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The Future of Effective Leniency Programmes – Note by the European Union

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More documents related to this discussion can be found at https://www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm

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1. The Commission's leniency programme

1. The European Commission has had a leniency programme in place since 1996. The current programme is set out in the 2006 Notice on immunity from fines and reduction of fines in cartel cases (the "Leniency Notice"[1]).

2. The Leniency Notice covers secret agreements and concerted practices between competing undertakings. It does not cover vertical restraints.

3. The Leniency Notice offers immunity from fines to the first undertaking ("immunity applicant") that discloses its participation in a cartel, which enables the Commission to start a cartel investigation[2] or to establish an infringement[3]). Subsequent undertakings applying for leniency ("reduction of fines applicants")[4] are eligible for reductions of fines within specific ranges if they provide evidence that strengthens the Commission's ability to prove the infringement.[5]

4. All leniency applicants are under the obligation to cooperate genuinely, fully and on a continuous basis throughout the Commission's investigation. Applicants must end their involvement immediately following an application save where this may jeopardise the investigation. Furthermore, the applicants must not have destroyed, falsified or concealed evidence nor disclosed the existence or content of their application.[6] Immunity applicants must not have coerced other undertakings to participate in the cartel.[7]

2. Changes in leniency applications over time

5. The Commission has witnessed a shift in the types of cartel conduct that leniency applicants report. Although we still see "traditional" cartels, i.e. price-fixing, market sharing, customer allocation agreements, new types of cartel behaviour have been reported in the past few years. These less traditional cartel cases include buyer cartels, collusion on various financial benchmarks, no poach agreements, agreements to restrict technical development and collusion on various product characteristics.

6. Generally, the Commission has not witnessed any noticeable decline in terms of the quality of applications in recent years. Although in most cases applicants fulfil their

[1] Commission Notice on Immunity from fines and reduction of fines in cartel cases (OJ C 298, 8.12.2006, p. 17). *The Leniency Notice is available* here.

[2] Article 8(a) of the Leniency Notice provides the applicant must provide evidence to allow the Commission to carry out a targeted inspection.

[3] Article 8(b) of the Leniency Notice.

[4] Immunity applicants and reduction of fines applicants will be collectively referred to as "leniency applicants" in this paper.

[5] Article 24 of the Leniency Notice provides that the applicant must provide 'significant added value' with regard to the evidence already in the Commission's possession.

[6] Point 12 of the Leniency Notice.

[7] Point 13 of the Leniency Notice.

obligation to cooperate fully and genuinely, the Commission occasionally has to deal with uncooperative applicants. In such cases, the Commission reminds the applicants about their ongoing duty of cooperation and the consequences in cases of a lack of cooperation (no grant/withdrawal of leniency). The Commission may also send such applicants direct requests for information with which they are required to comply otherwise they risk their leniency status.[8] Also occasionally leniency applicants submit an application which constitutes a (partial) defence rather than an acknowledgement of their participation in a cartel. In such a scenario, the Commission may consider rejecting the application.

7. With regard to the amount of information provided by applicants, the Commission generally receives more than it did in the past. This can be attributed to applicants now being able to digitally review large amounts of data, access various forms of communication (e.g. different devices, chat groups, platforms) and conduct interviews virtually, which was previously both time consuming and costly. Strict document retention policies may occasionally inhibit the provision of a significant volume of documentary evidence and in such circumstances applicants have to rely to a greater extent on (virtual) interviews and other means to maximise the reduction of the fine they may receive.

8. In terms of the number of leniency applications the European Commission has experienced a declining trend over a number of years despite a recent upturn (see section 4). There has been a significant decrease in leniency applications, in particular in immunity applications in the period between 2015 and 2021. There has been a particular decline in the number of international cartels reported.

3. Review of the Leniency Programme

9. In order to understand the reasons behind the overall decline as well as to explore measures that could potentially counteract this trend, the Commission carried out an extensive stock-taking and reflection exercise, starting at the end of 2020, to gather an informed view on the European and global state-of-play. It also reflected on various measures that could incentivise leniency applicants to come forward.

3.1. Process

10. First, the Commission engaged with targeted stakeholders, particularly lawyers with experience in dealing with leniency and damages actions. This included: competition specialist law firms in the EU, which represent immunity applicants frequently; specialist damages litigation firms acting on behalf of claimants; US Counsel who have been involved in damages litigation for decades; and in-house Counsel of parties subject to sizeable damages claims. Significant weight was placed on the views of practitioners as they have a unique insight into the decision-making process that determines whether a cartel participant apply for leniency.

