COMPETITION COMMITTEE

Leniency for Subsequent Applicants

Series Roundtables on Competition Policy

N° 134

OECD

2012

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

14-May-2013

English, French

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP(2012)25
Unclassified

LENIENCY FOR SUBSEQUENT APPLICANTS

JT03339501

Complete document available on OLIS in its original format

English, French

FOREWORD

This document comprises proceedings in the original languages of a Roundtable on Leniency for Subsequent Applicants held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in October 2012.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à la table ronde sur l'application des programmes de clémence aux demanderus suivants qui s'est tenue en octobre 2012 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la coopération et l'application de la loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

TABLE OF CONTENTS

EXECUTIVE SUMMARY

By the Secretariat

From the background paper, the country contributions and the discussion at the roundtable on leniency for subsequent applicants, the following points emerge:

(1) Competition authorities widely rely on leniency policies to detect, investigate and prosecute hard-core cartels. Jurisdictions that operate leniency programmes recognize the benefits of rewarding not only the first-in applicant who denounces the cartel but also subsequent applicants who provide useful corroboration or new evidence. Subsequent applicants can often supply essential co-operation for the successful prosecution of the full extent of a cartel and offer a cost-efficient way for gathering evidence.

Leniency programmes have proven very successful for competition authorities in detecting, investigating and prosecuting hard-core cartels and, as a result, have been adopted in a large number of jurisdictions around the world. Broadly speaking, there are two types of leniency programmes, those that reward only the first-in applicant with immunity (such as the US programme) and those that in addition to granting immunity to the first applicant also reward subsequent applicants with more lenient treatment (such as the European Union programme).

However, even jurisdictions with programmes that reward only the immunity applicant have mechanisms that allow competition authorities to treat subsequent co-operating applicants more leniently. For example, the US Department of Justice can reward subsequent co-operating companies by using its discretion in making sanctions recommendations under the US Federal Sentencing Guidelines.

There is a general consensus on the benefits of a mechanism for rewarding subsequent applicants both in terms of obtaining additional evidence and relieving the investigative burden of pursuing a case. While it was recognized that offering lenient treatment to subsequent applicants might weaken the incentives to be the first in, delegations on the whole found that the benefits of doing so outweigh the possible negative effects. Two approaches to minimizing the disincentive for first-in applicants were mentioned. Some emphasized the importance of the agency's discretion in determining the reward for subsequent applicants, while others pointed to the sufficient difference between the reduction for the first-in applicants (usually 100%) and the lower reductions available for a subsequent applicant.

Several delegations highlighted the value that a subsequent applicant can provide to an investigation by corroborating and completing the information on the cartel provided by the immunity applicant. As the threshold for obtaining immunity is generally relatively low in order to incentivize companies to come forward and denounce a cartel, subsequent applicants can often provide information and this co-operation is crucial for the prosecution of the cartel in its full extent and duration. In this context, delegations noted that since the immunity applicant is often not the ringleader it might not even know the full extent of the cartel conduct, hence highlighting the potential value of the subsequent applicants' co-operation.

Rewarding subsequent applicants also offers competition authority a cost-effective means of gathering evidence. In order to obtain a more lenient sanction in many jurisdictions, subsequent applicants are obliged to supply evidence that allows the authority to prove new facts or at least provides necessary corroboration of existing facts. It was however stressed that this effect, while of course beneficial, does not mean that the authority would simply wait for leniency applicants and relinquish its own investigation.

(2) To incentivize companies who have lost the race for immunity to come forward and turn into subsequent applicants, jurisdictions offer to treat them in a more lenient fashion than would be the case in the absence of co-operation. The types of available rewards, the criteria for, and the basis of granting them vary from jurisdiction to jurisdiction. Typically, they include the reduction of fines and lower criminal sanctions than would otherwise be imposed. Such reward is determined on the basis of the value and timing of the co-operation received.

The legal basis for rewarding subsequent applicants can either be the leniency programme itself, such as in the European Union or Japan, or prosecutorial discretion such as in the United States, where the leniency programme rewards only the first-in applicant and subsequent applicants are rewarded within the plea bargaining process. The types of rewards generally include the reduction in any fines that would otherwise be imposed, lower criminal sentences or, as is the case in Mexico, even complete immunity from criminal prosecution. A specific type of reward can be obtained by subsequent applicants under the so-called Amnesty Plus programs, which are available in some OECD jurisdictions, whereby a subsequent applicant might receive a higher reduction if it discloses to the authority the existence of another cartel (for which it obtains immunity). Criteria used to determine whether a subsequent applicant qualifies for a reward and its exact size include the order of applications, their timing and the value and degree of co-operation. The emphasis on these different criteria varies between jurisdictions.

As regards the types of rewards, certain jurisdictions such as the EU and those EU Member States whose programmes are based on the ECN Model Leniency Programme, set out specific discount ranges which decrease based on the order in which the applicants provide evidence of added value. In the view of the European Commission, this system, coupled with the publication of assessment of applications in final decisions provides the transparency and predictability necessary for the optimal functioning of the leniency programme. It also incentivizes applicants to come in as soon as possible and thus secure the highest possible discount range. Other jurisdictions emphasize the benefits of uncertainty on the race for leniency, which is ensured by reductions being fully in discretion of the authority.

In determining the specific size of a reduction, authorities generally look at the timing of the application and at the value of the evidence provided and, as is the case in the EU or Japan, on the rank of the application. Generally speaking, the value of evidence is often a function of the timing of an application in that every piece of evidence provided by an applicant is assessed against what the authority knows about the case at the time. The earlier evidence is provided, the more likely it is to be of higher value. Overall, the discussion has shown that certain jurisdictions place a higher importance on the timing of applications, while others look more at the value of the evidence provided. Other criteria used to determine the size of a reduction, include the involvement of management, internal procedures and availability of evidence as being relevant.

A few jurisdictions, such as Canada, United Kingdom or Chinese Taipei, offer markers to subsequent applicants, which in their view enhances the predictability and certainty of the process, hence increasing the incentives for companies to come forward.

(3) In order to obtain a leniency reward, subsequent applicants must fulfil a number of requirements, which generally mirror those for immunity applicants. These include qualification, co-operation and timing requirements, which vary in substance across jurisdictions. However, in the majority of jurisdictions, subsequent applicants are required to provide full and continuous co-operation throughout the procedure while ending their participation in the cartel and maintaining the fact of their co-operation confidential.

The requirements on subsequent applicants are generally identical to those for immunity applicants. In addition to ending their participation in the cartel and keeping the fact of their application confidential, subsequent applicants must provide full and continuous co-operation to the authority. The obligation to provide continuous co-operation with the investigation may entail making executives available for an interview, answering any questions promptly, supplying evidence located outside the jurisdiction's borders, not destroying or falsifying any evidence and so on. The requirement to compensate victims is in some jurisdictions a condition to obtaining lenient treatment as a subsequent applicant. Most delegations agreed that granting or confirming a leniency reward only at the end of the procedure is a useful tool to ensure that applicants comply with their obligations throughout the investigation.

Concerning the limitations on who may qualify for lenient treatment as a subsequent applicant, certain jurisdictions disqualify coercers, ringleaders, instigators or recidivists. Other jurisdictions limit the number of successful subsequent applicants. For example, Japan and Chinese Taipei allow only five successful leniency applicants (or three where an application is made after the investigation has started in the case of Japan). In Korea, there is not a possibility for the second applicant to be rewarded in the case of cartels with just two members. These limitations reflect the desire on the part of certain authorities to try to limit the scope for opportunistic or strategic behaviour on the part of applicants.

Last, with respect to the time limit within which applications may be submitted, many jurisdictions do not have any specific cut-off point, accepting them throughout the investigation. However, even in the absence of a formal cut-off point, several jurisdictions mentioned that a leniency application is likely to be rejected for not providing added value if received after the end of the investigative stage, marked by the issuing of a statement of objections. Several jurisdictions, do not accept applications after concluding the investigative stage.

(4) Leniency policies do not operate in a vacuum. They interact with other legal instruments and policies such as criminal liability for cartel conduct, early termination (settlements and plea bargaining) policies and private damage actions. The proper calibration of this interaction is essential for the optimal functioning of leniency programmes.

With respect to criminal liability, it is important that potential applicants are not deterred from coming forward and co-operating by the possibility of criminal sanctions for their employees (or the companies themselves) that would follow as a result. The experience of Hungary, whose programme was not, until its recent amendment, sufficiently clear as to the criminal consequences for successful applicants and as a result a decline in applications was registered, is particularly telling. In jurisdictions with criminal liability for cartel conduct, it is important that the reward granted to successful subsequent applicants also apply to potential criminal sanctions. Specific approaches differ across jurisdictions, with some offering full and automatic immunity from criminal sanctions to the employees of successful subsequent applicants, while others offer only reduced sanctions and/or provide beneficial treatment in the criminal area subject to the authority's discretion.

Early case termination policies such as plea bargaining or settlements interact with leniency for subsequent applicants in different ways. In the United States, for example, subsequent co-operating companies are rewarded within the plea bargaining process, whereby they must not only co-operate with the investigation but also plead guilty in return for a reduced sentence. In jurisdictions where early termination tools and leniency are operated as separate policies, a leniency reward is not conditional upon settling the charges, although one can often lead to the other. In such systems, it is important that rewards available for settling parties do not exceed rewards available under the leniency program so as not to reduce the incentives to co-operate under leniency. Thus, for example, the maximum settlement discount in the EU is 10%, while a successful subsequent leniency applicant can obtain up to a 20%, 30%, or 50% reduction depending on the order it came forward.

Exposure to private damages can also be a disincentive to coming forward under leniency. Competition authorities thus strive to put in place measures that ensure that leniency applicants are not worse off in private damage actions than companies that decided not to co-operate. On the other hand, leniency applicants should not be absolved of their civil liability for their cartel conduct. Some jurisdictions even promote restitution of victims as a pre-condition to obtaining leniency.

ISSUES PAPER

By the Secretariat

1. Introduction

This paper discusses issues related to "Leniency for subsequent applicants" and identifies the main questions to help the discussion which will take place on 23 October 2012 in Working Party No. 3 (WP3). Today, all OECD countries have adopted leniency policies to ensure more effective detection and prosecution of cartels. In light of the considerable experience acquired with the application of such policies, WP3 considered it timely to discuss a particular feature that distinguishes the two major types of leniency policies: the treatment of subsequent applicants, i.e., applicants that are not the first to denounce a secret cartel or bring decisive evidence of its existence.

The terminology used in the context of leniency programmes varies from jurisdiction to jurisdiction. For example, the United States use the term "leniency" or "amnesty" to refer to full immunity from any sanctions. In Canada and the European Union, this is described as "immunity". These jurisdictions use the term "leniency" to describe any lenient treatment (both amnesty/immunity and the reduction of sanctions) or only a reduction in sanctions for subsequent applicants.[1] For the purposes of this paper, we will use the term "*leniency programme*" to refer to both an amnesty or a leniency programme; the term "*immunity*" describes the benefit of complete immunity from any sanctions; and the term "*leniency*" covers benefits in the form of any reduction in sanctions that would otherwise be imposed on applicants that do not qualify for immunity.

2. The origins of leniency in antitrust enforcement

Due to their generally acknowledged illegality, cartels usually operate under the cloak of secrecy. They are often accompanied by outright measures to enhance their concealment and prevent their detection. Competition authorities face significant obstacles in detecting and prosecuting cartels, given the shroud of secrecy under which they operate. Under the traditional investigative means and information sources, the detection of a cartel is normally the result of the observation of market anomalies, complaints from customers or competitors, leads from informants such as disgruntled employees or "fall-outs" from other investigations. The successful uncovering and prosecution of a cartel requires solid information and reliable pieces of evidence. Unfortunately, traditional methods of detecting cartels, and obtaining the evidence required to successfully prosecute and punish them, are limited both in their effectiveness and efficiency.

In 1978 the US Department of Justice (US DoJ) adopted its first Corporate Leniency Policy in an attempt to overcome these limitations and enhance deterrence. The US DOJ introduced into antitrust enforcement the idea of reducing a criminal penalty in exchange for the criminal's co-operation in helping to convict its co-conspirators.[2] Under the 1978 policy, the US DoJ could grant full immunity to any

1 Correspondingly, a leniency programme that rewards only the first in the door is sometimes denoted as an "amnesty programme" and a programme that rewards both the first in the door and subsequent applicants is denoted as "leniency programme".

2 See, Wils, p. 14.

corporation reporting the existence of a cartel before the start of an investigation. In 1993, the US DoJ revised its policy, introducing three significant changes. These changes are generally credited with a dramatic increase in the number of cartelists coming forward to take advantage of the policy. First, in the stage before the start of an investigation, prosecutorial discretion was removed from the granting of immunity. Second, immunity was also made available after the start of an investigation. Third, immunity was extended to include employees and directors coming forward along with the co-operating corporation. In addition, the US DoJ adopted a Leniency Policy for Individuals in 1994, thus putting together a leniency structure, which remains in place today. The most significant change since 1994, introduced in 2004,[3] limited amnesty recipients' civil liability to single damages, provided they co-operate with the plaintiffs, and severed the joint and several liability between the amnesty applicant and its co-conspirators.

In 1996, the European Commission (EC) adopted its first Leniency Notice, although in its previous practice it had already rewarded co-operating companies with fine reductions.[4] The 1996 Leniency Notice formally introduced the concept of rewarding companies' co-operation into the EC's enforcement practice with either full immunity from, or the reduction of, any fines that would otherwise be imposed. The EC has since revised its policy twice: first in 2002 and then again in 2006, introducing changes designed to increase certainty in the process and the effectiveness of the policy.[5]

There are three crucial differences between the US DoJ and the EC leniency programmes. First, successful immunity applicants under the US DoJ's programme receive amnesty from prosecution whereas the EC adopts a formal decision even against successful immunity recipients (although the fine is reduced to zero). Second, not having individual criminal liability for cartel behaviour, the EU, in contrast to the US, also does not have a leniency policy for individuals. Last, the US DoJ's leniency programme rewards only the first applicant, whereas the EC's programme rewards both the first applicant and all subsequent applicants, provided their co-operation contributes to the EC's investigation and prosecution.[6]

While the first two differences reflect the specific enforcement context within which the relevant leniency policies operate – administrative enforcement with sanctions on corporations in the case of the EU and criminal enforcement system with criminal liability of both corporations and individuals in the US – the third difference (treatment of subsequent applicants) has no such clear explanation. However, due to the fact that the US DoJ has the ability to reward, and in its practice does reward, the co-operation of subsequent applicants outside its leniency program, the difference is rather one of form than substance.

---

3 Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA).

4 See Wils, p. 15. Faull & Nikpay, s. 8.108.

5 For example, the 2002 Leniency Notice introduced automatic immunity for the first company to inform the EC of a cartel it had not been aware of or to supply decisive evidence of its existence rather than a 75-100% band of reduction, as was the case under the 1996 notice. Also, in 2002, fine reductions for subsequent applicants were differentiated more firmly based on the time in which the applications were submitted. The 2006 notice introduced the possibility for immunity applicants to apply for a market, while at the same time increasing the demands on the cooperation that applicants have to provide to obtain leniency.

6 The US DoJ has the ability to reward cooperation of subsequent applicants, but, not through its leniency policy. Instead this is through the application of ranges in US Sentencing Guidelines in the process of plea bargaining. Another possibility of rewarding a subsequent applicant is a so-called "Amnesty Plus". Both of these possibilities are discussed in detail below.

Box 1. Questions and issues for discussion

1. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

2. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

3. Rationale for rewarding subsequent applicants

The rationale for offering immunity to a cartelist who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing the co-operating corporation. These benefits include increased detection rate, destabilising effects on cartels, cost savings in investigation and prosecution as a result of the applicant providing evidence directly from within the cartel, litigation savings and so on. All these benefits combined result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment.[7] But what are the policy reasons for rewarding companies for their co-operation in an already on-going investigation? The majority of them largely overlap with the reasons for rewarding the first applicant, save for that relating to the unveiling of another cartel of which the authority was previously not aware. The majority of leniency programmes offer immunity to the first applicant who reports a cartel before the start of any investigation. Some leniency programmes also offer immunity to applicants who have reported a cartel after the start of an investigation if they can brings new evidence allowing the authority to prove the infringement.

Authorities are likely to find themselves in situations where, while aware of the existence of a cartel as a result of a leniency application by the first applicant, they are not yet in a position to prove the infringement. This is the case, for example, if they were not able to collect the necessary evidence in dawn-raids or through other investigative means. In such situations, co-operation from other cartel members is key to a successful prosecution. It is often the case that co-operation from the second applicant is of particular value because its testimony and other evidence it presents can be used to corroborate the evidence submitted by the first applicant. Co-operation of subsequent applicants may contribute to proving additional facts either in terms of duration, product or geographic scope or the composition of the cartel. This might be particularly useful in cases where immunity is obtained by a minor player in the cartel, who while being aware of the overall activities of the cartel may have not possessed direct evidence of contacts other than those in which it was directly involved. In such a situation, the co-operation of a company from the core of the cartel could allow the authority to effectively investigate all the cartels' members and practices.

In addition, co-operation of subsequent applicants generates efficiencies in terms of lower administrative costs, as agencies can obtain evidence without carrying out a full investigation. For example, subsequent applicants may come forward after initial down raids and either submit evidence that was not found by the authority, explain any ambiguous content in the evidence found, or provide access to individuals with inside knowledge of the cartel. This might be particularly relevant in jurisdictions where the authority does not have the power to compel individual testimony. The authority might eventually

7 See, Kloub, p. 4, Wils, p.19, Faull & Nikpay, s. 8.105, Zingales, p. 7.

obtain this evidence or explanation otherwise, but only at the expense of going through a formal subpoena or information request process. In this sense, the co-operation of subsequent applicants lowers the authority's investigation and prosecution costs, allowing it both to proceed faster and possibly devote some of the saved resources to other investigations. Co-operation from subsequent applicants serves also as a pressure on the immunity applicant to submit all the evidence in its possession and accordingly carry out thorough internal reviews.

Subsequent applicants may be rewarded for two kinds of co-operation. First, for the co-operation in the investigation of the case in which they lost the race for immunity by, for example, providing corroborating evidence or other information that helps the authority in the investigation and prosecution of that particular case. Or, second, for co-operation that does not relate to the case in which the applicant company lost the race for immunity but allows the authority to uncover and investigate another possible infringement. The reward for the second form of co-operation is usually called "amnesty plus".

4. Arguments against rewarding subsequent applicants

The main objection to granting leniency benefits to subsequent applicants concerns the lowering of sanctions and the resulting decrease in deterrence. Careful consideration should be given to what rewards are strictly necessary and proportionate to the benefits obtained by the authority from the co-operation.

The second argument is based on the proposition that, in theory, leniency programmes might stimulate the creation of cartels or at least create scope for strategic behaviour of cartel members towards the authority.[8] Cartels, as any secret organisations, are sophisticated and capable of learning. It is thus possible that cartels would seek to strategically exploit any feature of a leniency programme. For example, in a system that offers reductions to subsequent applicants, cartel members might, prior to their cartel being uncovered, design a system whereby they divide and allocate evidence between themselves to achieve the maximum reductions for each of them.[9] Competition authorities could minimise this particular risk by adopting a high threshold for any lenient treatment, in particular for immunity. Doing so would also reduce the likelihood that while immunity has been granted, the authority still does not have enough evidence to successfully prosecute the case.

Rewarding subsequent applicants may also raise the question as to whether immunity remains sufficiently attractive compared to reductions available to subsequent applicants. If the reductions offered to subsequent applicants are too high, cartelists might forego reporting the cartel in exchange for immunity, and decide to come forward to co-operate only once the cartel is uncovered. It is therefore important that reductions for subsequent applicants do not undermine the incentives to come in and denounce the cartel in the first place in exchange for immunity.[10]

---

8 See Wils, p. 29.

9 Admittedly, this is a highly artificial theoretical construction but it is not excluded that such a system could be put in place, in particular in the case of cartels with just a few members where coordination is easier.

10 This risk is well illustrated on the example of the first EC leniency programme (the 1996 Leniency Notice), which offered 75-100% fines reduction to the first applicant and up to 50% to subsequent applicants. The concern was that undertakings waited to come forward to the Commission until they had no choice because an investigation was already on-going. By doing so, they could still obtain 75-100% reduction provided they were the first to come forward and submit decisive evidence of the infringement, or obtain a 50% reduction if they lost the race to the door. This was due to both the uncertainty as to the exact level of reduction for the first-in and to the relatively small difference between the lowest possible reduction for the first-in (75%) and the maximum reduction for subsequent applicants (50%). See Faull & Nikpay, 8.123.

5. The framework for rewarding subsequent applicants

It is generally acknowledged that the reasons for rewarding co-operation of subsequent applicants outweigh the arguments against doing so. For this reason, most jurisdictions with leniency programmes provide, in one way or another, incentives for subsequent applicants to co-operate with the authority's investigation even if they have lost the race for amnesty.

The majority of them do so within the framework of their leniency programme, with the treatment of immunity and leniency applicants being set out in one and the same instrument announcing and regulating the jurisdiction's leniency policy.[11] Other countries deal with the co-operation from the immunity applicant and from subsequent applicants in separate instruments.[12] Finally, some countries' leniency policies provide only for immunity for the first-in applicant, while subsequent applicants are rewarded either in the framework of other policies or under the relevant authority's prosecutorial discretion.[13]

It could be argued that a formalised framework for rewarding subsequent applicants provides added certainty and predictability (i.e. the two qualities that are generally seen as crucial to the success of any leniency programme). However, a public declaration accompanied by consistent application practice, as is the case in the US,[14] can be equally effective in fostering proper incentives for subsequent applicants. As with leniency in general, consistency, transparency and predictability of a competition authority's practice, are at least as important as its formal regulations and stated goals.

Box 2. Questions and Issues for Discussion

1. In your practical experience, what is the most compelling rationale for rewarding subsequent applicants' co-operation? If your jurisdiction does not reward subsequent applicants with any benefits, or no benefits other than "amnesty plus", what is the rationale for such an approach?

2. In your experience, what is the value of the co-operation of the second-in applicant? Have there been cases in your country where a case could not have been brought to a successful prosecution due to the lack of sufficient evidence in the absence of co-operation by the second-in applicant?

11 For example, the EU, Korea or Mexico.

12 In Canada, for example, immunity is dealt with in Bulletin on Immunity under the Competition Act, while leniency is set out in a separate Leniency Program Bulletin.

13 For example, Australia, the US or South Africa. The US DoJ's Corporate Leniency Policy contains no provisions on the treatment of subsequent applicants and rewarding them for their cooperation is a matter of prosecutorial discretion exercised by the US DoJ in the context of plea negotiations within the limits of the US Federal Sentencing Guidelines. The 1994 Individual Leniency Policy expressly states that individuals who fail to qualify for immunity will be considered for statutory or informal immunity from criminal prosecution as a matter of prosecutorial discretion, which puts them in a similar position as subsequent corporate applicants.

14 The treatment of subsequent corporate applicants in the US is set out in a public speech by Scott Hammond, the Deputy Assistant Attorney General for Criminal Enforcement, presented at the 54th ABA Antitrust Section Spring Meeting in Washington DC on 29 March 2006, available at http://www.justice.gov/atr/public/speeches/215514.htm.

6. Incentives for subsequent applicants

Incentives for subsequent applicants to co-operate generally take the form of reductions in any sanctions to which applicants are potentially subject. This can mean either reductions in any imposed or recommended monetary sanctions or lower criminal sentence recommendations than would otherwise be the case in jurisdictions with criminal liability for cartel conduct.[15] The size and form of rewards vary from jurisdiction to jurisdiction but generally they reach on average a maximum of approximately 50% of the sanction that would be imposed in the absence of any co-operation.

Some countries differentiate the size of the rewards for subsequent applicants on the basis of criteria such as the value of co-operation provided and/or its timing.[16] By doing so they introduce a gradation that has the effect of introducing a "race for leniency", similar to the "race for immunity". This is particularly the case when the criterion is the time of co-operation. In order to qualify for the highest possible reward, companies seek to come forward, provide whatever evidence is available to them and co-operate with the authority as soon as possible. This has clear beneficial effects for the authority.

Access to the Amnesty Plus types of policies, which reward the disclosure of a cartel *different* from the one that was first reported, is another incentive that some countries offer to subsequent applicants.[17] However, this aims primarily at uncovering another cartel rather than obtaining co-operation helpful to the investigation and prosecution of an on-going case. As such it differs in its purpose and therefore its functioning should be seen accordingly.

Leniency programmes also provide for partial immunity in order to remove the disincentive on the side of the applicant to submit evidence that could be used against it. Therefore, if an applicant submits evidence that the authority uses to establish additional facts increasing the gravity or the duration of the infringement, such facts are generally not taken into account when setting the fine against that applicant.[18]

Contrary to immunity, markers that would secure a subsequent applicant's place in line for an applicable band are normally not available.[19] The race to be the first to provide evidence with significant added value is thus fierce and it often starts just hours after a dawn-raid.

7. Requirements on subsequent applicants

The requirements on subsequent applicants to qualify for lenient treatment are generally the same as the requirements on applicants for immunity. In addition to submitting evidence, making executives available for interviews and effectively co-operating with the investigation, applicants are generally required to end their participation in the cartel prior to making an application and to maintain secrecy of the fact that they have made an application. In order to justify the granting of leniency and to obtain the

---

15 See, for example, points 25-26 of the EC 2006 Leniency Notice, Hammond, p. 3-10, Section 3.3. of the Canadian Leniency Program Bulletin.

16 Such as the EC (See points 25-26 of the EC Leniency Notice), the US DoJ (See Hammond, p. 5-6, 11), or the Canadian Competition Bureau (See section 3.3. of the Canadian Leniency Program Bulletin).

17 Such as the US (See Hammond, p. 9), Canada (Section 3.5. of the Canadian Leniency Program Bulletin), Israel (Section 3 of Israel Antitrust Authority's Leniency Program) or New Zealand (Points 3.41-3.44 of the New Zealand Commerce Commission's Cartel Leniency Policy and Process Guidelines).

18 See point 26 of the 2006 EC Leniency Notice, Hammond, p. 3.

19 Canada is one of the few countries that offer markers to subsequent leniency applicants (See section 3.7.1. of the Canadian Leniency Program Bulletin).

greatest value for doing so, competition authorities also place great importance on applicants providing timely and effective co-operation.

To ensure that applicants comply with the relevant requirements, the grant of leniency is usually made at the end of any proceedings before the competition authority.[20] Indeed, the granting of any reduction to a subsequent applicant should be made only at a point where the competition authority has brought the case to a stage at which it can no longer benefit from any further co-operation. This normally is either the formal finding of an infringement by the authority or formal recommendation to a judge or the filing of charges. As such, the promise of reduction can be withdrawn if the applicant fails to genuinely and effectively co-operate throughout the duration of the investigation.

It is a common feature of leniency programmes that cartel ringleaders or those who coerced others to participate or remain in a cartel cannot qualify for immunity. It is less frequent that such companies would be disqualified from obtaining a reduction of sanctions.[21] This reflects a balance between the undesirability to let companies that orchestrated a cartel completely off the hook against the fact that such companies might often be able to provide the best evidence due to their position at the centre of the cartel.

The timing of co-operation is usually one of the decisive factors in determining the amount of any reduction that may be granted,[22] since earlier co-operation is of greater value for the investigating agency than co-operation provided later in the procedure. It is for this reason that leniency policies sometimes provide for a cut-off point after which leniency is no longer available.[23]

---

20 In the case of the EC, the fact whether the Commission considers that an applicant qualifies for leniency and within what band is communicated in a statement of objections while the granting of any reduction in a final decision is made subject to the requirements being met until the end of the procedure.

21 See Hammond, p. 7.

22 In the case of the EC, time determines both the applicable reduction band and the precise reduction within that band.

23 See e.g. point 29 of EC 2006 Leniency Notice, according to which the EC may disregard any application made after the statement of objections has been issued. On the other hand, as the EU General Court recently ruled in *Fuji* (Case T-132/07, *Fuji Electric Corporation v Commission*) cooperation provided after the statement of objections can be of significant value as well, especially if it provides corroboration of certain elements disputed by the parties.

Box 3. Questions and issues for discussion

1. Please describe the treatment reserved to subsequent applicants in your country. In particular, focus on the incentives and requirements with respect to subsequent applicants and the evaluation of the degree of co-operation provided by them.

2. If your leniency programme includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be "first in the door" of potential applicants. Are markers also available to subsequent applicants?

3. Please explain if your leniency programme is always available during the proceedings, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore?

4. Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons?

5. If your leniency programme does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining)?

8. Interaction between leniency and other policies

Leniency policies do not operate in a vacuum. They interact with other legal instruments and as such produce frameworks specific to each jurisdiction. Criminal rules, enforcement procedures, privacy protection rules, and so on, all interact with leniency policies and the incentives they provide. Their careful balance with respect to the overall legal framework is consequently crucial to their success. Below are the three main competition policies which can directly affect the optimal functioning of a leniency programme.

First, *criminal liability of individuals*. A leniency policy in a jurisdiction with criminal liability is unlikely to work unless it provides for immunity/leniency for the applicant corporation's employees. Some jurisdictions, most notably the US, also operate leniency programmes for individuals, thus introducing a race for immunity between the corporation and its employees. If the corporation is first to qualify, its employees and directors are covered under its immunity. However, if it fails to report a cartel that an employee reported, it is only the employee who benefits from the immunity. Likewise, co-operating individuals (as subsequent applicants) under the Individual Leniency Program may obtain benefits subject to the US DoJ's prosecutorial discretion, as discussed above.

Second, *early case termination policies* (such as settlements or plea bargaining) whereby companies acknowledge their antitrust liability in exchange for a reduced sanction. In the last ten years, an increasing number of competition authorities have adopted early case termination policies, allowing them to achieve procedural efficiencies, which translate into increased deterrence. Plea bargaining in the context of US DoJ's investigations is probably the most well known example of an early termination policy. The recently introduced EC settlement procedure in cartel cases is an example of an early termination policy operating in the context of an administrative enforcement system. A company willing to enter into an early case termination procedure and accept liability for a cartel in exchange for a reduced penalty, is also highly likely to be willing to co-operate. As such, it is possible to imagine that a company might qualify, or wishes to qualify for both a leniency benefit and a "settlement" benefit. In the EU the benefits for leniency and settlement (10% fine reduction) are cumulative, so as to create incentives for companies to both co-operate with the investigation in terms of helping the EC to prove the infringement and to co-operate with it in achieving quicker adjudication by accepting liability for an infringement in a simplified procedure. The two policies, while pursuing separate aims, thus complement each other.

Irrespective of how leniency and early case termination policies operate in practice, it is generally accepted that there should be a sufficient difference between the benefits under leniency and settlement benefits. This is to maintain the attractiveness of leniency, as well as strong incentives for companies to come forward and actively assist the authority in an investigation rather than just wait to see whether the authority can prove the case and then simply accept liability. The EU considered a settlement reduction of 10% to be both sufficiently high to incentivise companies to enter into the settlement procedure and small enough in comparison to leniency discounts so as not to undermine the incentives to come and co-operate under the leniency program. This calculation appears to have been correct as attested by the number of EC settlement cases in the past years. In all of these, the EC also awarded significant leniency discounts.

Third, *private damage actions* can affect the incentives to apply for leniency. Leniency policies can be used to stimulate the compensation of victims, as is the case for example in the US, where successful applicants can obtain the benefit of de-trebling of damages. There is, however, no such requirement or benefit in relation to subsequent applicants. On the other hand, private damage actions can act as a disincentive for companies to come forward and co-operate under a leniency programme. In order to minimise these disincentives, competition authorities strive to make sure that leniency applicants are not worse off in terms of damage claims compared to the companies that did not co-operate. This is particularly relevant with respect to the information provided by leniency applicants.[24] Were this information to make it into the hands of potential plaintiffs, the relevant leniency applicants would certainly be worse off than if it had chosen not to co-operate. Therefore, competition authorities strive to ensure that the information provided to them under leniency is and can be used only for the purpose of their proceedings.[25]

Box 4. Questions and issues for discussion

1. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

2. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

9. Conclusion

Hard core cartels are one of the most serious violations of competition law, harming consumers and the economy as a whole. Discovering and prosecuting them, however, is complex because of the secrecy under which they operate. Traditional investigative means are not always sufficient to this purpose. Hence, competition authorities have introduced enforcement policies, such as leniency programmes to make discovery easier. Leniency programmes provide incentives for cartel members to break ranks, report the existence of the cartel and co-operate with the investigation. Such co-operation is rewarded by immunity from or reduction of sanctions that could otherwise be imposed to the co-operating company or individual.

24 This information usually consists of self-incriminating testimonies, direct evidence of the infringement and sometimes even evidence relating to the damage caused by the infringement to the applicant's customers.

25 For example, the 2006 EC Leniency Notice provides for oral submissions of corporate statements in a procedure designed to limit the amount of discoverable material that leniency applicants have in their possession as a result of having applied for leniency. Likewise, in civil damage proceedings the US DoJ regularly argues investigative privilege of any amnesty related material, hence generally successfully resisting, or helping leniency applicants to resist, discovery motions aimed at that particular material.

Leniency programmes represent the most effective tool in the fight against cartels. However, their optimal design is crucial for their success. This paper addresses the importance of co-operation from subsequent applicants for investigating authorities and the different ways in which jurisdictions reward such co-operation. This can be done either in the leniency programme itself, buy offering a lenient treatment to the first in the door and to subsequent applicants; or by rewarding co-operation from subsequent applicants through other policies, e.g. early case termination policies or the fining policy itself. Careful balancing of these policies is therefore necessary to ensure an effective enforcement action, and to maintain the appropriate incentives for companies and individuals to access the leniency programme.

FURTHER READING

Aubert C., Rey P. and Kovacic W., "The impact of leniency and whistle-blowing programs on cartels", (2006) 24(6) International Journal of Industrial Organization, pp. 1241-1266.

Borrell J., Jimenez J., and Garcia C., "Evaluating Antitrust Leniency Programs", XREAP (2012). ECN Leniency Model Program, available at http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

Faull J., Nikpay A., The EC Law of Competition, Oxford University Press (2007).

Hammond S., Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations, speech presented at the 54th ABA Antitrust Section Spring Meeting in Washington DC on 29 March 2006, available at http://www.justice.gov/atr/public/speeches/215514.htm.

Holmes S., Girardet P., The International Comparative Legal Guide to: Cartels and Leniency 2012, Global Legal Group (2011).

International Competition Network (ICN), Anti-cartel Enforcement Manual, Chapter 2 Drafting and Implementing an effective Leniency Policy, 2009, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf.

ICN overview of Leniency Programs (Leniency Promotion), available at http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx.

Kloub J., "Using Leniency to Fight Hard Core Cartels – Leniency as the Most Effective Tool in Combating Cartels", paper presented at the OECD LACF 2009, available at http://www.oecd.org/dataoecd/40/2/43420031.pdf.

Mobley S. and Denton R., "Global Cartel Handbook – Leniency: Policy and Procedure", Oxford University Press (2011).

OECD Policy Brief, Using Leniency to Fight Hard Core Cartels (2001), OECD Policy Brief, available at http://www.oecd.org/corporate/corporateaffairs/1890449.pdf.

OECD Report, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs (2002) OECD Report, available at http://www.oecd.org/competition/cartelsandanti-competitiveagreements/1841891.pdf.

Wils W., "Leniency in Antitrust Enforcement: Theory and Practice", (2007) 30 World Competition 25-64, available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

Zingales N., European and American Leniency Programs: Two Models Towards Convergence?, (2008) 5(1) ComLRev.

AUSTRALIA

1. Introduction

The Australian Competition and Consumer Commission (**ACCC**) enforces compliance with cartel laws in Australia. This includes investigating and prosecuting civil cartel contraventions and investigating criminal contraventions and referring those matters to the independent criminal prosecutor, the Commonwealth Director of Public Prosecutions.

There are three policies which support the detection, deterrence and punishment of cartel behaviour. The first is the ACCC Immunity Policy for Cartel Conduct (**Immunity Policy**).[1] This is complemented by the ACCC Cooperation Policy for Enforcement Matters (**Cooperation Policy**). The Commonwealth Department of Public Prosecutions (**CDPP**) administers the Prosecution Policy of the Commonwealth which has within it an Annexure relating to Immunity from Prosecution in Serious Cartel Offences.

Under these policies, complete immunity from civil and criminal prosecution is provided to the first successful applicant to approach the ACCC (**Immunity**). Only the first applicant can obtain this level of protection and there are strict guidelines surrounding when Immunity will be provided. Immunity is always provided on a conditional basis and final immunity is generally not granted until all the conditions are met at the end of the prosecution of cartel participants.

Participants in a cartel (either corporations or individuals) wishing to cooperate with the ACCC may be provided with reduced penalties or other punitive orders under the ACCC's Cooperation Policy. The extent of the credit given to a party for cooperation depends very much on the nature and scope of the cooperation provided.

2. Australia's approach to immunity

The *ACCC Immunity Policy Interpretation Guidelines* are '...a detection tool designed to deliver benefits to all Australians by identifying, stopping and prosecuting harmful and illegal behaviour.'

The Immunity Policy provides full immunity to the first applicant provided the Immunity applicant satisfies and continues to meet conditions. Those conditions include that:

- The Immunity applicant is or was party to a cartel;
- The Immunity applicant admits that its conduct in respect of the cartel may constitute contravention/s of the *Competition and Consumer Act 2010*;
- The Immunity applicant is the first person to apply for immunity in respect of the cartel under this policy;

[1] The Immunity Policy and interpretation guidelines are publicly available on the ACCC website at http://www.accc.gov.au/content/index.phtml/itemId/879795.

- The Immunity applicant has not coerced others to participate in the cartel and was not the clear leader in the cartel;

- The Immunity applicant has either ceased its involvement in the cartel or indicates to the ACCC that it will cease its involvement in the cartel;

- The Immunity applicant undertakes to provide full disclosure and cooperation to the ACCC; and

- Prior to the Immunity application, the ACCC has not received written legal advice that is has sufficient evidence to commence proceedings in relation to the cartel conduct.

If a corporation qualifies for conditional immunity, all nominated current and former directors, officers and employees of the corporation who admit their involvement in conduct of the corporation in respect of the cartel and provide full disclosure and cooperation to the ACCC will be eligible for conditional immunity in the same form as the corporation.[2]

The Immunity Policy is structured to provide businesses and legal advisers with certainty as to the process of applying for and receiving immunity. Pursuant to a Memorandum of Understanding (**MOU**) with the CDPP,[3] the ACCC receives and manages all requests for immunity in Australia relating to both potential criminal and civil regimes. The ACCC makes recommendations to the CDPP as to whether the Immunity applicant meets the criteria set out in the Immunity Policy.

Generally speaking, an eligible Immunity applicant will be able to obtain upfront civil immunity from the ACCC and criminal immunity from the CDPP at the same time.[4]

3. Australia's approach to leniency

Generally speaking, Australia does not confer Immunity on any subsequent party that comes forward. However, the ACCC and CDPP will give credit to parties who cooperate with investigations / legal proceedings. This credit will lead to a reduction in sanctions which will vary depending on the nature of the cooperation provided.

Australia recognises that there are both opportunities and risks associated with the reward of subsequent immunity applicants. These opportunities include:

- That information provided by subsequent immunity applicants potentially provides additional evidence required to efficiently and effectively prosecute cartel participants. For example, where the party receiving conditional immunity was not party to all relevant contracts, arrangements or understandings, other parties may be able to provide probative evidence as to the extent of the conduct and harm caused.

- Parties who cooperate with the ACCC investigations, particularly at an early stage of an investigation, can support the ACCC and CDPP in achieving efficient enforcement outcomes.

---

2 ACCC Immunity Policy for Cartel Conduct, paragraph 13.

3 The MOU is available on the ACCC website at http://www.accc.gov.au/content/item.phtml?itemId=1011117&nodeId=e5e7320461207c0567574766cc0c6c19&fn=Memorandum%20of%20understanding%20%20between%20CDPP%20and%20ACCC.pdf

4 Section 7.2 of the MOU.

Risks include that potential immunity or leniency applicants continue to engage in beneficial cartel conduct for as long as possible on the expectation that, if the cartel is reported by another, they will be able to obtain a reduced penalty under the leniency program. Australia considers that by basing the degree of leniency upon the level of cooperation provided by the cooperating party rather than order of application, this risk is minimised.

4. How is leniency for subsequent applicants determined?

Lenient treatment for second and subsequent parties is considered under the Cooperation Policy. This includes the cooperation aspect of Amnesty Plus where a subsequent applicant self reports another cartel to the ACCC.

There are separate, but in many respects similar principles that apply for individuals and corporations.

4.1 Individuals

Leniency is most likely to be considered appropriate for individuals who:

- come forward with valuable and important evidence of a contravention of which the ACCC is either otherwise unaware or has insufficient evidence to initiate proceedings
- provide the ACCC with full and frank disclosure of the activity and relevant documentary and other evidence available to them
- undertake to cooperate throughout the ACCC's investigation and comply with that undertaking
- have not compelled or induced any other person/corporation to take part in the conduct and were not a ringleader or originator of the activity.

4.2 Corporations

Leniency is most likely to be considered for a corporation that:

- comes forward with valuable and important evidence of a contravention of which the ACCC is otherwise unaware or has insufficient evidence to initiate proceedings
- upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity
- provides the ACCC with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and cooperates fully with the ACCC's investigation and any ensuing litigation
- has not compelled or induced any other corporation to take part in the anticompetitive agreement and was not a ring leader or originator of the activity
- is prepared to make restitution where appropriate
- is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking

- does not have a prior record of *Competition and Consumer Act* breaches, or related offences.

4.3 Amnesty Plus

Paragraphs 99 and 100 of the ACCC's *Immunity Policy Interpretation Guidelines* provide for such a circumstance:

> "99. If a person cooperates with the ACCC investigation into a cartel despite being ineligible for immunity, because another person has been granted conditional immunity in relation to that cartel, the ACCC may recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters. If, in addition to cooperating with investigations into the first cartel, such a person reports a second cartel, and is granted conditional immunity in relation to the second cartel, the ACCC will recommend to the court a reduced penalty in civil proceedings and recommend to the CDPP a reduced fine or sentence in criminal matters be further reduced in relation to the first cartel.
>
> 100. In some jurisdictions, this is referred to as amnesty plus."

Unlike some other jurisdictions, the degree of leniency will depend upon the level of cooperation provided by the cooperating party rather than the order of application of the Immunity applicants. This is determined on a case by case basis, having regard to:

- whether the applicant is able to bring forward high quality evidence which is not already available to the ACCC / CDPP in the investigation; and

- the leniency applicant's actions, both pre and post discovery of the cartel conduct.

In addition, when sentencing a corporation or individual for breaches of the CCA the court must take into account a number of factors including:

- the degree to which the person has shown contrition for the offence by taking action to make reparation for any injury, loss or damage resulting from the offence; or in any other manner

- if the person has pleaded guilty to the charge in respect of the offence—that fact

- the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences

ESTONIA

1. Introduction and purposes of the leniency programme

In Estonia the leniency programme came into force on 27th February 2010. Since according to the Art 400 of the Penal Code all types of anticompetitive cooperation between undertakings (including cartels, vertical restrictions etc.) are punishable as criminal offences in our jurisdiction the provisions regarding leniency have been enacted as amendments to the Competition Act and Code of Criminal Procedure. The relevant provisions are thereby divided between these two acts.

As it has been introduced into our law system only recently there have not been very many cases involving leniency and therefore we have not much practical experience yet on the implementation of the leniency programme. While drafting particular amendments to the laws the principals of the ECN model leniency programme have been taken into consideration, although with specific circumstances of the national system of criminal enforcement. Despite of the criminalisation of the anticompetitive cooperation since the year 2002 there have been only very few cases prosecuted until the year 2008 because of the hidden nature of the offences (especially cartels) and very high evidential standard of proof. The main purpose of elaborating and the introduction of leniency programme, including leniency conditions for the subsequent applicants was to generally ease the discovery of and help more efficient prosecution of secret cartels and other forms of anticompetitive co-operation. It was believed that the leniency programme would make fighting against anticompetitive collusion more effective. This policy purpose has been formally stated in the explanatory document to the amendment law which enacted the leniency programme.

2. Description of the leniency programme

The pre-trial investigation of competition restricting agreements and practices is carried out by officials of the Estonian Competition Authority while the Public Prosecutor's Office directs pre-trial proceedings in cases and ensures the legality and efficiency thereof and represents public prosecution in court. Thus, the powers and role of the Estonian Competition Authority on the one hand and the Public Prosecutor's Office on the other hand are different throughout criminal procedure. Accordingly, their roles in the leniency programme are also different.

The leniency application shall initially be submitted to the Estonian Competition Authority who shall carry out preliminary evaluation of the application and then furnish the application and the authority's observations to the Public Prosecutor's Office. The Estonian Competition Authority itself cannot grant leniency to the applicant but the decision in this regard shall have to be adopted by the Public Prosecutor's Office.

Article 205^1 of the Code of Criminal Procedure provides that the Public Prosecutor's Office shall, by its order, terminate criminal proceedings with regard to a leniency applicant who complies with the conditions for application of leniency provided for in the Competition Act who is the first to submit a leniency application and the information contained therein referring to a criminal cartel offence enables to commence criminal proceedings (subsection 1). Even if criminal proceedings concerning a criminal cartel offence has already been commenced before the submission of a leniency application, the Public Prosecutor's Office shall, by its order, terminate criminal proceedings with regard to a leniency applicant who complies with the conditions for application of leniency and who is the first to submit a leniency

application together with evidence which, according to the Prosecutor's Office, contribute significantly to bringing charges (art 205[1]subsection 2 of the Code of Criminal Procedure). In both cases described above the fulfilment of the leniency requirements by the first applicant serves as the basis for full immunity from any punishments.

If the leniency application complies with all requirements of law the granting of leniency will be guaranteed. In regards to the interpretation of Article 205[1] of the Code of Criminal Procedure Estonian Supreme Court has decided in its case No 3-1-1-10-12 that the wording of this provision suggests that the applicant who is the first to fulfil leniency conditions has lawful expectation that criminal proceedings shall be terminated in regards its actions. However, the actual moment of granting the leniency shall be decided by the State Prosecutor's Office. This shall be decided based on procedural situation.

As both legal and natural persons may be liable for competition-related criminal offences both may apply for leniency as well. If a leniency application is submitted by a natural person on his or her own name, that person shall be deemed to be the leniency applicant. If a leniency application is submitted by a representative of a legal person on behalf of the legal person, that legal person together with the natural persons associated with that legal person shall be deemed to be the leniency applicant. A natural person associated with a legal person is a representative, member or shareholder of a legal person, a member and an employee of a governing or supervisory body, including in cases where the relationship of the natural person with the legal person has been terminated. Leniency shall not be applied to a natural person, associated with a legal person, who fails to comply with the leniency conditions or to whom the legal person, who is the leniency applicant, has reasonably precluded the application of leniency in the leniency application.

It is also possible to get a marker according to Estonian leniency programme. All leniency applications shall be registered at the time of receipt and thereby the exact time of submission can be established. It is not required to include all the evidence to the leniency application but the applicant may be granted up to one month to submit the missing evidence. This may be necessary, for instance, in cases where it is not possible to present all the evidence right away but it is possible in the near future. Should the applicant fail to submit the evidence during this extended period, it would lose the marker and immunity will then become available for the next possible applicants. In case some evidence is not at the applicant's possession at all but it knows where the evidence is it will also be possible for him to describe the evidence and its whereabouts, so, the investigator can acquire the evidence itself.

The Estonian Supreme Court has ruled that the order of the Public Prosecutor's Office on the termination of criminal proceedings in regards to a leniency applicant can be appealed by other applicants, if he or she finds that violation of the procedural requirements in the performance of the procedural act or preparation of the order has resulted in the violation of his or her rights. An appeal regarding the order of the Public Prosecutor's Office should be filed to the Chief Public Prosecutor and then further to the County court.

The Code of Criminal Procedure provides for the possibility to renew the proceedings in regards to a person who has received lenient treatment. If, after an order of granting leniency is made, circumstances become evident which prevent application of leniency, the Public Prosecutor's Office may, by its order, resume proceedings with regard to the leniency applicant.

3. Subsequent applicants

According to Article 205[1] (3) of the Code of Criminal Procedure even if there are no basis for termination of criminal proceedings with regard to a leniency applicant who complies with the conditions for application of leniency, it is still possible to reduce the punishment imposed on the person for a

criminal cartel offence in proportion to the assistance received from the person in criminal proceedings. In this regard it is important to mention that reduction of punishment in the latter case is only possible with the final decision adopted by the court and the Public Prosecutor's Office itself cannot reduce punishment, although it may give the court its opinion on the amount of reduction. On the other hand the Code of Criminal Procedure requires the court of first instance to reduce punishment in case a person has applied for leniency and has fulfilled the conditions thereof.

The requirements of leniency application in regards to subsequent applicants are the same as in case of first-in applicants. For the leniency application to be successful it has to be submitted on the initiative of the applicant and comply with the formal requirements provided for in Article 78^1 (5) of the Competition Act (i.e. contain all the necessary data etc.); the applicant has to terminate participation in committing an offence unless otherwise agreed with the Prosecutor's Office; the leniency applicant shall have to disclose all evidence known to him or her on an infringement and co-operate fully and in good faith with investigative bodies and the Prosecutor's Office. The leniency application shall not be successful if the applicant has induced other persons to commit an infringement or conducted the preparation for or commission thereof or the applicant has destroyed or withhold evidence or otherwise hindered the proceedings.

There are no clear rules on assessing the quality of information from applicants regarding the infringement but this is rather decided case-by-case. It is worth mentioning that the standard of information is somewhat different for the first-in applicant when compared to subsequent applicants. The first-in applicant is required to furnish enough information to commence criminal proceedings or in case the proceedings have already been started to contribute significantly to bring charges while the law remain silent on the standard on subsequent applicants. The only rule is that the reduction of punishment shall be proportionate to the assistance received from the applicant, which means that the greater the assistance from the subsequent applicant the more the punishment shall be reduced. The law does not provide for any percentages or scales in regards to the amount of possible reduction. The judge shall have to decide it on a case-by-case basis but shall probably also take into account the opinion of the prosecutor and defence counsel.

As we have no extensive experience on the implementation of the leniency programme (because only less than 10 leniency applications have been submitted) it is not yet possible to discuss the advantages and the disadvantages of rewarding subsequent applicants or make any definitive conclusions in regards to efficiency of the leniency programme as such. Any advantages and disadvantages shall presumably be identified once we have more cases involving leniency.

The incentives for the subsequent applicants are not as good as for applicants for immunity. The principles for reduction of punishment are rather general in nature and do not give much legal certainty for the applicant. Thus, subsequent applicants have far less incentives for filing the application. The initial experience of the Estonian Competition Authority and the Public Prosecutor's Office has supported this – even in cases anticompetitive cooperation involved several undertakings only one subsequent application has been filed.

The law does not directly regulate the time leniency is available. As the application for leniency shall be submitted to the Estonian Competition Authority and decided by the Public Prosecutor's Office then the application has to be filed within pre-trial proceedings before the case is sent to court. During court procedure the Estonian Competition Authority has no specific role any more and the role of the Prosecutor's Office has also changed.

EUROPEAN UNION

1. EU leniency programme – introduction and background

Hard core cartels hiding under a cloak of secrecy are the most serious violations of competition law. The perpetrators increasingly use sophisticated or undetectable means of communication (e.g. anonymous email accounts, encoded language, telecommunication devices) in order to conceal their illegal actions. Therefore, the detection and prosecution of hard core cartels poses a major challenge for public enforcement. In a bid to increase the effectiveness of the anti-cartel enforcement, the Commission has introduced, as early as in 1996, a leniency policy which proved to be a mainstay of the Commission's action against cartels.

The European Commission leniency policy is embodied in a leniency notice, a self-imposed Commission policy instrument, which gives rise to rights and obligations for the companies wishing to cooperate with the Commission. The current 2006 Leniency Notice[1] was preceded by the 2002 Leniency Notice[2] and the initial 1996 Leniency Notice[3]. The revisions of the European Commission leniency policy have been driven by primarily practical experience gained in implementing the programme as well as by opinions voiced by the businesses and their legal advisors. The 2006 Leniency Notice, together with the decisions of the Commission as well as jurisprudence of the EU Courts, provide for transparent, predictable framework for cooperation between the Commission and cartel offenders willing to acknowledge their participation in a collusive conduct.

The Commission's anti-cartel enforcement operates in a system of parallel competences with the enforcement at a national level conducted by the National Competition Authorities (NCAs) of the EU Member States. In practice, this means that potential leniency applicants may need to apply for leniency with the Commission and all the NCAs that are empowered to impose sanctions for the cartel conduct concerned. While there can be some divergences between the leniency programmes of the competition authorities in the EU, these actors continuously work towards the alignment of their policies (to the extent national laws allow it) in order to increase attractiveness of leniency as a whole across the EU. To that end, the authorities cooperate within the European Competition Network (ECN), share their experience and develop best practices in the leniency area. In 2006, the ECN adopted a Model Leniency Programme (MLP) incorporating core procedural and substantive rules, which each leniency programme should contain. All competition authorities, including the Commission have made a political commitment to use their best efforts to align their programme with the MLP[4].

In punishing cartels, the Commission can only impose administrative sanctions on companies at the end of the proceedings that are administrative in nature. Accordingly, the Commission leniency policy covers purely administrative liability of companies and does not extend to individuals.

---

1 OJ C 298, 8.12.2006, p. 17-22.

2 OJ C 45, 19.2.2002, p. 3-5.

3 OJ C 207, 18.7.1996, p. 4.

4 2006 Leniency Notice is in conformity with the MLP.

The Commission leniency programme offers the cooperating companies essentially two types of leniency rewards. First, full immunity from fines is available to those companies that enable the Commission to carry out targeted inspections or to find a cartel. Secondly, fines reductions of up to 50% may be granted to any subsequent applicants (reduction of fines applicants), which voluntarily present to the Commission evidence representing significant added value. Both groups of applicants however must satisfy certain requirements set out in the 2006 Leniency Notice in order to qualify for leniency. Furthermore, in the event that the Commission increases the fine on the basis of compelling evidence[5] supplied by a reduction of fines applicant and which consequently increases the gravity or duration of an infringement, such an applicant, in order not to be adversely affected by its own admission, will not be liable to pay the fine increase.

Leniency policy, as an investigation tool, was complemented in 2008 by a new policy tool introduced by the Commission – the settlement procedure for cartels[6]. In contrast to the leniency policy, the settlement procedure aims at simplifying and expediting the procedure leading to the adoption of a formal decision, thereby allowing for procedural savings and the internal redeployment of enforcement resources. Under this procedure, concrete contributions to procedural efficiency are rewarded and all parties who agree to a settlement receive a reduction of 10% of their respective fines. Hence, although the leniency programme and settlements each serve a different purpose, they both ultimately lead to enhanced competition law enforcement.

2. Immunity applicant and subsequent applicants

Both the immunity applicant as well as any subsequent applicant has to satisfy certain identical conditions from the moment of filing an application[7], such as the obligation of full, genuine and expeditious cooperation on a continuous basis, in order to ultimately benefit from leniency rewards. However, the immunity application, on the one hand, and subsequent applications, on the other hand, cater for investigation needs of the Commission. Whereas the immunity applicant should enable the Commission either to launch an investigative action (e.g. inspections) or to find a certain specific infringement, subsequent applicants are required to provide evidence that reinforces the ability of the Commission to prove to the requisite legal standard a cartel in an already pending investigation. By the same token, the evidentiary thresholds that have to be met by the immunity applicant and any subsequent applicants differ.

As regards immunity (which is granted on a conditional basis until the adoption of the final decision in the cartel case), the applicant is required to proffer evidence that enables the Commission to carry out inspections (normally unannounced action) targeting specific suspected companies and behaviour. Alternatively, the immunity applicant has to supply the Commission with evidence that contributes in a decisive manner[8] to finding of an infringement by the Commission, which already launched or was able to launch an investigation in to the suspected cartel prior to the immunity application. In contrast, the

---

5 This refers to conclusive, stand-alone evidence, the probative value of which cannot be challenged by simple contestation (see point 26, last paragraph of the 2006 Leniency Notice).

6 OJ L 171, 1.7.2008, p. 3–5 and OJ C 167, 2.7.2008, p. 1–6.

7 As far as the obligation not to destroy, falsify or conceal the evidence and the non-disclosure obligation is concerned, they are incumbent on the applicants from the moment of contemplating the application. See point 12 of the 2006 Leniency Notice for more details on other conditions that have to be satisfied by leniency applicants.

8 By providing clear and persuasive evidence and an informative statement incorporating all information available to it on the cartel and its participants.

subsequent applicants must provide the Commission with evidence on the suspected cartel behaviour which adds significant value to the evidence already in the Commission's possession.

Given the fact that an immunity applicant takes an unprecedented step of disclosing existence of a secret cartel unknown to the Commission at the given time, such company merits more certainty and flexibility than any subsequent applicants reacting[9] to the launch of the Commission's cartel investigation.

In terms of flexibility afforded to the immunity applicants, the Commission leniency programme foresees a discretionary marker option, which is designed to preserve and protect applicant's place in a leniency queue for a definite period of time. Marker system caters for the needs of those immunity applicants who, for legitimate reasons (e.g. when a new management realised upon its appointment that the company was involved in a cartel) are not in the position to submit all necessary evidence and information at a given time, but are able to perfect their application within a certain specific time span. However, the markers are not available to the subsequent applicants, as the element of the 'race to the regulator' between the subsequent applicants would otherwise be compromised.

On the point of legal certainty, while the Commission usually decides on granting or rejecting conditional immunity at the initial stage of the investigation, typically before surprise inspections are carried out, the subsequent applicants will be informed about the grant of conditional reduction of a fine (with determination of the band without indication of the precise discount percentage) or declination thereof typically at the stage immediately preceding adoption of a statement of objections.

Leniency applicants should provide any documentary evidence (direct or indirect) on the suspected cartel behaviour that is available to them. The applicants also have first-hand information on the suspected cartel behaviour that only those participating in the cartel contacts have. They submit such accounts in voluntary statements (which can be made orally) typically describing the cartel and their own involvement in it. Therefore such statements merit special attention, especially in the light of their self-incriminating nature. In order not to dissuade the applicants to come forward with their voluntary account on cartel events, appropriate protection[10] of their self-incriminating leniency submissions is of great importance.

At the same time, the lenient treatment granted by the leniency programme to both immunity and subsequent applicants does not exempt them from liability for civil damages claimed in any civil litigation by private parties injured by the cartel.

Punishment and dismantling of secret cartels as the most serious violations of competition law is one of the top enforcement priorities of the Commission. In consideration of that, the grant of full immunity from fines is a considerable concession for the Commission, which is therefore strictly limited to a single cartel participant, the first to come forward and report on cartel behaviour. On the contrary, reduction of fines of up to 50% is available for unrestricted number of applicants, although the leniency reward for the third and next eligible applicants is limited to no more than 20%.

While reduction of fines is available to all subsequent applicants irrespective of their role in the cartel conduct under investigation or their behaviour vis-à-vis other cartel participants, the company that took steps to coerce others to join the cartel or to remain in it will not be eligible for immunity.

---

9 On rare occasions, subsequent applicants file leniency applications before any investigative measure is taken by the Commission.

10 See also part IV of the 2006 Leniency Notice.

3. Subsequent applications

One of the core principles of the Commission leniency policy is that even if the Commission has granted conditional immunity to an applicant or ex officio gathered sufficient evidence to establish a cartel infringement, other subsequent[11] leniency applicants willing to cooperate with the investigation can also receive lenient treatment in the form of a reduction of any fine that would otherwise have been imposed on them. This being said, any prospective reduction of fines is proportionate to the value added to the Commission's case by the evidence submitted by the subsequent applicant. Therefore, only meritorious subsequent applications, which strengthen the Commission's ability to prove a cartel are rewarded.

3.1. Rationale behind the system of subsequent leniency applications

Vast majority of the subsequent applications filed with the Commission significantly add value and get rewarded accordingly. These successful leniency applications amplify positive effects of the Commission leniency policy on effectiveness of the enforcement action, including on efficiency of case handling.

In general, in cases where several cartel participants cooperate under the umbrella of the 2006 Leniency Notice (as opposed to cooperation from immunity applicant only), the Commission may be able to complete the cases with fewer resources. Also, the evidence on which the case is based can be reinforced.

Furthermore, the leniency programme with its tempting benefits has a tendency to seed distrust and suspicion among cartel members and creates atmosphere of uncertainty, as any of the cartel members may at some point decide to apply for leniency. By allowing subsequent applicants to come forward and get rewarded for disclosing evidence on the cartel, the deterrence function of the leniency policy gains on prominence.

3.2. Leniency incentives for subsequent applicants

Each of the subsequent applicants that is found to have provided evidence representing significant added value (SAV), will receive a fine reduction within a given band. There are three reduction bands – (i) 30-50%, (ii) 20-30% and (iii) up to 20%. Placement in a given band is dependent on order in which companies meet the SAV criterion. In order to determine the level of reduction within each of these bands, the Commission will take into account the time at which the evidence meeting SAV was submitted and the extent to which it represents added value. The applicants are informed about a placement into a given band in so-called 'leniency letters' notified typically in the period immediately preceding the adoption of a statement of objections in a given case. The exact level of reduction is only made known to the applicants in the final prohibition decision adopted in the case.

Furthermore, the so-called "partial immunity" provision foreseen by the 2006 Leniency Notice designed to ensure that the applicants are not worse-off when deciding to cooperate also operates to the benefit of subsequent applicants. When a company provides compelling evidence enabling the Commission to establish new or additional facts liable to extend the gravity or the duration of the infringement, these facts will not be taken into account when setting the fine for the undertaking providing the evidence[12]. This "partial immunity" constitutes a supplementary benefit to be added to the

11 In the event that the Commission is able to find an infringement by itself, without the assistance from an immunity applicant, even the first applicant to submit a leniency application can at most qualify for reduction of fines.

