



**LATIN AMERICAN COMPETITION FORUM
9-10 September 2009, Santiago, Chile**

**-- Session 1: Using Leniency to Fight Hard Core Cartels --
Leniency as the Most Effective Tool in Combating Cartels**

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1 Introduction

1. Hard core cartels have been estimated to cause billions of dollars of damage to consumers and the economy each year.¹ Accordingly, combating them has become one of the chief priorities of competition authorities around the globe.

2. One of the main challenges posed to their enforcement effort is the cloak of secrecy under which modern cartels operate and which renders their successful uncovering and punishment by traditional investigative means difficult. In response, competition authorities have developed leniency programmes as a new tool in their fight against secret cartels, whereby incentives are offered for cartel members to come forward, denounce the cartel and provide evidence of its existence in exchange for favourable treatment.

3. In the jurisdictions which have adopted them, leniency programmes have proven to be a very effective enforcement tool, allowing competition agencies to uncover and punish cartels that would have gone undetected and prove others more easily on the basis of evidence brought forward by cooperating cartel members.

4. Following-up on the past work of the OECD on issues relating to hard core cartels and leniency², this paper is prepared as a contribution to the discussion on using leniency in fighting hard core cartels at the 7th Latin American Competition Forum. Accordingly, the purpose of the paper is two-fold. First, to provide an overview of the basic principles on which modern leniency programmes rest and discuss their application in the United States (US), Canada and the European Union (EU), the jurisdictions with the most experience in their application, as well in the Latin American countries that have adopted them thus far. Second, to discuss the prerequisites to a successful functioning leniency programme, the benefits associated therewith and the convergence of leniency programmes among various jurisdictions. This paper aims to serve both as a basis for discussion on the use of leniency in anti-cartel enforcement and as a potential source of information for jurisdictions that are contemplating adopting a leniency programme or amending an existing one.

5. As regards the scope of the paper, it deals with leniency programmes in general, with principal focus on corporate leniency. Its propositions, nevertheless apply to leniency for individuals as well and the relationship between leniency programmes and individual criminal sanctions is covered specifically in subsection 2.4.1 below.

2 Hard Core Cartels and Leniency Policies

6. Hard core cartels are anticompetitive agreements among competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets and as such are considered the most egregious violations of competition law. By artificially raising prices above the level that would prevail under competitive conditions, hard core cartels force purchasers to pay higher price than necessary or switch to

¹ OECD, *Hard Core Cartels: Recent Progress and Challenges Ahead* (2003).

² Private Remedies (2007) ; Plea Bargaining/Settlement of Cartel Cases (2006); Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations (2005); Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation (2005); Fighting Hard Core Cartels in Latin America and the Caribbean (2004), Cartels: Sanctions Against Individuals (2003); Hard Core Cartels: Recent Progress and Challenges Ahead (2003); Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002); Hard Core Cartels (2000); Recommendation of the Council concerning Effective Action against Hard Core Cartels (1998).

less suitable alternatives. Whether cartels organise at the manufacturer or retail level, it is generally the final consumer that ultimately suffers, in one form or another, their harmful effects.

7. While it is very difficult to assess in economic terms the exact harm of cartels, it is generally estimated that each year they cause billions of dollars worth of damage to the economy worldwide. In Latin America, Connor³ puts the volume of sales affected by uncovered global and regional cartels between \$150 and \$250 billion in the period 1990-2007, which translates into consumers paying \$15 to \$25 billion in overcharges.⁴

8. Accordingly, competition authorities around the world have made the fight against cartels their enforcement priority, imposing ever more stringent sanctions on conspiring companies and, in some jurisdictions, on individuals as well. However, as mentioned above, modern cartels, aware of their illegality, operate in secrecy and oftentimes engage in elaborate efforts to conceal their existence from the authorities. They employ encoded language, encrypted telecommunication means, anonymous email accounts and other ways of maintaining secrecy.⁵

9. Due to these efforts, learning about the existence of a cartel, as a prerequisite for its investigation and prosecution, becomes very difficult for competition agencies when relying on traditional investigative methods, such as market research or complaints from consumers and competitors, which are essentially sources of information outside the cartel. By contrast, leniency programmes target information sources within the cartel itself, capitalising on the inherent instability of an illegal conspiracy.

10. Nevertheless, it must be emphasised that in order to be effective, leniency programmes must be complemented by other investigative means so as to demonstrate that the competition authority has the ability to uncover cartels on its own, thus maintaining the requisite level of uncertainty on the part of cartelists to induce them to break ranks.

11. The practice of offering lenient treatment in exchange for disclosing the existence of a cartel was started by the US Department of Justice in 1978 when it adopted its first Corporate Leniency Policy. However, the policy began to yield significant results only after its revision in 1993, which introduced some of the elements now regarded as critical for the effectiveness of a leniency programme such as: (i) automatic full immunity if there is no pre-existing investigation, (ii) availability of full immunity even after an investigation has begun and, (iii) protection of all cooperating officers from criminal prosecution (essential in jurisdictions with criminal sanctions for individuals).⁶

12. While the 1978 Corporate Leniency Policy produced about one leniency application a year, the revised 1993 policy resulted in a surge of applications at an average rate of more than one per month and

³ JM Connor, "Latin America and the Control of International Cartels", prepared for delivery at the Latin American Competition Policy Conference (São Paulo, Brazil, April 4, 2008), p. 46, available at <http://ssrn.com/abstract=1156401>

⁴ It is estimated that on average cartels raise prices by 10%. In addition to this overcharge cartels cause waste and inefficiencies, with the resulting overall harm to society being 20% of affected sales (OECD, Hard Core Cartels (2000) p. 12).

⁵ For an example of the means that cartels employ to conceal their existence see the press release accompanying the European Commission's decision against the Gas Insulated Switchgear in 2007, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/80&guiLanguage=de>.

⁶ James Griffin: The modern leniency program after ten years: "A summary overview of the antitrust division's criminal enforcement program", presented at ABA section of antitrust law annual meeting at the Ritz-Carlton Hotel, San Francisco, California, August 12, 2003.

hence became a major generator of new cases, allowing the US Department of Justice to uncover and successfully prosecute large international conspiracies, such as the Vitamins or Lysine cartels.

13. Inspired by the successes of the revised 1993 leniency programme, many other jurisdictions followed and adopted their own version of leniency policy, modelled on the US programme but modified to fit the specificities of each jurisdiction's enforcement framework. One of the most significant of these is the European Union leniency programme, which was adopted in 1996, and since revised twice, first in 2002 and again in 2006. Today a large number of countries operate leniency policies with varying degrees of success and many others are considering their adoption. In Latin America, Brazil has had a leniency programme since 2000, Mexico since 2006 and Chile is expected to adopt one in September 2009.⁷

2.1 The Rationale for a Leniency Policy

14. As mentioned above, the secrecy under which modern cartels operate makes their detection and successful prosecution by traditional investigative means difficult, if not impossible. Therefore, inducing cartel members to self report and provide information about the conspiracy and the involvement of fellow co-conspirators in exchange for more lenient treatment is of crucial importance for successful anti-cartel enforcement.

15. The rationale behind a leniency policy is generally considered to be two-fold: (i) increased deterrence and (ii) enforcement efficiency. Due to these reasons, it is considered, on balance, in the public interest to entirely or partially forgo the punishment of someone who violated the law, even if considered in isolation, it may offend traditional notions of justice.

