Granting Immunity and Revoking Immunity: A Global Overview of Leniency Programmes

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Introduction

Leniency programmes in general are still in their infancy but continue to develop every year owing to the growing number of precedents by competition authorities worldwide and studies on the issue that have led to ongoing fine-tuning of the programmes. For instance, the European Competition Network ("ECN") implemented a convergence programme in 2006, with updates in 2012, for the leniency programmes used by its members. The ECN Model Leniency Program is designed to enhance the effectiveness of leniency programmes and to lessen the burden on both the applicants and authorities.[1] In the early 1990s, the Antitrust Division of the United States Department of Justice ("DOJ") revamped its Corporate Leniency Policy by bolstering the immunity offered to self-reporting applicants, leading to an increase in applications from one per year to two per month. Further adjustments to the US programme took place in 2008 when the DOJ published additional guidance clarifying its application policies and procedures.[2]

As a matter of public policy, leniency applications serve the ends of competition law enforcement by helping the competition authorities discover and investigate covert cartel activities. In general, leniency programmes are justified by the view that the interest of citizens in ensuring that secret cartels are detected outweighs the interest in punishing cartelist undertakings that co-operate with the competition authorities.[3] Thus, competition authorities are expected to set up their leniency programmes so as to grant favourable treatment to cartelist undertakings that co-operate with the competition authorities and thereby improve the general welfare.

Leniency programmes generally provide immunity or a fine reduction only if the applicant undertakings meet several requirements at the time of the application and throughout the administrative process until the final decision of the competition authority is made. The requirements that an undertaking must meet with respect to an application are intended to ensure that the application is not merely a frivolous attempt to injure a competitor but genuine assistance given to the competition authority to uncover an existing cartel. To a large extent, these requirements do not vary from one jurisdiction to another in their essence.

From this perspective, the elements of the leniency programmes resemble the carrot and stick metaphor: while the competition authorities offer the leniency applicant immunity as the carrot, they also have a stick at their disposal, namely, the monetary fine for those who fail to meet the leniency programme conditions.[4] Nonetheless, when the basic conditions are met,[5] the precedents in various jurisdictions provide that leniency applications should be encouraged and efforts should be made to interpret actions in favour of the applicant. However, the possibility that the immunity may be revoked if the competition authority determines that the conditions are not met, i.e. the unexpected wielding of the stick, threatens to undermine the success of leniency programmes. The possibility of being fined even after self-reporting deters potential leniency applicants from taking the risk at all.[6]

In fact, leniency programmes are based on a derivative setup of the prisoner's dilemma scenario. Fundamentally, leniency programmes are strategy games.[7] On one hand, the cartelist undertakings enjoy the benefits of being a part of a cartel: artificial price increases, less investment in R & D, a stronger position vis-à-vis their customers, etc. On the other, the cartelists also are aware of the risk that one of the participants of the cartel can blow the whistle and disclose the existence of the cartel. Sometimes the risk of disclosure is too huge to take and the cartelists will secretly race with each other to the competition authority's door.[8] At the end of the race, the winner will get the prize of immunity from fines while the rest start

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[1] *Report on Assessment of the State of Convergence*, ECN Model Leniency Programme (2006).

[2] J. Anthony Chavez, "The Carrot and the Stick Approach to Antitrust Enforcement" in 47th Annual Antitrust Law Institute, PLI Corp. Law & Practice, Course Handbook Series No.8736 (2006), pp.545–551; United States Department of Justice, "Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters" (November 19, 2008), *http://www.justice.gov/atr/public/criminal/239583.htm* [Accessed March 26, 2014].

[3] General Court Press Release No.87/11 on Case T-12/06 and Case T-25/06 (September 9, 2011).

[4] General Court Press Release No.87/11 on Case T-12/06 and Case T-25/06 (September 9, 2011).

[5] Please see "Granting conditional immunity" below.

[6] Iris Tilley, "A Sour Carrot and A Big Stick: Reviving Antitrust Enforcement After Stolt-Nielsen" (2007) 6 Seattle J. Soc. Just. 391, 393.

[7] Steven van Uystel, "A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program" (2008) 75(3) *Hosei Kenkyu* 1, 4.