12 See point 26, last para. for more details.

corresponding reduction of fines. The purpose of this provision is to reassure applicants that they will not suffer from their own submissions (meaning that their fines will not increase), but it also aims at encouraging them to provide all conclusive evidence as early as possible in the procedure in order to benefit from any extra reduction before others do.

Increased deterrence resulting from availability of the leniency treatment for subsequent applicants goes also hand in hand with an additional motivation for subsequent applicants to cooperate with the Commission. A mere possibility that inside information about a cartel, its functioning, participants and their role can be disclosed to a competition authority against tangible benefits by more than one cartel participant arguably increases incentives for subsequent leniency applicants to approach the Commission. This applies in particular in situations, where the Commission has already launched an inquiry into the cartelised sector, be it based on an immunity application or on ex-officio basis.

Furthermore, the leniency cooperation with the Commission in a cartel investigation gives the subsequent applicants an opportunity to 'clean the house' and ensure that the company was not involved in other illicit practices than those subject to the Commission's scrutiny at a given time. The companies may well come across evidence of other unrelated infringements, especially in large corporations pursuing business operations in various sectors. Subsequently, the companies may apply and may well benefit from immunity in the newly detected case. It is noteworthy that the Commission recurrently launches on such a basis new investigations in sectors related to those previously subject to the Commission anti-cartel action.

3.3. Substantive test – 'significant added value'

The SAV assessment implies thorough analysis. The underlying principle is that the value of each and every item of evidence provided by an individual leniency applicant is assessed against what is already in the possession of the Commission at the time of the submission of the respective item of evidence. Value added of the evidence provided is assessed against the extent to which such evidence strengthens the ability of the Commission to prove the cartel. Subsequently, based on such item-specific analysis of evidentiary value, an aggregate assessment of the overall value added is made.

In order for evidence to qualify as having SAV, it has to be submitted voluntarily by the leniency applicant. Therefore, for instance, evidence collected during inspections by the Commission is not eligible for SAV, even if the applicant subsequently decides to cooperate under the leniency programme.

The Commission shall take into account also the time at which the evidence was submitted by a leniency applicant. Leniency process can be described as a 'race against the clock' and the first applicant in time to bring the SAV to the case benefits from the placement in the first leniency band. The chances for every subsequent applicant to add significant value to the investigation considerably diminish with every new leniency submission made in the meantime by the precedent applicant(s). The later an applicant provides evidence, the more likely its value will be diminished, in particular in light of the amount and quality of the evidence that Commission might already have in its possession.

In terms of probative value of evidence, incriminating direct evidence (e.g. handwritten notes from the cartel meeting) will generally be considered to have greater value than indirect evidence (such as travel records, which aim at establishing occurrence of a cartel event at a certain date and participation therein).

Similarly, the degree of corroboration required from other sources in order to rely on certain evidence against other companies involved in the case will have an impact on the value of that evidence. Conclusive, stand-alone evidence that requires little or no corroboration to prove the case provides higher contribution to discharge the Commission's burden of proof than evidence, which largely requires corroboration if it is

contested. Detailed evidence regarding specific facts will also have greater value than vague information that has little or no value as evidence before court.

4. Conclusion

Availability of corporate leniency for subsequent applicants after an immunity applicant is an important destabilising factor for cartels and leads to a more effective anti-cartel enforcement action as well as to likely acceleration of cartel investigations. In order to have right balance between leniency incentives and the interest of the investigation, any rewards granted need to be, however, proportionate to the extent to which evidence provided by the subsequent applicants strengthens the ability of the Commission to find a cartel infringement.

FRANCE

(Version française)

La présente note a pour objet de décrire le traitement réservé par l'Autorité de la Concurrence (ci-après dénommée l' « Autorité ») aux demandeurs « ultérieurs » de clémence (**1**), et d'identifier les enjeux de l'interaction entre le programme de clémence et les autres mécanismes applicables aux procédures devant l'Autorité de la Concurrence (**2**).

Le programme de clémence français a été introduit par la loi du 15 mai 2011 relative aux nouvelles régulations économiques (dite « *loi NRE* »).

L'Article L. 464-2 IV du code de commerce, qui présente les principes et grandes lignes de la procédure de clémence dispose :

> *« Une exonération totale ou partielle des sanctions pécuniaires peut être accordée à une entreprise ou à un organisme qui a, avec d'autres, mis en œuvre une pratique prohibée par les dispositions de l'article L. 420-1 s'il a contribué à établir la réalité de la pratique prohibée et à identifier ses auteurs, en apportant des éléments d'information dont l'Autorité ou l'administration ne disposaient pas antérieurement. A la suite de la démarche de l'entreprise ou de l'organisme, l'Autorité de la concurrence, à la demande du rapporteur général ou du ministre chargé de l'économie, adopte à cette fin un avis de clémence, qui précise les conditions auxquelles est subordonnée l'exonération envisagée, après que le commissaire du Gouvernement et l'entreprise ou l'organisme concerné ont présenté leurs observations ; cet avis est transmis à l'entreprise ou à l'organisme et au ministre, et n'est pas publié. Lors de la décision prise en application du I du présent article, l'Autorité peut, si les conditions précisées dans l'avis de clémence ont été respectées, accorder une exonération de sanctions pécuniaires proportionnée à la contribution apportée à l'établissement de l'infraction».*

Le Conseil de la Concurrence (ci-après le « *Conseil* ») a précisé, dans un communiqué de procédure du 11 avril 2006, le champ d'application du programme ainsi que la procédure suivie pour l'enregistrement et le traitement des demandes de clémence. Un nouveau communiqué, tenant compte du programme modèle du Réseau Européen de Concurrence (ci après « *REC* ») en matière de clémence, rédigé en 2006 par un groupe de travail codirigé par le Conseil et l'autorité de concurrence britannique, l'Office of Fair Trading, a été publié par le Conseil le 17 avril 2007, remplaçant le précédent. Enfin, l'Autorité de la concurrence, succédant au Conseil, a adopté le 2 mars 2009 un communiqué révisé de procédure relatif au programme de clémence français (ci-après « *le communiqué de procédure* »).

Depuis la mise en place du programme de clémence en 2001, l'Autorité a adopté six décisions accordant des exonérations totales (cas de type 1) ou partielles (cas de type 2) des sanctions pécuniaires encourues par des entreprises ou organismes participant à une entente.

- Décision 06-D-09 du 11 avril 2006 relative à des pratiques mises en œuvre dans le secteur de la fabrication des portes[1] ;

[1] Arrêt de la Cour d'Appel de Paris du 24 mars 2007.

- Décision 07-D-48 du 18 décembre 2007 relative à des pratiques mises en œuvre dans le secteur du déménagement national et international[2] ;
- Décision 08-D-12 du 21 mai 2008 relative à des pratiques mises en œuvre dans le secteur de la production du contreplaqué[3] ;
- Décision 08-D-32 du 16 décembre 2008 relative à des pratiques mises en œuvre dans le secteur du négoce des produits sidérurgiques[4] ;
- Décision 11-D-17 du 8 décembre 2011 relative à des pratiques mises en œuvre dans le secteur des lessives[5].
- Décision12-D-09 du 13 mars 2012 relative à des pratiques mises en œuvre dans le secteur des farines alimentaires[6] .

1. Traitement réservé aux demandeurs « ultérieurs » de clémence

Le fondement de la réduction de sanction accordée aux demandeurs « ultérieurs»[7]

L'Autorité considère que la réduction de sanction accordée aux demandeurs « ultérieurs » se justifie par la facilitation de l'établissement de la preuve des pratiques anticoncurrentielles, grâce à la « valeur ajoutée significative » des éléments de preuve qu'ils fournissent par rapport à ceux dont l'Autorité dispose déjà, du fait de leur nature même ou du niveau de leur précision (voir également le ***point 1.1.*** ci-dessous).

Dans la décision précitée des produits sidérurgiques, un des participants à l'entente, Descours & Cabaud SA, qui a bénéficié d'une réduction de 35% de sa sanction pécuniaire, a fourni des éléments de preuve dont l'Autorité ne disposait pas avant la demande de clémence. Ces éléments ont été utilisés pour établir l'existence de l'infraction et ont contribué à renforcer les preuves que l'Autorité détenait déjà.

Plus récemment, dans l'affaire précitée des lessives, l'Autorité a relevé que l'un des participants, Henkel, lui avait fourni des éléments de preuve incontestables s'agissant de l'objet, de la durée de l'infraction, et des mécanismes utilisés pour s'assurer du respect de l'accord conclu. Ces éléments corroboraient les déclarations faites par le premier demandeur, Unilever, et ont contribué à l'établissement de la preuve de l'existence d'accords sur les prix et promotions. En outre, l'Autorité a relevé que le troisième demandeur, Procter & Gamble, était le premier à fournir des éléments de preuve particulièrement concluants et contemporains à la dernière période de l'accord. Ainsi, cette affaire n'aurait pu permettre l'établissement de l'infraction sans les éléments de preuve soumis par chacun des demandeurs de clémence.

L'objectif poursuivi par l'Autorité, en accordant une exonération partielle de sanction aux demandeurs « ultérieurs », est d'encourager les entreprises à fournir des éléments susceptibles de renforcer la détection et la sanction des pratiques anticoncurrentielles les plus graves, c'est-à-dire les ententes secrètes. En effet, l'attrait du programme de clémence de l'Autorité réside dans le fait que se trouvent récompensés non seulement le premier demandeur de clémence mais également tout demandeur ultérieur

2 Arrêt de la Cour d'Appel de Paris du 25 février 2009 et arrêt de la Cour de Cassation du 7 avril 2010.

3 Arrêt de la Cour d'Appel de Paris du 29 septembre 2009 et arrêt de la Cour de Cassation du 15 mars 2011.

4 Arrêt de la Cour d'Appel de Paris du 19 janvier 2010.

5 Arrêt de la Cour d'Appel de Paris en attente.

6 Arrêt de la Cour d'Appel de Paris en attente.

7 Cette section répond aux Questions 1 et 2 figurant en page 7 du Document de travail.

qui fournirait des éléments apportant une « valeur ajoutée significative » aux éléments dont l'Autorité dispose déjà.

1.1 Les conditions de l'exonération partielle

Avant de présenter le traitement réservé par l'Autorité aux demandeurs « ultérieurs » (cas de type 2), il est important de rappeler brièvement les règles applicables à l'exonération totale (cas de types 1 A et B), qui définissent également, indirectement, le champ d'application des cas de type 2.

Cas de type 1 :

Le communiqué de procédure précise, au point 13 (cas de type 1 A), que l'Autorité

> *« accordera le bénéfice conditionnel d'une exonération totale des sanctions pécuniaires à toute entreprise qui lui fournit, la première, des informations et des éléments de preuves de l'existence d'une entente si les deux conditions suivantes sont réunies :*
>
> - *l'Autorité ne disposait pas antérieurement d'informations et d'éléments de preuves suffisants pour procéder ou faire procéder de sa propre initiative à des mesures d'investigation ciblée au titre de l'article L. 450-4 du code de commerce, et*
>
> - *du point de vue de l'Autorité, les informations et les éléments de preuves fournis par cette entreprise à l'appui de sa demande de clémence lui permettent de faire procéder à de telles mesures ».*

De plus, lorsque l'Autorité dispose déjà d'informations sur l'entente présumée, qui lui permettent de procéder ou faire procéder à des inspections (cas de type 1 B), le communiqué de procédure prévoit, au point 15, que l'exonération totale sera accordée lorsque :

- *« l'entreprise est la première à fournir des éléments de preuves qui, de l'avis de l'Autorité, sont suffisants pour lui permettre d'établir l'existence d'une infraction à l'article L. 420-1 du code de commerce et, le cas échéant, à l'article 81 du traité CE caractérisant l'existence d'une entente ;*

- *au moment de la demande, l'Autorité ne disposait pas d'éléments de preuves suffisants pour lui permettre d'établir l'existence d'une infraction à l'article L. 420-1 du code de commerce et, le cas échéant, à l'article 81 du traité CE caractérisant l'existence d'une entente, et*

- *aucune entreprise n'a obtenu d'avis conditionnel d'exonération totale de type 1 A pour l'entente présumée ».*

Cas de type 2[8] :

Le communiqué de procédure précise également les conditions d'éligibilité à l'exonération partielle des sanctions pécuniaires lorsque l'entreprise n'est pas éligible à l'exonération totale.

Selon le point 17 du communiqué de procédure, le critère unique pour accorder une réduction de la sanction pécuniaire est la fourniture d'éléments de preuves apportant une valeur ajoutée significative par rapport aux éléments de preuve dont l'Autorité dispose déjà, « *la notion de valeur ajoutée [visant] la mesure dans laquelle les éléments de preuves fournis renforcent, par leur nature même et/ou par leur*

[8] Cette section répond à la Question 1 qui figure à la page 10 du Document de travail.

niveau de précision, la capacité de l'Autorité à établir l'existence de l'entente présumée ». Dans cette perspective, l'Autorité prend en compte les éléments suivants :

- *« les éléments de preuve écrits contemporains de l'entente présumée ont une valeur supérieure aux éléments établis ultérieurement ;*

- *les éléments de preuve à charge se rattachant directement aux faits en cause ont une valeur supérieure aux éléments s'y rapportant indirectement, et*

- *les éléments de preuve incontestables ont une valeur supérieure aux éléments devant être corroborés en cas de contestation ».*

Dans la décision précitée des produits sidérurgiques, la valeur ajoutée des déclarations et documents fournis à l'Autorité a été reconnue du fait de la présence des trois caractéristiques cumulatives de la « valeur ajoutée significative » :

- Des explications portant sur le fonctionnement général du cartel, sur la définition des termes employés dans le cartel, ses mécanismes concrets de mise en œuvre sur le marché ainsi que ses évolutions dans le temps ont été fournies ;

- Des spécificités du mécanisme de fonctionnement du cartel ont été soigneusement mises en lumière.

- Des éléments additionnels ont été fournis, qui établissaient la preuve de collusion des participants dans des régions dans lesquelles aucune vérification sur place n'avait été effectuée.

Pour évaluer le niveau d'exonération des sanctions pécuniaires, l'Autorité prend en compte (i) le rang de la demande, (ii) le moment où elle a été présentée et (iii) le degré de « valeur ajoutée significative » que les éléments de preuves fournis par cette entreprise ont apporté. Par exemple, l'Autorité a adopté une décision mettant en œuvre les cas de clémence de type 2 dans le cartel des produits sidérurgiques mentionné ci-dessus, et a accordé une réduction de 35% de la sanction pécuniaire au demandeur. Dans cette décision, l'Autorité a précisé que *« pour déterminer la part de l'exonération accordée, l'Autorité prend en compte la date à laquelle la société a fait sa démarche, la valeur ajoutée des éléments apportés et toutes les autres circonstances* ».

Concernant les incitations accordées aux demandeurs « ultérieurs », le niveau de réduction ne peut en principe excéder 50% de la sanction pécuniaire qui devrait être imposée en l'absence du bénéfice de la clémence. De plus, le point 19 du communiqué de procédure précise que « *si l'entreprise qui présente la demande fournit des preuves incontestables permettant à l'Autorité d'établir des éléments de fait supplémentaires ayant une incidence directe sur la détermination du montant des sanctions pécuniaires infligées aux participants à l'entente, cette contribution supplémentaire sera prise en compte dans la détermination individuelle de la sanction qui pourra faire l'objet d'une exonération partielle* ».

Outre les conditions d'éligibilité, le point 21 du communiqué de procédure prévoit deux conditions de fond (également applicables aux cas de type 1) : (i) l'entreprise doit cesser immédiatement toute participation dans le cartel présumé et (ii) le demandeur à la clémence doit apporter à l'Autorité une coopération véritable, totale, permanente et rapide. Concernant la condition de la coopération, le communiqué de procédure précise qu'elle doit être entendue comme comprenant les obligations suivantes :

- *« fournir sans délai à l'Autorité toutes les informations et tous les éléments de preuves qui viendraient en sa possession ou dont elle peut disposer sur l'entente présumée ;*

- *se tenir à sa disposition pour répondre rapidement à toute demande de sa part visant à contribuer à l'établissement des faits en cause ;*

- *mettre à sa disposition, pour les interroger, ses représentants légaux et ses salariés actuels, ainsi que, dans la mesure du possible, ses anciens représentants légaux et salariés ;*

- *s'abstenir de détruire, de falsifier ou de dissimuler des informations ou des éléments de preuves utiles se rapportant à l'entente présumée, et*

- *s'abstenir de divulguer l'existence ou la teneur de sa demande de clémence avant que l'Autorité n'ait communiqué ses griefs aux parties, sauf si l'Autorité y donne son accord».*

En pratique, l'Autorité a toujours constaté que la coopération de chaque entreprise était suffisamment véritable, totale et permanente pour leur permettre de bénéficier de la clémence dans les conditions prévues par l'avis conditionnel. Dans chacune de ces décisions, l'Autorité a vérifié avec attention que les demandeurs de clémence avaient respecté leur obligation de coopération véritable. En revanche, dans la décision des lessives susmentionnée, un des demandeurs « ultérieurs », Henkel, n'a pu obtenir le montant maximal de réduction envisagé, de 30% de sa sanction pécuniaire, en raison d'une atteinte partielle à son devoir de coopération.

1.2 L'approche de l'Autorité

En premier lieu, il convient de relever qu'une prise de contact anonyme avec l'Autorité afin d'obtenir des informations générales sur la procédure de clémence est possible.

Ensuite, la demande est effectuée soit par lettre recommandée avec avis de réception soit oralement, auquel cas le Rapporteur Général de l'Autorité prend note de la date et de l'heure de la déclaration.

Le point 27 du communiqué de procédure indique que « pour accomplir cette démarche, l'entreprise doit fournir à l'Autorité, outre son nom et son adresse, des informations sur les circonstances ayant conduit à l'introduction de sa demande de clémence, le(s) produit(s) en cause et le(s) territoire(s) sur lesquels l'entente présumée est susceptible de produire ses effets, l'identité des auteurs de cette entente, sa nature et sa durée estimée, ainsi que sur toute demande de clémence relative à cette entente présumée qui a été ou sera formulée auprès d'autres autorités de concurrence ».

1.3 Le système du marqueur

Le programme de clémence français prévoit un marqueur quasi automatique, c'est-à-dire dès lors que l'entreprise fournit tous les renseignements énoncés au point 27 susmentionné.

Le communiqué de procédure énonce que :

- *« La réception du courrier adressé en recommandé avec demande d'avis de réception ou l'établissement d'un procès-verbal par le rapporteur général permet de marquer l'ordre d'arrivée des demandes de clémence, à condition que l'entreprise ait fourni les informations visées au point précédent » (nous soulignons) ;*

- *« Le rapporteur général accorde à l'entreprise un délai, dont il fixe la durée, pendant lequel le rang d'arrivée de la demande est maintenu, afin de permettre à l'entreprise de réunir les informations et les éléments de preuves relatifs à l'entente présumée qui seront nécessaires à l'examen de sa demande de clémence par l'Autorité. Si elle respecte les délais impartis, les*

informations et éléments de preuves fournis seront considérés comme ayant été communiqués à la date de réception de la demande, constatée dans le courrier ou le procès-verbal marquant son rang d'arrivée » » (nous soulignons).

Tel que précisé ci-dessus, si toutes les informations énumérées au point 27 susmentionné sont recueillies, l'Autorité n'a pas un pouvoir discrétionnaire pour octroyer le marqueur. Toutefois, le marqueur est subordonné à un certain nombre de conditions : il est conditionnel et n'est plus opposable à l'Autorité si le requérant ne fournit pas tous les éléments de preuve et informations dans le délai imparti par le rapporteur au cas par cas (la pratique courante est d'octroyer un délai de deux mois pour recueillir toutes les informations pertinentes). Une prorogation du délai peut être accordée au cas par cas, notamment dans des affaires où surviennent des difficultés clairement identifiées pour collecter des informations. Un délai supplémentaire peut également être accordé pour soumettre une copie originale d'un document identifié ou lorsque, après la requête, sont identifiées de nouvelles zones géographiques de l'entente.

Il importe de souligner que tous les types de demande de clémence peuvent donner lieu à un marqueur, en ce compris les demandes ultérieures.

1.4 Instruction de la demande de clémence[9]

Premièrement, il convient de noter que la date à laquelle les participants au cartel apportent des informations est importante pour le sort qui sera réservé à la demande de clémence. En effet, la demande de clémence doit être enregistrée et examinée avant la réception de la communication des griefs, étant donné que l'objectif du programme de clémence est précisément de fournir à l'Autorité les moyens de détection de pratiques et d'établissement de la communication des griefs.

Après la réception de la demande, le rapporteur désigné pour instruire la demande de clémence prépare un rapport dans lequel il vérifie que les conditions pour obtenir le bénéfice d'une exonération totale ou partielle sont réunies. Son rapport est ensuite adressé, au moins trois semaines avant la séance devant le collège de l'Autorité, qui dispose d'une compétence exclusive pour la décision et la fixation de la sanction, à l'entreprise demanderesse. A la suite de cette séance, l'Autorité adopte un avis dans lequel elle indique à l'entreprise si elle accorde une exonération totale ou partielle des sanctions pécuniaires, ainsi que, dans ce dernier cas, les fourchettes du taux de l'exonération qui lui sera éventuellement accordé si la coopération attendue de la part de l'entreprise a été effectivement fournie par cette dernière. Dans le cas où l'Autorité estime que les conditions posées pour obtenir l'exonération totale ou partielle ne sont pas réunies, elle émet un avis défavorable ; les informations et les éléments de preuves fournis sont alors restitués à l'entreprise si celle-ci en fait la demande. L'avis de clémence conditionnel est délivré, en général, quelques mois après l'enregistrement de la demande par le rapporteur général. Pour une présentation exhaustive du traitement des demandes de clémence par l'Autorité, veuillez vous référer à l'**Annexe 1** ci-jointe.

L'avis rendu par l'Autorité reste conditionnel et ne sera confirmé que lors de la décision définitive rendue sur le fond. L'Autorité ne peut, sauf violation de l'obligation de coopération, se départir de la fourchette indiquée dans un sens défavorable au demandeur mais elle peut lui faire bénéficier d'un traitement plus favorable qu'initialement envisagé, comme cela a été le cas dans la décision précitée relative au marché de l'acier, si la coopération mise en œuvre est d'une qualité particulière.

L'avis conditionnel de clémence, pour les candidats « ultérieurs » comme pour les autres, peut être révoqué si les conditions de coopération n'ont pas été satisfaites. Une telle situation ne s'est jamais présentée devant l'Autorité. Toutefois, dans le secteur du gaz de pétrole liquéfié (GPL), l'Autorité a rendu

9 Cette section répond aux Questions 3 et 4 figurant à la page 10 du Document de travail.

un avis de clémence positif avant de décider que les preuves fournies par les demandeurs n'étaient pas en mesure de contribuer à l'établissement du cartel, les éléments de preuve contenant des incohérences significatives. En effet, postérieurement à l'avis conditionnel, l'Autorité a reçu une expertise mettant en doute l'authenticité de documents fournis dans le cadre de la demande. En conséquence, l'Autorité a clos la procédure, n'étant pas en mesure d'établir la réalité de l'infraction (décision 10-D-36 du 17 décembre 2010). La décision précise que cette mesure est sans préjudice d'une éventuelle décision du président de l'Autorité de soumettre le dossier au Procureur de la République en application de l'article R. 461-1 du code de commerce.

En outre, comme précédemment indiqué, dans l'affaire des lessives, Henkel s'est vu accorder une réduction de 25%, soit un chiffre compris dans la fourchette envisagée par l'avis de clémence, mais il n'a pas obtenu la réduction maximale à laquelle il prétendait avoir droit. Après avoir examiné la valeur ajoutée de la preuve présentée par le demandeur et évalué si son comportement était conforme à son devoir de coopération, l'Autorité a estimé, qu'à partir du 22 avril 2010, ce candidat à la clémence avait partiellement méconnu ses obligations de coopération en compromettant l'établissement de l'infraction visée dans l'avis de clémence par les services d'instruction et le collège de l'Autorité (paragraphes 710-744).

Concernant la définition du devoir de coopération, la décision précise que :

> *« Le Code de commerce appréhende la procédure de clémence comme une contribution active et volontaire d'entreprises ou d'organismes ayant participé à des ententes, non seulement à leur détection par l'Autorité, par le biais de la production d'éléments de preuve, mais également, en aval, à l'instruction de l'affaire par les services d'instruction et, en définitive, au constat, par le collège, de la réalité de la pratique prohibée. En pratique, l'obligation de « contribuer à établir la réalité de la pratique prohibée et à identifier ses auteurs, en apportant des éléments d'information dont l'Autorité ne disposait pas antérieurement » signifie donc que, dans les procédures d'ententes, qui comprennent plusieurs étapes, d'une part, et qui peuvent porter sur des faits complexes à établir et généralement occultes, d'autre part, la coopération attendue du demandeur n'est pas épuisée par le seul fait de présenter sa demande de clémence ; elle reste nécessaire tout au long de la période séparant le dépôt de cette demande de la tenue de la séance du collège, en passant par les différentes étapes de la phase préliminaire d'enquête et de la procédure d'instruction. Cette obligation de coopération, qui se retrouve aussi dans le programme modèle du Réseau européen de la concurrence en matière de clémence et dans la jurisprudence de l'Union (voir, par exemple, arrêt du Tribunal Elf Aquitaine/Commission, et la jurisprudence du 9 septembre 2011, Deltafina/Commission, T-12/06), est rappelée par le communiqué de procédure du 17 avril 2007 précité. Celui-ci souligne en particulier que la coopération attendue du demandeur doit être « véritable, totale, permanente et rapide dès le dépôt de la demande et tout au long de la procédure d'enquête et d'instruction » (paragraphe 20). Il rappelle aussi que cette obligation doit être respectée « dans tous les cas » et qu'elle « ouvre droit à l'exonération totale ou partielle » de sanction pécuniaire (paragraphes 716 et 717 de la décision) ».*

2. Interaction entre le programme de clémence et les autres politiques d'application des règles de concurrence[10]

Les développements suivants traitent des interactions entre le programme de clémence et la procédure de non-contestation des griefs (**2.1**.), l'action en dommages et intérêts (**2.2.**) et la responsabilité pénale des personnes physiques (**2.3**.).

[10] Cette section répond aux questions 1 et 2 se trouvant aux pages 5 et 11 du Document de travail.

2.1 Interaction entre le programme de clémence et la non-contestation des griefs

2.1.1 Les principes directeurs de l'Autorité

Le premier principe directeur consiste en la possibilité pour l'Autorité d'accorder ou non la non-contestation des griefs, en fonction des gains procéduraux attendus, en prenant en compte toutes les preuves que l'Autorité possède déjà, y compris les éléments de preuve issus des demandes de clémence antérieures.

Le deuxième principe consiste pour l'Autorité à s'assurer que le profit maximum qui peut être obtenu d'une demande de clémence ultérieure demeure plus intéressant que celui qui pourrait être obtenu d'une simple non-contestation des griefs. Il existe en effet un écart entre les niveaux de coopération dans les deux hypothèses : dans une non-contestation des griefs, contrairement à la clémence, le demandeur se contente de renoncer à contester les griefs et ne fournit pas d'éléments de preuve sur l'infraction et l'identité des parties à l'entente.

2.1.2 La pratique décisionnelle de l'Autorité

En pratique, l'Autorité distingue deux situations : premièrement, la combinaison entre clémence et non-contestation des griefs dans le cadre de la même affaire pour différentes infractions, et deuxièmement, la combinaison des deux procédures pour le même contrevenant.

- Dans la première hypothèse, l'Autorité ne rejette pas les demandes de non-contestation des griefs dans les affaires dans lesquelles elle a déjà accordé un avis de clémence conditionnel favorable pour d'autres infractions. Dans les affaires des déménagements internationaux, des produits sidérurgiques et de la farine précitées, la proposition du rapporteur général d'accepter la non-contestation des griefs a été validée par le collège.

- Dans la deuxième hypothèse, l'Autorité pourrait cumuler des réductions au bénéfice de la même entreprise sur la base, d'une part, d'une demande de clémence acceptée (qui peut résulter, le cas échéant, d'une demande « ultérieure »), et d'autre part, d'une non-contestation des griefs, si cette combinaison offre des avantages procéduraux à l'Autorité. Dans la récente décision sur le cartel des lessives, l'Autorité a considéré qu'une telle économie de procédure trouvait à s'appliquer dans les hypothèses où le champ des griefs est plus large que celui de la demande de clémence.

2.1.3 Communiqué sur la procédure de non-contestation des griefs

Le 10 février 2012, l'Autorité a adopté un communiqué de procédure relatif à la non-contestation des griefs. Celui-ci prend en compte la décision précitée sur le cartel des lessives et ouvre la possibilité, dans certaines circonstances, de combiner les bénéfices de la clémence et de la non-contestation des griefs. A ce titre, le communiqué de procédure distingue clairement les exigences de l'Autorité à l'égard des deux procédures.

En effet, le communiqué de procédure précise que la contribution attendue d'une entreprise qui renonce à son droit de contester une communication de griefs et s'engage à mettre en œuvre des mesures visant à assurer que ses activités commerciales respectent le droit de la concurrence n'est pas identique à celle d'une entreprise qui coopère avec l'Autorité en amont dans le cadre d'une demande de clémence.

Même si la clémence et la non-contestation des griefs facilitent les investigations et génèrent des gains d'efficacité en termes de délais et de coûts administratifs, les deux mécanismes ne poursuivent pas les mêmes objectifs. L'objectif d'une demande de clémence est, contrairement à une non-contestation des

griefs, de présenter des éléments de preuve permettant de détecter et qualifier une pratique anticoncurrentielle. En conséquence, ce mécanisme présente un intérêt supérieur à la décision de renoncer à contester les griefs notifiés par l'Autorité.

Par ailleurs, le point 6 du communiqué de procédure relatif à la non-contestation des griefs précise que la coopération attendue dans le cadre d'une demande de clémence est plus importante que celle attendue d'une entreprise souhaitant obtenir une réduction de la sanction pécuniaire sur la base d'une non-contestation des griefs. En conséquence, afin de ne pas porter atteinte à l'attractivité du programme de clémence par rapport à celle de la non-contestation des griefs, l'Autorité considère que dans les affaires dans lesquelles les deux procédures sont envisageables, la réduction de la sanction pécuniaire pouvant être accordée aux entreprises au titre de la non-contestation des griefs sera inférieure à l'exonération totale ou partielle attachée à la clémence. En outre, la combinaison des deux réductions de la sanction pécuniaire résultant d'une demande « ultérieure » de clémence ne doit pas être plus élevée que la réduction obtenue par le premier demandeur.

2.2 Interaction entre le programme de clémence et les actions en dommages et intérêts

La question de l'interaction entre le programme de clémence et les actions civiles est liée à la question de l'attractivité de la demande de clémence dans l'hypothèse de la divulgation d'informations relatives à la clémence au profit des demandeurs à l'action civile.

Il est essentiel d'éviter que le demandeur à la clémence, qui a spontanément fourni des éléments de preuve et des déclarations qui établissent sa participation à une infraction, se trouve, devant les juridictions civiles, dans une situation moins favorable que si l'entreprise n'avait pas fourni à l'Autorité ces informations (voir l'avis de l'Autorité du 21 septembre 2006 sur l'introduction de l'action collective en matière de pratiques anticoncurrentielles et sa réponse du 25 mai 2001 à la consultation publique lancée par la Commission Européenne). Cette préoccupation est partagée à travers l'Union Européenne, comme le montre la résolution adoptée par les Présidents des Autorités de Concurrence Européennes du 23 mai 2012, qui retient qu'il est fondamental de protéger autant qu'il est nécessaire les preuves issues de la clémence contre leur divulgation dans le cadre d'une action civile en réparation du préjudice afin de préserver l'efficacité des programmes de clémence.

C'est la raison pour laquelle l'Autorité s'engage à ne divulguer aucune déclaration issue de la clémence dans le cadre de procédures judiciaires et a suggéré des modifications législatives en ce sens.

2.3 L'articulation entre le programme de clémence et la responsabilité pénale des personnes physiques

Bien que des poursuites pénales soient possibles contre une personne physique qui a frauduleusement pris une part personnelle et déterminante dans la création, l'organisation ou la mise en œuvre d'un cartel, en application de l'Article L. 420-6 du code de commerce, cette disposition reste peu appliquée.

En théorie, des sanctions individuelles existent, pour les cartels autant que pour les autres infractions aux règles de concurrence (par exemple, collusion dans les soumissions d'offres, autres accords anticoncurrentiels verticaux ou horizontaux, et abus de position dominante). En pratique, ces sanctions sont confinées aux hypothèses de soumission concertée à un appel d'offre. L'infraction pénale aux règles de concurrence est, en général, combinée à d'autres infractions pénales telles que le détournement de fonds, la corruption, le favoritisme ou l'abus de bien sociaux. Depuis 2002, une seule peine d'emprisonnement a été prononcée. Dans tous les autres dossiers, quelques peines de prison avec sursis on pu être prononcées, allant de 6 à 12 mois, mais dans la majorité des cas, seules des amendes ont été infligées, dont le montant variait de 1000 à 30 000 euros.

Cette application faible de la législation pénale n'a en conséquence pas réellement d'effet dissuasif sur la politique de clémence.

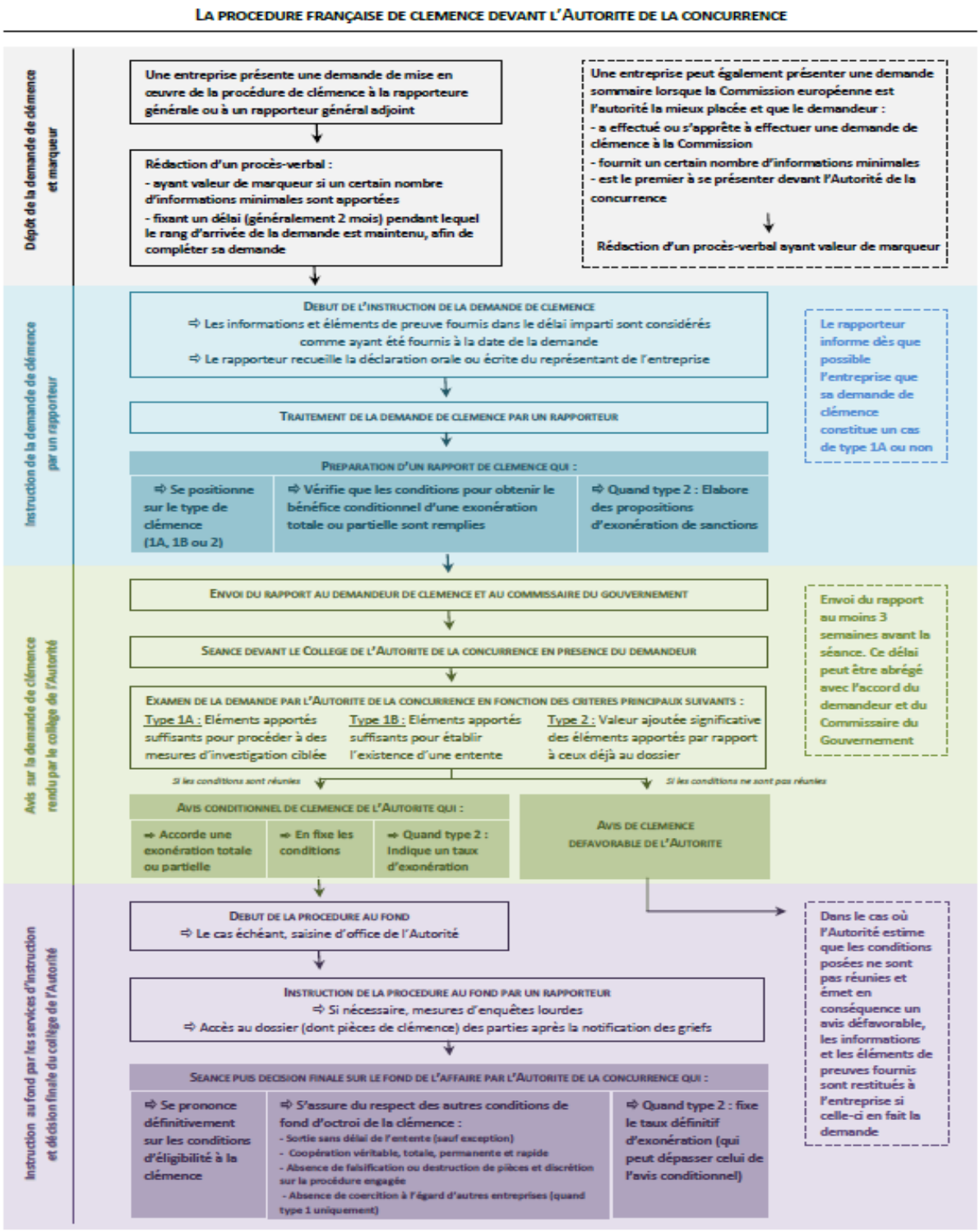
En outre, le point 48 du communiqué de procédure relatif à la politique de clémence de l'Autorité prévoit :« l'Autorité considère que la clémence est au nombre des motifs légitimes qui justifient la non transmission au parquet d'un dossier dans lequel les personnes physiques, appartenant à l'entreprise qui a bénéficié d'une exonération de sanctions pécuniaires, seraient susceptibles de faire aussi l'objet de telles poursuites ». L'Autorité considère en effet que la protection de la confidentialité des éléments de preuve issus de la clémence est essentielle au maintien de l'attractivité de son programme de clémence, et, en conséquence, à la dissuasion.

Afin de renforcer cette position, un rapport officiel (le « Rapport Coulon[11] ») a été présenté au Garde des Sceaux en janvier 2008. Son objectif principal était d'engager une réflexion sur le droit pénal des affaires et, notamment de modifier l'articulation entre la sanction pénale et la sanction administrative dans le domaine de la distribution, de la consommation et de la concurrence. La mission a conclu, dans ce dernier domaine qu'il y avait un besoin, réel bien que limité, de moderniser ce domaine du droit. Elle a suggéré d'introduire un système de clémence pour les personnes physiques, qui prendrait en compte l'appréciation, par l'Autorité, du degré de coopération de l'individu et de l'entreprise dans laquelle il est employé ou dirigeant.

11 Jean-Marie Coulon, ancien Président de la Cour d'Appel de Paris, a présidé la commission de 19 membres chargée de réfléchir à la dépénalisation de la vie des affaires.

ANNEXE 1

Le traitement des demandes de clémence par l'autorité de la concurrence



FRANCE

(English version)

The present note aims at describing the treatment reserved by the Autorité de la concurrence (hereafter the "*Autorité*") to subsequent leniency applicants (**1**) and identifying the stakes of the interplay between the leniency programme and several other enforcement mechanisms applicable before the Autorité (**2**).

The French leniency programme was introduced by the New Economic Regulations Law ("*NRE law*") of 15 May 2001.

Article L.464-2 IV of the code de commerce, which sets out the principles and outlines the leniency programme, provides that:

> "*Immunity from any fine or a reduction of fine may be granted to an undertaking or body which has, with others, implemented a practice prohibited by the provisions of article L.420-1 if it has contributed to establishing the reality of the prohibited practice and to identifying its perpetrators, by providing information which the Autorité de la concurrence or administration did not have previously. Following the steps taken by the undertaking or body, the Autorité de la concurrence shall adopt for this purpose a leniency opinion, which shall specify the conditions attached to the envisaged immunity, after the Government Official and the undertaking or body concerned have presented their observations. This opinion shall be notified to the undertaking or body and shall not be published. When the decision is adopted pursuant to point I of the present article, the Autorité may, if the conditions specified in the leniency opinion have been met, reduce the fines in proportion to the contribution made to establishing the infringement*".

On 11 April 2006, a Procedural Notice relating to the French leniency programme was adopted by the Conseil de la concurrence (hereafter the "*Conseil*") which detailed the scope of the leniency programme and the procedural steps which apply to leniency applications. This Procedural Notice was updated on 17 April 2007 in order to align it with the European Competition Network (hereafter the "*ECN*") Model Leniency Program drafted in 2006 by a working group co-chaired by the Conseil and the British Office of Fair Trading. On 2 March 2009, the Autorité de la concurrence, which took over antitrust powers from the Conseil, adopted a revised Procedural Notice.

Since the introduction of the leniency programme in 2001, the Autorité has issued six fining decisions implementing leniency, granting both full immunity from fines (type 1 case) and partial immunity from fines (type 2 case).

- Decision 06-D-09 of 11 April 2006 relating to a cartel on doors manufacturing[1];
- Decision 07-D-48 of 18 December 2007 relating to a cartel in domestic and international removal services[2];

1 Judgment of the Court of Appeal of Paris of 24 March 2007.

- Decision 08-D-12 of 21 May 2008 relating to a cartel on cardboards[3];
- Decision 08-D-32 of 16 December 2008 relating to a cartel on steel trade retailing products[4];
- Decision 11-D-17 of the 8 December 2011 relating to a cartel on laundry detergents[5];
- Decision 12-D-09 of the 13 March 2012 relating to a cartel on packaged flour marketed in the food retailing sector[6].

1. Treatment reserved to subsequent applicants

Rationale for granting a reduction of fine to subsequent applicants[7]

The Autorité considers that the rationale for granting a reduction of fine to subsequent applicants is that such co-operation facilitates the establishment of anticompetitive practices given the "significant added value" of pieces of evidence provided by the applicants in comparison with those that the Autorité has already in its possession, given their nature or level of accuracy (please refer also to ***point 1.1*** below).

In the *steel trade* case mentioned above, one of the participants in the cartel, Descours & Cabaud SA, which benefited from a 35% reduction of fine, provided pieces of evidence, among which some were unknown from the Autorité before the leniency application. These elements were used to establish the existence of the infringement and contributed to reinforce the evidence already held by the Autorité.

More recently, in the *laundry detergents* case mentioned above, concerning one of the subsequent applicants, Henkel, the Autorité noted that this undertaking provided it with material and compelling evidence reporting the exact purpose and duration of the infringement, describing the mechanisms to ensure compliance with the agreement reached. All these elements corroborated the statements made by the first applicant, Unilever, and contributed towards the proof of the existence of agreements on prices and promotions. Moreover, the Autorité noticed that the third applicant, Procter & Gamble, was the first to provide documentary evidence, contemporaneous and particularly conclusive on the later period of the practices. Therefore, this case could not have been brought to a successful prosecution without pieces of evidence submitted by the subsequent applicants.

The objective pursued by the Autorité by granting a reduction of fine to subsequent applicants is to encourage undertakings to provide material susceptible to reinforce the detection and the penalization of the most harmful practices, namely secret cartels. Indeed, the attractiveness of the Autorité's leniency programme results obviously from the fact that not only the first applicant is rewarded but also subsequent applicants if their evidence have "significant added value".

---

2 Judgment of the Court of Appeal of Paris of 25 February 2009 and judgment of the Court of cassation of 7 April 2010.

3 Judgment of the Court of Appeal of Paris of 29 September 2009 and judgment of the Court of cassation of 15 March 2011.

4 Judgment of the Court of Appeal of Paris of 19 January 2010.

5 The appeal is pending.

6 The appeal is pending.

7 This part answers to Questions 1 and 2 listed on page 7 of the Issue Paper.

1.1 Conditions of the benefit of partial immunity

Prior to describing the treatment by the Autorité of subsequent applicants (type 2 case), it is important to recall briefly the rules applicable to the benefit of full immunity from fines (type 1 A and B case), as these also define indirectly the scope of type 2 applications.

Type 1 case

The Procedural Notice specifies, in point 13 (type 1 A case), that the Autorité:

> *"will grant the conditional benefit of immunity from fine to any undertaking which is the first to submit information and pieces of evidence on the existence of an agreement if the following conditions are met:*
>
> - *the Autorité did not previously have sufficient information and pieces of evidence to be able to carry out or to have carried out targeted inspections, on their own initiative, as per article L.450-1 of the code de commerce, and*
>
> - *the information and pieces of evidence submitted by the undertaking applying for leniency are sufficient, in the Autorité's point of view, to have such measures carried out".*

Furthermore, where the Autorité already has information on the suspected agreement enabling it to carry out inspections (type 1 B case), the Procedural Notice states in point 15 that the conditional benefit of full immunity from fines will be granted if:

- *"the undertaking is the first to submit pieces of evidence which, in the Autorité's view, are sufficient to establish the existence of an infringement of article L.420-1 of the code de commerce and, where applicable, to article 81 of the EC Treaty defining the existence of an agreement;*

- *at the time of the application, the Autorité did not have sufficient evidence to establish the existence of an infringement to article L.420-1 of the code de commerce and, where applicable, to article 81 of the EC Treaty defining the existence of an agreement, and*

- *no undertaking has obtained a conditional opinion granting a type 1 A full immunity for the alleged agreement".*

Type 2 case[8]

The Procedural Notice also indicates the eligibility conditions for benefiting from a reduction of fine where the undertaking does not qualify for full immunity.

According to point 17 of the Procedural Notice, the sole criterion to grant a reduction of fine is to bring forward pieces of evidence with "*significant added value*" in comparison to evidence already in possession of the Autorité, "*the concept of added value refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the ability of the Autorité to prove the existence of the alleged agreement*". In this regard, the Autorité takes into account the following elements:

- *"the written evidence contemporaneous with the alleged agreement has a greater value than evidence subsequently established;*

8 This part answers to Question 1 listed on page 10 of the Issue Paper.

- *the incriminating evidence directly relevant to the facts at stake has a greater value than evidence of indirect relevance;*

- *the compelling evidence has a greater value than the evidence which requires corroboration in case of dispute".*

In the *steel trade* case mentioned above, the added value of statements and documents submitted to the Autorité was acknowledged because of three cumulative "significant added value" features:

- the explanations on the overall functioning of the cartel, on the definition of specific terms employed within the cartel, on its mechanisms of concrete implementation on the marketplace, as well as their modifications through time;

- very detailed highlights were drawn on specific functioning mechanisms of the cartel, and

- further elements evidencing collusion of the participants in some regions where no inspections on the spot were carried out.

For assessing the level of the reduction of the fine, the Autorité considers (i) the ranking of the application, (ii) the time when the evidence was submitted and (iii) the extent to which the elements submitted by the undertaking bring "significant added value". For instance, the Autorité issued a decision applying type 2 leniency in the *steel trade* cartel mentioned above and granted a 35% reduction of fine to the applicant. In this decision, the Autorité indicated that "*To determine the level of partial immunity to be awarded, the Autorité takes into account the exact date of the application, the added value of the elements brought forward and any other in concreto circumstances of the case*".

Concerning the incentives granted to subsequent applicants, the level of reduction shall not in principle exceed 50% of the fine which would have otherwise been imposed, had it not been granted leniency. Furthermore, point 19 of the Procedural Notice specifies that "*if the undertaking applying for leniency provides compelling evidence which enable the Autorité to establish additional elements of facts which have a direct bearing on the amount of the fine imposed on the participants to the agreement, this additional contribution will be taken into account in the individual setting of the fine which may give rise to partial immunity*".

In addition to the eligibility conditions, point 21 of the Procedural Notice sets out two substantive conditions (also applicable to type 1 case): (i) the undertaking must end its involvement in the cartel without delay and (ii) the applicant must genuinely and fully co-operate with the Autorité, on a continuous basis and expeditiously. Concerning the condition of genuine co-operation, the Procedure Notice specifies that such a co-operation includes:

- *"providing without delay the Autorité information and pieces of evidence on the alleged agreement that would come into the applicant's possession or are available to it;*

- *remaining at their disposal to answer promptly to any request on their part that aims at contributing to the establishment of the facts at stake;*

- *making current and, insofar possible, former employees and legal representatives available for interrogation;*

- *abstaining from destroying, falsifying or concealing relevant information or evidence relating to the alleged agreement; and*

- *abstaining from disclosing the existence or the content of its leniency application before the Autorité has issued its statement of objections to the parties unless otherwise agreed with the Autorité".*

In practice, the Autorité noticed that co-operation of all undertakings was genuine, full and continuous enough to grant final leniency benefits in the conditions provided for by the conditional opinion. In each of these cases, the Autorité carefully reviewed whether leniency applicants had fully complied with their obligation of "genuine co-operation". On the contrary, in the *laundry detergents* case mentioned above, one of the subsequent applicants, Henkel, did not benefit from the maximum amount of reduction expected, a 30% reduction of fine, given the partial breach of its co-operation duty.

1.2 Approach of the Autorité

First, it should be noted that prior and anonymous contacts with the Autorité to obtain general information on the leniency procedure are possible.

Then, the application is either initiated by letter sent by recorded delivery with receipt request or made orally, in which case the General Rapporteur of the Autorité takes notice on a written document of the time and date of the statement.

Point 27 of the Procedural Notice indicates that "the undertaking must provide the Autorité, in addition to its name and address, with information on the circumstances which led to the introduction of its leniency application, on the product(s) and on the territory(-ies) on which the alleged agreement is likely to have an impact, the identity of the parties to the alleged agreement, the nature and the estimated duration of the agreement and on any leniency application which has been, or will be made, to other competition authorities in relation to this alleged agreement".

1.3 Marker system[9]

The French leniency programme provides for an almost automatic marker, i.e. if the undertaking provides all information stated in point 27 mentioned above.

The Procedural Notice specifies that:

- *"the receipt of the mail sent by recorded delivery with receipt request or the statement established by the General Rapporteur makes it possible to mark the application for the leniency program in the queue, provided the undertaking has submitted the information referred to in the previous paragraph" (we underline);*

- *"the General Rapporteur grants the undertaking a period of time, during which the application's rank in the queue is maintained, to allow the undertaking to collect the information and pieces of evidence relating to the alleged agreement which will be necessary for the examination of the leniency application by the Autorité. If the periods are respected, the information and the pieces of evidence will be considered as having being submitted at the date of the receipt of the application, as indicated in the letter or in the statement marking its order of arrival"* (we underline).

As specified above, if all information listed in point 27 mentioned above is gathered, the Autorité has no discretionary power to grant the marker but the marker is conditional: it is not binding on the Autorité if

[9] This part answers to Question 2 listed on page 10 of the Issue Paper.

the applicant does not supply all the supplementary evidence and information within the timeframe defined by the General Rapporteur on a case-by-case basis (common practice is to grant 2 months delay to gather all relevant information). The deadline may be extended on a case-by-case basis, in particular in cases where difficulties to collect information were clearly identified and grounded or to allow time to submit the original copy of a document identified or when new geographical areas of the cartel were identified after the application.

It should be underlined that all types of leniency applications can give rise to a marker, including for subsequent applicants.

1.4 Examination of the leniency application[10]

First, it should be noted that the point in time at which participants in the cartel come forward with information is relevant for the outcome of leniency application. Indeed, leniency must be registered and examined before the receipt of the statement of objections as the aim of the leniency programme is precisely to provide the Autorité with the means to detect the practices and to elaborate the statement of objections.

After the receipt of the application, the case-handler appointed to investigate the leniency application drafts a report which assesses whether the conditions are met to obtain benefit for full or partial immunity. The report is then sent to the applicant at least three weeks before the hearing before the Board of the Autorité which has an exclusive jurisdiction for taking the decision and setting the fine. Following this hearing, the Autorité issues a leniency opinion, which grants or not the undertaking provisional full or partial immunity from fines as well as, in the latter case, ranges for the rate of reduction that may be eventually granted if the cooperation expected from the undertaking is actually performed. If the Autorité considers that the conditions for granting a provisional total or partial immunity are not fulfilled and therefore issues a negative opinion, the information and pieces of evidence are returned to the undertaking at its request. The conditional leniency opinion is provided, in general, a few months after the application has been registered by the Rapporteur General. For an exhaustive presentation of the treatment of leniency applications by the Autorité, please refer to ***Annex 1*** attached.

The opinion issued by the Autorité remains conditional and is only confirmed in the final decision on the merits at the final stage of the proceedings. The Autorité may not, except in the case of a breach of the cooperation duty, derogate from the range in an unfavorable way for the applicant but may grant a treatment more favorable than that envisaged, as this was the case in the *steel trade* decision, if the cooperation implemented by the applicant is of a particular quality.

The conditional leniency opinion, for subsequent applicants like for other applicants, may be revoked if the condition of cooperation has not been complied with. Such a situation has never occurred before the Autorité, but in the liquefied petroleum gas ("*LPG"*) sector, the Autorité issued a positive leniency opinion and then ruled that the evidence provided by the applicants could not contribute to establish the cartel as these pieces of evidence contained material inconsistencies. Indeed, after the conditional opinion, the Autorité received an expertise that cast doubts on the authenticity of documents supplied in the context of a leniency application after it had issued a conditional positive opinion on the leniency application. The Autorité therefore closed the proceedings on the ground that it was not able to establish the reality of the infringement (decision 10-D-36 of the 17th of December 2010). The decision specified that this act would not prejudice the possible decision of the President of the Autorité to refer the dossier to the State Prosecutor pursuant to Article R. 461-1 of the code de commerce.

10 This part answers to Questions 3 and 4 listed on page 10 of the Issue Paper.

Furthermore, as mentioned above, in the *laundry detergents* case, Henkel was granted a 25% reduction, within the range that it was notified in the leniency opinion, but it did not obtain the maximum reduction rate it claimed it was entitled to. After having examined the added value of the evidence adduced by the applicant and having assessed whether its behaviour was consistent with the duty of cooperation, the Autorité found that, from 22 April 2010, this leniency applicant had partially breached his duty of cooperation by jeopardizing the establishment by the investigation services and the Board of the Autorité of the infringement referred to in the opinion relative to the leniency application (paragraphs 710-744).

Regarding the definition of the duty of cooperation, the decision reads as follows:

> *"The Code of commerce perceives the leniency proceeding as an active and voluntary contribution of undertakings, that participated to anticompetitive agreements, not only to uncover these by submitting evidence, but also, downstream during the investigation of the case until its adjudication by the Board to finding the reality of the prohibited practice. In fact, the duty to "contribute in establishing the reality of the prohibited practice and to identify its authors, in bringing about pieces of information not already in the possession of the Autorité" means that, in cartels proceedings, that are composed of several procedural stages, on the one hand, and that may deal with complex and generally secret facts, on the other hand, the cooperation expected from the applicant is not extinguished with the mere fact to introduce a leniency application; it is deemed necessary all along the period of time ranging from the introduction of the application and the hearing before the Board, including among others the preliminary phase of investigation and the investigation phase itself. This cooperation duty, that also steams from the Model Leniency Programme of the ECN and from the European case-law (see for example, ruling Elf Aquitaine v. Commission, and Deltafina v. Commission T-12/06), is provided in the procedural notice of 17 April 2007 of the Conseil. It underlines in particular that the cooperation expected from the applicant must be "genuine, full, continuous and expeditious from the introduction of the application and all along the investigation phase (pargraph 20). It recalls that this duty must be complied with, in any event, and that it conditions full or partial immunity of fine (same paragraph)." (paragraphs 716 and 717 of the decision)*

2. Interplay between the leniency programme and the other enforcement policies[11]

The following developments deal with the interaction between the leniency programme and the procedure of settlement (**2.1.**), private damage actions (**2.2.**) and criminal liability of individuals (**2.3.**).

2.1 Interplay between leniency programme and settlement

2.1.1 Principles guiding the Autorité

The first principle which guides the Autorité is that its choice to grant or not a settlement depends on the procedural gains the Autorité expects from the application, taking into account all the evidence that the Autorité already possesses, including from leniency applications that were made upfront.

The second principle is that the Autorité makes sure that the maximum reward that can be obtained from a subsequent leniency applicant remains more attractive that the one that might be obtained from a settlement alone. There is indeed a gap between the levels of co-operation in the two hypotheses: in a settlement, unlike in leniency, the applicant simply waives its rights to challenge the objections and does not provide evidence of the infringement and of the identity of the infringers.

[11] This part answers to Questions 1 and 2 listed on pages 5 and 11 of the Issue Paper.

2.1.2 The Autorité's decisional practice

In practice, the Autorité distinguishes two situations: first, the combination of leniency and settlements in the same case for different infringers and secondly, the combination of both tools for the same infringer.

- In the first hypothesis, the Autorité does not reject applications for settlements in a case where the Autorité already granted a conditional favorable opinion on leniency applications from other infringers. In the *international removals*, *steel trade* and *flour* cases mentioned above, the proposal of the Rapporteur General to accept such settlement applications was validated by the Board.

- In the second hypothesis, the Autorité could accumulate reductions of fines in the benefit of the same undertaking, on the basis of a successful leniency application (which could come from a subsequent applicant) on the one hand, and of a settlement on the other hand, if this combination offers procedural gains for the Autorité. Indeed, in the recent *laundry detergents* cartel decision, the Autorité ruled that such procedural savings could be identified where the scope of the objections is wider than that of the leniency application.

2.1.3 Procedural Notice on Settlements

On 10 February 2012, the Autorité adopted a Procedural Notice on Settlements which takes into account the *laundry detergents* decision mentioned above, allowing in certain circumstances the combination between the benefit of leniency and that of settlement. In this regard, the Procedural Notice distinguishes clearly the requirements of the Autorité towards both enforcement instruments.

Indeed, this Procedural Notice specifies that the contribution expected from an undertaking which waives its rights to challenge a statement of objections and undertakes to set up measures intended to ensure that its business activities comply with competition law is not the same as that from an undertaking which cooperates with the Autorité at an upstream level within the framework of a leniency application.

Even if leniency and settlement facilitate the investigation and generate efficiencies in terms of time and administrative costs, both mechanisms do not pursue the same objectives. The aim of a leniency application is, unlike a settlement, to unveil evidence enabling to detect and qualify an anticompetitive practice. Therefore, this instrument presents a superior interest in comparison with the decision of waiving its right to challenge a statement of objections.

Furthermore, point 6 of the Procedural Notice on Settlement underlines that the co-operation required within the framework of a leniency application is more important than that of an undertaking seeking a reduction of fine on the basis of a settlement. As a consequence, in order to preserve the relative attractiveness of the leniency programme as compared with that of a settlement, the Autorité considers that, in cases where both procedures are applicable, the reduction of fine that can be obtained from an undertaking which waives its right to challenge the statement of objections must be lower than the maximum reward granted to a first or subsequent leniency applicant. Besides, the combination of both reductions of fine in the benefit of a subsequent leniency applicant shall not be higher than the reduction obtained by the first applicant.

2.2 Interplay between leniency programme and private damage actions

The question of the interplay between leniency programme and civil actions gives rise to the issue related to the attractiveness of leniency application in the case of disclosure of leniency information to the benefit of civil claimants.

It is paramount to avoid placing the leniency applicant, who has spontaneously provided evidence and statements which establish its participation to an infringement, in a less favorable position before the civil court than if the undertaking had not submitted information to the competition authority (see opinion of the Autorité of 21 September 2006 on the introduction of collective action in the field of anticompetitive practices and its answer of 25 May 2001 to the public consultation launched by the European Commission). This concern is shared throughout the European Union as the resolution of the Heads of the European Competition Authorities of 23 May 2012 demonstrates, holding that it is fundamental to protect leniency material against disclosure in the context of civil damages actions to the extent that is necessary to ensure the effectiveness of leniency programmes.

This is why the Autorité commits not to disclose any leniency declaration in the context of court proceedings and has suggested legislative amendments to support this stance.

2.3 Interplay between leniency programme and criminal liability of individuals

Although criminal action is possible against an individual who has fraudulently played a personal and decisive role in the creation, organization or implementation of the cartel, pursuant to Article L. 420-6 of the code of commerce, the rate of enforcement is very low.

In theory, individual sanctions exist for cartels as well as for all other antitrust infringements (i.e. bid-rigging, other vertical or horizontal anticompetitive agreements and abuses of dominance). In practice, they focus on bid-rigging cases. The antitrust criminal offence is, in general, combined with other types of criminal offences such as embezzlement, corruption, favouritism or misuse of company assets. Since 2002, one imprisonment sentence was ordered. In all the other dossiers, a few suspended imprisonment sentences were ordered, from 6 to 12 months, but, in the vast majority of cases, only fines were ordered, whose amount ranged from €1,000 to €30,000.

This low criminal enforcement record does not therefore have a chilling effect on leniency.

In addition, point 48 of the Procedural Notice on leniency of the Autorité states that "the Autorité considers that leniency is one of the legitimate reasons which justifies not to pass on to the State Prosecutor a case file in which individuals, belonging to the same undertaking which has been granted leniency, would be liable to such proceedings". The Autorité is indeed of the view that the protection of the confidentiality of leniency material is crucial to maintain the attractiveness of its leniency programme and therefore its substantial deterrent effect.

