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Chapter
Drafting and implementing an
effective leniency policy
Subgroup 2: Enforcement techniques

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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 2006 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.

The terms leniency, immunity and amnesty are used in many jurisdictions but the definitions of these terms vary between jurisdictions. For example, under the U.S. program, “corporate amnesty” and “corporate leniency” are used interchangeably to mean complete immunity from criminal conviction and from fines for the anticompetitive conduct. Some other jurisdictions, such as the EU, use “leniency” to refer to any reduction in fines up to 100 percent.

In this chapter “**leniency**” is used to mean total immunity and “**lenient treatment**” to mean less than full immunity. A competition agency’s decisions that could be considered lenient treatment include agreeing to pursue a reduction in penalties or not to refer a matter for criminal prosecution.

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 on how the agency implements its leniency policy, including processes for conferring leniency and/or lenient treatment.

2.2 The benefits of implementing a leniency policy

Many jurisdictions have developed programs that offer leniency and/or lenient treatment because of the many benefits that flow from having them. Leniency programs encourage violators to confess and implicate their co-conspirators, providing first-hand, direct “insider” evidence of conduct that the other parties to the cartel want to conceal. The programs also help to uncover conspiracies that would otherwise go undetected and can destabilize existing cartels. They act as a deterrent to those contemplating entering into cartel arrangements.

Evidence can be obtained more quickly, and at a 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 prison sentences, less restrictive orders, or even complete immunity.

The benefits of implementing leniency programs can be grouped together as:

- Deterrence – making cartel membership less attractive
- Detection – promoting the discovery of cartels
- Desistence – causing cartels to cease operation
- Sanctioning – making punishment of co-conspirators more likely

The overall objective of leniency programs is however, to improve the level of compliance with antitrust and competition laws, through the increased detection of cartels. This benefits the community through the increase in competition, leading to lower prices, better service, more innovation and more efficient firms, an objective consistent with that of enforcement agencies.

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 is that no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and sanctioning.

There is broad consensus among most competition agencies that there are three essential prerequisites to successfully implement a leniency program. These are:

- **High risk of detection** – agencies must adopt a strong enforcement program to detect cartels. Agencies have to commit to vigorously investigate cartels using robust investigatory powers and to ensure that they are taking action against infringements. Those participating in cartels must perceive that there is a real risk of detection and that, in the absence of a leniency application, subsequent enforcement action will necessarily follow. This will encourage them to come forward before they are caught. In addition, there are also further benefits if a leniency policy can create a race between the members of the cartel to be “first in the door”, or even between the company and an employee.
- **Significant sanctions** – the sanctions imposed on cartel participants who are not part of the leniency program 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 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 come forward. This is why agencies ensure that their leniency policies are clear, comprehensive, regularly updated and well publicized.

2.4 Incentives and disincentives to self-report

Leniency programs provide the opportunity for companies to report anticompetitive conduct and reduce or avoid sanctions. The “first through the door” policy incentivizes cartelists to self-report. This means that the first eligible applicant is given conditional immunity, or a marker (where this is provided for), even on the basis of incomplete evidence.

Leniency programs often lead to a race among co-conspirators to self-report, and creates powerful incentives for a company to self-report at an early stage. While the benefits of a valid and enforceable immunity agreement cannot be overstated, there are also some risks involved in entering into such an agreement.

When drafting and implementing a leniency policy, it is therefore, 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.

Individual jurisdictions will necessarily do risk / reward assessments of their leniency offering in the context of their specific laws.

Information obtained from attorneys who have represented leniency applicants in the past highlighted some of the other issues that could inhibit potential applicants from self-reporting in some jurisdictions. These include:

- uncertainty about the ability to obtain leniency after an investigation has commenced
- inability of the 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 programs 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, not only 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
- a requirement to submit written leniency applications
- a requirement to establish all the elements of an offence before receiving conditional leniency
- cultural issues – making it socially unacceptable to self-report

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

The leniency programs that currently exist display a number of differences. Not all of the features that exist in some jurisdictions could be transposed from one system to another, because of legal obligations, and/or because of the need for them to cohere with other elements of competition policy or general public policy.