[8] Bruce H. Kobayashi, "Antitrust, Agency, and Amnesty: An Economic Analysis of the Enforcement of Antitrust Laws Against Corporations" (2001) 69 Geo. Wash. L. Rev. 715, 729–730. See generally; Glenn Harrison and Matthew Bell, "Recent Enhancements in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots" (2006) 6 Hous. Bus. and Tax L.J. 207, 211.

bitterly paying their dues.[9] However, with the possibility that conditional immunity may be unreasonably revoked, the incentive of the cartelists to disclose the existence of the cartel is diminished. By necessity, a potential whistleblower will ponder the risk-to-reward ratio of participating in the cartel and applying to the leniency programme. The equation of self-reporting and gaining the immunity reward seems pretty clear without the risk of revocation, but owing to the cases where competition authorities attempted to revoke conditional immunity, such as *Stolt-Nielsen* and *Italian Tobacco*, the immunity reward appears far less substantial and certain.[10]

Indeed, the need to strictly limit the circumstances under which a revocation may occur is further supported by the reality that leniency applicants take significant risks when filing applications. The leniency applicants put themselves at risk by exposing the facts of their own behaviour that they themselves believe constitute, or very well may constitute, violations of competition laws or other laws such as tender laws. Then, during the ensuing phases of the investigation, they must aid the competition authority's efforts to uncover more damning evidence. No undertaking would have an incentive to make an application if it does not ultimately receive leniency, despite all its efforts during the administrative process, and then must face the competition authority using all the applicant's information against it.

This article aims to evaluate the efficiency and applicability of revoking immunity. The first part starts with an overview, from a global perspective, of the requirements for obtaining conditional immunity at the outset and sustaining it during the administrative process until the final decision. The second part analyses the main cases where the revocation of immunity occurred or was considered. Lastly, the third part examines the necessity and efficiency of the revocations of immunity from an objective perspective and suggests a solution for a higher degree of legal certainty, less risk for the immunity applicants and a smoother process for the competition authorities.

Granting conditional immunity

Contractual agreement or administrative act?

There are conceptual differences between the Anglo-Saxon legal systems and continental European legal systems that manifest in how leniency programmes in different jurisdictions are designed. In the case of leniency applications in the United States, the applicant signs a leniency agreement with the DOJ that is governed by the common law principles that apply to contracts. On the other hand, in European countries the competition authority need only apply a provision in their relevant legislation, namely the competition act and leniency regulations, if the applicant meets the conditions.

In the United States, immunity from prosecution in exchange for self-incriminating information, sometimes referred to as a non-prosecution agreement, is a form of informal immunity. Informal immunity is the result of an agreement between the Government and a witness.[11] Courts have held that these agreements are subject to the general principles of contract law, though consideration is given to their unique nature as part of the criminal justice system.[12] Consequently, once an undertaking applies to the leniency programme, the Government and the witness (the applicant undertaking) become parties to a contract and discuss and then commit to the terms of the agreement.[13] Under the relevant contract law, if a material breach occurs upon an act of either of the parties, the agreement will be void.[14] Thus, it seems prudent to interpret the situation here as follows: there is an agreement between the Government and the leniency applicant, and in the case of a material breach by the applicant, the Government must prove in court (and cannot decide unilaterally) that there has been a breach in order to be released from its obligations and prosecute the applicant.[15] However, "if a defendant lives up to his end of the bargain, the government is bound to perform its promises".[16]

The approach that American courts generally adopt regarding non-prosecution agreements is that, because the applicant gives away his or her constitutional "right to remain silent" by voluntarily providing self-incriminating information to the Government, the Government should not abrogate the applicant's immunity without a significant reason.[17] More precisely, given that

[9] Please see John M. Connor, "A Critique of Partial Leniency for Cartels by the US Department of Justice" (2008), p.5, SSRN, *http://papers.ssrn.com/sol3/papers.cfm?abstract id=977772* [Accessed March 26, 2014].
[10] Tilley, "A Sour Carrot and A Big Stick" (2007) 6 Seattle J. Soc. Just. 391, 408.
[11] Formal immunity, by contrast, is granted by statute in circumstances involving compelled testimony, and is judicially supervised. See *United States v Berry* Nos 92-40043-01-SAC to 92-40043-04-SAC, 1992 WL 372181, at *14 (D. Kan. 1992) (contrasting formal immunity and informal immunity).
[12] See, e.g., *United States v Baird* 218 F. 3d 221, 229 (3d Cir. 2000) (noting "special due process concerns" relating to interpretation of non-prosecution agreements); *United States v Fitch* 964 F. 2d 571 (6th Cir. 1992) (same); see also *United States v Hembree* 754 F. 2d 314, 317 (10th Cir. 1985); 18 USC §6002 (1970); *United States v Castaneda* 162 F. 3d 832, 835 (5th Cir. 1998); *United States v Brown* 801 F. 2d 352, 354 (8th Cir. 1986).
[13] See, e.g., Department of Justice, *Corporate Lenience Program Model Letter*, *http://www.justice.gov/atr/public/criminal/239524.htm* [Accessed March 26, 2014]. Needless to say, in negotiating the terms of the agreement, the Government has an enormous amount of leverage, as courts have acknowledged. See *United States v Baird* 218 F. 3d 221 229 (3d Cir. 2000) ("In view of the government's tremendous bargaining power, we will strictly construe the text against it when it has drafted the agreement.").
[14] *United States v Girdner* 773 F. 2d 257, 259 (10th Cir. 1985).
[15] *Castaneda* 162 F. 3d 832, 835, 835–836 (5th Cir. 1998).
[16] *Castaneda* 162 F. 3d 832, 835, 835–836 (5th Cir. 1998).
[17] *Taylor v Singletary* 148 F. 3d 1276, 1283 (11th Cir. 1998); see also *Castaneda* 832, 836 (5th Cir. 1998) (holding that the Government must prove by a preponderance of the evidence that the defendant breached the contract and that the breach is material enough to warrant recission); *Fitch* , 964 F.2d 571, 574 (6th Cir. 1992) (discussing standards of proof that courts have applied when assessing alleged breaches of non-prosecution agreements).