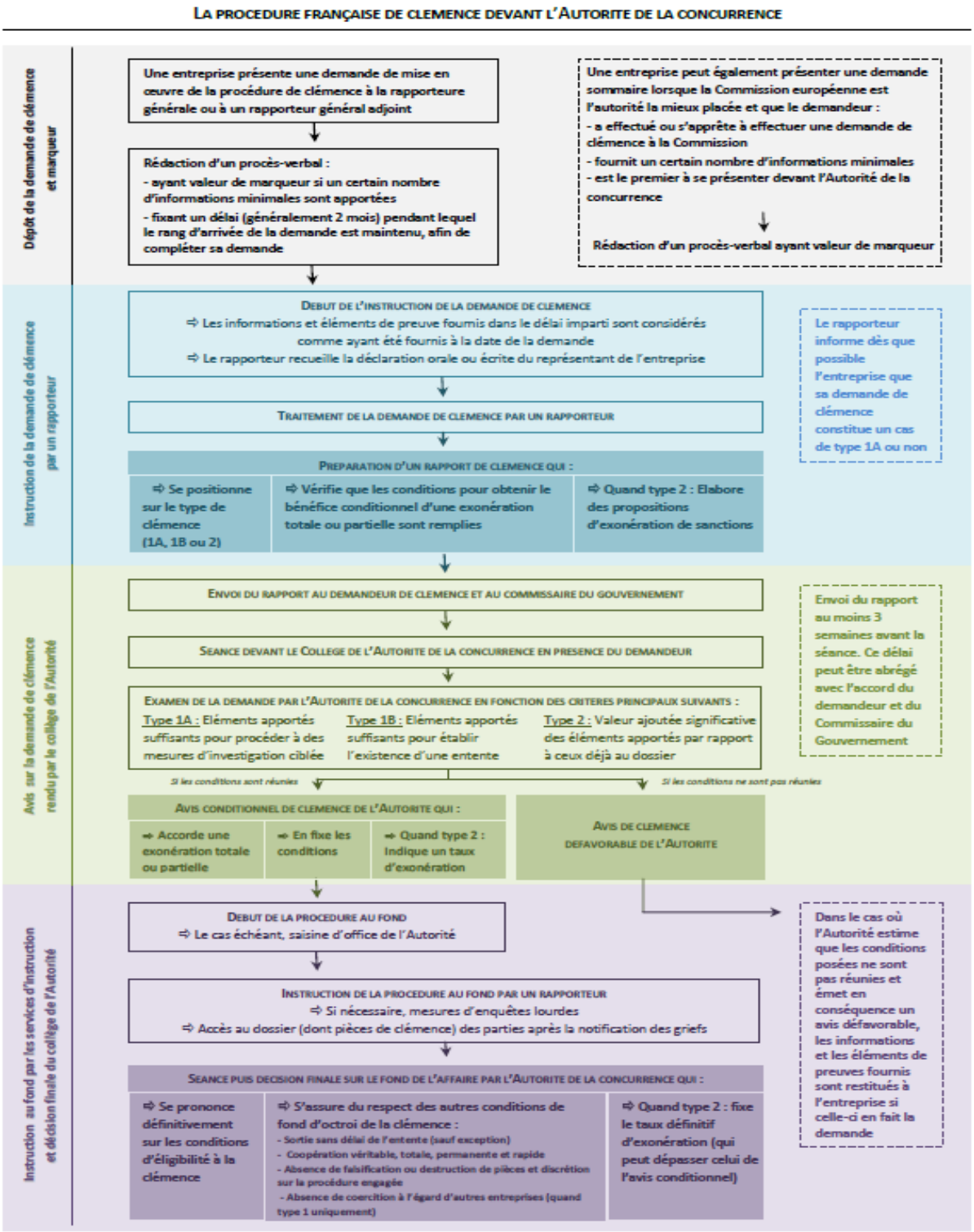
In order to strengthen this position, an official report (known as the "Rapport Coulon"12) was submitted to the Minister of Justice in January 2008. Its main aim was to launch a reflection on criminal law and modify the interplay between criminal sanction and sanction in the field of distribution, consumer and competition law. In that latter area, the conclusion of the mission was that there was an actual, but limited, need to modernize the law in this area. It suggested introducing a leniency system for individuals

12 Jean-Marie Coulon is a former President of the Court of Appeal of Paris and presided over the works of the commission, which comprised 19 members.

that would take into account the assessment by the Autorité of the level of cooperation performed by the individual and the firm in which he is an employee or manager.

ANNEX 1

The treatment of leniency applications by the Autorité de la concurrence



GERMANY

1. Introduction

Leniency programmes have turned out to be a success story for many competition authorities all around the world. However, just as there are different competition regimes, there are also significant differences in their leniency programmes.

This paper will describe the Bundeskartellamt's experience with its Leniency Programme (2.) and focus especially on the possibility of granting a reduction of fines for subsequent leniency applicants (3.). It will then continue with a word of caution on the relationship between leniency programmes and settlements (3.) and conclude with the interplay of leniency programmes and private damages claims (4.).

2. The Bundeskartellamt's Leniency Programme

As one of the first competition authorities after the US Department of Justice and the European Commission, the Bundeskartellamt adopted a leniency programme over ten years ago in 2000 and revised it in 2006.[1] Under this programme the co-operation of a cartelist with the Bundeskartellamt can lead to the reduction of or even immunity from a fine. The purpose of the leniency programme is not formally stated in the programme itself, but becomes apparent from the context.

The leniency programme serves to improve the gathering of evidence. In order to effectively combat cartels it is often helpful or even necessary to uncover cartel agreements with the help of an insider and cartel member. The prospect of immunity from a fine creates uncertainty among cartel members as to whether one of them might blow the whistle at some stage to obtain immunity. Therefore an effective leniency programme also has a second objective which is to increase the deterrent effect before a cartel agreement is reached. As a consequence, companies shy away from entering into such illegal agreements, which prevents considerable damage to the national economy.

According to the leniency programme, those helping to uncover a previously unknown cartel will be granted immunity from a fine. Those cooperating after the Bundeskartellamt has become aware of the agreement will be granted a reduction of their fine. The amount of this reduction will depend on how valuable their contribution is for clarifying the facts of the case, their position in the leniency queue and the time at which the leniency application was submitted.

The programme clearly states that the "first come first served principle" applies.[2] Only the first applicant will be granted full immunity from a fine. Later applicants can, however, be granted a reduction of up to 50 % of the fine.

Allowing subsequent leniency applications may negatively affect the race for immunity. However, this also has several benefits for the Bundeskartellamt. In some cases the information given by the

1 See Notice no. 9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases, available at www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf

2 See Notice 9/2006, Section "B. Immunity from fines".

immunity applicant may not be sufficient to prove the case. Especially in cases where information is not allocated equitably, the first applicant may not have had access to all information. In these cases the information given by subsequent applicants may be vital to concluding the case. Every further piece of information helps the Bundeskartellamt to understand the case better. It will also become more difficult for other parties involved to deny their involvement.

The Bundeskartellamt will grant immunity from a fine if the applicant is the first participant in a cartel to contact the Bundeskartellamt before it has sufficient evidence to obtain a search warrant. Furthermore, the applicant has to provide verbal and written information and, where available, evidence which enables the Bundeskartellamt to obtain a search warrant. The applicant may not be the only ringleader of the cartel nor have coerced others to participate in the cartel, and he has to cooperate fully and on a continuous basis with the Bundeskartellamt.[3] The applicant must end his involvement in the cartel immediately on request by the Bundeskartellamt.[4]

If the Bundeskartellamt is already in a position to obtain a search warrant, it will, as a rule, grant immunity from a fine, provided that immunity has not been granted to another cartel participant according to the above provisions. Furthermore, the applicant has to fulfil the same conditions as set out above for cases in which the Bundeskartellamt is not yet in a position to obtain a search warrant.[5]

Also, subsequent applicants must cooperate fully and on a continuous basis with the Bundeskartellamt during the entire duration of the proceedings. The Leniency Notice does not contain a formal application period within which applicants have to seek immunity or reduction of the fine. The cut-off point for applications is rather based on practical considerations and is defined by the point at which the proceedings have developed so far that the information supplied by the applicant no longer provides the necessary added value.

In Germany, leniency applications can be filed verbally, and in German or English. Cartel participants can contact the head of the Bundeskartellamt's Special Unit for Combating Cartels or the Chairman of the competent Decision Division to declare their willingness to cooperate, thereby setting a "marker". A marker allows leniency applicants to secure a certain position in the leniency queue without having to submit a complete leniency application. In order to obtain a marker, applicants have to provide details about the type and duration of the infringement, the product and geographic markets affected, the identity of those involved, and state at which other competition authorities applications have been or are intended to be filed. The marker can also be placed verbally or in writing.[6]

The Bundeskartellamt has had good experience with a lean and automatic marker system. This means that if the conditions set out in the leniency programme are fulfilled, the marker will be granted without any discretion on the part of the Bundeskartellamt. Fears that the authority could receive a great number of markers with no real basis for the suspicion, which had been raised in discussions prior to the leniency programme, have proved to be unfounded. The Bundeskartellamt's burden of managing markers is not very high and it is clearly outbalanced by the system's positive effects. Furthermore, a lean marker system offers the advantage that the immunity applicant is "hooked" by the Bundeskartellamt at a very early stage and that the Bundeskartellamt – now being in the driver's seat- has an increased opportunity to steer the investigations in order to avoid destruction of evidence and leaks.

---

3 See Notice 9/2006, Section "B. Immunity from fines".

4 See Notice 9/2006, Section "D. Obligations to cooperate".

5 See Notice 9/2006, Section "B. Immunity from fines".

6 See Notice 9/2006, Section "E. Marker, Application, Statement of Assurance".

If an applicant does not fulfil his obligations (especially his obligation to cooperate), his status of priority lapses and subsequent applicants move up in rank.[7]

The amount of the reduction granted depends on the value of the co-operation and the order of precedence of the application. An applicant's position in the leniency queue is decisive for his immunity or the amount of reduction of his fine. Leniency programmes try to initiate a race among the cartel members. This race is more easily triggered if the thresholds for the first move are low.

In parallel cases with implications for several jurisdictions the burden on the potential applicants is high anyway because of the necessity of multiple filing. In such a scenario a lean marker system is of particular importance. In addition, the ECN established its "ECN Model Leniency Programme" in 2006, which introduced a new procedure for a uniform summary application system for cases concerning more than three EU Member States.[8] Such summary applications alleviate the burden of multiple filings for leniency applicants. If a full application has been made with the Commission, national competition authorities can accept temporarily to protect the applicant's position on the basis of very limited information that can be given orally. Should any of the national competition authorities want to act on the case it will grant the applicant additional time to complete its application. The summary application system is supposed to save resources for both applicants and authorities without jeopardising the flexible work-sharing within the ECN.[9] Such an application is available in Germany, also for subsequent leniency applicants. However, summary applications are not available in all jurisdictions in Europe.

In its "ECN Leniency Convergence Project" the ECN is currently reviewing the practical application of the "ECN Model Leniency Programme", trying to identify further possibilities for improvement.

In a further effort to strengthen its cartel prosecution and leniency programmes, the Bundeskartellamt installed an anonymous whistle blowing system in June 2012. This electronic system allows the authority to receive anonymous tip-offs on cartel law infringements.

Such a system has proved effective over many years of practice by a number of German criminal police offices. It guarantees the anonymity of informers while still allowing for continual reciprocal communication with investigative staff at the Bundeskartellamt via a secure electronic mailbox. The new system gives those informers who have not contacted the Bundeskartellamt up to now for fear of reprisal a chance to support the authority in its cartel prosecution work.

3. Subsequent leniency applicants

It is also important to keep in mind that not only the first applicant seeking immunity but also subsequent applicants may be capable of providing valuable information to the competition authority. Therefore, it is advisable to encourage cartelists to come in with subsequent leniency applications.

Furthermore, the correlation between an applicant's place in the leniency queue and the value of the information provided has to be clear to applicants. A better place in the leniency queue does not mean that the reduction of the fine will automatically be higher than the reduction that is granted to an undertaking with a lower place in the leniency queue. The position in the queue of candidates entitled to a reduction in

7 See Notice 9/2006, Section "E. Marker, Application, Statement of Assurance".

8 See MEMO/06/356 "Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions" of 29th September 2006.

9 See MEMO/06/356 "Competition: the European Competition Network launches a Model Leniency Programme – frequently asked questions" of 29th September 2006.

fines is especially important if evidence or information presented at a later date proves obsolete in the light of evidence already presented at an earlier stage. On the other hand, evidence presented at a later stage may be particularly essential to solving the case, with the result that subsequent leniency applicants may be granted a higher reduction despite being further down in the queue.

Additionally, an increased reduction (within the limit of up to 50 % of the fine) can be granted on the basis of the rank position itself (because earlier co-operation of lower evidential value can be strategically more important than later co-operation with better evidential value. For example, this can be useful for further dawn raids or trying to convince remaining cartel members to admit the infringement, as with each new leniency applicant it will become harder to deny the facts). Nonetheless, an increased reduction in fine for early co-operation still requires that at least some added value has been provided.

4. Leniency programmes and settlements

So far, the German Leniency Programme has been very successful. It has brought many cartel cases to the Bundeskartellamt's attention, which have been concluded effectively. The growing number of cases has made it even more important to also develop useful tools for the termination of proceedings. Over the last years the Bundeskartellamt has made increasing use of settlements to close proceedings.

For a competition authority like the Bundeskartellamt it is very important to coordinate and differentiate between these two tools. It is especially vital to ensure that the two systems do not hinder each other and that one system does not undermine the incentive to cooperate under the other. For example, it should be ensured that the reduction of the fine granted for co-operation in the settlement proceedings does not reach a level which discourages cartelists to be the first to come in for leniency. The reduction in fines for applicants which cooperate in the settlement proceedings plus the reduction for subsequent applicants under the leniency programme should still leave enough room for incentives to come in for immunity. If this gap is not clearly discernible, there will be no race to apply for immunity and it will be more difficult to destabilise cartels.

5. Leniency programmes and private damage claims

The tools at the disposal of the Bundeskartellamt have to be used cautiously, and it must be prevented that one tool interferes with the efficiency of other tools. Therefore, the leniency programme also has to be implemented and used with care. In this context the interaction of the Bundeskartellamt's leniency programme and potential private damages claims is important. One of the major issues in this regard is access to files by third parties which intend to bring private damages claims.

The success of any immunity programme depends on the after effects on the immunity applicants: They may be discouraged from seeking immunity or reduction of fines if such an application increases their risk of facing private damages law suits.

In the "Pfleiderer" case, which was eventually taken to the ECJ, a third party had requested access to the Bundeskartellamt's files in an administrative fine proceeding in order to prepare its private damages claim.[10] Pfleiderer, a customer of a décor paper cartel, which sued the cartelists for damages, requested information from the Bundeskartellamt's proceedings against the cartel, including leniency documents. On

[10] See Germany's contributions to the June 2010 Roundtable on "Procedural Fairness issues in civil and administrative enforcement", OECD Doc. DAF/COMP/WP3/WD(2010)35 and Germany's contribution to the October 2011 Roundtable on "Institutional and procedural aspects of the relationship between competition authorities and courts, and update on developments in procedural fairness and transparency", OECD Doc. DAF/COMP/WP3(2011)77.

14 June 2011, the European Court of Justice (ECJ) issued a preliminary ruling in the case Pfleiderer vs. Bundeskartellamt.[11]

The ECJ ruled that national courts must decide on the level of disclosure by balancing the need to protect the effectiveness of leniency programmes with the right of cartel victims to receive compensation.[12] Applying the judgment, the Local Court of Bonn refused disclosure. [13] Pfleiderer was not granted access to the leniency applications of the cartel participants. This decision has far reaching consequences for the future practice of the Bundeskartellamt in the prosecution of hard-core cartels.

With its decision the court affirmed the Bundeskartellamt's view that leniency applications are subject to particularly strict confidentiality. In order to maintain effective anti-cartel enforcement, the effectiveness of leniency programmes should be maintained. Private claims for damages suffered from cartel law violations are an important supplement to public antitrust enforcement. But to be able to claim damages, the victims of cartel agreements are dependent on the competition authorities to uncover the cartel. If the leniency programme does not function properly, significantly fewer cartels will be uncovered. This would hamper not only the punishment of the perpetrators, but also the compensation of the victims.

In the very recent decision of the Düsseldorf Higher Regional Court of August 2012, the court even ruled that the denial of third-party access to leniency applications of cartel participants was also valid in court proceedings. Therefore, leniency applicants can now rely on their applications being kept confidential not only by the Bundeskartellamt, but also in court proceedings.[14]

11 The decision is available at http://curia.europa.eu/jurisp/cgibin /gettext.pl?where=&lang=en&num=79889385C19090360&doc=T&ouvert=T&seance=ARRET

12 See ECJ, decision of 14 June 2011.

13 See the Local Court of Bonn's decision of 18 January 2012, available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Presse/2012/Urteil_des_AG_Bonn_vom_18.01.2012_-_Az._51_GS_53-09.pdf

14 See the Bundeskartellamt's Press release of August 27, 2012 on the Higher Regional Court's decision available at http://www.bundeskartellamt.de/wEnglisch/News/press/2012_08_27.php

HUNGARY

1. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

2. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

Question 1

The Hungarian Competition Authority (hereinafter: Gazdasági Versenyhivatal – GVH) introduced its leniency policy in 2003. The main aim of the leniency policy was to provide an effective tool for detecting cartel agreements. The legal background of the leniency policy was set forth by Section 78 (3) of the Competition Act[1] (hereinafter HCA), which provided that in setting the amount of the fine, the "effective co-operation" of the respondent had to be taken into consideration "during the proceedings" as a factor which may reduce the amount of the fine to be imposed. Moreover, Subsection (8) empowered the GVH to set out its own leniency policy in a manner which would enable it to effectively detect cartel agreements. This meant giving the GVH the power to determine under what principles the active cooperation of an undertaking suspected of engaging in illegal conduct should be taken into consideration when setting the amount of the fine to be imposed. The criteria for the policy of permissiveness shall be defined in a notice posted in accordance with Section 36 (6). As a result of this provision, in Hungary, the first institutional appearance of the leniency policy was manifested in *Notice No 3/2003 of the President of the Hungarian Competition Authority and the Chair of the Competition Council of the Hungarian Competition Authority*. As regards to the legal nature of Presidential Notice, it was not a source of law and so was not legally binding.[2] Although the GVH felt itself bound by the Notice in practice, the lack of the binding nature of the Notice meant that it was not binding on the courts. As a result of this, the courts theoretically had the possibility of revising the decisions made by the GVH on leniency issues during the appeal procedure. Moreover, the GVH faced criticism from the legal community on several occasions due to the fact that under the 2003 Notice conditional leniency decisions were made by the Cartel Unit of the GVH, while final leniency decisions were made by the Competition Council on the merits. Together with the non-binding nature of the Notice, legal advisers found the system controversial and felt that legal certainty was not fully ensured.

In 2006 an amendment was made to the notice, but the organisational system was not changed and leniency was still not regulated at a statutory level.

---

1 Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices.

2 According to Section 36 (6) of *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices (Hungarian Competition Act – HCA)* the President of the Hungarian Competition Authority may issue notices, together with the Chair of the Competition Council,, which describe the basic principles of the law enforcement practice of the Hungarian Competition Authority. **Notices have no binding force; their function is to increase the predictability of law enforcement**.

In 2005, criminal sanctions were introduced for cartels which had been established concerning tenders published in connection with public procurement procedures or activity that was subject to a concession contract (hereinafter: bid-rigging cartels). These crimes can be sanctioned by imprisonment of up to 5 years. The Hungarian Criminal Code stated that the perpetrator of the criminal act would be exonerated from punishment if he/she confessed the cartel to the competition authority/police/financial supervisory authorities first hand and revealed the circumstances of the cartel. This provision was introduced to exempt immunity applicants from criminal sanctions (or at least Type 1A applicants who had revealed cartels before dawn raids), but did not work well in practice because there were a lot of open questions (where to apply, in what form, possibility of multiple applications from persons belonging to the same undertaking, etc.). Therefore, Criminal Sanctions had severe consequences for the GVH's leniency policy in bid-rigging cases.

The European Competition Network (hereinafter: ECN) published its *Leniency Model Programme in 2006*. This programme provided recommendations for introducing leniency in the EU Member States and for harmonising the existing leniency policies of the MSs. The aim of the Model Programme was not to create a fully harmonised system in every Member State, but to ensure that the common basic principles set out in the programme existed in every regime.

On the basis of the Model Programme, a significant amendment was made to the Competition Act in June 2009 which gave the GVH the power to act on issues related to leniency at a statutory level.

As mentioned above, the legislators always tried to adapt each enforcement policy to the leniency provisions which were based on the ECN Model Programme principles. Due to an amendment to the previous Public Procurement Act, significant changes were introduced regarding the scope of the candidate tenderers. The Act states that only those tenderers who were fined for cartel infringements are excluded from the tender procedures. Those tenderers who obtained full immunity under the leniency policy are not subject to exclusionary rules and can be candidate tenderers. These rules have also been upheld by the new 'Act on Public Procurement' which entered into force on 6 July 2012.

In leniency cases opened after 1 June 2009, the provisions of the amended HCA apply for the non-imposition or the reduction of fines and not the former Notice. In the present system, basic leniency rules are regulated in the Competition Act and detailed leniency rules on applying for leniency and the leniency procedure can be found in the "Application Form for Leniency" (hereinafter: Application Form) and in the "Explanatory Notes of the President of the GVH on the Application of the Rules concerning Leniency" (hereinafter: Explanatory Notes). Both documents are provided by the GVH and are published on its homepage.[3] The new leniency policy is in line with ECN Model Programme, moreover in order to ensure legal certainty, leniency rules have become binding and both conditional and final decisions on leniency are made by the GVH's decision-making body, the Competition Council.

Together with the new leniency regime, some rules relating to civil damages claims were introduced in favour of leniency applicants. This resulted in the elimination of the joint and several liabilities of leniency applicants with other cartel members, and created a more favourable situation for leniency applicants.[4] It should be noted that the revision of the rules for the protection of leniency documents is under consideration.

---

3 www.gvh.hu

4 According to Section 88/D of the HCA any person to which immunity from a fine has been granted under Article 78/A may refuse to pay damages for the harm caused by his conduct infringing Article 11 of the HCA or Article 101 of the Treaty until the claim can be recovered from any other person responsible for causing harm by the same infringement. This rule is without prejudice to the possibility of bringing a joint

Important changes will be introduced by the new *Act C of 2012 on the Criminal Code (hereinafter: new CC)* which will enter into force on 1 July 2013. The future provisions will take into account the leniency policy that is applied in the field of competition law and will extend the personal scope of those leniency applicants who are entitled to protection against prosecution. Consequently, the new criminal provisions are in line with the leniency rules of the GVH. Under the new criminal rules, those who receive Type 1A[5] conditional immunity under the leniency rules are exempted from public prosecution if they also cooperate with the police and the public prosecutor in the criminal case. Those Type 1B and Type 2 leniency applicants who receive conditional leniency decisions from the GVH may also have their *punishments mitigated* without limitation in the corresponding criminal cases if they cooperate with the police or public prosecutor. The new criminal provisions apply to all present or former employees, executives and persons acting or who have acted on behalf of the undertaking. This is a novelty as under the previous criminal provisions, the former employees and executives of the company were not entitled to preferential treatment under the criminal rules. It has to be mentioned that in Type 1A cases, persons involved in the cartel may be exempted from public prosecution in two cases: a) either if their undertaking applied for leniency or b) even their undertaking did not apply, they report the cartel to the GVH or the police/public prosecutor individually. So, individuals are not bound to the decision of their company.

All in all, it can be seen from the above-mentioned rules that the Hungarian leniency policy from the very beginning is entirely based on the EU leniency system. If new enforcement policies (like criminal sanctions for bid-rigging, public procurement tools) were introduced to the Hungarian legal system, the Hungarian legislators main aim was not the change the already well-functioning leniency system, but to fit the other enforcement policies to it.

Question 2

We do not have any early termination policies.

3. In your practical experience, what is the most compelling rationale for rewarding subsequent applicants' co-operation? If your jurisdiction does not reward subsequent applicants with any benefits, or no benefits other than "amnesty plus", what is the rationale for such an approach?

4. In your experience, what is the value of the co-operation of the second-in applicant? Have there been cases in your country where a case could not have been brought to a successful prosecution due to the lack of sufficient evidence in the absence of co-operation by the second-in applicant?

Question 3 & Question 4

Cartel agreements generally involve several players and have wide-ranging ramifications. As a result, it is often not possible to gather sufficient evidence from one cartel member only. The GVH's opinion and

---

action against persons causing the harm. Lawsuits initiated to enforce claims against persons responsible for causing harm to which immunity from a fine has been granted shall be stayed until the date on which the judgment made in the administrative lawsuit which has been initiated upon the request for a review of the decision of the GVH establishing an infringement becomes legally binding.

5 In accordance with the provisions of the ECN Modell Programme, we use the following categories: a type 1A immunity applicant refers to an immunity applicant who files an application before the initiation of the case; a type 1B immunity applicant refers to an immunity applicant who files an application after the initiation of a dawn raid; a type 2 applicant refers to reduction of fine applicant.

practice strongly concurs with the opinion written under Section 9 of the 'Issue Paper'. We can therefore only repeat the arguments used in Section 9 of the 'Issue Paper':

- It may arise even with a Type 1A application that the GVH is not in a position to prove the infringement and that therefore the cooperation of other cartel members is essential in order for the prosecution to be successful.

- Co-operation from the second applicant is of particular value because the testimony and other evidence it provides can be used to corroborate the evidence which has been submitted by the first applicant.

- The co-operation of subsequent applicants may contribute to proving additional facts either in terms of duration, product or geographic scope or the composition of the cartel. This might be particularly useful in cases where immunity is obtained by a minor player in the cartel.

The GVH considers it important to obtain evidence from additional sources, especially because recent court decisions tend to send a message to the GVH that statements made by the leniency applicant vis-á-vis the denial of the other cartelists are not enough to prove the infringement.

As regards our practice, so far we do not have a closed case that can be referred to. However, we can easily imagine a situation where an infringement cannot be proven without the cooperation of subsequent applicants.

5. Please describe the treatment reserved to subsequent applicants in your country. In particular, focus on the incentives and requirements with respect to subsequent applicants and the evaluation of the degree of cooperation provided by them.

According to the provisions of the HCA and the Explanatory Notes, the following rules on the reduction of fines apply to subsequent applicants:

- If the GVH has already made a conditional immunity decision in respect of a case, the application of the next undertaking to come forward is no longer eligible to meet the conditions of immunity from fines. Therefore, while the GVH will not grant immunity from fines, it will reduce the fine imposed on an undertaking if it provides evidence which constitutes significant added value[6] relative to the evidence already available to the GVH. The level of the reduction in the amount of the fine is 30–50% for the first undertaking, 20–30% for the second undertaking, and up to 20% for third or subsequent undertakings.

[6] As regards the evidentiary threshold, the Explanatory Notes explain that the nature and quality of the evidence that will actually meet the conditions depends on the circumstances of the given case and the evidence available to the GVH. Nevertheless, when evaluating the provided evidence the GVH will generally consider physical evidence which originates from the period of time when the infringement was committed and which is directly relevant to the facts in question to be of greater value than evidence which has been subsequently established, that only has indirect relevance, or which requires corroboration from other sources. The degree to which the authenticity of the evidence can be corroborated from other sources may also have an impact on the value of the evidence. The phrase according to which the GVH correlates the evidence submitted by the applicant with the evidence already available to it, means that the GVH estimates the significant added value of the evidence relative to the evidence stemming from already closed or from already started but not yet closed investigative measures.

- An undertaking which applies for a reduction in the amount of the fine to be imposed faces the same conditions as an immunity applicant as regards its obligation to cooperate and its willingness to terminate its participation in the infringement in question (see Q4 below), with the difference that an undertaking which has taken steps to coerce other undertakings to participate in the infringement is not excluded from benefiting from a reduction in the amount of the fine to be imposed.

As regards to the procedure which is followed when applications are made for reductions in the amount of the fines to be imposed, the following may be highlighted:

- The possible fine may be reduced in two ways: a) by reclassifying the application for immunity from fines ex officio; or b) by submitting an application for the reduction of a fine.

- An application for the reduction of a fine may be submitted only as a complete application, no marker procedure exists in these cases.

- Written or oral applications are accepted.

- The Cartel Unit of the GVH receives and examines the application and provides an opinion on it before submitting the information that is available to the GVH in respect of the infringement to the proceeding competition council. The Competition Council then makes a conditional leniency decision on the application on the basis of the proposal of the Cartel Unit. No separate legal remedy may be sought against an order which grants a conditional reduction of a fine or which rejects an application.

- The applicant may not withdraw its application and the GVH may use the application for a reduction of a fine and the documents attached to it from the date of their submission to prove the infringement (event in case of refusal).

- When closing the competition supervision proceeding, the proceeding competition council considers whether the applicant has met the conditions which must be fulfilled if a reduction in the amount of the fine to be imposed is to be made. If the conditions have been fulfilled, it then decides on the exact amount of the reduction in its decision on the merits of the case.

The HCA also acknowledges the possibility of "de facto immunity". This instrument differs from an application for a reduction of a fine. Article 78/A(5) of the Competition Act deals with a particular case of the reduction of a fine. It covers those cases in which an undertaking provides evidence relating to an infringement which is unknown to the GVH and which is of direct importance when the GVH is considering which circumstances should to be taken into account when the amount of the fine is being determined. In such cases the GVH shall not take such aggravating evidence into account when setting the fine to be imposed on the undertaking which provided this evidence.

6. If your leniency programme includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be "first in the door" of potential applicants. Are markers also available to subsequent applicants?

The GVH only allows Type 1A applicants to apply for leniency on the basis of limited information and to receive a marker which will provide them with the time to file a full application. The relevant provision entered into force in Hungary on 1 June 2009. The marker procedure of the GVH is also set out in the Explanatory Notes and its mandatory contents are listed in the Application form. The granting of the marker for the undertaking is automatically ensured and it is non-discretionary. This means that if the

applicant specifies the minimal information that is set out in the Application form, the GVH will automatically give the applicant the opportunity to submit a full application by a specified deadline.

A marker allows a company to file an application as soon as it discovers an infringement without having all the information that is necessary to file an application. This helps an undertaking file an application as quickly as possible.

7. Please explain if your leniency programme is always available during the proceedings, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore?

Immunity applications may be filed during the whole procedure, while an application for the reduction of a fine may be submitted, at the latest, on the day before the date of service of the preliminary position or the day before the starting date for the access to the files of any of the parties, which of the two is the earlier.

8. Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons?

A reduction which has been made to a fine can be revoked at the end of the procedure, in the final decision; if it turns out that the applicant has breached any of the following obligations:

- the applicant has failed to terminate any involvement it may have had in the infringement immediately upon the submission of its application, or after it has supplied evidence, except where the nature and extent of such involvement has been deemed by the GVH to have potential in serving the desirable outcome of the inspections;

- the company has failed to cooperate with the GVH in good faith throughout the competition control proceedings.

9. If your leniency programme does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining)?

This question is not applicable to the GVH.

10. Please describe the relationship between your leniency programme and the other enforcement policies discussed above. When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

See our reply to Question 1. It is important to highlight the fact that the GVH's leniency policy existed before the criminal law rules were introduced and that the GVH tried to persuade the legislator to bring the criminal law rules into line with the leniency rules.

11. In particular, discuss if and how early termination policies (such as settlements and plea bargaining) relate to rewarding co-operation from subsequent applicants. Do they have the same objectives as the leniency programme (e.g. to obtain information and encourage co-operation).

There is no possibility under the present rules to have early termination policies.

ITALY

1. Introduction

The Italian Competition Authority (hereinafter referred as "ICA") adopted its Leniency Notice (the "Notice") through resolution No. 16472 of 15 February 2007, subsequently amended on 6 May 2006. (An English version of the Notice is available on the Ica's website www.agcm.it/en/comp/1887-notice-on-the-imposition-and-reduction-of-fines-under-section-15-of-law-no-287-of-10-october-1990-.html).

The Notice was adopted, after a public consultation of the draft, on the basis of article 15, paragraph 2bis of law No. 287/90 (introduced by law No. 248/2006 converting Decree No. 223/2006) that allows the ICA to determine cases where immunity from fines or reduction can be granted to companies that cooperate in ascertaining infringements to competition rules.

The Italian Notice is largely inspired by the 2002 EU Commission Notice on immunity from fines and reduction of fines in cartel cases (as amended in 2006)[1] and by the Leniency Model in use in the framework of the European Competition Network[2]. As in the EU system, the possibility of exempting or reducing fines is justified by the fact that the public interest of detecting and punishing secret cartels – which is often very difficult to achieve – outweigh the interest to fine those companies allowing the antitrust authority to detect and punish such infringements.

The programme, as the EU one, applies to secret cartels, such as horizontal agreements or concerted practices in violation either of article 101 TFUE or article 2, Law No.287/90, with particular regard to hardcore violations, also in the framework of bid rigging, aimed at restricting competition through the fixing of selling or purchase prices, the allocation of production and sales quotas or the sharing of the markets (section 1).

2. The Italian Leniency Programme: full immunity from fines

According to the Notice, full immunity is granted for the first company that on a voluntary basis reports one of the above mentioned infringements to the Ica, providing information and documents. Applications can be filed both in writing or orally. Oral statements are recorded in an audio file and transcripted in a summary minute.

In order to be eligible to immunity it is necessary to satisfy several cumulative conditions, set out by both section 2 and 7 of the Notice:

(i) the applicant has to provide the Ica with information or evidence deemed decisive by the latter to establish the alleged infringement, although an inspection will be necessary for collecting proof;

(ii) when the application for immunity is submitted, the Ica should not yet dispose of sufficient information to prove the infringement.

1 Official Journal C 298, 8. December 2006, p. 17.

2 Model Leniency Programme, available at www.ec.europa.eu/competition/ecn/model_leniency_en.pdf.

Therefore, the Italian Notice considers crucial that the cooperation allows the Ica to detect and prove the infringement at a stage where the Authority still does not have sufficient elements in this regard.

Furthermore, the applicant has to cease its involvement in the infringement, unless the ICA deems necessary the participation of the applicant in the conduct in order to safeguard the integrity of the investigation. The company shall fully and continuously cooperate with the ICA during the entire investigation, providing any information and evidence that the applicant has at its disposal and will have in the future, and ensuring, if necessary, that its actual and former employees can be interviewed by the ICA. The applicant shall inform the ICA whether it has submitted, or has the intention to submit in the future, any other leniency application related to the same infringement; the applicant shall maintain secrecy of the fact it has filed a leniency application with the ICA (section 7) except with other competition authorities

The applicant shall also provide the Ica with a precise description of the infringement, including, for instance, the nature of the cartel, the goods and services affected, the geographic scope, dates and places where contacts among participants in the cartel have taken place and the individuals involved in the cartel in question (section 2).

The Notice sets out the possibility to obtain a marker. In particular on the basis of a reasoned request the ICA may determine a deadline within which the applicant shall provide all information and evidence supporting its application. Temporarily, the applicant's place in the queue will be held. In case the applicant provides all the information and evidence required to meet the immunity threshold according to section 3 within the time limit, its application will be considered filed as of the date on which the deadline has been fixed. The marker is not available for subsequent applicants.

When the EU Commission seems to be the best placed authority to carry out an investigation since more than three Member States are involved in the cartel, the applicant, that has already submitted an application to the Commission, has the option to file a short form application with the ICA as well as with any other national authority involved, equally well placed to intervene. The short form application may also be submitted by subsequent applicants that claim for a reduction of fines (see next section). The short form application shall contain a detailed description of the infringement without the need to be supported by documentary evidence, which shall be submitted should the ICA acquire jurisdiction. If so, the ICA will set out a deadline within which supplementary information and evidence shall be provided.

Immunity is conditionally granted in case the benefit is still available at the time the application has been submitted. The ICA will then set out in its final decision whether or not to reward the first applicant with full immunity, after verifying that all conditions of section 7 have been met.

At present, the Notice does not provide either for civil or criminal immunity, but, as described, it only grants for non-imposition or reduction of administrative fines foreseen by competition law No. 287/90. Nevertheless, in a recent opinion the ICA has asked the Government to grant individuals for a criminal immunity concerning offences that may occur in the framework of a cartel, and specifically in bid rigging. The ICA has also suggested to limit civil liability for companies participating in the leniency programme. In particular leniency applicants should be responsible for damages caused to cartel victims concerning exclusively their share of the relevant market. Civil and criminal immunity might make leniency programme more attracting, enhancing an effective and efficient defeat of cartels.

Finally the Italian legal system does not provide for "early case termination tools" based on the acknowledgement of their liability by the companies involved in a cartel, such as the settlement procedure recently introduced at EU level.

3. Reward of subsequent applicants in the Italian programme

In theory leniency applications can be filed at any stage of the investigation, since no formal time limit is set out in the Notice. Nevertheless, it has to be considered that full immunity can no longer be granted once the ICA has in its possession sufficient information or evidence to prove the existence of the infringement, either gathered at its own initiative or on the basis of a previous leniency application. Consequently, companies should submit an application or request a marker as soon as possible.

Nevertheless, in case the applicant loses the "race to the courtyard", since the ICA would already know about the infringement, a reduction of fine not exceeding 50% may be granted. Specific thresholds of reduction are not set out in the Notice, since in a first application phase it was considered appropriate to allow a wide flexibility. Nevertheless in theICA's experience the maximum reduction possible has generally been granted to subsequent applicants.

The ICA considers that subsequent applicants can play a fundamental role, since they can provide new elements concerning a wider geographical scope and a longer duration of the cartel, as the case law has confirmed.

The eligibility for the reduction requires that a significant added value is provided by the applicant to the end of establishing the infringement. The latter must submit evidence that for its nature and level of detail significantly strengthens the evidence in theICA's disposal. Furthermore, the conditions required by section 7 for full immunity, other than submission as first applicant, shall be met. In the statement of objection, the ICA communicates if the applicant is entitled to get a reduction of fine. The exact amount of the reduction granted is set out in the final decision, if the applicant has genuinely, continuously and effectively cooperated during the whole proceeding.

When determining the reduction the ICA has to take into consideration the effective value of the elements of proofs provided by the applicant, the timing of the submission and the degree of cooperation provided compared to other companies involved in the programme. The ICA's decision can be appealed in front of the Regional Administrative Court of first instance (TAR - Tribunale Amministrativo Regionale).

4. The Ica's case law, with particular regard to subsequent applicants

Since the entering into force of the Notice, the ICA has dealt with four different cases where full immunity and reduction of fines have been granted to companies that have provided their cooperation to the investigation.

Case I701 (*Vendita al dettaglio di prodotti cosmetici* No. 21924, 15 December 2010), which concerned a cartel of large retailers for cosmetic and health care products, was the first proceeding originating from a leniency application. The ICA fined the main manufacturers of cosmetics distributed in retail outlets and the national trade association as part of a single complex agreement based on the exchange of sensitive information, especially in occasion of association meetings. This exchange was aimed at coordinating the conducts in relation to retailers on future price increases, rebates and contractual conditions). The case originated from Henkel's leniency application and its cooperation was deemed fully, continuous and effective. In particular, the ICA considered the evidence provided by Henkel fundamental to detect the cartel and to identify the companies participating in it, in order to carry out inspections and establish the infringement. In its decision, the ICA followed the EU orientation, according to which the first applicant is not supposed to provide all the necessary information to asses a statement of objections or a final decision; information provided should be decisive to prove the infringement, but not necessarily complete and exhaustive. Consequently Henkel was rewarded with full immunity. The subsequent applicants Colgate and P&G were granted a fine reduction respectively of 50% and 40%. In particular,

evidence provided by Henkel allowed the ICA to consider a wider scope and a longer duration of the infringement. P&G cooperation strengthened the evidentiary proofs at the ICA's disposal with regard to both participants in the cartel and its duration. As stated by the Administrative Court of Latium, applicants cannot merely report an unlawful conduct, but have to admit their involvement in the infringement and support their statements with evidence (TAR 8945, 17 November 2011, *Vendita al dettaglio di prodotti cosmetici*).

In case I722 (*Logistica internazionale* No. 22521, 15 June 2011), the ICA fined the main shipping agents, who exchanged information on costs with the purpose of coordinating increases in prices charged to consumers. The case originated from a summary application, which was subsequently integrated after the case had been reallocated to the ICA by the European Commission. More specifically, the Commission dealt with air transport services, while the procedure concerning road transport was reallocated to theICA. Schenker, as first applicant, was granted full immunity for its cooperation by the Ica. Subsequent applicants Agility, DHL and Sittam were granted a fine reduction respectively of 50%, 49% and 10%. In particular, Agility provided evidence concerning a longer duration of the conduct, its involvement and the involvement of other companies. DHL, which was the first applicant before the Commission, turned out to be the third in front of the ICA. The TAR Latium confirmed theICA's orientation, ruling that a leniency applicant with the EU Commission does not automatically qualify for leniency in other member States, since national and EU programmes are distinct and autonomous, as specified in paragraph 38 of the Commission Notice on cooperation within the Network of Competition Authorities: "in the absence of a European Union-wide system of fully harmonised leniency programmes, an application for leniency to a given authority is not to be considered as an application for leniency to any other authority". It is therefore in the interest of the applicant to file applications with all national authorities that could be competent. Concerning the last applicant, Sittam, a reduction equal to 10% was granted, since its submission was filed after the proceeding had been opened and inspections carried out. Furthermore its contribution was deemed of an *appreciable value*, whereas DHL and Agility's cooperation had a *significant added value*. An analysis of the different reductions of fines granted by the ICA to the subsequent applicants shows how the authority takes into account, not only the timeline of the applications, but also the level of cooperation provided by the company.

The last case dealt with by the ICA (I733 *Servizi di agenzia marittima* No. 23338, 22 February 2012), concerned a cartel among the main sea freight forwarders. The first applicant Maersk was rewarded with full immunity, whether the second Hapag Lloyd was granted a reduction equal to 50%, by virtue of its cooperation that allowed the ICA to investigate and prosecute a wider infringement in terms of goods and services affected and longer duration of the infringement.

5. Conclusion

The Italian experience confirms the importance of rewarding subsequent applicants, since their contribution may be crucial to investigate and prosecute cartels with wider scopes – geographically, in terms of participants and goods and services affected - and with longer durations. New elements may emerge by virtue of subsequent applicants' cooperation as compared to the infringement depicted by the first applicant. Experience has also showed that, in the absence of a harmonised leniency programme, a strong cooperation among antitrust agencies, particularly when dealing with multijurisdictional cartels is needed, in order to avoid possible problems stemming from the fact that same applicant may have different positions in the leniency queue before different CAs.

JAPAN

1. Overview of the leniency program

The Japan Fair Trade Commission (hereinafter referred to as the "JFTC") introduced a leniency program following the amendment of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the "Act" or "Antimonopoly Act") in 2005. Subsequently, the JFTC revised the leniency program according to the amendment of the Act in 2009. The leniency program is stipulated in Article 7-2 of the Act, while the practical procedure for the program is stipulated in the Rules on Reporting and Submission of Materials Regarding Immunity From or Reduction of Surcharges (hereinafter referred to as the "Leniency Rules"). Under Japan's leniency program, immunity from or reductions in surcharges may be granted for the limited number of applicants including subsequent applicants.

Described below are (1) the types of violations which are covered by the leniency program, (2) the introduction of the leniency program upon the amendment of the Act in 2005, (3) the revision of the leniency program upon the amendment of the Act in 2009, and (4) the operational situation of the leniency program.

1.1 Types of violations covered by the leniency program

Types of violations covered by the leniency program are those that fall under unreasonable restraint of trade[1] that is subject to surcharges (Article 2, paragraph 6 of the Act), including cartels and bid rigging. Although international as well as domestic cartels are included in the violations for which the leniency program is applicable, if a party seeks immunity from or reductions in sanctions such as surcharges regarding international cartels outside Japan, it is necessary for the party to apply for such immunity or reductions with the competition authorities in the relevant jurisdictions, in addition to making an application with the JFTC. On the other hand, private monopolization that is subject to surcharges (Article 2, paragraph 6 of the Act) and certain unfair trade practices that is subject to surcharges (Article 2, paragraph 9 of the Act; concerted refusal to trade, discriminatory pricing, unjust low-price sales, resale price restriction, and abuse of superior bargaining position) does not fall under violations for which the leniency program is applicable.

Details concerning the relationship between the time schedule of leniency application and rates of immunity or reduction for surcharges, etc. are presented in section II below.

1.2 Introduction of the leniency program

The leniency program was introduced by the amendment of the Act in 2005, and it was subsequently put into effect on January 2006.

[1] The leniency program is also applicable to unreasonable restraint of trade by trade associations (Article 8, items 1 of the Act).

At the time of the introduction of the leniency program, up to 3 applicants before, during or after the investigation start date may be granted immunity from or a reduction in surcharges, under the sole condition that an enterprise applies for the program independently.

The relationship between the time and order of application and rates of immunity or reduction of surcharges at the time of introduction of the leniency program is presented in table 1 below.

Table 1. Table 1: Time and order of application and immunity/reduction rate

Time and order of application	Immunity/reduction rate
1st applicant before the investigation start date	Total(100%) immunity
2nd applicant before the investigation start date	50% reduction
3rd applicant before the investigation start date	30% reduction
Applicants on and after the investigation start date	30% reduction irrespective of orders (Note)

Note: The total number of applicants, including applicants before the investigation start date, that may be granted reductions in surcharges under the leniency program is limited to 3.

1.3 Revision of the leniency program

In light of the leniency program's operations since 2006, the program was revised by the amendment of the Act in 2009. A new leniency program has been in operation since January 2010.

In the new leniency program, (i) joint application is permitted under certain conditions for enterprises within the same company group (Article 7-2, paragraph 13 of the Act) (See also 2.3 a); (ii) up to 5 applicants before, during and after the investigation start date may be granted surcharge immunity or reductions (Article 7-2, paragraph 11 of the Act), although up to 3 applicants on and after the investigation start date may be granted surcharge reductions (Article 7-2, paragraph 12 of the Act) (See also 2.3 b (c)).

1.4 Operational situation of the leniency program

During Fiscal Year (FY) 2011, the JFTC received a total of 143 applications for the leniency program (Since the program became effective in January 2006, the JFTC has received 623 applications in total).

2. Leniency for subsequent applicants

Under Japan's leniency program, not only may the first leniency applicant be granted immunity from surcharges but also may subsequent applicants (second applicant to last applicant of a specified time order) be granted a reduction in surcharges.

Described below are (1) policy reasons for granting subsequent applicants a reduction in surcharges, (2) granting incentives to leniency applicants, (3) requirements and procedures for a leniency application, and the method of determining the rate of immunity from or reduction in surcharges, (4) prior consultation and marker system, (5) deadline for submitting a leniency application, and (6) criteria for disqualification.

2.1 Policy reasons for granting a reduction to subsequent applicants

As described above, under Japan's leniency program, immunity from or a reduction in surcharges may be granted for up to the first 5 applicants without regard to the application before, on or after the investigation start date (Article 7-2, paragraph 10 and 11 of the Act). However, it must be noted that a total of up to three applicants on and after the investigation start date may be granted such a reduction (Article 7-2, paragraph 12 of the Act).

When the leniency program was introduced following the amendment of the Act, it was decided that a reduction in surcharges would be granted for the first 3 leniency applicants; this was deemed the minimum number of informants necessary to react to the situation where, considering past experiences in investigations, it was difficult to grasp the overall picture of cartels or bid rigging. Such acts were conducted in private and are therefore difficult to uncover based solely on information from the first informant. When deciding on the minimum number of informants, a comparison was taken into consideration between the advantage of being able to grasp a full understanding of a cartel or bid rigging incident that might contribute to an early resolution, and the disadvantage of allowing a "first do, first win" meaning that the party actually responsible for committing the violations may be granted total immunity from or a reduction in surcharges.

When the leniency program was revised upon amendment of the Act, a comparison was made between the advantage of facilitating clarification of violations by obtaining more information from an increased number of entrepreneurs, to which the leniency program is applicable, and the disadvantage of weakening the incentive to come forward early to provide information to the JFTC. As a result it was determined that reductions in surcharges were to be granted for up to the fifth leniency applicant. With respect to the fourth and fifth applicants, it was decided that they could qualify for leniency under the condition that they provide information that had not yet been obtained by the JFTC.

2.2 Granting incentives to leniency applicants

The leniency program in Japan is basically a system under which the earlier an entrepreneur applies for leniency, the higher the immunity and reduction in surcharges that is granted. For example, the first leniency applicant apply for the leniency program before the investigation start date may be granted full immunity from surcharges (Article 7-2, paragraph 10 of the Act) as well as immunity from criminal accusation (See also 3.1), while the second applicant may be granted only a 50% reduction in surcharges (Article 7-2, paragraph 11 of the Act). The third to fifth applicants that apply before the investigation start date or any applicants that apply on and after the investigation start date may only be granted a 30% reduction (Article 7-2, paragraph 12 of the Act). As such, entrepreneurs are given the incentive to make early an application for leniency, and the size of the incentive will differ between the first and subsequent applicants accordingly.

2.3 Requirements and procedures for a leniency application and the method for determining the rate of immunity or reduction

a. General requirements

Procedures for obtaining leniency vary depending on the time and order of application. We will start by describing general requirements for obtaining leniency.

The first requirement (Article 7-2, paragraph 10, 12 and 13 of the Act and Forms No.1, No.2 and No.3 of the Leniency Rules) is that an application for leniency must be made by entrepreneurs (e.g. corporations) not by individuals (e.g. executives and employees). This is because entrepreneurs are the subject of cartels and bid rigging not individuals, and so it is entrepreneurs that are subject to surcharge payment orders. Although internal investigations would be required in order for entrepreneurs to receive immunity from or a reduction in surcharges under the leniency program, it is unlikely that individuals would offer such levels of cooperation.

The second requirement (Article 7-2, paragraph 10, 11 and 12 of the Act) is that individual entrepreneurs must make the leniency application independently. There are two reasons for this; firstly, the deterrent effect of preventing violations by exposing entrepreneurs to the risk that other corporate

conspirators may provide information to the authorities, and secondly the necessity to rule out the possibility of coordination among the conspirators, in order to ensure an appropriate reporting of violations. In principle, it is therefore inappropriate to grant immunity from or a reduction in surcharges for joint applications for leniency from entrepreneurs. However, entrepreneurs may make a joint application for leniency (Article 7-2, paragraph 13 of the Act) if the entrepreneurs have relationships such as parent and subsidiary (relationships in which entities belong to the same business group) at the time of their leniency application and the relationships were kept for the entire period that they took part in the illegal activity in collusion with each other. In this case, entrepreneurs within the same company group are deemed to have made a single leniency application and are granted the same time order in their leniency application and the same rate of surcharge immunity or reduction. However, it should be noted that this does not mean that corporate conspirators are allowed to determine the time order for their individual leniency application on a joint basis. Corporate conspirators are prohibited internal discussions to determine the time order for collectively making a single leniency application.

The third requirement (Article 8 of the Leniency Rules) is that leniency applications may not be disclosed to any third parties without a justifiable reason. This is to prevent other participants in cartels, bid rigging, etc. from concealing evidence or making secret arrangements once they have been informed of applications.

The fourth requirement (Article 7-2, paragraph 10, item 2, paragraph 11, item 4 or paragraph 12, item 2 of the Act) is that a leniency applicant before the investigation start date cannot be conducting the illegal act on or after the investigation start date (in the case of leniency application on or after the investigation start date, on and after the date of submission of the prescribed report and materials using Form No. 3). This is to prevent applicants, who may be granted immunity from or a reduction in surcharges, from continuing to take advantage of carrying out the illegal activity.

b. Necessary procedures for leniency application

When applying for leniency, the applicant must adhere to the following procedures. Procedures for leniency application vary depending on the time and order of application.

(a) Before the investigation start date

The leniency applicant that makes an application before the investigation start date is required to provide an overview of the illegal activity by submitting a report using Form No. 1[2] (Article 1 of the Leniency Rules). Subsequently, by the deadline indicated by the JFTC (Article 2 of the Leniency Rules), the applicant is also required to report details of the illegal activity by submitting a report using Form No. 2 and materials (Article 3 of the Leniency Rules). There is hardly any difference among the first three applicants in the volume and quality of evidence required, regardless of the time order of leniency application.

Even after the submission of Form No. 2, the applicant will be required by the JFTC to make reports on the illegal activity until an order for a surcharge payment is issued (Article 7-2, paragraph 16 of the Act and Article 6-3 of the Leniency Rules).

[2] http://www.jftc.go.jp/dk/genmen/newyosiki1.pdf (in Japanese only) Entries shall be made in Japanese with respect not only to Form No. 1 but also to Forms No. 2 and No. 3 (Article 9, paragraph 1 of the Leniency Rules).

The fourth or fifth leniency applicant is additionally required to provide information that the JFTC has not yet obtained from any other source at the time of application (at the time of the submission of Form No. 2), in addition to the requirements described above (Article 7-2, paragraph 11, item 3 of the Act).

As described above, the bar is generally set higher for applicants that submit reports later because the JFTC will have already received a large amount of information.

With respect to whether a report submitted by a leniency applicant includes the necessary content, this requirement can be satisfied by submitting an additional report after the submission of a report using Form No. 2 and materials because the JFTC usually makes a judgment upon the deadline for submitting Form No. 2.

(b) On and after the investigation start date

An applicant that makes a leniency application on and after the investigation start date must report details of the illegal activity by submitting a report using Form No. 3 (Article 4 of the Leniency Rules), and subsequently submitting materials within 20 days of the investigation start date (Article 5 of the Leniency Rules).

Even after submission of Form No. 3, the applicant will be required by the JFTC to make reports on the illegal activity until an order for a surcharge payment is issued (Article 7-2, paragraph 16 of the Act and Article 6-3 of the Leniency Rules).

In addition, unlike cases of leniency application before the investigation start date (other than the fourth or fifth application), the applicant is required to provide information that the JFTC has not yet obtained from any other source at the time of application (at the time of submission of Form No. 3), regardless of the time order of leniency application (Article 7-2, paragraph 16, item 1 of the Act).

Consequently, the bar is generally set higher for applicants that submit reports later because the JFTC will already have received a large amount of information.

With respect to whether a report submitted by a leniency applicant includes the necessary content, this requirement can be satisfied by submitting an additional report after the submission of a report using Form No. 3 and materials because the JFTC usually makes a judgment 20 days after the investigation start date.

(c) Method of determining the rate of immunity or reduction

Finally, the rate of immunity from or reduction in surcharges is automatically and uniformly determined based on the time and order of the leniency application, in accordance with the procedures described in (b) above, on the condition that the requirements for the immunity or reduction described in (a) above are satisfied. Accordingly, even if an applicant offers a significantly higher degree of cooperation with the authorities than is required in the procedures described in (b) above, the applicant will not receive the benefit of additional immunity or reduction. However, if an applicant offers further cooperation, the possibility of adherence to the procedures in (b) above is increased, and this may benefit their leniency application by decreasing the risk of immunity or reduction not being granted.

The relationship between the time and order of leniency application and the rate of immunity from or reduction of surcharges is shown in table 2 and 3 below.

Table 2. Table 2: Immunity/reduction rate before the investigation start date

Order of application	Immunity/reduction rate
1st applicant	Total(100%) immunity
2nd applicant	50% reduction
3rd applicant 4th and 5th applicants	30% reduction

Table 3. Table 3: Immunity/reduction rate on and after the investigation start date

Order of application	Immunity/reduction rate
Up to 3 applicants	30% reduction (Note)

Note: Together with the parties before the investigation start date, a maximum of 5 companies may be granted (e.g. if three applicants are granted leniency before the investigation start date, a maximum of two applicants may be granted leniency on and after the investigation start date).

2.4 Prior consultation and marker system

a. Prior consultation

Before making an application, a party that intends to apply for leniency may learn the expected time order of its application by holding a prior consultation (not a statutory system) with the Senior Officer for Leniency Program. Although the prior consultation may be held anonymously, the JFTC does not deal with consultations if their sole purpose is to gather information; this is because the prior consultations are only to be held for parties that intend to apply for leniency.

Specifically, when a consulter has requested a prior consultation before the investigation start date, the Senior Officer for the Leniency Program will inform them of the time order of their application if the application is made at the time of the prior consultation. On the other hand, when a consulter has requested a prior consultation on or after the investigation start date, the Senior Officer for the Leniency Program will inform them of the possibility of being granted a reduction in surcharges if the application is made at the time of the prior consultation.

Although prior consultation is not a statutory system, it is structured in such a way that subsequent leniency applicants will not be discouraged to apply due to the uncertainty of the time order of leniency application. Prior consultation offers an opportunity to receive instruction about the time order of leniency application from the Senior Officer for Leniency Program.

It should be noted that the JFTC will not commence investigations, before formal applications for leniency, based on the information obtained during the prior consultation in order to ensure that a party with the intention of applying for leniency can easily receive consultation[3].

b. Marker system

Under Japan's leniency program, the adopted marker system is limited to applications before the investigation start date (Article 7, paragraph 1 of the Leniency Rules). The reason for adopting the marker system is if the leniency application time order of an applicant who has conducted rigorous internal investigations in order to report the details of illegal activity is behind that of another applicant who has

[3] It goes without saying that in some cases investigations may be commenced based on information obtained from sources other than a consulter of prior consultation concerning leniency application (e.g., report by any person described in 3.4 below).

conducted a simple internal investigation in order to report an outline of the illegal activity, the incentive for applicants to make more detailed reports to the JFTC would be diminished.

First of all, the JFTC notifies an applicant of its tentative time order for leniency application (Article 2 of the Leniency Rules) upon submission of the outline of illegal activity using Form No. 1(Article 1 of the Leniency Rules). Subsequently, the tentative time order is finalized as the formal time order (Article 7, paragraph 1 of the Leniency Rules) if the applicant reports the details of the illegal activity by submitting Form No. 2 and materials by the deadline specified by the JFTC (Article 3 of the Leniency Rules). The tentative time order will be formalized unless the applicant fails to make the required reports using Form No. 2 and materials within the specified time frame.

Even if the applicant submits the required reports using Form No. 2 and materials later than other applicants, its formal time order for leniency application will not be affected by the delay as long as the reports are submitted within the specified time frame. However, if the applicant fails to submit said reports within the time frame, their application becomes invalid and time orders for other leniency applicants are prioritized.

Moreover, the marker system is applicable not only to the first applicant but to subsequent applicants if their leniency applications are made before the investigation start date. However, the system is not applicable to any application made on and after the investigation start date, regardless of the time order of application. For this reason, if a party applies for leniency on and after the investigation start date, the party needs to submit Form No. 3 to report the details of illegal activity at the time of the first application (Article 4 of the Leniency Rules). Time order for leniency application on and after the investigation start date shall be determined based solely on the time order of the submission of Form No. 3 (Article 7, paragraph 2 of the Leniency Rules).

2.5 Deadline for submitting a leniency application

The deadline for submitting a leniency application on and after the investigation start date is within 20 days of that date. Public holidays are not included in the 20 days (Article 7-2, paragraph 12 of the Act and Article 5 of the Leniency Rules). After the 20 days have elapsed, applications are no longer accepted, regardless of the time order of leniency application. This deadline is prescribed because clarification of an incident of a cartel, bid-rigging, etc. is expected to make significant progress when the JFTC is gathering and examining various information before, on and immediately after the investigation date, while the desired progress is unlikely to be made long time after an onsite inspection.

It should be noted that the investigation start date is determined by each incident. Even if onsite inspections are conducted for two or more entrepreneurs over two or more dates concerning an incident, the date of the first onsite inspection will be the investigation's start date. Consequently, there is a possibility that the onsite inspection date at a leniency applicant's location may not correspond with the investigation start date.

2.6 Criteria for disqualification

In the event of any of the following cases (criteria for disqualification) after determination of formal time orders for leniency applications, a leniency applicant will be disqualified (Article 7-2, paragraph 17 of the Act): (i) false information included in the reports or materials submitted by the applicant; (ii) the applicant failed to submit additional report or submitted a false report or materials in response to a request from the JFTC; (iii) the applicant coerced other entrepreneurs to participate in illegal activity; (iv) the applicant obstructed other entrepreneurs from ceasing to violate the Act. However, it should be noted that

if an applicant with a formal time order for leniency application falls under any of the criteria for disqualification, the time orders of the other leniency applicants will not be affected.

3. Relationships with other enforcement policies and tools

3.1 Criminal penalties

Below is an explanation of the relationship between the leniency program and criminal penalties.

a. Accusation policy

Any party that has caused private monopolization, unreasonable restraint of trade, etc. is subject to criminal sanctions pursuant to the Act (Article 89 of the Act). The JFTC has the exclusive authority to file an accusation (Article 96 of the Act: A public prosecutor may not prosecute a violation of the Antimonopoly Act without an accusation filed by the JFTC). In October 2009, the JFTC announced the amendment of its policy on criminal accusation[4]. According to this revised policy, the JFTC has filed accusations concerning criminal cases since January 1, 2010. The relationship between the leniency program and the revised policy on criminal accusation are outlined as follows.

(a) Entrepreneurs

The JFTC will not file an accusation against the first party to submit a standalone leniency application (the first applicant for leniency) before the investigation start date. Similarly, an accusation shall not be filed against entrepreneurs that belong to the same corporate group and make a joint application as the first applicants for leniency.

(b) Executives and employees of entrepreneurs

The JFTC will not file an accusation against executives, employees, etc. of the first entrepreneur to submit a standalone application for leniency or the first entrepreneurs to submit a joint application for leniency (the first applicant[s] for leniency) before the investigation start date, on the condition that such executives, employees, etc. cooperate with the JFTC's investigations in the same manner as the entrepreneur(s).

On the other hand, regarding filing an accusation against subsequent applicants (applicants that were the second to last to file a leniency application before the investigation start date or applicants that submitted leniency applications after the investigation start date) other than the first applicant(s) to submit an application for leniency before the investigation start date, it is at the JFTC's discretion whether or not to file an accusation against a subsequent applicant including its executives and employees, taking into account the applicant's degree of cooperation with the JFTC's investigation.

b. Increased criminal penalties

With respect to criminal sanctions against any party that has caused private monopolization or unreasonable restraint of trade, the maximum jail terms (Article 89 of the Act) were increased from three to five years upon amendment of the Act in 2009. As a result of the amendment, there is a large difference in the penalty between an entrepreneur that may be subject to a criminal sanction but is the first party to

[4] The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (revised in October 2009).

submit a leniency application before the investigation start date and is therefore exempt from having an accusation filed by the JFTC, and the entrepreneur who is otherwise subject to the JFTC's discretion.

c. Summary

The current leniency program is a system under which the first party to submit an application for leniency before the investigation start date may receive immunity from criminal accusation. With the increased criminal penalties, the leniency program is structured to provide incentives for corporate conspirators to apply for leniency early.

3.2 Increased rate of surcharges

Below is an explanation of the relationship between the leniency program and other surcharge systems, including application of increased rates of surcharges applicable to those repeatedly committing violations and playing a leading role in violations.

If a party that has received an order for surcharge payments, etc., (limited to cases where said order has become final and binding) as a result of violations of the provisions of Article 3 of the Act (private monopolization or unreasonable restraint of trade) commits another violation of Article 3 of the Act within 10 years and becomes subject to a surcharge payment order, the rate of calculating surcharges shall be increased by 50%. The same increase applies to an entrepreneur who plays a leading role in the illegal activity prescribed under Article 3 of the Act (limited to unreasonable restraint of trade).

Even when an increased rate of calculating surcharges is applicable, a surcharge immunity or reduction under the leniency program may also be applicable (exemption from or reduction of the newly calculated surcharge rate). For this reason, there is a large difference in penalty between the cases where a party that is subject to a surcharge payment calculated using an increased rate is granted leniency, and the cases where it is not granted. The increased surcharge rates are therefore a strong incentive for an entrepreneur to apply for leniency early.

