Leniency programmes: an introduction

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What is leniency?

The term leniency means **a system of immunity and reduction of fines and sanctions (depending on the jurisdiction) that would otherwise be applicable to a cartel participant in exchange for reporting on illegal anticompetitive activities and supplying information or evidence.**

A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process.

A brief history of leniency programs

The **first leniency programme** was adopted by the DOJ in the US in **1978 and revised in 1993.**

The **European Union** introduced its own leniency programme in **1996, and revised it in 2002 and 2006.**

Triggered by the successes of the United States and the EU, leniency has become a standard feature of cartel enforcement regimes throughout the world.

Starting with the British and German competition authorities **in the year 2000, all OECD member countries have adopted leniency programmes** -as well as all European Union (EU) Member States with the exception of Malta.

Currently, there are **more than 60 leniency programmes in place in various jurisdictions**

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Leniency program scope

Most jurisdictions limit the benefits of their Leniency Programme to hard-core cartel conduct, hence excluding other horizontal agreements, vertical restrictions and unilateral conduct.

The reason for this is that hard-core cartels are the most egregious infringement of competition law and are secret in nature making detection very difficult. Amnesty is the trade-off for detecting and stamping out conduct that are never pro-competitive and harm consumers the worst.

Types of infringements covered by leniency

At the EU level, the programmes generally extend to **cartels that have both vertical and horizontal features, such as hub-and-spoke cartels**.

When the European Competition Network Model Leniency Programme was revised in 2012, it was clarified that "[i]t is not excluded […] that a cartel which includes vertical elements may be covered by the leniency programme".

That said, **a few EU Member States such as Estonia and Poland, have adopted a broader approach, allowing immunity or leniency in relation to purely vertical agreements.**

For example, the **Polish CA** has granted a reduction of fines to an undertaking involved in minimum resale price maintenance with its distributors and, more recently, immunity to a company involved in a similar infringement [13 **]. This approach was followed in Lithuania, Romania as well as in the UK, where the leniency programme is applicable to vertical agreements, but only to those containing a pricing element**.

Johan Ysewyn, Jennifer Boudet: "Leniency and competition law: An overview of EU and national case law", Concurrences, N°72355

Objective of leniency programs

Detection. Probably the most important objective of every cartel enforcement policy is **to detect hard core cartels**. A leniency policy increases the probability of detection and effective punishments of such hidden cartels. **It helps to uncover cartels that would otherwise go undetected and destabilises existing cartels** (ICN, 2014).

Deterrence. The possibility of one cartelist applying for leniency makes collusion more difficult to sustain and increases uncertainty, making it harder for cartel participants to reach an agreement, diminishing trust among cartelists and increasing the need for costly monitoring by cartel members (Wils, 2016a).

Desistence . Causing cartels to cease operation

Enforcement efficiency. Leniency programmes are a **cost-effective enforcement tool to detect and punish cartels.** Authorities need to spend less time and investigative efforts to uncover the evidence needed for fighting cartel participants. Using leniency, a competition authority can reduce the difficulty, time and administrative costs of collecting information of cartel infringements through the co-operation of the leniency applicants throughout the administrative procedure.

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Three pre-conditions for leniency programs

1) High risk of detection.

Leniency is not a substitute to ex-officio enforcement but a complement.

Leniency will generally work well if the relevant competition authority has built up a sufficient level of credibility as to its capacity to detect and punish cartel infringements and if cartel members perceive a genuine risk that competition authorities might detect and establish a cartel infringement, even without recourse to a leniency programme.

In an OECD Survey 2017, **many competition authorities stressed the importance of ex officio investigations based on complaints from third parties, publicly available information, screening on available data such as procurement data, information from other investigations, and information from other agencies.**

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Three pre-conditions for leniency programs

2) Significant Sanctions.

As a second condition for a functioning leniency programme, **sanctions for those cartel members that do not qualify for leniency must be significant**.

Such sanctions might be criminal sanctions, including jail time for individuals, or financial penalties for individuals and companies. Ideally, fines should outweigh the potential cartel yields so that they cannot simply be regarded as a "cost of doing business".