2.1.1 Deterrence

16. Deterrence of cartel behaviour, one of the principal goals of antitrust enforcement is achieved by the combination of two factors. The first is the level of sanctions (pecuniary or criminal) imposed on individual violators, which, in the case of pecuniary sanctions should be substantial.⁸ Second is the detection rate, as any potential violator will discount the expected sanction by the probability of being discovered. It is with respect to this factor that leniency policies yield the greatest benefits.

17. In jurisdictions with successfully functioning leniency programmes, cases started on the basis of a leniency application informing the authority of the cartel's existence account for a large number of the overall case work, while the prosecution of many of those initiated without a leniency application benefit substantially from additional evidence brought by leniency applicants after the initiation of the case. Empirically, successfully functioning leniency policies therefore substantially add to the detection rate of a given antitrust authority and, in combination with sufficiently high sanctions imposed, contribute to the overall level of deterrence of cartel behaviour.

18. In addition, a leniency programme creates a prisoners dilemma for cartelists by providing a strong incentive for a member of a cartel to break ranks and escape punishment while the other members suffer high sanctions. This results in great uncertainty as none of the cartel members can be sure that another

⁷ Colombia is also in the process of adopting a new competition law, which authorizes the implementation of a leniency programme.

⁸ For further discussion of OECD members' experiences with deterrent fining policies, see the following OECD reports: "[Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes](#)", (2002) in particular Part II : Report on the nature and impact of hard core cartels and sanctions against cartels, and "[Hard Core Cartels: Recent challenges and progress ahead](#)" (2003), in particular Section V: Sanctions against cartel conduct.

member will not report on their illegal activities, for example due to changes in management, thus maximising the inherent instability of secret cartels. Such a risk, when viewed from the perspective of a would-be cartel member may thus provide an additional deterrent to engaging in cartel behaviour.⁹

2.1.2 Enforcement Efficiency

19. A leniency programme allows an antitrust authority to detect and prosecute cartels in a much more cost-effective manner than by using traditional investigative methods. Obtaining information about the existence of a secret cartel directly from one of the cartel members as opposed to outside sources is already a great gain as the authority need not extend any effort in this respect. However, optimally set-up leniency programmes also require applying companies to provide information and evidence that will enable the authority to establish the existence of the violation to the requisite legal standard, resulting in successful prosecution.

20. In addition, companies are obligated to cooperate with the authority throughout the investigation and promptly answer any requests or questions the latter may have. Lastly, there are substantial resource savings due to the fact that either the prosecution of amnesty recipients may not even have commenced (for example in the US) or the findings of an administrative enforcement agency may not be disputed under judicial review.

2.2 Fundamental Features of a Leniency Programme

21. While leniency policies vary across jurisdictions due to various factors, for example antitrust enforcement may be of administrative or adjudicative character, there are elemental features that are common to all of them. Before discussing these common features it is however useful to briefly outline the characteristics of the two fundamental types of leniency policies: (i) amnesty policy and (ii) leniency policy.

22. An amnesty policy, a representative example of which is the US leniency programme (see sub-section 3.1 below), provides for rewards (usually full immunity) only to the first-in applicant. It is a system where the winner takes all and subsequent applicants cannot benefit from any reductions of sanctions. However, as is explained more in detail in paragraphs 29-31 below, cooperation from cartel members that lost the race for immunity may greatly contribute to the successful investigation and prosecution of a cartel. In jurisdictions that have an amnesty policy this is generally achieved through the use of settlements (plea bargaining) whereby companies that did not qualify for immunity under leniency may obtain favourable treatment in exchange for admission of guilt (or non-contestation of the authority's case) and cooperation (for further discussion on the use of settlements see sub-section 2.4.2 below).

23. In contrast, a leniency policy offers not only full immunity to the first-in applicant but also reductions of sanctions for subsequent applicants. An example of a leniency policy is the EC programme (see sub-section 3.2 below). The amount of reduction for subsequent applicants generally depends on the quality of cooperation and the order in which companies come forward, i.e. the second-in applicant to qualify receives higher reduction than the third-in and so on. And while jurisdictions that have a leniency programme may employ settlements as well, these are used not to further the investigation (as in jurisdictions with amnesty policies) but as a mechanism to obtain procedural efficiencies (see sub-section 2.4.2 below for more detail).

⁹ For further information on the effects of leniency policies on cartels see e.g. C Aubert, P Rey and WE Kovacic, "The impact of leniency and whistle-blowing programs on cartels", (2006) 24(6) *International Journal of Industrial Organization*, pp. 1241-1266.

24. Notwithstanding their methodological differences, jurisdictions with an amnesty or a leniency policy have a common set of objectives and incentive systems. They all provide, either through a leniency programme alone (leniency policy jurisdiction) or in combination with settlements (amnesty policy jurisdiction) incentives for first-in as well as subsequent applicants to come forward and cooperate with the investigation. Therefore, this paper does not, unless necessary (such as when discussing settlements), make a distinction between leniency and amnesty policies when discussing the general objectives, requirements and prerequisites of leniency programmes.

2.2.1 Incentives for Cartel Members

25. The basic principle of leniency is that a cartel member that discloses the existence of an illegal cartel to the authorities is in exchange protected in some form from the sanctions whose imposition is ordinarily foreseen by law. This includes full immunity from any pecuniary and criminal sanctions or their reduction in correspondence to the value of cooperation provided.

26. Like any grant of immunity, the offer of amnesty or lenient treatment in exchange for self-reporting and terminating illegal conduct creates an incentive for cartel members to defect and come forward with information that the authorities would otherwise have difficulty obtaining. The fact that the greatest protection, immunity from sanctions, is granted only to the first cartel member to report, induces strategic behaviour in which each conspirator will try to maximise its benefits, hence creating conditions for a “race to the door” of a competition authority.

27. However, it is also important to emphasise that reporting cartel members will behave strategically in their approach to the antitrust authority as well, providing only so much information as required to obtain the fullest benefit while minimising the negative consequences flowing from the establishment of a violation of which they were a part. Therefore, modern leniency policies are set up so as to ensure that by forgoing sanctions against the first cartel member to report the existence of a cartel of which the authority was not previously aware (first-in applicant) the authority obtains sufficient information and leverage to maximise its ability to successfully prosecute the remaining members of the cartel, hence satisfying requirements of justice.

28. This is generally achieved by requiring that the first-in applicant provide information of certain characteristics and quality in order to qualify for immunity and by further imposing on it an obligation of continued cooperation with the investigation until its conclusion under the threat of withdrawal of immunity. Doing so enhances the value of the first-in applicant’s contribution beyond mere disclosure of a cartel and contributes to the enforcement authority’s ability to carry out a successful prosecution.

29. Nevertheless, there are limits to the utility of the first-in applicant’s cooperation for the prosecution. It is rare that such an applicant will provide information and evidence that would enable the enforcement authority to establish the existence of the violation to the requisite legal standard without the need for further corroboration. It is possible that the needed additional evidence will be obtained through the use of the enforcement authority’s investigative powers such as on-site inspections, interrogations, written requests for information and other methods. However, it is not uncommon that none of these investigative means yield the desired results, because even though the information provided by the first-in applicant may allow for their more targeted and effective use, the discovery and collection of material evidence is still complicated by the secret character of the cartel. If that is the case, then the enforcement authority, despite knowing of the existence of the cartel, may not be able to successfully prosecute it or be able to do so only to a limited extent (e.g. with respect to duration, members of the cartel or products covered).