the Government must prove a material breach to be released from its obligations, the Government must evaluate carefully whether the breach is significant enough to attempt to revoke the immunity before pursuing a leniency applicant for antitrust violations.

On the other hand, in continental European legal systems, the Government does not enter into any agreements with the leniency applicant but simply applies the laws as written. The laws grant the ability to the competition authority to apply the leniency programme, as a first step. The competition authority then looks to see if the applicant meets the requirements set forth in the laws. The competition authority uses its powers as granted by the laws and performs an administrative act, rather than entering into a contractual agreement. Thus, the competition authority may revoke the applicant's immunity in the event that the applicant deviates from the conditions of the leniency, or is perceived to have done so, without having to prove that any agreement has been breached.

In brief, while the revocation depends on whether the parties perform their contractual obligations in the US leniency system, it depends on whether the applicant meets the conditions set forth in the laws in the continental European leniency system, as determined by the competition authority in the first instance.[18]

Requirements

Fundamentally, the leniency programmes are based on the information asymmetry between the competition authorities and the cartelist undertakings. When one of the cartelist undertakings decides to correct this information asymmetry and reveal the cartel, the competition authority rewards this undertaking with conditional immunity. Nonetheless, owing to the secret and illegal essence of the cartels, in order to undertake the expense and risk of providing the information to the competition authority, the would-be leniency applicant would reasonably expect a guarantee, or at least reliable assurances, that leniency will be granted.[19]

Besides the courage it requires to initially apply for immunity, the competition laws in each jurisdiction entail additional requirements in order to ultimately grant immunity to the leniency applicants. These requirements originate from the Corporate Leniency Program ("CLP") created in the United States in 1993.[20] The CLP provided two different categories of applications and thus different sets of requirements, based on the timing of the application. The first type is where the undertaking submits the leniency application before a government investigation has begun, in other words, a pre-investigation application (type A). In the second type, the leniency application is submitted after an investigation has begun but before the DOJ has collected enough evidence to uncover the cartel, that is, a post-investigation application (type B).

In type A cases, where the applicant is faster than the DOJ in putting evidence on the table, there are still some requirements that the would-be leniency applicant must fulfil. First, the applicant must be the first to come forward to reveal the cartel. Also, it must take prompt and effective action to terminate its part in the activity, and must report the wrongdoing with candour and completeness. In addition, the application must provide full, continuing and complete co-operation to the DOJ throughout the investigation. As another requirement, the confession of wrongdoing must be truly a corporate act, as opposed to isolated confessions of individual executives or officials. Where possible, the applicant must make restitution to injured parties. Finally, it must not have coerced another party to participate in the cartel and must not have been the leader in, or originator of, the cartel.

If the applicant is not swift enough to come forward before the DOJ launches an investigation (i.e. type B cases), the DOJ still gives the applicant a chance for immunity if the applicant provides evidence that the DOJ has not yet acquired and is likely to result in a sustainable conviction. In addition, the applicant must fulfil the same requirements as in type A cases. The DOJ must also determine that granting leniency would not be unfair to others, considering the nature of the cartel, the confessing corporation's role in it, and when the applicant came forward.

The revised CLP resulted in a surge in leniency applications[21] (namely, a 20-fold increase) and its success motivated other jurisdictions.[22] Today, more than 50 jurisdictions offer leniency programmes[23] to those undertakings that want to reap the advantages of blowing the whistle.