With respect to the relationship between increased surcharge rates and time order in leniency application, a reduction of surcharges based on the leniency program shall be applicable even to subsequent applicants subject to surcharge payments at an increased rate.

3.3 Civil lawsuits for damages

Below is an explanation of the relationship between the leniency program and civil lawsuits for damages.

In Japan, there is no legal provision for the adjustment of monetary amounts where an entrepreneur that is granted leniency receives a lower amount for damages in civil lawsuits.

However, in order to avoid weakening the incentive for an entrepreneur to come forward and apply for leniency, an applicant may verbally report part of the report content that is to be submitted to the JFTC using Forms No. 2 and No. 3 (Article 3, item 4 and Article 4 of the Leniency Rules). This reflects consideration for preventing any disadvantage to a party that submits an application for leniency in Japan with respect to an incident of an international cartel for which a foreign court may, in relation to a civil lawsuit for damages outside Japan, issue an order to the applicant to submit or disclose the documents that the applicant has submitted to the JFTC for the leniency application.

With respect to the relationship between civil lawsuits for damages and time order in leniency application, even a subsequent applicant for leniency may verbally report part of the report content that is

to be submitted to the JFTC using Form No. 2 (if such reporting is made before the investigation start date) or Form No. 3 (if such reporting is made on and after the investigation start date).

3.4 Others (compatibility with the JFTC's own ability to detect information)

To ensure the effectiveness of the leniency program, it is important that the relevant authority has the superior ability to detect information about the illegal activity. The higher the authority's own ability to detect information about the illegal activity, the greater is the possibility for corporate conspirators participating in the illegal activity to become subject to surcharge payments, hence there is stronger incentive for such corporate conspirators to come forward early for leniency application. Below is a description of a report of antitrust concerns submitted to the JFTC (Article 45, paragraph 1 of the Act) as a method for detecting information about illegal activity that does not rely on leniency applications.

In Japan, the report on violations of the Antimonopoly Act is accepted from general consumers (individuals), executives and employees of entrepreneurs, and entrepreneurs, etc., in addition to reports from entrepreneurs under the leniency program. In FY2011, the number of such report cases (except for cases under the leniency program) stood at 8,759 (compared to 11,773 in FY2009 and 10,769 in FY2010).

Unlike in cases of leniency application, an informant is not necessarily required to report violations of his or her own company or specific facts concerning violations. An informant can offer a wide range of information to the JFTC when there is doubt that a violation has taken place.

An informant may also provide the Information Analysis Office with information about illegal activity using a free form and method (reports via telephone/internet or anonymous reports are also accepted), whereas when applying to the Leniency Program Office that is a completely different section to the Information Analysis Office, Leniency Rules require the use of specific methods (e.g. when submitting reports using Form No. 1 or Form No. 3, transmission by fax with a company name, etc. is mandatory).

On the other hand, based on the condition that an informant reports antitrust concerns to the JFTC in accordance with the provisions of the Fair Trade Commission Rules, the JFTC is obliged to notify the informant of whether or not measures have been taken concerning the reported incident (there is no such system in the leniency program). In the case of the report of antitrust concerns, there is an advantage that the informant is allowed to know the authority's response to the reported matter.

It should be noted that making a report of antitrust concerns does not mean that the informant has applied for leniency, and vice versa.

KOREA

1. Background

In Korea, cartels are regarded as 'Public Enemy Number 1' to the market economy. This is because cartels cause inefficiencies in resource allocation by agreeing on price or other terms of trade. In most cases cartels inflict severe harm to consumers. For example, the graphite electrodes cartel is allegedly known to have raised price by 50% in a 5 year period.

Korea has always placed a high priority on cartel regulation since the enactment of the Monopoly Regulation and Fair Trade Act (MRFTA) in 1981. This trend is intensified as the Korea Fair Trade Commission (KFTC) has placed even higher priority on cartel enforcement. Since 1994, when the KFTC became independent from Economic Planning Board (EPB), there has been a three-fold increase in sanctions against cartels above corrective order in the 10 year period from 2001 to 2010, compared to 1981 to 1998. The number of remedies issued doubled during 2001-2010 from 250 during 1981-1998

Despite KFTC's rigorous efforts to regulate cartels and subsequent success, KFTC was looking for stronger tools for a more effective enforcement. As part of this effort, leniency scheme was introduced in 1997 for enhanced cartel detection and punishment. After then, reflecting ongoing discussions of the global community and some necessary improvements, major revisions of its own Leniency Program have been made four times – in 2001, 2005, 2006 and 2009.

2. Korea's Introduction of Leniency Program and its Evolution

2.1 Introduction of Leniency Program

In the late 1990's, the Korea Fair Trade Commission strengthened regulations on cartels and considered adopting Leniency Program[1] as means to identify cartels effectively.

Leniency Program was first introduced in Korea in Dec 1996 through MRFTA revision. In the early days of the adoption, it was stipulated that "an informant[2] who voluntarily reports a cartel to the KFTC before initiation of an investigation will be eligible for leniency." However, as there was no provision on procedures for application and degrees of leniency, they were entirely left to the Commission's discretion.

[1] In Korea, up until the 1980's, cartels were not often considered as hideous legal violation. That was because, in the course of breakneck economic development led by the government, it deeply intervened in the market and had extensive influence on business activities of companies. Furthermore, business associations were formed in almost every industry, so companies maintained a very close relationship around these associations and considered that helping each other and making concession was a virtue based on the traditional Confucianism.

[2] Under the MRFTA, applicants are divided into two groups – informants and cooperators. Informants are those who voluntarily report cartels to the authority before it initiates investigation, while cooperators refer to those who cooperate in investigation by the Commission. Both of them are collectively called Leniency applicants in this paper.

2.2 Improvement to the Program in 2001

From the introduction of the program in 1996 to up until 2000, only 2 applications for leniency were made. As this shows, the program was barely used up until recently. To boost the use of the program, the MRFTA and its enforcement decree were revised to incorporate the following changes:

- Aside from voluntary informants who report cartels to the authority before investigation, applications for leniency by those who promise to cooperate in the KFTC's investigation will be also accepted.

- When informants or cooperators satisfy requirements to be eligible for leniency, they will be given leniency within a pre-determined scope.

- As for the degree of mitigation of or exemption from surcharge for leniency applicants, 75% or more will be cut in surcharge for the first voluntary informant, while 50% or more for the first cooperator in the investigation and less than 50 % for the rest.

With these changes, as the degree of mitigation of or exemption from is stated in great detail in laws and regulations, the predictability for applicants increased a lot. However, applicants still felt unsure about their fate, as the Commission had too much discretionary power and both eligibility for leniency and the degree of it were determined not at the beginning of investigation, but on the heels of the KFTC's decision.

2.3 Improvement to the Program in Apr 2005

The improvement to the program in 2001 was not successful in making the program popular enough among companies to encourage them to report their offenses voluntarily. In response to this, starting from early 2004, the KFTC, based on its experience and what was discussed during international conferences on designing effective Leniency Program, took on the work of reviewing existing Leniency Program. The reviews were conducted in parallel with overall cartel regulations improvement.

After a year-long review, in Apr 2005, relevant laws and regulations were amended and went into effect. The amendment included the following changes:

- Surcharges against cartels will be increased up to 10 % of relevant turnover (previously 5%) and other law enforcement against cartels (investigative authority) will be strengthened as well.

- The degree of leniency will be determined automatically so that applicants will clearly know what benefits they will get.

- Confidentiality on leniency applicants will be strengthened so that applicants' identity will not be disclosed.

- Procedures for application should be transparent and also made public. In the initial stages of investigation, applicants shall be notified of whether they are eligible for leniency or not.

2.4 Improvement to the Program in Jul 2006

The two distinguished features of this revision are 'Introduction of oral leniency application' and 'expansion of the period for submitting evidences to be supplemented.' The KFTC abolished the barriers hindering potential applicants from coming forward by permitting the oral application because accepting only the written application may chill the efforts of applicants who might be fear of the 'discovery system'

of the U.S., for instance. Permission of oral leniency application is evaluated to have facilitated the race for amnesty as well.

In addition, the KFTC expanded the period for submitting evidential materials from 24 days to 150 days maximum, perceiving that it usually takes considerable time for the prospective amnesty applicant of international cartels to collect, translate the relevant evidences and cope with several competition agencies simultaneously.

2.5 Improvement to the Program in May 2009

On May 19, 2009, the KFTC made additional revision to the leniency programme to better address the unique aspects of international cartels and requests from foreign applicants.

Under the revision, first, joint leniency application by two or more companies is allowed if specific requirements are met, given that sometimes desirable cooperation would be feasible only when two or more companies cooperate with the KFTC's investigation simultaneously. The revision stems from a concern that the existing rule granting immunity status to a separate enterpriser might deter a potential leniency application from coming forward particularly in the case of international cartels where multinationals with subsidiaries across the world altogether often apply for leniency. Under the revised rule, joint application of two or more companies is allowed if the companies are in the parent/subsidiary relationship or they are the parties in corporate spin-off/transfer of business and did not participate in the cartel conduct in question. This amended rule is retroactively applied to the on-going cases to benefit the enterprisers which already filed leniency application to the KFTC.

Second, predictability for the second applicants has been improved. So far the leniency status could be transferred to the next applicant only in the case of disqualification of immunity status. However, the revision allows the cases of voluntary withdrawal of application, cancellation of the application position and other occasions, as well. This revision, as well, is applied to the pending cases.

In addition, the point of time when applicants should desist from the concerted act in question has changed from "before the final decision of the Commission" to "immediately after the application", but, when the KFTC deems it appropriate for the successful investigation, they can stop the engagement after the certain period designated by the agency.

3. Leniency & Subsequent Applicant

3.1 Outline

Leniency applicants in Korea receive exemption from or reduction of surcharges or remedies discriminately according to their order of application. In case of an application coming in before investigation, its applicant is regarded as a leniency applicant; whereas after investigation, an investigation cooperator. The first pre-investigation applicant gets exemption from surcharges and remedies and the first post-investigation cooperator receives surcharge exemption or easing of remedies. The second pre-investigation applicant and second post-investigation cooperator are given 50% surcharge reduction or some remedy mitigation specific to the case in question.

3.2 Background of Acknowledging Subsequent Applicant

Evidence presented by second applicants is usually supplementary to that given by first applicants. Such subsequent evidence plays an important role for watertight cartel detection and punishment by filling in a gap, if any, in the first applicant's submission. Plus, cartelists' admission of facts or charges discourages other cartel participants who try to deny charges thus facilitating efficient case resolution. In

this sense, secondary investigation statements are also significant for case handling because they, along with first-in statements, disrupt the cohesion of other cartelists.

With a view to enhanced remedy effectiveness, the KFTC has recently amended the law (enacted on June 22, 2012) to stop easing punishments for second-in applicants who involved in a concerted act by only two enterprisers. Previously, knowing that they could still get surcharge reduction even thought they were not the first-in applicant; enterprisers intentionally delayed filing an application. So the amendment aimed at inviting some application race among companies by modifying the previous rules which could not fully punish either enterprisers involved in a two-party cartel.

3.3 Legal Requirement

There are some requirements to gain recognition as a leniency applicant or investigation cooperator. A first-in applicant and cooperator should satisfy the followings:

- Present firstly evidence necessary to prove a concerted act
- Present evidence not held by the KFTC but necessary before or after the commencement of investigation
- Have cooperated in good faith until the end of investigation
- Have ceased the concerted act in question
- Have not forced the joining or discontinuing of an unfair concerted act
- Have not repeated the same kind of violation within the past 5 years

A second-in applicant and cooperator should satisfy the followings:

- Present secondly evidence necessary to prove a concerted act
- Have cooperated in good faith until the end of investigation
- Have ceased the concerted act in question
- Have not forced the joining or discontinuing of an unfair concerted act
- Have not repeated the same kind of violation within the past 5 years

3.4 Status Disqualification & Elevation

21. The KFTC also set up an additional system drawing continued full cooperation from all applicants until its final decision. In Korea, all applicants including a second-in enterpriser are subject to disqualification if they fail to cooperate for investigation, submit falsified documents, fail to stop cartel activities, force a cartel or present weak evidence, etc. Leniency applicants (including second-ins) can appeal such disqualification to a court. In a case with 2 or more applicants and some of their leniency status is disqualified, the subsequent applicant will elevate to the upper status. During the applicant acceptance phase where no status is yet granted, if an earlier applicant is rejected from immunity, the following applicant will fill in the status. Such a mechanism stimulates a race between first- and second-in applicants for better investigatory cooperation. Since the first and second applicants receive different level

of benefits and their status of order goes uncertain until investigation ends, second-in applicants are motivated to offer more evidence or stronger cooperation than that from a first applicant. The system also keeps a possibility open for third-in or lower-ranked applicants to see their status elevated before the final KFTC decision.

4. Relations with Other Systems

4.1 Criminal & Civil Enforcement

The KFTC currently gives leniency applicants immunity from prosecutor accusation, except for some cases with, for instance, the prosecutor general's accusation request. Unlike the US, in Korea, cartels are punished by an administrative body - the Korea Fair Trade Commission. And the organization holds the exclusive right of complaint regarding any cartel participant, which is a major exception to the prosecutor's complaint domination. The KFTC, with this exclusive right, viewed it necessary to more activate leniency for cartels, considering their nature of going secret. So the Commission added individual or corporate immunity from prosecutor's accusation as an important incentive of leniency program in addition to surcharge reduction and remedy mitigation. In doing so, the Commission also considered that granting to applicants remedy or surcharge benefits but no prosecutorial immunity was hardly in line with the initial intention to introduce incentives and that it could possibly be the gravest obstacle in stimulating the system.

Korea also imposes on cartelists administrative restrictions plus civil liabilities for damages. But not any leniency applicant can automatically enjoy exemption from such civil liabilities just as other countries.

4.2 Early Case Termination Policy

Korea has employed no early case-closing system for unfair concerted acts. So any confirmed leniency applicant, just as other enterprisers under investigation, should undergo the whole investigation processes and provide full cooperation until the case-closing stage where the Commission makes a final decision and authorizes to give benefits. Cartels were also exempted from Consent Resolution brought in the country in December 2011 for a reason that they make a serious and obvious law violation.

5. Conclusion

Korea accepts leniency applications after the start of investigation and recognizes upto second-in applicants as an effective subsequent applicant. This is to induce full-blown cooperation across the investigation procedures including cartel evidence submission by triggering competition between applicants. We may think of giving some differential benefits to third-in applicants or lower, but 1) it is not desirable to expand such benefits too much for law violators, 2) there still remains a possibility open that such lower-ranked comers become elevated to a higher position in case of status disqualification, which motivates them to cooperate till the end as well, and 3) benefits of mitigation are actually given to the kind of cooperation corresponding to other general mitigation requirements. For these reasons, Korea has limited such benefits up to second-in applicants since the scheme introduction in 1996.

To strike a balance between effective leniency enforcement and applicant motivation, competition agencies are required to examine market conditions, market participants' behavioral changes, etc. on a regular basis and reflect the outcome in their systems.

LATVIA

Please provide a brief description of your immunity programme, its background and its development over time. Please focus your submission particularly on recent developments and/or changes in your immunity policy.

Leniency programme in Latvia has been introduced in 2004. Programme offers full immunity for the first-in applicant and reductions of fines for the subsequent applicants. Programme was drafted taking after the relevant EC legislation. So far there has been one summary application, which was submitted as part of parallel leniency applications in several jurisdictions for the infringement of Article 101(1) of Treaty on the Functioning of the European Union. No leniency application for an infringement of the cartel prohibition according to the Latvian Competition Act has been filed so far.

Latvian Leniency programme applies to hard-core cartels – (i) fixing prices or trading conditions; (ii) limiting or controlling production, markets, technical development or investment; (iii) sharing markets based on territory, customers or suppliers; and (iv) bid-rigging.

Recently, Latvian Competition Council has proposed to amend the Leniency programme regarding access to the leniency file. If adopted, the programme will explicitly state that only parties to the antitrust investigation may be granted access to the leniency file and only for the purposes of defence in the antitrust proceedings. The proposal aims to protect leniency applications from otherwise mandatory disclosure and increase its appeal for the potential applicants.

Please discuss what is/are the policy purpose(s) of your immunity programme. Is the purpose of the immunity programme formally stated in guidelines or notices? If your agency grants some form of immunity to subsequent applicants, what is the policy rationale for doing so?

Latvian Leniency programmes aims to improve Council's enforcement efficiency and, more general, raise overall level of deterrence.

Detection of cartels and gathering of sufficient incriminating information and evidence solely *ex officio* is resource intensive and will result in inefficient enforcement regime. In this respect the Leniency programme offers a cost and time saving supplement to *ex officio* investigations. Also, information and evidence gathered through leniency applications, as opposed to an outside source, will tend to be more coherent, accurate and reliable. Thus, the Leniency programme benefits enforcement efficiency, at the same time raising the overall level of deterrence.

Existing Leniency programme is stipulated in the 29.09.2008 Regulation No 796 of the Cabinet of Ministers "Procedures for the Determination of Fines for the Violations Provided for in Section 11, Paragraph one and Section 13 of the Competition Law" (available in English http://www.kp.gov.lv/uploaded_files/ENG/E_mkn796.pdf). There are no further guidelines or notices.

Rationale for granting fine reductions to the subsequent applicants can be viewed as an extension of the policy considerations discussed above. Subsequent applicants should fill in evidential gaps, for which the Council did not gather sufficient incriminating evidence. As subsequent reductions are conditional on the quality of evidence and cooperation provided, the Council may be able to accumulate sufficient

incriminating evidence in a relatively shorter period and save resources, which would otherwise be allocated to the investigation. Also, evidence gathered from the subsequent applicants will tend to corroborate the first-in application, strengthening the antitrust case against potential appeals. Overall, subsequent reductions may bring down resistance of cartel members, induce cooperation and smooth the investigation. Based on this, it may be argued that the enforcement regime may reap the most benefits by awarding subsequent reductions, when prosecuting cartels with a large number of participants.

1. Issues related to leniency for subsequent applicants

Please discuss the policy advantages and the disadvantages of rewarding subsequent applicants.

Policy advantages of rewarding subsequent applicants are increased enforcement efficiency and increased deterrence. More on the advantages please refer to the Question I-2.

If implemented properly and bearing in mind the policy objectives discussed above, rewarding of subsequent applicants should not result in significant policy disadvantages. If, however, conditions attached to the leniency applications are complied with formally or reductions are granted arbitrarily, then it will compromise the enforcement efficiency, which a leniency regime was meant to increase instead. For example, if the subsequent reduction is too high, it does not incentivize the cartel member to be the first to reveal the secret illegal activity. There might be also some disadvantages from the perspective of the subsequent applicant. If the additional evidence materially widens the scope of the illegal activity or its duration, then a subsequent reduction may not sufficiently offset an increase in the fine due to the additional evidence supplied.

Please describe the treatment reserved to subsequent applicants under your immunity program. In particular: - describe the incentives that your immunity program provides to companies or individuals who wish to benefit from the immunity program. Are these incentives different for the first-in and the subsequent applicants, and among subsequent applicants?

As an incentive, Latvian Leniency programme offers immunity from a fine for cartel members, which are willing to put end to their participation in the cartel and cooperate. There are no benefits reserved for individuals, as the Latvian competition regime does not foresee penalties for natural persons.

Level of immunity differs according to the speed at which applicants have approached the Council. The first-in applicant receives full immunity and the second – a fine reduction of 30% to 50%. All other subsequent applicants may receive fine reduction ranging from 20% to 30%.

As a general incentive, the recent proposal for an explicit protection against the disclosure of a leniency file to third parties may provide an important impulse for a full and sincere cooperation not only for the first-in, but more so for the subsequent applicants, which have no benefit from the full immunity.

Describe the requirements placed on applicants who wish to benefit from the immunity program. Are these requirements different for the first-in and the subsequent applicants, and among subsequent applicants?

There is a general obligation placed on all leniency applicants to cooperate fully and sincerely for the duration of the investigation. The scope of cooperation is similar to the ECN Model Leniency Programme, Chapter V “Conditions attached to leniency”. Applicants must submit all the relevant information and evidence and reply swiftly. Applicants must not have destroyed, falsified or concealed evidence falling within the scope of application or disclosed directly or indirectly to any person the fact of filing for leniency.

As opposed to the subsequent applicants, the first-in applicant has to declare, that it did not coerce other undertakings to participate in the cartel.

Discuss how your agency assessed the degree of co-operation from applicants under your immunity program, e.g. in terms of the amount of evidence made available to the agency and the timeliness of co-operation. Is there a different standard (e.g. on the amount and quality of information demanded) for first-in and subsequent applicants, and among subsequent applicants?

The degree of cooperation does not differ among the leniency applicants during the investigation. After making the initial application, which is sufficient to conduct targeted inspections, the first-in applicant is still under the obligation to submit all the relevant information and evidence at its disposal, if at the moment of application it could not do that. Failing to do so may result in the loosing granted immunity.

Naturally, the burden of providing information and evidence for the subsequent applicants is higher. Whereas the first-in applicant only has to submit information and evidence at its disposal, the subsequent applicants will be rewarded if their information and evidence adds significant value to the investigation. Also, as the time since the initiation of the investigation elapses, the probability that new evidence will add significant value falls. Therefore late subsequent applications generally should not be granted significant reductions.

Describe the criteria that you apply to determine the appropriate level of discount in fines/sanctions to encourage cartelists to enter into the immunity program. If you reward co-operation from subsequent applicants, how did you differentiate the level of discounts for the various applicants?

The main criteria to define the appropriate level of reduction is the speed (order) at which cartel members approach the Council and the value which the information and evidence supplied adds to the investigation.

As regards discounts based on the speed at which applicants have approached the Council, the first-in applicant receives full immunity and the second – a fine reduction of 30% to 50%. All other subsequent applicants may receive a fine reduction ranging from 20% to 30%, as long as the criteria of a significant added value are fulfilled. Criteria, which would measure the value added to the investigation, would be determined within the case at hand.

If your immunity program includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be „first in the door" of potential applicants. Are markers available also to subsequent applicants?

Marker system is instrumental in securing applicant's place in the queue for immunity. Marker is granted for a given period of time, which allows the applicant to gather necessary evidence in order to meet the relevant evidential threshold for the full immunity.

Marker system is not available for the reduction of fines. However, subsequent applicants may benefit from the full immunity, if the previous in line fails to meet its marker conditions.

Please explain if your immunity program is always available during the proceeding, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore.

There is no formal cut-off date during the investigation after which the Council will not accept leniency applications (applications for fine reduction). However, from the practical point of view, any leniency application, received after the statement of objections has been issued, is likely to be rejected.

Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons.

Before the adoption of the decision finding an infringement, conditional reduction of the fine may be revoked if the applicant fails to meet conditions attached to the leniency, discussed in Question 2, 2nd indent.

If your immunity program does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining).

Not applicable.

2. Relationship between leniency for subsequent applicants and other enforcement policies/tools

Please describe the relationship between your immunity programme and the other enforcement policies discussed in the introduction above. When designing your immunity program, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

Latvian Leniency programme is similar to the ECN Model Leniency programme. This allows for a convergent leniency treatment across EEA Member States and facilitates similar interaction with the other enforcement policies, such as fining, settlement or plea bargaining.

If the fining policy does not sufficiently reflect gains from the illegal activity, operation of a leniency programme might become suboptimal. Early case termination policies (e.g., settlements and plea bargaining) are not practiced by the Council. However, it is possible to settle court dispute, once the decision finding an infringement is subjected to judicial review. There are no formal limits established with regards to the amount of a reduction which may be granted through court dispute settlement. However, it may be argued, that an overly favourable settlement reduction may have a negative effect on the objectives of the Leniency programme. A reduction comparable to that of a leniency reduction will compromise incentives to apply for a leniency reduction and will achieve only a reduced impact on the enforcement efficiency, cost saving or the level of deterrence.

As regards private damages claims, as mentioned in Question 1, the Council has recently proposed to amend the Leniency programme regarding access to the leniency file. If adopted, the programme will explicitly state that only parties to the antitrust investigation may be granted access to the leniency file and only for the purposes of defence in the antitrust proceedings. The proposal aims to protect leniency applications from otherwise mandatory disclosure and increase its appeal for the potential applicants.

In particular, discuss if and how early termination policies (such as settlements and plea bargaining) and immunity programs relate to rewarding co-operation from subsequent applicants. Do early termination policies have the same objectives as the immunity program (e.g. to obtain information and encourage co-operation)?

Please refer to the previous question.

LITHUANIA

1. General description of Lithuanian leniency programme

Please provide a brief description of your immunity programme, its background and its development over time. Please focus your submission particularly on recent developments and/or changes in your immunity policy.

To briefly provide you with legal background and evolution of the leniency program in the Republic of Lithuania, it must be mentioned that the provision on amnesty from fines was first foreseen in the Law on Competition since its adoption in 1999. At that time the Law on Competition had foreseen amnesty from fines not only for the participants of anti-competitive agreements, but also for undertakings, abusing their dominant positions. This provision was abolished in 2009.

The more standard leniency programme, as it is understood nowadays *sensu stricto*, was adopted in Lithuania in 2008, when the Competition Council of the Republic of Lithuania ('the CC') adopted Rules on Immunity from Fines and Reduction of Fines ('the Leniency Rules'). These rules were applicable solely to horizontal agreements among competitors.

Latest amendment of the leniency rules took place this year, when on the 1st May 2012 new version of the Law on Competition came into force. While the procedure for the assessment of leniency applications as well as applications for a reduction of fine did not change, the new provision widened the scope of the leniency programme so as to include applicants taking part in anti-competitive agreements between non-competitors on direct or indirect price fixing.

As to the leniency programme application for subsequent applicants, it must be said that since the adoption of the Leniency Rules in 2008, subsequent leniency applicants have a right to apply for reduction of fines. After the scope of leniency applicants has been expanded recently to participants of vertical agreements, subsequent leniency applications shall be admitted in this scope too.

Please discuss what is/are the policy purpose(s) of your immunity programme. Is the purpose of the immunity programme formally stated in guidelines or notices? If your agency grants some form of immunity to subsequent applicants, what is the policy rationale for doing so?

Prior to discussing policy purposes of the leniency programme, it must be mentioned, that since the adoption of the Leniency Rules, the CC had received three leniency applications so far – one each year in 2008, 2009 and 2010. In none of these cases there were applications submitted by subsequent leniency applicants, so the CC has no actual experience of treating this kind of applications.

According to the provisions of the Law on Competition, as well as Leniency Rules, in Lithuania the leniency programme offers full immunity to the first-in applicant (in some cases, having regard to various circumstances, the immunity offered can reach up to 75-50 per cent of the fine), and reductions of fines for subsequent applicants (50-20 per cent of the imposed fines).

In general, the approach of the CC towards leniency programme and leniency applicants is very favourable and flexible. The CC intends to encourage undertakings to submit their applications by

providing them with unofficial guidance, advice and other means of co-operation. The rationale for such a position can be regarded as a reach to detect and reveal as many anti-competitive agreements as possible, spreading information on theory of harm caused by the anti-competitive agreements, also, having in mind a rather small number of administrative staff of the CC and limited human resources which could be used more efficiently and purposefully when undertakings co-operate with the CC, etc. It must be also mentioned that the CC, being a part of the European Competition Authorities Network, chose to apply a standard leniency programme (which foresees both first-in and subsequent applicants), in order to ensure uniform and harmonized application of the EC competition law in the entire EU.

Due to these reasons and, as mentioned above, small number of leniency applications (only three so far), the CC would accept both first-in as well as subsequent leniency applications despite all the possible negative aspects of such applications (lower degree of deterrence, smaller sanctions, possibility for undertakings to strategically set their behaviour, etc.).

2. Issues related to leniency for subsequent applicants

Please discuss the policy advantages and the disadvantages of rewarding subsequent applicants.

As already mentioned above, the CC has had no practice yet of subsequent leniency applications. For the possible general advantages and disadvantages of this programme please see answer to question No. 2 above.

Please describe the treatment reserved to subsequent applicants under your immunity program. In particular: - describe the incentives that your immunity program provides to companies or individuals who wish to benefit from the immunity program. Are these incentives different for the first-in and the subsequent applicants, and among subsequent applicants?

In Lithuania the leniency programme could be classified as a "traditional" leniency programme as it is provided for by the European Commission (Leniency Rules were adopted in accordance with the requirements of the European leniency programme). Therefore incentives that are provided for the first-in and subsequent applicants differ significantly.

The treatment provided for the first-in leniency applicant, meeting all the relevant conditions, is as follows (according to Leniency Rules):

> "An undertaking which is a party to a prohibited agreement (i.e. an agreement, complying with the features provided for in Art. 5 of the Law on Competition or/and Art. 101 TFEU), shall be granted immunity from a fine, which would otherwise have been imposed, if all the following conditions are met:
>
> 1. an undertaking submits information before the initiation of investigation of the agreement;
>
> 2. an undertaking is the first of all the parties to an agreement to submit information;
>
> 3. an undertaking submits all the information known to it that concerns the agreement and cooperates with the CC during the investigation;
>
> 4. an undertaking was not the initiator of the prohibited agreement and did not encourage other undertakings to participate in the agreement".

It should be mentioned that there are also other kinds of treatment for the first-in leniency applicants: if the CC has already had initiated the investigation and the leniency application is received afterwards, the

fine imposed upon the applicant can be reduced by 50-75 per cent. Next, a fine, calculated for an undertaking which was the initiator of the prohibited agreement or which coerced other undertakings to participate in the prohibited agreement, can be reduced by 50 per cent.

Subsequent leniency applicants do not have a right to apply for a full immunity from fines, however, the fine imposed upon them may be reduced by 20-50 per cent if certain condition are met (it should be pointed out that there is no requirement to be the first of all the parties to an anti-competitive agreement). The treatment for subsequent leniency applicants is as follows:

> "A fine, calculated for an undertaking which is a party to a prohibited agreement and which does not satisfy the conditions provided for in items 8 and 9 of the Rules (i.e. „traditional" reduction of fines cases), shall be reduced by 20-50 per cent, if the undertaking:
>
> 1. submits the evidence of a prohibited agreement which the CC does not possess and which is significant to prove the prohibited agreement;
>
> 2. exercises all the conditions provided for in items 5.2 and 5.3 of the Rules – i.e. ends its involvement in a prohibited agreement immediately following its submission of information to the CC, except for what would, in the CC's view, be reasonably necessary to preserve the integrity of the investigation; and from the moment of submission of information to the CC until the end of the investigation cooperates with the CC without reservation and on a continuous basis".

So, as it can be seen from these different provisions on the treatment of leniency applicants, the fundamental difference between the first-in and subsequent applicants is the amount of fine that can be reduced. The maximum limit of the reduction for the subsequent applicant is, as can be seen, 50 per cent of the imposed fine.

Describe the requirements placed on applicants who wish to benefit from the immunity program. Are these requirements different for the first-in and the subsequent applicants, and among subsequent applicants?

Please see the answer to question above.

Discuss how your agency assessed the degree of co-operation from applicants under your immunity program, e.g. in terms of the amount of evidence made available to the agency and the timeliness of co-operation. Is there a different standard (e.g. on the amount and quality of information demanded) for first-in and subsequent applicants, and among subsequent applicants?

According to the provisions of the Leniency Rules, cooperation of the undertaking with the CC is one of the cumulative conditions necessary in order to be immuned from a fine or to be reduced a fine. There is a duty upon undertakings from the moment of submission of information to the CC until the end of the investigation to cooperate with the CC without reservation and on a continuous basis. This cooperation purports that an undertaking:

1. provides the CC promptly with all the relevant information and evidence that comes into its possession or becomes known to it;

2. answers promptly to any request of the CC that may contribute to the establishment of the facts relevant to the anti-competitive agreement;

3. assures the possibility to make current and, if possible, former employees and directors available for interviews;

4. does not destroy, falsify and conceal relevant information and evidence relating to the alleged anti-competitive agreement;

5. does not disclose the fact of its application and content of it until the CC has issued a statement of objections to the parties (unless otherwise agreed with the CC).

This requirement to cooperate is the same for both the first-in as well as the subsequent leniency applicants.

Describe the criteria that you apply to determine the appropriate level of discount in fines/sanctions to encourage cartelists to enter into the immunity program. If you reward co-operation from subsequent applicants, how did you differentiate the level of discounts for the various applicants?

In order to determine the level of fine reduction, the CC will take into account the time at which the evidence was submitted (including whether the applicant was the first, the second or the third etc. to notify the CC) and the significance of the evidence for proving the anti-competitive agreement. The requirement of "significant" evidence is described in the Leniency Rules as follows:

> "submits the evidence of an anti-competitive agreement of competitors which the CC does not possess and which is significant to prove the anti-competitive agreement. The significance of the evidence is estimated having regard to the direct proof of it as for conclusion of an anti-competitive agreement or intention to conclude an anti-competitive agreement. Usually written evidence originating from the period of an anti-competitive agreement, as well as direct evidence confirming the participation of other undertakings in the anti-competitive agreement shall be regarded as significant. Indirect evidence, evidence originating after the period of the anti-competitive agreement or which do not confirm the participation of other undertaking therein, or explanations of the undertakings, unsubstantiated by no means may be regarded as significant subject to their nature and content".

If your immunity program includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be „first in the door" of potential applicants. Are markers available also to subsequent applicants?

According to the Leniency Rules, an undertaking wishing to apply for immunity from a fine or reduction of a fine, may in the first place inform the CC of its intention and apply for setting a period within which it would collect all necessary information and evidence. In that case an undertaking usually within 15 days must submit all lacking information and evidence, and of which an undertaking is informed as promptly as possible. If an undertaking submits the lacking information and evidence within the period set, the information and evidence shall be deemed to have been submitted on the day of the receipt of the primary application in the CC.

It must be mentioned that the Leniency Rules do not specify between first-in and subsequent applicants on this issue, therefore it can be said that subsequent applicants also have a right to apply for markers.

Please explain if your immunity program is always available during the proceeding, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore.

According to the Leniency Rules, applications to be immune from a fine or to reduce a fine shall not be considered if submitted to the CC after the investigation is completed and the parties to the proceedings are sent a Statement of objections, or which do not meet other conditions for being immune from a fine or to reduce a fine provided for in the Leniency Rules. Such applications of the undertakings may be considered as a circumstance extenuating the liability of an undertaking as provided for in the Law on Competition.

Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons.

Prior to answering the question it must be pointed out, that due to the provisions of the Law on Competition and the Leniency Rules, there are two types of "revoked" leniency application. The first one is that a fine imposed on the undertaking shall not be reduced if during the investigation it is established that the undertaking when contemplating of or making its application to the CC, destroyed, falsified or concealed evidence of the alleged anti-competitive agreement and/or disclosed the fact or any of the content of its application, except to other competition authorities of the EU and/or the European Commission. In such situation the CC would probably revoke the application and would not consider it without waiting till the end of investigation.

The second way to revoke (any) leniency application is the adoption of the final resolution on infringement by the CC. Only in this final resolution all the fines are imposed, and, consequently, undertakings can be immuned or the fines reduced, if the CC is convinced that all the relevant requirements are fulfilled. So, at this phase the CC, having regard to all the important circumstances of the investigation, shall finally grant (or revoke) immunity or reduction of fine.

Presumably, there should also be a third way to revoke a granted reduction, if necessary, at the court of first instance. For example, if the CC did not know during the investigation that an undertaking did not meet some necessary requirements, it should have a right to appeal this issue in the court.

If your immunity program does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining).

N/A.

3. Relationship between leniency for subsequent applicants and other enforcement policies/tools

Please describe the relationship between your immunity programme and the other enforcement policies discussed in the introduction above. When designing your immunity program, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

In the Republic of Lithuania, there is no criminal liability of individuals, foreseen for cartels and other anti-competitive agreements. However, after the new version of Law on Competition was adopted on the 1st May, 2012, a new provision as regards disqualification of directors, who organized or significantly contributed to an anti-competitive agreement, appeared. According to the provisions of this rule, if the undertaking was immuned from a fine, its director shall also not be disqualified.

As to early case termination policies (settlements or plea bargaining) or private damage actions, the CC has had no such experience yet, therefore it is difficult to escalate what effect of leniency (especially subsequent applicants) programme would be upon these enforcement policies. Despite of this, it should be

mentioned that due to the Leniency Rules, the fact that immunity from a fine or reduction of a fine was granted cannot protect an undertaking from the civil law claims, as far as they concern its participation in an anti-competitive agreement.

Regarding other enforcement policies, it should be mentioned that currently there is an incentive to amend the Law on Public Procurement, which foresees that undertakings which were imposed fines for infringements of Art. 5 of the Law on Competition (and/or Art. 101 TFEU), shall be disqualified from public procurements for three years. By the amendment it is expected to exclude undertakings immuned from fines. However, this amendment is under consideration and is not in force yet.

In particular, discuss if and how early termination policies (such as settlements and plea bargaining) and immunity programs relate to rewarding co-operation from subsequent applicants. Do early termination policies have the same objectives as the immunity program (e.g. to obtain information and encourage co-operation)?

No experience yet.

MEXICO

1. General description of the immunity/amnesty/leniency program

Brief description of Mexico's immunity programme, its background and its development over time, recent developments and changes, policy purposes, guidelines or notices and the rationale for subsequent applicants.

The leniency programme in Mexico was established in the 2006 amendments to the Mexican Federal Competition Law (LFCE, for its acronym in Spanish). Before the amendments, the Federal Competition Commission (CFC, for its acronym in Spanish) applied discretionary administrative fine reductions for cooperating agents involved in an on-going investigation.

The leniency programme is regulated by the LFCE, LFCE's regulations, and the Federal Criminal Code. The leniency programme contemplates fine reductions and criminal liability immunity.

The most important traits of the CFC's leniency programme are:

- The following are entitled to apply to the programme: (i) economic agents who incur in hard core cartel conducts; (ii) individuals directly engaged in absolute monopolistic practices, on behalf or in the name of their represented infringing companies; and (iii) any individual, company, association or other, that has assisted, induced or participated in a collusive agreement.

- It has a marker system, the first cartel member who denounces the existence of a hard core cartel will receive the maximum "leniency" set forth in the law, and subsequent applicants are only entitled to fine reductions of 50, 30 or 20 per cent, according to the applications' chronology and the relevance of the evidence provided. In any case, there are specific requirements each applicant must meet to benefit from the reduction of fines;

- If the first applicant to the program complies with that set forth in the law he will receive a fine that will amount to one general minimum daily wage (currently aprox. 5 U.S. Dollars). Subsequent applicants will benefit from the leniency program only if they provide evidence different from that the Commission has already gathered. The benefits of subsequent applicants will depend on the quality of information provided and the application's chronology.

- The applicants must cooperate fully and constantly with the CFC to benefit from the leniency program. The applicant should deliver all information and documents available and cooperate to the best of its ability. This will sometimes mean, as required by the agency, that the applicant will have to cease or continue its involvement with the cartel, bring employees, directors or board members to testify on the cartel's existence and agreements, amongst others;

- Once accepted into the program, the leniency applicant's identity will be concealed and kept secret after the investigation ends.

- Before the investigation is concluded a leniency request can be filed at any time.

The CFC issued and published guidelines (*Guía del Programa de Inmunidad*[1]) which explain the general terms of the leniency programme. The Guidelines aim to increase the program's transparency and describe its scope. The guidelines serve as an informative instrument for potential applicants who wish to be informed about the program's provisions. It also serves as a useful guide for staff who handles leniency requests.

During the latest reform to the Mexican Competition Law criminal sanctions for hard core cartel activity were incorporated. In this regard, the benefits from the leniency programme widened and now include criminal immunity. The criminal code sets forth that leniency grants by the CFC shall be taken into account by the Attorney General. Therefore, individuals under the program's protection will not be prosecuted criminally. Criminal immunity is extended to subsequent applicants.

To maintain congruency with criminal provisions, the 2011 amendments to competition law state clearly that the employees of a company protected by the leniency program can enjoy the program's benefits. The latter subject to the fulfilment of the program's requirements, such as: (i) providing all elements of proof; (ii) cooperating with the authority; (iii) cease unlawful conducts.

The programme has proven to be a successful tool in the detection of cartels and the obtainment of information and evidence.

2. Issues related to leniency for subsequent applicants

Policy advantages and the disadvantages of rewarding subsequent applicants and treatment reserved to subsequent applicants (incentives that the program provides to companies or individuals, requirements placed on applicants, degree of cooperation from applicants, criteria to apply level of discounts in fines or sanctions), availability of the immunity program during the proceeding, and revocation of leniency.

As described above, subsequent applicants are only entitled to fine reductions of 50, 30 or 20 per cent, according to the applications' chronology and the relevance of the evidence provided. They shall only be entitled to receive the benefits of the program once they provide additional evidence different from that gathered by the Commission through investigative tools or through other applicants. The fine reduction percentage shall be determined according to the evidence they provide and their position marker. Taking these two elements into account, the CFC has discretionary powers to determine the exact reduction percentage.

The advantage of having a system that allows for subsequent applications relies on the possibility of gathering more elements of proof. In addition, infringing parties which confess their illegal conducts might be compelled to adopt compliance programs.

The incentives to apply for leniency for individuals or companies are mainly: (i) reduced administrative fines; and (ii) criminal immunity. Even when subsequent applicants do not receive full leniency in terms of monetary penalties, they do receive full criminal immunity, which in itself represents a strong incentive.

The immunity program is available during the entire investigation stage. The cut-off point is the resolution that concludes this stage, which is made public through the Commission's website.

[1] Guía del programa de inmunidad, http://www.cfc.gob.mx/images/stories/Documentos/guias/cfcguia.pdf

The Commission can revoke leniency granted to both the first or subsequent applicants. The latter applies when applicants: (i) fail to provide every element of proof they possess; (ii) fail to cooperate fully and continuously with the authority; and (iii) fail to cease unlawful conduct.

3. Relationship between leniency for subsequent applicants and other enforcement policies/tools

Relationship between Mexico's Immunity Program and other enforcement policies (early termination, plea bargains).

It is worth noting that the leniency programme does not protect companies from damage claims by those directly affected nor do they exonerate the applicant from recidivism. Although, these might undermine the program's incentives, it should be mentioned that there have been no successful civil claims cases related to competition issues in Mexico.

Furthermore, the LFCE does not provide for early case termination mechanisms for hard core cartels, as they are considered per se violations, therefore not subject to settlements or plea bargaining.

POLAND

1. Introduction

Cartels belong to the most harmful practices restricting competition, contributing to increasing prices and limiting consumers' choice. They are also the most difficult to detect since their participants operate in secret. That is why competition law enforcement, next to traditional investigative methods, is increasingly enhanced with leniency programmes. The programmes are patterned upon a specific trade off, whereby companies that provide the agencies with information about an anticompetitive agreement in which they participated might receive a lenient treatment with respect to fines. Granting immunity from penalties or reduction of the penalties in exchange for information, provided that several conditions are met, could contribute to optimal antitrust enforcement[1].

Leniency policies are typically aimed at (i) deterrence (alternatively: prevention), (ii) detection and thus (iii) fighting the phenomenon of market cartelization. Deterrence, although its effects may not be straight forward, shall constitute the primary goal of leniency policies[2]. Effective leniency programmes along with transparent, predictable and severe fining systems constitute two central pillars of discouraging cartels. Cartels are generally highly secretive and information on their existence is not easy to *obtain.* Moreover, the need to present an extensive body of evidence in court makes it crucial to gather direct internal proof of anticompetitive agreements. Leniency programmes thus shall render investigations more swift and save competition agencies' scarce resources. Consequently, another aim of the leniency policies is to enable prompt and efficient detection of anticompetitive agreements. Accordingly, the two aims contribute to combating thereof.

2. Origins and general description of the Polish leniency programme

The Polish experience regarding leniency dates eight years back, similarly as the Polish presence in the European Union. Precisely on 1 May 2004, by way of the amendment of the Act of 15 December 2000 *on competition and consumer protection*[3], provisions allowing for the adoption of a more lenient approach towards participants of anticompetitive agreements entered into force[4]. The programme has undergone an evolution ever since it had been first introduced. Currently, it has its foundations in Article 109 of the Act of 16 February 2007 on *competition and consumer protection* (hereinafter also referred to as: "Competition

---

1 See: W. Wils, *Leniency in Antitrust Enforcement: Theory and Practice,* (2007) 30 World Competition, pp. 25-64, available at: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

2 See e.g.: G. Spagnolo, *Leniency and Whistleblowers in Antitrust*, Discussion Paper Series No. 5794, August 2006, CEPR, available at: www.cepr.org/pubs/dps/DP5794.asp, pp.. 7-10, 16 and 19; B. Turno, *Leniency. Program łagodzenia kar pieniężnych w polskim prawie ochrony konkurencji,* Wolters Kluwer Polska, Warszawa 2013 (forthcoming), p. 170-17.

3 Act of 15 December 2000 *on competition and consumer protection* (Journal of Laws of 2005 No. 244, item 2080, with changes).

4 Pursuant to the provisions of the Act of 16 April 2004 *on the amendment of the Act on competition and consumer protection* (Journal of Laws 2004 No. 93, item 891), Article 103a was added to the Act *on competition and consumer protection.*

Act")[5]. Key amendments to the legal framework of leniency in Poland were brought about by the Regulation of the Council of Ministers of 26 January 2009 *concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines* (hereinafter also referred to as: "Leniency Regulation")[6] and by the Guidelines of the President of the Office of Competition and Consumer Protection (UOKiK, hereinafter also referred to as: "the Office") concerning the leniency programme – *the procedure of submitting and handling applications for immunity from or reduction of a fine - "leniency applications"* (hereinafter also referred to as: "Leniency Guidelines")[7]. Currently, there is an ongoing process of the review of the Competition Act, whereby some major changes are to be introduced to the Polish leniency scheme. The newest draft proposal of 24 September 2012 *of the amendment of the Act on competition and consumer protection* (hereinafter also referred to as: "Draft Amendments"), is now being reviewed by the Permanent Committee of the Polish Council of Ministers[8].

As a general rule, Polish leniency programme is, with some particularities, in line with the European Competition Network (ECN) Model Leniency Programme[9].

Pursuant to Article 109 (1) of the Competition Act, the President of the Office shall grant immunity from fine to an undertaking party to anticompetitive agreement, should this undertaking have jointly fulfilled the following conditions: (1) it has been the first, amongst the participants of the agreement, to (a) provide the President of the Office with information concerning the existence of such a prohibited agreement, as may suffice for instituting antimonopoly proceedings, or (b) present to the President of the Office, upon its own initiative, proof rendering it possible to issue a prohibition decision or a decision declaring an agreement anticompetitive and stating that it was discontinued in the past - provided that the President of the Office did not have at that time any information or pieces of evidence proving sufficient for instituting antimonopoly proceedings or issuing such a decision; (2) it is fully cooperating with the President of the Office in the course of the proceedings, providing him with any and all proofs or pieces of evidence that it has at its disposal, or the ones it may have at its disposal, and promptly giving any information relating to the case, upon its own initiative or upon demand of the President of the Office, (3) it has ceased participating in the agreement not later than as of the day on which it notified the President of the Office, the existence of an agreement or presented the proof described here-above; (4) it was not the initiator of the agreement and did not induce other undertakings to participate in the agreement[10].

If relevant conditions for immunity are not met, the applicant may still benefit from a reduction of fines, provided that the cumulative conditions set in the programme are fulfilled. The President of the

---

5 Act of 16 February 2007 *on competition and consumer protection* (Journal of Laws of 2007 No. 50, item 331, with changes).

6 Regulation of the Council of Ministers of 26 January 2009 concerning the mode of proceeding in cases of enterprises' applications to the President of the Office of Competition and Consumer Protection for immunity from or reduction of fines (Journal of Laws 2009 No. 20, item 109).

7 Available at: www.uokik.gov.pl. Leniency Guidelines are a soft-law instrument. Their aim is to increase the transparency of the provisions of both the Competition Act and the Leniency Regulation and to present uniform procedures applied under the leniency programme as well as to provide instructions for enterprises which intend to apply for leniency (Leniency Guidelines, para. 1 and 2).

8 Draft proposal of 24 September 2012 of the amendment of the Act on competition and consumer protection, available at: http://legislacja.rcl.gov.pl/lista/1/projekt/43452. Hereinafter, where applicable, main changes foreseen by the Draft Amendments will be indicated.

9 ECN Model Leniency Programme, available at: http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

10 Competition Act, Article 109(1).

UOKiK grants a reduction of fines to an undertaking if: (1) it has presented to the President of the Office, upon its own initiative, proof which to an essential extent will contribute to issuing a prohibition decision or decision declaring an agreement anticompetitive and stating that it was discontinued in the past (2) it has ceased participating in the agreement not later than as of the day on which it presented the proof[11] (3) it is fully co-operating with the President of the Office in the course of the proceedings[12].

In practice, it may be difficult to assess which of the participants of an anticompetitive agreement was its initiator. For this reason, pursuant to the Draft Amendments, solely an undertaking which took steps to *coerce* another undertaking to participate in the anticompetitive agreement shall not be eligible for immunity from fines. Similarly, it should be noted that a more flexible approach to the ceasing condition should be introduced under the Draft Amendments. The applicant shall cease its participation at the latest immediately *following* its application for immunity or reduction of fines. The rationale for introducing such an approach is to secure that the applicants could effectively correct their conduct on the one hand, and to preserve the integrity of the authority's inspections on the other hand (not to enable the other cartel participants, suspecting that the application was filed, to destroy or conceal relevant evidence before the Office's inspection). These changes should bring the Polish programme more in line with the ECN Model Leniency Programme.

One of the specificities of the Polish leniency framework is its scope. The programme covers not only secret cartels, but is on an equal basis available to the participants of all horizontal and vertical agreements[13]. Due to the fact that vertical agreements, may be highly harmful for the economy, it is to bring the benefits of cooperating with an antitrust authority to the widest possible range of enterprises. It is also worth noting that an overwhelming majority of decisions issued in cases where leniency applications were filed concerned vertical agreements, such as resale price maintenance or minimum resale price maintenance, mostly bearing some features of "hub and spoke" type of agreements. Such a record proves that the programme works very well in practice with respect to this kind of competition law offences.

Since the introduction of the programme, forty four leniency applications have been submitted to the Office, out of which: two applications in 2005, three applications in 2006, six applications in 2007, three applications in 2008, six applications in 2009, eight applications in 2010, two applications in 2011, and fourteen application in the present year so far. These numbers mirror a growing popularity of the

11 Competition Act, Article 109(2).

12 It could be noted that the requirement of full cooperation of undertakings applying for reduction of fines is not *expressis verbis* provided for by the Competition Act, which will be subject to an amendment in this respect, nor the Leniency Regulation. However, the Leniency Guidelines underline that any applicant is obliged to cooperate with the President of the Office from the moment of submitting the leniency application (Leniency Guidelines, para. 28). Similarly, such requirement stems from the case-law of the President of the UOKiK.

13 Article 109(1) of the Competition Act stipulates that the leniency programme covers competition restricting agreements. Leniency Guidelines (para. 5) define such agreements as: (i) agreements made between enterprises, associations of enterprises and between enterprises and their associations, or some provisions of such agreements, (ii) arrangements made in whatever form by two or more enterprises or their associations (concerted practices) and resolutions or other by-laws of associations of enterprises or their statutory bodies, aimed at elimination, restriction or any other infringement of competition in the relevant market (Leniency Guidelines, para. 5). Furthermore, it is *expressis verbis* stated that the leniency applications may be submitted in connection with both horizontal agreements and vertical agreements (Leniency Guidelines, para. 6).

programme amongst the Polish enterprises. The President of the UOKiK has so far issued fifteen decisions in these cases[14].

3. Specific issues related to leniency for subsequent applicants

The policy rationale for granting reductions to subsequent applicants does not as a rule differ from the rationale for granting immunity to first-in applicants. Both tools fulfill the same general purposes, i.e. genuine deterrence, efficient detection and effective combating of anticompetitive agreements[15].

Three basic policy advantages for rewarding subsequent applicants could be identified. First, second-in and subsequent applications contribute to effective enforcement. Especially in situations, where immunity applications and other sources of intelligence enable a competition authority to prove the existence of an anticompetitive agreement, but do not offer detailed information on how it was actually exercised in practice, subsequent applications may provide agencies with in-depth knowledge on how the agreement functioned. Duration, scope, specific infringements within an agreement, participants to it, their role, are only some additional facts on how an agreement was carried-out in practice which could be proved or better proved on the basis of the subsequent applicants' testimonies. Second, such applications help reduce costs and save agencies' scarce resources and thus improve their ability to efficiently use them to collect other evidence and intelligence. What is more, a possibility for more than one undertaking to apply for leniency destabilizes cartels and creates an atmosphere of uncertainty amongst their members.

Under the Polish leniency scheme, different incentives are given to undertakings willing to cooperate with the Office depending on their place in the queue of applicants. The enterprise which is the first to submit a leniency application and meet the immunity requirements set forth in the Competition Act may expect to be granted full immunity from fines. A reduced fine imposed upon the undertaking which was the first, the second and subsequent to submit the application and meet the conditions for reduction laid down in the Act should not exceed accordingly 5%; 7% or 8% of the revenue earned in the accounting year preceding the year within which the fine is imposed[16]. These enterprises may be granted the following reductions of fines: the first applicant – reduction of a fine by maximally 50%; the second applicant – reduction of a fine by maximally 30%; the subsequent applicants – reduction of a fine by maximally 20%[17]. According to the Draft Amendments, the maximum band on the reduced fine should be abolished

14 Decision of the President of the UOKiK of 1 August 2006, case no. DOK-87/2006; Decision of the President of the UOKiK of 18 September 2006, case no. DOK-107/2006; Decision of the President of the UOKiK of 31 December 2007, case no. RKT-79/2007; Decision of the President of the UOKiK of 7 April 2008, case no. DOK-1/2008; Decision of the President of the UOKiK of 13 November 2009, case no. DOK-6/2009; Decision of the President of the UOKiK of 8 December 2009, case no. DOK-7/2009; Decision of the President of the UOKiK of 26 April 2010, case no. DOK-3/2010; Decision of the President of the UOKiK of 24 May 2010, case no. DOK-4/2010; Decision of the President of the UOKiK of 31 December 2010, case no. DOK-11/2010; Decision of the President of the UOKiK of 31 December 2010, case no. DOK-12/2010; Decision of the President of the UOKiK of 23 May 2011, case no, DOK-4/2011; Decision of the President of the UOKiK of 12 August 2011, case no. RKT-22/2011; Decision of the President of the UOKiK of 28 November 2011, case no. DOK-10/2011; Decision of the President of the UOKiK of 28 December 2011, case no. DOK-12/2011; Decision of the President of the UOKiK of 30 August 2012, case no. RBG-19/2012 (decisions available at: www.uokik.gov.pl).

15 It should be noted that the general policy purposes of the Polish leniency programme are not set forth in the legislation, nor in the Leniency Guidelines, however they could be interpreted from the applicable case-law. In this respect, it was e.g. established that both the *ratio* and the aim of the leniency programme is the detection of anticompetitive agreements (see e.g.: Decision of the President of the UOKiK of 7 April 2008, case no. DOK-1/2008 (p. 68).

16 Competition Act, Article 109(3).

17 Leniency Guidelines, para. 31.

and the fine should be dependent exclusively on the level of the reduction measured on the basis of the fine otherwise applicable. The following caps for reduction have been proposed: from 30% up to 50% for the first undertaking to apply for reduction; from 20% up to 30% for the second undertaking; and up to 20% for subsequent applicants.

Referring to the above, it is also worth noting, that under the Draft Amendments, the Leniency Plus institution, aimed at raising the interest of subsequent applicants in the programme, shall be introduced into the Polish leniency scheme. Leniency Plus would be available for those undertakings which may not qualify for immunity for the initial matter under investigation, but disclose to the Office another anticompetitive agreement which so far has not been the subject of any proceedings (neither explanatory, nor antimonopoly) before the Office. This should lead to a substantial additional 30% reduction of a fine calculated after the first reduction was granted in the ongoing investigation, and to a 100% reduction in the new case.

As it was already underlined, for an undertaking to qualify for a reduction of fines under the Polish leniency programme, it must fulfil three cumulative conditions. The programme requires the applicant for reduction, on its own initiative, to provide the authority with a proof which to a substantial degree will contribute to issuing a decision on the merits, to cease participation in the agreement and to fully cooperate with the Office[18]. These requirements do not differ among subsequent applicants.

The Polish legislation does not *expressis verbis* provide for the significant added value (SAV) of evidence requirement. However, whether an undertaking provides the Office with a proof which to a substantial degree will contribute to issuing a decision is in practice decided on the basis of the SAV criterion. The value of each evidence provided by an applicant is assessed against what is already in the possession of the Office at the time of the submission of the respective evidence. The "evidence contributing to issuing a decision" shall be understood as evidence which increases the value of the evidence already in the possession of the President of the Office, i.e. evidence which, due to its scope and degree of accuracy, increases the possibility for the Office to prove an infringement[19].

The Polish leniency programme sets up a marker system for both immunity and reduction applicants. Submitting the abridged leniency application guarantees the enterprise a place in the queue of applicants, provided that the application is subsequently completed. The applicant shall be requested in writing to complete the application with specified information within an appointed deadline determined based on circumstances of each individual case[20].

Neither Competition Act, nor Leniency Regulation provide for a cut-off point in time after which the Office does not accept leniency applications anymore, consequently, from the procedural point of view, the programme is always available during the proceedings. This being said, the Office takes into account the time when the evidence was submitted. Applications submitted prior to the initiation of the Office's proceedings (either explanatory or antimonopoly ones), shall receive a particularly positive evaluation[21]. This is primarily because of the fact that such prompt cooperation speeds up the investigation. Moreover, late leniency applications, are more likely to be of a limited added value, considering the evidence that the

18 See: here-above, points 6 - 7.

19 See: e.g.: Decision of the President of the UOKiK of 24 May 2010, case no. DOK-4/2010, paras 418 - 423.

20 Leniency Regulation § 5, Leniency Guidelines, paras 16 - 17.

21 Leniency Guidelines, para 24.

Office has already in its possession. Further in a queue of applicants, the chances for a subsequent applicant to add new, valuable evidence typically diminish[22].

In this respect it is also important to consider inspections and the moment of application nexus. It is likely to happen that subsequent applicants decide to file leniency applications during[23] or following inspections. In such cases, for the purposes of assessment of the added value of evidence provided by subsequent applicants, information gathered by the Office during inspections should be treated as being in its possession from the moment of the start of the inspections.

In the event that the President of the Office, based on the analysis of the application, decides that the applicant has preliminarily met the formal requirements for eligibility for the leniency programme, the enterprise is notified of this fact in writing. In the notification, the enterprise is informed of its place in the queue of applicants. Such notification does not mean that the enterprise is guaranteed immunity from or reduction of fines, as it will depend on the applicant's attitude (e.g. co-operation with the Office) in the course of the proceedings[24]. A determination on whether immunity from or reduction of fines is granted is made in the decision concluding the proceedings in a case[25]. In case of rejection of an application, the application shall not be taken into consideration when establishing the order of submitted applications[26]. The enterprise may withdraw its application at any time before the President of the Office issues the decision concluding the proceedings. Withdrawal of an application shall not influence the order of the remaining applications[27].

So far five decisions of the President of the UOKiK related to applications filed by more than one applicant[28], out of which in three cases[29] the President of the Office granted maximum 50% reductions of fines to the second-in applicants[30]. The Decision of 8 December 2009 (case no. DOK-7/2009) was the first,

22 For instance, in case no DOK-11/2010, a leniency application was submitted at a very final stage of the proceeding, i.e. after the undertakings were provided with an official notification that the Office *finished* gathering evidence. Thus, the Office rejected the application and stated that the applicant had not enclosed any evidence which to an essential extent would contribute to issuing a decision on the merits.

23 Under Leniency Guidelines, the application might be filed for the record during an inspection (Leniency Guidelines, para. 8.5).

24 See: Decision of the President of the UOKiK of 7 April 2008, case no DOK-1/2008.

25 See: Leniency Regulation § 8, Leniency Guidelines, para: 20.

26 See: Leniency Regulation, § 9.

27 See: Leniency Regulation, § 10.

28 Decision of the President of the UOKiK of 8 December 2009, case no. DOK-7/2009; Decision of the President of the UOKiK of 24 May 2010, case no. DOK-4/2010; Decision of the President of the UOKiK of 31 December 2010, case no. DOK-11/2010; Decision of the President of the UOKiK of 31 December 2010, case no. DOK-12/2010; Decision of the President of the UOKiK of 28 December 2011, case no. DOK-12/2011.

29 Decision of the President of the UOKiK of 8 December 2009, case no. DOK-7/2009; Decision of the President of the UOKiK of 24 May 2010, case no. DOK-4/2010; Decision of the President of the UOKiK of 31 December 2010, case no. DOK-12/2010.

30 The President of the UOKiK did not grant any reductions in the other two cases. The reasons behind such decisions were mostly procedural. In one case (case no. DOK-11/2010) two leniency applications were filed by two undertakings in one envelope. The two undertakings applied for full immunity. UOKiK decided not to grant neither immunity, nor reduction of fines to any of the applicants. In the Office's view filing such two motions, as a result of an obvious continuing cooperation was clearly contrary to the fundamental principles of the programme and made the Office unable to determine the order of the applications. In that case another - third - leniency application was submitted and rejected as it did not meet

and so far the only issued both on the basis of Polish and European Union law where a reduction of fine to second-in applicant was granted. No decision whereby a reduction for third-in and subsequent applicants would be granted was so far issued.

It is also worth noting that in all cases falling outside of the leniency programme, the cooperation with the President of the Office in the course of the proceedings, in particular contributing to a quick and efficient conduct of the proceedings, may still be taken into account as a mitigating factor[31].

4. Relationship between leniency for subsequent applicants and other enforcement policies

Leniency programmes interconnect with other investigative and enforcement policies. The way in which such policies are shaped and operated in practice may both increase and diminish the effectiveness of the programme. Coherent regulations, predictable and uniform decisions, as well as consistency of actions constitute the necessary conditions of such effectiveness. In this respect, it is of utmost importance that the leniency programme be accompanied with a predictable system of fines, overt to the parties, preferably based on guidelines on the calculation methods.