11. Second, the Commission liaised with other competition agencies across the world. The purpose was to explore similarities in challenges, trends and perceptions, to identify successful elements of other leniency regimes that could be incorporated into the Commission's leniency policy and to assess the impact of multiple leniency regimes.

12. Third, the Commission analysed and drew on a number of existing leniency related surveys, notably the study conducted by the law firm Covington & Burling in cooperation

[8] Requests based on point 12 of the Leniency Notice.

with the Brussels School of Competition,[9] Global Competition Review surveys[10] and OECD papers,[11] collecting the experience of national competition authorities, law practitioners and in-house counsel concerning leniency trends of the past five years.

13. Fourth, the Commission analysed its cartel decisions over the past five years to get a more precise overview of the type of companies that applied for leniency (including their position in the cartel and on the concerned market) and assessed this from various statistical bases.

14. Lastly, the Commission collected information on, and analysed the specific leniency trends of, the national competition authorities of the Member States, which, together with the Commission, form the European Competition Network.

15. The outcome of this exercise was a confirmation that the EU leniency programme has been effective. Undertakings and their legal representatives in general indicated their trust in the Commission's leniency programme and found it reliable, predictable, and transparent.

3.2. Reasons for declining applications and possible solutions

16. The exercise confirmed that the overall decline in the number of leniency applications is likely due to a combination of different aspects. A number of factors and possible solutions were identified.

17. First, the emergence of increasing damages claims in the EU following the adoption of the Damages Directive[12] has changed the enforcement landscape. The likelihood of follow-on damages claims, after a cartel has been sanctioned by the competition authorities, appears to operate as significant disincentive to apply for leniency. The impact is felt most significantly by immunity applicants, which do not want to expose themselves to damages when a cartel is still uncovered. Furthermore, uncertainty over the level of likely damages combined with the length and costs of damage procedures operate as a disincentive. The Damages Directive includes provisions that aim to protect the effectiveness of public enforcement. A key exception to the normal disclosure obligations is that leniency corporate statements are never disclosable.[13] Equally, the Directive aims to further preserve the attractiveness of the leniency programme by providing that the immunity recipient is in principle only liable for damages to its own customers.[14] Due to the temporal application

[9] Covington; Brussels School of Economics (2020), Immunity and Leniency Survey 2019/20, available here.

[10] GCR, Rating the Enforcement, https://globalcompetitionreview.com/survey/rating-enforcement/2020

[11] See for example the discussion paper of OECD (2021) concerning leniency trends, Competition Compliance Programmes, OECD Competition Committee Discussion Paper, http://oe.cd/ccp

[12] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions 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. 1–19., (the "Damages Directive").*

[13] Article 6(6)(a) of the Damages Directive.

[14] Article 11(4) of the Damages Directive provides that an immunity recipient is jointly and severally liable to its own (direct and indirect) customers but to other injured parties only where full compensation cannot be obtained from other infringers. Article 11(5) also foresee that the amount

of the Damages Directive, these protections are, however, only just beginning to kick in. It is therefore difficult to gauge how effective they may be. Nevertheless, in Europe, the issue has been raised as to whether it would be necessary to provide further protection, such as possibly shielding the immunity applicant from all civil liability. The interplay between leniency and damages raises a number of complex issues that deserves careful consideration before any conclusions can be drawn.

18. Second, as mentioned in section 2 above, the nature of reported cartels is changing. In addition to classic price fixing or market sharing cartels, the Commission has witnessed an increase in less traditional cartels, partly mirroring the range of cartel conduct that the Commission has pursued during the last years. The exercise indicated that there was a degree of uncertainty as to whether detected conduct would be classified as a cartel and fall within the Leniency Notice. This could act as a disincentive to come forward. To solve such concerns, the Commission included guidance on the scope of the Leniency Notice in its recent Frequently Asked Questions on leniency and has put in place practical arrangements allowing for upfront exchanges (see section 4).

