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CARTEL WORKING GROUP
Subgroup 2: Enforcement Techniques

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Chapter
Drafting and Implementing
an Effective Leniency Program

2

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1. INTRODUCTION

The purpose of this document is to draw together key practices concerning the drafting and implementation of an effective leniency policy.

A number of the issues outlined in this document were discussed at the 2004 International Competition Network (ICN) Leniency Workshop, held in Sydney, Australia in November 2004. The materials from the Workshop are available on the ICN website at <http://www.internationalcompetitionnetwork.org/>.

A number of “good practices”¹ in regard to drafting and implementing an effective leniency policy have been identified throughout the document. These may assist jurisdictions in their consideration of leniency programs. A list of these good practices can be found at **Appendix 1: Good practices relating to leniency programs.**

The relevance and therefore likely adoption by jurisdictions of particular practices outlined in this document will be influenced by their competition policy and law environment. In some cases certain practices will not be available due to legal, legislative or political regimes in which those agencies operate.

This document replaces the April 2005 version of *Chapter 2: Drafting and Implementing an Effective Leniency Program* as part of the Anti-Cartel Enforcement Manual.

¹ "Good practices" are generally considered to be practices which work well in the jurisdiction(s) where they are applied, but which may or may not work well in the legal context of another jurisdiction, and, therefore, cannot necessarily be recommended for adoption by other ICN members.

2 DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY PROGRAM

2.1 What is Leniency?

Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition enforcement agency. In addition, agency decisions that could be considered **lenient treatment** include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution. This chapter will use the term “leniency” to mean total immunity and “lenient treatment” to mean less than full immunity.

The terms immunity, leniency and amnesty are used in various jurisdictions to describe partial or total exoneration from penalties but are not synonymous in all jurisdictions.

A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process. A leniency policy is one component of a leniency program, which also includes internal agency processes, for example how the agency implements their leniency policy.

2.2 Why implement a leniency policy?

There are many benefits that flow from having such a policy and there are varying reasons why competition enforcement agencies have adopted them.

Many jurisdictions have developed programs that offer leniency in order to encourage violators to confess and implicate their co-conspirators with first-hand, direct “insider” evidence that provides proof of conduct parties want to conceal. The programs uncover conspiracies that would otherwise go undetected, can destabilise existing cartels and can act as a deterrent effect to entering into cartel arrangements. The programs elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence can be obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete leniency.

The objective of all leniency programs is, through increased detection of cartels, to increase the level of compliance with antitrust or competition laws, which then benefits the community through increased competition, an objective which is consistent with that of the agency.

2.3 Prerequisites to adopting a leniency policy

Without strong penalties and a vigorous enforcement program by the agency, there is no incentive for cartel participants to self report their breach of competition laws. The corollary being that no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and prosecution.

There appears to be a general consensus between most agencies that there are essentially three prerequisites to successfully implement a leniency program:

- **High risk of detection** - agencies must adopt a strong enforcement program to fight cartels. Agencies have to commit to vigorously investigating cartels and ensuring action establishing the infringement is taken. Those participating in cartels must perceive that there is a real risk of detection, in the absence of a leniency application, and that subsequent enforcement action will necessarily follow, in order to encourage them to come forward before they are caught. In addition it is also effective if a leniency policy can create a race between the company and its employee or, indeed, between members of the cartel to be “first in the door”.
- **Significant sanctions** - the sanctions imposed on cartel participants must be significant. If sanctions are inadequate, cartel participants will not come forward since the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants should not be greater than the cost of getting caught.
- **Transparency and certainty** – there must also be transparency and certainty in the operation of a leniency program. Agencies need to build up the trust of applicants and their legal representatives by applying a consistent application of the program. An applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not.

2.4 Issues for consideration in the drafting and implementation of a successful leniency policy

Leniency programs around the world have different features not all of which could be transposed from one system to another, because of legal obligations, and/or the need to cohere with other elements of competition policy or general public policy. The following practices are divided into two groups, those which are frequently encountered in leniency programs, and those which are rarer, occurring in only one or two such programs. But very few of them are universal.

Leniency should be available in circumstances both where the agency is unaware of the cartel and where the agency is aware of the cartel but the agency does not have sufficient evidence to proceed to adjudicate or prosecute. Whether or not leniency is granted in such cases will depend on the quality of the information submitted by the applicant.