Within the last 20 years, there has been a worldwide trend to increase fines against companies as well as against individuals (OECD, 2017).

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Three pre-conditions for leniency programs

3) Transparency and predictability.

A leniency programme must be transparent and predictable **so that potential applicants can anticipate how they will be treated and what the consequences of an application will be**. A competition agency should, thus, ensure that its leniency policy is clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted (ICN, 2014).

-The **US DOJ revised its leniency policy** in 1993, **removing prosecutorial discretion** from granting of immunity.

-In its 2002 Leniency Notice the **EU Commission** sought to introduce more legal certainty into the leniency system **making immunity automatic once certain conditions were fulfilled**. Among other things, it created the opportunity for companies to **check with the Commission on an anonymous basis and in hypothetical terms whether the kind of information companies wanted to provide in their leniency applications would qualify for immunity**.

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

First applicants, subsequent applicants

The **first applicant** may **bring the infringement to the attention of the antitrust agency** or enable that agency materially to progress its investigation. **Most leniency regimes provide the possibility of complete immunity for the first company to self-report a violation.**

Subsequent applicants may **allow the Competition Authority to expand the scope of an existing case or to further improve the efficiency of the investigation**. Many but not all leniency regimes provide an incentive for the second and subsequent applicants, whether as a formal part of the leniency programme.

Jurisdictions which include **leniency for subsequent applicants include most but not all EU Member States, Australia, Canada, Japan, Korea, New Zealand, India and Singapore**.

Jurisdictions **whose leniency programmes do not reward subsequent applicants include Brazil, Ireland, Israel, South Africa and Ukraine**. The US offers incentives informally by way of relaxing sentencing recommendations, but not as part of its formal leniency programme.

The beneficiaries of leniency: undertakings

Undertakings who participated in a cartel

Leniency programmes are available to the undertakings that participated in a cartel and want to come forward with evidence of such cartel in exchange for a reduction of fines.

Undertakings who intitiated the cartel ?

No: Czech Republic
No immunity to the ring leader: Germany from immunity.

Yes : Ireland, Slovakia and Poland

Recidivists?

Until 2011, the leniency programme of the Greek competition authority excluded recidivists from immunity fines in order to avoid the leniency being unfairly exploited by large multinational companies operating in multiple markets. In 2011, however, the Greek competition authority changed the provision, and recidivists can now also obtain immunity from fines.

Undertakings which coerced others to join a cartel?

No

The beneficiaries of leniency: individuals

The increase in immunity systems for individuals seems to be largely due to the fact that the absence of immunity from criminal suits for employees and directors may deter companies from applying for leniency.

This issue was recently raised by officials at the Italian CA, when discussing the drop of leniency applications relating to bidrigging practices. They explained that the lack of criminal immunity likely deters companies that engage in bidrigging from applying for leniency, resulting in the CA having to increasingly rely on other types of evidence to detect bid-rigging.

Johan Ysewyn, Jennifer Boudet: "Leniency and competition law: An overview of EU and national case law", Concurrences, N°72355

The beneficiaries of leniency: individuals

In the **UK** , the Competition & Markets Authority ("CMA") will grant **"blanket" criminal immunity from prosecution to every co-operating current and former employee and director of the business that has been granted immunity**. In addition, individuals can apply on their own account to obtain a "no-action" letter from the CMA granting them immunity from prosecution for the criminal cartel offence.

Similarly, in **Poland**, **current and former managers can file for leniency on their own**. The application will not cover the undertaking.

In **Ireland,** a revised Cartel Immunity Programme ("CIP") came into effect on 22 January 2015, **extending corporate immunity to directors, officers and employees who admit their involvement in the anti-competitive activity.** Individuals can also apply on their own.

Johan Ysewyn, Jennifer Boudet: "Leniency and competition law: An overview of EU and national case law", Concurrences, N°72355

The beneficiaries of leniency: individuals

ECN Plus proposal: Article 22

"Interplay between leniency programmes and sanctions on natural persons

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

Johan Ysewyn, Jennifer Boudet: "Leniency and competition law: An overview of EU and national case law", Concurrences, N°72355

Amnesty plus

•. 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.