30. Therefore, in order to fully utilise the first-in applicant's contribution, it is essential that there are incentives for the other members to come in after the initiation of the case to provide both information that can be used to further the investigation and evidence to corroborate the facts alleged by the first-in applicant. The second-in applicant "makes the case" by providing the necessary corroboration.

31. In addition, the possibility of obtaining cooperation from additional cartel members exerts further pressure on the first-in applicant to provide as full and truthful account of events as possible. This is because if it is subsequently established that the first-in applicant withheld any information available to it, the consequence may be the withdrawal of immunity.

32. Similarly, in cases that were not started on the basis of a leniency application, a competition agency rarely manages to collect sufficient evidence through inspections or other traditional means. Therefore, it is crucial that leniency be available even after the case is initiated, either in the form of full immunity for the first applicant that provides information that allows for the establishment of the violation or partial immunity for applicants that supply information of sufficient value.

33. Finally, leniency can go too far and undermine the incentives that make the programme work. If it is possible for too many members of the cartel to benefit from leniency, the threat of punishment decreases, and fewer leniency applications can be expected in the future.

2.2.2 Requirements Placed on Leniency Applicants

34. Having discussed the question of what incentives a leniency programme should offer to cartel members to induce them to cooperate, we shall now turn to the conditions for leniency and requirements commonly placed on leniency applicants.

35. However, a preliminary issue of eligibility for leniency should be briefly addressed first. There are generally no restrictions as to who is eligible for leniency except with respect to full immunity for those companies that initiated the cartel (instigators), significantly lead others in the course of its operation (leaders) or coerced others to participate therein (coercers). Some jurisdictions preclude granting full immunity to instigators, leaders and coercers¹⁰ while others exclude only coercers¹¹ or leaders¹². The relevant choice is a matter of public policy of the particular jurisdiction. However, instigators, leaders and coercers are usually not excluded from eligibility for partial immunity.

36. Turning to the requirements placed on leniency applicants, it is first necessary to understand the two-stage process of granting leniency. In the first stage, an applicant is generally informed, at around the time when it provides the required information, whether it qualifies for leniency. A conditional decision to that effect may be issued, providing the requisite level of certainty to the applicant. However, such a decision is only conditional and is subject to confirmation at the second stage, at the end of the investigation or prosecution, provided that the applicant complies with the requirements (demands) imposed upon it. It is through this two-stage procedure that the enforcement authority ensures compliance on the part of the applicant with any obligations it may wish to place on it.

37. Modern leniency policies generally impose three types of requirements on leniency applicants: (i) to terminate its involvement in the cartel, (ii) to maintain secrecy as to the fact that an immunity

¹⁰ Such as the United States which, apart from coercers excludes companies that clearly lead or instigated the illegal conduct (see paragraph 72).

¹¹ For example the European Commission and Canada (see paragraphs 80 and 88 respectively).

¹² For example Brazil (see paragraph 93).

application was made, and (iii) to cooperate fully with the enforcement authority throughout the proceedings.

38. Leniency applicants are required to terminate their participation in the cartel, at the latest, when the application is made. This is generally an issue only in case of the first-in applicant who discloses the existence of an ongoing cartel. However, in such a case, immediate termination of participation could jeopardise the success of eventual inspections that the enforcement authority may wish to carry out as a sudden withdrawal of one cartel member may put the remaining members on alert. They may subsequently engage in concealment of evidence hence decreasing the likelihood that any will be found during inspections. Therefore, an enforcement authority should have the discretion to authorise continued involvement of a first-in applicant for a reasonable time and only to the extent necessary to allow it to prepare and carry out inspections.

39. A related requirement, aimed at maintaining the secrecy of the initiated investigation is that the first-in applicant must not disclose the fact that it has applied for leniency to any party and particularly not to the other cartel members. In addition, this obligation serves an important purpose even after the investigation has become public, e.g. after inspections have been carried out, as it maximises the uncertainty of the other cartel members as to what information the authority may already possess. If members of a cartel know which one of them broke ranks and applied for immunity, they may be able to gauge what information was supplied to the enforcement authority on the basis of the communication structure of the cartel. In such a case, they may either choose not to come forward for leniency at all or tailor their applications so as to provide the minimum amount of information, while qualifying for some reduction in sanctions. Maintaining the identity of the first-in applicant secret until the end of the investigative stage of the case reduces the scope for this type of strategic behaviour on the part of the other cartel members.

40. The last, but certainly not the least, of commonly used requirements is the obligation to cooperate fully with the enforcement authority until the conclusion of the case. This includes the obligation to respond promptly to any requests from the authority, make company officers available for interviews without the need for compulsion and other suitable forms of cooperation depending on the particular jurisdiction's enforcement framework.

2.2.3 Standard of Information Demanded From Leniency Applicants

41. The type of information demanded is generally different with respect to first-in applicants who disclose the existence of the cartel than for subsequent applicants.

42. With first-in applicants, the enforcement authority obtains knowledge of the existence of a cartel of which it was previously unaware, and as such it will usually wish to conduct secret surveillance or surprise inspections as a first investigative measure. To be able to do so, it will require first-in applicants to supply not only evidence pointing to the cartel's existence and its members but also information of a logistical nature so as to enable it to effectively target its investigative measures. This type of information includes names and addresses of individuals involved, means of communication used in running the cartel, information as to whether evidence may be stored in places outside the business and so on.

43. The demands on subsequent applicants are generally more fluid. However, as any reduction in sanctions that would otherwise be imposed is derived from the quality of cooperation and utility of the information supplied, there is pressure for leniency applicants to provide as complete and comprehensive account of the facts as possible, supported by all available evidence.

44. Information and evidence can usually be provided both in oral and written form, depending on the evidentiary rules in different jurisdictions. For example in common law countries greater emphasis is placed on oral testimony due to the demands of an adjudicatory system, which include the right to cross-examine any witnesses. In jurisdictions with administrative enforcement, written accounts in the form of affidavits (or deposition notes) of the individuals involved are generally more common. Along with any witness accounts, be they in oral or written form, leniency applicants should supply any underlying documentary evidence, such as meeting notes, travel records and diaries of persons involved, emails etc.

45. The use of electronic methods of communication and storage means that leniency applicants must often sift through a large number of records to locate potentially relevant evidence. As the preparation of leniency applications usually occurs under significant time pressure (race to the door), companies may wish to shift some of the burden of locating evidence onto the authority and simply include vast amounts of largely irrelevant material in their application. This obviously negates the efficiency gains that the authority aims to obtain through the use of leniency. It is therefore appropriate to demand that leniency applicants “do their homework” and submit leniency applications of certain quality and relevance.

46. Such a policy of demanding information of a certain quality may be enhanced by the use of markers. Leniency applications are assessed in the order they were made and therefore it is important for applicants to be in the door of the agency before others. However, the agency is interested in obtaining relevant information of the highest quality possible. Therefore it may wish to provide the applicant more time for collection of information while reserving its place in the line with a marker for a reasonable time period. Markers are most commonly used for first-in applicants, where both the question of time for the applicant and the need for the most accurate information for the authority are most acute.