Frequently-occurring features of leniency programs

- leniency, depending on the criteria being met, is granted to the first eligible applicant who self reports its involvement in a cartel.
- a “marker” system or the practice of reserving a place for applicants whilst they conduct further internal investigations and attempt to perfect their application for leniency prior to the agency determining the first eligible applicant. The applicant’s position is reserved in the queue usually on the condition that it provides further information within an agreed time period. Therefore, the applicant lays down a “marker” which provides certainty and clarity for potential applicants and encourages a race to contact the agency.
- provision for an anonymous leniency approach in order to allow an applicant to discuss particular circumstances of a case and the availability of leniency in these circumstances. Prior consultation is a common practice amongst jurisdictions (safeguards may be needed to avoid the risk of parties spying out the agency).
- provision for leniency for the first eligible applicant to submit an application after an investigation has begun.
- lenient treatment (less than full leniency) for second and subsequent applicants.
- full and frank disclosure of requisite information or evidence by the applicant to be eligible for, or sustain an application for leniency and lenient treatment.
- ongoing requirement for the applicant to cooperate fully and on a continuous basis.
- applicant to cease participation in the cartel conduct unless instructed otherwise by the agency, which is authorised to do so by law.
- applicant not to have coerced others, instigated the cartel, or acted as ringleader.

Less-frequently occurring elements of leniency programs

- amnesty plus - encourages subjects and targets of ongoing investigations to consider whether they may qualify for leniency in other markets where they compete. Pursuant to the amnesty plus policy, an applicant that does not qualify for leniency for the initial matters under investigation, but discloses a second cartel, and meets the leniency program requirements, will receive leniency for the second offence and a substantial additional reduction in the calculation of the fine for its participation in the first offence.
- penalty plus - provides that if an applicant participated in a second antitrust offence and does not report it under the amnesty plus policy, enforcers will urge the sentencing authority to consider the company's and any culpable executives' failure to report the conduct voluntarily as an aggravating sentencing factor. For a company, the failure to self-report under the amnesty plus program could mean the difference between a potential fine versus no fine at all. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.

- hypothetical application - some enforcement agencies allow for hypothetical proffers/applications by counsel during a conditional leniency application.
- agencies to have clear and concise standard form letters and protocols for general use (in some instances, however, a standard form is not appropriate and flexibility is necessary).
- applicant to make restitution to injured parties (only applicable in some jurisdictions).
- affirmative amnesty or the practice of an agency approaching a company - which may at the time not even know that it or its competitors are under investigation - to cooperate and seek leniency. This is not possible in some jurisdictions where it would be considered as discriminatory treatment between different companies.
- uncovering facts previously unknown – in some systems where total immunity is no longer available, if an undertaking applies for partial reduction of the applicable penalty and provides evidence relating to facts which were previously unknown to the competition authority and which have a direct bearing on the gravity or the duration of the infringement, then these facts will not be taken into account when setting the fine against it provided that it meets the other conditions for partial reduction of the applicable penalty.

A list of leniency policies of competition enforcement agencies can be found in Appendix 2.

2.5 Issues in self-reporting

When drafting and implementing a leniency policy, it is important for an agency to not only consider whether its program has the right incentives, but also whether its program contains any disincentives preventing cartel participants from self-reporting their cartel conduct.

At the ICN Leniency Workshop in Sydney in 2004, a panel of Non-Governmental Advisors (NGAs) from Australia, Canada, the European Union, Korea and the United States, attorneys who regularly represent leniency applicants, discussed some issues that may inhibit potential applicants from self-reporting, including:

- uncertainty about the ability to obtain leniency after an investigation has commenced
- inability for applicant to anonymously explore with an agency whether leniency is available
- possible disclosure to other enforcement agencies or third parties without the applicant's approval
- absence of "amnesty plus" credit (in systems where leniency programmes do not contain predictable and transparent rules for reduction of fines)
- absence of a marker system
- absence of automatic leniency for first applicant to self-report before an investigation
- discoverability of information and documents produced in the jurisdiction where leniency is granted but also mainly in other jurisdictions

- lack of standard form letters setting out obligations and protections for both the applicant and the agency, unless such obligations and protections follow clearly from the program itself
- requirement to submit written leniency applications
- a requirement to establish all the elements of an offence before receiving conditional leniency
- cultural issues – not acceptable to self-report

