

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by  
Israel****5 June 2018**

This document reproduces a written contribution from Israel 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-lenieny-programmes.htm](http://www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm)

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**JT03431067**

## *Israel*

### **1. Introduction**

1. The Israel Antitrust Authority (IAA) has a formal leniency program since 2005. Thus far, the program has not been very successful, although the IAA recently succeeded in obtaining a number of convictions in a case which began with a leniency application. This document describes the recent convictions, outlines the major features of the existing leniency program, offers some possible explanations for the program's relative lack of success, and finally points to a number of possible changes which are being considered in order to improve the program's effectiveness.

### **2. The Present Leniency Program**

2. The IAA has a formal antitrust leniency program since 2005. The program offers immunity from criminal prosecution, subject to the applicant's meeting the program's conditions. The major conditions for receiving immunity under the program are as follows:

- The program applies to cartel offenses only, and not to other types of antitrust offenses.
- Only the first applicant who meets the conditions is entitled to a grant of immunity.
- The applicant must provide the IAA with all relevant information known to the applicant and with all the evidence under the applicant's control.
- Immunity will be granted only if the applicant came forward before the IAA began an overt investigation.
- In the case of a corporate applicant, a clear and legally binding corporate resolution is required; if immunity is granted, it will apply to the corporation's managers and employees as well as to the corporation itself.
- In the absence of an application by the corporation, a present or former manager or employee may apply.
- Immunity will be granted only if the applicant ceased all involvement in the cartel (or agrees to cease all involvement in coordination with the IAA).
- The applicant must cooperate fully with the IAA and must provide complete and truthful information during the investigation and in court.
- Immunity will not be granted to the leader of the cartel.
- Immunity will not be granted to one who was convicted in the past of participation in a cartel, or who was granted immunity under the program in the past.
- Where appropriate, the IAA will make the grant of immunity subject to the payment of compensation to the cartel's victims.

3. Where the program's conditions are met, the applicant is entitled to immunity. The program does not derogate from the IAA's ability to agree to non-prosecution on a discretionary basis, in return for information and evidence, where the program's conditions are not met.

### **3. The Tree-Pruning Cartel – The First Major Success of Israel's Antitrust Leniency Program**

4. On January 23, 2018, after a lengthy trial, the Jerusalem District Court convicted 17 tree-pruning contractors (corporations and individuals) in connection with the rigging of bids for large-scale contracts with the Israel Electric Company and with two municipalities. In addition to antitrust offenses, almost all the defendants were also convicted of fraud offenses; several of the defendants were also convicted of money-laundering offenses.

5. The tree-pruning cartel was discovered when one contractor came forward and reported the cartel to the IAA. After preliminary contacts, the contractor was granted immunity from prosecution under the IAA's leniency program. The contractor also agreed to carry out clandestine recordings of meetings and phone conversations with other contractors. During the covert investigation, these recordings helped the IAA's investigators to obtain a court order for non-consensual monitoring of the phones of several contractors. At trial, the recordings carried out by the contractor, together with the products of the non-consensual monitoring, supplied a massive core of evidence against the defendants. In addition, the contractor's testimony, and documents which the contractor delivered to the IAA's investigators, helped to convict several of the defendants in connection with bid-rigging activity carried out before the contractor came forward. The court is expected to hand down its sentence shortly.

6. Prior to the District Court's decision, more than 20 other tree-pruning contractors were convicted under plea agreements. These were mostly minor defendants, who were sentenced to public works in lieu of incarceration.

7. The tree-pruning cartel case thus appears to be a major success for the leniency program. It should be noted, however, that the contractor who came forward and received immunity would have most likely reported the bid-rigging to the IAA even in the absence of a leniency program, since his main motivation to uncover the case was to take revenge upon certain other contractors who, he believed, had cheated him in a previous round of bid-rigging. In addition, most of the evidence of the tree-pruning cartel was gathered as a result of the contractor's agreement to carry out clandestine recordings on the IAA's behalf; however, the leniency program does not condition the grant of leniency on agreement to carry out undercover activities of this sort, so the success in this case is not necessarily attributable to the program.

8. Apart from the tree-pruning cartel, one other leniency application led to the filing of an indictment; this criminal prosecution is still pending in court. In addition, there were cases in which leniency applications led to the opening of investigations, but these investigations ultimately did not result in the filing of indictments. Thus, while the tree-pruning cartel is not the only case in which a leniency application led to the opening of an investigation, the general picture still is not one of great success.

#### 4. The Leniency Program has not been Effective

9. The present leniency program is not considered to be effective. 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.

10. Thus, the program has not led to the discovery of many cartels. There also is little reason to think that the existence of the program deters cartels or makes them less stable.