19. Third, as indicated in section 2 above leniency applications concerning international, cross-border cartels have diminished significantly in the past five years. The reasons for this are complex, including the proliferation of jurisdictions having a leniency regime, discrepancies between such regimes and the interdependence of jurisdictions resulting in less predictability and increased costs for applying for leniency in such cases. To address these issues the Commission is intensifying its cooperation with other agencies in Europe within the ECN and internationally within the ICN as well as on a bilateral basis.

20. Fourth, to a lesser extent, individual sanctions in certain Member States can have a "chilling effect" on corporate leniency programmes if protection is not extended to the employees of applicants. Article 23 of the Commission's ECN plus Directive[15] constitutes a significant step towards protecting the immunity applicant's employees from prosecution, which may serve to mitigate any disincentive to apply.

21. Fifth, a functioning ex officio strategy is a pre-requisite to any successful leniency programme. Insufficient ex officio enforcement would lead to a perception of a reduced risk of detection and may be a factor contributing to decline in leniency applications (section 5 describes the Commission's ex officio strategy).

4. Recent Developments

4.1. E-leniency

22. The Commission's leniency programme requires applicants to provide corporate statements containing detailed descriptions of the cartel arrangements and participating companies. The Commission has put in place different rules and practices to ensure that such voluntary self-incriminating statements are protected from discovery and disclosure. This includes the possibility to provide such statements orally at the Commission's

of contribution from an immunity recipient shall not exceed the amount of the harm it caused to its own customers.

[15] Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market**,** *OJ L 11, 14.1.2019, p. 3–33.*

premises.[16] In 2019, the Commission introduced an e-leniency tool that allows parties to submit applications to the Commission through an online platform while maintaining the existing confidentiality and legal protections that are found in the traditional procedure of making oral statements at the Commission premises. The e-leniency tool is available 24/7 and has now become the primary and preferred procedure for leniency submissions.

23. In October 2022 the Commission launched a new version of this tool. While the first version only allowed parties to submit documents to the Commission, the second version allows the parties to have online secure access to leniency documents created or held by the Commission, for example letters granting a marker or corporate statements submitted by other parties (in the context of access to the file). Although this new version was only launched relatively recently the Commission is already routinely using it in cases to increase efficiency and reduce the costs associated with the handling of leniency related information.

4.2. Frequently Asked Questions on Leniency

24. In October 2022, the Commission also published Frequently Asked Questions ("FAQs") on Leniency, as an immediate reaction to its stock-taking and reflection exercise.[17]

25. The FAQs are designed to enhance transparency, predictability and accessibility and will be updated if, and when, a need arises. Concretely, the purpose of the FAQs is to provide guidance on the Commission's current policy and practice and increase awareness of additional protections and benefits enjoyed by leniency applicants (including and beyond the ones described in the Leniency Notice). At the same time, the Commission also put in place new practical arrangements to facilitate contacts with the Commission.

26. These new practical arrangements include offering potential applicants the possibility to have discussions on a 'no names' basis. Potential applicants or their representative can describe the conduct in the abstract without disclosing their identity, the identity of other parties or the market concerned. In response the Commission will give an indication as to whether the conduct is likely to fall within the Leniency Notice. This is intended to remove any residual uncertainty about whether certain less traditional cartels may in principle qualify for leniency. This new opportunity has been successfully used by the legal community and the Commission has been able to give targeted advice on the applicability of the Leniency Notice.

27. Also the Commission now has identified Leniency Officers to represent the public face of the programme. Their role is to be a first point of contact on leniency matters, to provide informal advice on any aspect of leniency and to deal with the 'no names' applications.

4.3. Trends in Applications

28. Although there was a significant decline in the total number of applications received in the period 2015 to 2021, the Commission has observed an increase in the number since 2021. The Commission received twice as many applications in 2022 compared to 2021 and three times as many as in 2020. The statistics for the first half of

[16] Points 32-35 of the Leniency Notice. See also the above reference to the protections guaranteed under the Damages Directive.

[17] The FAQs are available here.

2023 confirm this steady increase. In addition to the above initiatives there are several factors which may also have contributed to this uplift.

29. First, 2021 was a year of significant enforcement for the Commission with 10 cartel infringement decisions addressed to almost 40 different company groups resulting in combined fines of almost 1.7 billion euros. This may have served as a reminder of the sanctions that cartelists face and how those can be avoided or mitigated through leniency.