2.6 Practical issues

2.6.1 Making an application for leniency

Leniency applications are based on a model whereby cartel participants self-report their conduct in exchange for leniency. There are two common approaches:

- ‘First through the door’ policy whereby the first eligible applicant is given a marker regardless of the quality of evidence before the agency has commenced an investigation into the cartel. The applicant must later perfect its application by providing more detailed evidence to support a grant of leniency. Leniency may also be available for the first eligible applicant after an investigation has commenced if the applicant satisfies additional evidentiary requirements.
- An application based on the quality of the evidence, for example enabling an agency to conduct dawn raids. Applicants cannot reserve a position in the queue and being the first applicant to contact the agency does not automatically lead to leniency if sufficient evidence is not provided. The applicant’s place in the queue is only secured when it has provided sufficient evidence. Leniency may also be available for the first eligible applicant after an investigation has commenced if the applicant satisfies the evidentiary requirements.

The applicant, in most jurisdictions, needs to satisfy certain conditions in exchange for leniency. This includes full cooperation, the provision of sufficient information or evidence and participation in the cartel to cease. Moreover, in most jurisdictions, certain types of applicants are not eligible for immunity because of the role they have played in the cartel (such as for example coercer, ringleader or instigator).

Requirements for leniency should include full and frank disclosure of the requisite information or evidence to apply for and sustain an application for leniency and a requirement for full and ongoing cooperation by the applicant, and if applicable, the applicant’s directors, officers and employees.

Second and subsequent applicants

The question of dealing with second, subsequent and amnesty plus applicants and whether they will be rewarded under a leniency program is also an issue that should be considered. In some jurisdictions the maximum level of lenient treatment that the second through the door can receive is a 50% reduction in fines. The level of lenient treatment that subsequent applicants can be granted depends on a number of elements including the speed at which they approach the agency and the quality of the evidence provided.

It is good practice for a leniency program to provide that leniency be granted to the first eligible applicant who self reports its involvement in a cartel, provided that the relevant criteria have been met, and to provide for lenient treatment (less than full leniency) for second and subsequent applicants.

Applying in other jurisdictions

Some jurisdictions also have the practice of suggesting that applicants approach other jurisdictions with leniency policies. Indeed, applicants are often advised to seek leniency in other jurisdictions because even though the information provided to the agency is held on a confidential basis, the subsequent investigations and court action mean the fact of the alleged conduct will become public. In addition, when applicants apply simultaneously in multiple jurisdictions, they often grant waivers to allow the jurisdictions to share leniency information with each other, conserving resources for the applicant and allowing the jurisdictions to conserve resources and expedite investigations.

Where applicable, it is good practice for agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred.

2.6.2 Form of the application for leniency

There are essentially two forms of leniency applications:

- written
- oral

An important consideration in deciding which form to implement is the agency's ability to protect the application (if written) and any information provided by the applicant in support of their leniency application.

Written applications

Written applications are an option in many jurisdictions. However, potential applicants may be reluctant to make a written application due to fear of damages actions arising out of the application or a fear that any documents supplied are discoverable by private plaintiffs in other jurisdictions. Some jurisdictions are attempting to address this issue by limiting the information content in written applications.

Oral Applications

Oral applications for leniency have developed as a response to the incriminating nature of providing a written statement. Many jurisdictions now use a “paperless process”.

2.6.3 Protection of information

As evidenced above, the protection of information is necessary to allay any fears that such information may be used against the applicant in private civil actions or shared with another government agency, foreign or domestic, which may use that information against the applicant without awarding it equivalent protection.

The potential discoverability of materials submitted to agencies in relation to a leniency application is an on-going concern for leniency applicants. Civil plaintiffs could seek discovery of this material resulting in exposure of the leniency applicants to further litigation, making them potentially worse off than if they had not sought leniency in the first place.

Depending on the leniency program, if an agency revokes an applicant’s conditional leniency for failure to meet all the requirements of the conditional leniency, the agency may be free to use all information obtained from that former applicant in the investigation and prosecution of that former applicant.

It is good practice to keep the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver or the agency is required by law to disclose the information.