The following practices are divided into two groups: those frequently encountered in leniency programs, and those which are used less frequently. But, even in the first group, few practices 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.

In jurisdictions where a settlement procedure exists, the procedural and substantive interplay between leniency and settlement should also be considered".

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.

2.5.1 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 an applicant for a finite period of time whilst it conducts further internal investigation and attempts to perfect its application for leniency. The applicant’s position is reserved for an agreed upon amount of time in the queue usually on the condition that it provides further information within the agreed time period. Therefore, the applicant receives 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 gaming the process and the agency to determine whether they have an open investigation)
- provision for leniency for the first eligible applicant to submit an application before or after an investigation has begun.
- confidentiality obligations on both the applicant and the competition agency.
- lenient treatment (less than full immunity) for second and subsequent applicants.
- the requirement for full and frank disclosure of relevant information or evidence by the applicant to be eligible for, or to sustain, an application for leniency and lenient treatment.
- an ongoing requirement for the applicant to cooperate fully and on a continuous basis, including by its cooperating employees.
- a requirement that the applicant cease participation in the cartel conduct unless instructed otherwise by the agency, where this is permitted by law.
- applicant not to have coerced others, instigated the cartel, or acted as the ringleader.

2.5.2 Less-frequently occurring elements of leniency programs

- *amnesty plus*. This 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 matter under investigation, but discloses a second cartel, and meets the leniency program requirements for the second matter, will receive leniency for the second offence and lenient treatment for its participation in the first offence. For a company, the failure to self-report under the amnesty plus program could mean the difference between a potential fine and no fine at all. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether.
- *penalty plus*. This provides that if an applicant participated in a second cartel and does not report it under the amnesty plus policy, enforcers will urge the sentencing authority to consider the company’s, and any of its culpable executives’, failure to report the conduct voluntarily as an aggravating sentencing factor.
- hypothetical application - some enforcement agencies allow for hypothetical proffers/applications by counsel during a conditional leniency application.
- agencies will find it useful 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.
- 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 agency 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 lenient treatment.

3 PRACTICAL ASPECTS IN ADMINISTERING AN EFFECTIVE LENIENCY PROGRAM

3.1 Purpose of markers in a leniency program

As outlined above, a “marker” system under a leniency program is a means for applicants to reserve their place in the queue for a finite period of time whilst they conduct further internal investigations and attempt to perfect their application for leniency prior to the agency determining the first eligible applicant. Markers are often sought and granted with incomplete information provided by the applicant.

The applicant’s position is reserved in the queue for an agreed upon amount of time usually on the condition that it provides further information within the agreed time period. Therefore, the applicant receives a “marker” which provides certainty and clarity for potential applicants and encourages a race to contact the agency.

If internal investigations fail to disclose a breach of the law, the marker may be withdrawn or allowed to lapse if it is granted for a specific period.

Some agencies extend the marker beyond those first-in under their program and provide for the queuing of potential applicants and consider that having such a queue assists in securing cooperation and information from other parties to the cartel.

3.2 Extensions to the marker period in a leniency program

In many jurisdictions, markers are granted for specific periods, for example 28 days, to allow for a company to perfect its leniency application.

Many jurisdictions with a marker system provide for the possibility of extensions to the marker period. In some circumstances and subject to the agency’s particular leniency program, it may be appropriate to grant an extension to a marker if an applicant can demonstrate to the agency why additional time is necessary to perfect its application and that the applicant is making a good-faith effort to complete its application in a timely manner.

An applicant may seek an extension of its marker if it is unable to perfect its application. This may occur for a number of reasons, particularly if aspects of the investigation are outside the applicant’s control, documents or information is outside the jurisdiction or the conduct is broader than originally thought. Inflexible timeframes may reduce the incentives for early self reporting and may impact on the effectiveness of a leniency program.