47. An important issue with respect to information provided by leniency applicants is confidentiality. There are generally two dimensions in which concerns of confidentiality play out. First is the area of business secrets and other commercially sensitive information. This, however, is not exclusive to leniency applications. Enforcement authorities generally have procedural means of dealing with the protection of this type of confidential information. The second area in which confidentiality concerns arise is the access of third parties to leniency applications. If a leniency applicant knows that anything it voluntarily provides to the enforcement authority may end up in the hands of its customers or other third parties, it may be discouraged to come forward. Therefore, leniency programmes are generally set up so as not to place leniency applicants in a worse position than they would be had they not come forward. The exact way to achieve that obviously depends on the enforcement framework of a particular jurisdiction and its procedural rules.

2.3 Prerequisites to Leniency Programme’s Success

48. Leniency programme is essentially a system of incentives for companies to come forward and denounce their participation in a cartel. As such it has to be set against sanctions that are high enough to make an offer for their relaxation attractive. Hence it is generally accepted that one of the main prerequisites to a successfully functioning leniency programme is the threat of severe sanctions that may be imposed on hard core cartels (the relationship between leniency and sanctioning policies is further explored in sub-section 2.4.1 below).

49. Similarly, as mentioned above, an enforcement authority should demonstrate its ability to uncover and punish cartels on its own and continue to do so even when it has a results producing leniency programme. A credible threat of detection, prosecution and punishment is necessary to make leniency an attractive option for cartel members. It is therefore important that enforcement authorities not only rely on leniency applications to generate cases but also initiate them without leniency applications to show enforcement credibility requisite for the sustained success of a leniency programme.

50. In order to fully capitalise on both the sufficient level of sanctions and enforcement credibility in maximising a leniency programme's effectiveness, an enforcement authority should publicise the results of its activity. Engaging in competition advocacy and building awareness of the severity of legally foreseen sanctions, the number of companies (and individuals) prosecuted and the sanctions imposed on the one hand and of the benefits that await cartel members who break ranks on the other hand, contributes greatly to a leniency programme's success.

51. Certainty is another important element for the success of a leniency programme. As mentioned above, when deciding whether to apply for leniency, cartel members engage in rational cost benefit analysis. It is therefore crucial that they be able to work with clearly set or at least sufficiently predictable payoffs. The stakes are particularly high in the case of a potential first-in applicant, hence it is highly desirable to make the granting of immunity more or less automatic upon the revelation of the existence of a cartel (of course subject to the fulfilment of the requirements discussed in sub-section 2.2.2 above).

52. A related factor is fairness in the application of the leniency programme. An enforcement authority should exercise great care in the way it administers its leniency policy and deals with applicants. Procedures that allow for timely registration of leniency applications should be set up given that it matters greatly whether a company is first or second in. It is not uncommon that full immunity or a significant reduction escapes applicants by hours or even minutes. Furthermore, an enforcement authority should be fair in the evaluation of cooperation under leniency and strictly adhere to the conditions set out in its leniency programme. If, for example, sanction reductions are dependent on the order in which applications are made, then a transparent system for assessment of cooperation that takes that order into account must be set up.

53. It must be emphasised that any violation of the principles of fairness and certainty may lead to the applicant contesting the enforcement agency's case, thereby negating any efficiency gains. More importantly, it will also undermine the credibility and hence success of the leniency programme in the long run. Enforcement authorities should therefore take great care in ensuring that they apply their leniency policies in close adherence to these principles.

2.4 Interaction between Leniency Programmes and Other Policies

54. Leniency policies do not operate in a vacuum, in addition to the elements mentioned in the preceding paragraphs, they also interact with other related broader policies in the area of anti-cartel enforcement: (i) sanctioning (fining) policy (ii) settlements (also sometimes referred to as early case termination policies), (iii) private damage claims.

2.4.1 Sanctioning (fining) Policy and Leniency

55. While there is no universal agreement as to the requisite amount of sanctions for cartel behaviour, it is generally accepted that their seriousness is an important factor in the successful functioning of a leniency programme.¹³ The higher the sanctions the greater the benefit a potential applicant can expect to derive from coming forward and applying for leniency. Cartel behaviour is traditionally punished by pecuniary sanctions imposed on companies (corporate sanctions)¹⁴, however several jurisdictions also

¹³ For further information on the setting of fines for cartel behavior see "Setting of fines for cartels in ICN jurisdictions", April 2008, available at <http://www.internationalcompetitionnetwork.org/media/library/Cartels/Fines%20report%20-%20FINAL.pdf>.

¹⁴ With respect to the objectives of corporate sanctions and the determination of their optimal level, see e.g. WPJ Wils, "Optimal Antitrust Fines: Theory and Practice", (2006) 29(2) World Competition, June 2006, available at <http://ssrn.com/abstract=883102>.

provide for criminal liability of individuals involved in a cartel conduct (e.g. managers and sales personnel) with corresponding sanctions (imprisonment and/or fines).

56. As regards corporate pecuniary sanctions, companies involved in a cartel are generally rational actors who engage in cost benefit analysis of their actions. Therefore, if potential pecuniary sanctions do not exceed the gains obtained from cartel conduct (or are applied too infrequently), a company has little incentive to break ranks and come forward. In this respect it should be mentioned that transparency and predictability as to the general amount that may be imposed for a particular violation plays an important role when a company is deciding whether to apply for leniency. Jurisdictions thus often adopt guidelines setting out the considerations taken into account in determining the amount of sanction and the methodology of their calculation.¹⁵

57. Criminal sanctions on individuals involved in the illegal behaviour and a corresponding offer for their relaxation have shown to be very effective in inducing cooperation under a leniency programme.¹⁶ In addition, they can be a powerful deterrent to cartel activity as company officers are much more likely to consider the potential consequences of their conduct when not only the company's accounts but also their personal freedoms are at stake.¹⁷

58. It is however important to emphasise that a jurisdiction with individual criminal liability must ensure that its leniency programme also offers protection against criminal sanctions for the relevant personnel. Otherwise, a company, acting through its officers who may have been implicated in the cartel conduct, would be much less likely to come forward under leniency. The fact that in most jurisdictions competition and criminal enforcement are carried out by different authorities may require coordinated measures by the competent bodies or even changes in law. However, doing so is crucial for the successful functioning of a leniency programme.

2.4.2 Settlements and Leniency

59. Some jurisdictions have policies that allow them to “settle” cartel cases.¹⁸ This means that they can formally dispose of cases at an earlier stage through the use of a settlement policy instrument (settlement or a plea bargain). Under this mechanism a defendant admits to a competition law violation, agrees to cooperate with the authority and waives, or accepts a limited exercise of certain procedural rights, sometimes including the right of appeal, in exchange for a reduced sanction. Such a procedure has the potential of greatly reducing the time it takes to prosecute cartel cases, allowing a competition authority to use its resources more efficiently. In addition, eliminating an eventual appeal procedure achieves further resource savings.

¹⁵ See for example the United States Sentencing Guidelines (part R of the Sentencing Guidelines Manual, p. 302, available at <http://www.ussc.gov/2008guid/GL2008.pdf> or the European Commission Guidelines on the Method of Setting Fines, available at [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC0901(01):EN:NOT).

¹⁶ One issue with criminal liability is that the standard of proof in criminal prosecution is higher than in administrative prosecution and judges or juries may look with more skepticism at testimonies of leniency applicants, perceiving them as self-serving. That is however an unavoidable cost that must be weighed against the large overall benefits derived from a leniency programme.