2.6.4 Responsibility for the program within the agency

A clear contact point for applicants is considered essential for an effective leniency program. This can be achieved in a number of ways, including by designating a responsible individual or establishing a dedicated cartel unit. Having an individual responsible for administering the program may enhance the transparency and consistency in the application of the leniency policy and processes. If an applicant may contact more than one person in an agency, it is very important for each point of contact to track the exact time of the application or request for a marker, as applicants may apply very close in time and there must be a record of which applicant applied first.

Whatever method the agency chooses, the overarching goal is to ensure consistent, predictable and transparent implementation of the leniency policy.

2.6.5 Clear requirements about the applicants' obligations to cooperate

Ensuring ongoing cooperation from a leniency applicant will enable the agency to complete its investigation and any associated prosecution. To assist in managing this issue, some agencies have adopted a number of approaches, including:

- clear description of the requirements for full cooperation, which then need to be communicated to applicants
- clear and concise standard form letters and protocols
- preparedness to deal with non-compliance with the cooperation requirements, such as by withdrawing leniency or filing obstruction of justice charges.

Agencies typically demand complete and continuing co-operation from applicants seeking leniency. Further investigation will be needed to locate all the participants and assemble the necessary formal evidence, and leniency applicants are particularly well placed to assist in that process. In addition, the agencies want to avoid the risk that a leniency applicant will change its mind and repudiate its original confession.

There should be maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles, responsibilities and contact information for officials involved in the implementation of the leniency program.

2.6.6 Implementation of leniency decisions

Some jurisdictions have a **conditional leniency** system, which requires ongoing cooperation throughout the course of investigation/prosecution. In many of the leniency models across jurisdictions, the final implementation of leniency decisions does not usually take place until the end of the enforcement process.

After an applicant is determined to be eligible for leniency, the agency usually offers the applicant conditional leniency, which is contingent on the applicant satisfying the other ongoing requirements of the policy, which usually include cooperation with the enforcement agencies in their investigation and prosecution of other cartel participants.

In some jurisdictions the application is then perfected or implemented after any enforcement action has been completed.

2.6.7 Making leniency work in a bifurcated enforcement model

A bifurcated enforcement model typically refers to the situation where the investigative/administrative and prosecutorial roles are divided between two different agencies. Bifurcation of responsibilities in respect of cartel matters can introduce some unpredictability and uncertainty regarding the leniency policy, particularly the application and decision-making process.

In a bifurcated system, where different authorities are responsible for the investigation and prosecution of cartels, respectively, it is important that the authorities have consistent leniency policies, shared philosophy about the seriousness of cartel conduct, share priorities toward prosecuting cartel activity and open and constant communication.

2.7. Leniency as an ongoing investigatory tool

There is no doubt that, given the right environment, a leniency policy can be an efficient and effective means of detecting, investigating, and prosecuting or adjudicating cartel conduct.

Some jurisdictions are authorised to go further by asking leniency applicants to continue their conduct to enable them to collect information about their co-conspirators, for example, by recording meetings or telephone conversations or providing information to enable an agency to utilise its evidence gathering powers, such as searches or wiretaps.

In other jurisdictions, the applicant must cease all cartel activities immediately. In some jurisdictions, covertly recorded conversations are not admissible in evidence in any case. Applicants can however continue certain cartel activities in order to safeguard the investigation. These divergences may cause difficulties both for the applicant and enforcement authorities when simultaneous leniency applications are made in jurisdictions with differing rules on this issue.

It is good practice for competition authorities to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, if any, have been imposed. This may assist coordination between agencies.

2.8 Education and awareness

Another important element of establishing a successful leniency program is educating and engaging business, government and consumer groups in order to heighten the awareness of such a program and ultimately to generate leniency applications.

Education and awareness campaigns could include targeted publications, speeches and presentations at conferences by senior agency officers, press articles, and information sessions to business, consumer and government organisations.

It is good practice to encourage leniency applications through education and awareness campaigns.

APPENDIX 1: Good practices relating to leniency programs

The following list reflects key practices common to many ICN member agencies. This list is meant to provide a concise summary of common and widely reported practices relating to the drafting and implementation of effective leniency programs. The list does not purport to present all possible practices. Practices used will depend on the peculiarities of each jurisdiction's cartel regime and the particular circumstances.