It is good practice to use markers in the leniency application process because time is of the essence in making a leniency application. It is also good practice to grant extensions to marker periods where an applicant is making a good faith effort to complete its application in a timely manner.

It is good practice to ensure that markers and extensions to marker periods maintain the incentives on cartel participants to self-report their involvement in a cartel.

3.3 Considering 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 (not mutually exclusive) 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 information 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 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 providing full cooperation and ceasing participation in the cartel. 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 and ongoing cooperation by the applicant, and if applicable, the applicant’s directors, officers and employees.

3.4 Forms of 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 maintain confidentiality of the application (if written) and any information provided by the applicant in support of their leniency application.

Written applications

Written applications are used 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 contained 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” under which applicants must provide all documents already in existence, but which does not impose obligations on them to create any new documents / additional evidence. Although statements are acquired in paperless format

(e.g. by way of tape recording) they often provide evidence of the infringement (in the form of either factual details of or admission of participation to the infringement).

3.5 Dealing with 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 or under an agreement outside the leniency program is also an issue that should be considered. In some jurisdictions the maximum level of lenient treatment that the second applicant 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 they provide. It may also be tied to factors such as complete acceptance of responsibility for cartel behaviour and other factors in mitigation.

It is good practice to provide for lenient treatment (less than full leniency) for second and subsequent cooperating cartel members.

3.6 Where applicants have sought leniency 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, avoiding duplication 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.

3.7 Protection of information

As evidenced above, the protection of information is necessary to allay 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 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.

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 also noted that such protections are not meant to inhibit an agency's investigation into the cartel and there are limits that the agency can take to protect the identity of leniency applicants, such as in industries with limited numbers of competitors, as their identity may be inferred from the agency's investigation.

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, the agency is required by law to disclose the information, or the leniency applicant discloses its application.

3.8 Responsibility for the leniency program within an 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.

3.9 Clear requirements for applicants to cooperate with the agency

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.

Leniency applicants are often asked to undertake specific tasks, which then provide a mechanism to assess their level of cooperation. Failure to complete these tasks may have implications on their status in the leniency program.

- Such tasks will depend on the agency, the legal system under which it operates, and the leniency policy, but may include:
- forensic imaging of computers of relevant executive(s)

- providing telephone records of executives
- making current employees available for interview
- providing records to assist in locating former employees

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.

3.10 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.

Such agencies usually offer the applicant conditional leniency, which is contingent on the applicant satisfying the other ongoing requirements of the policy, including verification of the applicant's eligibility for leniency and cooperation with the enforcement agency in its investigation and prosecution of other cartel participants.

In some jurisdictions final leniency is granted after any enforcement action has been completed

3.11 Closing an investigation where there is a leniency applicant

Investigations may be closed for various reasons and not all leniency applications will lead to enforcement action.

In these circumstances, depending on the agency and their leniency program, it may be appropriate to grant final immunity where administrative action or adjudicated proceedings has not and will not occur. Further, it may be appropriate to ask the applicant if they wish to withdraw their application.

There may be unintended consequences on other agencies if one agency closes an investigation and others also have the same leniency applicant and investigating the same cartel.

It is good practice to ensure that certainty for applicants is maintained where investigations involving leniency applicants are closed.

3.12 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 may introduce some unpredictability and uncertainty regarding the leniency policy, particularly the application and decision-making process. This may be compounded if the investigating agency and the prosecuting agency are separate and they have their own leniency policies.

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, a shared philosophy about the seriousness of cartel conduct, shared priorities toward prosecuting cartel activity and open and constant communication.

3.13 Making leniency work in a parallel civil and criminal model

A parallel civil and criminal enforcement model typically refers to the situation where it is possible to take both civil and criminal action against cartels, depending on the evidence available against cartel members. In some circumstances, such a model may also involve a bifurcated enforcement model for the prosecution of the criminal aspect.