30. Second, increased investigative activity may also have played a role. The Commission resumed the exercise of its powers to carry out dawn-raids in the second half of 2021, as soon as the travel restrictions due to the COVID-19 pandemic in the EU allowed simultaneous inspections in different Member States. Partly due to a built-up backlog, a high number of dawn-raids took place within a short period of time, including at private premises (target persons working from home).

31. Third, in recent years the Commission has invested heavily in its ex officio strategy and these efforts have yielded positive results in terms of building capacities and know-how (see section 5 below).

5. Ex officio cartel investigations

32. Probably one of the most important drivers for a company to submit an immunity application is the fear that the competition authority might discover the conduct in question, either through the self-reporting of other cartel participants or through other intelligence gathering activities. For a functioning leniency system, it is therefore important to ensure that a competition authority not only relies on immunity applications but is also able to detect and investigate cartels through other means.

33. While the general perception regarding the Commission's cartel investigations in the last two decades appears to be that these were solely based on leniency applications, intelligence based, so called ex-officio investigations,[18] have been always a part of the Commission's portfolio. The Commission has continuously invested in the development of its ex officio investigatory tools and intensified its efforts in recent years with the implementation of several new initiatives, in order to counterbalance and reverse the downward trend in leniency numbers.

5.1. Whistleblower tool

34. The Commission launched its anonymous whistleblower tool in 2017 to provide an opportunity to anonymous informants (both physical and legal persons) who have knowledge of the existence of a cartel to report it to the Commission.[19]

35. The tool has been improved over the years. The whistleblower tool is operated by an external service provider and allows a two-way communication between the informants and the Commission. This is a crucial element in its functioning, as it provides the Commission with the possibility to obtain additional information or clarifications from the informants without them revealing their identity. Such verification increases the likelihood

[18] The Commission uses the term ex officio cartel investigation or intelligence-based investigation for all investigations which were initially based on leads other than immunity applications.

[19] Practical information on the whistleblower tool and the tool itself can be found on the respective DG Competition website, including information on other non-anonymous whistleblower channels: https://competition-policy.ec.europa.eu/cartels/whistle-blower_en.

that the leads provided by the informants will enhance successful progress of investigations. The newest version of the tool also allows the uploading of documents so that whistle-blowers can provide contemporaneous documents illustrating anti-competitive behaviour.

36. Information received through the anonymous whistleblower tool is initially handled by a dedicated team, which ensures that all whistle-blowers receive a quick response and remain available for follow up questions from the Commission. This has proven to be an efficient and successful set-up to process the roughly 150 messages that the Commission receives on an annual basis through its whistleblower channels and serves to incentivise whistleblowers to come forward.

37. The tool has been used by a variety of informants. As expected, the biggest part of information still comes from customers or competitors which suspect the existence of anticompetitive behaviour affecting their businesses. Recently, a growing number of leads, however, comes from cartel insiders, in particular (ex)employees.[20] These kinds of leads create an interesting alternative to leniency-based leads, as they can provide the Commission with a similar level of detail concerning the alleged cartel conduct. In addition, a company that hesitates to immediately report a cartel under the leniency programme now faces a situation where immunity may no longer be available, if the Commission has already received information from an (ex) employee through whistleblower channels.

38. A number of pending investigations and dawn raids have been initially triggered by information received through the whistleblower tool. Due also to the success of this tool, its scope, which first only covered antitrust and cartels, has recently been expanded to also cover merger and state aid issues.

39. The communication via the anonymous whistleblower tool is not the only channel for whistleblowers and informants. The Commission continues to receive and rely on information from non-anonymised sources as well. Some informants also choose to use law firms as intermediaries.

40. The knowledge of the identity of the informant significantly facilitates Commission's investigations, as it enhances the information exchange, and it also enables the Commission to verify the leads provided by the cooperating party more easily. If warranted, the Commission can protect the identity of the informant, e.g. in light of credible concerns regarding a possible retaliation from the undertakings participating in the cartel. This is an essential feature of our interactions with all informants and whistleblowers that the Commission takes very seriously.

5.2. Outreach activities

41. When cooperating with informants, the Commission does not rely only on a passive receipt of leads, but it also actively reaches out to different stakeholders, including business associations. The aim of these outreach activities is to gather new leads and intelligence but also to corroborate and vet already received leads. Companies and associations can be a significant source of information concerning possible cartel activities in different sectors of the EU economy. However, companies witnessing suspicious behaviour are often

[20] DIRECTIVE (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law (Whistleblower Directive) introduced several measures increasing the protection for such informants and gave them the right to report conduct directly to the concerned agencies (without informing their employer).

reluctant to share this information with the authorities. Even large companies might fear retaliation by potential cartelists.