ICN Anticartel Enforcement Manual., 2009

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.**

ICN Anticartel Enforcement Manual., 2009

Definition of threshold for an immunity

Immunity: immunity from any fine or sanction which would otherwise have been imposed/recommended for cartel participation. For immunity, a leniency programme should include:

- **a) A submission that enables targeted inspections when the agency has no sufficient prior information to conduct that investigation**:

- provision of evidence and detailed description of the cartel, such as:

- **name/address of entities involved**;
- **name/position/address of individuals involved;**
- **product scope**;
- **known duration**;
- **type of conduct, means**;
- **foreseeable meetings or contacts** (if the cartel is on-going);
- **information on other agencies with whom they have filed or plan to file similar submissions**.

ICN Checklist for efficient and effective leniency programmes

Definition of threshold for immunity

A. Immunity: immunity from any fine or sanction which would otherwise have been imposed/recommended for cartel participation. F

b) A submission that enables the agency to establish the full extent of an infringement on the basis of the evidence and information provided when the agency has conducted inspections, or no other applicant has qualified for immunity under the first threshold:

it should enable the agency to describe and prove the infringement against participants in it.

ICN Checklist for efficient and effective leniency programmes

Definition of threshold for leniency

The evidentiary threshold **for reduction of fines**: namely the **provision of evidence contributing significant added value compared to the evidence already in the agency's possession at the time of the submission.**

Successful **leniency applicants have to provide evidence that strengthens by its very nature, quality and/or its level of detail the agency's ability to prove the infringement**, such as:

- **direct evidence** vs. indirect or circumstantial evidence;
- **stand-alone evidence** vs. evidence that requires corroboration;
- **written, contemporaneous evidence** vs. oral statement at the time of the procedure.

ICN Checklist for efficient and effective leniency programmes

Conditions attached to the immunity and leniency

Behavioural conditions for awarding the leniency: applicants should comply with certain conditions in order to obtain leniency, for example:

a. **on-going duty of sincere cooperation until the investigation and prosecutions are complete** (e.g. reporting the relevant facts, submitting documents, having the concerned individuals cooperate with the authority's investigation. All the cooperation should be made promptly available upon the authority's request);

b. **providing full and frank explanations throughout the process to the best of their ability**;

c. **ending the participation in the cartel** (or continuing under agency direction/agreement);

d. **not destroy, falsify or conceal evidence**;

e. **disclosing/admitting participation in the cartel**; and

f. **confidentiality duty of the applicants**.

ICN Checklist for efficient and effective leniency programmes

Conditions attached to the immunity and leniency

The EU case

1) Following the application, and throughout the procedure, the applicant is expected to **cooperate fully, genuinely, expeditiously, on a continuous basis and in a sincere spirit of cooperation.**

2) The applicant **must terminate its participation in the infringement as of the date of the application** except the Competition Authority authorises a derogation from that duty to discontinue participation.

3) The applicant is **prohibited from destroying evidence.**

4) The applicant is **prohibited from disclosing the existence of the leniency application**.

Procedural elements of a leniency program

Procedural aspects of successful leniency programs, may include several of the below elements:

a. availability of **anonymous approaches/hypothetical applications**;

b. availability of **a marker** (protection of an applicant's place in the queue for immunity or reduction of fines);

c. procedures for **revoking leniency if necessary**;

d. summary applications;

e. form of applications (written or oral, **ability to make oral submissions known as proffers**);

f**. protection to private plaintiffs from disclosure of self-incriminating statements provided under leniency** ;

g. **procedures for handling information** on closely related leniency applications;

h. **handling information in the case of withdrawal/refusal of the application.**

CN Checklist for efficient and effective leniency programmes

The marker system

Most competition authorities have adopted marker systems as part of their leniency programmes.