¹⁷ With respect to criminal sanctions see e.g. OECD Third Report on Hard Core Cartels, p 26 et seq. ([Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation \(2005\)](#)).

¹⁸ For an in-depth discussion on the use of settlements in cartel cases see “Cartel Settlements: Report to the ICN Annual Conference,” April 2008, available at http://www.internationalcompetitionnetwork.org/media/library/Cartels/Cartel_WG_1.pdf.

60. Broadly speaking, depending on whether a jurisdiction applies an amnesty or a leniency policy (see paragraphs 22-23 above) there are two models of settlement policies, each of which interact in a distinct way with a leniency programme.

61. First is the plea bargaining model, which is used in the US, where it is a general feature of criminal procedure and not limited to cartel cases. Due to the fact that the US applies an amnesty policy (see paragraphs 21-24 above) and as such offers immunity only to the first-in applicant (and no reductions for subsequent applicants), plea bargaining is used in a similar way that jurisdictions with leniency policies use leniency programmes (which provide reductions to subsequent applicants), i.e. to obtain information and cooperation. Under such a model the interaction between leniency and plea bargaining is that of complementarity and partial overlap.

62. The second model, an example of which is the settlement procedure used in the EU, however poses slight issues when it comes to interaction with a leniency programme.¹⁹ Under this model, settlements are not used as an investigative tool to obtain information, because the leniency programme is designed to do that by providing reductions to more than one applicant (leniency policy, see paragraphs 21-24 above). Instead, settlements are used to achieve procedural efficiencies once the investigation has been concluded and the case is at a stage leading up to a formal decision or a trial.

63. Under this model, leniency and settlements thus serve different principal purposes and coexist in parallel, which creates the potential for harmful interaction. If a settlement mechanism offers a reduction large enough, cartel members may be less incentivised to apply for leniency as they can fight the investigation and then admit to whatever violation the competition authority was able to establish. It is therefore important to ensure that leniency reductions remain attractive, for example by keeping settlement reductions relatively low and providing that reductions under both leniency and settlement are cumulative. In this way, leniency and settlements can work in a symbiotic manner, each achieving a distinct objective.²⁰

2.4.3 Private Damage Claims and Leniency

64. Private claims for damages sustained as a result of a cartel violation (or private enforcement as it is sometimes referred to) raise several issues when it comes to their interaction with leniency programmes. In several jurisdictions, a victim of a competition law violation (e.g. customer of a cartel member) may bring an action for damages sustained as a result of that violation in civil court. However, at the moment it is only in the US that private damage claims are widely used. In most other countries they are rare as their efficient use is complicated by various procedural or substantive hurdles. Nevertheless, in a number of jurisdictions, for example in the EU, there are ongoing initiatives aimed at strengthening private actions for damages, which are seen as a beneficial complement to public enforcement.²¹ Indeed, private damage actions can serve as a further deterrent to cartel activity while ensuring that victims of cartel violations are compensated for the damage they suffered.

¹⁹ For a detailed description of the EC settlements policy see K Mehta & MLT Centella, "Settlement procedure in EU cartel cases", published in Competition Law International and available at: http://professorgeradin.blogs.com/professor_geradins_weblog/files/settlements_paper_mehta_and_tierno_centella.pdf

²⁰ For a detailed discussion of the similarities and differences between the US plea bargaining and EC settlement procedures, see A O'Brien, "Cartel Settlements in the U.S. and EU: Similarities, Differences & Remaining Questions", presented at the 13th Annual EU Competition Law and Policy Workshop, Florence, Italy, June 6, 2008, available at <http://www.usdoj.gov/atr/public/speeches/235598.htm>

²¹ The materials prepared in the course of this initiative as well as stakeholders' comments thereon can be accessed at <http://ec.europa.eu/competition/antitrust/actionsdamages/index.html>.

65. Leniency programmes have the potential to promote compensation of victims of a cartel. In the US one of the requirements placed on immunity is that the applicant compensates the victims of its illegal conduct. In exchange, its liability in private suits is limited to actual damages (and not treble damages as is normally the case).

66. However, the threat of private damage claims can be a disincentive for a company considering applying under leniency if that would increase its exposure to liability in civil suits. If by applying for leniency cartel members would be placed in a worse position in relation to civil damage suits as compared with members that did not apply, their willingness to come forward would be significantly reduced. In the US, a company's exposure in damage claim suits is generally perceived as merely another negative payoff that must be included in the cost benefit analysis of whether to come forward.²² The fact that damage suits are so common and plaintiffs well equipped with procedural means of obtaining evidence through discovery renders private damage litigation more or less inevitable once a violation is detected. However, qualifying for leniency results in damages being de-trebled²³, which is a powerful motivator to come forward as civil liability often greatly exceeds any pecuniary sanction imposed through public enforcement.

67. In other jurisdictions private damage actions are generally not viable at all absent a competition authority's finding of a violation, which could be used as evidence of the existence of the cartel in civil court.²⁴ But even if plaintiffs can rely on the competition authority's finding of an unlawful act, they still have to prove the remaining elements of a damage claim action: causal link between the act and damages and the amount of damages. Not being able to obtain evidence to prove these elements through discovery, they may attempt to turn to the competition authority's files. That is where protecting the confidentiality of leniency submissions becomes very important for maintaining the attractiveness of leniency programmes. If potential leniency applicants know that any information and evidence they provide under leniency may become accessible to private plaintiffs, their willingness to come forward may be significantly reduced.

²² See e.g. GR Spratling & DJ Arp, "Making the Decision: What to do When Faced with International Cartel Exposure", presented at the joint ABA and IBA 7th International Cartel Workshop, San Francisco, January 30-February 1, 2008.

²³ In the US, victims of a cartel are normally entitled to treble damages (three times the amount of actual damages).

²⁴ Actions, which follow a competition authority's investigation and finding of a violation, are commonly referred to as "follow-on actions". The term "stand-alone actions" on the other hand refers to actions brought absent (before) the finding of a violation by a competition authority. In follow-on actions a victim of a cartel can usually rely on the decision of the competition authority as conclusively establishing the existence of an unlawful act, i.e. there is no need to prove that the violation occurred (in stand-alone actions, the plaintiff must prove that the violation took place). Nevertheless, showing that an unlawful act occurred is only one element of a damage claim. Under traditional principles of tort law a plaintiff seeking recovery must prove further elements to succeed in its claim, such as the causal link between the act and the damage and the extent of the damage itself (some jurisdictions even require the showing of fault).

3 Leniency Programmes in Selected Jurisdictions

3.1 United States

68. The Antitrust Division of the US Department of Justice (DOJ) adopted its first leniency policy in 1978 and substantially revised the programme with the issuance of the Corporate Leniency Policy in 1993 and a Leniency Policy for Individuals in 1994.²⁵

69. As mentioned above, under the US programme only one leniency (in the form of full immunity) is granted per conspiracy. It can be granted either to (i) the first corporation or (ii) to the first individual who approaches the DOJ on his/her own behalf, provided they meet the requisite criteria.

70. As time is of the essence, counsel for a corporation that comes forward may apply for a marker so as to preserve its place in line for leniency, while collection of information in support of an application is being finalised.²⁶ Markers are granted only for a finite period of time, the exact duration of which depends on a number of factors such as the number of employees that need to be interviewed and the amount of records to be reviewed. A usual period is 30 days, which can be further extended if circumstances so require.