42. The outreach activities try to lower the barriers for the companies to share information on suspicious conduct by creating a trust-based environment where the source of information can be protected, if warranted. The benefit for the cooperating undertakings would be represented not only by restoring a properly functioning business environment but also by the possibility to recover the harm suffered from the cartel.

43. The Commission is also investing in closer cooperation with other leading agencies, both within and outside the European Competition Network on ex-officio matters.

44. The cooperation includes the exchanges of experiences with ex officio investigations (tools, methodologies, organisational set-ups) and, if warranted, also the sharing of information concerning existing leads that might be more efficiently pursued by another competition authority or which are suitable for joint actions. The mutual sharing is essential for creating an efficient investigative and enforcement network leading to a higher deterrence.

45. A recent example is the ex officio investigation of the European Commission into the fragrance sector where the Commission has been in contact with the Antitrust Division of the US Department of Justice, the UK Competition and Markets Authority and the Swiss Competition Commission in relation to this matter. This allowed the Commission and the other three competition authorities to take independent actions at the same time in the respective jurisdictions.[21]

5.3. Investment in new skills and technology

46. While the Commission is legally more limited in its investigative powers than many some other competition enforcers as it does not have at the moment, for example, the power of wiretapping or other forms of (electronic) surveillance, the Commission is investing significantly in new skills and technology to foster its existing investigatory powers.

47. The Commission has in recent years strengthened its multidisciplinary investigations team by hiring data analysts and former police inspectors for conducting intelligence and investigative analysis, with the use of advanced digital solutions, in order to support the Commission's cartel enforcement activities.

48. These data analysts are supporting investigations by, among others: (i) gathering data from different public web sources (including tender databases) with the use of data collection tools and methodologies; (ii) cleaning, processing, analysing and visualising data with the use of programming languages and data analytics tools; and (iii) analysing digital solutions (including algorithms) used by companies. Moreover, these specialists are regularly giving support in the preparation and implementation of inspections together with DG Competition's forensic IT specialists.

49. Furthermore, the Commission is investing heavily in updating its technology to keep up with the technological developments and, in particular, to search, handle and efficiently analyse bigger and more complex data sets.

50. These increased capabilities are also helpful or sometimes even necessary in discovering new leads and support new initiatives. These investments allow the Commission to not only carry out more sophisticated Open Source Intelligence searches,

[21] Press release, IP 23/1532, *Antitrust: Commission confirms unannounced inspections in the fragrance sector*, 7/3/2003.

but also to screen for signs of collusions, including e.g. potential concerns relating to signalling (whether companies collude by sending signals through public announcements for example through news announcements, trade publications or earnings calls).

51. Another example is the detection of potential cases of bid rigging where the increased technological capabilities combined with analytical know-how is essential for the analysis of voluminous tender data.[22]

6. Conclusion

52. In view of the changed landscape of cartel enforcement and a decline in the number of leniency applications the Commission engaged in a review of its leniency programme. Although the programme was considered effective by stakeholders, the Commission identified the possible reasons for the decline and attempted to address them. It implemented a number of initiatives such as e-leniency, FAQs and increasing its accessibility with a view to maximising the effectiveness of its programme going forward.

53. In particular, the Commission has implemented a wide range of measures to enhance its ex officio capabilities with the aim of complementing investigations based on its leniency programme. Ex officio investigation has become a stable pillar in the Commission's portfolio of cases with a constantly growing potential not only to generate cases but also to drive leniency applications.

54. It seems evident that the latest initiatives in respect of leniency combined with increased ex officio activities, which raise the risk of detection, have contributed to the recent increase in the number of leniency applications received by the Commission.

55. Another element which can further enhance cartel enforcement going forward would be continuous cooperation between competition agencies in respect of both leniency and ex officio matters.

[22] Most tender procedures are national or even regional and thus, bid rigging concerns are usually handled by the respective national competition authorities as part of the allocation system in the European Competition Network. The Commission will focus on suspicious tenders which cover several countries or where there is the suspicion that the potential bid-rigging is part of a wider market sharing arrangement.