A “marker” system is 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.**

ICN Anticartel Enforcement Manual., 2009

Flexibility of the marker system: extensions to the marker period

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

ICN Anticartel Enforcement Manual., 2009

Flexibility of the immunity or leniency: Material thresholds to get a marker

Material thresholds for the granting of leniency should be based on the information already in the possession of the competition agency at the time of the application.

This, **in turn, may influence the requirements for the granting of leniency markers** – which should refer merely to the possibility of the leniency applicant providing the relevant information in an adequate timeframe – and for the type of leniency (i.e. full immunity or reduction of fine amount) that will be granted to individual applicants.

Differences in marker systems in leniency programmes

The national marker systems are autonomous and independent of each other.

Their **differences** might relate to **the types and quantity of information required for a successful application, the time agencies grant to a successful marker applicant to perfect its leniency application, the automatic or discretionary nature of a marker, the point in the investigation up to when a marker is available, the availability of the marker for subsequent applicants, and the ability of applicants to apply for a marker on an anonymous basis** (OECD, 2014a).

Due to differences in national marker systems, a company that asks for a marker in one system has no guarantee to receive a marker with the same rank in other jurisdictions. **It has been argued that due to differences and restrictions in the marker systems, companies may have reduced incentives to apply for leniency in international cartel cases at all** (Obersteiner, 2013).

Transparency and predictability of leniency programmes

Clarity to the material scope of the Programme is an important feature to its success, as decisions of potential applicants as to whether to enter the Programme or not will be dictated by the certainty and predictability of the Programme itself.

As regards **subsequent applicants**, it is BIAC's view that:

- an antitrust agency should provide **as much guidance as possible on the conditions which apply to leniency applicants**. Conditions which involve substantial discretion in respect of subsequent applicants, such as a requirement that the applicant provide information of 'significant added value' to the authority should be minimised and guidelines should clarify how the authority will exercise its discretion, e.g. by describing the types of evidence that are likely to add value to an investigation.
- the **extent of the reduction in sanctions and other benefits available to subsequent applicants should be clarified**, so far as practicable, by guidelines and other published information on the authority's practice.
- the antitrust agency's leniency guidance should **clarify that a subsequent applicant's fine will not be increased as a result of any new evidence adduced by them which increases the scope/duration of the infringement under investigation.**

Issues that could inhibit potential applicants from self-reporting

- **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

ICN Anticartel Enforcement Manual., 2009

Coordination of leniency programmes with other cartel enforcement policies

A significant challenge for all leniency policies lies in the **need to be aligned** with other enforcement policies, especially **private enforcement**, **criminal liability** or **settlements** (in the US: plea bargaining).

Balancing a leniency programme with the overall cartel enforcement framework is crucial to its success (OECD, 2012).

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Coordination of leniency programmes with private damage actions

Although **a leniency applicant** will almost certainly obtain some reduction of the fine, at the same time, it **opens itself to greater exposure for civil liability, should the content of the leniency application find its way into the hands of the plaintiff**. Civil courts, for example, might ask the competition authorities to transmit information voluntarily submitted as part of the leniency applications. Actually, **if competition authorities readily grant access to leniency documents, plaintiffs might mainly target leniency applicants, which might lead to leniency applicants being disadvantaged in comparison to other cartel member who have not applied for leniency** (OECD, 2015).

This danger is especially pronounced in jurisdictions which have discovery rules in the context of civil litigation.

With regard to **international cartels**, it is discussed if the threat of damage claims has become the most influential determinant for global leniency application **strategies-as a company that self-reports an international cartel will face near certain civil litigation in the US, in addition to an ever increasing number of jurisdictions** (Obersteiner, 2013).

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Coordination of leniency programmes with private damage actions

Competition authorities should try to make sure that leniency applicants are, at least, not worse off in terms of damage claims compared to other companies that did not co-operate, especially in relation to the information provided by leniency applicants.

In the **US**, the Antitrust Criminal Penalty Enhancement and Reform Act 2004 provides some protection to immunity applicants by **enabling the de-trebling of damages and decoupling joint and several liability**.