71. Corporate leniency is available either before (“Type A leniency”) or after (“Type B leniency”) the DOJ investigation has begun. If granted, Type A leniency covers the whole corporation as identified in the application and all its present directors, officers and employees who admit their involvement in the criminal antitrust violation as part of the corporate confession and continue to assist with the investigation. As for Type B leniency, the policy provides that company directors, officers and employees will be considered as if they approached the DOJ individually; however in practice the DOJ treats them in the same manner as with Type A applicants. The DOJ may also agree, and often does, that past directors, officers and employees will not be prosecuted, which effectively includes them under leniency coverage.

72. Type A leniency will be granted to a corporation that reports illegal antitrust activity before the DOJ has received information about the activity from any other source. In order to qualify, the corporation must show that it did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity. In addition, it must meet the following conditions:

- i. the corporation took prompt and effective action to terminate its participation in the illegal activity, unless the DOJ agrees to its continuation in the interest of the investigation;
- ii. the corporation reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation throughout the investigation;
- iii. the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
- iv. where possible, the corporation makes restitution to injured parties.

²⁵ Available at <http://www.usdoj.gov/atr/public/criminal/leniency.htm>. See also SC Hammond and BA Barnett, “Frequently Asked Questions Regarding the Antitrust Division’s Leniency Program and Model Leniency Letters (November 19, 2008)”, available at <http://www.usdoj.gov/atr/public/criminal/239583.htm>.

²⁶ To qualify for a marker a corporation’s counsel must (i) report that it has indications that its client engaged in cartel activity, (ii) disclose the general nature of the conduct discovered, (iii) identify the market involved specifically enough to allow the DOJ to determine whether leniency is still available and (iv) identify the client. In certain situations anonymous markers are also available, albeit only for a couple of days.

73. Type B leniency is available even after the DOJ has received information about the illegal activity. It will be granted to a corporation that is the first to come forward and qualify for leniency with respect to the activity, provided that:

- i. at the time the corporation comes in, the DOJ does not have evidence against the company that is likely to result in a sustainable conviction;
- ii. the DOJ determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation's role in the activity, and when the corporation comes forward;
- iii. the corporation meets the conditions set out in the preceding paragraph (72) under i.- iv.

74. As already mentioned the leniency programme does not provide for any reductions for corporations that do not qualify for either Type A or Type B leniency. Nevertheless, cartel members that come in second or even later may still receive reductions as compared with normally foreseen sanctions as part of its plea agreement, provided they admit to the violation and cooperate with the investigation.²⁷

75. Such corporations may also qualify for the so called “Amnesty Plus”, whereby they receive an additional reduction within their plea agreement for conspiracy X, where they do not qualify for leniency, provided they report a separate conspiracy Y, for which they may receive leniency. Under Amnesty Plus corporations may therefore receive dual credit for coming forward and cooperating by receiving leniency with respect to conspiracy Y, while receiving a greater reduction in the recommended fine with respect to conspiracy X.

76. The DOJ also has the Leniency Program for Individuals, under which an individual who comes forward on his or her own behalf to report illegal antitrust activity may qualify for leniency, provided that the following conditions are met:

- i. at the time the individual comes forward, the DOJ has not received information about the activity from any other source;
- ii. the individual reports the wrongdoing with candour and completeness and provides full, continuing, and complete cooperation with the investigation;
- iii. the individual did not lead, initiate or coerce any party to participate in the activity.

77. After a leniency applicant (corporation or individual) approaches the DOJ, it receives a conditional leniency letter. If the applicant satisfies all of its obligations (usually after the completion of the investigation and prosecution) and its eligibility is verified, the DOJ will issue a final letter confirming the grant of leniency.

3.2 European Commission

78. The European Commission (Commission)²⁸ adopted its first leniency programme in 1996, which has been revised twice, first in 2002 and again in 2006 when the current Leniency Notice was adopted.²⁹ It

²⁷ The DOJ's practice is to agree to reductions on average between 30 and 35 % for corporations that are second to cooperate. Subsequently cooperating companies receive gradually lower discounts (S.D. Hammond, “Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations”, presented at the ABA Section of Antitrust Law Spring Meeting (Washington D.C., March 29, 2006), available at <http://www.usdoj.gov/atr/public/speeches/215514.pdf>.)

²⁸ The European Commission is the authority responsible for the enforcement in the European Union of, i.a., Article 81 of the EC Treaty, which prohibits collective anticompetitive practices, including cartels.

applies to secret cartels between two or more competitors and covers only corporations, as EU law provides no sanctions for individuals participating in cartel conduct.

79. Similar to the US policy, the Commission will grant full immunity to either one of two types of applicants:

- i. an applicant that discloses its participation in a cartel and is the first to supply information and evidence which enable the Commission to carry out a targeted inspection, if, at the time of the application for immunity, the Commission did not yet have sufficient evidence to adopt a decision to carry out an inspection and had not yet carried out such inspection;
- ii. if immunity is not granted on the above ground, the Commission will alternatively grant immunity to an applicant that is the first to submit information and evidence, which will enable the Commission to find an infringement of Article 81 EC, provided that the Commission did not yet have, at the time of the submission, enough evidence to make such a finding.

80. In order to qualify for immunity the applicant has to meet the following further conditions:

- i. cooperate fully, expeditiously and on a continuous basis with the Commission throughout the procedure;
- ii. end its involvement in the alleged cartel immediately following its application, except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections;
- iii. when contemplating making its application, the applicant must not have destroyed, falsified or concealed evidence of the alleged cartel nor disclosed the fact or any of the content of its contemplated application, except to other competition authorities;
- iv. the applicant must not have taken steps to coerce other undertakings to join the cartel or to remain in it.

81. Like the US programme, the Commission's Leniency Notice allows an immunity applicant to apply for a marker in order to preserve its place in line, while it finalises collection of information and evidence necessary to support its application. The Commission will grant a marker on a case-by-case basis for a period necessary to finalise the application.³⁰ Once a marker is perfected³¹ within the period set by the Commission, the information and evidence is deemed to have been submitted on the date when the marker was granted.

82. However, unlike amnesty under the US system, full immunity does not mean absence of prosecution. The Commission will still adopt a decision against the immunity applicant, formally finding the existence of a violation but not imposing any fine on the applicant.

83. If a company does not qualify for full immunity, it may still be eligible for a reduction in fines under the Leniency Notice if it provides the Commission with evidence that represents significant added value as compared to the evidence already in the Commission's possession. In addition, in order to qualify

²⁹ Commission Notice on immunity from fines and reduction of fines in cartel cases, [2006] OJ C298/17, available at http://ec.europa.eu/competition/cartels/legislation/leniency_legislation.html.

³⁰ To be eligible to secure a marker, the applicant must provide the Commission with information concerning its name and address, the parties to the alleged cartel, the affected product(s) and territory (-ies), the estimated duration of the alleged cartel and the nature of the alleged cartel conduct.

³¹ A marker is perfected when the applicant submits the information and evidence required to meet the relevant threshold for immunity.

it must meet the requirements of termination of participation in the cartel and full cooperation, just as is demanded from immunity applicants. The first applicant to provide evidence of significant added value will receive a reduction between 30-50% of the fine that would otherwise be imposed, the second receives a reduction of 20%-30% and the third a reduction up to 20%.