Some particular policies which may remain in the interaction with leniency programmes are *early termination policies, individuals' liability* and *private damage actions.* Settlements and individuals' liability constitute novelties to be introduced into the Polish legislation under the Draft Amendments.

Basic rationale for early case termination and leniency policies are the same. They both provide scope for acceleration of the proceedings, saving resources, increasing the detection rate and overall efficiency of the antitrust enforcement. Under the Draft Amendments, where a party to the proceedings agrees with the Office's findings, it could acknowledge its participation in an infringement and accept its liability, in order to obtain a 10% fine reduction. The Office could offer this option whenever the circumstances of a given case provide for this solution.

Similarly, individuals' liability and leniency policy could have a common deterring goal. According to the Draft Amendments, a fine up to Euro 500.000 could be imposed on the key managers, whose acts or negligence led the undertaking to breach Article 6 (1) 1-6 of the Competition Act or 101 (1) a-e of the Treaty on the functioning of the European Union. This possibility is not limited to cartels, but will also cover all horizontal and vertical agreements. Both fines – on an undertaking and an individual would be imposed within the same proceedings before the President of the Office. Moreover, it is worth noting that under the proposal the individuals would be eligible for leniency. Consequently, introducing such measure will provide the Office with access to the new sources of information, as individuals would take part in the leniency "race against the clock" next to undertakings.

One of the most important points of intersection between private antitrust enforcement and leniency schemes is the possibility of using information provided by the applicant for immunity or reduction of fines as evidence in civil litigations[32]. On the one hand, the fact that an undertaking applied for, and was

---

the evidentiary threshold (see: here-above, footnote 22). In another case, leniency applications were filed by two undertakings which subsequently merged, the first-in applicant acquiring the second-in. As a result, the proceedings against the subsequent applicant were discontinued and the immunity was granted to the first applicant (case no. DOK-12/2011).

31 See: para 4.1 e of the Guidelines of the President of the Office of Competition and Consumer Protection *on setting fines for competition-restricting practices* (available at: www.uokik.gov.pl). This was for instance the case in case no. DOK-11/2010.

32 See e.g.: E. Rumak, P. Sitarek, *Polish Leniency Programme and its Intersection with Private Enforcement of Competition Law,* YARS 2009, v. 2(2), pp. 99-123.

granted, leniency certainly strengthens the position of those seeking private enforcement. On the other hand, private damage actions can constitute a disincentive for the undertakings to co-operate under a leniency programme. Consequently, under the Draft Amendments new measures are being proposed limiting access to the leniency documents.

5. Conclusion

Cartels belong to the most serious infringements of competition law. Due to their confidential nature, detecting and counteracting such agreements could be to a great degree hindered. Therefore, enterprises which decide to cooperate with the antitrust authority and offer the evidence or information on such agreements shall be rewarded in a fair manner. Accordingly, regardless of the advancement of different leniency legislations, as well as their specificities, some basic issues such as transparency, predictability or adequacy of the programmes, are of the same interest to all leniency applicants worldwide, and maybe of a special interest to second-in and subsequent applicants. On the other hand, the lenient treatment of leniency applicants, and particularly second-in and subsequent applicants, should not result in overlooking the general objectives of leniency policies, and especially their deterrence element.

ROMANIA

1. Introduction

Leniency applications are one of the principal drivers of cartel investigations undertaken by competition enforcement agencies around the world.

In Romania, although a leniency programme may have not been seen as necessary in the very first phase of competition law enforcement, when competition culture was so limited that "naïve cartels" could be uncovered by reading the newspapers, leniency policy, as an instrument against anticompetitive practices of cartel type became part of the Romanian legislation in 2004 [1].

As part of its moves to adopt EU enforcement methods, in September 2009, Romanian Competition Council (hereinafter referred as RCC) replaced its original 2004 leniency program, which has not produced any result, with a new amended version[2]. aimed at encouraging undertakings to collaborate with the RCC in revealing cartels.

The new Guidelines regarding the conditions and criteria for implementation of a leniency policy, published in September 2009, bring further clarification on certain procedural aspects It also set out new important elements such as the marker system for immunity applications, the protection of an immunity applicant's position within a queue and the simplified immunity application for cases that may fall under the jurisdiction of several NCAs or/and the EC that allow a unitary approach with other EU Member States for leniency applications. Therefore, nowadays, the national provisions regarding the Leniency policy are fully harmonized with the ECN Model Leniency programme.

With the new guidelines, the RCC decided also to broaden the leniency scope by making possible for the distributors or suppliers to also report vertical anticompetitive agreements, such as price fixing, market allocation, imports or exports restrictions concluded with their downstream or upstream partners.

Since the adoption of the refined Guidelines, RCC managed to identify and sanction further to a leniency application in 2010 a local cartel formed by the taxi drivers in Timis County. Nevertheless, RCC is confident that the number of leniency applications will further increase in the near future and this will happen when more and more cases with deterrent fines become legally binding in Romania.

2. Rationales for rewarding subsequent applicants

The purpose of the leniency programme is not formally stated in the Romanian Guidelines. However, international experience has showed that only strong potential penalties corroborated with some legal forms of reward cooperation can provide powerful "carrot and stick" inducements for competition authorities for cracking down on cartels.

---

1 The Guidelines on the conditions and criteria for applying a leniency policy on the basis of art. 51(2) of the Competition Law no 21/1996.

2 Order no. 300 of 21 august 2009 for the adoption of the Guidelines on the conditions and criteria for applying a leniency policy on the basis of art. 51(2) of the Competition Law no 21/1996.

Very often, obtaining evidence of a hard core cartel from "insiders," or cartel participants can be critical to the success of an investigation. Under these circumstances, the prospect of an elimination or reduction of the sanction that would otherwise be imposed upon the conspirator in a prosecution of the conduct creates real incentives for encouraging such insiders to cooperate when in ordinary circumstance they would not do so. If a company stops its participation in a cartel and informs the competition authority of the operation of the cartel, the competition authority may reward that company with a full or partial exemption from the fine. In addition, the prospect of an elimination or reduction of the fines adds an incentive for cartel participants to create and keep more evidence in the first place, with the aim to be able to bring it to the authority in case they decide to blow the whistle. This has a beneficial effect for the competition authorities as they can eventually find more evidence in one place when carrying out a dawn-raid (first virtuous circle of leniency). Another beneficial effect of leniency policy stems from the possibility that arises for a competition authority to impose larger fines on the companies involved given the larger amount and better quality of the information gathered about the cartel through the leniency tool (second virtuous circle of leniency[3]). Other benefits include increased detection rate, destabilising effects on cartels, cost savings in investigation and prosecution as a result of the applicant providing evidence directly from within the cartel, litigation savings and so on. Therefore, for all above mentioned rationales, RCC would argue that leniency policy is the best source of information that can be available to a competition authority.

Apart from being the most successful investigative tools against cartels that would help RCC to detect and dismiss cartels and to punish cartel participants, RCC believes that the leniency policy indirectly serves also to achieving the deterrent function of its anti-cartel enforcement policy.

In RCC's opinion, the race to the courtroom should have only one winner. However, allowing subsequent leniency applications has other benefits that deserve to be pointed out. It may happen that the RCC is not able to prove the infringement solely on the basis of the information provided by the immunity applicant with all its best efforts. Therefore, the information provided by subsequent applicants may become critical in some cases for the success of the investigation. Indirectly, rewarding subsequent applicants' cooperation may make also the leniency policy more appealing to potential applicants since a second-in applicant may become a first applicant in a different case as long as it is encouraged by the treatment received from RCC.

3. Arguments against rewarding subsequent applicants

The existence of the subsequent leniency is questionable as long as the leniency itself is an exception to the legal principle of the responsibility of the undertakings for their wrongdoings. As exceptions must be applied in a limited and restrictive way, RCC opines that subsequent applications should be used with care and never as a main instrument but only as a complement to the first applicant leniency.

Also, the rewards granted to subsequent applicants have to be sufficiently low in order not to undermine the attractiveness of the immunity programme. As an example for this situation stands the first EC Leniency Notice which offered 75-100% reduction to the first applicant (instead of immunity) and up to 50% to the second. This was changed in 2002 because it was considered that a bigger difference between the treatment reserved to the first in and the subsequent applicant would ensure a bigger success to the leniency policy in general.

[3] Wils W., "Leniency in Antitrust enforcement: Theory and Practice", (2007) 30 World Competition 25-64.

4. Short description of the immunity programme

The Romanian leniency Guidelines provide that only the first undertaking to submit information about the cartel can obtain immunity from fines.

In order to obtain total immunity from a fine under the Romanian leniency policy, a company which participated in a cartel or a vertical anticompetitive practice must be the first to inform the Competition Council of the undetected illegal activity by providing sufficient information to allow the authority to open an investigation and launch an inspection at the premises of the companies allegedly involved in the anticompetitive practice (Type 1A - Immunity). If the Competition Council is already in possession of enough information to launch an investigation, or has already opened one, the company must provide evidence that enables the Competition Council to prove the infringement (Type - 1B immunity). So, the first test under the immunity programme is satisfied once the company has submitted sufficient information to enable RCC to carry out an inspection in connection with the alleged cartel or to come to an infringement decision.

The second test under the immunity programme requires the company to fulfill certain criteria to qualify for immunity (the Cooperation obligation). That means that the company must fully and continuously cooperate with the Competition Council throughout its procedure (including promptly providing all evidence that comes into its possession, remaining at the RCC's disposal to answer questions, making employees available for interviews and not destroying, falsifying or concealing relevant information or evidence on the alleged infringement), end its involvement in the suspected cartel immediately at the request of RCC and not disclose the contemplated and actually filled application to third parties other than competition authorities).

The Guidelines also mention that the ringleader of the cartel and/or the undertaking which took steps to coerce other undertakings to participate in the alleged cartel cannot benefit from immunity.

Another observation that deserves to be made in this context is that RCC is not required to obtain a judicial mandate for carrying out dawn raids. Therefore, the level of information required from the applicants is higher for the type 1B immunity than for type 1A immunity even if in practice the thresholds are relatively similar. That means that in the case of type 1B immunity, the data and documents provided should contribute decisively to the establishment of the infringement. This feature might deter potential applicants as long as they have to "put everything on the table" in order to benefit from the immunity but the feature is inherent.

5. Leniency for subsequent applicants

Companies which do not qualify for total immunity from a fine may benefit from a reduction of fines that would otherwise be imposed. Such companies must fulfill also a two-part test. First, they must provide evidence that represents "significant added value" to that already in the Competition Council's possession and secondly, they must cumulatively comply with the Cooperation Obligation as detailed above under the immunity programme[4].

Evidence is considered to be of a "significant added value" when it reinforces, by its very nature and/or its level of detail, RCC's ability to prove the infringement. Under the second part of the test, the percentage range of reduction available is dependent on the timing of the application. Thus, the first

[4] The treatment of subsequent applicants is dealt with in chapter III of the Romanian leniency programme and the procedural aspects for subsequent applications are enshrined in its chapter VI.

company to meet these conditions may receive 30% to 50% reduction, the second 20% to 30% and subsequent companies up to 20% of the fine.

In comparison with the conditions provided for immunity applications, in the case of the subsequent applications, the ringleader and/or the undertaking coercing others to participate in the alleged cartel may still qualify for a reduction of a fine, if they fulfill the relevant requirements and meet all the conditions thereof.

RCC acknowledges that from the applicant's perspective the standard to be met for providing evidence of a "significant added value" (SAV) may be a source of uncertainty that can deter him from applying for subsequent leniency. He cannot know how much information the authority has at the time when he lodged the application. Therefore, the subsequent applicant can never be sure of what added value the information he will bring will have compared to what the authority already has in its possession, unless he was the ringleader of the cartel.

Therefore, the exact amount of the reduction will be determined by the Authority by taking into account the value of the information provided as well as the date of the subsequent application.

Regarding the procedural aspects for subsequent applications, section 40 of the refined Guidelines provides that subsequent applications can only be made in the form of a full formal application, which strengthens the idea that markers are not available for subsequent applicants.

Section 15 of the Guidelines that deals with the conditions for subsequent applications does not mention any cut-off point after which RCC does not accept leniency applications anymore. Still, a cut-off point seems to result from the wording of section 16. Section 16 explains the meaning of "significant added value" (SAV). For a piece of evidence to be able to qualify as SAV it needs to strengthen the ability of the Authority to prove the infringement. Thus, after the moment when the Authority is able to prove the infringement, no piece of evidence will be able to fulfil the conditions to be qualified as SAV anymore, and therefore, no new subsequent application will be able to fulfil the conditions to qualify for subsequent leniency provided in section 15.

The Guidelines do not contain any rules on the revocation of leniency. In principle, this is however possible, if for instance, the information provided and based on which the leniency was granted, proves to be false or misleading. So, this possibility is provided, as a general principle, by the Romanian Competition Law, thus not only for leniency applicants. In such situation, the RCC will inform the applicant by letter immediately after it becomes obvious that the applicant infringed one of the conditions of the two-part test.

6. Marker system

The marker system in the Romanian leniency programme has been introduced on the occasion of the review of its Guidelines in 2009 and it is thoroughly described at points 26-32 of the Guidelines. Markers are only available for immunity applicants. In order to obtain a marker, applicants have to provide details about the their name and address, the identity of those involved in the alleged infringement, the nature of the alleged infringement, the estimated duration of the alleged infringement, the product and geographic markets affected, short description of the functioning of the alleged infringement and state at which other competition authorities applications have been or are intended to be filed. The marker can be placed both orally or in writing. When applying for the marker, the applicant must also justify its request for a marker. That means that the level of information that has to be provided at an early stage by applicants when asking for a marker is high.

At the same time, RCC acknowledges that the existence of marker system influences the race to "be the first the door" of immunity applicants. However, being the first in the door is no longer of such a crucial importance, because it does not necessarily mean that the first applicant will receive the immunity, but rather immunity will be given to the first applicant that fulfils the conditions in order to receive the marker (completes the marker), even if that particular applicant was, for example, the second to come to the Authority. Thus, the race to the door is transformed in a race to complete the marker and the one who wins it is the one who gathers and presents enough valuable information that the Authority can use to perform on-site inspections or to establish the infringement. So, in case of the immunity applicants, timing is no longer the essential aspect, but rather the quantity and quality of the information provided.

Unlike other leniency programmes in Europe that provide for a certain time limit for the drafting of a complete leniency application, the Romanian programme does not establish a clear time limit. Rather, it provides that the Authority has a discretionary power to set a time limit, on a case-by-case basis. This feature comes from the fact that the leniency programme is still a young instrument and the number of applications is reduced. Hence, flexibility was considered necessary in order to encourage applicants to come to RCC. In the future, this should change and as long as the practice accumulates, specific or indicative deadlines will be introduced. The general term is two weeks but could be longer if necessary. If the market is not perfected within the time limit set up by RCC, the application will be considered void.

On the other hand, not having a marker system for subsequent applicants means that the first to bring SAV is the one that will receive the first band of reduction.

For the purpose of the example let's imagine the situation of a cartel where W placed a marker for immunity, followed by X. The benefit of immunity has already been granted to X, because he was the first to bring evidence that fulfilled the evidential thresholds for the granting of immunity. Later, there comes applicant Y, (who can only qualify for subsequent leniency), who brings SAV and qualifies for the first band of reduction. Later on, applicant Z comes, who brings evidence that has even more SAV than the evidence brought by Y. Still, Z will receive a smaller reduction in fine.

We can therefore see that in subsequent applications the timing is more important than the substance for the granting of leniency (reduction of the fine in that case) than in immunity applications.

Furthermore, we note that there are certain competition authorities that care more about the substance than about the timing, even in their subsequent leniency policies. The balancing of timing and substance is a difficult and sensitive aspect of a leniency policy. One should decide what matters the most: to prove the infringement quicker or to prove the infringement better.

The OECD Secretariat Note on Leniency for subsequent applicants notes that in this respect, Canada is one of the few countries that offer markers to subsequent leniency applicants (Section 3.7.1. of the Canadian Leniency Program Bulletin). We note that along with Canada the United Kingdom has a similar policy. Thus, the OFT offers markers for type C leniency (i.e. subsequent applications) that can be perfected by providing all relevant information available to the applicant in relation to the cartel and that information must fulfil the SAV criterion, and to comply with the other requirements of leniency.

Furthermore, the OFT's Guidelines[5] provide that the discounts granted in subsequent application cases, (just as the discounts granted in immunity applications that are discretionary turned into leniency by the OFT – but that remain immunity applications in substance) depend more on the value of the material provided than on the timing of the application. Section 5.7 of the OFT Guidelines reads as follows: "Que position in type C cases is not decisive. It is possible that an applicant who is third in the queue may get a

5 "Leniency and no-action" OFT's guidance note on the handling of applications, OFT 803, December 2008.

discount greater than an applicant who is second in the queue." Moreover, the OFT tempers this attitude and includes the idea of timing: *"That said, it is the usual experience of the OFT that the further ahead in the queue an applicant is, the greater the value added by its application. Therefore, would-be applicants are encouraged to apply at the earliest possible stage"*.

7. Relations between leniency and other enforcement policies

To make RCC's investigations more efficient and effective, the recent amendments brought to the Competition Law distinguish now among increased forms of cooperation between RCC and offenders. Thus, apart from the cooperation within the leniency policy, the mere cooperation in administrative proceedings, which implies that the said company provides information and support the Competition Council's activity beyond its legal obligations, may be retained by RCC as a mitigating circumstance at the moment of the individualization of the fines for substantial infringements of Competition law.

Romanian law does not provide for clean settlements or plea bargaining but there is a legal instrument which was inspired from both of them ("hybrid" settlement). Thus, in case of offences for the violation of the provisions of Articles 5 and 6 of the national law and their equivalents, i.e. Articles 101 and 102 of the TFEU, it is also possible the cooperation of RCC with offenders in the form of acknowledgement of the anticompetitive deed.

This kind of instrument is considered as a mitigating circumstance with a special regime in the sense that the fine may be reduced more than following a simple mitigating circumstance, but less than the reduction achieved under the leniency policy so not to discourage leniency applications. Undertakings which admit their responsibility in the infringement and commit to adopt certain behaviours benefit from a reduction of up to 30% of the fines from the basic level, after deducting any other mitigation factor.

The purpose of introducing this mechanism was to decrease the interest of the offenders to challenge the Competition Council's decision, after acknowledging the deed and obtaining a reduction of the fine.

So, this mechanism and leniency policy pursue different objectives. While leniency policy is intended to facilitate the gathering of evidence or to encourage cooperation, the hybrid settlement provided by the Romanian Competition Law aims to serve to another goal, i.e. reducing the number of RCC's decisions challenged in front of the Court. Also, they have distinct legal regimes and grant to the companies different 'rewards', naturally, more significant under leniency as already explained.

Another distinction between these two instruments is that the acknowledgement of the deed could occur only when the company becomes interested to do this, that means after the communication of the investigation report which triggers also the company's right of access to file or during hearing whereas the application of leniency policy is essentially done even prior to opening of the investigation and the drafting of the investigation report.

The law does not provide expressly for an early termination procedure but this is possible in some way through the "hybrid" settlement described above.

8. Leniency programme and private damage claims

Regarding the influence of leniency applications on private antitrust litigation, Romanian competition law in line with the recommendations from the White Paper on Damages Actions for Breach of the EC antitrust rules (2008) of the European Commission provides that the undertaking benefiting from immunity from a fine will not be held jointly and severally liable for the damages caused through its participation in an anticompetitive practice prohibited by Articles 5 and 6 of the Romanian competition law or Articles 101 and 102 of the TFEU but for the portion of the damage caused by him.

9. Leniency and criminal liability of individuals

In Romania, leniency also operates in respect of the criminal liability of individuals, provided that a simultaneous application is lodged with the Prosecutor's Office.

Article 60 of the Competition law no. 21/1996 with further amendments and completions provides that an individual found to be involved with fraudulent intent and in a decisive way to the conceiving, organization or the performance of an anti-competitive agreement or practice prohibited by Article 5(1) of the Romanian Competition law can be subject to a criminal fine or imprisonment of between six months and four years and would be disqualified by a court decision from his managerial duties in case he made use of his position to commit the offence, under the terms provided by the Criminal Code. However, since Competition Council's proceedings are administrative by nature and not criminal, in such cases, RCC only notifies the criminal authorities in relation to the potential criminal offences discovered during the investigation.

10. Conclusion

To conclude, we may argue that RCC paid attention in designing an enforcement structure in which the maximum of benefits are granted to the undertaking which is the first to disclose and bring valuable evidence of a cartel. Any other instruments –hybrid settlement, mitigating factors – were designed to grant fewer benefits that leniency.

The system is designed as a channel which is very large at the beginning but becomes narrower with every mile and, eventually, only a few drops may pass through.

Beyond this metaphor, in practice, as more time passed since the investigation started, the benefits available to the undertaking admitting their involvement and cooperating with RCC are reduced in an arithmetical progression.

For instance, RCC applies a high standard and is very strict in its practice in granting full cooperation as a mitigating factor, based on the fact that admission and cooperation should be expressed through leniency, in the first place. On the other hand, RCC admits that the reduction of the fine for subsequent leniency applicants can be applied in the same time with an additional reduction following an admission of the responsibility, but in such a situation the later reduction cannot exceed the threshold of 10% from the basic level. This is an important factor to bring an additional reward to second-in applicants, whilst the undertaking also commits to change his behaviour in the market.

In order to encourage the leniency applications, the refined Guidelines for setting fines in case of substantial infringements, including cartels further provide that the reduction of the fine following an admission of responsibility of an undertaking may be of maximum 20% as far as that undertaking could have applied for leniency, but he did not do it. Also, if one of the undertakings participating in an anticompetitive practice applied and benefits from leniency, another undertaking part of the anticompetitive practice acknowledging its responsibility in the infringement cannot benefit from a reduction of a fine higher than 20% from the basic level.

RUSSIAN FEDERATION

1. Introduction

Over recent years anticartel activity is one of the priorities of the Federal Antimonopoly Service and according to Decision of the Board of the FAS Russia (in February 2012) it will remain top priority for the coming years.

The system of sanctions for violation of the antimonopoly legislation in general and in particular for cartels is the most important part of legal relations that protect competition. Application of the antimonopoly legislation is impossible without it. With the active participation of the Competition Authority Russia has formed a balanced system of measures of administrative and criminal liability for violation of the antimonopoly legislation in recent years.

An important component of a tool kit for proving that there is violation of the law, i.e. the cartel offence, are leniency programs (the rules for release from liability for participation in cartel).

In the period of 2010 – 2012 more than 40 economic entities participated in the leniency program; they provided evidence that became the basis for decisions of Competition Authority on violation of the antimonopoly legislation.

2. Exemption from liability for violation of the antimonopoly legislation of the Russian Federation

Release from liability for violation of the antimonopoly law is executed in accordance with paragraph 1 of the Notes to Article 14.32 of the Code of Administrative Violations of the Russian Federation (CoAV), which states:

> *"A person (a group of persons defined in accordance with the anti-monopoly legislation of the Russian Federation) that has voluntarily applied to the antimonopoly body to report on an agreement or coordinated actions shall be relieved of administrative accountability (participant of the cartel, "surrendered" to the antimonopoly body does not carry any penalties) provided the following conditions are observed in their entirety:*
>
> - *as of the time of the person's report the antimonopoly body did not have relevant information and documents concerning the administrative offence committed;*
> - *the person has refused to take part or to continue taking part in the agreement or to implement or continue implementing the coordinated actions;*
> - *the information and documents that have been presented are sufficient for the purpose of establishing the event of the administrative offence.*
>
> *Relief from administrative accountability shall be granted to the person that was the first to comply with all the conditions set out in the present Note to Article 14.32 to CoAV".*

In practice the statement of pleading guilty can be confidentially recorded by the authorized official, which is confirmed by a special receipt.

The telephone number, e-mail to communicate with the authorized person are posted on the official web-site of the FAS Russia.

Legal framework of procedural aspects for the statement of pleading guilty is the Decree of the FAS Russia of September 26, 2008 N 369 "On additional measures for enforcement of the Note to Article 14.32 of the Code of Administrative Violations" as follows:

1. The obligation to receive statements of facts of agreements or concerted practices that restrict competition and are prohibited by the antimonopoly legislation of the Russian Federation (hereinafter - Application)is personally assigned to the State Secretary - Deputy Head of FAS Russia, the Head of the Anti-cartel Department.

2. Heads of Departments and Regional Offices of the FAS Russia should immediately inform the above mentioned officials in case of receipt of such Applications.

3. Anti-cartel Department is in charge of receiving, registration and storing of Applications in accordance with the rules of official use document book keeping.

Along with the administrative liability of individuals and legal entities for violation of the antimonopoly legislation Russian legislation also provides for mitigation or burdening administrative responsibility for these activities.

The legal basis for mitigation or burdens of administrative responsibility is item 4 of Notes to Article 14.31 of the CoAV, which states:

> *"If there are circumstances alleviating administrative liability the amount of the administrative fine imposed on the legal entity shall be reduced for each such circumstance by one eighth of the difference of the maximum rate of the administrative fine envisaged for the commission of the given administrative offence and the minimum rate of the administrative fine envisaged for the commission of the given administrative offence. If there are circumstances aggravating administrative liability the amount of the administrative fine imposed on the legal entity shall be increased for each such circumstance by one eighth of the difference of the maximum rate of the administrative fine envisaged for the commission of the given administrative offence and the minimum rate of the administrative fine envisaged for the commission of the given administrative offence".*

In accordance with Part 1 of Article 4.2. of the CoAV, circumstances mitigating administrative responsibility, include:

> *"1) repentance by the person that has committed an administrative offence;*
>
> *2) the voluntary termination of wrongful behaviour by the person that has committed an administrative offence;*
>
> *3) the voluntary provision of information about an administrative offence by the person that has committed the administrative offence to a body empowered to carry out proceedings in a case of the administrative offence;*

4) the assistance of the entity that has committed an administrative offence rendered to a body empowered to carry out proceedings in a case of the administrative offence in establishing the circumstances that are to be established in the case of the administrative offence;

5) the prevention of harmful circumstances of an administrative offence by the person that has committed the administrative offence;

6) voluntary compensation by the person that has committed an administrative offence for inflicted damage or voluntary elimination of inflicted harm;

7) the voluntary execution (before the issuance of a decision on a administrative case) of an order for elimination of committed offence issued by a body responsible for state control (supervision) by the entity that has committed the administrative offence;

8) the committal of an administrative offence in the state of strong mental agitation (heat of passion) or in grave personal or family circumstances;

9) the committal of an administrative offence by minors (under age);

10) the committal of an administrative offence by a pregnant woman or a woman having an infant".

In accordance with Part 1 of Article 4.3 of the CoAV, circumstances aggravating administrative responsibilities include:

"1) continuation of wrongful conduct, despite the demand of authorized persons to terminate it;

2) repeated commitment of a similar administrative offence, in which the person has already been penalized for committing such an offence in respect of which the term, provided for by Article 4.6 of this Code, has not yet expired;

3) involvement of a minor in committing an administrative violation;

4) administrative violation by a group of persons;

5) administrative violation in the conditions of a natural disaster or other emergency;

6) an administrative violation in a state of intoxication."

An important legislative norm that guides antimonopoly authority when they take the decision on release from a liability is provided in the Resolution of the full Commission of the Supreme Commercial Court of the Russian Federation No. 30 of 30.06.2008 "On Some Issues Arising in Relation to the Use by the Commercial Courts of Competition Law" (paragraph 10.3), which states:

"Upon consideration of administrative cases under Article 14.32 of the Administrative Code of the Russian Federation or the cases challenging the decisions of the competition authority on administrative liability established under that Article, courts must proceed from the following.

In view of the footnote to Article 14.32 of the Administrative Code of the Russian Federation, the entity who voluntarily reported to the competition authority on entering into an agreement prohibited by the antimonopoly law of the Russian Federation or on carrying out concerted actions prohibited by the antimonopoly law of the Russian Federation is exempt (released) from

liability for administrative offenses under Parts 1 and 3 of this Article, provided all of the conditions listed in paragraph 1 of the note are met.

During the process of settlement of such issues (i.e. the conditions of the note are met at the time of application by the entity with a statement and the competition authority did not have the relevant information and documents related to the administrative offense) courts should observe that this condition is met, i.e. the application is handed in before the announcement of the decision of the antimonopoly authority's commission which establishes the fact of violation of the antimonopoly legislation of the Russian Federation (Part 2 of Article 49 of the Law on Protection of Competition) that was the reason for initiating an administrative case (section 1.1 of Article 28.01 of the Administrative Code)."

This legal norm defines a "point of no return" for business entities (participants of anti-competitive agreements) in taking the decision on "pleading guilty".

The following cases of violation of the antimonopoly legislation considered by the FAS Russia in 2011 can serve as examples of release from liability.

Case 1. Consideration of the case on conclusion of anticompetitive agreement in the chlorine market the group of persons (entities) including JSC "Sibur", JSC "SIBUR Holding", and JSC "SIBUR Neftekhim" (Nizhny Novgorod) disclosed the following:

- they submitted an application for exemption from liability in accordance with the notes to Article 14.32 of the Administrative Code;
- they declared on the fact of an agreement, which led to price fixing and chlorine market division by volume of sales and the composition of the buyers;
- they refused to participate further in the agreement violating antimonopoly laws.

Thus the group of persons (entities) fulfilled all the requirements under the notes to Article 14.32 of the Administrative Code.

The above mentioned circumstances became the grounds for exemption from administrative liability for the group of persons (entities), including JSC "Sibur", JSC "SIBUR Holding", and JSC "SIBUR Neftekhim" (Nizhny Novgorod).

Case 2. During the investigation of the case of JSC "Alfa Insurance" and then OJSC "SG "MSK", and "Rosgosstrakh" LLC related to anti-competitive agreements in the insurance market the companies:

- submitted applications for exemption from liability in accordance with the notes to Article 14.32 of the Administrative Code;
- declared on signing agency agreements with CJSC "KRK" in which the applicants carried out the fixing of the size of the insurance tariff for insurance of the vehicle that was the subject of pledge of CJSC "KRK" or CB "KRK" as 9.99% out of the original cost of the vehicle.

Thus, the applicants fulfilled all the requirements under the notes to Article 14.32 of the Administrative Code.

The mentioned circumstances have led to the exemption of "Alfa Insurance" from liability.

As OJSC "SG MSK" and "Rosgosstrakh" LLC were not the first entities applying to the FAS Russia minimal administrative penalties were imposed on them.

Case 3. In the course of the proceedings under Article 16 of the Law on Protection of Competition in the market of dairy products OJSC "MosMedynagroprom":

- submitted an application for release from liability in accordance with the notes to Article 14.32 of the Administrative Code;
- declared on signing the agreement on distribution of the factory's produce with the Government of Moscow, the Department of Trade and Services of Moscow, the Health Department of Moscow City, the Education Department of Moscow City, the Prefectures of Administrative Districts of Moscow;
- terminated further participation in the agreement violating the antimonopoly law.

Thus, OJSC "MosMedynagroprom" fulfilled all the requirements under the notes to Article 14.32 of the Administrative Code.

The above mentioned circumstances served as grounds for the exemption of OJSC "MosMedynagroprom" from liability.

Within the frameworks of the described procedures the competition authority may decide to release the individuals and legal entities **only from the administrative liability**.

The question of exemption from criminal liability of individuals (officials) is the responsibility of law enforcement authorities.

As for the exemption from criminal liability the legal basis for such decisions is Paragraph 3 of the Notes to Article 178 of the Criminal Cody, i.e.:

> *"A person committing an offense under this Article shall be exempt from criminal liability if it contributed for the exposure of this crime, compensated for the losses or otherwise made amends for the damage caused by the actions provided for in this Article, and if it committed no other crime".*

In accordance to the current legislation exemption from administrative liability of an individual (an official) for violation of antimonopoly law does not imply the exemption of that person from criminal responsibility for such activities.

In order to eliminate this legal gap the FAS Russia elaborated the proposal to amend Paragraph 3 of the Notes to Article 178 of the Criminal Code i.e.:

> *"A person committing an offense under this Article shall be exempt from criminal liability if it was the first out of the number of accomplices to voluntarily report the crime to the competition authority, and if it actively contributed for the exposure of this crime, and (or) the investigation of this crime, as well as compensated for the losses incurred, or otherwise made amends for the damage, and if his actions do not contain any other crime."*

These amendments are supported by the Chairman of the Government of the Russian Federation and are being prepared to be submitted to the State Duma of the Federal Assembly of the Russian Federation for in accordance with the established procedure.

3. For reference: Types of responsibility for violations of the Russian antimonopoly legislation

The violation of the antimonopoly legislation is established by the decision of the Commission of the antimonopoly authority according to the order provided in the Article 9 of the Law "On Protection of Competition" and is registered in the case decision on violation of the antimonopoly legislation.

In accordance with the current legislation responsibility is inflicted for both individuals and legal entities. For example, upon deciding of ac case on administrative responsibility the antimonopoly authority is guided by the Part 3 of the Article 2.1 of the Code of the Russian Federation on Administrative Violations (the CoAV), which states that:

> *"Imposition of an administrative penalty on a legal entity shall not relieve the guilty natural person of administrative responsibility for the given offence, and holding a natural person to administrative or criminal responsibility shall not relieve the legal entity of administrative responsibility for the given offence".*

However, for a natural person (depending on the gravity of effects caused by violation) may be subjected to either administrative or criminal responsibility, but according to the Russian legislation legal entities can be only administratively responsible.

The administrative responsibility for natural persons and legal entities for violation of such rules is establishes by the Article 14.32 of the CoAV and is as the following:

> "1. The conclusion by an economic entity of an agreement which is inadmissible under the **antimonopoly legislation** of the Russian Federation, and equally, participation therein or the commission by an economic entity of coordinated actions that are deemed inadmissible under the antimonopoly legislation of the Russian Federation shall cause the imposition of an administrative fine at the rate of 20,000 to 50,000 rubles or disqualification for a term of up to three years for officials; and on legal entities from one hundredth to fifteen hundredths of the sum of the offender's proceeds from the sale of the product (work or service) in the market of which the administrative offence has been committed, or from one tenth to a half of the initial value of the subject matter of trading, but in any case not below 100,000 rubles or if the sum of the offender's proceeds from the sale of the product (work or service) in the market of which the administrative offence has been committed exceed 75 per cent of the aggregate sum of the offender's proceeds from the sale of all products (works or services), or the administrative offence has been committed in the market of commodities (works or services) whose sale takes place at the prices (tariffs) regulated in accordance with the legislation of the Russian Federation, at the rate from three thousandths to three hundredths of the sum of the offender's proceeds from the sale of the product (work or service) in the market of which the administrative offence has been committed but in any case not below 100,000 rubles.
>
> 2. The coordination of the economic activities of economic entities which is inadmissible according to the **antimonopoly legislation** of the Russian Federation shall cause the imposition of an administrative fine on officials at the rate of 20,000 to 50,000 rubles or disqualification for a term of up to three years; and on legal entities from one hundredth to fifteen hundredth of the sum of the offender's proceeds from the sale of the product (work or service) in the market of which the administrative offence has been committed but in any case not below 100,000 rubles or if the sum of the offender's proceeds from the sale of the products (work or service) in the market of which the administrative offence has been committed exceeds 75 per cent of the aggregate sum of the offender's proceeds from the sale of all products (works or services), or the administrative offence has been committed in a market of commodities (works or services)

whose sale takes place at the prices (tariffs) regulated in accordance with the legislation of the Russian Federation, at the rate of three thousandths to three hundredths of the sum of the offender's proceeds from the sale of the product (work or service) in the market of which the administrative offence has been committed but in any case not below 100,000 rubles.

3. If a federal executive governmental body, an executive governmental body of a subject of the Russian Federation, a local self-government body, another body or organization that carries out the functions of said bodies or a state non-budget fund has concluded an agreement which is inadmissible according to the **antimonopoly legislation** of the Russian Federation or if said bodies or organizations have performed coordinated actions which are inadmissible in accordance with the antimonopoly legislation of the Russian Federation –it shall cause the imposition of an administrative fine on officials at the rate of 20,000 to 50,000 rubles or disqualification for a term of up to three years".

The criminal responsibility for violation of the antimonopoly legislation is established by the Article 178 of the Criminal Code of the Russian Federation (the Criminal Code), as the following:

"1. Preventing, restricting or eliminating competition by entering economic entities-competitors into competition-restricting agreements (cartels), repeatedly abusing dominant position by fixing and (or) maintaining monopolistically high or monopolistically low prices for the goods, unreasonably refusing to enter into a contract or evading a contract, and restricting market entry, if those actions have inflicted heavy damages to citizens, organizations or the state or resulted in gaining income on a large-scale, are punishable by a fine from 300,000 to 500,000 rubles, or in the amount of the salary of a convicted person or other income received during a period from one to two years, or compulsory labour for a period for up to three years, with or without depriving of the right to hold certain positions or be involved in certain activities for up to one year, or imprisonment for up to three years, with or without depriving of the right to hold certain positions or be involved in certain activities for up to one year.

2. The same actions:

a) exercised by a person, abusing his/her position;

b) associated with liquidating or damaging somebody else's property, or the threat of its liquidation or damaging, in the absence of the elements of extortion;

c) which inflicted especially heavy damages or resulted in gaining income on especially large scale, are punishable by compulsory labour for up to five years, with or without depriving of the right to hold certain positions or be involved in certain activities for up to three years, imprisonment for up to six years, with imposing a fine in the amount of up to one million rubles or the salary of a convicted person or other income received during the period for up to five years, or without imposing a fine, with or without depriving of the right to hold certain positions or be involved in certain activities for a period from one to three years.

3. Actions specified in Parts 1 or 2 of this Article, and committed with violence or a threat of violence, are punishable compulsory labour for up to five years, with or without depriving of the right to hold certain positions or be involved in certain activities for a period from one to three years, or imprisonment for up to seven years, with or without depriving of the right to hold certain positions or be involved in certain activities for a period from one to three years."

Notes:

1. In this Article, **"**income gained on a large scale" means income exceeding five million Rubles, and "income gained on especially large scale" means income exceeding twenty five million rubles.

2. "Heavy damages" means damages exceeding one million rubles, and "especially heavy damages" are damages exceeding three million rubles".

SOUTH AFRICA

1. The Leniency/Immunity policy in South Africa

Section 4(1) (b) of the Competition Act of South Africa, 1998 ("the Act") prohibits competitors in a market from engaging in horizontal practices that amount to cartel conduct. This includes bid rigging, market allocation and price fixing. The Competition Commission South Africa ("the Commission") is tasked with investigating cartel conduct and referring it to the Tribunal for adjudication. In turn, the Competition Tribunal ("the Tribunal") is empowered, inter alia, to interdict prohibited cartel conduct and to impose administrative penalties, where appropriate.

In 2004 the Commission adopted a leniency programme under its Corporate Leniency Policy (CLP) in an effort to detect, stop and prevent cartel conduct. In doing so, it consulted international best practice including similar programmes operational in the United States, the United Kingdom, Canada, Australia and the European Union. In terms of the CLP firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution. The CLP was amended in 2008 removing the provision which prevented instigators from applying for leniency.

2. Recent Challenge to the Commission's Leniency Policy

In a recent appeal arising out of a High Court review application[1], the appellants challenged the Commission's decision to grant conditional immunity to the applicant (a respondent), in accordance with its CLP in respect of its admitted participation in cartel conduct that violates s 4(1) (b). The appellants contended that the Commission had no power to offer immunity from prosecution to a participant in a prohibited practice, and that its offer of conditional immunity was unlawful. They further contended that the unlawful offer of immunity tainted both the initiation and the subsequent referral of the complaint to the Tribunal, and rendered each invalid and liable to be set aside. Finally, they contended that any evidence obtained as a result of its offer of immunity should be declared by the High Court to have been unlawfully obtained, and excluded from use in the Tribunal. In essence, the appellants sought to use the High Court proceedings to prevent the hearing and determination of the complaint referral in the Tribunal, either by reviewing and setting aside the initiation and/or referral of such complaint, or by preventing the use of the incriminating evidence provided to the Commission by the leniency applicant in those Tribunal proceedings. The Commission and the leniency applicant both opposed such relief. The High Court dismissed the application on the basis that it fell within the exclusive jurisdiction of the Tribunal, and could not be determined by it. It then went on to state that if it had been empowered to consider the matter, it would have found that the grant of conditional immunity to the applicant and the initiation and referral of the complaint was lawful and valid. The appellants appealed that decision to the Supreme Court of Appeal ("the SCA"). On 27 September 2012, the SCA dismissed the appeal finding in favour of the Commission[2]. This judgment reaffirms the legitimacy of the Commission's CLP which has been an extremely effective tool in the detection of cartel conduct in South Africa

1 Agri Wire (Pty) Limited and Another v Commissioner of the Competition Commission and Others (7585/2010) [2011] ZAGPPHC 117 (5 July 2011)

2 [2012] ZASCA 134 (660/2011)

3. The CLP

The policy sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for immunity. The granting of immunity becomes an incentive for a firm that participates in a cartel activity to terminate its participation, and inform the Commission accordingly.

On the basis of an application for leniency and its own investigations, the Commission will determine whether an applicant had complied with the preliminary requirements of the CLP and grants it conditional immunity. The granting of conditional immunity constitutes a conditional undertaking by the Commission not to pursue relief against the applicant in Tribunal proceedings. However, the Commission expressly reserves the right to withdraw that immunity at any time, if the applicant failed to meet the requirements of the CLP or the conditional immunity agreement it concluded with the Commission. Thus, if the applicant did not comply with its obligations, the Commission could amend the relief it sought and press for declaratory relief or a fine against the applicant. Conversely, if the applicant acted in accordance with the terms of the conditional immunity agreement, then at the close of proceedings the Commission would refrain from seeking relief against it.

The CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, immunity for its participation in cartel activity upon the cartel member fulfilling specific requirements and conditions set out under the CLP. The CLP is designed to uncover cartels that would otherwise go undetected and also to make the ensuing investigations more efficient. It is for this reason that the benefits of immunity are spelt out from the outset to serve as an incentive for the applicant to come forward.

Immunity granted by another competition authority would not automatically qualify the applicant for immunity by the Commission under the CLP. The applicant must submit to the Commission a separate application which meets the conditions and requirements set out under the CLP.

4. Subsequent applicants

Only a firm that is ‘first to the door’ to confess and provide information in accordance with the CLP to the Commission in respect of cartel activity would qualify for immunity under the CLP. If other members of the cartel wish to come clean on their involvement in a cartel to which the applicant has already confessed, the Commission may explore other processes outside the CLP, which may result in the reduction of a fine, a settlement agreement or a consent order. In the event that the matter is referred for adjudication to the Tribunal, the Commission may consider at its discretion asking the Tribunal for favourable treatment of the applicants who were not the first to apply for immunity pursuant to the CLP. In this instance, favourable treatment implies a substantially reduced or minimum fine from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of co-operation given.

5. Requirements placed on applicants who wish to benefit from the immunity program

The applicant for immunity under the CLP will qualify for immunity provided it meets the following conditions and requirements:

(a) the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;

(b) the applicant must be the first applicant to provide the Commission with information, evidence and documents sufficient to allow the Commission in its view, to institute proceedings in relation to a cartel activity;

(c) the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and the subsequent proceedings in the Tribunal or the Appeal Court are completed;

(d) the applicant must immediately stop the cartel activity or act as directed by the Commission;

(e) the applicant must not alert other cartel members or any other third party that it has applied for immunity;

(f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and

(g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.

6. The marker system

Prior to making an application for immunity pursuant to the CLP, a prospective applicant may choose to apply to the Commission for a marker (the "marker application"). The marker application is made in writing to the Manager of the Cartels Division of the Commission by one of the certain specified ways including by fax, email or hand delivery. The marker application must identify that it is being made to request a marker, the applicant's name and address, the alleged cartel conduct and its participants and justify the need for a marker. The Commission may grant, at its discretion and on a case-by-case basis, a marker to protect the applicant's place in the queue of applications for immunity. In granting the marker, the Commission will determine on a case-by-case basis the period of time within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in the CLP. If the applicant submits at a later stage an application for immunity along with the necessary information, evidence and documents within the time limit determined by the Commission, such application for immunity and information, evidence and documents will be deemed to have been provided on the date when the marker application was granted by the Commission.

7 Cut-off point for leniency applications

On particular occasions, the Commission received applications for leniency after it made a decision to refer the case for adjudication to the Tribunal. Such applications were rejected on the basis that the Commission's investigations were completed and a leniency application was not required to uncover the cartel conduct. In such cases the late applicant was invited to settle with the Commission. There are also instances when an application for leniency was received subsequent to a third party complaint. Such applications for leniency were accepted and processed.

8. Revocation of leniency

Revocation may occur at any time in respect of conditional immunity. The Commission will revoke a conditional immunity in writing. Revocation will occur if the applicant fails to meet the conditions and requirements of the CLP, including in the event of lack of cooperation by the applicant, provision of false or insufficient information, misrepresentation of facts and dishonesty. A person commits an offence when he knowingly provides false information to the Commission. Thus, an applicant whose immunity has been revoked by the Commission based on the provision of false information will be liable to penalties

stipulated in the Act, if convicted of such an offence. Where conditional immunity is revoked, the Commission may decide to pursue the matter in terms of the relevant provisions of the Act.

9. Conclusion

With the advent of criminalisation envisaged in the Competition Amendment Act No. 1 of 2009, the Commission is occupied with amendments to the CLP, in particular, the appropriate wording of the CLP in relation to concepts such as "deserving of leniency." The amendments also incorporate the CLP as an integral part of the Act.

SPAIN

1. Brief description of the Spanish Leniency Programme.

The Competition Act 15/2007, of 3 July 2007 (CA) introduced for the first time a leniency programme in the Spanish jurisdiction, a powerful tool for Competition Authorities to detect cartels, the most harmful of anti-competitive infringements. The legal provisions related to the leniency programme came into force the 28 February 2008, with 6 leniency applications submitted on the very first day.

The Spanish leniency programme is adapted to EC Regulations and closely resembling to the European Competition Network´s (ECN) Leniency Programme Model. The Spanish competition system as a whole is extremely similar to the European one, being an administrative jurisdiction and not a criminal one, and therefore providing individuals and undertakings with the benefit of immunity or a reduction in the amount of the fines.

The Spanish leniency programme sets out two levels of leniency:

- Exemption from the payment of the fine (immunity): For the first applicant who provides the Comision Nacional de la Competencia (CNC) with evidence that enables it to order an inspection in relation to a cartel or enables it to verify an infringement of Article 1 CA in connection with a cartel, providing that, at the time of its provision, the CNC does not have sufficient evidence to find the infringement and any exemption has not been granted to an undertaking or natural person.

- Reduction of the amount of the fine: For the first applicant that fulfils the legal requirements a reduction of 30-50% of the amount of the fine that would otherwise have been imposed; for the second applicant a reduction of 20-30% and successive, up to 20% for the subsequent applicants.

Under the Spanish CA, exemption from payment of the fine is just granted to the first leniency applicant, although a leniency applicant which took steps to coerce others undertakings to join the cartel or to remain in it, is not eligible for immunity from fines. Notwithstanding this, it may still qualify for a reduction of fines if it fulfills the relevant requirements and meets all the conditions set out in the CA.

The reductions in the fine are progressively scaled down for the second and subsequent leniency applicants. These reduction applicants must submit evidence of the cartel with significant added value with the respect to the evidence already in the Comision Nacional de la Competencia (CNC)'s possession. According to the legal provisions it is also possible to submit a reduction application after the statement of objections (SO) has been issued. Notwithstanding this, the reduction application should be assessed taking into account the information already available, and the nature and/or the content of the evidence submitted by the reduction applicant.

2. Policy purpose of the Spanish leniency programme.

The main purpose of the Spanish leniency programme is the prosecution of the cartels.

This way the leniency programme enables the CNC to achieve greater effectiveness in the fight against cartels, to prevent and detect cartels and to increase the instability of a cartel agreement.

Since its inception, the Spanish Leniency programme has been a successful enforcement tool in the fight against cartels, increasing the cartel infringements prosecuted by the CNC, working as a strong deterrence through the fines and the publication of CNC´s Decisions in the media.

Since 2008, when the programme was established by the CA, there hasn´t been any legal amendment, modification or change in its fundamentals and scope. A provisional guidance about the Spanish leniency programme was issued and updated one year later.

At the moment the Notice of the Spanish leniency programme is under construction, including all the experience gained in these 4 years of legal application and the Decisions taken by the CNC´s Council including a leniency application.

3. Issues related to leniency for subsequent applicants.

The CA sets out strong incentives to the undertakings or individuals who wish to benefit from the leniency programme. In this sense, the CNC will grant immunity from any fine which would otherwise have been imposed to an undertaking or individual if that undertaking or individual is the first to submit information and evidence which in the CNC's view will enable it to carry out a targeted inspection in connection with the alleged cartel.

The subsequent applicants of a leniency application may be eligible to benefit from a reduction of any fine that would otherwise have been imposed. In order to obtain this benefit, the subsequent applicant must provide the CNC with evidence of the alleged cartel which represents significant added value with respect to the evidence already in the CNC's possession, whether by its nature o level of detail, reinforcing the CNC ability to prove the relevant facts and must meet also the cumulative conditions set out in the CA:

a) To cooperate fully, continuously and expeditiously with the CNC throughout the procedure.
b) To end its involvement in the alleged cartel immediately following its leniency application, except for what would, in the CNC's view, is reasonably necessary to preserve the integrity of the inspections;
c) Not neither to destroy, falsify or conceal relevant information or evidence relating to the alleged cartel nor to disclose, directly or indirectly, to third parties other than the European Commission or other Competent Authorities, the fact or any of the content of its leniency application.

The first leniency applicant to provide significant added value will benefit from a reduction of 30-50 %, 20-30% for the second leniency applicant to provide significant added value and up to 20% for the subsequent applicants that provide significant added value.

The CNC´s Council should assess the leniency applications submitted by subsequent applicants in terms of the added value of the evidences with respect to the evidence already in the CNC´s possession, as well as the level, scope and degree of cooperation from the leniency applicants throughout the procedure.

4. "Marker" system and the race to be "first in the door" of potential applicants.

The Spanish leniency programme has not formally established the use of markers, because the immunity applicant must submit to the Directorate for Investigations a formal leniency application including all the information and evidence available to it, setting the order of the leniency applications according to the date and time of register in the CNC, with a receipt of the submission of the leniency application.

However, the Directorate for Investigations of the CNC may concede as an exceptional measure a "marker" upon reasoned request of the leniency applicant. This measure concedes the leniency applicant with an additional period of time for providing the Directorate for Investigations with evidences related to the cartel in possession of the leniency applicant or at his disposal. In these cases the date of the leniency application´s submission would be the date of the initial leniency application. This marker protects the applicant's place in the leniency queue for a given period of time in order to allow the applicant to complete its leniency application. The general purpose of the marker is to make the leniency programme more attractive for potential leniency applicants while maintaining its effectiveness. The marker does guarantee leniency applicant that the different leniency applications that may have been submitted later in relation to the same alleged cartel, will be assessed in the order of receipt of those applications or the markers.

5. Immunity programme available.

In practice, immunity is available if an antitrust conduct is reported before the begin of an investigation, although submitting a leniency application in the first place does not necessarily guarantee that the conditional immunity will be granted, because of the leniency applicant must be the first to submit the elements of proof.

In any case, if the conditional immunity is not available, in the rejection´s notification of the conditional immunity, the subsequent leniency applicants will be informed that the information and evidence submitted could be withdrawn or be assessed as an application for reduction of the fine.

According to the Spanish leniency programme, the Directorate for Investigations will reject an immunity application if it is submitted after a SO has been issued. In this case, the leniency applicant may withdraw the information and evidence disclosed for the purposes of its immunity application or requests the Directorate for Investigations to consider it as a reduction application.

Notwithstanding this, applications for reduction of fines after the CNC has issued the SO could be accepted if, taking into account the information in the CNC´s possession and the nature or the content of the evidence submitted by the applicant, it strengthens the CNC´s ability to prove the alleged cartel.

6. Leniency to subsequent applicants can be revoked after it has been granted.

According to the CA the subsequent applicants could get a reduction of the amount of the fine if they meet all the requirements set out in the CA. Notwithstanding the proposal to reduce the amount of the fine could be revoked if the leniency applicant does not cooperate fully, continuously and diligently with the CNC over the course of the proceeding.

So, in the case S/0091/08 Jerez Wine[1], the Directorate for Investigations revoked his proposal included in the SO, due to the fact that after the SO notification, the leniency applicant breached this requirement of fully cooperation, denying their involvement in the cartel.

For that reason, the Directorate for Investigations did not put forward in the Draft Decision to reduce the amount of the fine of the leniency applicant. The Council of the CNC followed this Draft Decision and did not reduce the amount of the fine finally.

In other case, S/0086/08 Professional Hair Care[2], the Council of the CNC did not follow the Draft Decision of the Directorate for Investigation and did not reduce the amount of the fine of the subsequent

1 Decision of 28 July 2010, S/0091/08 Jerez Wine.

leniency applicant, considering the information submitted by this leniency applicant had not provided significant added value to benefit the reduction and even less that it had allowed the duration of the cartel to be lengthened, and therefore did not consider that it is entitled to a reduction of the amount of the fine.

In another case law, S/0244/10 Balearian Maritime Companies[3], the Council of the CNC did not follow the Draft Decision of the Directorate for Investigations and didn´t reduce the amount of the fine of one of the subsequent applicant due to the fact that the behavior of the leniency applicant could not be assessed as a fulfillment of the co-operation duties set out in the CA for the leniency applicants.

7. Relationship between your immunity programme and other enforcement policies. When designing your immunity programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

Although the Spanish system does not belong to the criminal jurisdiction, but to the administrative one, individuals could be also fined for their personal liability in any antitrust infringement. Taking this into account, an individual could submit also a leniency application, but to the date there hasn´t been any such application.

However it is a common practice according to the Spanish leniency programme, that the undertaking submits a leniency application also in the name of all their executive officers and members of the Administration´s Board who could have been involved in the cartel.

In relation with early case termination policies such as settlements, the Spanish CA does not foresee this tool, although the article 64.3 CA sets out mitigating circumstances that could be taken into account, such as to finish the infringement, the effective non-application of the prohibited conduct, the doings intended to repair the damage caused or the active and effective collaboration with the CNC carried out outside the cases of leniency.

Nevertheless, the CNC´s Council has considered these mitigating factors and has reduced by a percentage [5 – 15%] the amount of the fine of one undertaking based on the degree of cooperation, factual admissions that it provided in the proceeding and/or the willingness of the undertaking to provide active collaboration in demonstrating the existence of the cartel[4].

The Spanish CA sets out in the article 52.1 another enforcement tool, which is called the conventional termination. According to that legal provision, when an alleged offender proposes commitments that resolve the effects on competition derived from the conduct covered by the proceedings and the public interest is sufficiently guaranteed, the CNC´s Council may resolve the termination of the sanctioning proceedings in matters of agreements and illegal practices.

In order to set out the cases in which the conventional termination can be applied, the CNC published a Notice about conventional termination in a proceeding[5].

---

2 Decision of 2 March 2011, S/0086/08 Professional Hair Care.

3 Decision of 23 February 2012, S/0244/10 Balearian Maritime Companies..

4 Decisions of 2 March 2011, S/0086/08 Professional Hair Care and 19 October 2011, S/0226/10 Government Roadwork Tendering.

5 Spanish Competition Commision´s Statement of Conventional Termination in a proceeding (October 2011), available in the CNC Web page.

According to that article 52.1 CA and the former CNC´s Notice, the CNC´s Council has recently disposed that this antitrust enforcement tool can´t be applied in a proceeding with a cartel, because in these kind of harmful infringements not only the effects on competition derived from the conduct can´t be resolved, but also the public interest isn´t sufficiently guaranteed[6].

In relation to the private damage actions there have not been many cases to the date in the Spanish Jurisdiction. However, one of the most recent cases in the matter is the Sentence of the Supreme Court of 8 June 2012, confirming the Sentence of the Provincial Court of Valladolid, setting the compensations that the offenders for a cartel in the sugar market must satisfy to claimants, according to a previous Decision of the CNC´s Council.

Furthermore in a case of private damage actions, the leniency materials should be protected against disclosure to ensure the effectiveness of the leniency programme, as it has been established in the Decision of the Meeting of Heads of the European Competition Authorities of 23 May 2012, so the private damage actions in the Spanish jurisdiction should not affect the incentives to apply for leniency.

8. In particular, discuss if how early termination policies (such as settlements and plea bargaining) and immunity programmes relate to rewarding co-operation from subsequent applications. Do early termination policies have the same objectives as the immunity programme (e.g. to obtain information and encourage co- operation)?

The Spanish CA does not include any early termination policies like the settlements and plea bargaining as in other Jurisdictions, so there is any interplay between the leniency programme and this other enforcement tools. According to that, the CNC has any kind of experience to assess these early termination policies.

Notwithstanding this, as previously mentioned, the degree of cooperation, factual admissions that it provided in the proceeding and/or the willingness of one undertaking to provide active collaboration in demonstrating the existence of the cartel has been assessed by the CNC´s Council o as a mitigating factor in the sense of article 64.3 CA to reduce the amount of the fines in a 5 - 15 %.

To conclude the CNC encourage the active co-operation of all parties during the procedure, not only with the existence of the leniency programme, but also with the treatment of the parties´ active collaboration during the proceedings as a mitigating factor for setting the fines.

6 Decision of 20 September 2012, R/0107/12 SUMINISTROS COPLASA.

SWITZERLAND

1. General description of the Swiss Leniency programme

The Swiss leniency programme was introduced in the revision of the Swiss Act on Cartels (ACart) 2004 along with the implementation of pecuniary sanctions for undertakings. The principle underlying the leniency programme is contained in art. 49 para 2 of the Swiss Cartels Act: "*If the enterprise assists in the discovery and removal of the restriction of competition, the sanction may be fully or partially exempted*." The conditions and procedure for full or partial exemption from sanction under article 49a para 2 ACart are contained in the Ordinance regarding the sanctions for unlawful restrictions of competition (OS ACart).[1]

The Swiss leniency programme grants full reduction of the sanction to the first-in applicant who enables to open a procedure or if the procedure is already open, to establish a competition violation. Under the Swiss leniency programme, the leniency applicant disqualifies for full exemption of sanction if it has coerced any other undertaking into participating in the infringement of competition and has played the instigating or leading role in the relevant infringement of competition (art. 8 para. 1 OS ACart); This disqualifying factor does not apply to subsequent leniency applicants.

Partial exemption of sanction up to 50% is available to subsequent applicants according to the undertaking's contribution to the success of the proceedings (art. 12 para. 2 OS LCart). Partial exemption from sanction up to 80% is available to enterprises who reports a further competition violation (so-called "amnesty plus", art. 12 para. 3 OS ACart). Several enterprises pro cartel can qualify for a partial reduction of sanction.

Lastly, for first-in applicants, the following conditions are required (art. 8 para. 2 OS ACart):

- The enterprise has to maintain complete, continuous, and expeditious cooperation with the competition authorities throughout the proceedings.

- The enterprise has to cease its involvement in the competition violation at the latest at the time of the self-reporting or at the first instruction from the competition authorities.

Subsequent applicants have to fulfill the following requirements: a voluntary cooperation with the competition authorities and the immediate termination of its participation in the infringement (art. 12 para. 1 OS ACart).

2. Issues related to leniency for subsequent applicants

2.1 Level of discount

To encourage the "race to the authority", there is a full reduction of the sanction to the first-in applicant, but just a maximum of 50% reduction of fine granted to subsequent applicants. Several applicants per cartel can qualify for this maximum reduction.

[1] OS ACart in English: http://www.admin.ch/ch/e/rs/c251_5.html.

For subsequent applicants, the decisive criterion for the level of discount granted according to the Ordinance on sanctions is **the undertaking's contribution to the success of the proceedings** (art. 12 para 2 OS ACart). In the OS ACart, this criterion was deliberately expressed in a broad way, in order to let the Swiss Competition Commission (COMCO) develop its case-law and to therefore let an appreciation margin to the COMCO to grant a partial reduction within the 50% range.

The contribution to the success of the proceedings is not only a question of the timeliness of the self-report. It is more the whole cooperation in general which is evaluated to determine the level of discount granted to subsequent applicants. Timeliness plays logically a certain role: the longer the leniency applicant waits, the less likely it can contribute to the success of the proceedings. Moreover, there is no cut-off point after which a subsequent applicant cannot file a leniency application. For instance, in a recent case, a 5% discount was granted to an applicant who came forward shortly before the statement of objections was issued.[2]

The main criteria for the level of discounts for subsequent applicants are the **quality and the quantity of information** provided. Written information contemporaneous to the infringement are more valuable than statements made solely for the leniency application. The overall conduct during the investigation can play an important role as well: the cooperation must be genuine. For instance, if the authority gains the impression that the undertaking is not cooperating proactively (i.e. unasked), this can have an impact on the level of discount granted.[3]

At the beginning of the Swiss leniency programme, undertakings tended to communicate their willingness to cooperate with the competition authority at an early stage (usually after the house-search). However, in most cases they failed to deliver decisive information or pieces of evidence afterwards. Nevertheless, even if the cooperation was in reality of limited use, the COMCO usually granted a certain amount of reduction (for instance a reduction of 20%).[4] Its aim was to encourage undertakings to come forward in the first place as the Swiss leniency programme was still at an infancy stage. In recent cases, the COMCO tends to fix higher standards for cooperation for subsequent applicants. In one case, although the cooperation had been excellent, all the 7 enterprises received a reduction of but 40%. In the latest leniency case decided in December 2011, only two enterprises qualified for a 50% discount. This states clearly that a 50% reduction nowadays requires very high standards of cooperation that is to say a flawless cooperation in all regards and at an early stage.