In the **EU,** new rules concerning actions for damages and infringements of competition law have been introduced on 26 December 2014 by the Damage Directive 2014/104/EU. **The Directive limits the liability of undertakings that have received immunity under the leniency programme of the European Commission or a national competition authority in follow-on actions for damages to their own direct or indirect purchasers or providers**. **The Directive also exempts leniency statements and settlement submissions from disclosure**.

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Coordination of leniency programmes with criminal proceedings

Cartel criminalisation may, arguably, serve to enhance deterrence, thereby reducing the level of cartel infringements.

It is argued that **criminal offences may have a chilling effect on leniency applications** (Stephan, 2014). Most jurisdictions with criminal sanctions only grant immunity to the first applicant and there is no "second prize" for further applicants. However, often the value of the information provided by the second, third and following applicants can still be crucial for establishing an infringement. This might be undermined by allowing criminal sanctions, or only partial reductions of criminal sanctions, for further applicants in exchange for their co-operation.

In the US if a corporation is first to qualify, also its employees and directors are covered under its immunity.

In other jurisdictions, however, criminal liability is not covered by the leniency programmes for individuals, e.g. in **Germany or Poland for bid rigging where individuals face criminal charges but only companies can benefit from immunity for their offences (Trepka and Wurm, 2016).**

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Coordination of leniency programmes with criminal proceedings

Several jurisdictions have experienced problems in relation to criminalisation of cartel law.

For example, in **Australia, at least in the early years after criminal sanctions were introduced, the numbers of markers and proffers under the competition authority's leniency policy actually fell** (Beaton-Wells, 2017 with further references).

Similar results were reported for the UK: When the criminal cartel offence was adopted, it was expected that the UK would become the most active criminal competition enforcement regime outside the US and was envisaged that the offence would yield six to ten convictions a year. However in practice, very few cases were actually prosecuted with the first criminal case (the British Airways case) actually collapsing in court (Stephan, 2014).

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Risk Alleviation

- **Extending leniency to civil and criminal proceedings**

- **Reducing otherwise punitive damages or removing any joint and several liabilities for the leniency applicants**.

-**Use of paperless leniency application procedures** so as to reduce the availability of evidence (which would not exist absent a leniency application) to support a follow-on action for damages.

- **Preventing communication to third parties** (except to exercise their rights of defense) of leniency applications

Possiblity of oral statements for leniency applicants

Potential leniency applicants might be dissuaded from cooperating if this could impair their position in civil proceedings, as compared to companies who do not cooperate.

This is a matter that arises if it is possible for victims of a cartel to sue for damages, or if the documents submitted in the context of leniency proceedings can be discovered by potential claimants.

Even if disclosure is not possible in Argentina, in the context of international cartels some jurisdictions will require the disclosure of documents submitted to authorities in other jurisdictions.

Possibility of oral statements

In the EU undertakings submit evidence through corporate statements, which can be made orally or in writing.

Under the Commission's 2006 Notice, applicants cannot provide oral statements if they have already disclosed the content of the statement to third parties.

The possibility for undertakings to provide oral corporate statements was only recently integrated into "hard law" by the revision of the Implementing Regulation.

Leniency programmes in the international context

As more and more jurisdictions adopt leniency programmes, potential applicants face increased regulatory complexity due to differences in leniency systems.

A company that detects and wants to report an international cartel has to bear in mind that there is **no one-stop shop, meaning that applying for immunity with one antitrust authority will not automatically grant immunity in any other jurisdict**ion.

International cartel cases raise various challenges for companies, ranging from **costs of multi-jurisdictional applications**, **managing different and maybe conflicting regulatory requirements and dealing with differences in national marker systems**. As the ability of potential leniency applicants to apply for leniency is made more burdensome by the complexity of navigating multiple regulatory regimes, incentives to apply for leniency might be affected.