84. Whether evidence strengthens the Commission's ability to prove the alleged cartel, hence constituting added value is determined on the basis of its nature and/or level of detail. Contemporaneous as well as directly incriminating evidence will be considered of higher relevance than ex post and indirect evidence. The degree of corroboration needed is also a factor and accordingly compelling evidence is attributed higher value than that requiring corroboration, such as a simple statement.

85. The Leniency Notice provides for partial immunity whereby if a leniency applicant provides evidence that enables the Commission to prove additional facts increasing the gravity or the duration of the infringement, such additional facts will not be taken into account when determining the fine to be imposed on the applicant.

86. As regards procedure, an immunity applicant is provided with a conditional decision granting immunity shortly after it approaches the Commission. If it fulfils all the conditions and requirements, the Commission will, in its final decision establishing the existence of the infringement, grant the applicant immunity from all fines.

3.3 Canada

87. Canada's leniency programme was formally introduced in 2000 when the Canadian Competition Bureau (Bureau) issued an Information Bulletin (2000 Bulletin), setting out the terms of Canadian Immunity Program, formalising a practice that has been in existence since 1991. The 2000 Bulletin has been superseded by subsequent modifications and the currently applicable Canadian leniency programme is set out in the Bureau's 2007 Bulletin (2007 Bulletin).³²

88. Under the 2007 Bulletin, a participant³³ in a cartel activity that has not coerced others to take part therein³⁴, may be eligible for immunity from all criminal prosecution (full immunity), subject to the fulfilment of the required conditions, if:

- i. the Bureau is unaware of an offence, and the party is the first to disclose it; or
- ii. the Bureau is aware of an offence, and the party is the first to come forward before there is sufficient evidence to warrant a referral of the matter to the prosecution office (Director of Public Prosecutions of Canada).

89. In order to qualify for immunity activity the applicant must meet the following conditions and requirements:

- i. terminate its participation in the cartel,
- ii. provide complete, timely and ongoing cooperation with the investigation and subsequent prosecutions, which includes the following obligations:

³² Available at <http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/eng/02483.html>.

³³ A company may come forward also on behalf of its employees, who may also approach the Bureau on their own behalf, in which case each offer of cooperation will be evaluated separately.

³⁴ The 2007 Bulletin excludes coercers in contrast with the 2000 Bulletin, which excluded leaders, instigators and those who were sole beneficiaries of the illegal activity in Canada.

- a. not disclose the fact that it has applied for a marker without the Bureau's consent;
- b. reveal any and all conduct of which it is aware, or becomes aware, that may constitute an offence under the Competition Act and in which it may have been involved;
- c. provide full, complete, frank and truthful disclosure of all non-privileged information, evidence and records in its possession, under its control or available to it, wherever located, that in any manner relate to the anti-competitive conduct for which immunity is sought;
- d. ensure cooperation from former directors, officers and employees as well as current and former agents;
- e. facilitate the ability of current and former directors, officers, employees and agents to appear for interviews and to provide testimony in judicial proceedings in connection with the anti-competitive conduct.

90. If a company qualifies for immunity, all of its current directors, officers and employees are covered as well if they provide cooperation. Former directors, officers and employees who offer cooperation may qualify as well. If the company does not qualify for immunity, current or former directors, officers, employees or agents may still be considered for immunity as though they had approached the Bureau individually. To qualify, they must admit their involvement in the cartel activity and provide complete, timely and ongoing co-operation with the investigation and any subsequent prosecution.

91. Where an applicant does not qualify for full immunity, but cooperates with the investigation, it may be considered for some form of leniency (partial reduction of sanctions).

92. As regards procedure, an applicant may request a marker to preserve its place in line for immunity on the basis of limited hypothetical disclosure that identifies the nature of the conduct in respect of a specified product with sufficient detail. If the applicant decides to proceed with its application, it must provide a "proffer", consisting of a detailed description of the illegal activity and disclose sufficient information for the Bureau to determine whether it might qualify for immunity. Once the Bureau determines that the applicant is eligible for immunity, an immunity agreement is executed, which lists all of the applicant's ongoing obligations (full cooperation and the obligations included there under). The immunity agreement may be revoked at any time during the investigation or prosecution if the party fails to comply with any of its terms.

3.4 Brazil

93. A leniency programme was introduced in Brazil in 2000 and subsequently revised in 2006. It is administered by the Secretariat of Economic Law of the Ministry of Justice (SDE). The leniency programme provides for full or partial immunity, depending on whether the SDE was already aware of the existence of the cartel or not, to the first applicant that comes forward and confesses its participation in the cartel. Companies that were the leaders of a cartel are eligible neither for full nor partial immunity. A marker that preserves the applicant's place in the line, allowing it to present further information, is available for an agreed duration of maximum 30 days.

94. In order for an applicant to qualify for full or partial immunity the following conditions must be met:

- i. the applicant must terminate its participation in the illegal conduct;
- i. it must agree to fully cooperate with the investigation;
- ii. the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that prove its existence;

- iii. at the time the applicant comes forward, the SDE has not had sufficient information allowing it to establish the existence of the illegal activity with respect to the applicant.

95. Full immunity is available provided that the SDE was unaware, at the time of the application, of the existence of the cartel. If it was already aware, the applicable penalty can be reduced by one to two-thirds, depending on the effectiveness of the cooperation and the “good faith” of the party in complying with the leniency agreement.

96. While the leniency programme rewards only the first-in applicant that meets the applicable conditions, cartel members who lost the race for leniency may still obtain favourable treatment in exchange for cooperation under a settlement programme adopted in 2007.³⁵ Companies wishing to settle have to either admit guilt or not contest (*nolo contendere*). However when the investigation was started on the basis of a leniency application admission of guilt is required to obtain settlement.

97. Leniency protects both administratively and criminally the directors and managers of the applicant company if those individuals sign the agreement and fulfil the legal requirements. Similarly to the US programme, “leniency plus” is also available to applicants that do not qualify for leniency in the case under investigation, but disclose a separate cartel, and meet requirements for leniency for that second cartel. Such applicants will receive leniency for the second offence and a one-third reduction fine reduction with respect to the first offence.

3.5 Chile

98. At the time of writing of this paper, Chile is expected to adopt a new competition law in September 2009. The new law contains Article 39 bis providing for a leniency programme with the following characteristics.

99. A first applicant that provides the Fiscalía Nacional Económica (FNE) with information that leads to proving an illegal cartel and identifying the participants therein may be fully exempted from any fines (immunity).

100. In order to qualify for a fine exemption an applicant must comply with the following conditions:

- i. provide precise, true and verifiable information that represents an effective contribution to constitute sufficient evidence in order to found a submission of charges before the tribunal;
- ii. not disclose the fact that an application has been made until the FNE submits charges or orders filing the record regarding the request;
- iii. terminate its participation in the cartel immediately after having submitted its application;
- iv. it must not have been the organizer of the illegal conduct or coerced others to participate in it.

101. A company that does not qualify for a fine exemption may apply for a reduction of a fine, if it complies with the conditions listed in the preceding paragraph and provides additional information to the one presented by the first applicant. A reduction may be up to 50% of the highest fine requested for the other parties involved, which were not able to obtain a fine exemption or reduction.