2.2 Marker

The competition authority shall consider any subsequently received voluntary reports only after it has reached a decision on previously received voluntary reports (art. 10 OS ACart). According to the explaining note of the OS ACart, the possibility of a marker is foreseen but for first-in applicants (explaining note pertaining to art. 9 para 3 OS ACart)[5]. This means that a first-in applicant can put down a marker and is given a certain period of time to complete its leniency application. The leniency application is doomed to be filed at the time of the marker. Although not explicitly foreseen by the OS ACart, the COMCO has in practice granted this possibility to subsequent applicants, too. For subsequent applicants, the exact time of the leniency application does not play as crucial a role as for first-in applicants. For subsequent applicants who cooperate in a satisfying manner, the same level of discount has been applied if

2 Roads in the canton of Aargau, LPC 2012/2, p. 420-421.

3 Roads in the canton of Aargau, LPC 2012/2, p. 419-420,

4 Windows fittings, LPC 2010/4, p. 769-770.

5 http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de.

they decide to cooperate at the same stage of the proceedings, regardless of the exact order of receipt of the leniency application ("*Bernese electricians*").[6]

2.3 Revocation of leniency

At the outset of the proceedings, the Secretariat (the investigative body of the COMCO) together with a member of the presidency of the COMCO communicates to the leniency applicants if they are the first-in applicant or not. The exact level of discount for subsequent applicants is not communicated at the outset. The partial reduction is only granted by the COMCO at the end of the proceedings with the COMCO decision, therefore there can be no revocation of partial reduction.

2.4 Amnesty plus

Art. 12 para 3 OS ACart is introducing an amnesty plus to the Swiss leniency programme. An amnesty plus enables to grant a full exemption of sanction in a second new proceeding but also a reduction up to 80% in the first proceeding. The amnesty plus was granted but once up to now. A subsequent leniency applicant received a discount of 60% in the first proceeding (windows fittings) because he had reported a further infringement in the market of doors fittings.[7]

3. Relationships between leniency and other enforcement policies

3.1 Early termination

Besides a 40% discount through the leniency programme, the COMCO granted a supplementary 20% discount to all seven subsequent leniency applicants when agreeing to an amicable settlement in a bid-rigging case ("Bernese electricians")[8]. This supplementary discount was implicitly prompted by the fact that all enterprises involved in the bid-rigging decided to cooperate with the COMCO after the house-search. This is a kind of "early termination" of the competition violation supplemented by a commitment not to engage in "covered consortium", that is to say to consortium of undertakings which are not known from the Bauherr.

3.2 Civil damages

The COMCO recently came to a decision in a bid rigging case in the canton of Aargau (93 bids involving 15 undertakings, of which 4 were 4 leniency applicants). In the public version of the case[9] () the COMCO did neither publish the names of the bidders nor the location of the construction sites of the bids affected by the illicit agreements.

Some municipalities and the canton of Aargau requested access to the COMCO's files bringing forward among other interests that they might like to consider whether follow-on civil damages against cartels members could be appropriate. This request is still pending. The Secretariat of the COMCO has to weigh the interests of the municipalities affected by the competition violation against the necessity to keep its leniency programme attractive for future leniency applicants. If a leniency applicant receives a reduction of its sanction through the leniency programme but at the same time is exposed to civil damages due to its voluntary cooperation, it is "punished" for its cooperation and might have been better off not

6 Bernese electricians, LPC 2009/3, p. 220.

7 *Windows fittings*, LPC 2010/4, p. 769-770.

8 *Bernese electricians*, LPC 2009/3, p. 217-218.

9 *Roads in the canton of Aargau*, LPC 2012/2, p. 270.

cooperating in the first place. In order to keep up the attractiveness of its leniency programme, the Secretariat plans to deny access to the decision as far as bids are concerned that were reported by leniency applicants being a beneficent of the construction project. In other words: access to the COMCO's files should be denied in those cases in which a leniency applicant seriously has to fear civil actions by the municipalities that have been harmed by the bid rigging. For other construction projects, that were detected by information received from the dawn raid or for which leniency applicants "only" filed "cover bids", in the COMCO's opinion, access to the decision, which is very detailed, should be given in full. However, this process is still ongoing and the decision about whether and to which extent to give access to files is not yet made.

CHINESE TAIPEI

1. A Brief Description of Chinese Taipei's Leniency Policy, Its Background and Its Development

The leniency program was adopted and introduced in 2011 when the Fair Trade Act underwent its fifth amendments where a new provision Article 35-1 was added to the Act. The Fair Trade Commission (hereinafter "the FTC") had previously drafted a new proposal to revise the Act in 2003, but did not complete and submit it to the legislature for approval until 2011. In accordance with Article 35-1 of the Fair Trade Act amendment, the details of the 2011 leniency program were set out in the "Regulations on Immunity and Reduction of Administrative Fines against Concerted Actions" (hereinafter "the Leniency Regulations") which were promulgated and enacted on 6 January 2012 to provide the legal basis for the implementation of the leniency program.

Generally speaking, the content of Chinese Taipei's leniency program is similar to that of the leniency programs adopted in other countries. In short, the design of Chinese Taipei's leniency program requires that enterprises partaking in concerted actions should voluntarily come forward the cartel and assist the FTC before the latter learns of the agreement or initiates an investigation. Alternatively, such enterprises are required to provide concrete evidence and assist in the investigation process that will enable the FTC to successfully complete its investigation and to convict the involved cartel members that have violated Article 14 of the Fair Trade Act. Such a program is designed to encourage a company to voluntarily provide information on the alleged behavior of itself and of others to the FTC in exchange for immunity from or a reduction in their legal responsibility in accordance with the law.

The term "legal responsibility" here refers to the administrative fines imposed by the FTC according to the Fair Trade Act, and not criminal liability. In accordance with the precedence of the administrative remedy over judicial adjudication, as stipulated in the Fair Trade Act, violators of Article 14 shall be ordered to cease, rectify their illegal conduct or take necessary corrective action and shall have a fine imposed on them following a review by the FTC. Repeat offenders shall be referred to the courts and subjected to criminal liability. Therefore, the leniency program adopted in Chinese Taipei belongs to administrative enforcement with sanctions on corporations, and not a criminal enforcement system with criminal liability. Such a program rewards the first applicant by providing full immunity from fines and a reduction in fines for subsequent applicants.

In principle, the criteria applied in the leniency policy of Chinese Taipei are also similar to those adopted by the OECD members. Before or after the start of the investigation, enterprises participating in concerted actions may apply for leniency either orally or in writing. "Full immunity" is granted only to the first applicant and the subsequent applicants, four in total to be accepted, may only be offered the treatment of a reduction in fines. At the same time, all applicants must provide the concrete content of the violation and evidence submitted that can help the FTC start the investigation or establish the involved members' violation of Article 14 of the Act. An enterprise that has coerced other enterprises to participate in the cartel or has restricted others from exiting the cartel cannot qualify for leniency. However, the originator or ringleader/ leader of the cartel is qualified. No applicants may disclose to any other parties their intention to file the application or any content of the application during the investigation. They also cannot destroy, forge, alter or conceal any information or evidence related to the concerted action in question. The applicants are required to withdraw from the concerted action in question immediately upon filing the application or at the time specified by the FTC. Once the FTC approves the leniency application with

conditions attached, applicants must cooperate and provide full and continuous assistance during the investigation.

2. The Policy Purpose of Chinese Taipei's Leniency Program and the Policy Rationale for Granting of Immunity to Subsequent Applicants

The inclusion of the leniency policy in the fifth amendments to the Fair Trade Act was primarily in consideration of the serious impact of concerted actions on trading order. Since the Fair Trade Act was enforced, obtaining substantive evidence of concerted actions has become increasingly difficult over the years. The leniency program cannot only effectively break the code of silence among cartel conspirators so that the FTC can obtain the content of the violation and evidence, but can also save on investigative costs, discover the illegal conduct in time and prevent the spread of injury. Thus, it has the effect of preventing and deterring enterprises from being so inclined.

In light of the adoption of a leniency program becoming increasingly prevalent among competition law authorities, and taking into consideration the suggestions (one was to introduce a sound leniency program to fight against hard core cartels) put forward in the peer review report of the Global Forum on Competition of the OECD in February 2006, the fifth amendments to the Act came into effect on November 25 and included the introduction of a leniency policy to correspond with the trend toward globalization. It is expected that the introduction of a leniency policy can deter illegal concerted actions.

Due to the lawmaking process, the legislative purpose of the leniency policy was not specified in the Fair Trade Act or its related law (i.e., the Leniency Regulations). However, it is concretely and precisely presented in related legislative information, that is, legislative documents containing the general description and the description of each provision. The partial immunity or the reduction of fines for subsequent applicants is clearly defined in the Leniency Regulations, including the applicant's qualifications, the weight of evidence and provision of information, and the level of discounts, etc.

3. Issues Related to Leniency for Subsequent Applicants

Please discuss the policy advantages and the disadvantages of rewarding subsequent applicants.

The main advantages in granting leniency to subsequent applicants are that according to the Leniency Regulations, as long as the first applicant provides evidence that is sufficient for the FTC to initiate an investigation, even though it does not establish that the involved members have violated Paragraph 1, Article 14 of the Fair Trade Act, it meets the requirement. In other words, the evidence provided by the first applicant only has to be substantial enough for the FTC to believe there exists illegality and launch the investigation; it does not have to be strong enough to convict the alleged behavior in the case. Under such circumstances, the incentives offered will encourage subsequent applicants to provide further corroborating evidence that will help the FTC to carry out the purpose of the leniency policy. Otherwise, the FTC may be unable to obtain the corroborating evidence to convict other members engaged in the concerted action for antitrust violations and impose sanctions on them. Thus, the application of the leniency policy will be to no avail.

On the other hand, rewarding subsequent applicants means that more than one enterprise participating in a concerted action will be given the opportunity to have their administrative fines reduced due to the leniency program. Granting leniency to an excessive number of members may result in diminishing marginal utility and will not help the investigation. If the evidence provided by the applicants is similar or repeated, it is not only not beneficial to the investigation, but may also cause controversies regarding the reductions in the level of fines imposed on them. In addition, in cases where there are only a few cartel members, the number of enterprises to be punished for their illegal conduct will be relatively small and the

result will weaken the deterrent effect of the sanctions given by the FTC if most of the members in the case apply for leniency and receive the reductions in their fines. Under such circumstances, it will be difficult to achieve the deterrent effect of imposing sanctions on cartel members.

Please describe the treatment reserved to subsequent applicants under your immunity program. In particular: - Describe the incentives that your immunity program provides to companies or individuals who wish to benefit from the immunity program. Are these incentives different for the first-in and the subsequent applicants, and among subsequent applicants?

The incentives offered to leniency applicants mainly include immunity from and reductions of administrative fines. As mentioned above, the first applicant is granted full immunity, while the subsequent applicants (the second to fifth applicants), are given a level of fine reduction in accordance with the times the applications are filed. In other words, the incentive for the first applicant is full immunity from any fine and the incentives for the subsequent applicants are partial immunity from fines. The difference is that full immunity means that the applicant is granted full fine immunity whereas in partial immunity, applicants are granted a 50% to 10% reduction in the fine to be imposed. (The level of fine reductions will be determined in accordance with the times at which the applications are filed.) The rewards for the first applicant and the subsequent applicants are significantly different and the program is designed so as to encourage potential applicants to come forward as early as possible to receive the maximum reward.

Describe the requirements placed on applicants who wish to benefit from the immunity program. Are these requirements different for the first-in and the subsequent applicants, and among subsequent applicants?

As mentioned earlier, the incentives for the first applicant and subsequent applicants are different. Accordingly, they have to meet dissimilar requirements. The first applicant may be rewarded for two kinds of cooperation: (1) Before the FTC starts the investigation, the applicant requirements are that the evidence submitted must be able to assist the FTC to initiate an investigation. In other words, when an application is filed with the FTC before the investigation begins, the weight of the evidence provided at this point need not be strong. (2) Cartel members that file their application for immunity from fines after the FTC has launched the investigation (during the course of the FTC's investigation of a cartel) must provide evidence that can assist the FTC in establishing the involved enterprises in violation of Paragraph 1, Article 14 of the Act. It means that the weight of the evidence required at this point has to be stronger and the evidence provided must be direct or crucial.

Provision of evidence by subsequent applicants filing their applications for the reduction of fines after the FTC has launched the investigation (during the investigation process) can be divided into two stages. First, when filing the application, applicants are only required to provide evidence that can "assist the FTC's investigation" (designed to encourage leniency application). After the FTC approves the application with conditions attached, applicants must cooperate and provide information and evidence that "must be of significant help in the FTC's investigation on the concerted action in question or able to enhance the probative value of the evidence the FTC has already obtained." In other words, after the FTC's initial approval for the reduction of the fines to be imposed on subsequent applicants with conditions attached, the applicant has to provide currently possessed or attainable evidence that is obviously valuable to the FTC for its investigation.

In addition, according to the Leniency Regulations, all applicants are required to provide concrete content of the violation and evidence (orally or in writing) at the time of the application. This application requirement applies to both the first applicant and subsequent applicants.

- Discuss how your agency assessed the degree of co-operation from applicants under your immunity program, e.g. in terms of the amount of evidence made available to the agency and the timeliness of co-operation. Is there a different standard (e.g. on the amount and quality of information demanded) for first-in and subsequent applicants, and among subsequent applicants?

Since the incorporation of the leniency policy in the Fair Trade Act in November 2011 and the promulgation and implementation of the Leniency Regulations in January 2012, there has been only one application for immunity from fines and the application was filed after the FTC initiated an investigation. Therefore, the FTC adopted a more lenient standard when evaluating the degree of the said applicant's cooperation in order to encourage potential participants in other concerted actions to come forward and enter the leniency program. However, as this was the only case the FTC has tackled, plus the intrinsic differences of each case, it is difficult to say whether the FTC will apply different standards for first-in and subsequent applicants, and among subsequent applicants when assessing the degree of cooperation from applicants in the future.

- Describe the criteria that you apply to determine the appropriate level of discount in fines/sanctions to encourage cartelists to enter into the immunity program. If you reward co-operation from subsequent applicants, how did you differentiate the level of discounts for the various applicants?

As mentioned earlier, the incentives offered to leniency applicants mainly include immunity from and reduction of administrative fines. The levels and criteria of such immunity and the reduction of fines are determined in accordance with the Leniency Regulations. To be more precise, the first applicant is given full immunity (full exemption from the fines) while the subsequent applicants (the second to fifth applicants) are granted different levels of fine reductions according to the chronological order in which applications were received. The level of discounts is flexible (not fixed). The second to the fifth qualified applicants can only enjoy certain fine reductions (the respective fine reductions for the second to the fifth applicants are: 30%~50% off, 20%~30% off, 10%~20% off, and 10% or less off). To encourage subsequent applicants to file their applications as early as possible and assist the FTC in its investigation, the level of fine reductions applied to applicants is determined in accordance with the chronological order in which applications were received, and not on the level of cooperation or the weight of the evidence provided.

If your immunity program includes the possibility to apply for a "marker", please discuss how the marker system affects the race to be "first in the door" of potential applicants. Are markers available also to subsequent applicants?

The "marker" system in Chinese Taipei only applies to applicants for full immunity; therefore, it does not apply to subsequent applicants since they can only request a fine reduction. In referring to the enforcement experiences of leniency programs in different countries, the FTC's leniency program was introduced and applicants for immunity from fines are allowed to apply for a "marker" so as to encourage potential applicants to apply as early as possible. However, before there is a substantial accumulation of precedents, it is still too early to assess with certainty what kind of concrete impact the practice may have on the enforcement of the leniency policy.

Please explain if your immunity program is always available during the proceeding, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore.

In principle, the FTC accepts leniency applications during the investigation process until the date when the FTC reaches the final decision on the case in question. However, a leniency applicant may be too late to be eligible for leniency when the number of applicants reaches the limit set forth in the Leniency Regulations (one for full immunity from fines and four for a reduction in fines) or when the FTC has

already obtained enough evidence and information. In other words, the "too late" time point is not a fixed deadline, but the FTC may decide not to accept any further applications during the investigation process.

To be more precise, a leniency program requires that conspirators should provide concrete content of the violation and evidence and assist before the FTC is aware of the agreement or initiates an investigation. Once the FTC has begun the investigation procedures, it is meaningless for any applicant to provide evidence that can "help initiate an investigation." This means the cut-off point in time when the FTC initiates an investigation should be in principle regarded as the deadline for application for immunity from fines. Meanwhile, when applicants file their applications for immunity from fines/reduction of fines during the investigation process, they are required as set forth in the Leniency Regulations to provide evidence that can help the FTC investigate and establish the involved enterprises' violation of Paragraph 1, Article 14 of the Act. Hence, by the time the FTC has already obtained enough evidence to establish the involved enterprises' violation of the Act, any evidence and information provided will not be beneficial to the FTC's investigation or cartel violation conviction. Under such circumstances, this cut-off point in time is to be considered the deadline for application for immunity from fines/reduction of fines.

Please explain if leniency to subsequent applicants can be revoked after it has been granted and if yes, for what reasons.

Once the FTC makes the decision to offer subsequent applicants a reduction in fines according to the leniency policy, there is no regulation that the FTC can apply to revoke the decision. However, such a decision is an administrative sanction according to Administrative Law. Therefore, it is still possible to take the administrative procedure to revoke such a sanction if it is deemed necessary. In principle, the FTC may have the authority "to revoke in whole or in part an administrative disposition." As for the reason for cancellation, the FTC may determine on a case-by-case basis since there is no specific regulation.

If your immunity program does not reward subsequent applicants, please describe other ways (if any) on which your agency relies to reward co-operation of other participants to the cartel (e.g. through the use of settlement or plea bargaining).

As mentioned earlier, the FTC offers a reduction in fines as an incentive to encourage subsequent applicants, and not through the use of settlement or plea bargaining.

UKRAINE

The institute of leniency is an efficient method to obtain direct evidence of cartel conspiracies.

The Ukrainian leniency envisages a principle of leniency for companies that report to the AMCU about cartel conspiracies earlier than others and submit information essential for making decisions in such cases. In this respect, such companies take efficient measures to terminate their anticompetitive concerted actions, not to initiate such actions and to submit all evidence available, which they can obtain without hindrance.

However, at least two aspects of this regulation in practice may restrict the relations of cartel members in addressing the AMCU bodies with cartel information.

The first aspect is that the primacy of address depends greatly on occasional circumstances. So in many cases a person, absolutely ready for voluntary cooperation with competition protection bodies, is unable to get leniency, because for reasons not depending on it other persons were the first to contact such bodies. This impairs the motivation of cartel participants to cooperate in exchange for leniency or reduction.

The other aspect is related to the fact that the first person to contact does not have, for objective reasons, certain important data for making decision in the case (e.g. full cartel membership). Such information could be provided by another person, but since it is not the first, no leniency will be applicable to it. This also decreases the motivation of business entities to collaborate with competition authorities.

A possible way to resolve these problems, currently developed by the Antimonopoly Committee of Ukraine, is implementation of a leniency principle for applicants that voluntarily submit important cartel information, although they were not the first to do that.

Thus, for instance, the Committee initiated a case in relation to anticompetitive concerted actions of participants of specialized auctions selling untreated wood led by «Mebliderevrpom» Association. During its examination, interviews were held with each of the defendants in order to explain the gravity of the offence and substantial penalties stipulated by the law for such actions. After these measures, at the stage of receipt of presentations with preliminary opinions in the case three defendants admitted the fact of violation and requested to make allowance for this fact as reducing their liability. In accordance with the above, the defendants that had acknowledged the offence, were subject to a fine of UAH 30 thousand each, whereas 12 other defendants that had failed to admit the offence in the case, had to pay a total fine of UAH 419 million.

The said leniency principle should envisage a decrease in the amount of fine compared to its full size. This being said, the first informer will receive a 50% reduction, the second – 30%, and the third applicant – a 20 % reduction.

In accordance with the developed proposals, the liability will only be decreased for persons that submit to the Committee material evidence of anticompetitive concerted actions in addition to those available in the Committee. This materiality should be assessed at the time of making a decision in a case

of violation. The materiality criteria include, among other things, an extent to which the evidence submitted by the applicant enable the Committee to prove the fact of offence.

In order to secure the interests of investigation in the case and protection of informers addressing the corresponding body for leniency purposes, it is suggested to specify attached information and applicant's details in the relevant requests.

The implementation of these proposals in practice for leniency for subsequent applicants is currently being elaborated.

UNITED STATES

Under the Corporate Leniency Program of the Antitrust Division of the U.S. Department of Justice ("Division"), full immunity from prosecution for hard-core cartel violations is available only to the first qualified applicant. Subsequent applicants cannot qualify for immunity under the leniency program, but can enter into plea agreements with the Division that reward them for their cooperation. In contrast to the Division's program, many other jurisdictions include favorable treatment for subsequent applicants within the rubric of their leniency programs. In any case, we are not aware of any jurisdictions that do not reserve full immunity to the first applicant, as in the U.S.

Consistent with the list of issues raised in the Chairman's letter of July 24, this submission describes the Division's leniency policy, the purposes of the policy and the rationale for rewarding only the first qualified leniency applicant, the benefits available to companies that are not the first-in through negotiated plea agreements, and the cooperation and timing conditions for companies that qualify for leniency or agree to plead guilty.

1. The Corporate Leniency Policy

Pursuant to the Division's Corporate Leniency Policy, corporations that are the first to report their illegal antitrust activity and meet the other conditions of the program will not be charged criminally for the activity being reported. The policy is also known as the corporate "amnesty" or corporate "immunity" policy.

The Division adopted its first Corporate Leniency Policy for hard-core cartel cases in 1978. Under the 1978 policy, leniency was available only to companies that came forward before the Division had opened an investigation, and the Division retained broad discretion in deciding whether to allow an applicant the benefits of the program. In the first ten years of this policy, only four companies qualified for leniency.

In order to make our policy more effective, the Division introduced three major revisions in 1993 to its corporate leniency policy in order to enhance transparency and certainty from the perspective of a possible applicant: (1) leniency was automatic if the Division had no previous knowledge of the cartel and certain objective conditions were met ("Type A leniency"); (2) leniency was available even if the Division had knowledge of the cartel ("Type B leniency"); and (3) corporate executives were covered as well as corporations by a grant of corporate leniency.

The leniency policy in effect today[1] still applies only when applicants report criminal antitrust violations (conduct that is prosecuted as a criminal violation of Section 1 of the Sherman Act, 15 U.S.C. § 1: price fixing; bid rigging; capacity restriction; or allocations of customers, products, market shares, territories, or production or sales volumes). There are 6 conditions for Type A leniency (which applies when the Division has no previous knowledge of the reported cartel):

1. At the time the company reports the cartel, the Division has no information about the activity;

[1] http://www.justice.gov/atr/public/guidelines/0091.htm.

2. Upon discovery of the cartel, the company took "prompt and effective" action to terminate its participation in the cartel;

3. The company reports the conduct with candor and completeness, and provides full, continuing, and complete cooperation;

4. The company's confession is a truly corporate act, and not isolated confessions of individuals;

5. Where possible, the company pays restitution to injured parties; and

6. The company did not coerce its co-conspirators, and was not the leader or originator of the cartel.

For Type B leniency, which applies when the Division has prior knowledge of the cartel being reported, the company must have approached the Division before the Division had evidence likely to result in a sustainable conviction. Conditions 2-5 above for Type A leniency also apply, and the Division must determine that a grant of leniency would not be unfair considering the nature of the activity, the applicant's role, and the timing of the application for leniency (the burden on the applicant increases with time and the closer the Division is to possessing evidence likely to result in a sustainable conviction).

The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), 15 U.S.C. § 1 note, de-trebled private damage liability for a corporate leniency applicant and its employees if they cooperate with civil plaintiffs in their lawsuits; liability extends only to actual damages attributable to the applicant's commerce in the affected market. Co-conspirators remain liable for treble damages on a joint and several basis for all damages caused by the cartel.

In 1994 the Division introduced an individual leniency policy,[2] which applies only in Type A situations when the Division has no previous information about the cartel. Type B corporate leniency can be granted for a particular cartel after individual leniency in the same matter, but the reverse is not possible. Individual leniency acts to further destabilize cartels, as companies are aware that their employees could act on their own to seek a leniency application.

2. Purpose of the Leniency Program

As stated on the Division's *Leniency Program* webpage,[3] the "Division's leniency program is its most important investigative tool for detecting cartel activity." Cartels by their nature are secretive and, therefore, hard to detect. Leniency programs provide enforcers with an investigative tool to uncover cartels that may otherwise go undetected. While the notion of letting hard-core cartel participants escape punishment was initially unsettling to many Division prosecutors, the Division recognized in 1993 that the grant of full immunity was necessary to induce cartel participants to turn on each other and self-report, resulting in the discovery and termination of the conduct, the successful prosecution of the remaining cartel participants, and damage recovery for victims. Moreover, the expectation was that the benefits of leniency would extend beyond the cartels it directly uncovered and that the very existence of the leniency policy would be viewed by executives as raising the risk of detection and punishment, leading to greater deterrence of cartel activity. This expectation has been shown to be justified.

Effective leniency programs create a race among conspirators to disclose their conduct to enforcers, in some instances even before an investigation has begun, and quickly crack cartels that may have otherwise gone undetected. Effective leniency programs destabilize cartels. If cartel members have a significant fear

2 http://www.justice.gov/atr/public/guidelines/0092.htm.

3 http://www.justice.gov/atr/public/criminal/leniency.html.

of detection and the consequences of getting caught are severe, then the rewards of self-reporting become too important to risk losing the race for leniency to another cartel member, or perhaps to a firm's own employees if individual leniency is available. This dynamic literally creates a race to be the first to the competition agency's offices.

The leniency program provides enormous benefits to cartel enforcement. The leniency applicant will admit its conduct in some cases before an investigation is even opened, and then turn on its co-conspirators once the investigation is underway. The program provides critical cooperation of inside participants and access to documents, even when located outside the agency's jurisdiction, and access to witnesses regardless of their location or nationality. Finally, it may open up opportunities for covert investigative operations.

Leniency works by providing great incentives to be the first to self-report and implicate one's co-conspirators. No charges will be filed against the successful leniency applicant or its cooperating employees; there will be no criminal or administrative fines; and the Division promises confidentiality to the applicant. Importantly, *immunity is available only to the first company to self-report and meet the conditions of the program.* Subsequent applicants, even if, as has been the case, they arrive only minutes or hours after the first company, and their executives, face severe sanctions.

The winner-take-all approach creates distrust within the cartel and destabilizes it. In our experience, there is no "honor among thieves," and with the stakes so high, cartel members can no longer afford to trust one another, and so revert to competition. Thus the Division's leniency policy depends for its success on restricting its benefits to the first successful applicant, the only one to benefit from full and complete immunity. As discussed below, however, subsequent applicants that fail to qualify for the leniency program, but that do agree to plead guilty and cooperate with the Division, can expect significant benefits, even if they do not qualify for the leniency program.

3. Policy advantages and disadvantages of rewarding subsequent applicants

As noted, the winner-take-all approach, which limits the benefits of the immunity program to the first qualified applicant, provides strong incentives to upset the agreement among cartel participants. In order to attract leniency applicants and uncover otherwise secret cartels, there should be a clear contrast between the benefits of leniency – no criminal charges against the applicant or its employees, reduced civil damages, confidentiality of the application – and the consequences of failing to be a successful leniency applicant – severe penalties, including criminal sanctions in the U.S., for the firm and its employees, with full exposure to civil damages, trebled in the U.S.

Granting full immunity to a subsequent applicant would negate this incentive – why rush to be the first when you can achieve the same benefit by applying after the first applicant? Distinguishing the leniency program from the benefits available to companies and individuals that enter into negotiated plea settlements helps to emphasize the unique attraction of the leniency program to cartel participants, thereby reinforcing the program's utility as a tool to destabilize and uncover cartels. At the same time, however, competition agencies may wish to provide incentives for companies that fail to qualify for leniency to plead guilty and cooperate with the agency as part of a settlement, as discussed below.

4. Treatment of subsequent applicants in the U.S.

Subsequent applicants – those that arrive after the first qualified leniency applicant – receive no benefits under the Division's leniency program. Because of the extraordinary value of obtaining full immunity, and the possibility that cartel members might decide to seek leniency at roughly the same time, the Division created a marker system, to allow a company to secure a place at the front of the line and

ensure its status as the first-in, giving it a finite period of time to complete its internal investigation and prepare its leniency application. Companies realize they must rush to secure the marker even before they complete their internal investigation; a second-in company will not be permitted to jump ahead while the first-in company is completing its application.

Companies and individuals that do not qualify for full immunity, but do offer timely and valuable cooperation, can still obtain significant benefits, including a substantial reduction in fines and more favorable treatment for culpable executives. Sentencing discounts for these cooperators are handled outside of the Division's leniency program. These benefits are conferred through the negotiation of plea agreements whereby the defendant is obligated to plead guilty and provide full and continuing cooperation to the Division. In exchange, the Division commits to making a specific sentencing recommendation to the court, which, experience shows, the courts are very likely to follow. Therefore, in most cases, the defendant knows what the Division's sentencing recommendation will be and what sentence the court is likely to impose at the time the defendant enters into a plea agreement with the Division. Since the Division negotiates, signs, and publicly files plea agreements throughout the course of its investigations, most corporate defendants do not have to wait until their cooperation is complete, or until the investigation is over, before they learn the value that the Division places on their cooperation.

The vast majority of the Division's major international cartel investigations involve the cooperation of a corporate leniency applicant. Moreover, over the last 25 years, well over 90 percent of the corporate defendants charged with an antitrust offense have entered into plea agreements with the Division where they admitted guilt and cooperated with the Division's criminal investigations. This system of negotiated plea agreements benefits the Division, cooperating defendants, the judicial system, the victims, and the public at large by encouraging early cooperation and acceptance of responsibility by cartel members through the promise of a transparent, proportional, expedited, certain and final plea disposition.

5. The purpose of negotiated plea agreements

From the Division's perspective, the goals of cartel settlements are to: 1) obtain timely and valuable cooperation from cartel participants; 2) create and sustain momentum in its investigations; and 3) resolve cartel cases relatively quickly without the need for litigation. For the Division, the early cooperation of a defendant, pursuant to a public plea agreement, often leads to the swift prosecution of other cartel members. After the first company or individual pleads guilty in open court, there is tremendous momentum gained in an investigation. Other cartel members, knowing that one of their own has pled guilty and can provide information inculpating them, frequently race to the Division's door to begin plea negotiations with Division staff. If the Division is required to pursue litigation against any holdout firms, then the cooperating defendant and its employees, along with any leniency applicant, become key witnesses in providing the insider evidence that is critical to securing a conviction.

Cooperation provided pursuant to a plea agreement often leads to the detection of other previously unidentified cartels relating to different products or in different geographic markets. Through the Division's Amnesty Plus Policy, the pleading company's decision to tell the Division about an additional previously undisclosed cartel can lead to a substantial sentencing benefit as to the first offense and complete immunity for the newly reported conduct. Amnesty Plus is a win-win situation for the defendant and the Division, and has itself become an increasingly important cartel-detection and case-generation tool.

6. Incentives for subsequent applicants

There are many incentives for a company to cooperate with the Division at an early stage, even if the company cannot benefit from being the first-in to qualify for leniency and full immunity. The potential rewards and incentives available for second-in companies are described in detail in the Division's paper,

Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations.[4] Many of them relate to the calculation of the fine under the U.S. Sentencing Guidelines ("Guidelines"),[5] but they also include the possibility of securing more favorable treatment for culpable executives, a greater likelihood that the company will be in a position to qualify for Amnesty Plus credit or the benefits of "affirmative" amnesty.[6]

The rewards for second-in companies are not uniform, because the value of a second-in corporation's cooperation can vary dramatically from case to case. The value to the Division of a company's cooperation varies because what the particular defendant brings to the table (e.g., credible witnesses, compelling documents, previously undisclosed information), and what the Division can already prove, is not a constant and varies from case to case. While a second-in company's cooperation typically will significantly advance an investigation, there are times when the cooperation is either cumulative or no longer needed.

As noted, in a negotiated plea agreement, the Division typically agrees to recommend to the federal district court a sentence more favorable to the defendant than what the Guidelines recommend, based on the cooperation offered by the defendant. Where full immunity is no longer available, second-in or early cooperators can still obtain substantial discounts below their Guidelines fine and incarceration ranges. The amount of the substantial assistance reward, commonly referred to as the "cooperation discount," that the Division will recommend to the sentencing court is within the discretion of the Division.

7. Cooperation obligations for leniency applicants and under negotiated plea agreements

7.1. Leniency

As described above, leniency applicants must provide "full, continuing and complete cooperation to the Division throughout the investigation." The model corporate conditional leniency letter describes specific cooperation obligations of the applicant, such as provision of documents, information, and materials wherever located, and using its best efforts to secure the cooperation of its current directors, officers, and employees.

In the Division's leniency program, there is no particular standard for the quantum or quality of evidence provided by the applicant. In some cases, a leniency applicant's cooperation will provide sufficient evidence to convict all of the remaining cartel members. In other cases, however, the applicant's full cooperation will not, in and of itself, amount to decisive evidence of the existence of the cartel, but it may nonetheless *lead to* such evidence. For example, in one case an amnesty applicant was a peripheral player that did not attend the key cartel meetings, but it provided the Division with information that allowed us to obtain warrants to search the offices of several of the cartel members. The execution of the warrants, demonstrating the existence of an insider's cooperation, quickly led to the cooperation and guilty pleas of the remaining six conspirators and nearly $300 million in fines. So, while an amnesty applicant's cooperation alone may not always add up to decisive evidence, it can provide us with leads and opportunities that will take us to additional evidence and, ultimately, result in successful prosecutions. For this reason, and to avoid what might be perceived as a subjective standard of sufficiency that might deter

---

4 Scott D. Hammond, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations, Speech Before the ABA Antitrust Section 2006 Spring Meeting (March 29, 2006), *available at* http://www.usdoj.gov/atr/public/speeches/215514.htm.

5 United States Sentencing Commission, Sentencing Guidelines, *available at* http://www.ussc.gov/guidelin.htm.

6 Under affirmative amnesty, when the Division on its own uncovers cartel conduct in an unrelated market, staff may elect to approach one of the subject companies with information about the suspected cartel and provide it with an opportunity to cooperate in a covert investigation in return for amnesty.

potential leniency applicants, the Division has not required a particular level or quality of evidence as a condition of granting leniency.

7.2. Plea agreements

For negotiated plea agreements, the defendant's cooperation is the primary benefit that the Division receives from entering into a plea agreement. Therefore, a commitment by the defendant to provide full, continuing, and complete cooperation is virtually always required in Division plea agreements.http://www.justice.gov/atr/public/speeches/219332.htm - N_78_ As discussed above, the amount of the substantial assistance reduction in the fine or period of incarceration below the Guidelines range that the Division will recommend is directly tied to the timeliness and quality of the cooperation that the defendant is able and willing to provide.

The specific types of cooperation that a defendant is required to provide to the Division are specified in the plea agreement,[7] including providing the Division with all non-privileged documents and information, wherever located, in the possession, custody, or control of the defendant, and appearing for interviews, grand jury appearances and trials. For corporate defendants, the defendant and any related entities covered under the plea agreement must also use their best efforts to secure the cooperation of current, and sometimes also former, corporate employees covered under the plea agreement, including making employees (even when located outside the U.S.), available at the defendant's expense for interviews and testimony.

Corporate employees covered by the plea agreement are also bound to cooperate with the Division. If a covered employee fails to comply with his/her cooperation obligations, the Division's agreement not to prosecute that person will be rendered void. The Division is then free to prosecute the non-cooperating employee and use information provided by that individual against him/her in a criminal trial.http://www.justice.gov/atr/public/speeches/219332.htm - N_81_ In rare situations, the Division's non-prosecution promise with the company may be specifically tied to the full cooperation of certain executives, where the company's cooperation is essentially meaningless without the full cooperation of those executives.

It is important to note that the cooperation requirements contained in a plea agreement are ongoing obligations and the plea agreement may be voided by the Division for failure to comply with the cooperation obligations contained in the plea agreement even after acceptance of the plea and imposition of sentencing.

8. Timing issues for leniency applications and negotiated plea agreements

A company cannot qualify for leniency after the Division has obtained evidence elsewhere that is likely to result in a sustainable conviction. In addition, to qualify for leniency, the company must demonstrate that "upon its discovery of the illegal activity being reported, [it] took prompt and effective action to terminate its part in the activity." The Division generally considers the corporation to have "discovered" the illegal activity at the earliest date on which either the board of directors or counsel for the corporation (either inside or outside) were first informed of the conduct at issue. Thus, the fact that top executives, individual board members, or owners participated in the conspiracy does not necessarily bar a corporation from eligibility for leniency. The purpose of this interpretation is to ensure that as soon as the authoritative representatives of the company for legal matters -- the board or counsel representing the corporation -- are advised of the illegal activity, they take action to cease that activity.

[7] The Division's Model Corporate Plea Agreement is available at http://www.justice.gov/atr/public/guidelines/corp_plea_agree.pdf.

Timing issues for "subsequent applicants" are different. They will never qualify for leniency. However, the same cartel participant that has lost the race for full immunity may immediately initiate plea negotiations with the Division to resolve its culpability and be rewarded for the cooperation it can provide. A cooperating cartel participant can reach a settlement with the Division at any time, from very early in the Division's investigation until after formal charges are brought. A series of plea agreements individually entered over time are the norm in Division cartel investigations, and the Division regularly negotiates, signs, and publicly files plea agreements throughout the course of its investigations. In addition, a plea agreement can be entered as soon as an agreement is reached and sentencing can take place immediately. As noted above, the timeliness of a company's plea agreement is one of the primary factors determining the size of the settlement discount it can expect.

9. Conclusion

The Division's corporate leniency policy, along with the system of negotiated plea agreements in criminal cases, continues to play a vital role in cracking cartels and swiftly advancing the Division's investigation and prosecution of cartel members. The leniency program, with its prize of full immunity only to the first qualified applicant, remains by far the most effective tool for detecting cartel activity. Plea agreements provide enormous benefits to the Division, cooperating defendants, the courts, victims, and the public at large by persuading cartel members to cooperate early and accept responsibility for their criminal conduct. The policies are balanced and work together to provide an efficient system for detecting, punishing, and deterring harmful cartel conduct.

BIAC

1. Introduction

BIAC appreciates the opportunity to contribute to Working Party No 3's discussion of leniency for subsequent applicants, a topic of significance to business where there are opportunities to build on best practice internationally.

Leniency programmes have had a transformative effect in eradicating hard core cartels by improving the chance that they are uncovered and the efficiency with which they can be prosecuted. In BIAC's view, a leniency programme which offers appropriate incentives for subsequent applicants can improve enforcement to the benefit of the enforcement authority, potential applicants and consumers. Such a programme will be most effective if it is transparent as to its scope and conditions and predictable as to its application and outcomes. An effective programme will offer appropriate benefits in terms of sanctions and provisions in respect of follow-on actions to encourage self-reporting and co-operation. In respect of international cartels, which may be subject to investigation in an ever-growing number of countries, leniency for subsequent applicants can play a particularly important role in improving the likelihood that leniency applications will be made if the terms on which leniency is available are reasonably attractive and reasonably consistent across the various jurisdictions potentially involved. BIAC is concerned by any element of a programme which may allow the authority to pick the winners in the race for leniency.

2. Benefits of leniency for subsequent applicants

BIAC recognises the value of leniency incentives for the first applicant (which may bring the infringement to the attention of the antitrust agency or enable that agency materially to progress its investigation); as well as for subsequent applicants (which may expand the scope of an existing case or further improve the efficiency of the investigation).

Many leniency regimes around the world provide the possibility of complete immunity for the first company to self-report a violation.[1] Although many also provide an incentive for the second and subsequent applicants, whether as a formal part of the leniency programme or in practice as part of settlement arrangements, not all of even the major antitrust jurisdictions do so.[2]

BIAC considers that a leniency regime offering the possibility of a measured incentive for a subsequent applicant brings a number of benefits for agency and potential applicants alike.

---

1 For example, see Baker & McKenzie *Global Cartels Handbook* (Oxford University Press, 2011, eds Mobley and Denton) which cites 54 regimes.

2 Those which do include most but not all EU Member States, Australia, Canada, Japan, Korea, New Zealand, India and Singapore. In contrast, jurisdictions whose leniency programmes do not reward subsequent applicants include Brazil, Ireland, Israel, South Africa and Ukraine. The US offers incentives informally by way of relaxing sentencing recommendations, but not as part of its formal leniency programme.

First, the second applicant's evidence may corroborate - or bring into question - the evidence already received from the immunity applicant. The evidence provided by a subsequent applicant therefore provides an essential check on the veracity of evidence provided by a company which may not be aware of the full facts - or might have misrepresented their own involvement and the operation of the alleged cartel in order to increase the chances of obtaining immunity, for example by omitting evidence of coercion. The subsequent applicant can therefore increase the robustness of an agency's investigation and ultimate decision, including by reducing the likelihood of appeals from other implicated companies who contest the account of a single party which obtained immunity.

Secondly, the very existence of a potential reward for subsequent applicants can strengthen the incentive for a company to apply for leniency in the first place since:

- companies that are concerned about whether or not they would be first-in (especially in countries that do not provide a marker or reliable information about a prospective applicant's place 'in the queue') may nevertheless apply for leniency in the knowledge that they stand a good chance of obtaining a reduction even if they are not first to apply. Companies will of course be even more inclined to apply for leniency in situations where the agency is able to provide a reliable indication in advance that a prospective applicant would be, at that particular time, in second place. Ideally, the agency would also be able to provide additional reassurance that the prospective applicant would meet other conditions such as the "significant added value" threshold.

- having a reward for subsequent applicants ensures that a company which knows it does not qualify for full immunity (e.g. because it is a coercer/ringleader) will nonetheless be incentivised to come forward and bring what it knows about an infringement to the attention of an agency.

Thirdly, the possibility of an incentive for subsequent applicants will provide for a smoother and quicker investigation of cases since an applicant obtaining immunity in one country but a reduction for being in second place in another is more likely to provide a waiver for the exchange of confidential information between those countries. In contrast, this is much less likely where the company has elected not to apply at all in one of the countries concerned where there was an unacceptable risk of not receiving any substantial leniency benefits.

Finally, since infringing practices often develop unknown to the top management, which discovers them only when they are revealed by the first-in applicant, leniency for subsequent applicants can be an incentive to launch internal investigations which may benefit the company's compliance efforts generally and may increase the likelihood of "amnesty plus" type leniency applications.

3. Transparency and predictability for second and subsequent applicants

An important hall-mark of an effective leniency programme is transparency and predictability as to the programme's applicability and outcomes. As regards subsequent applicants, it is BIAC's view that:

- an antitrust agency should provide as much guidance as possible on the conditions which apply to leniency applicants. Conditions which involve substantial discretion in respect of subsequent applicants, such as a requirement that the applicant provide information of 'significant added value' to the authority should be minimised and guidelines should clarify how the authority will exercise its discretion, e.g. by describing the types of evidence that are likely to add value to an investigation. For example, the guidelines could indicate that written evidence from the time of the infringement and directly relevant incriminating evidence will be given a high value (in contrast with evidence requiring corroboration from other sources). In BIAC's view, an authority

should have a working presumption that a second-in applicant's information will always meet the relevant threshold given the vital corroborative role such evidence has (for the reasons outlined above in paragraph 2.4).

- the extent of the reduction in sanctions and other benefits available to subsequent applicants should be clarified, so far as practicable, by guidelines and other published information on the authority's practice. For example, some authorities publish the percentage range of the reduction available to the second applicant and to the third and subsequent ones. The actual value attributed to subsequent applicants' cooperation must draw a careful line between being too generous – and so undermining the incentive to be first to self-report – and being an insufficient incentive for vital cooperation from subsequent applicants.

- the antitrust agency's leniency guidance should clarify that a subsequent applicant's fine will not be increased as a result of any new evidence adduced by them which increases the scope/duration of the infringement under investigation. Failure to provide this confirmation or uncertainty in this respect erodes the incentive to apply for leniency and reduce the likelihood of uncovering the full extent of self-reported cartels.

A factor to be considered in establishing the conditions for the award of leniency to second and subsequent applicants, particularly a requirement for added value evidence, is the need for fair and proportionate treatment for cartel members who come forward to self report. One potential distortion of making a leniency award to subsequent applicants conditional upon added value evidence is that this may place a comparatively less guilty co-cartelist (e.g. one whose participation in the cartel was more peripheral) at a disadvantage compared with that of a 'more guilty' cartelist who is likely to have more contemporaneous and complete evidence about the cartel. To avoid such a distortion, the agency should address the value of the information provided by the subsequent applicant by reference to what was, in fact, available to that applicant and taking full account of the value of corroboration even where the subsequent applicant's evidence is not new.

4. The international dimension

As more jurisdictions introduce and enforce antitrust laws, the multiplication of possible sources of investigation and sanctions can make it more difficult for a company which discovers that it has been involved in a cartel to self-report by applying for leniency. For many years after the scope and benefits of the 1993 US amnesty programme were first revealed[3], the balancing of risk -- i.e., risking criminal sanctions versus applying for amnesty -- effectively drove the leniency decision in favour of self-reporting in almost any case involving US jurisdiction. The situation is no longer necessarily so clear as the international landscape has developed with increasing risks and sometimes less clear and consistent benefits. Indeed, the current international landscape has been described "as a jigsaw puzzle where not even the number of pieces - let alone the overall picture to be achieved - is apparent".[4] Such a situation is sub-optimal from both the agency and business perspectives.

The incentives to self-report will be maintained if the programmes applicable to subsequent applicants are internationally consistent, to the extent possible given the different legal, procedural and sanctions regimes. BIAC strongly supports the development of arrangements to assist a company which has decided

[3] http://www.justice.gov/atr/public/guidelines/0091.htm.

[4] Baker & McKenzie *Global Cartels Handbook* (Oxford University Press, 2011, eds Mobley and Denton), pp xcvii.

to self-report to receive appropriate and consistent benefits internationally. One proposal along these lines has been the creation of a global "one-stop shop" whereby applicants would apply for leniency markers through an international clearinghouse of sorts. Each participating jurisdiction would then apply its own policies and procedures to determine whether the applicant successfully perfects its marker.[5]

5. Confidentiality considerations and Impact on damages actions

BIAC favours the adoption of safeguards designed to ensure that any leniency applicant is not worse off than non-cooperating co-cartelists as result of applying for leniency. For example, BIAC advocates the use of paperless leniency application procedures so as to reduce the availability of evidence (which would not exist absent a leniency application) to support a follow-on action for damages.[6] Safeguards are also important in order not to deter potential applications in countries where individual criminal sanctions are non-existent or rarely applied and which may create concerns regarding an extension of the procedure to jurisdictions where such sanctions apply.

To ensure that the incentive to apply for leniency remains attractive, BIAC considers that agencies should provide successful leniency applicants (including second and subsequent applicants) with some benefit as regards the increasingly inevitable exposure in multiple jurisdictions to follow-on civil damage actions. For example, the option of reducing otherwise punitive damages or removing any joint and several liabilities for the leniency applicants should be explored thoroughly by the agency and appropriate incentives for a prospective immunity applicant should be provided.

6. 'Amnesty plus' and subsequent applicants

BIAC notes that the availability of a system of 'amnesty plus' such as that used by the US authorities can have the effect of increasing the likelihood that an agency's leniency system will be used by subsequent applicants. The incentive for a subsequent applicant to apply is greater because a company that is aware of a second infringement may be more inclined to apply for leniency in relation to the first infringement in the knowledge that it might obtain a benefit in respect of both violations even if it only managed to achieve second place in connection with the first infringement.

7. Genuine self-reporting should be rewarded

BIAC's view is that leniency programmes should encourage genuine self-reporting and not serve as a basis for the authority to 'pick winner(s)' to whom rewards will be given. Any provision of a programme which gives or appears to give the authority a discretion to pick the companies which will benefit from leniency, such as the possibility for an agency to award "affirmative amnesty" (which describes a situation where the agency becomes aware, in the context of one investigation, of an infringement in another market and approaches an implicated company inviting it to apply for amnesty) will lead to at least the appearance of inappropriate favouritism. In the context of international cartels there may be particular concerns that local companies will be best known and trusted by the local agency and so more likely to be inappropriately favoured.

---

5 John Taladay, *Time for a Global "One-Stop Shop" for Leniency Markers*, ANTITRUST, (forthcoming Fall 2012). While this particular proposal focuses on first-to-file status, the underlying logic could be expanded to include subsequent applicants as well.

6 In order to guarantee the protection of the leniency applicant, third party access to any authority's file relating to leniency applications should, in BIAC's view be prohibited by law, including by specific legislation where necessary.

8. Conclusion

BIAC looks forward to participating in these discussions and to contributing to the elimination of hard core cartel behaviour by assisting in the development of best practice for leniency programmes. In BIAC's view an effective leniency programme will be transparent and ensure that all potential leniency applicants, whether or not first to apply, will have the incentive of being in a better position as a consequence of applying for leniency than otherwise. Internationally, best practice should aim for consistent policies and would ideally incorporate a one-stop-shop for the initial notification of leniency applications.

OTHER REFERENCES

United Kindgom – Applications for Leniency and No-action in Cartel Cases:
http://www.oft.gov.uk/OFTwork/consultations/leniency-supplementary/#.UXarUTecHJc

SUMMARY OF DISCUSSION

By the secretariat

Mr. Frederic Jenny, the Chair of Working Party 3 (WP3), opened the roundtable on leniency for subsequent applicants and welcomed all the participants. He explained that the discussion would be structured around three main topics: first, the incentives and rationale of rewarding subsequent leniency applicants, second, the treatment of subsequent applicants in jurisdictions with leniency programmes (programmes that reward both the first-in and subsequent applicants), and third, the treatment of subsequent applicants in jurisdictions with amnesty programmes (programmes that reward only the first-in applicants).

1. Maintaining incentives for the first-in applicant

The Chair noted that a fundamental question for this roundtable is whether rewarding subsequent applicants weakens the incentive to be the first-in and he asked the US and French delegations, whose written contributions offer different views, to say a few words on this.

The US delegation stressed that while its programme is based on a 'winner takes all approach', subsequent applicants do have the opportunity to benefit from their co-operation with the US Department of Justice (US DoJ). In contrast to the successful amnesty applicant, subsequent applicants do have to plead guilty, but they can be rewarded for timely co-operation that brings new evidence forward, and as such obtain greater benefits than companies that only agree to plead guilty. The US DoJ's experience also shows that the certainty and speed with which the successful amnesty applicant, as well as the subsequent applicants, are able to resolve the investigation and move on with their business is an important benefit that accrues to both.

The French delegation emphasized that leniency for subsequent applicants is an indispensible tool for the competition authority. By providing an incentive for later applicants, the authority receives information that enables it to verify information obtained from the original immunity applicant and from dawn raids and to better understand the nature and duration of the violation. In other words, while the first-in applicant often provides the basis for the investigation, the information from subsequent applicants often yields the proof needed to secure the case.

At the same time, it is important to clearly distinguish the hierarchy of treatment received by the original and subsequent applicants in order to maintain the incentive to come forward first, thereby destabilizing any cartel. In France, subsequent applicants can never receive a reduction of more than 50% of fines while the first-in applicant may receive complete immunity.

The Chair thanked the two delegations and invited the Australian delegation to discuss whether its policy of not rewarding subsequent applicants stems from concerns that doing so would undermine the incentives for immunity applicants.

The Australian delegation explained that while immunity is available only to the first successful applicant, subsequent applicants may be rewarded under the co-operation policy if they provide useful information. However, their reward depends on the concrete value of their contribution, not on any

automatic reduction based on the order of applications. This approach is, according to the delegation, essential to the balance between maintaining strong incentives for the first-in applicant, while leaving the door open to subsequent applicants to provide further evidence useful for the investigation. Offering, on the other hand, pre-defined, automatic reductions would in its view threaten the proper functioning of the leniency programme.

The Chair then asked the Ukrainian delegation to explain its policy on the treatment of subsequent applicants.

The Ukrainian delegation began by noting that full immunity for first applicants was introduced in Ukrainian law on 11 January 2001. Having gained experience with its application, in July 2012 the Antimonopoly committee approved detailed rules setting out the obligations and demands placed on immunity applicants. However, there is so far no formalized basis for rewarding subsequent applicants for the valuable co-operation the Antimonopoly committee finds they often provide. In past cases on the insurance and timber markets, the Antimonopoly office used its discretion in setting fines to reward subsequent applicants who co-operated with the investigation after the stage of the preliminary opinion. The Ukrainian delegation noted that this situation is not ideal as subsequent applicants lack predictability in the process, which may be a disincentive to co-operate. Therefore, the Antimonopoly office is currently working on a proposal for an amendment to the antimonopoly act, which would establish a legal basis for a formalized procedure to reward subsequent applicants.

The Chair asked the delegation of the European Commission (EC) to explain the treatment of subsequent applicants under European competition law and, if possible, to explain the standards for full immunity, which may influence the incentives for subsequent applicants.

The EC delegation began by noting that its leniency programme operates within a system of administrative enforcement, which influences some of its features. In the EC leniency programme, there are two possible standards for obtaining conditional immunity, first, to provide information that allows the EC to carry out a targeted inspection, or second, to provide information allowing the EC to establish the existence of a cartel. While the targeted inspection threshold may seem relatively low, it must be kept in mind that it applies in situations where the EC is not aware of the cartel and the requisite information demanded from the applicants is very detailed, including the description of the cartel, names of participants and so on. Also, once the threshold is met, the EC grants conditional immunity, which is confirmed at the end of the proceedings only if the applicant met its obligation of full co-operation, which includes providing all evidence and information in its possession.

As regards the threshold for subsequent applicants, the EC leniency programme requires them to provide significant added value for the investigation, essentially strengthening the EC's ability to prove the cartel as compared to the situation before the applicant came forward. To maintain a sufficient difference between the benefits obtained by the first-in and subsequent applicants, the highest possible reduction for a subsequent applicant is 50%. The delegation emphasized that having pre-defined reduction bands (30-50%, 20-30%, 0-20%) and publishing the assessments of leniency applications in final decisions contribute to the transparency of the leniency system, which is essential for its optimal functioning. Similar to immunity applicants, subsequent applicants are also under the obligation of continuous co-operation throughout the investigation, which means that they have to provide all information in their possession and display genuine spirit of co-operation. The value of their co-operation, which is a function of both the information provided and its timing, determines the exact reduction within an applicable band. Generally, the earlier an applicant comes in the higher the possible value of its co-operation. However, the EC delegation mentioned cases where even after a year and a half after the inspections took place, information provided by a subsequent applicant was found to have significant added value resulting in a reduction in the fine.

The Chair turned to the German delegation with a question on its views regarding the appropriate thresholds for immunity within a leniency programme.

The German delegation explained that overall, its policy is based on the assumption that the lower the threshold to obtain the benefits of the leniency program, the more unstable cartels become. Under its leniency programme, an applicant must, in order to obtain immunity, provide the Bundeskartellamt with evidence and information that allows it to obtain a search warrant. Also, it must provide continuous co-operation throughout the investigation and turn over all available evidence. While this threshold might seem relatively low, time has proven it to be very successful in that it has led to more than 234 leniency applications since 2000 when the leniency programme was introduced.

Although there is always a risk that the immunity applicant will wish to provide only the bare minimum of information necessary to obtain immunity, the policy of rewarding subsequent applicants keeps that incentive in check, according to the German delegation. If, for example, a subsequent applicant revealed new information that the immunity applicant could have previously provided, this could lead to the loss of its immunity status for failure to co-operate fully.

The Chair noted that so far it appears that a relatively low standard for immunity appears to be a common feature. He then asked whether any of the delegations would care to comment on this.

The Canadian delegation explained that in Canada, the threshold for obtaining immunity or leniency is low. An applicant must provide a proffer that describes in detail the illegal activity for which immunity or leniency is sought, the effect of this illegal activity in Canada, its role in the offence for which immunity or leniency is sought, and the supporting evidence. Leniency applicants must also agree to plead guilty. After an assessment of an applicant's proffer, the Bureau will present the information to the Public Prosecution Service of Canada (“PPSC”) in support of the Bureau's immunity or leniency recommendation. The PPSC has the final independent authority to decide if it will grant immunity or leniency to an applicant. An applicant is required to provide full disclosure and cooperation after immunity or leniency has been granted.

The EC delegation noted that its immunity threshold is very close to the Canadian and US standard and that in all these authorities the applicants have a continuous cooperation obligation covering the whole duration of the proceedings. Also, by requiring the applicant to disclose its participation in a cartel, the requirement is effectively to admit guilt.

2. Incentives for subsequent applicants

The Chair thanked the intervening delegations and turned to the incentives for subsequent applicants as the next thematic issue of the roundtable. He asked the Spanish delegation to explain its system of rewarding subsequent applicants.

The Spanish delegation began by describing the Spanish leniency and enforcement system, in which there are two bodies within the competition authority in charge of applying the leniency programme. The first body is the Directorate of Investigations, which carries out the investigation and proposes a decision, including on leniency, to the second body, the Council of the Comisión Nacional de la Competencia (CNC).

The leniency programme itself has been in place since February 2008 and is modelled on the Model Leniency Programme of the European Competition Network (ECN), hence closely resembling that of the European Commission. Subsequent applicants can be rewarded for providing significant added value to the investigation subject to them fulfilling general co-operation duties. The Spanish delegation cited the

provision of information that increases the number of cartel members or the duration of the cartel or that expands the practices involved as examples of what might constitute significant added value.

Leniency applications are accepted until the notification of the statement of objections, after which they are assessed and a proposal on their value is made to the Council of the CNC, which then adopts a final decision. There have been several instances where the Council of the CNC did not accept the proposal to grant leniency. In the Professional Hair Care case, it deemed that the leniency applicant did not provide evidence of significant added value to the investigation. In two other cases, the Council considered that the applicants did not satisfy their duty of co-operation by either appealing against a provisional decision of the Directorate of Investigations or submitting ten conflicting supplementary statements. Consequently, the Council did not grant the proposed leniency reductions.

The Chair thanked the delegation and noted that a number of submissions such as those of France, Germany and the EC highlight the essential contribution that the second-in applicant's co-operation has for the successful prosecution of a case. The submissions mention that without the subsequent applicants' co-operation it would be difficult to successfully terminate some cases. Against this background the Chair asked the US delegation whether the situation is similar in the US or whether there is a greater reliance on the information provided by the first-in applicant and the US DoJ's own investigative measures.

The US delegation responded that while it is difficult to generalize across cases, experience shows that subsequent applicants can often complete the picture provided by the first-in applicant and thus help to prosecute the full extent of a conspiracy. The first-in applicants are usually not the ringleaders and therefore do not have information on the whole scope of the conduct. As such, the information by subsequent applicants is often very helpful.

The Chair asked Hungary to discuss the issue of consistency between leniency and other policies, which is stressed in its written contribution.

The Hungarian delegation described its experience with the introduction of criminal sanctions for bid-rigging in 2005, which had a negative effect on the Hungarian leniency programme due to the lack of clarity and predictability in the application of criminal immunity for successful leniency applicants. A recently adopted amendment to the criminal law, which will come into force in January 2013, aims at coherence between criminal liability and leniency rules, whereby successful applicants would see their leniency benefits mirrored in the criminal realm. The delegation expressed its hope that this amendment will bring much needed certainty into the system with positive effects on the functioning of the leniency programme.

3. Treatment of subsequent applicants

The Chair then turned to the question of treatment of subsequent applicants and the various criteria used to determine a potential reduction for their co-operation. The written submissions reveal that authorities in different jurisdictions generally look among the following three factors, the order of the applications, their timing within the procedure and the value of the co-operation provided. The Chair asked Poland to describe the factors taken into account in its leniency system.

The Polish delegation explained that the amount of a reduction for subsequent applicants depends on the order in which the applications are made. The first subsequent applicant receives a 50% reduction, the second a 30% reduction and the following a 20% reduction each. As the value of the information is partly a function of the time in which it is provided (as it is assessed against the information that the authority has already in its possession), it is also taken into account. However, the primary factor is the order of the applications. To the Chair's question on the effects of this system, the Polish delegation stated that even if a

potential fourth applicant would bring in the definitive proof needed to prosecute the cartel, it would still receive only a 20% reduction in fine as long as the previous applicants had provided information of added value, even if it was not enough to successfully prosecute the case.

The Chair turned to the French delegation with a question on what is the relative ranking of the factors of time, value and order of application in France.

The French delegation responded that in the French system prominence has been given to the temporal aspect of co-operation in that there are decreasing reductions based on the order of the applications. This encourages a race to the authority to provide it with information at the earliest stage possible. As the granting of both immunity and leniency is conditional upon the fulfilment of the duty of on-going co-operation, applicants are incentivized to co-operate throughout the procedure, submitting further evidence as soon it becomes available. The timing and value of an application are also very relevant criteria. They are partly interrelated in that an application submitted prior to the inspections is likely to have greater value than a subsequent application. The delegation closed by stressing that while the purpose of the leniency race is not to save the authority's investigative resources by relying on subsequent applicants to come in, it is nevertheless its natural consequence.

The Chair then asked the Australian delegation to describe its system, which appears to place greater importance on the value of the information provided than on the order of applications in determining the reward for subsequent applicants.

The Australian delegation explained that this approach, whereby reductions given to subsequent applicants is discretionary depending on the value of co-operation, reflects the underlying philosophy of the Australian leniency system, which maximizes the incentives of immunity. Only the first-in has a guaranteed and predictable reduction, while the subsequent applicants face an uncertain situation. This is a different approach than, for example, the one of the European Commission, which provides for predictable reduction bands for subsequent applicants.

The Chair turned to Switzerland, whose written contribution also emphasizes the value of co-operation as a principal factor in determining reductions for subsequent applicants.

The Swiss delegation explained that the determination of the reduction to be granted to subsequent applicants is highly discretionary with no criteria set out in any legislative texts. In practice, the Swiss competition authority looks at the quantity and quality of the information provided and determines the appropriate reduction on a case-by-case basis. To the Chair's question, the delegation responded that companies have not complained of this lack of predictability nor has it been a disincentive for them coming forward.

The Chair asked the Italian delegation to explain the difference between information of significant added value and of appreciable value, which are mentioned as factors from granting leniency in its written contribution.

The Italian delegation explained that the Italian leniency notice does not make a formal distinction between information of significant and appreciable value. However, this distinction was made in case law in the context of the discretionary power of the Italian competition authority, which determines the value of individual reductions based on the timing, value and degree of corroboration. The concept of appreciable value was applied in the Logistica Internazionale case to the fourth applicant, whose application was, while still useful to prove the full duration of its participation, of materially lower value than the significant value of the previous applicants' contributions. As a result, it was granted only a 10% reduction of its fine.

