

COMPETITION LAW COMPLIANCE AND LENIENCY

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This Note identifies certain issues for discussion relating to competition law compliance and leniency. First, the definition of leniency: immunity from, or reduction of, what risks and penalties should be offered to a leniency applicant to encourage disclosure of secret cartels. Sub-issues include: Is it sufficient incentive for companies only to grant immunity from fines? Does immunity from fines actually benefit companies when they can pass on the cost of fines to consumers in the form of higher prices or to shareholders in lower dividends? Would more companies disclose secret cartels if they were also given immunity from civil damages suits? Finally, would granting immunity from damages claims undermine the value of a leniency program from the cartel victim's viewpoint, bearing in mind joint and several liability rules permit all the losses caused by a cartel to be claimed against any one of the cartel members on their own?

Second, can immunity or reduction of the penalties available only to a company be a sufficient incentive to management or employees involved in, or aware of, a secret cartel to disclose it to a competition authority for the purposes of investigation and termination? Further, does the experience in the United Kingdom since cartel criminalization support the general introduction of criminal personal penalties such as fines and imprisonment as well as penalties for responsible directors in the form of director disqualification? Also, will the European Commission's approach to protect employees and directors from individual personal civil and criminal sanctions in its March 2017 Proposal for a Directive (Article 22) on the European Competition Network ("ECN") Member States' powers have a similar effect?

Third, who can prove they are the first in line? How can greater legal certainty be established for the use of marker systems and the evidence tests applied in leniency programs, for example, by the European Commission?

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Fourth, do international guidelines assist to standardize the leniency practice of competition authorities if there is no international court to sit in judgment on their application?

Fifth, how can the ECN best practice guidelines be improved? Is the section on leniency in the Commission's proposal for a new directive on ECN powers and cooperation sufficient to ensure uniform marker systems and common standards of evidence? (See the Annex for Articles 16 to 22, requiring the EU Member States effectively to legislate for the application of the ECN Leniency guidelines).

Sixth, how can the International Competition Network ("ICN") best practice model leniency program be improved? (See Brussels 1461847.1).

Seventh, what lessons can be learned by other jurisdictions from leniency practice in the United States, Canada, Japan, Korea, Australia, Brazil, Russia, China and South Africa?

Eighth, does the ECN or ICN model leniency program encourage competition compliance? Does the availability of immunity from fines encourage cartels because companies know they can always try to gain immunity from fines by being the first to disclose the secret cartel? Also, without any coherent leniency programs, is it likely that secret cartels would remain undisclosed? Furthermore, would the introduction of a global requirement to file all cartel behavior with an authority like the U.S. Securities and Exchange Commission or the U.K. Financial Conduct Authority ("FCA"), subject to avoidance under a leniency program, result in even greater compliance?

Annex
CHAPTER VI
LENIENCY

Article 16
Immunity from fines

1. Member States shall ensure that national competition authorities have in place leniency programs that enable them to grant immunity from fines to undertakings.
2. Member States shall ensure that immunity can be granted only if the undertaking
 - a) fulfills the conditions laid down in Article 18;
 - b) discloses its participation in a secret cartel; and
 - c) is the first to submit evidence which:
 - i. at the time the national competition authority receives the application, enables it to carry out a targeted inspection in connection with the secret cartel, provided that the national competition authority did not yet have in its possession evidence to carry out an inspection in connection with the secret cartel or had not already carried out such an inspection; or
 - ii. in the national competition authority's view, enables the finding of an infringement of competition law, provided that the national competition authority did not yet have in its possession evidence to find such an infringement and that no other undertaking previously qualified for immunity under paragraph 2(c)(i) in relation to the same cartel.
3. Member States shall ensure that all undertakings are eligible for immunity from fines, with the exception of undertakings that have taken steps to coerce other undertakings to participate in a secret cartel.

Article 17
Reduction of fines Brussels 1461847.1

1. Member States shall ensure that national competition authorities have in place leniency programs that enable them to grant a reduction of fines to undertakings which do not qualify for immunity.
2. Member States shall ensure that a reduction of fines is granted only if the conditions laid down in Article 18 are fulfilled and the

applicant discloses its participation in a secret cartel and provides the national competition authority with evidence of the alleged secret cartel which represents significant added value for the purpose of proving an infringement of Article 101 TFEU or a corresponding provision under national law, relative to the evidence already in the national competition authority's possession at the time of the application.

3. Member States shall ensure that national competition authorities are able to grant an additional reduction of fines if the applicant submits evidence which the national competition authority uses, without the need for further corroboration, to prove additional facts which lead to an increase in fines as compared to the fines that would otherwise have been imposed on the participants in the secret cartel. The reduction of fines for the applicant shall be proportionate to such increase in fines.