It is good practice:

- to make leniency available both where the agency is unaware of the cartel and where the agency is aware of the cartel but the agency does not have sufficient evidence to proceed to adjudicate or prosecute. Whether or not leniency is granted in such cases will depend on the quality of the information submitted by the applicant.
- For the requirements for leniency to include full and frank disclosure of the requisite information or evidence to apply for and sustain an application for leniency and a requirement for full and ongoing cooperation by the applicant, and if applicable, the applicant's directors, officers and employees.
- for a leniency program to provide that leniency be granted to the first eligible applicant who self-reports its involvement in a cartel, provided that the relevant criteria have been met, and to provide for lenient treatment (less than full leniency) for second and subsequent applicants.
- where applicable, for agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred.
- to keep the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver or the agency is required by law to disclose the information.
- to have maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles, responsibilities and contact information for officials involved in the implementation of the leniency program.
- in a bifurcated system, where different authorities are responsible for the investigation and prosecution of cartels, respectively, for authorities to have consistent leniency policies, shared philosophy about the seriousness of cartel conduct, share priorities toward prosecuting cartel activity and open and constant communication.
- for competition authorities to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so what conditions, if any, have been imposed. This may assist coordination between agencies.
- to encourage leniency applications through education and awareness campaigns.

APPENDIX 2: Leniency Policies

The following is a list² of leniency policies of competition enforcement agencies in ICN member jurisdictions:

Austria

Australia

- [ACCC Immunity Policy for Cartel Conduct](#)
- [Immunity Policy.pdf](#)
- [Immunity Policy interpretation guidelines.pdf](#)

Belgium

Brazil

- [Antitrust Law](#)
- [Regulation on Administrative Procedures.pdf](#)

Canada

- [Immunity Program under the Competition Act.pdf](#)

Cyprus

- [Cartel Immunity and Reduction of a Fine Programme.pdf](#)

Czech Republic

- [Leniency Programme](#)

European Free Trade Association

- [Notice on Immunity from fines and reduction of fines in cartel cases](#)

² Efforts were made to ensure that this list is as complete as possible as of April, 2006. The list is provided for reference only. Agencies and their websites should be consulted directly to ensure that the leniency policy is the “official” and most current version.

European Union

- [Commission Notice on the non-imposition or reduction of fines in cartel cases \(96/C207/04\)](#)
- [Guidelines on the method of setting fines imposed pursuant to Article 15 \(2\) of Regulation No 17 and Article 65 \(5\) of the ECSC Treaty \(98/C 9/03\).pdf](#)
- [Commission notice on immunity from fines and reduction of fines in cartel cases \(2002/C 45/03\).pdf](#)

Finland

- [Finnish Competition Authority: FCA's Guidelines on the Application of Articles 8 and 9 of the Act on Competition Restrictions \(reduction and non-imposition of competition infringement fine\)](#)

France

- [Litigation function - leniency](#)

Germany

- [Leniency programme – SKK – Combating Cartels](#)
- [Notice no.9/2006 of the Bundeskartellamt on the immunity from and reduction of fines in cartel cases. Leniency Programme of 7 March 2006.pdf](#)

Hungary

- [The application of a leniency policy to promote the detection of cartels. Notice No.3/2003 of the President of the Gazdasági Versenyhivatal and the President of the Competition Council of the GVH](#)

Ireland

- [Cartel Immunity Programme](#)
- [Cartel Immunity Programme.pdf](#)

Israel

- [Leniency Program](#)

Japan

- [Rules on Reporting and Submission of Materials regarding Immunity from or Reduction of Surcharges](#)

Korea

- [Guidelines for Enforcing the Leniency Program for the Informant reporting the Improper Concerted Act](#)

Latvia

- [Cabinet Regulation No.862 "Procedures for calculation of fines for violations referred to in Section 11, paragraph one and Section 13 of the Competition Law"](#)

Lithuania**Luxembourg****The Netherlands**

- [Leniency guidelines and the address for notifying NMa of cartels](#)
- [Leniency Guidelines.pdf](#)

New Zealand

- [Leniency Policy](#)

Poland**Romania**

- [Romanian Competition Council](#)

Slovakia**South Africa**

- [Corporate Leniency Policy](#)

Sweden

- [Swedish Competition Authority - new set of guidelines on leniency rules](#)

United Kingdom

- [United Kingdom Leniency Policy - General guidance on leniency.pdf](#)
- [United Kingdom Leniency Policy - Leniency and the calculation of penalties.pdf](#)

United States of America

- [Corporate Leniency Policy](#)
- [Leniency Policy for Individuals](#)