Challenges and Co-Ordination of Leniency Programmes - Background Note by the Secretariat, OECD Competition committee, 5 June 2018

Possible differences and inconsistences in leniency programs

Areas where inconsistencies and diverging approaches between leniency programmes exists include :

(i) fact-finding requirements imposed on potential leniency applicants,

(ii) marker policies with respect to the availability, information requirements, timing and scope,

(iii) the extent of the **jurisdictional nexus required to trigger an investigation**,

(iv) safeguards regarding use and disclosure of leniency information (including commitments to oppose disclosure for use in private litigation),

(v) the **extent of cooperation with enforcement agencies (and civil plaintiffs) required** following leniency applications,

(vi) recognition of legally privileged materials and approaches regarding legal privilege in general, as well as in relation to in-house legal counsel and

(vii) timing and scope of requests for applicants to provide information exchange waivers.

(viii) boundaries of **what constitutes a cartel might differ from jurisdiction to jurisdiction**; and with it the question if leniency is available. While, for example, some leniency programmes cover vertical agreements, others do not.

International cooperation on leniency

BIAC submits that meaningful progress can be made particularly by efforts aimed at harmonizing leniency and marker policies and, potentially. **BIAC would welcome an in-depth discussion of an efficient global mechanism to report potential cartel conduct that would be centered on the existence of a "one-stop shop" for markers that would preserve applicants' place in line in all participating jurisdictions**.

By launching such an initiative the OECD can help to ease the burden and complexity of seeking leniency, potentially in numerous jurisdictions, and at the same time assist newer and less practiced regimes develop their cartel programmes.

OECD, BIAC contribution, the OECD Competition Committee Working Party No. 3., Panel on Limitations and Constraints to International Cooperation , October 23, 2012

Effectiveness of leniency programmes

Theoretical research has highlighted the **strong potential for well-designed and well-managed LPs to contribute to social welfare**.

However, it has also highlighted the serious risk that poorly implemented LPs may have the opposite effect. **An overly generous LP offering fine reductions to several reporting firms may make a competition authority appear very successful in terms of the number of convicted firms, while reducing social welfare by decreasing cartel deterrence and increasing the amount of prosecution costs (because there are more prosecuted cartels).**

Catarina Marvão, Challenges to EU leniency program, Background note, Challenges and co-ordination of leniency programmes, OECD Working Party No. 3 on Co-operation and Enforcement, 5 June 2018

Effectiveness of leniency programs

An empirical evaluation of implemented LPs is crucial to understanding whether they are being administered in a way that is likely to increase social welfare — that is, by reducing cartel formation — or in a way that is likely to decrease social welfare, notwithstanding an increase in the number of cases successfully closed.

Unfortunately, there are only a few studies which empirically test the effectiveness of LPs as tools to enhance the detection, prosecution and deterrence of cartel conduct.

Catarina Marvão, Challenges to EU leniency program, Background note, Challenges and co-ordination of leniency programmes, OECD Working Party No. 3 on Co-operation and Enforcement, 5 June 2018

Leniency inflation

While one cannot observe whether leniency is increasing deterrence, **one can clearly see that there is an increasing trend in the share of cartel members which receive some degree of a leniency reduction and in the average leniency reduction granted**. Marvão and Spagnolo (2018b) document this recent phenomenon of "leniency inflation". In the EU cartels fined between 1998 and October 2014, leniency reductions were granted to 52% of all the convicted cartel members, even in cases which were already under investigation in the US. This is a concern as leniency awarded when the competition authority is already aware of the cartel's existence has ambiguous effects (see Motta and Polo (2003)).

The share of cartel members receiving a leniency reduction range from averages of 14% in 1999, up to 82% in 2013. Moreover, the amount of the leniency reduction granted ranges between averages of 23% in 1998, up to 61% in 2012.

This "leniency inflation" phenomenon seems to be an attempt to solve a problem – low cartel deterrence and too many cartel cases to be prosecuted by competition authorities – which is worsened, rather than solved, by overusing leniency. Its cost adds to the already large distortive effect of non-deterrent fines.

Catarina Marvão, Challenges to EU leniency program, Background note, Challenges and co-ordination of leniency programmes, OECD Working Party No. 3 on Co-operation and Enforcement, 5 June 2018

Thank you for your attention

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