11. Various possible explanations have been offered for the program's lack of success. These possible explanations include the following:

- The sentences imposed on cartel offenders may not be severe enough to motivate cartel participants to come forward and request immunity. Although the Supreme Court has stated repeatedly that cartel offenders should be sentenced to incarceration, in practice the majority have been sentenced to public works in lieu of incarceration. While an increasing number of cartel offenders have been sentenced to incarceration in recent years, cartel participants may still believe that they won't be sentenced to incarceration if the cartel is discovered, and may conclude that they don't have a sufficient incentive to apply for leniency.
- The fines imposed on corporate defendants generally are not sufficient to create an incentive to apply for immunity. This may be especially important when there is a change in corporate management and the new management discovers that it has inherited a cartel from the previous management. If the new management ends the corporation's involvement in the cartel, the new management will not face personal liability, and thus will have no personal incentive to apply for immunity. In such a case, the only incentive to apply for immunity would be to save the corporation from having to pay a criminal fine; but if the expected fine is small relative to the civil damages the corporation would have to pay once the cartel is uncovered, the new management rationally would decide not to apply for immunity.
- The leniency program offers immunity from criminal prosecution only, but not from civil damages actions. Potential applicants may be deterred from coming forward by the threat of civil damages actions, including class actions.
- In some recent cases, such as the tree-pruning case, cartel offenders were prosecuted not only for offenses under the Antitrust Law, but also for related fraud and money-laundering offenses. However, the leniency program promises immunity from prosecution under the Antitrust Law only (and also from prosecution for certain related offenses of obstruction of justice), but not from prosecution for other offenses such as fraud and money-laundering. Potential applicants may be deterred by the perceived possibility that despite being granted immunity under the program, they still will be prosecuted for other, related offenses.
- Certain conditions of the program may create legal uncertainty as to the outcome of an application for immunity. For instance, the condition which denies immunity to the leader of the cartel may deter potential applicants who are not certain whether they will be defined as the leader of the cartel.

- Some attribute the program's relative lack of success to general socio-economic factors. Israel is a small country, and potential applicants may fear that after exposing a cartel and testifying against their cartel partners, they will be subject to reprisals, will lose their means of making a living and will not be able find work. Reporting a cartel to the IAA may be viewed in some circles as socially dishonorable behavior, and potential applicants may be deterred by the fear of social ostracism.
12. Clearly, some of the foregoing possible explanations are beyond the IAA's control. Increasing the severity of cartel sentencing is a matter for the courts, and exposure to civil damages actions is a matter for the legislature. Socio-economic factors also are beyond the IAA's control.
13. Other possible explanations can be remedied by amendments to the program. Conditions which create legal uncertainty can be clarified or eliminated. The scope of the immunity offered under the program can be expanded to include related offenses.

## 5. The IAA is Considering Amending the Program

14. Recently, the IAA began conducting a review of the leniency program, with a view to increasing its effectiveness. The review process included interviews with several antitrust defense attorneys, comparison with leniency programs from around the world and study of relevant academic and theoretical literature. Because of the game-theoretic nature of leniency programs, IAA economists were also included in the review.
15. The point of departure for the IAA's review of the program is the assumption that potential applicants will make their decision on the basis of a weighing of perceived costs and benefits of coming forward or not coming forward. In most cases, only if the cost-benefit analysis of applying for immunity comes out more favorable than the cost-benefit analysis of not applying, will the potential applicant decide to come forward and apply. Thus, the IAA's goal should be to reduce the costs, and to increase the benefits, of applying for immunity, while increasing the costs and reducing the benefits of not applying for immunity. In addition, clarity and legal certainty should be increased.
16. Subjects considered for possible amendment include the following:
- 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).
  - Offering leniency (not full immunity) to second and subsequent applicants.
  - Expanding the scope of immunity to cover related offenses.
  - Removing the conditions which disqualify cartel leaders and repeat offenders from applying for immunity.
  - Finding an appropriate way to decrease immunity recipients' exposure to civil damages actions relative to the exposure of other cartel participants.
  - Offering monetary incentives in addition to immunity.

- Removing the condition under which the IAA may require immunity recipients to compensate the cartel's victims.
  - Protecting immunity recipients from various kinds of retaliation.
  - Expanding the program to include non-cartel antitrust offenses.
17. Some of the above-mentioned possibilities cannot be effected by merely amending the program, and would require changes in legislation.

## 6. Conclusion

18. After more than ten years, the existing leniency program has not been successful. Several possible reasons may be offered. On this basis, the IAA is considering several options for amending the program in order to improve its effectiveness.