Like a bifurcation system, a parallel civil and criminal model may introduce some unpredictability and uncertainty regarding the leniency policy, particularly the application and decision-making process.

In a parallel system it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential applicants.

3.14 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 in an undercover capacity for the enforcement agency 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 investigative powers, such as searches or wiretaps.

In other jurisdictions, the applicant is asked to 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 enforcement 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.

4 EDUCATION AND AWARENESS RAISING

International experience has shown that one of the most important elements of establishing a successful leniency program is for agencies to raise education and awareness of the program and competition law generally.

Educating and engaging business, government, consumer groups and even the public in general is important in order to heighten the awareness of any leniency program and ultimately to generate leniency applications. This goes hand in hand with a heightened awareness of the potential penalties for any involvement in cartel behaviour without the possibility of leniency. International experience suggests this can be achieved through a variety of methods some of which are outlined below.

The internet is widely used and most jurisdictions publish their leniency programs on their websites. To make the leniency program more accessible, some also publish additional documentation such as guidelines² and/or Frequently Asked Questions³ on the leniency program. Some jurisdictions⁴ produce television adverts that are also posted on their websites. These seem to be effective techniques for promoting greater awareness of leniency programs and competition law generally.

In a bifurcated system, leniency programs should be published on the websites of the agency and/or authority responsible for the investigation of cartels, as well as the authority responsible for the prosecution⁵. This helps to demonstrate that both authorities have undertaken a shared responsibility and commitment to active enforcement of competition law through, *inter alia*, promoting use of the leniency program.

A consultation process during the launch and/or any subsequent review of a leniency program can also be used as a method of drawing attention to and encouraging dialogue on the program. Experience⁶ suggests that during such consultation processes input is not only given by legal associations and competition law experts – domestic and international. Legal firms will often publish articles and express their views on the matter in a variety of domestic fora, including mainstream legal journals and the general media. These help broaden the scope of awareness of the leniency program.

Education and awareness campaigns often include targeted publications and position papers, speeches and presentations at conferences by senior agency officers⁷. Business, consumer and government organisations can be invited to information sessions and road shows can be organised to raise awareness of the leniency program, targeting for example industry bodies and/or trade associations

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

² OFT in the UK; http://www.oft.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/leniency

³ DOJ in the US; <http://www.usdoj.gov/atr/public/criminal/239583.htm>

⁴ In Poland and the Netherlands: http://www.uokik.gov.pl/en/competition_protection/leniency_programme/
http://www.nmanet.nl/nederlands/home/Bedrijven/Clementie/Film_Clementie_in_kartelzaken.asp

⁵ Canada and Ireland (and soon also Australia)

⁶ In South Africa

⁷ Such as a paper presented in New Zealand “Altered States: Co-operation between Carteliser & Commerce Commission”, 7th Annual Competition Law & Regulation Review, 2007

Business cards⁸ containing the salient points of the leniency program, the website address for the leniency program, as well as any “leniency hotline” number can be printed and distributed by case officers / investigators in the normal course of business.

Press articles and/or releases focusing on successful cartel prosecutions arising from leniency applications (where confidentiality is not breached) are also a good way to draw attention to the leniency program, especially if such prosecutions involved high fines and even prison sentences in jurisdictions with criminal sanctions.

Education is a key part of establishing a successful leniency program as it heightens the awareness of the leniency program and ultimately encourages leniency applications.