Article 18

General conditions for leniency

1. Member States shall ensure that, in order to qualify for leniency, the applicant must satisfy the following cumulative conditions:

- a) it ended its involvement in the alleged secret cartel immediately following its application, except for what would, in the competent national competition authority's view, be reasonably necessary to preserve the integrity of its investigation;
- b) it cooperates genuinely, fully, on a continuous basis and expeditiously with the national competition authority from the time of its application until the authority has closed its proceedings against all parties under investigation by adopting a decision or has otherwise terminated its proceedings. This includes:
 - i. providing the national competition authority promptly with all relevant information and evidence relating to the alleged secret cartel that comes into its possession or is available to it;
 - ii. remaining at the national competition authority's disposal to answer any request that may contribute to the establishment of the facts;
 - iii. making current (and, if possible, former) employees and directors available for interviews with the national competition authority;
 - iv. not destroying, falsifying or concealing relevant information or evidence; and

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- v. not disclosing the fact of, or any of the content of, its application before the national competition authority has issued objections in the proceedings before it, unless otherwise agreed; and
- c) when contemplating making an application to the national competition authority, it must not have:
 - i. destroyed, falsified or concealed evidence of the alleged secret cartel; or
 - ii. disclosed the fact or any of the content of its contemplated application, except to other competition authorities.

*Article 19***Form of leniency applications**

1. Member States shall ensure that applicants can apply for leniency in writing and that national competition authorities have a system in place that enables them to accept leniency statements either orally or by other means that do not result in the production of documents, information, or other materials in the applicant's possession, custody, or control.

*Article 20***Marker for a formal application for immunity**

1. Member States shall ensure that an undertaking wishing to make an application for immunity can initially apply for a marker to national competition authorities. The marker grants the applicant a place in the queue for a period to be specified on a case-by-case basis by the national competition authority receiving the application for a marker. It allows the applicant to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity.

2. Member States shall ensure that national competition authorities have discretion whether or not to grant a marker.

3. Member States shall ensure that if the applicant perfects the marker within the specified period, the information and evidence provided will be deemed to have been submitted at the time the marker was granted.

*Article 21***Summary applications**

1. Member States shall ensure that applicants that have applied for leniency, either by applying for a market or by submitting a full application, to the Commission in relation to an alleged secret cartel can file summary applications in relation to the same cartel with the national competition authorities, which the applicant considers well-placed, to deal with the case.

2. Member States shall ensure that national competition authorities accept summary applications provided that they take one of the forms stipulated in Article 19, have the same product, geographic and durational scope as the leniency application filed with the Commission and include a short description of the following, in so far as it is known to the applicant at the time of the submission:

- a) the name and address of the applicant;
- b) the other parties to the alleged secret cartel;
- c) the affected product(s);
- d) the affected territory(ies);
- e) the duration;
- f) the nature of the alleged cartel conduct;
- g) the Member State(s) where the evidence is likely to be located; and
- h) information on the applicant's other past or possible future leniency applications in relation to the alleged secret cartel.

3. Member States shall ensure that national competition authorities refrain from requesting from the applicant any information related to the alleged infringement covered by the summary application beyond the items set out in paragraph 2 before they require the submission of a full application pursuant to paragraph 6. Brussels 1461847.1.

4. Member States shall ensure that national competition authorities which receive a summary application provide the applicant with an acknowledgement stating the date and time of receipt.

5. Member States shall ensure that national competition authorities which receive a summary application verify whether they already had received a previous summary or leniency application in relation to the same alleged secret cartel at the time of its receipt and inform the applicant accordingly.

6. Member States shall ensure that applicants have the opportunity to submit full leniency applications, perfecting the summary appli-

cations referred to in paragraph 1, to the national competition authorities concerned, once the Commission has informed those authorities that it does not intend to act on the case in whole or in part. Member States shall ensure that national competition authorities have the power to specify a reasonable period of time within which the applicant must submit the full application together with the corresponding evidence and information.

7. Member States shall ensure that if the applicant submits the full application in accordance with paragraph 6, within the period specified by the national competition authority, the information contained therein will be deemed to have been submitted at the date and time of the summary application. If the applicant had submitted the summary application no later than 5 working days after filing the leniency application to the Commission, the summary application will be deemed to have been submitted at the date and time of the leniency application submitted to the Commission.

Article 22

Interplay between leniency programs and sanctions on natural persons

1. Member States shall ensure that current and former employees and directors of applicants for immunity from fines to competition authorities are protected from any criminal and administrative sanctions and from sanctions imposed in non-criminal judicial proceedings for their involvement in the secret cartel covered by the application, if these employees and directors actively cooperate with the competition authorities concerned and the immunity application predates the start of the criminal proceedings.