The Chair thanked the delegation and noted that so far there has been little discussion as to the merits of the significant added value criterion and whether its use can, for example, induce strategic behaviour on the part of competition authorities. By not spending any resources on its own investigation, an authority may shift the investigative burden onto the applicants who then receive large reductions as their contributions are compared to the little that is in the file at the moment of their application. He then turned to the Romanian delegation, which in its written contributions expresses some scepticism towards the criterion of significant added value.

The Romanian delegation began by explaining that its leniency programme, which is in place since 2004 but revised in 2009, is fully in line with the ECN Model leniency programme. It went on to discuss the issue of markers for subsequent applicants (available for example in Canada and the United Kingdom) and how they could be potentially useful in getting away from timing as the most important factor in determining the amount of reduction.

The Chair went on to ask the Mexican delegation to describe the criteria used in Mexico to determine the reward for subsequent applicants.

The Mexican delegation explained that under Mexican law subsequent applicants may qualify for a reduction of 50, 30 or 20% of the fine, depending on the timing and value of their co-operation. In determining the exact size of a reduction, the Mexican competition authority exercises wide discretion. While adhering to the two criteria set out in the law, it also looks to other factors, such as management involvement, internal procedures and availability of evidence. The delegation also mentioned that successful leniency applicants receive criminal immunity for their employees, which is an important incentive and reward.

The Chair turned to the US delegation and asked it to explain what criteria are used by the US DoJ.

The US delegation responded that while there are no formal criteria that would determine the amount of reward for subsequent applicants, the US DoJ has repeatedly stated that timing and the value of co-operation are two factors that would be taken into account within the US DoJ's prosecutorial discretion. Based on these two factors, the prosecutor can make a recommendation within the Federal Sentencing Guidelines to impose a sanction within a lower range than would be the case in the absence of co-operation.

The Chair then asked the Canadian delegation to describe its system for subsequent applicants.

The Canadian delegation explained that its leniency programme for subsequent applicants was formalised in 2010 after an extensive public consultation. This consultation showed that the business community places a very high value on predictability and certainty, which is one of the reasons that the Canadian Competition Bureau chose to include a marker system for subsequent applicants. Given that successful first-in leniency applicants also receive full criminal immunity for their employees, having the necessary time to provide the requisite evidence carries great weight for the applicants. The delegation noted that the balance struck in the design of the Canadian leniency programme places a high premium on predictability and transparency in order to incentivise companies to come forward and co-operate.

Following an invitation from the Chair, the New Zealand delegation, described its programme for subsequent applicants, which was put in place in 2010. The system contains many of the same elements as those discussed so far, such as the criteria of timing and value of information supplied and the demands of continuing co-operation placed on subsequent applicants. The possible discounts range between 25% and 50% and their exact amounts are determined at the discretion of the competition authority, taking into

account the timing and value of the application. As such, there is relative uncertainty for subsequent applicants, which is designed to maximize the incentives for applying for immunity.

The Chair thanked the delegations and turned to Japan and Chinese Taipei, which both have an absolute limit on the number of successful subsequent applicants, and asked them to describe the rationale for this limitation and their experiences with it.

The Japanese delegation started by explaining that its leniency programme was introduced in 2006 and revised in 2010. It offers immunity for the first applicant and surcharge reductions for subsequent applicants. Prior to the 2010 revision, the maximum number of successful applicants was three with reductions depending on the time when the application was made. For applications made prior to the start of the investigation, the first-in would receive 100%, the second 50% and the third 30%. If an application was made only after the start of the investigation, reductions would be 30% irrespective of the order.

Having reviewed its experience with the application of the system, the Japan Fair Trade Commission (JFTC) decided to increase the number of successful applicants to five in situations when an application is made before the start of an investigation. This was done in order to incentivize more companies to come forward, allowing the JFTC to establish a complete picture of the cartel, while still maintaining the race for leniency and the incentive to come forward earlier.

Markers are available prior to the start of the investigation. The start of an investigation also increases the thresholds for leniency in that applicants after this point must bring forward new evidence in order to qualify for a reduction. With respect to criminal penalties, the first-in applicant before the investigation start date receive automatic immunity whereas the JFTC has discretion on whether to file accusations against subsequent applicants or any applicants after the investigation. The Japanese delegation closed its presentation by mentioning that the high number of leniency applications received (623 since 2006 and 143 in 2011) testifies to the success of the JFTC's leniency programme.

To the Chair's question whether there has been criticism of the system of a limited number of successful leniency applicants from industries with large numbers of participants, the Japanese delegation responded that the increase in the number of successful applicants was partly a result of such criticism but that the current limitation strikes the proper balance.

The Chinese Taipei delegation then went on to explain its system and the limitation of the number of successful applicants. Leniency was introduced in November 2011 following a number of studies carried out by the competition authority, which have shown, among other things, that the average number of members in a cartel is between 7 and 8. This led the authority to limit the number of successful leniency applicants to five, the first of which receives 100% and the last a maximum 10% discount.

Leniency is available throughout the entire procedure but there are different requirements based on whether an application is made before or after the commencement of an investigation. Markers are available for both immunity and subsequent applicants. The first application the authority received was made in an investigation that was started ex officio following a press release by the US DoJ announcing the settlement of a case involving a company from Chinese Taipei. While only one company applied under the leniency programme in this case, it has been a success for the competition authority in that it brought important lessons on the application of both its cartel and leniency rules.

The Chair invited the Lithuanian delegation to comment on the issue of markers for subsequent applicants, which is mentioned in its written submission.

The Lithuanian delegation explained that while there has been a leniency programme in Lithuania since 2008, there have been only three immunity applications and no subsequent applications so far.

Markers for subsequent applicants are available under the rationale that they add certainty for potential applicants, who can obtain a very sizeable reduction of up to 75% of the fine. In response to the Chair's question as to what might be the reasons for the lack of subsequent applications, the delegation mentioned the small size of the economy, the country's totalitarian past bearing negatively on reporting to authorities, the relative small size of the fines and the lack of credibility of the competition authority.

The Chair asked the U.K. delegation and the Korean delegation to comment on the criteria used to disqualify subsequent applicants from receiving fine reductions.

The U.K. delegation first observed that in this respect there is an important tension between legal certainty for potential applicants and discretion granted to the authorities. It also noted that how countries approached this question would vary depending on whether it employs an administrative or judicial system. For example, the U.S. provides very clear guidance with respect to sentencing guidelines since the proceedings are predominantly criminal.

Authorities must consider how best to explain not only their leniency policies but also how those policies will be applied in practice so that companies may have some *ex-ante* idea of their position before applying for leniency. At the same time, flexibility is required to encourage other applicants to come forward as needed.

With respect to disqualifying subsequent applicants, the delegation noted that the U.K. authority has never in practice withdrawn leniency although its policies make clear that the authority may do so at any time, including during the appeal procedure, if any of the conditions of leniency have not been met. In doing so, the authority reserves the right to use any of the information provided by the failed applicant against it or any third parties.

The delegation made a distinction between failing to provide constructive help and outright obstruction, such as falsifying or destroying documents, both of which can result in the revocation of leniency. Therefore, the authority attempts to make clear to the parties what obligations they are under as well as provide some clear examples as to what would constitute bad faith obstruction.

The Korean delegation highlighted key amendments to the Korean competition act specifically designed to curb opportunistic behaviour by firms applying for leniency. First, it increased the fine limit to 10% of turnover to strengthen the deterrence of punishment. It later broadened criminal punishment by revising its guidelines for filing accusations to the public prosecutor’s office.

In reaction to instances where firms submitted unhelpful or insignificant evidence in order to receive first-in status, the authority amended its leniency notice to expand the scope of proof an applicant must provide before its status is confirmed. And like the U.K. Office of Fair Trading, the Korean Fair Trade Commission maintains the right to revoke leniency until the investigation is complete in case false or manipulated data is uncovered.

The most recent amendment to the act limits leniency to the first-in applicant where there are only two cartelists. This was in reaction to the second cartelist waiting years before coming forward, knowing it could still receive a 50% reduction in fines. This amendment also stipulated that subsequent applicants would not receive any benefit for coming forward two or more years after the receipt of the first application.

The Chair then confirmed that in Korea the revocation of the ability of the last-in applicant to apply for leniency only applies when the cartel has two companies involved. He posed the normative question of whether, since in some jurisdictions it is possible for all participating cartelists to receive some form of leniency, at least one of the companies be punished to the full extent.

He then asked the South African and Estonian delegations to share its experiences with appeals made of the competition authorities' leniency decisions.

The South African delegation summarized the status of a current case in which a company appealed the granting of leniency by the Competition Tribunal pursuant to recommendation by the Competition Commission. The company challenged the legal right for the Commission, a prosecutorial body, to suggest that parties be granted immunity. The Supreme Court of Appeal upheld the decision stating that the Commission operates in an administrative system within which its function is to combat anticompetitive behaviour and promote market transparency. In that vein, the Commission is obliged to use all the tools at its disposal including its leniency programme. The company has now challenged the policy as unconstitutional and the case is pending at the Constitutional Court.

The Chair turned to the Estonian delegation to discuss challenges it has faced to its authority's discretion in granting leniency.

The Estonian delegation recounted a recent Supreme Court case, which held that the granting of immunity by the public prosecutor's office subsequent to a leniency application submitted to the competition authority can be appealed by other applicants if that decision has violated or interfered with the other applicants' substantive or procedural rights.

The Chair then opened this question to the floor of whether courts have upheld the discretion granted to competition authorities with respect to subsequent leniency applicants.

The Canadian delegation highlighted a recent decision written by the Chief Justice of the Federal Court of Canada detailing the reasons for sentencing following a guilty plea entered by Maxzone Auto Parts (Canada) Corp. Chief Justice Crampton emphasized that the sequence in which co-conspirators sought leniency should be fundamental in the determination of the ultimate fine or sentence imposed. Legal certainty, in his view, would promote co-operation among subsequent applicants, as well as proportionate fines designed to punish and deter the illegal conduct. The judgment determined that the framework for the authority's leniency programme was sufficiently comprehensive and flexible as to be in the public interest and not compromise the administration of justice.

Chief Justice Crampton agreed with the general rationale of leniency programmes, in that they encourage both organizations and individuals to come forward to receive leniency recommendations. He noted that the information provided by subsequent applicants is both helpful in corroborating evidence provided by the immunity applicant and incredibly cost-saving in terms of investigatory and prosecutorial efforts.

The German delegation explained that when a defendant does not accept a decision of the authority, it may submit its substantiated appeal. If the decision is changed by the authority, the appeal is sent to the general prosecutor's office who then decides whether to take the case to court.

The EC delegation explained that there had only been one case in which the Commission withdrew conditional immunity. In the Italian Raw Tobacco case, Deltafina tipped off its fellow cartel members just before the Commission inspection. On appeal, the court endorsed the Commission's decision and its overall discretion in determining leniency reductions, reiterating the obligation of leniency applicants to not only provide information but also to genuinely co-operate with the authority.

There has been so far only one case in which the court has overturned the Commission's decision with respect to leniency. In the Gas Insulated Switchgear cartel investigation, the Commission denied Fuji leniency as it had applied after the statement of objections had been issued since it had the opportunity to

see the full evidence against the cartel. The General Court found an application cannot be excluded on that basis alone as it could still provide significant added value.

The US delegation noted there had been no court decisions with respect to its discretion in findings or penalties.

In sum, the Chair noted that courts seem to understand the importance of discretion and flexibility in awarding leniency and reducing penalties. The Chair then moved to the third and final issue of the treatment of subsequent applicants in jurisdictions that limit the use of the leniency programme to the first-in applicant.

4. Treatment of subsequent applicants in jurisdictions with amnesty programmes

The Chair asked the French delegation to first explain the clear distinction made by the French authority between leniency applicants and firms that subsequently come forward agreeing to co-operate.

The French delegation explained that there is a hierarchy in the possible reduction in fines between leniency applicants and firms that later negotiate settlements or plea bargains by co-operating. Leniency applicants provide key evidence used to identify the cartel, including its duration, nature and the identity of its participants forming the basis on which fines are ultimately levied. In contrast, firms that do not contest the charges against them merely reduce some of the administrative burden of pursuing a formal case rather than contributing to proving the existence of the cartel.

The Chair asked the US delegation to explain the passage in its contribution where it is said that firms that later settled often also helped the US DoJ to strengthen or to establish proof of the violation.

The US delegation put forth three central purposes for its leniency programme and explained how subsequent applicants who plead guilty contribute to all of them. The first stated purpose is the disclosure and termination of the cartel. Subsequent applicants clarify the full extent of the cartel, and by admitting the infringement, they necessarily agree to terminate their activities in the cartel. The second purpose is to successfully prosecute the entire cartel. By coming forward and entering into a plea agreement, the later applicants automatically plead guilty. The last purpose is the recovery of damages. Although not technically required of subsequent applicants, the US DoJ considers that their willingness to make restitution when determining the appropriate reduction in penalties. Moreover, subsequent applicants tend to keep up the momentum of an investigation by adding to the information provided by the first-in and allow the US DoJ to save on resources by avoiding a trial.

The Chair then asked the US delegation to explain why in order to be granted amnesty, the first-in applicant must commit to compensating its victims.

The US delegation explained that objective of its antitrust programme in general, including the leniency programme, is to protect and remedy harm done to consumers. Therefore, companies are required to provide full restitution only if they are able to do so. There remains a substantial benefit to coming forward, because first-in applicants are exempted from treble damages.

The Chair then turned to the Australian delegation to ask if the Australian authority makes a similar distinction as the French authority with respect to co-operating firms that come forward subsequently to the first-in applicant.

The Australian delegation clarified that no distinction is made for any company that comes forward after the first-in immunity applicant under the co-operation policy. The two objectives of the policy,

increased evidence to support the finding of a violation and the efficient disposal of the case, are applicable to all subsequent applicants who come forward with information.

The Chair then asked the BIAC delegation to add its perspective to the discussion.

The BIAC delegation started by saying that the business community also supports the success of leniency programmes in eradicating hard-core cartels but underscored the importance of transparency and predictability in administering such programmes. BIAC is in favour of a broad policy, which ensures that any leniency applicant who comes forward will be in a better position than a firm that did not choose to co-operate.

From the BIAC written contribution, the delegation highlighted the following points. First, the value of the information brought to light by the subsequent applicant should be judged based on what was available to the applicant, whether it was a ringleader or a minor participant. Moreover, acting as a corroborating witness despite not providing additional information is valuable in and of itself.

Second, the unclear interaction between authorities and the variance in leniency policies make the benefit to apply for leniency unclear. In particular, companies worry that applying in one jurisdiction could benefit other cartel participants applying in other jurisdictions. BIAC emphasizes the need for authorities to maintain transparent and predictable policies and puts forth the idea of a global one-stop shop or marker system for leniency applications.

The Chair then wrapped up the discussion by noting that there was a consensus on the benefit of a mechanism for subsequent applicants both in terms of additional evidence and relieving the administrative burden of gathering it. He also observed that across varying jurisdictions and leniency programs, there was not a significant difference in objectives. What was different was the criteria applied by the authority to grant leniency, with some authorities focused more on timing while others applied more weight to information contributed to the investigation.

The Chair observed that universally, leniency programs required authorities to have a large amount of discretion in their application. As a result, authorities need to constantly consider how to ensure both that their policies are applied fairly and that there is sufficient transparency to provide guidance and predictability to potential applicants. He then thanked the participants and closed the roundtable discussion.

SYNTHÈSE

Par le Secrétariat

Les points ci-dessous ressortent du document de synthèse, des contributions des pays et des débats lors de la table ronde consacrée à l'application des programmes de clémence aux demandeurs suivants :

(1) Les autorités de concurrence font largement appel à des mécanismes de clémence pour détecter, instruire et poursuivre les ententes injustifiables. Les pays qui mettent en œuvre des programmes de clémence reconnaissent les avantages que confère une récompense en faveur non seulement du premier demandeur qui dénonce l'entente mais également en faveur des demandeurs suivants qui corroborent certains éléments utiles ou fournissent de nouvelles preuves. Les demandeurs suivants peuvent souvent apporter une coopération essentielle pour assurer l'aboutissement des poursuites portant sur l'ensemble d'une entente et permettre de recueillir à moindre coût des éléments de preuve.

Les programmes de clémence se sont révélés très précieux pour permettre aux autorités de concurrence de détecter, instruire et poursuivre les ententes injustifiables, et c'est la raison pour laquelle ils ont été adoptés par de nombreux pays à travers le monde. Pour l'essentiel, il existe deux types de programmes de clémence : ceux qui ne récompensent que le premier demandeur en lui octroyant une immunité (comme c'est le cas aux États-Unis) et ceux qui, en plus de conférer une immunité au premier demandeur, récompensent également les demandeurs suivants en leur réservant un traitement favorable (comme c'est le cas dans l'Union européenne).

Cependant, même les pays qui mettent en œuvre des programmes ne récompensant que le premier demandeur de l'immunité sont dotés de mécanismes qui permettent aux autorités de concurrence de traiter avec plus d'indulgence les demandeurs suivants qui coopèrent. Par exemple, le ministère américain de la Justice a toute latitude pour récompenser les sociétés coopérantes suivantes en faisant des recommandations relatives aux sanctions dans les limites prévues par les Lignes directrices en matière de détermination de la peine (US Federal Sentencing Guidelines).

Il existe un consensus général quant aux avantages que confère un mécanisme qui récompense les demandeurs suivants, qu'il s'agisse de recueillir de nouveaux éléments de preuve ou d'alléger la charge de travail des enquêteurs. Bien qu'il ait été admis que faire preuve d'indulgence envers les demandeurs suivants pouvait décourager ces derniers à faire le premier pas, les délégations ont dans l'ensemble estimé que les avantages de cette indulgence l'emportaient sur de possibles retombées négatives. Deux stratégies visant à atténuer l'effet de dissuasion sur les premiers demandeurs ont été évoquées. Certains ont souligné l'importance du pouvoir discrétionnaire qu'exerce l'agence compétente pour déterminer la récompense à octroyer aux demandeurs suivants, tandis que d'autres ont mis en exergue l'écart insuffisant qui existe entre la réduction accordée au premier demandeur (habituellement 100 %) et le niveau de réduction plus faible applicable à un demandeur suivant.

Plusieurs délégations ont mis en évidence la valeur ajoutée que peut apporter un demandeur suivant pour une enquête dans la mesure où il corrobore et complète les informations sur l'entente qui ont été fournies par le demandeur de l'immunité. Étant donné que le seuil à franchir

pour bénéficier d'une immunité est en général relativement faible afin d'encourager les entreprises à proposer leur aide et à dénoncer une entente, les demandeurs suivants peuvent souvent fournir des informations, cette coopération étant cruciale pour mener des poursuites visant toute la portée et la durée d'une entente. Dans ce contexte, les délégations ont relevé que, puisque le demandeur de l'immunité est rarement le meneur de l'entente, il risque de ne pas en connaître toute la portée, soulignant ainsi la valeur que pourrait revêtir la coopération des demandeurs suivants.

En récompensant les demandeurs suivants, les autorités de concurrence peuvent également recueillir des éléments de preuve à moindre coût. Pour pouvoir bénéficier d'une sanction plus clémente, les demandeurs suivants sont contraints, dans un grand nombre de pays, de fournir des éléments permettant à l'autorité compétente de prouver de nouveaux faits ou, au moins, de corroborer comme il se doit les faits existants. Il a toutefois été souligné que cet effet, bien que manifestement bénéfique, ne signifiait pas que l'autorité compétente allait se contenter d'attendre que se présentent des demandeurs d'une mesure de clémence et renoncer à des poursuites.

(2) *Pour encourager les entreprises qui ont perdu la course à l'immunité à proposer aux autorités de coopérer avec elles et à devenir des demandeurs suivants, les pays entendent les traiter avec une plus grande clémence que si elles n'avaient pas proposé leur coopération. Les types de récompenses disponibles, leurs critères et leur justification varient d'un pays à l'autre. Il s'agit habituellement de réduction d'amendes et d'allègement des sanctions pénales qui seraient imposées s'il en avait été autrement. De telles récompenses sont octroyées en fonction de la valeur de la coopération et du moment où elle est proposée.*

Le fondement juridique d'une récompense octroyée aux demandeurs suivants réside soit dans le programme de clémence lui-même, comme c'est le cas dans l'Union européenne ou au Japon, soit dans le pouvoir discrétionnaire du ministère public, comme c'est le cas aux Etats-Unis où le programme de clémence ne récompense que le premier demandeur et où les demandeurs suivants sont récompensés dans le cadre des procédures de négociation de la peine. Parmi les types de récompenses habituellement octroyées, on peut citer la réduction de toute amende qui serait normalement imposée, un allègement des sanctions pénales ou même, comme c'est le cas au Mexique, une immunité totale de poursuites pénales. Les demandeurs suivants peuvent bénéficier d'un type particulier de récompense dans le cadre de programmes dits « Amnesty Plus » qui sont proposés dans certains pays de l'OCDE et en vertu duquel un demandeur suivant peut bénéficier d'une réduction plus importante s'il révèle à l'autorité compétente l'existence d'une autre entente (ce pour quoi il obtient alors l'immunité). Parmi les critères retenus pour établir si un demandeur suivant a droit à une récompense et pour définir les contours exacts de cette récompense, citons l'ordre des demandes, le moment où elles sont présentées et la valeur et le degré de la coopération. Chaque pays accordera une importance plus ou moins grande à ces différents critères.

S'agissant des types de récompenses, certaines juridictions comme l'Union européenne ou certains de ses États membres, dont les programmes reposent sur le « Programme modèle du REC en matière de clémence », fixent des fourchettes de réduction précises qui diminuent en fonction de l'ordre dans lequel les demandeurs fournissent des éléments de preuve à valeur ajoutée. Pour l'Union européenne, ce système, en parallèle avec la publication de l'évaluation des demandes dans les décisions définitives, confère la transparence et la prévisibilité nécessaires au fonctionnement optimal du programme de clémence. Il encourage également les demandeurs à se manifester le plus tôt possible et donc à bénéficier des taux de réduction les plus élevés possibles. D'autres pays mettent en avant les avantages de l'incertitude pour la course à la clémence, l'autorité compétente ayant toute latitude pour octroyer les réductions de son choix.

Pour déterminer l'importance d'une réduction, les autorités tiennent habituellement compte du moment où la demande a été formulée, de la valeur des éléments de preuve communiqués et, comme c'est le cas dans l'Union européenne et au Japon, du niveau hiérarchique dont émane la demande. En règle générale, la valeur des preuves dépend souvent du moment où survient la demande dans la mesure où chaque élément qui est communiqué par un demandeur est évalué à l'aune de ce que connaît déjà l'autorité au même moment. Plus un élément de preuve sera communiqué tôt, plus il sera susceptible de revêtir une valeur élevée. Dans l'ensemble, les débats ont montré que certains pays accordent une plus grande importance au moment où une demande est formulée, tandis que d'autres tiennent davantage compte de la valeur des éléments communiqués. Parmi les autres critères retenus pour déterminer la taille d'une réduction, citons la participation de la direction, les procédures internes et l'existence de preuves jugées pertinentes.

Certains pays, comme le Canada, le Royaume-Uni ou le Taipei chinois, octroient des marqueurs aux demandeurs suivants, ce qui, selon eux, renforce la prévisibilité et la certitude du processus, et donc encourage les entreprises à offrir leur concours.

(3) *Pour pouvoir bénéficier de mesures de clémence, les demandeurs suivants doivent remplir un certain nombre de critères qui, le plus souvent, sont le reflet des critères applicables aux demandeurs d'immunité. Il s'agit notamment des critères de qualification, de coopération et d'opportunité, et dont le fond varie d'un pays à l'autre. Cependant, dans la plupart des pays, les demandeurs suivants sont tenus d'apporter un concours intégral et ininterrompu durant toute la procédure tout en mettant un terme à leur participation à l'entente et en préservant le caractère confidentiel de leur coopération.*

Les exigences imposées aux demandeurs suivants sont habituellement les mêmes que celles imposées aux demandeurs d'immunité. En plus de mettre fin à leur participation à l'entente et de rendre leur demande confidentielle, les demandeurs suivants doivent coopérer pleinement et sans interruption avec l'autorité compétente. Pour s'acquitter de l'obligation d'apporter un concours ininterrompu dans le cadre de l'enquête, le demandeur tiendra ses cadres-dirigeants à disposition pour des interrogatoires, répondra rapidement aux questions, fournira des éléments de preuve situés en dehors du pays, s'abstiendra de détruire ou de falsifier des preuves, etc. Dans certains pays, un demandeur suivant devra dédommager les victimes pour pouvoir bénéficier d'un traitement indulgent. Pour la plupart des délégations, n'octroyer ou ne confirmer une mesure de clémence qu'au terme de la procédure constitue un outil précieux pour s'assurer que les demandeurs s'acquittent de leurs obligations tout au long de l'enquête.

S'agissant des restrictions quant aux personnes pouvant bénéficier d'une mesure de clémence en qualité de demandeur suivant, certains pays excluent quiconque a contraint d'autres personnes à participer à l'entente ou à rester en son sein, les principaux membres de l'entente, les instigateurs ou les récidivistes. D'autres pays limitent le nombre de demandeurs suivants qui peuvent bénéficier de mesures de clémence. Par exemple, le Japon et le Taipei chinois n'autorisent qu'à cinq demandeurs à bénéficier de mesures de clémence (ou, comme c'est le cas au Japon, à trois lorsqu'une demande est déposée après l'ouverture d'une enquête). En Corée, il n'est pas possible pour le deuxième demandeur de bénéficier de mesures de clémence dans le cas d'ententes réunissant seulement deux membres. Ces limitations traduisent le souhait pour certaines autorités de tenter de limiter la possibilité de comportements opportunistes ou stratégiques de la part des demandeurs.

Enfin, s'agissant des délais pendant lesquels des demandes peuvent être présentées, beaucoup de pays ne prévoient aucune échéance butoir précise et acceptent les demandes tout au long de l'instruction. Cependant, même en l'absence d'une date butoir formelle, plusieurs pays ont

indiqué qu'une demande de clémence était susceptible d'être rejetée parce qu'elle ne conférait aucune valeur ajoutée si elle était reçue après la fin de l'instruction, marquée par une communication de griefs. Plusieurs pays n'acceptent plus de demandes après la fin de l'instruction.

(4) *Les politiques en matière de clémence ne se situent pas dans l'abstrait. Elles sont conjuguées aux autres instruments juridiques et à d'autres politiques telles que le régime de responsabilité pénale des personnes physiques ou morales ayant participé à une entente, les procédures de résolution accélérée des affaires (comme les règlements amiables ou les procédures de négociation de la peine) et les actions privées en dommages et intérêts. Or, le bon fonctionnement des programmes de clémence dépend éminemment d'un bon calibrage de cette action réciproque.*

S'agissant de la responsabilité pénale, il importe que la possibilité de sanctions pénales à l'encontre d'employés (ou des entreprises elles-mêmes) ne dissuadent pas les demandeurs éventuels de se manifester et de coopérer. L'exemple de la Hongrie est particulièrement éloquent : son programme n'étant, jusqu'à sa récente modification, pas suffisamment précis quant aux retombées pénales pour les demandeurs bénéficiant de mesures de clémence, on a pu observer une diminution du nombre de demandes. Dans les pays qui prévoient une responsabilité pénale pour une participation à une entente, il est important que les mesures de clémence accordées aux demandeurs suivants s'appliquent également à d'éventuelles sanctions pénales. Les stratégies varient en fonction des pays, certains octroyant une immunité totale et automatique de sanctions pénales pour les employés de demandeurs pouvant bénéficier de mesures de clémence, d'autres n'accordant que des réductions de sanctions et/ou n'accordant un traitement de faveur qu'au domaine pénal relevant du pouvoir discrétionnaire de l'autorité compétente.

Les procédures de résolution accélérée des affaires, comme les règlements amiables ou les procédures de négociation de la peine, interagissent à plusieurs égards avec les mesures de clémence pour les demandeurs suivants. Aux États-Unis, par exemple, les sociétés coopérantes suivantes sont récompensés dans le cadre de la procédure de négociation de la peine, ne devant pas seulement accepter de coopérer avec les enquêteurs mais également de plaider coupables en échange d'une réduction de peine. Dans les pays où des mécanismes de résolution accélérée des affaires et un régime de clémence constituent des outils distincts, l'octroi de mesures de clémence ne dépend pas de règlements amiables, bien que l'un puisse souvent découler de l'autre. Dans de tels systèmes, il importe que les récompenses accordées aux parties concernées ne dépassent pas celles qui sont prévues dans le cadre du programme de clémence, et ce afin de ne pas saper les mécanismes incitant les entreprises à coopérer dans ce cadre. Ainsi, par exemple, la réduction maximale pour un règlement amiable est de 10 % dans l'Union européenne, tandis qu'une entreprise dont la demande de clémence a abouti peut obtenir une réduction allant jusqu'à 20 %, 30 % ou 50 % en fonction du moment où cette entreprise a prêté son concours.

Les actions privées en dommages et intérêts peuvent également décourager les entreprises à proposer leur aide aux autorités dans le cadre d'un programme de clémence. Les autorités de la concurrence s'efforcent donc de mettre en œuvre des dispositions visant à s'assurer que les demandeurs de mesures de clémence visés par des actions en dommages et intérêts ne bénéficient pas de conditions moins bonnes que celles des entreprises qui ont décidé de ne pas coopérer. En revanche, les demandeurs de mesures de clémence ne sauraient être dégagés de leur responsabilité civile pour avoir participé à une entente. Certains pays cherchent même à subordonner l'octroi de mesures de clémence au dédommagement des victimes.

DOCUMENT DE RÉFLEXION

Par le Secrétariat

1. Introduction

La présente note examine les questions relatives à « l'application des programmes de clémence aux demandeurs suivants » et met en relief les principales questions qui contribueront à la discussion qui se tiendra le 23 octobre 2012 au sein du Groupe de travail n°3. Actuellement, tous les pays de l'OCDE ont adopté des programmes de clémence pour rendre plus efficaces la détection des ententes et les poursuites engagées à leur encontre. Compte tenu de l'expérience considérable acquise en matière de mise en œuvre de ces programmes, le Groupe de travail n°3 a jugé que le moment était venu d'étudier un aspect particulier différenciant les deux grandes catégories de programmes de clémence, à savoir le traitement des demandeurs suivants. On entend par demandeurs suivants les demandeurs – hormis le premier – qui dénoncent une entente secrète ou apportent des éléments décisifs établissant son existence.

La terminologie utilisée dans le contexte des programmes de clémence varie d'un pays à l'autre. Ainsi, les États-Unis emploient le terme de « clémence » ou d'« amnistie » pour désigner une immunité totale de sanctions. Au Canada et dans l'Union européenne, cette notion est appelée « immunité ». Ces pays recourent ainsi au terme de « clémence » pour désigner soit tout traitement de faveur (amnistie/immunité et réduction des sanctions) soit uniquement une réduction des sanctions imposées aux demandeurs suivants[1]. Pour les besoins de la présente note, nous utiliserons ici le terme de « *programme de clémence* » pour designer à la fois un programme d'amnistie ou de clémence. Le terme d'« *immunité* » désigne le bénéfice de l'immunité complète de sanctions et le terme de « *clémence* » couvre les avantages octroyés sous forme de réduction des sanctions qui auraient été sans cela imposées aux demandeurs ne pouvant prétendre bénéficier de l'immunité.

2. Les origines des programmes de clémence en tant qu'outils d'application du droit de la concurrence

Étant donné leur caractère illégal généralement admis, les ententes exercent la plupart du temps leur activité sous le sceau du secret. Elles s'accompagnent souvent de mesures radicales visant à renforcer leur clandestinité et à éviter d'être détectées. En raison de la clandestinité dans laquelle elles opèrent, les autorités de la concurrence se heurtent à des obstacles importants lorsqu'il s'agit de mettre au jour des ententes et d'ouvrir des poursuites à leur encontre. Avec les moyens d'enquête et les sources d'information classiques, la détection d'une entente découle normalement de la constatation d'anomalies sur le marché, de plaintes des consommateurs, de pistes fournies par des informateurs (par exemple des salariés mécontents) ou des retombées d'autres enquêtes. De solides informations et des pièces à conviction fiables sont indispensables pour réussir à révéler une entente et engager des poursuites. Malheureusement, l'efficacité et l'efficience des méthodes classiques de détection des ententes et de recueil des éléments de

[1] En conséquence, un programme de clémence ne récompensant que le premier demandeur est parfois appelé « programme d'amnistie » et un programme récompensant à la fois le premier demandeur et les demandeurs suivants est appelé « programme de clémence ».

preuve requis pour assurer l'aboutissement des poursuites et sanctionner les membres des ententes, sont limitées.

Pour tenter de surmonter ces limites et de renforcer les facteurs dissuasifs, le ministère américain de la Justice a adopté, en 1978, son premier programme de clémence visant les entreprises. Il a inscrit dans son dispositif d'application du droit de la concurrence l'idée d'une réduction des sanctions pénales en contrepartie de la contribution des contrevenants à la condamnation de leurs complices[2]. En vertu de la politique adoptée en 1978, le ministère américain de la Justice pouvait accorder l'immunité à toute entreprise l'informant de l'existence d'une entente avant l'ouverture d'une enquête. En 1993, le ministère a révisé son programme, y apportant trois modifications importantes. On attribue généralement à ces changements la hausse spectaculaire du nombre de membres d'une entente demandant à en bénéficier. Premièrement, au stade qui précède l'ouverture d'une enquête, l'octroi de l'immunité n'est plus subordonné à l'exercice du pouvoir discrétionnaire en matière de poursuites. Deuxièmement, l'immunité peut également être accordée après le début d'une enquête. Troisièmement, elle a été étendue aux salariés et aux administrateurs proposant leur aide aux autorités en même temps que l'entreprise qui coopère. En 1994, le ministère a en outre adopté un programme de clémence applicable aux personnes physiques, mettant ainsi en œuvre un dispositif de clémence encore en place aujourd'hui. Le changement le plus important survenu depuis 1994, apporté en 2004[3], limite la responsabilité civile des bénéficiaires d'une amnistie, s'ils coopèrent avec les plaignants, à des dommages et intérêts simples et abroge le principe de responsabilité conjointe et solidaire entre le demandeur de l'amnistie et ses complices.

En 1996, la Commission européenne (CE) a adopté sa première communication sur la clémence (communication sur la non-imposition d'amendes ou la réduction de leur montant dans les affaires portant sur des ententes ou « communication de 1996 »), même si elle avait déjà auparavant pour pratique de récompenser par un allègement d'amendes les entreprises qui coopéraient[4]. La communication de 1996 introduisait officiellement dans la pratique d'application de la CE l'idée de récompenser la coopération des entreprises, en leur accordant soit une totale immunité d'amendes, soit une réduction du montant des amendes qui leur auraient été imposées en l'absence de coopération. La CE a depuis révisé cette politique à deux reprises : la première fois en 2002 et la deuxième 2006, apportant des modifications visant à réduire l'incertitude de la procédure et à renforcer l'efficacité de ce dispositif[5].

Il existe trois différences essentielles entre le programme de clémence du ministère américain de la Justice et celui de la CE. Premièrement, dans le cadre du programme américain, les demandeurs qui réussissent à obtenir l'immunité bénéficient d'une immunité de poursuites alors que la CE rend une décision officielle même à l'encontre des bénéficiaires d'une immunité totale (et même en cas d'annulation totale de l'amende). Deuxièmement, n'étant pas dotée d'un régime de responsabilité pénale des personnes

2 Voir Wils, p. 14.

3 Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) [Loi sur la réforme et le renforcement des sanctions pénales applicables en cas de pratiques contraires au droit de la concurrence].

4 Voir Wils, p. 15. Faull et Nikpay, s. 8.108.

5 La communication de la Commission sur l'immunité d'amendes et la réduction de leur montant dans les affaires portant sur des ententes, publiée en 2002, introduit ainsi une immunité automatique à l'entreprise qui est la première à dénoncer à la CE une entente dont la Commission ignorait l'existence ou à lui fournir des éléments de preuve déterminants de l'existence de cette entente au lieu de lui accorder une réduction de 75 % à 100 % du montant de l'amende qui lui aurait été infligée en l'absence de coopération, comme le prévoyait la communication de 1996. La communication de 2002 déterminait en outre plus clairement le niveau de réduction de l'amende dont bénéficient les demandeurs suivants en fonction du moment où ils déposent leur demande. La communication de 2006 a introduit la possibilité, pour les demandeurs, de solliciter l'octroi d'un marqueur, tout en relevant les exigences relatives au niveau de coopération que les demandeurs doivent fournir pour bénéficier de la clémence.

physiques ayant participé à une entente, l'UE, au contraire des États-Unis, ne dispose pas non plus d'un programme de clémence applicable à ces dernières. Enfin, le programme de clémence du ministère américain de la Justice ne récompense que le premier demandeur, alors que le programme de la CE récompense à la fois le premier demandeur et les demandeurs suivants, sous réserve qu'ils aient contribué, par leur coopération, à l'enquête et aux poursuites engagées par la CE[6].

Alors que ces deux différences tiennent au contexte particulier d'application du droit de la concurrence au sein duquel chaque programme de clémence est mis en œuvre – application administrative avec imposition de sanctions aux entreprises dans le cas de l'UE et application pénale assortie d'un régime de responsabilité pénale des personnes morales et physiques aux États-Unis – la troisième différence, qui a trait au traitement des demandeurs suivants, ne s'explique pas aussi clairement. Cela étant, le ministère américain de la Justice ayant la possibilité de récompenser, et récompensant en pratique, la coopération des demandeurs suivants en dehors de son programme de clémence, cette différence est davantage une question de forme que de fond.

Questions et problèmes à examiner

1. Veuillez décrire l'interaction entre votre programme de clémence et les autres mesures d'application évoquées plus haut. Lors de la mise au point de votre programme de clémence, avez-vous tenu compte de ses répercussions sur d'autres instruments d'application ? Dans l'affirmative, veuillez expliquer comment vous avez procédé et quelles solutions vous avez adoptées.

2. Veuillez indiquer, en particulier, si et de quelle manière les procédures de résolution accélérée des affaires (comme les règlements amiables ou les procédures de négociation de la peine) sont liées à des mécanismes permettant de récompenser la coopération des demandeurs suivants. Ces procédures visent-elles les mêmes objectifs que le programme de clémence (par exemple recueillir des informations et favoriser la coopération).

3. Raisons justifiant de récompenser les demandeurs suivants

Les raisons justifiant d'accorder l'immunité à un membre d'une entente décidant de s'en désolidariser, d'informer les autorités de l'existence de celle-ci et de coopérer en leur apportant son aide pour leur permettre de condamner les autres membres de l'entente tiennent au fait que les avantages pour la collectivité découlant de cette coopération l'emportent sur l'intérêt public que représenterait l'imposition d'une sanction à l'entreprise qui a coopéré. Font partie de ces avantages l'augmentation du taux de détection, les effets déstabilisateurs sur les ententes, les économies des coûts liés aux enquêtes et aux poursuites du fait que le demandeur fournit des éléments de preuve provenant directement de l'intérieur de l'entente, des économies de frais de justice, etc. Tous ces avantages confondus permettent à l'autorité de la concurrence de se montrer plus dissuasive vis-à-vis des ententes sans avoir besoin de mobiliser à cette fin les ressources correspondantes[7]. Quelles raisons justifient cependant que les pouvoirs publics récompensent les entreprises pour leur contribution à une enquête déjà engagée ? Mise à part celle tenant à la mise au jour d'une autre entente dont les autorités n'avaient jusque-là pas connaissance, ces raisons sont pour la plupart les mêmes que celles justifiant de récompenser le premier demandeur. La plupart des

6 Le ministère américain de la Justice a la possibilité de récompenser la coopération des demandeurs suivants mais ne peut le faire par le biais de son programme de clémence. Il le fait en appliquant les fourchettes de sanctions prévues par les US Sentencing Guidelines [Lignes directrices sur la détermination de la peine] dans le cadre de la procédure de négociation de peine. Il existe également une autre possibilité, appelée mécanisme d'« Amnesty Plus ». Nous reviendrons plus loin en détail sur ces deux possibilités.

7 Voir Kloub, p. 4, Wils, p. 19, Faull et Nikpay, s. 8.105, Zingales, p. 7.

programmes de clémence octroient l'immunité au premier demandeur signalant l'existence d'une entente avant l'ouverture d'une enquête. Certains programmes accordent en outre l'immunité après l'ouverture d'une enquête si les demandeurs peuvent fournir de nouveaux éléments de preuve contribuant à l'établissement de l'infraction.

Les autorités sont susceptibles de se trouver dans des situations où, bien qu'ayant été informées de l'existence d'une entente à la suite de la demande de clémence du premier demandeur, elles ne sont pour autant pas en mesure d'établir l'infraction. Tel est le cas, par exemple, si elles ne peuvent recueillir les preuves nécessaires en procédant à une perquisition ou par d'autres moyens d'enquête. Le cas échéant, la coopération d'autres membres de l'entente est essentielle pour assurer l'aboutissement des poursuites. La coopération du deuxième demandeur est souvent particulièrement précieuse car sa déposition et les autres éléments d'information qu'il fournit peuvent servir à corroborer les éléments communiqués par le premier demandeur. La coopération des demandeurs suivants peut contribuer à établir des faits supplémentaires concernant la durée, le périmètre géographique, la composition de l'entente ou les produits en ayant fait l'objet. Cela peut être particulièrement utile lorsque l'immunité est accordée à un membre mineur de l'entente qui, tout en ayant une connaissance générale des activités de celle-ci, peut ne pas être en possession de preuves directes sur des contacts autres que ceux avec lesquels il avait un lien direct. Le cas échéant, la coopération d'une entreprise jouant un rôle de premier plan dans l'entente pourrait permettre aux autorités d'enquêter avec efficacité sur tous les membres et toutes les pratiques de l'entente.

De surcroît, la coopération des demandeurs suivants engendre des gains d'efficacité en réduisant les coûts administratifs puisque les autorités peuvent recueillir des éléments de preuve par leur intermédiaire, sans mener d'enquête complète. Les demandeurs suivants peuvent ainsi proposer leur aide aux autorités après les premières perquisitions et leur soumettre des pièces à conviction que les autorités n'ont pas trouvées, éclairer le contenu ambigu des éléments de preuve recueillis ou mettre les autorités en relation avec des personnes physiques ayant une connaissance approfondie de l'entente, ce qui peut être particulièrement intéressant dans les pays où les autorités n'ont pas le pouvoir d'assigner une personne physique à témoigner. L'autorité de la concurrence pourrait certes recueillir plus tard, par d'autres moyens, ces éléments et explications, mais seulement à condition d'assumer les frais induits par une procédure d'assignation à comparaître ou de demande d'information. En ce sens, la coopération des demandeurs suivants minore, pour l'autorité, les coûts induits par les enquêtes et les poursuites, lui permettant à la fois de progresser plus rapidement et de consacrer éventuellement à d'autres enquêtes les ressources ainsi économisées. La coopération des demandeurs suivants sert également de moyen de pression pour obliger le demandeur de l'immunité à communiquer tous les éléments en sa possession et par conséquent à procéder à des vérifications internes minutieuses.

Les demandeurs suivants peuvent être récompensés pour deux types de coopération. Premièrement, lorsqu'ils contribuent à l'enquête portant sur l'affaire qu'ils n'ont pas dénoncée en premier, en fournissant, par exemple, des éléments ou d'autres informations concordants qui aident l'autorité lors de l'enquête et des poursuites portant sur l'affaire en question. Ou deuxièmement, en contrepartie d'une coopération sans rapport avec l'affaire pour laquelle le demandeur n'a pas remporté la course à l'immunité mais qui permet à l'autorité de mettre au jour une autre infraction présumée et d'ouvrir une enquête. La récompense attachée à cette deuxième forme de coopération est généralement appelé mécanisme d'« Amnesty plus ».

4. Raisons s'opposant aux dispositifs de récompense des demandeurs suivants

La principale objection à l'octroi des avantages prévus par le programme de clémence aux demandeurs suivants concerne l'allègement des sanctions et le moindre pouvoir de dissuasion qui en découle. Il faut donc examiner attentivement quelles récompenses sont strictement nécessaires et sont proportionnelles aux avantages que l'autorité retire de la coopération.

Le second argument repose sur l'idée qu'en théorie, les programmes de clémence sont susceptibles de favoriser la formation d'ententes ou du moins de donner à leurs membres la possibilité d'user d'une stratégie vis-à-vis de l'autorité[8]. Les ententes, comme toute organisation secrète, se caractérisent par leur ingéniosité et leur capacité à apprendre. Leurs membres peuvent donc chercher à exploiter stratégiquement toutes les particularités d'un programme de clémence. Ainsi, dans le cadre d'un système octroyant des réductions de peine aux demandeurs suivants, les membres de l'entente pourraient, avant la détection de leur entente, concevoir un dispositif leur permettant de se partager et de s'attribuer mutuellement les éléments de preuve pour atteindre chacun le niveau maximum de réduction dont il pourra bénéficier[9]. Les autorités de la concurrence pourraient minimiser ce risque particulier en conditionnant tout traitement de faveur, notamment l'octroi d'une immunité, à un seuil de coopération élevé. En agissant ainsi, elles s'exposeraient en outre moins au risque de ne pas recueillir, après avoir accordé l'immunité, de preuves suffisantes pour pouvoir mener les poursuites à leur terme.

On peut aussi se demander, dans un système récompensant les demandeurs suivants, si l'immunité octroyée au premier demandeur reste suffisamment attrayante par rapport aux réductions dont les demandeurs suivants bénéficient. Si les réductions accordées à ces derniers sont trop généreuses, les membres d'une entente pourraient renoncer à dénoncer son existence en contrepartie de l'immunité et décider de ne coopérer qu'une fois l'entente révélée. Il importe donc que les réductions dont peuvent bénéficier les demandeurs suivants ne remettent pas en cause l'incitation à être le premier demandeur à dénoncer l'entente en contrepartie de l'immunité[10].

5. Le dispositif de récompense des demandeurs suivants

Il est généralement admis que les raisons justifiant de récompenser la coopération des demandeurs suivants l'emportent sur les arguments s'opposant à cette pratique. C'est pourquoi la plupart des pays dotés d'un programme de clémence prévoient, sous une forme ou sous une autre, des mécanismes incitant les demandeurs suivants à contribuer à l'enquête engagée par l'autorité, même s'ils ont perdu la course à l'immunité.

La majorité des pays ont pris des dispositions en ce sens dans le cadre de leur programme de clémence, le traitement des demandeurs d'une immunité et d'une mesure de clémence étant alors déterminé par un seul et même instrument annonçant et définissant les règles de la politique de clémence nationale[11]. Dans d'autres pays, des instruments distincts régissent la coopération du demandeur de

8 Voir Wils, p. 29.

9 Il s'agit-là assurément d'une hypothèse extrêmement artificielle et théorique mais il n'est pas exclu qu'un tel dispositif puisse être mis en place, en particulier dans le cas d'ententes ne comptant qu'un petit nombre de membres au sein desquelles ceux-ci peuvent plus facilement coordonner leur action.

10 L'exemple du premier programme de clémence de la CE (la communication de 1996) illustre bien ce risque. Ce dispositif accordait des réductions de 75 % à 100 % du montant de l'amende au premier demandeur et pouvant atteindre 50 % aux demandeurs suivants. Le souci était que les entreprises attendaient, pour proposer leur aide à la Commission, d'y être acculées, du fait qu'une enquête à leur encontre était déjà en cours. Ce faisant, elles pouvaient quand même obtenir une réduction de 75 % à 100% du montant de leur amende à condition d'être la première à proposer son aide et à fournir des éléments déterminants établissant la preuve de l'infraction commise ou se voir octroyer une réduction de 50 % si elles ne proposaient pas leur aide en premier. Cet attentisme était dû à la fois au fait qu'elles ne connaissaient pas avec certitude le niveau exact de la réduction accordée au premier demandeur et à l'écart relativement peu important entre la réduction minimale prévue pour le premier demandeur (75 %) et la réduction maximale (50 %) applicable aux demandeurs suivants. Voir Faull et Nikpay, 8.123.

11 Par exemple, la Corée, le Mexique ou l'UE.

l'immunité et celle des demandeurs suivants[12]. Enfin, le programme de clémence de certains pays ne prévoit l'immunité que pour le premier demandeur, alors que les demandeurs suivants sont récompensés soit dans le cadre d'autres dispositions, soit par suite de l'exercice du pouvoir discrétionnaire en matière de poursuites par l'autorité compétente[13].

On pourrait faire valoir qu'un dispositif institutionnalisé de récompense des demandeurs suivants renforce la certitude et la prévisibilité (deux qualités généralement essentielles au succès d'un programme de clémence). Cela étant, une déclaration publique s'accompagnant d'une pratique cohérente de l'autorité vis-à-vis des demandes, comme c'est le cas aux États-Unis[14], peut favoriser tout aussi efficacement la mise en place des mécanismes d'incitation appropriés visant les demandeurs suivants. Comme pour les programmes de clémence en général, la cohérence, la transparence et la prévisibilité de la pratique de l'autorité de la concurrence sont alors au moins aussi importantes que ses règles formelles et ses objectifs déclarés.

Questions et problèmes à examiner

1. D'après votre expérience pratique, quelle est la raison la plus impérieuse justifiant de récompenser la coopération des demandeurs suivants ? Si votre pays ne récompense pas les demandeurs suivants en leur octroyant des avantages ou au moyen d'autres avantages que ceux prévus par le mécanisme d'« Amnesty plus », quelles raisons justifient une telle approche ?

2. D'après votre expérience, quelle est la valeur de la coopération du second demandeur ? Y a-t-il eu, dans votre pays, des cas où les poursuites n'ont pas pu aboutir dans une affaire donnée faute d'avoir pu réunir des preuves suffisantes en l'absence de coopération du second demandeur ?

6. Incitations des demandeurs suivants

Les mécanismes incitant les demandeurs suivants à coopérer prennent généralement la forme d'un allègement de toutes les sanctions que les demandeurs sont susceptibles d'encourir. Il peut ainsi s'agir d'une réduction des sanctions pécuniaires imposées ou recommandées ou d'un allègement des sanctions pénales préconisées qui seraient appliquées, en l'absence de coopération, dans les pays dotés d'un régime

12 Au Canada, par exemple, l'immunité est régie par le Bulletin sur l'immunité prévu par la Loi sur la concurrence alors que la clémence est déterminée par le Bulletin distinct sur le programme de clémence.

13 Par exemple, l'Afrique du Sud, l'Australie ou les États-Unis. La politique de clémence applicable aux entreprises du ministère américain de la Justice ne contient aucune disposition relative au traitement des demandeurs suivants et les mesures visant à les récompenser pour leur coopération relèvent du pouvoir discrétionnaire en matière de poursuites exercé par le ministère de la Justice dans le cadre de procédures de négociations de peine et dans les limites prévues par les Lignes directrices en matière de détermination de la peine (US Federal Sentencing Guidelines). La politique de clémence applicable aux personnes physiques adoptée en 1994 prévoit explicitement que le cas des personnes physiques qui ne peuvent prétendre à l'immunité sera examiné – si ces personnes demandent à bénéficier d'une immunité de poursuites pénales, prévue par la loi ou informelle, – comme une affaire relevant du pouvoir discrétionnaire en matière de poursuites, ce qui les place dans une situation analogue à celle des entreprises occupant le rang de demandeurs suivants.

14 Aux États-Unis, le traitement applicable aux personnes morales occupant le rang de demandeurs suivants a été énoncé dans une allocution prononcée à Washington DC, le 29 mars 2006, par M. Scott Hammond, Vice-procureur général adjoint chargé de l'application du Code pénal, lors de la 54e réunion de printemps de la section de l'ABA chargée du droit de la concurrence, et qui peut être téléchargée à l'adresse suivante : http://www.justice.gov/atr/public/speeches/215514.htm.

mettant en jeu la responsabilité pénale des membres d'une entente[15]. L'ampleur et la forme des récompenses varient d'un pays à l'autre mais elles atteignent généralement, en moyenne, un niveau représentant au maximum 50 % de la sanction qui serait imposée en l'absence de coopération.

Certains pays déterminent l'importance des récompenses en fonction de critères comme la valeur de la coopération fournie et/ou du moment où elle l'a été[16]. Ils introduisent ainsi une gradation ayant pour effet d'instaurer une « course à la clémence », analogue à la « course à l'immunité ». C'est notamment le cas lorsque le critère retenu est celui du moment où le demandeur a apporté sa coopération. Afin de prétendre au niveau de récompense le plus élevé, les entreprises s'efforcent d'être, autant que possible, les plus rapides à proposer leur aide à l'autorité, à lui communiquer les éléments de preuve, quels qu'ils soient, à leur disposition et à coopérer avec elle. Ce système est à l'évidence bénéfique pour l'autorité de la concurrence.

L'accès à des programmes de type « Amnesty Plus », qui récompensent la dénonciation d'une entente *différente* de celle qui a déjà été mise au jour, est une autre incitation que certains pays mettent à la disposition des demandeurs suivants[17]. Cela étant, ce mécanisme vise davantage à mettre au jour une autre entente qu'à obtenir des demandeurs qu'ils contribuent à l'enquête et aux poursuites concernant une affaire en cours. Sa finalité n'est donc pas la même et il convient donc d'en tenir compte lorsque l'on étudie son fonctionnement.

Les programmes de clémence prévoient en outre une immunité partielle visant à ne pas décourager le demandeur de communiquer des éléments de preuve qui pourraient être utilisés contre lui. Par conséquent, si un demandeur fournit des pièces à conviction dont l'autorité se sert pour établir des faits supplémentaires aggravant l'infraction ou en allongeant la durée, celle-ci renonce généralement à prendre ces faits en compte au moment où elle fixe le montant de l'amende qu'elle imposera à ce demandeur[18].

Au contraire de ce qui est prévu pour l'immunité, les demandeurs suivants ne peuvent normalement pas solliciter l'octroi de marqueurs leur permettant de s'assurer telle ou telle fourchette de sanction applicable[19]. La course que se livrent les demandeurs pour fournir en premier des éléments de preuve représentant une valeur ajoutée significative est donc féroce et commence généralement quelques heures après une perquisition.

---

15 Voir, par exemple, les points 25 à 26 de la communication de 2006 de la CE, Hammond, p. 3 à 10, section 3.3. du Bulletin canadien sur le programme de clémence.

16 Comme c'est le cas de la CE (voir points 25 à 26 de la communication de 2006), du ministère américain de la Justice (voir Hammond, pp. 5 à 6 et p. 11) ou du Bureau de la concurrence du Canada (voir la section 3.3. du Bulletin canadien sur le programme de clémence).

17 Comme c'est le cas des États-Unis (voir Hammond, p. 9), du Canada (section 3.5. du Bulletin canadien sur le programme de clémence), d'Israël (section 3 du programme de clémence de l'autorité de la concurrence israélienne) ou de la Nouvelle-Zélande (points 3 41 à 3.44 des Leniency Policy and Process Guidelines [lignes directrices sur la procédure et la politique de clémence dans les affaires d'entente] de la New Zealand Commerce Commission).

18 Voir point 26 de la communication de 2006 de la CE, Hammond, p. 3.

19 Le Canada est l'un des quelques pays à octroyer des marqueurs aux demandeurs suivants prétendant à bénéficier d'un régime de clémence (voir section 3.7.1. du Bulletin canadien sur le programme de clémence).

7. Exigences imposées aux demandeurs suivants

Les exigences imposées aux demandeurs suivants pour prétendre à un traitement de faveur sont généralement les mêmes que celles auxquelles doivent se plier les demandeurs d'une immunité. Outre la communication d'éléments de preuve et l'obligation imposée aux entreprises demandeuses de faire le nécessaire pour que ces dirigeants soient entendus et de contribuer efficacement à l'enquête, les demandeurs sont généralement tenus de mettre un terme à leur participation à l'entente avant de déposer une demande de clémence et de s'abstenir de divulguer l'existence de leur demande. Afin de justifier l'octroi de mesures de clémence et d'en tirer le maximum de profit, les autorités de la concurrence accordent en outre une grande importance au fait que les demandeurs apportent leur coopération dans les délais impartis et avec efficacité.

Pour veiller à ce que les demandeurs se conforment aux exigences en question, l'octroi de la clémence intervient généralement à la fin de la procédure engagée devant l'autorité de la concurrence[20]. De fait, l'octroi d'une réduction à un demandeur suivant ne doit avoir lieu au plus tôt que lorsque l'autorité de la concurrence a porté l'affaire jusqu'à un stade où elle ne peut plus bénéficier d'une coopération supplémentaire. Ce stade correspond normalement à la constatation officielle de l'infraction par l'autorité, à la présentation d'une recommandation officielle à un juge ou à une mise en examen. De ce fait, l'autorité peut revenir sur sa promesse de réduction des sanctions si le demandeur ne coopère pas réellement et efficacement durant toute la durée de l'enquête.

Les programmes de clémence ont pour point commun que les principaux membres de l'entente ou ceux ayant contraint d'autres personnes à participer à l'entente ou à rester en son sein ne peuvent prétendre à l'immunité. Il est plus rare que ces entreprises ne puissent prétendre à obtenir un allègement des sanctions[21]. Ceci s'explique par l'équilibre à préserver entre le fait qu'il n'est guère souhaitable de laisser échapper à la justice les entreprises ayant orchestré une entente et le fait que ces entreprises soient celles qui sont généralement en mesure de fournir les éléments de preuve les plus déterminants en raison de leur position même au centre de l'entente.

Le moment de la coopération est généralement l'un des critères décisifs pour déterminer l'ampleur de la réduction qui peut être octroyée[22], une coopération précoce étant plus précieuse pour l'instance d'instruction qu'une coopération fournie à un stade plus tardif de la procédure. C'est la raison pour laquelle les programmes de clémence prévoient parfois une échéance butoir au-delà de laquelle la clémence ne peut plus être accordée[23].

---

20 Dans le cas de la CE, le fait que la Commission estime qu'un demandeur peut prétendre à la clémence et à l'intérieur de quelle fourchette de réduction du montant de l'amende est notifié dans une communication de griefs alors que l'octroi d'une réduction dans une décision finale est subordonné au respect par le demandeur, avant la fin de la procédure, des conditions énoncées.

21 Voir Hammond, p. 7.

22 Dans le cas de la CE, la date à laquelle les éléments de preuve ont été communiqués détermine à la fois la fourchette de réduction et la réduction précise à l'intérieur de cette fourchette.

23 Voir, par exemple, le point 29 de la communication de 2006 de la CE, selon lequel la Commission peut s'abstenir de prendre en considération une demande de réduction d'amendes pour le motif qu'elle a été présentée après l'envoi de la communication des griefs. En revanche, comme l'illustre la décision récemment rendue par le Tribunal de l'Union européenne dans l'affaire Fuji (Affaire T-132/07, *Fuji Electric Corporation v Commission*), la coopération fournie après la notification de la communication des griefs peut aussi avoir une valeur ajoutée significative, notamment lorsqu'elle permet de corroborer certains éléments contestés par les parties.

Questions et problèmes à examiner

1. Veuillez décrire le traitement réservé aux demandeurs suivants dans votre pays. Veuillez en particulier préciser les incitations qui leur sont proposées et les exigences qui leur sont imposées et mettre l'accent sur l'évaluation du degré de coopération qu'ils fournissent.

2. Si votre programme de clémence prévoit la possibilité de solliciter l'octroi d'un « marqueur », veuillez analyser comment ce système a une incidence sur la course « à la première place » à laquelle se livrent les demandeurs éventuels. Les demandeurs suivants peuvent-ils aussi solliciter l'octroi d'un marqueur ?

3. Veuillez expliquer si votre programme de clémence reste applicable tout au long de la procédure ou si une échéance butoir est fixée au delà de laquelle votre organisme n'accepte plus aucune demande de clémence ?

4. Veuillez indiquer si les mesures de clémence accordées aux demandeurs suivants peuvent être révoquées par la suite et, le cas échéant, pour quelles raisons ?

5. Si votre programme de clémence ne récompense pas les demandeurs suivants, veuillez indiquer les autres moyens – si tant est qu'il y en ait – (comme les règlements amiables ou les procédures de négociation de peine) auxquels votre organisme recourt pour récompenser la coopération des autres participants à l'entente ?

8. Interaction entre le programme de clémence et d'autres mesures

Les politiques de clémence ne fonctionnement pas en vase clos. Elles interagissent avec d'autres instruments juridiques et instaurent de ce fait des dispositifs propres à chaque pays. Les règles pénales, les procédures d'application, les règles de protection de la vie privée, etc., interagissent toutes avec les politiques de clémence et les incitations qu'elles proposent. Pour que ce dispositif juridique global porte ses fruits, il est donc essentiel de préserver un équilibre entre tous les éléments qui le composent. Ci-après sont présentées les trois grandes composantes des politiques de la concurrence susceptibles d'avoir une incidence directe sur le fonctionnement optimal d'un programme de clémence.

Premièrement, *le régime de responsabilité pénale des personnes physiques*. Dans un pays doté d'un régime de responsabilité pénale, un programme de clémence ne fonctionnera probablement pas à moins de prévoir l'octroi de l'immunité ou de la clémence aux salariés de l'entreprise demandeuse. Certains pays, principalement les États-Unis, proposent également des programmes de clémence aux personnes physiques, instaurant de ce fait une course à l'immunité entre l'entreprise et ses salariés. Si l'entreprise est la première à remplir les conditions requises, ses salariés et administrateurs sont couverts par son immunité. En revanche, si elle ne dénonce pas une entente révélée par l'un de ses salariés, seul celui-ci en bénéficiera. De même, comme on l'a vu, les personnes qui coopèrent (en tant que demandeurs suivants) dans le cadre du programme de clémence applicable aux personnes physiques peuvent obtenir certains avantages conditionnés par l'exercice du pouvoir discrétionnaire du ministère américain de la Justice en matière de poursuites.

