.

35. Seeking to address the challenges facing leniency as a source for cartel investigations must go hand in hand with enhancing the ability to detect cartels through other measures. The Commission is also committed towards making progress in improving communication around the benefits of leniency programmes and strengthening the visibility of existing leniency instruments.