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.
- to use markers in the leniency application process because time is of the essence in making a leniency application. It is also good practice to grant extensions to marker periods where an applicant is making a good faith effort to complete its application in a timely manner.
- for the requirements for leniency to include full and frank disclosure and ongoing cooperation by the applicant, and if applicable, the applicant's directors, officers and employees.
- It is good practice to provide for lenient treatment (less than full leniency) for second and subsequent cooperating cartel members.
- where applicable, for agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred.
- to ensure that markers and extensions to marker periods maintain the incentives on cartel participants to self-report their involvement in a cartel.
- to keep the identity of the leniency applicant and any information provided by the leniency applicant confidential unless the leniency applicant provides a waiver the agency is required by law to disclose the information, or the leniency applicant discloses its application.
- 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.
- to ensure that certainty for applicants is maintained where investigation involving leniency applicants are closed.
- 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, shared priorities toward prosecuting cartel activity and open and constant communication.
- In a parallel system it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential applicants.
- 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 list of leniency policies⁹ of competition enforcement agencies in ICN member jurisdictions:

Albania

<http://www.caa.gov.al/rlegal.asp?id=16>

Australia

<http://www.accc.gov.au/content/index.phtml/itemId/706268>

<http://www.accc.gov.au/content/index.phtml/itemId/708758>

Austria

<http://www.bwb.gv.at/BWB/Gesetze/default.htm> (German only)

Belgium

http://economie.fgov.be/organization_market/competition/press_releases/annex/Leniency_Notice.pdf

Bosnia and Herzegovina

Article 54: http://economie.fgov.be/organization_market/competition/press_releases/annex/Leniency_Notice.pdf

Brazil

<http://www.mj.gov.br/data/Pages/MJ34431BE8ITEMID3DAD7B1909B2482EB4A0C2456D06789DPTBRIE.htm>

<http://www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?DocumentID={557F1C6C-D5DA-48FB-9FCE-2CE68C6D5330}&ServiceInstUID={2E2554E0-F695-4B62-A40E-4B56390F180A}>

Bulgaria

<http://www.cpc.bg/system/storage/Leniency%20Decision%20EN.doc>

Canada

http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_02000.html

Cyprus

http://www.competition.gov.cy/competition/competition.nsf/dmlrelease_en/dmlrelease_en?OpenDocument

Czech Republic

<http://www.compet.cz/en/competition/antitrust/new-leniency-programme/>

Denmark

<http://www.ks.dk/en/competition/leniency/>

http://www.ks.dk/fileadmin/webmasterfiles/konkurrence/Straflempelse/Guidelines_leniency.pdf

EFTA

<http://www.eftasurv.int/fieldsofwork/fieldcompetition/otherpublications/dbaFile1211.html>

EU

<http://ec.europa.eu/competition/cartels/leniency/leniency.html>

Fiji

<http://www.commcomm.gov.fj/Default.aspx?page=compGuide>

⁹ 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.

Finland

<http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=guidelines-leniency>

France

<http://www.autoritedelaconcurrence.fr/doc/leniency17april2007.pdf>

Germany

http://www.bundeskartellamt.de/wEnglisch/download/pdf/06_Bonusregelung_e.pdf

Greece

<http://www.epant.gr/nomothesia.php?Lang=en&id=198>

Hungary

http://www.gvh.hu/gvh/alpha?do=2&st=2&pg=145&m5_doc=2369&m170_act=210

Iceland

http://www.samkeppni.is/en/collusion/reduction_or_cancellation_of_fines/

India

Article 46: http://www.cci.gov.in/images/media/competition_act/act2002.pdf

http://www.cci.gov.in/index.php?option=com_content&task=view&id=62

Ireland

<http://www.tca.ie/EnforcingCompetitionLaw/CartelImmunityProgramme/CartelImmunityProgramme.aspx>

Israel

<http://eng-archive.antitrust.gov.il/files/168/Leniency%20Program.pdf>

Italy

<http://www.agcm.it/eng/leniency.htm>

Notice: [http://www.agcm.it/agcm_ita/docum/docs.nsf/0af75e5319fead23c12564ce00458021/6978e48868020029c12572bb00347842/\\$FILE/Leniency%20Program.pdf](http://www.agcm.it/agcm_ita/docum/docs.nsf/0af75e5319fead23c12564ce00458021/6978e48868020029c12572bb00347842/$FILE/Leniency%20Program.pdf)