³⁵ See the description of the settlement programme available at <http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID=%7BEDB72BD5-9425-4116-889D-ED971CA94BBB%7D&ServiceInstUID=%7B2E2554E0-F695-4B62-A40E-4B56390F180A%7D>.

3.6 Mexico

102. In Mexico a leniency programme was introduced in 2007 by an amendment to the Ley Federal de Competencia (LFCE) and is administered by the Federal Competition Commission (CFC). It provides for fine reductions to applicants that meet the prescribed requirements. Reduction of fines may be also considered for applicants that are not the first to come forward with information, provided they contribute information towards the investigation.

103. In order to qualify for a fine reduction, an applicant must apply during the course of the investigation (even after its initiation) and fulfil the following conditions:

- i. be the first to provide sufficient elements that allow the CFC to prove the existence of a cartel (“absolute monopolistic practice” in the terminology of the LFCE);
- ii. fully and continuously cooperate with the investigation and prosecution;
- iii. terminate its participation in the cartel.

4 Convergence of Leniency Policies

104. As mentioned above, the success of the 1993 revision of the US Corporate Leniency Policy has inspired many jurisdictions to adopt their own versions of a leniency programme. Today a large number of countries have leniency policies in place, all of which are to some extent modelled upon the US programme. While there are a number of similarities between various jurisdictions’ policies, notably when it comes to fundamental elements, there are also many differences, in particular with respect to the specific requirements on applicants.

105. Convergence in leniency policies of various jurisdictions can be beneficial in and of itself. Many modern cartels are of global scope exposing cartel members to potential liability in a number of jurisdictions. Accordingly, the decision whether to break ranks and come forward under leniency is a global decision. Once a cartel member decides to come forward it can and often does so in several jurisdictions simultaneously.

106. The factors that a company considers when deciding where to apply for leniency (or if to apply at all) may include: (i) extent of exposure, (ii) eligibility requirements, (iii) availability of a marker, (iv) guarantees of confidentiality and (v) predictability and transparency in the application of a leniency programme.³⁶

107. The extent of company’s exposure to liability obviously plays a major role in deciding where to apply. As that depends on the territorial impact of the cartel conduct it is a factor that a leniency programme may influence only minimally. However, once a company identifies in which jurisdictions it may be liable to sanctions and determines which of these are crucial due to the extent of its exposure (determination depending mainly on the size and character potential sanctions), the parameters of the relevant leniency programmes assume great significance.

108. A company will first look at eligibility requirements. For example, if it clearly was a leader of the cartel, it cannot apply in the US. Or, one jurisdiction may require it to cease participation in the cartel immediately while other may wish that it postpones doing so by a reasonable amount so as not to

³⁶ For a further discussion as to what considerations companies take into account when deciding whether and where to apply for leniency see GR Spratling & DJ Arp, “Making the Decision: What to do When Faced with International Cartel Exposure”, presented at the joint ABA and IBA 7th International Cartel Workshop, San Francisco, January 30-February 1, 2008.

jeopardise inspections. The fact whether a marker is available or the company must submit a full application from the outset also impacts on the decisions where to apply in order to maximize the overall benefits. As a company's exposure may also encompass civil liability, protections against the discoverability of leniency applications by private plaintiffs play a large role as well. Lastly, certainty and predictability in the application of a leniency programme, or rather the lack thereof, has a great influence on deciding where not to apply. If for example executives of a company that qualified for leniency are subsequently prosecuted in criminal proceedings (against a recommendation of the competition authority), such a jurisdiction will be highly unattractive to potential applicants.

109. Competing requirements or crucial inconsistencies in leniency programmes in the relevant jurisdictions may force the applicant to choose whether and where to apply. Obviously that is not an optimal outcome as such a situation may induce strategic complications whereby cartel members are forced to prioritise, choosing jurisdictions with the greatest sanctions (and hence benefit by coming forward). Similarities in leniency programmes, especially with respect to the requirements placed on leniency applicants, reduce the complications inherent in a multijurisdictional filing and encourage companies to apply in multiple jurisdictions. Pragmatically speaking, by aligning a leniency programme with those of major jurisdictions such as the US and the EU (which are similar in all material aspects) a country may attract more leniency applicants.

110. Therefore, apart from contributing to the improvement of leniency programmes, convergence of leniency policies brings about a distinct set of benefits for their effective functioning insofar as it reduces complications in reporting global cartels in various jurisdictions.

5 Conclusion

111. Hard core cartels are one of the most egregious competition law violations, harming consumers and the economy as a whole and causing billions of dollars worth of damage world-wide. Combating them is, however, complicated by the secrecy under which they operate and which renders their discovery and effective prosecution by traditional investigative means complicated, if not impossible. Leniency policies, which induce cartel members to break ranks, report the existence of the cartel and cooperate with the investigation in exchange for immunity from or reduction of any sanctions that may ordinarily imposed, represent a very, if not the most effective tool in the fight against cartels.

112. However, their optimal design is crucial for their success. While there is no universal template guaranteeing success, there are a number of essential elements that a leniency programme should have. These can be summarised as follows:

- Competition agencies must ensure that enforcement is credible and sanctions are of sufficient level so as to make an offer of their reduction attractive to cartel members.
- Certainty, transparency and predictability with respect to the application of a leniency programme are all vital for its successful functioning.
- Competition authorities should place clear conditions and requirements on leniency applicants to maximise the value of a leniency policy and to foster successful investigation and prosecution of the cartel.
- Cooperation among various jurisdictions and convergence of their leniency policies is beneficial for the improvement of existing policies and enhancing their effectiveness.

113. In conclusion, in the past decade and a half, leniency policies have developed from a non-traditional tool to a cornerstone of modern anti-cartel enforcement. In jurisdictions which have adopted them, leniency policies generate the majority of cases and enable competition agencies to successfully

prosecute them. Empirically, leniency thus represents the most effective tool in the fight against hard core cartels.

6 Further Reading

- JM Connor, “Latin America and the Control of International Cartels”, prepared for delivery at the Latin American Competition Policy Conference (São Paulo, Brazil, April 4, 2008), available at <http://ssrn.com/abstract=1156401>.
- WPJ Wils, “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.
- C Aubert, P Rey and WE Kovacic, “The impact of leniency and whistle-blowing programs on cartels”, (2006) 24(6) International Journal of Industrial Organization, pp. 1241-1266.
- ICN guidelines “Drafting and Implementing an Effective Leniency Program - Enforcement Techniques Enforcement Techniques Manual”, available at http://www.internationalcompetitionnetwork.org/media/library/conference_5th_capetown_2006/FI_NALFormattedChapter2-modres.pdf.
- OECD reports and other materials:
 - [Private Remedies \(2007\)](#)
 - [Plea Bargaining/Settlement of Cartel Cases \(2006\)](#)
 - [Best Practices for the Formal Exchange of Information Between Competition Authorities in Hard Core Cartel Investigations \(2005\)](#)
 - [Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation \(2005\)](#)
 - [Fighting Hard Core Cartels in Latin America and the Caribbean \(2004\)](#)
 - [Cartels: Sanctions Against Individuals \(2003\)](#)
 - [Hard Core Cartels \(2000\)](#)
 - [Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes \(2002\)](#)
 - [Hard Core Cartels: Recent Progress and Challenges Ahead \(2003\)](#)
 - [Recommendation of the Council concerning Effective Action against Hard Core Cartels \(1998\)](#)