Deuxièmement, *les procédures de résolution accélérée des affaires* (comme les règlements amiables ou les procédures négociées) permettant aux entreprises de renoncer volontairement à contester les griefs qui leur ont été notifiés en contrepartie d'une réduction de la sanction. Ces dix dernières années, de plus en plus d'autorités de la concurrence ont adopté ce type de mesures, qui leur permettent de réaliser des gains d'efficacité lors de la procédure, lesquels ont à leur tour pour effet de renforcer leur pouvoir de dissuasion. Dans le cadre des enquêtes menées par le ministère américain de la Justice, la procédure de négociation de peine est probablement l'exemple le plus connu de ce type de mesures. La procédure de règlement amiable

récemment adoptée par la CE dans les affaires d'entente est un exemple de mécanisme de résolution rapide des affaires fonctionnant dans le cadre d'un régime d'application administrative. Une entreprise disposée à s'engager dans une telle procédure et à ne pas contester sa responsabilité dans une entente en contrepartie d'une réduction de peine sera aussi très probablement prête à coopérer. De ce fait, il est possible d'imaginer qu'une entreprise puisse prétendre ou souhaiter prétendre bénéficier à la fois des avantages relevant d'un programme de clémence et de ceux que procure un « règlement amiable ». Dans l'UE, les avantages prévus dans le cadre du programme de clémence et d'un règlement amiable (à savoir une réduction d'amende de 10 % dans ce dernier cas) peuvent se cumuler, ce qui est destiné à inciter les entreprises à la fois à contribuer à l'enquête en aidant la CE à établir l'infraction et à coopérer avec elle, en assumant sa responsabilité pour une infraction dans le cadre d'une procédure simplifiée, afin de lui permettre de rendre plus rapidement sa décision. Quoique visant des objectifs distincts, ces deux types de mesures sont donc complémentaires.

Quelles que soient les modalités de fonctionnement des programmes de clémence et des procédures de résolution accélérée dans la pratique, il est généralement admis qu'il devrait y avoir une différence suffisante entre les avantages octroyés dans le cadre des premiers et ceux accordés dans le cadre des secondes. Cette différence vise à préserver l'attrait du programme de clémence, ainsi qu'à ne pas affaiblir les mécanismes incitant les entreprises à proposer de contribuer activement à une enquête plutôt que de se contenter d'attendre pour voir si l'autorité peut établir la preuve de l'infraction et, le cas échéant, de se borner à ne pas contester les griefs à leur encontre. L'UE a estimé qu'une réduction de 10 % accordée dans le cadre d'un règlement amiable constitue à la fois un allègement suffisamment important pour inciter les entreprises à s'engager dans une telle procédure et suffisamment limité par rapport aux réductions prévues par le programme de clémence pour ne pas saper les mécanismes incitant les entreprises à coopérer dans ce cadre. Ce calcul semble s'avérer juste comme l'atteste le nombre de règlements amiables conclus par la CE ces dernières années. Dans le cadre de tous ces règlements, la CE a également accordé à certaines entreprises d'importantes réductions d'amendes en vertu de son programme de clémence.

Troisièmement, *les actions privées en dommages et intérêts* peuvent avoir une incidence sur les incitations des entreprises à solliciter la clémence. Les programmes de clémence peuvent être utilisés pour favoriser l'indemnisation des victimes, comme c'est le cas aux États-Unis par exemple, où les entreprises dont la demande a abouti peuvent bénéficier d'un dé-triplement des dommages et intérêts. Cependant, aucune règle ou avantage de cette nature n'est prévu pour les demandeurs suivants. En revanche, les actions privées en dommages et intérêts peuvent avoir pour effet de dissuader les entreprises de proposer aux autorités de coopérer avec elles dans le cadre d'un programme de clémence. Afin de minimiser ces éléments dissuasifs, les autorités de la concurrence font leur possible pour assurer que, s'agissant des dommages et intérêts, les entreprises demandant à bénéficier d'un programme de clémence ne soient pas plus mal loties que celles qui n'ont pas coopéré. Ce souci est particulièrement pertinent concernant les informations qu'elles communiquent[24]. En effet, si ces informations tombaient entre les mains d'éventuels plaignants, les demandeurs concernés s'en tireraient sans conteste plus mal que s'ils avaient choisi de ne pas coopérer. Les autorités de la concurrence doivent donc faire leur possible pour veiller à ce que les informations qui leur sont fournies dans le cadre du programme de clémence ne soient et ne puissent être utilisées que pour les besoins de cette procédure[25].

---

[24] Ces informations consistent généralement en dépositions auto-incriminantes, en éléments de preuve directs de l'infraction voire parfois en preuves du préjudice causé par l'infraction aux clients du demandeur.

[25] Ainsi, la communication de 2006 de la CE prévoit la possibilité, pour les entreprises, de faire des déclarations orales dans le cadre d'une procédure conçue pour limiter la quantité de documents auxquels des tiers pourraient avoir accès et que les demandeurs ont en leur possession par suite de leur demande de clémence. De même, dans le cadre des actions au civil en dommages et intérêts, le ministère de la Justice fait régulièrement valoir le principe du secret de l'instruction pour tous les documents ayant un lien avec la

Questions et problèmes à examiner

1. Veuillez décrire l'interaction entre votre programme de clémence et les autres mesures d'application évoquées plus haut. Lors de la mise au point de votre programme de clémence, avez-vous tenu compte de ses répercussions sur d'autres instruments d'application ? Dans l'affirmative, veuillez expliquer comment vous avez procédé et quelles solutions vous avez adoptées.

2. Veuillez indiquer, en particulier, si et de quelle manière les procédures de résolution accélérée des affaires (comme les règlements amiables ou les procédures de négociation de la peine) sont liées à des mécanismes permettant de récompenser la coopération des demandeurs suivants. Ces procédures visent-elles les mêmes objectifs que le programme de clémence (par exemple recueillir des informations et favoriser la coopération).

9. Conclusion

Les ententes injustifiables sont l'une des plus graves infractions au droit de la concurrence, lésant les consommateurs et portant tort à l'économie dans son ensemble. Les mettre au jour et ouvrir des poursuites à leur encontre est néanmoins complexe car elles exercent leurs activités sous le sceau du secret. Les moyens d'enquête classiques ne sont donc pas toujours suffisants pour y parvenir. Par conséquent, les autorités de la concurrence ont adopté des mesures d'application, comme les programmes de clémence, pour faciliter la révélation de ces ententes. Ces programmes prévoient des mécanismes incitant les membres de l'entente qui s'en désolidarisent à en dénoncer l'existence et à contribuer à l'enquête. Leur coopération est récompensée par l'octroi d'une immunité ou par une réduction des sanctions qui auraient été infligées, en l'absence de coopération, à la personne morale ou physique en cause.

Les programmes de clémence représentent l'instrument le plus efficace de lutte contre les ententes. Pour en assurer le succès, ces programmes doivent cependant être conçus de manière optimale. La présente note traite de l'importance de la coopération des demandeurs suivants pour les instances d'instruction, ainsi que des différents mécanismes par lesquels les pays récompensent leur coopération. Les autorités peuvent récompenser la coopération dans le cadre du programme de clémence proprement dit, en accordant un traitement de faveur au premier demandeur et aux demandeurs suivants ou en faisant bénéficier les demandeurs suivants d'autres mesures, au moyen de la procédure de résolution accélérée des affaires ou de la politique de détermination des amendes par exemple. Il convient donc de trouver un équilibre délicat entre ces divers dispositifs pour assurer l'efficacité des mesures d'application et pérenniser les mécanismes appropriés incitant les personnes morales et physiques à demander à bénéficier d'un programme de clémence.

demande d'amnistie, s'opposant ainsi, ou permettant ainsi aux demandeurs de s'opposer, à toute demande de communication des pièces visant les documents en question.

AUTRES OUVRAGES À CONSULTER

Aubert C., Rey P. et Kovacic W., « The impact of leniency and whistle-blowing programs on cartels », (2006) 24(6) International Journal of Industrial Organization, pp. 1241 à 1266.

Borrell J., Jimenez J.et Garcia C., « Evaluating Antitrust Leniency Programs », XREAP (2012). ECN Leniency Model Program, consultable en suivant le lien http://ec.europa.eu/competition/ecn/model_leniency_en.pdf.

Faull J., Nikpay A., The EC Law of Competition, Oxford University Press (2007).

Hammond S., Measuring the Value of Second-in Cooperation in Corporate Plea Negotiations, allocution prononcée à Washington DC, le 29 mars 2006, lors de la 54e réunion de printemps de la section de l'ABA chargée du droit de la concurrence, consultable en suivant le lien http://www.justice.gov/atr/public/speeches/215514.htm.

Holmes S., Girardet P., The International Comparative Legal Guide to: Cartels and Leniency 2012, Global Legal Group (2011).

Kloub J., « Using Leniency to Fight Hard Core Cartels – Leniency as the Most Effective Tool in Combating Cartels », note présentée lors du Forum latino-américain sur la concurrence de l'OCDE en 2009, consultable en suivant le lien http://www.oecd.org/dataoecd/40/2/43420031.pdf.

Mobley S. et Denton R., « Global Cartel Handbook – Leniency: Policy and Procedure », Oxford University Press (2011).

OCDE, Du recours à la clémence pour réprimer les ententes injustifiables (2001), Synthèses de l'OCDE, consultable en suivant le lien http://www.oecd.org/fr/gouvernementdentreprise/affairesdentreprises/1890464.pdf.

OCDE, Lutte contre les ententes injustifiables. Effets dommageables, sanctions efficaces et programmes de clémence (2002) Rapport de l'OCDE, consultable en suivant le lien http://publications.oecd.org/acrobatebook/2402012e.pdf.

Réseau international de la concurrence (RIC), Anti-cartel Enforcement Manual, Chapter 2 Drafting and Implementing an effective Leniency Policy, 2009, consultable en suivant le lien http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf.

RIC, ICN overview of Leniency Programs (Leniency Promotion), consultable en suivant le lien http://www.internationalcompetitionnetwork.org/working-groups/current/entente/awareness/leniency.aspx.

Wils W., « Leniency in Antitrust Enforcement: Theory and Practice », (2007) 30 World Competition 25-64, consultable en suivant le lien http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=456087.

Zingales N., European and American Leniency Programs: Two Models Towards Convergence?, (2008) 5(1) ComLRev.

COMPTE RENDU DE LA DISCUSSION

Par le Secrétariat

M. Frédéric Jenny, Président du Groupe de travail n° 3, ouvre la table ronde consacrée à l'application des programmes de clémence aux demandeurs suivants et souhaite la bienvenue aux participants. Il explique que les débats seront axés autour de trois thèmes principaux : premièrement, les incitations des demandeurs suivants et les raisons justifiant de les récompenser par des mesures de clémence ; deuxièmement, le traitement réservé aux demandeurs suivants dans les pays dotés de programmes de clémence (programmes qui récompensent tant les premiers demandeurs que les demandeurs suivants) ; et troisièmement, le traitement des demandeurs suivants dans les pays dotés de programmes d'amnistie (programmes qui ne récompensent que les premiers demandeurs).

1. Préserver les incitations pour le premier demandeur

Le Président relève qu'une question fondamentale au cœur des débats est celle de savoir si le fait de récompenser les demandeurs suivants amoindrit l'incitation à être le premier demandeur, et il invite les délégations américaine et française, dont les contributions écrites divergent sur ce point, à s'exprimer brièvement à ce propos.

La délégation des États-Unis souligne que, même si le principe de son programme de clémence est que le « vainqueur de la course rafle la mise », possibilité est donnée aux demandeurs suivants de tirer parti de leur coopération avec le ministère américain de la Justice. À la différence du demandeur qui parvient à bénéficier d'une amnistie, les demandeurs suivants doivent plaider coupables, mais ils peuvent être récompensés pour avoir, au moment opportun, apporté une coopération qui permet de recueillir de nouveaux éléments de preuve, et donc bénéficier d'avantages plus importants que les entreprises qui s'en tiennent à accepter de plaider coupable. L'expérience du ministère américain de la Justice montre également que la certitude et la célérité avec lesquelles les demandeurs qui bénéficient d'une amnistie ainsi que les demandeurs suivants sont en mesure de permettre la clôture de l'enquête et donc de poursuivre leurs activités constituent un avantage important dont tous peuvent profiter.

La délégation française souligne qu'un programme accordant la clémence aux demandeurs suivants constitue un outil indispensable pour l'autorité de la concurrence. En offrant une incitation aux demandeurs ultérieurs, l'autorité obtient des informations qui lui permettent de vérifier celles qui lui ont été communiquées par le premier demandeur d'amnistie ou recueillies lors de perquisitions, et de mieux comprendre la nature et la durée de l'infraction. En d'autres termes, tandis que le premier demandeur procure les premiers éléments permettant d'ouvrir une enquête, les informations communiquées par les demandeurs suivants fournissent souvent des preuves suffisantes pour pouvoir mener les poursuites à leur terme.

Dans le même temps, il importe de respecter une hiérarchie précise entre le traitement offert au premier demandeur et celui réservé aux demandeurs suivants afin de préserver l'incitation à être le premier à proposer sa coopération, déstabilisant ainsi l'entente. En France, les demandeurs suivants ne peuvent jamais bénéficier d'une réduction d'amende supérieure à 50 %, alors que le premier demandeur peut se voir accorder une amnistie totale.

Le Président remercie les deux délégations et invite la délégation australienne à préciser si sa politique consistant à ne pas récompenser les demandeurs suivants est fondée sur la crainte qu'un tel dispositif puisse porter atteinte aux incitations des entreprises demandant l'immunité.

La délégation australienne explique que, bien que l'immunité soit seulement accordée à la première entreprise dont la demande aboutit, les demandeurs suivants peuvent être récompensés en application de la politique de coopération s'ils communiquent des informations utiles. Cependant, leur récompense dépend de la valeur concrète de leur contribution et elle ne repose pas sur une réduction automatique déterminée par l'ordre des demandes. Selon la délégation, cette méthodologie est essentielle pour préserver l'équilibre entre le fait de proposer des incitations fortes aux premiers demandeurs et celui d'offrir la possibilité aux demandeurs suivants de fournir des preuves supplémentaires utiles aux enquêteurs. Pour la délégation, le fait de proposer des réductions prédéterminées et automatiques compromet, à l'inverse, le bon déroulement du programme de clémence.

Le Président demande ensuite à la délégation ukrainienne d'expliquer sa politique de traitement des demandeurs suivants.

La délégation ukrainienne relève avant tout que l'immunité totale des premiers demandeurs a été inscrite dans le droit ukrainien le 11 janvier 2001. Au gré de l'expérience acquise à mesure que cette loi était mise en œuvre, la Commission antimonopole a, en juillet 2012, adopté des règles précises fixant les obligations et les exigences imposées aux demandeurs d'immunité. Cependant, il n'existe pour l'instant aucun mécanisme formalisé de récompense des demandeurs suivants pour la précieuse coopération – selon la Commission antimonopole – qu'ils apportent souvent. Dans des affaires survenues sur les marchés des assurances et du bois, la Commission antimonopole a exercé son pouvoir discrétionnaire d'imposer des amendes ou de récompenser des demandeurs suivants qui avaient coopéré avec les enquêteurs après le stade de l'avis préliminaire. La délégation ukrainienne relève que cette situation n'est pas idéale dès lors que les demandeurs suivants ne bénéficient d'aucune prévisibilité quant au processus, ce qui peut les dissuader de coopérer. Cependant, la Commission antimonopole travaille actuellement sur une proposition de modification de la loi antimonopole qui formerait le socle juridique d'une procédure formalisée de récompense des demandeurs suivants.

Le Président demande à la délégation de la Commission européenne d'expliquer les mécanismes de traitement des demandeurs suivants en application du droit européen de la concurrence et, si possible, d'expliquer les critères d'octroi de l'immunité totale susceptibles d'avoir une incidence sur les incitations des demandeurs suivants.

La délégation de la Commission européenne précise tout d'abord que son programme de clémence relève d'un régime de mise en œuvre administrative, ce qui influence certaines de ses caractéristiques. Dans le cadre du programme de clémence de la Commission, deux critères permettent d'obtenir une immunité conditionnelle : premièrement, la communication de renseignements permettant à la Commission de procéder à une inspection ciblée ou, deuxièmement, la communication de renseignements permettant à la Commission de constater l'existence d'une entente. Même si le seuil des renseignements qui doivent être communiqués pour qu'une inspection ciblée puisse être effectuée peut sembler relativement bas, il ne faut pas perdre de vue qu'il s'applique à des cas où la Commission n'a pas connaissance de l'entente et où les renseignements que la Commission exige des demandeurs sont très précis (description de l'entente, noms de ses membres, etc.) Par ailleurs, une fois que ce seuil a été franchi, la Commission accorde une immunité conditionnelle, qui n'est confirmée au terme de la procédure que si le demandeur a rempli son obligation de coopérer pleinement, notamment en communiquant tous les éléments de preuve et renseignements en sa possession.

S'agissant du seuil à atteindre pour les demandeurs suivants, le programme de clémence de la Commission européenne les oblige à apporter une valeur ajoutée significative aux enquêtes, dans le but essentiellement de lui permettre de prouver plus facilement l'existence de l'entente qu'elle ne le pouvait avant que le demandeur ne lui prête son concours. Pour préserver une différence suffisante entre les avantages accordés aux premiers demandeurs et aux demandeurs suivants, ces derniers ne peuvent bénéficier que d'une réduction d'amende maximale de 50 %. La délégation souligne que des fourchettes de réduction prédéfinies (de 30 % à 50 %, de 20 % à 30% et de 0 % à 20 %) et la publication d'évaluations des demandes de clémence dans les décisions finales contribuent à la transparence du système de clémence, laquelle est capitale pour que son fonctionnement soit optimal. À l'instar des demandeurs d''immunité, les demandeurs suivants sont également tenus de coopérer sans interruption tout au long de l'instruction, ce qui signifie qu'ils doivent communiquer toutes les informations en leur possession et faire preuve d'un réel esprit de coopération. La valeur de leur coopération, qui dépend tant des informations qui sont communiquées que du moment où elles le sont, détermine la réduction précise qui sera octroyée au sein de la fourchette applicable. En règle générale, plus tôt le demandeur se manifeste, plus grande est la valeur de sa coopération. Cependant, la délégation de la Commission fait état d'affaires dans lesquelles elle a estimé que, même un an et demi après les inspections, les informations communiquées par un demandeur suivant revêtaient une valeur ajoutée significative et justifiaient une réduction de l'amende.

Le Président demande à la délégation allemande de lui faire part de ses vues concernant les seuils adéquats à appliquer pour accorder l'immunité dans le cadre d'un programme de clémence.

La délégation allemande explique que, dans l'ensemble, sa politique est fondée sur le postulat selon lequel plus le seuil à partir duquel un demandeur peut obtenir des avantages dans le cadre d'un programme de clémence est bas, plus les ententes deviennent instables. En vertu du programme de clémence allemand, tout demandeur est tenu, pour bénéficier de l'immunité, de communiquer au *Bundeskartellamt* des éléments de preuve et des renseignements permettant à cet organisme d'obtenir un mandat de perquisition. Par ailleurs, le demandeur doit coopérer sans interruption durant toute la durée de l'instruction et communiquer toutes les preuves à sa disposition. Bien que ce seuil puisse sembler relativement bas, l'expérience a montré qu'il était tout à fait suffisant puisqu'il a donné lieu à plus de 234 demandes de clémence depuis 2000, année où le programme de clémence a été mis en place.

Selon la délégation allemande, même s'il est toujours possible que le demandeur d'immunité préfère ne communiquer que le minimum d'informations nécessaires pour obtenir l'immunité, les demandeurs suivants n'en sont pas moins incités à coopérer en raison des mécanismes de récompense qui les visent. Ainsi, si un demandeur suivant communique, par exemple, de nouvelles informations que le premier demandeur aurait pu lui aussi fournir, ce dernier peut perdre son immunité faute d'avoir pleinement coopéré.

Le Président note que, pour l'instant, le seuil relativement peu élevé permettant de bénéficier de l'immunité semble être une caractéristique commune de bon nombre des programmes de clémence. Il invite ensuite toutes les délégations à s'exprimer sur cette question.

La délégation canadienne explique qu'au Canada, le seuil pour obtenir l'immunité ou la clémence est faible. Le demandeur doit fournir une présentation qui décrit en détail l'activité illégale pour laquelle l'immunité ou la clémence est sollicitée, l'effet de cette activité illégale au Canada, son rôle dans l'infraction pour laquelle l'immunité ou la clémence est demandée, et les pièces justificatives. Les demandeurs de clémence doivent également accepter de plaider coupable. Après une évaluation de la présentation de l'information du demandeur, le Bureau présentera l'information au Service des poursuites pénales du Canada («SPPC») en faveur de la recommandation d'immunité ou de clémence du Bureau ou une recommandation de clémence. Le SPPC a l'autorité finale indépendante de décider s'il accordera

l'immunité ou la clémence à un demandeur. Le candidat est tenu de fournir une communication et coopération totales après que l'immunité ou la clémence ait été accordée.

La délégation de la Commission européenne relève que le seuil de coopération prévu par la Commission pour l'octroi de l'immunité est très proche de celui du Canada et des États-Unis et que dans toutes ces autorités les demandeurs ont une obligation de coopérer pendant toute la durée de la procédure. Par ailleurs, l'obligation faite au demandeur de déclarer qu'il participe à une entente correspond dans la pratique à une obligation de reconnaissance de culpabilité.

2. Incitations des demandeurs suivants

Le Président remercie les délégations qui sont intervenues et indique que les incitations des demandeurs suivants sont la prochaine question qui sera abordée lors de la table ronde. Il demande à la délégation espagnole de présenter son dispositif de récompense des demandeurs suivants.

La délégation espagnole décrit tout d'abord le système de clémence et de répression des ententes dans le cadre duquel deux organes, relevant l'un et l'autre de l'autorité de la concurrence, sont chargés de mettre en œuvre le programme de clémence. Le premier organe est la Direction des enquêtes, qui mène l'instruction et propose une décision, en matière de clémence notamment, qu'elle adresse au deuxième organe, le Conseil de la *Comisión Nacional de la Competencia* (CNC).

Le programme de clémence en tant que tel existe depuis février 2008. Il est inspiré du programme modèle en matière de clémence du Réseau européen de la concurrence (REC) et s'apparente par conséquent très fortement à celui de la Commission européenne. Les demandeurs suivants peuvent être récompensés pour avoir apporté une valeur ajoutée significative aux enquêtes, pour autant qu'ils satisfassent à leurs obligations générales en matière de coopération. À titre d'exemples d'informations à valeur ajoutée significative, la délégation espagnole cite celles qui permettent de connaître un plus grand nombre de membres de l'entente, de mieux préciser sa durée ou de mettre au jour davantage de pratiques incriminées.

Les demandes de clémence sont acceptées jusqu'à la communication des griefs, après quoi elles sont examinées et une proposition relative à leur valeur est adressée au Conseil de la CNC, qui adopte ensuite une décision finale. Il est arrivé plusieurs fois que le Conseil de la CNC rejette la proposition d'octroi de mesures de clémence. Dans l'affaire des produits professionnels de soins capillaires, il a estimé que le demandeur de mesures de clémence n'avait pas fourni de preuves apportant une valeur ajoutée significative à l'enquête. Dans deux autres affaires, il a estimé que les demandeurs n'avaient pas rempli leur obligation de coopération puisque dans l'une, ils avaient fait appel d'une décision provisoire de la Direction des enquêtes et dans l'autre ils avaient effectué dix nouvelles dépositions contradictoires. C'est pourquoi le Conseil n'a pas octroyé les réductions proposées au titre du programme de clémence.

Le Président remercie la délégation espagnole et relève que de nombreuses contributions, comme celles de la France, de l'Allemagne et de la Commission européenne, mettent en évidence l'apport essentiel que constitue la coopération du deuxième demandeur à l'aboutissement des poursuites. Dans ces contributions il est précisé que, sans la coopération des demandeurs suivants, il serait difficile de mener à leur terme certaines affaires. Dans cette optique, le Président demande à la délégation américaine si la situation est semblable aux États-Unis ou si les autorités s'appuient davantage sur les informations fournies par le premier demandeur et sur les mesures d'enquêtes propres au ministère de la Justice.

La délégation des États-Unis répond que, même s'il est difficile d'extrapoler à l'ensemble des affaires, l'expérience a montré que les demandeurs suivants peuvent souvent compléter les premières informations fournies par les premiers demandeurs et donc contribuer aux poursuites portant sur l'ensemble des

membres de l'entente. Il est rare que les premiers demandeurs soient les meneurs de l'entente et qu'ils disposent d'informations relatives à l'entente dans son ensemble. C'est pourquoi les renseignements émanant de demandeurs suivants sont souvent très précieux.

Le Président demande à la Hongrie d'aborder la question de la cohérence entre les mécanismes de clémence et les autres dispositifs, qu'elle a mis en évidence dans sa contribution écrite.

La délégation hongroise décrit l'évolution observée depuis l'instauration en 2005 de sanctions pénales en cas de manipulation des procédures d'appel d'offres, ces sanctions ayant eu un effet négatif sur le programme de clémence hongrois en raison du manque de clarté et de prévisibilité, concernant l'application des critères d'immunité pénale, pour les entreprises dont la demande de clémence avait abouti. Une récente modification du droit pénal, qui entrera en vigueur en janvier 2013, vise à préserver une cohérence entre la responsabilité pénale et les règles de clémence et à garantir que les mesures de clémence dont bénéficient les entreprises dont la demande a abouti se traduisent bien dans le domaine pénal. La délégation dit espérer que cette modification injecte dans le système le degré de certitude indispensable et ait une incidence positive sur le fonctionnement du programme de clémence.

3. Traitement des demandeurs suivants

Le Président aborde ensuite la question du traitement des demandeurs suivants et des divers critères retenus pour leur octroyer ou non une réduction éventuelle de la sanction en contrepartie de leur coopération. Les contributions écrites font apparaître que les autorités des différents pays tiennent généralement compte des trois facteurs suivants : l'ordre des demandes, le moment où elles sont déposées et la valeur de la coopération apportée. Le Président demande à la Pologne de décrire les facteurs dont elle tient compte dans le cadre de son programme de clémence.

La délégation polonaise explique que l'ampleur de la réduction octroyée aux demandeurs suivants dépend de l'ordre dans lequel les demandes sont déposées. Le premier des demandeurs suivants bénéficie d'une réduction de 50 %, le deuxième d'une réduction de 30 %, et tous les autres d'une réduction de 20 % chacun. Dans la mesure où la valeur des informations dépend en partie du moment où elles sont fournies (par rapport aux informations dont l'autorité dispose déjà), il est également tenu compte de ce critère. Cependant, le facteur principal est l'ordre de réception des demandes. À la question du Président de savoir quels sont les effets de ce système, la délégation polonaise répond que même si un quatrième demandeur apporte les éléments probants nécessaires pour poursuivre l'entente, il ne bénéficierait toutefois que d'une réduction de 20 % du montant de l'amende dès lors que les demandeurs précédents ont fourni des informations à valeur ajoutée, quand bien même ces dernières n'ont pas suffi pour faire aboutir les poursuites.

Le Président adresse une question à la délégation française concernant la priorité accordée en France aux facteurs que constituent le moment et la valeur des demandes ainsi que l'ordre dans lequel elles sont effectuées.

La délégation française répond que le système français donne la priorité à l'aspect temporel de la coopération dans la mesure où il applique des réductions dégressives en fonction de l'ordre de dépôt des demandes. Un tel système favorise une course entre les demandeurs pour fournir à l'autorité de la concurrence des informations le plus tôt possible. Dès lors que l'octroi de l'immunité et de la clémence est subordonné au respect de l'obligation de coopération ininterrompue, les demandeurs sont incités à coopérer tout au long de la procédure et communiquent de nouveaux éléments dès qu'ils en ont connaissance. Le moment et la valeur d'une demande sont également des facteurs très pertinents. Ils sont en partie indissociables dans la mesure où une demande déposée avant les inspections est susceptible de revêtir une valeur plus grande qu'une demande ultérieure. Pour conclure, la délégation souligne que, bien

que l'objectif de la course à la clémence ne soit pas de permettre à l'autorité d'économiser les moyens qu'elle consacre à ses enquêtes du fait qu'elle peut s'appuyer sur les demandeurs suivants, cet avantage découle néanmoins naturellement du système en vigueur.

Le Président demande ensuite à la délégation australienne de décrire son système, qui semble accorder une plus grande importance à la valeur des informations fournies qu'à l'ordre des demandes pour déterminer la récompense à octroyer aux demandeurs suivants.

La délégation australienne explique que cette ligne de conduite, selon laquelle l'octroi de réductions à des demandeurs suivants est discrétionnaire et dépend de la valeur de la coopération, traduit la philosophie ayant présidé à la conception du système de clémence australien, qui incite le plus possible les demandeurs à bénéficier de l'immunité. Seul le premier demandeur bénéficie d'une réduction assurée et prévisible, tandis que pour les demandeurs suivants, la situation est incertaine. Cette approche diffère, par exemple, de celle de la Commission européenne qui a fixé des fourchettes de réductions, qui sont donc prévisibles pour les demandeurs suivants.

Le Président se tourne alors vers la Suisse, dont la contribution écrite met également l'accent sur le facteur principal que constitue la valeur de la coopération pour déterminer la proportion des réductions à octroyer aux demandeurs suivants.

La délégation suisse explique que la détermination de l'ampleur de la réduction à accorder aux demandeurs suivants est hautement discrétionnaire, aucun critère n'étant défini dans aucun texte de loi à cet égard. Dans la pratique, l'autorité suisse de la concurrence examine la quantité et la qualité des informations reçues et détermine au cas par cas l'ampleur de la réduction qu'il convient d'appliquer. À la question posée par le Président, la délégation répond que les entreprises ne se plaignent pas de ce manque de prévisibilité qui ne les décourage pas de prêter leur concours.

Le Président demande à la délégation italienne d'expliquer la différence entre les informations à valeur ajoutée significative et les informations dont la valeur est appréciable, dont elle explique dans sa contribution écrite qu'il s'agit de facteurs déterminant l'octroi de mesures de clémence.

La délégation italienne explique qu'en Italie, il n'est fait, dans la communication sur la clémence, aucune distinction formelle entre les informations à valeur significative et les informations dont la valeur est appréciable. Cette distinction est toutefois apparue dans la jurisprudence s'agissant du pouvoir discrétionnaire de l'autorité italienne de la concurrence qui détermine l'ampleur de telle ou telle réduction en fonction du moment, de la valeur et du degré de la collaboration. Le concept de valeur appréciable a été appliqué dans l'affaire *Logistica Internazionale* au quatrième demandeur, dont les informations ayant motivé la demande, même si elles étaient utiles pour prouver toute la durée de sa participation à l'entente, avaient une valeur nettement inférieure à la valeur significative des contributions des demandeurs précédents. Par conséquent, ce demandeur n'a pu bénéficier que d'une réduction de 10 % de l'amende.

Le Président remercie la délégation et relève qu'il n'a gère été accordé d'attention à ce jour à la vertu du critère de valeur ajoutée significative et à la question de savoir si son application peut, par exemple, être à l'origine d'une action stratégique de la part des autorités de la concurrence. Sans consacrer aucune ressource à ses propres enquêtes, une autorité peut ainsi en effet faire peser la charge de l'enquête sur les demandeurs qui bénéficient alors d'importantes réductions lorsque leurs contributions sont comparées au petit nombre d'éléments qui figurent dans le dossier au moment de leur demande. Le Président s'adresse ensuite à la délégation roumaine qui, dans sa contribution écrite, a fait part de son scepticisme à l'égard du critère de valeur ajoutée significative.

La délégation roumaine explique tout d'abord que son programme de clémence, qui a été adopté en 2004 et remanié en 2009, est tout à fait conforme au programme modèle en matière de clémence du REC. Elle aborde ensuite la question des marqueurs pour les demandeurs suivants (utilisés, par exemple, au Canada et au Royaume-Uni) et la manière dont ils peuvent être utiles afin que le facteur du moment de la demande ne soit plus le plus important des critères à retenir pour déterminer l'ampleur de la réduction.

Le Président demande ensuite à la délégation mexicaine de décrire les critères retenus au Mexique pour déterminer la récompense à octroyer aux demandeurs suivants.

La délégation mexicaine explique qu'en application du droit mexicain, les demandeurs suivants peuvent bénéficier d'une réduction d'amende de 50 %, 30 % ou 20 %, en fonction du moment et de la valeur de leur coopération. Pour déterminer l'ampleur précise d'une réduction, l'autorité mexicaine de concurrence jouit d'un important pouvoir discrétionnaire. Tout en observant les deux critères fixés par la loi, elle tient également compte d'autres facteurs, tels que la participation de la direction, les procédures internes et la mise à disposition d'éléments de preuve. La délégation indique également que les entreprises dont la demande de clémence aboutit bénéficient d'une immunité pénale pour leurs salariés, ce qui constitue une incitation et une récompense non négligeables.

Le Président demande à la délégation américaine de décrire les critères retenus par le ministère américain de la Justice.

La délégation des États-Unis répond que, bien qu'aucun critère formel ne soit appliqué pour déterminer le montant de la récompense accordée aux demandeurs suivants, le ministère américain de la Justice a, à plusieurs reprises, indiqué que le moment et la valeur de la coopération apportée constituent deux facteurs dont il tient compte lorsqu'il exerce son pouvoir discrétionnaire en matière de poursuites. En se fondant sur ces deux facteurs, le procureur peut faire une recommandation dans les limites prévues par les Lignes directrices en matière de détermination de la peine (*US Federal Sentencing Guidelines*) pour imposer une sanction inférieure à celle qui aurait été infligée en l'absence de coopération.

Le Président demande ensuite à la délégation canadienne de décrire le système qu'elle met en œuvre pour les demandeurs suivants.

La délégation canadienne explique que son programme de clémence en faveur des demandeurs suivants a été formalisé en 2010 au terme d'une vaste consultation publique. Cette consultation a révélé que les entreprises accordaient une grande valeur à la prévisibilité et à la certitude, ce qui est l'une des raisons qui avaient amené le Bureau de la concurrence à adopter un système de marqueurs pour les demandeurs suivants. Étant donné que les premiers demandeurs de clémence dont la demande aboutit bénéficient également d'une immunité pénale totale pour leurs salariés, disposer du temps nécessaire pour fournir les preuves requises est d'une grande importance pour les demandeurs. La délégation relève qu'en raison de l'équilibre instauré dans la conception du programme canadien de clémence, une grande importance est accordée à la prévisibilité et à la transparence afin d'encourager les entreprises à se manifester et à coopérer.

Après y avoir été invitée par le Président, la délégation néo-zélandaise décrit son programme pour les demandeurs suivants, lequel a été adopté en 2010. Ce système présente bon nombre des caractéristiques décrites précédemment, telles que le moment de la demande, la valeur des informations communiquées et l'obligation de coopération ininterrompue de la part des demandeurs suivants. Les réductions possibles varient entre 25 % et 50 %, leur ampleur exacte relevant du pouvoir discrétionnaire de l'autorité de la concurrence qui tient compte du moment et de la valeur de la demande. On observe donc une incertitude relative pour les demandeurs suivants qui vise à les inciter le plus possible à demander l'immunité.

Le Président remercie les délégations et se tourne vers le Japon et le Taipei chinois qui imposent tous deux une limite absolue au nombre de demandeurs suivants pouvant bénéficier de mesures de clémence, et il leur demande de préciser les motifs d'un tel système et les résultats obtenus.

La délégation japonaise explique tout d'abord que son programme de clémence a été adopté en 2006 et réaménagé en 2010. Ce programme accorde l'immunité au premier demandeur et des réductions de la surtaxe aux demandeurs suivants. Avant son réaménagement en 2010, le nombre maximal de demandeurs pouvant bénéficier de mesures de clémence était limité à trois, les réductions étant fonction du moment où la demande avait été déposée. Pour les demandes effectuées avant l'ouverture de l'enquête, le premier demandeur bénéficiait d'une réduction de 100 %, le deuxième de 50 % et le troisième de 30 %. Si la demande n'était formulée qu'après l'ouverture de l'enquête, les réductions étaient de 30 %, quel que soit l'ordre des demandes.

Après avoir passé en revue les résultats obtenus avec ce système, la *Japan Fair Trade Commission* (JFTC) a décidé de porter à cinq le nombre de demandeurs pouvant bénéficier de mesures de clémence lorsque la demande était déposée avant l'ouverture d'une enquête. Il s'agissait d'encourager un plus grand nombre d'entreprises à prêter leur concours, permettant à la JFTC d'obtenir un vue complète de l'entente tout en maintenant la course à la clémence et, partant, l'incitation à être le premier demandeur.

Un système de marqueurs attribués avant l'ouverture de l'enquête existe. Au-delà de ce stade, les seuils à atteindre pour bénéficier de mesures de clémence sont relevés, les demandeurs étant alors tenus de fournir de nouvelles preuves pour pouvoir bénéficier d'une réduction. En ce qui concerne les sanctions pénales, le premier requérant dont la demande d'immunité est faite avant la date de début de l'investigation bénéficie automatiquement d'une immunité, tandis qu'il appartient à la JFTC de décider de porter plainte contre les requérants suivants, y compris après l'investigation. La délégation japonaise conclut sa présentation en indiquant que le nombre élevé de demandes de clémence (623 depuis 2006 et 143 en 2011) atteste de la réussite du programme de clémence de la JFTC.

À la question du Président de savoir si les secteurs comptant de nombreux acteurs ont critiqué le système limitant le nombre d'entreprises pouvant bénéficier de mesures de clémence, la délégation japonaise répond que l'augmentation du nombre de demandeurs est en partie le résultat de ces critiques mais que les limites actuelles ont permis d'instaurer un bon équilibre.

La délégation du Taipei chinois présente ensuite son système qui limite le nombre de demandeurs pouvant bénéficier de mesures de clémence. Le programme de clémence a été mis en place en novembre 2011 au terme de nombreuses études menées par l'autorité de la concurrence qui ont entre autres révélé que le nombre moyen de participants à une entente était de 7 ou 8. L'autorité de la concurrence a alors décidé de limiter à cinq le nombre de demandeurs pouvant bénéficier de mesures de clémence, le premier demandeur bénéficiant d'une réduction de 100 % et le dernier d'une réduction maximale de 10 %.

Des mesures de clémence peuvent être accordées tout au long de la procédure mais diverses exigences sont imposées selon que la demande a été déposée avant ou après l'ouverture d'une enquête. Des marqueurs sont utilisés tant pour les demandeurs de l'immunité que pour les demandeurs suivants. La première demande que l'autorité de la concurrence a reçue a été déposée dans le cadre d'une enquête ouverte d'office sur la base d'un communiqué de presse publié par le ministère américain de la Justice annonçant le règlement d'une affaire impliquant une entreprise du Taipei chinois. Bien que, dans cette affaire, une seule entreprise ait déposé une demande dans le cadre du programme de clémence, l'exercice a été un succès pour l'autorité de la concurrence qui a pu tirer des leçons importantes quant à l'application de ses règles en matière d'entente et de clémence.

Le Président invite la délégation lituanienne à s'exprimer sur la question des marqueurs pour les demandeurs suivants, laquelle est évoquée dans sa contribution écrite.

La délégation lituanienne explique que, bien qu'un programme de clémence existe en Lituanie depuis 2008, seules trois demandes d'immunité ont été enregistrées jusqu'à présent et aucune demande de clémence. Des marqueurs sont utilisés pour les demandeurs suivants au motif qu'ils confèrent une certitude pour les demandeurs potentiels, qui peuvent, grâce à ce système, bénéficier d'une réduction d'amende non négligeable pouvant atteindre 75 %. À la question du Président de savoir quelles peuvent être les raisons de l'absence de demandeurs suivants, la délégation invoque la petite taille de l'économie, le fait que le passé totalitaire du pays a une incidence négative sur la divulgation d'informations aux autorités, le montant relativement peu élevé des amendes et le manque de crédibilité de l'autorité de la concurrence.

Le Président demande aux délégations britannique et coréenne de donner des précisions sur les critères qu'elles retiennent pour refuser des réductions d'amendes à certains demandeurs suivants.

La délégation britannique relève tout d'abord qu'à cet égard, il existe une tension importante entre la certitude juridique qui doit être assurée aux demandeurs potentiels et le pouvoir discrétionnaire conféré aux autorités. Elle souligne également que la manière dont les différents pays traitent cette question est fonction du fait qu'ils ont recours à un système administratif ou à un système judiciaire. Par exemple, les États-Unis fixent des orientations très claires au moyen de leurs directives en matière de détermination de la peine puisque la procédure appliquée dans ce cadre y est principalement de nature pénale.

Les autorités doivent réfléchir à la meilleure manière d'expliquer leurs politiques de clémence, mais également comment ces politiques seront mises en pratique et ce afin que les entreprises ait, *ex ante*, une idée de ce qui les attend avant de solliciter le bénéfice de la clémence. Dans le même temps, il faut aussi faire preuve de flexibilité pour encourager d'autres demandeurs à prêter leur concours s'il en est besoin.

S'agissant de l'exclusion de certains demandeurs suivants, la délégation note que l'autorité britannique de concurrence n'a, dans la pratique, jamais refusé de mesures de clémence, même si ses politiques précisent qu'elle est habilitée à le faire à tout stade de la procédure, y compris en appel, si l'un quelconque des critères d'octroi n'est pas rempli. L'autorité se réserve ainsi le droit d'utiliser toute information communiquée par un demandeur débouté à l'encontre de celui-ci ou d'un tiers.

La délégation fait une distinction entre l'absence d'aide constructive et l'entrave manifeste, telle que la falsification ou la destruction de documents, ces deux comportements pouvant donner lieu à l'annulation des mesures de clémence. C'est la raison pour laquelle l'autorité cherche à expliquer aux parties quelles sont leurs obligations et à leur fournir quelques exemples précis de ce qui est susceptible de constituer une entrave frauduleuse.

La délégation coréenne met en évidence les modifications importantes apportées dans le droit coréen de la concurrence qui visaient précisément à empêcher les attitudes opportunistes d'entreprises sollicitant de mesures de clémence. Tout d'abord, ces modifications ont porté le niveau de l'amende à 10 % du chiffre d'affaires afin de renforcer le caractère dissuasif de la sanction. Elles ont ensuite élargi le champ des sanctions pénales en modifiant les lignes directrices de la Corée relatives à la saisine du ministère public.

En réaction à des situations où des entreprises ont communiqué des preuves sans intérêt ou peu utiles afin de bénéficier de la qualité de premier demandeur, l'autorité a modifié sa communication sur la clémence dans le but d'étendre le champ des preuves qu'un demandeur doit fournir avant la confirmation de son statut. À l'instar de l'*Office of Fair Trading* britannique, la *Korean Fair Trade Commission*

conserve le droit d'annuler des mesures de clémence jusqu'au terme de l'enquête en cas de découverte de données fausses ou falsifiées.

La dernière modification législative en date limite l'octroi de mesures de clémence au premier demandeur lorsque l'entente ne comporte que deux participants. Cette disposition a été prise parce que le deuxième participant pouvait attendre plusieurs années avant de se manifester, sachant qu'il pouvait toujours bénéficier d'une réduction d'amende de 50 %. Cette modification de loi précise également que les demandeurs suivants ne bénéficieront d'aucun avantage s'ils prêtent leur concours deux années ou plus après le dépôt de la première demande.

Le Président confirme ensuite qu'en Corée, l'annulation de la possibilité pour le dernier demandeur de solliciter des mesures de clémence ne s'applique qu'aux ententes comportant deux participants. Il pose la question normative de savoir si, dès lors que dans certains pays tous les participants à une entente peuvent bénéficier d'une forme ou l'autre de clémence, au moins une entreprise peut être sanctionnée sans réduction de peine.

Il invite ensuite les délégations sud-africaine et estonienne à faire part de leur expérience concernant les appels interjetés contre les décisions en matière de clémence rendues par les autorités de la concurrence.

La délégation sud-africaine fait succinctement le point sur une affaire en cours dans laquelle une entreprise a interjeté appel contre l'octroi de mesures de clémence par le tribunal de la concurrence sur la base d'une recommandation de la *Competition Commission*. L'entreprise en question a contesté le droit que la loi donne à la Commission, l'autorité chargée des poursuites, de proposer que des parties bénéficient d'une immunité. La Cour suprême d'appel a confirmé la décision de la Commission, précisant que cette autorité relevait d'un système administratif dont la mission était de lutter contre les comportements anticoncurrentiels et de promouvoir la transparence du marché. Dans le même esprit, la Commission est donc tenue de mettre en œuvre tous les outils à sa disposition, y compris le programme de clémence. L'entreprise a contesté la constitutionnalité de cette politique et la Cour constitutionnelle a été saisie de l'affaire.

Le Président demande à la délégation estonienne d'expliquer en quoi le pouvoir discrétionnaire conféré à l'autorité de la concurrence d'octroyer des mesures de clémence a été contesté.

La délégation estonienne relate une affaire portée devant la Cour suprême, qui a conclu que la décision d'octroi de mesures de clémence par le ministère public sur la base d'une demande adressée à l'autorité de la concurrence est susceptible d'appel de la part d'autres demandeurs si cette décision a porté atteinte à leurs droits fondamentaux ou procéduraux.

Le Président invite ensuite les participants à préciser si des tribunaux ont confirmé la validité du pouvoir discrétionnaire conféré aux autorités de la concurrence s'agissant des demandeurs suivants.

La délégation canadienne attire l'attention sur une récente décision rendue par le juge en chef de la Cour fédérale du Canada exposant les motifs ayant présidé à la détermination de la peine à la suite du plaidoyer de culpabilité de Maxzone Auto Parts (Canada) Corp.. Le Juge en Chef a souligné que l'ordre dans lequel les co-conspirateurs déposaient leur demande de clémence était essentiel pour déterminer l'amende ou la peine imposée en définitive. Pour lui, la certitude juridique favorise la coopération des demandeurs suivants, de même que l'application d'amendes proportionnées destinées à sanctionner et à décourager les actes illicites. Le jugement a conclu que le dispositif du programme de clémence de l'autorité de la concurrence était suffisamment vaste et flexible pour servir l'intérêt général sans compromettre l'administration de la justice.

Le Juge en Chef Crampton a convenu de l'objectif général des programmes de clémence, qui est d'encourager les entreprises et les particuliers à prêter leur concours pour bénéficier de recommandations en matière de clémence. Il a relevé que les informations communiquées par les demandeurs suivants étaient non seulement utiles pour corroborer les preuves fournies par les demandeurs d'immunité, mais qu'elles permettaient également de réaliser des économies considérables tant au niveau des enquêtes que des poursuites.

La délégation allemande explique que lorsqu'un défendeur conteste une décision rendue par l'autorité de la concurrence, il peut déposer un appel motivé. Si l'autorité modifie sa décision, l'appel est envoyé au procureur général qui décide s'il convient de saisir le tribunal.

La délégation de la Commission européenne explique qu'il n'y a eu qu'une seule affaire dans laquelle la Commission a annulé l'immunité conditionnelle. Dans l'affaire de l'entente sur le marché italien du tabac brut, Deltafina avait averti les autres membres de l'entente à laquelle elle participait juste avant que la Commission effectue son inspection. En appel, le Tribunal a entériné la décision de la Commission et reconnu son pouvoir discrétionnaire de détermination des réductions à accorder, rappelant que les demandeurs sont tenus de fournir des informations, mais également de coopérer véritablement avec l'autorité.

Dans une affaire, le Tribunal de l'Union européenne a annulé la décision de la Commission en matière de clémence. Dans l'affaire de l'entente relative aux appareillages de commutation à isolation gazeuse, la Commission a refusé à Fuji le droit de demander à bénéficier de mesures de clémence après la communication des griefs puisqu'elle avait eu, à ce stade, la possibilité de prendre connaissance de l'ensemble des preuves incriminant l'entente. Le Tribunal a estimé pour sa part qu'une demande ne pouvait pas être exclue pour ce seul motif puisqu'elle pouvait toujours apporter une valeur ajoutée significative.

La délégation des États-Unis relève qu'aucune décision de justice n'a remis en cause son pouvoir discrétionnaire, s'agissant de conclusions rendues ou de peines infligées par elle.

Pour conclure, le Président note que les tribunaux semblent avoir conscience de l'importance du pouvoir discrétionnaire et de la flexibilité en ce qui concerne l'octroi de mesures de clémence et la réduction des peines. Il aborde ensuite le troisième et dernier point thématique, à savoir le traitement des demandeurs suivants dans les pays qui limitent l'application du programme de clémence au premier demandeur.

4. Traitement des demandeurs suivants dans les pays dotés d'un programme d'amnistie

Le Président demande à la délégation française de commencer par expliquer la distinction claire instaurée par l'Autorité de la concurrence française entre les demandeurs de mesures de clémence et les entreprises qui se manifestent ultérieurement et acceptent de coopérer.

La délégation française explique qu'il existe une hiérarchie applicable, concernant les éventuelles réductions d'amendes, entre les demandeurs de mesures de clémence et les entreprises qui négocient ultérieurement un règlement ou une transaction pénale en contrepartie de leur coopération. Les demandeurs de mesures de clémence fournissent des preuves essentielles permettant à l'autorité de prendre connaissance de l'entente, y compris de sa durée, de sa nature et de l'identité de ses participants, et qui servent de base pour déterminer les amendes imposées au final. En revanche, les entreprises qui ne contestent pas les accusations dont elles font l'objet permettent seulement d'alléger quelque peu la charge administrative induite par des poursuites formelles et ne contribuent pas à prouver l'existence de l'entente.

Le Président demande à la délégation des États-Unis d'expliciter le passage de sa contribution où elle indique que les entreprises qui négocient un règlement ultérieurement aident aussi généralement le ministère américain de la Justice à corroborer ou à établir la preuve de l'infraction.

La délégation des États-Unis expose trois objectifs-clés de son programme de clémence et explique comment les demandeurs suivants qui plaident coupables contribuent à leur réalisation. Le premier objectif est de mettre au jour l'entente et d'y mettre un terme. Les demandeurs suivants font apparaître tous les aspects l'entente et, en admettant avoir participé à l'infraction, acceptent nécessairement de mettre fin à leurs activités dans le cadre de l'entente. Le deuxième objectif vise à faire aboutir les poursuites à l'encontre de l'entente dans son ensemble. En prêtant leur concours et en concluant une transaction pénale, les demandeurs suivants reconnaissent obligatoirement leur culpabilité. Le dernier objectif est celui de la réparation du préjudice. Bien qu'en théorie, les demandeurs suivants n'y soient pas tenus, le ministère américain de la Justice tient compte de leur disposition à dédommager les victimes lorsqu'il s'agit de déterminer la réduction de peine. En outre, les demandeurs suivants ont tendance à stimuler les enquêtes en fournissant des informations qui viennent compléter celles communiquées par le premier demandeur et permettent au ministère américain de la Justice d'économiser ses ressources en évitant un procès.

Le Président demande ensuite à la délégation des États-Unis d'expliquer pourquoi, pour bénéficier d'une amnistie, le premier demandeur doit s'engager à dédommager les victimes.

La délégation des États-Unis explique que, dans l'ensemble, son programme antitrust, y compris son programme de clémence, vise à protéger les consommateurs et à réparer les dommages qui leur sont causés. C'est pourquoi les entreprises sont tenues de réparer intégralement le préjudice, mais seulement si elles sont en mesure de le faire. Prêter leur concours demeure très intéressant pour elles puisque les premiers demandeurs échappent au triplement des dommages-intérêts.

Le Président demande ensuite à la délégation australienne si l'autorité australienne de la concurrence opère la même distinction que l'autorité française s'agissant des entreprises qui prêtent leur concours après le dépôt de la première demande.

La délégation australienne précise qu'elle ne fait aucune différence pour les entreprises qui prêtent leur concours après le premier demandeur d'immunité en application du dispositif de coopération. Les deux objectifs de ce dispositif, à savoir la multiplication des preuves permettant de constater une infraction et le règlement efficace de l'affaire, sont valables pour tous les demandeurs suivants qui acceptent de fournir des informations.

Le Président demande ensuite à la délégation du Comité consultatif économique et industriel auprès de l'OCDE (BIAC) de donner son point de vue sur cette question.

La délégation du BIAC indique tout d'abord que les entreprises reconnaissent elles aussi le succès des programmes de clémence qui permettent l'éradication des ententes injustifiables, tout en soulignant l'importance de la transparence et de la prévisibilité dans la mise en œuvre de ces programmes. Le BIAC est partisan d'une politique de grande envergure garantissant à tout demandeur de mesures de clémence qui prête son concours qu'il se trouvera en meilleure posture qu'une entreprise qui a préféré ne pas coopérer.

La délégation du BIAC met en exergue les points suivants de sa contribution écrite. Premièrement, la valeur des informations communiquées par le demandeur suivant doit être appréciée à l'aune des informations en sa possession, qu'il s'agisse de l'un des meneurs de l'entente ou d'un participant de moindre importance. En outre, intervenir en qualité de témoin corroborant des informations même sans fournir de nouveaux éléments est, en soi, d'une grande utilité.

Deuxièmement, étant donné que l'interaction entre les différentes autorités de la concurrence n'est pas très claire et qu'il existe des divergences entre les différents dispositifs de clémence, on peut se demander en quoi les entreprises ont avantage à solliciter le bénéfice de la clémence. Les entreprises craignent en particulier que le dépôt d'une demande dans un pays donné ne profite aux autres membres de l'entente dans d'autres pays. Le BIAC souligne qu'il est nécessaire que les autorités appliquent des politiques transparentes et prévisibles et émet l'idée d'un guichet unique ou d'un système de marqueurs unique à l'échelon mondial pour toutes les demandes de clémence.

Le Président conclut ensuite les débats en notant qu'il existe une convergence de vues sur les avantages que présente l'existence d'un mécanisme en faveur des demandeurs suivants, tant en termes de communication de preuves supplémentaires que d'allègement de la charge administrative liée à leur collecte. Il fait également observer que d'un pays et d'un programme de clémence à l'autre, il y n'a guère de différences importantes pour ce qui est des objectifs visés. Les différences se situent au niveau des critères retenus par les autorités de la concurrence pour l'octroi de mesures de clémence, les unes accordant une plus grande importance au moment du dépôt de la demande, les autres donnant plus de poids aux éléments que les informations communiquées apportent à l'enquête.

Le Président fait observer que, dans le monde entier, les programmes de clémence imposent aux autorités de la concurrence d'exercer un vaste pouvoir discrétionnaire pour les mettre en œuvre. C'est la raison pour laquelle les autorités doivent se demander comment faire pour que leurs politiques soient appliquées avec équité et pour qu'il existe une transparence suffisante pour que les demandeurs potentiels aient une idée de la marche à suivre et puissent prévoir ce qui les attend. Il remercie ensuite les participants et clôt les débats de la table ronde.

OTHER TITLES

SERIES ROUNDTABLES ON COMPETITION POLICY

1	Competition Policy and Environment	OCDE/GD(96)22
2	Failing Firm Defence	OCDE/GD(96)23
3	Competition Policy and Film Distribution	OCDE/GD(96)60
4	Efficiency Claims in Mergers and Other Horizontal Agreements	OCDE/GD(96)65
5	The Essential Facilities Concept	OCDE/GD(96)113
6	Competition in Telecommunications	OCDE/GD(96)114
7	The Reform of International Satellite Organisations	OCDE/GD(96)123
8	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11	Competition Issues related to Sports	OCDE/GD(97)128
12	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14	Resale Price Maintenance	OCDE/GD(97)229
15	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21	Competition and Regulation in Broadcasting in the Light of Convergence	DAFFE/CLP(99)1
22	Relations between Regulators and Competition Authorities	DAFFE/CLP(99)8
23	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25	Oligopoly	DAFFE/CLP(99)25
26	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27	Competition in Professional Services	DAFFE/CLP(2000)2

28	Competition in Local Services: Solid Waste Management	DAFFE/CLP(2000)13
29	Mergers in Financial Services	DAFFE/CLP(2000)17
30	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32	Competition in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34	Competition Issues in Road Transport	DAFFE/CLP(2001)10
35	Price Transparency	DAFFE/CLP(2001)22
36	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41	Communication by Competition Authorities	DAFFE/COMP(2003)4
42	Substantive Criteria Used for the Assessment of Mergers	DAFFE/COMP(2003)5
43	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44	Media Mergers	DAFFE/COMP(2003)16
45	Universal Service Obligations	DAF/COMP(2010)13
46	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48	Merger Remedies	DAF/COMP(2004)21
49	Cartels: Sanctions Against Individuals	DAF/COMP(2004)39
50	Intellectual Property Rights	DAF/COMP(2004)24
51	Predatory Foreclosure	DAF/COMP(2005)14
52	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56	Competition on the Merits	DAF/COMP(2005)27
57	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58	Barriers to Entry	DAF/COMP(2005)42
59	Prosecuting Cartels Without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18
61	Competition in the Provision of Hospital Services	DAF/COMP(2006)20

62	Access to Key Transport Facilities	DAF/COMP(2006)29
63	Environmental Regulation and Competition	DAF/COMP(2006)30
64	Concessions	DAF/COMP/GF(2006)6
65	Remedies and Sanctions in Abuse of Dominance Cases	DAF/COMP(2006)19
66	Competition in Bidding Markets	DAF/COMP(2006)31
67	Competition and Efficient Usage of Payment Cards	DAF/COMP(2006)32
68	Vertical Mergers	DAF/COMP(2007)21
69	Competition and Regulation in Retail Banking	DAF/COMP(2006)33
70	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71	Public Procurement - The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72	Competition, Patents and Innovation	DAF/COMP(2007)40
73	Private Remedies	DAF/COMP(2006)34
74	Energy Security and Competition Policy	DAF/COMP(2007)35
75	Plea Bargaining/Settlement of Cartel Cases	DAF/COMP(2007)38
76	Competitive Restrictions in Legal Professions	DAF/COMP(2007)39
77	Dynamic Efficiencies in Merger Analysis	DAF/COMP(2007)41
78	Guidance to Business on Monopolisation and Abuse of Dominance	DAF/COMP(2007)43
79	The Interface between Competition and Consumer Policies	DAF/COMP/GF(2008)10
80	Facilitating Practices in Oligopolies	DAF/COMP(2008)24
81	Taxi Services Regulation and Competition	DAF/COMP(2007)42
82	Techniques and Evidentiary Issues in Proving Dominance/Monopoly Power	DAF/COMP(2006)35
83	Managing Complex Mergers	DAF/COMP(2007)44
84	Potential Pro-Competitive and Anti-Competitive Aspects of Trade/Business Associations	DAF/COMP(2007)45
85	Market Studies	DAF/COMP(2008)34
86	Land Use Restrictions as Barriers to Entry	DAF/COMP(2008)25
87	Construction Industry	DAF/COMP(2008)36
88	Antitrust Issues Involving Minority Shareholdings and Interlocking Directorates	DAF/COMP(2008)30
89	Fidelity and Bundled Rebates and Discounts	DAF/COMP(2008)29
90	Presenting Complex Economic Theories to Judges	DAF/COMP(2008)31
91	Competition Policy for Vertical Relations in Gasoline Retailing	DAF/COMP(2008)35
92	Competition and Financial Markets	DAF/COMP(2009)11
93	Refusals to Deal	DAF/COMP(2007)46

94	Resale Price Maintenance	DAF/COMP(2008)37
95	Experience with Direct Settlements in Cartel Cases	DAF/COMP(2008)32
96	Competition Policy, Industrial Policy and National Champions	DAF/COMP/GF(2009)9
97	Two-Sided Markets	DAF/COMP(2009)20
98	Monopsony and Buyer Power	DAF/COMP(2008)38
99	Competition and Regulation in Auditing and Related Professions	DAF/COMP(2009)19
100	Competition Policy and the Informal Economy	DAF/COMP/GF(2009)10
101	Competition, Patents and Innovation II	DAF/COMP(2009)22
102	Standard for Merger Review	DAF/COMP(2009)21
103	Failing Firm Defence	DAF/COMP(2009)38
104	Competition, Concentration and Stability in the Banking Sector	DAF/COMP(2010)9
105	Margin Squeeze	DAF/COMP(2009)36
106	State-Owned Enterprises and the Principle of Competitive Neutrality	DAF/COMP(2009)37
107	Generic Pharmaceuticals	DAF/COMP(2009)39
108	Collusion and Corruption in Public Procurement	DAF/COMP/GF(2010)6
109	Electricity: Renewables and Smart Grids	DAF/COMP(2010)10
110	Exit Strategies	DAF/COMP(2010)32
111	Standard Setting	DAF/COMP(2010)33
112	Competition, State Aids and Subsidies	DAF/COMP/GF(2010)5
113	Emission Permits and Competition	DAF/COMP(2010)35
114	Pro-active Policies for Green Growth and the Market Economy	DAF/COMP(2010)34
115	Information Exchanges between Competitors under Competition Law	DAF/COMP(2010)37
116	The Regulated Conduct Defence	DAF/COMP(2011)3
117	Procedural Fairness: Transparency Issues in Civil and Administrative Enforcement Proceedings	DAF/COMP(2010)11
118	Competition in Ports and Port Services	DAF/COMP(2011)14
119	Crisis Cartels	DAF/COMP/GF(2011)11
120	Horizontal Agreements in the Environmental Context	DAF/COMP(2010)39
121	Excessive Prices	DAF/COMP(2011)18
122	Cross-border Merger Control: Challenges for Developing and Emerging Economies	DAF/COMP/GF(2011)13
123	Competition in Hospital Services	DAF/COMP(2012)9
124	Procedural Fairness: Competition Authorities, Courts and Recent Developments	DAF/COMP(2011)122
125	Remedies in Merger Cases	DAF/COMP(2011)13

126	Economic Evidence in Merger Analysis	DAF/COMP(2011)23
127	Unilateral Disclosure of Information with Anticompetitive Effects	DAF/COMP(2012)17
128	Promoting Compliance with Competition Law	DAF/COMP(2011)20
129	Impact Evaluation of Merger Decisions	DAF/COMP(2011)24
130	Market Definition	DAF/COMP(2012)19
131	Competition and Commodity Price Volatility	DAF/COMP/GF(2012)11
132	Quantification of Harm to Competition by National Courts and Competition Agencies	DAF/COMP(2011)25
133	Improving International Co-operation in Cartel Investigations	DAF/COMP/GF(2012)16