Japan

<http://www.jftc.go.jp/e-page/legislation/ama/immunity.pdf>

Jersey

<http://www.jcra.je/pdf/071121%20JCRA%20Leniency%20Policy.pdf>

Korea

http://ftc.go.kr/data/hwp/leniency_program.doc

Latvia

http://www.kp.gov.lv/?object_id=673

Lithuania

http://www.konkuren.lt/en/index.php?show=antitrust&antitrust_doc=res1591

Luxembourg

http://www.concurrence.public.lu/procedure/declenchement_procedure/clemence/index.html

Mexico

http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2997&Itemid=9 (Spanish)

¹⁰ From June 2009 a new Amendment of the Act LVII of 1996 on the Protection and Unfair and Restrictive Market Practices will enter into force which put to new articles, 78/A and 78/B. § to the act, what is called as Competition Law, where the leniency program and procedure are introduced and regulated. From June 2009 the former Notice's validity expires.

Netherlands

http://www.nmanet.nl/engels/home/Business_information/Leniency/Leniency_guidlines.asp

New Zealand

<http://www.comcom.govt.nz/TheCommission/LeniencyPolicy/leniencypolicynew.aspx>

Norway

<http://www.konkurransetilsynet.no/en/legislation/Regulation-on-the-calculation-of-and-leniency-from-administrative-fines-/>

<http://www.konkurransetilsynet.no/en/legislation/Fact-sheet-Leniency-/>

Pakistan

<http://www.mca.gov.pk/Downloads/ccp-Rules/Leniency%20Regulations.pdf>

Poland

http://www.uokik.gov.pl/en/competition_protection/leniency_programme/Regulation: <http://uokik.gov.pl/download/Z2Z4L3Vva2lrL2VuL2RlZmF1bHRfYWtOdWFsbn9zY2kudjAvMzcvMTQ3LzEvcmVndWxhdGlvbI9vZl90aGVfY291bmNpbF9vZl9taW5pc3RlcnMucGRm>

Portugal

http://www.concorrencia.pt/download/Leniency_Law_ENG.pdf

Romania

<http://www.competition.ro/?pag=132>

Singapore

<http://www.ccs.gov.sg/LeniencyProg/index.html>

Guidelines: <http://www.ccs.gov.sg/NR/rdonlyres/FBD20422-09D0-42E7-BC55-BD40C8E3C686/23325/GuidelineLenienceProgramme220109final.pdf>

Slovakia

http://www.antimon.gov.sk/files/30/2008/LeniencyII_final_en.rtf

South Africa

http://www.compcom.co.za/resources/Government%20Gazette_111.doc

<http://www.compcom.co.za/resources/Comp%20Comm%20March%20HTML/2%20corporatele.html>

Spain

<http://www.cncompetencia.es/Inicio/Porqueesimportantelacompetencia/ProgramadeClemencia/tabid/100/Default.aspx> (Spanish only)

Guidelines: <http://www.cncompetencia.es/Portals/0/PDFs/INDICACIONES%20DE%20LA%20COMISIÓN%20NACIONAL%20DE%20LA%20COMPETENCIA.pdf>

Sweden

http://www.kkv.se/t/Page___913.aspx

Switzerland

<http://www.weko.admin.ch/dienstleistungen/00106/index.html?lang=en>

http://www.weko.admin.ch/dienstleistungen/00106/index.html?download=NHZLpZeg7t,Inp6lONTU042l2Z6ln1ad1lZn4Z2qZpn02Yuq2Z6gpJCDdH12g2ym162epYbg2c_JjKbNoKSn6A-&lang=en

Turkey

<http://www.rekabet.gov.tr/index.php?Sayfa=sayfahtml&Id=753>

<http://www.rekabet.gov.tr/dosyalar/yonetmelik/yonetmelik10.pdf>

United Kingdom

http://www.offt.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/leniency

United States

[http:// www.usdoj.gov/atr/public/criminal/leniency.htm](http://www.usdoj.gov/atr/public/criminal/leniency.htm)