However, leniency programmes need to follow certain principles in order to be successful and encourage participation. Uystel observed that "not only the incentives will have to be spelled out clearly, also the standards for qualifying and their operation and application have to be transparent".[24] Indeed, absent of these qualities, some may think applying to a leniency programme is little more than gambling, because while it promises a big return once the competition authority grants full immunity, it also carries the risk that the competition authority finds the application insufficient and only grants a small reduction of the monetary fine. In other words, it is important to clarify the details of the

[18] Katalin J. Cseres, Maarten Pieter Schinkel and Floris O.W. Vogelaar, "Law and Economics of Criminal Antitrust Enforcement: An Introduction" in *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (Cheltenham: Edward Elgar Publishing, 2006), p.2.
[19] Van Uystel, "A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program" (2008) 75(3) *Hosei Kenkyu* 1, 9.
[20] US Department of Justice, *Corporate Leniency Program* (1993), *http://www.justice.gov/atr/public/guidelines/0091.htm* [Accessed March 26, 2014].
[21] US Department of Justice, *Status Report: Corporate Leniency Program*, *http://www.usdoj.gov/atr/public/criminal/9938.pdf* [Accessed March 26, 2014].
[22] Chavez, "The Carrot and the Stick Approach to Antitrust Enforcement" in 47th Annual Antitrust Law Institute, PLI Corp. Law & Practice, Course Handbook Series No.8736 (2006), p.557, para.6.1.
[23] Joe Harrington, "Leniency Programs: Past Experiences and Future Challenges", Presentation at Instituto Milenio SCI, December 13, 2010.
[24] Steven van Uystel, "A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program" (2008) 75(3) *Hosei Kenkyu* 1, 30.

standards for qualifying (i.e. qualification conditions) as well as the advantages of leniency programmes. The applicants should be aware of all the pros and cons before they take a step forward.

While it is not possible to list the qualification standards of every jurisdiction in detail, as each has its own tailor-made programme particular to its cultural, social and legal environment, four basic conditions operate as rules of thumb in most of the jurisdictions offering leniency programmes. These are: (1) being the first to come forward and confess your participation in the cartel; (2) refraining from further participation in the cartel from the time of your disclosure to the competition authority; (3) not having coerced others to be party to the cartel and/or not having taken steps to lead the cartel; and (4) providing the competition authority with all information available to you regarding the existence and activities of the cartel and maintaining continuous and complete co-operation throughout the investigation.

This section elaborates below these four basic conditions and cites relevant formulations and alterations of those in different jurisdictions.

First to come forward

Leniency programmes, in general, limit the immunity benefit to the first applicant. In other words, first-come, first-and-only-served, while the second comer does not obtain immunity.[25] As indicated above, this can lead to a race between the cartel participants, which diminishes the trust between them. Such motivation enables the leniency programmes to be efficient and successful. Otherwise leniency programmes' effectiveness would be diminished if more than one applicant could be rewarded with immunity or if the difference between the reward given to the first and the second applicants were insignificant.[26] In such a scenario, the cartel participants could simply decide who would be the first to apply for leniency, and after the first application, the rest would file their applications with the competition authority together, and reasonably expect to obtain immunity.[27]

A comparison between the EU Leniency Notice published in 1996[28] and the revised EU Leniency Notice published in 2002[29] demonstrates how the success of a leniency programme can be undermined by insufficient incentives for the first applicant. Under the EU Leniency Notice 1996, only 3 of the 80 leniency applications in six years requested immunity, while the rest opted for fine reductions after investigations had already launched. With the amended EU Leniency Notice published in 2002, which introduced a number of reforms aimed at increasing legal certainty for applicants, there were 80 applications for immunity and 79 applications for fine reductions in three and a half years.

Although the basic principle of rewarding the first applicant is common to most jurisdictions, numerous related issues arise that must be addressed in more detailed regulations, and different jurisdictions around the world have addressed them in their own ways. For example, the newly revised ECN Model Leniency Programme elaborates on the requirement of being the first to apply. Under the ECN Model Leniency Programme, the undertaking must be the first to submit evidence which will enable the competition authority, at the time it evaluates the application, to carry out targeted inspections in connection with an alleged cartel.

In practice, it is critical for the would-be applicant to know whether it is still possible to be first. As such, the would-be applicant must remain tight-lipped vis-à-vis the competition authority until it knows whether it is the first to apply. The United Kingdom's Office of Fair Trading approaches this problem in its Leniency Guidance[30] by allowing the legal adviser of the would-be applicant to ask questions to learn whether an immunity application is possible, before disclosing his/her client's name for the leniency application. First, counsel asks whether type A immunity is available in general. If the answer is positive, then counsel asks, after indicating the relevant sector, whether there is a pre-existing civil and/or criminal investigation and/or a pre-existing application. The OFT requires the would-be applicant's genuine intention to obtain leniency. If the OFT finds the requirements are met, the OFT will state its position to the would-be applicant, by which it will consider itself bound, provided: (1) the discussion is followed by an application within a reasonable time; and (2) the information given when the inquiry was made was not false or misleading and there has been no material change of circumstance.

The requirement of being the first applicant should be an objective condition; in other words, it should not require any interpretation but only the fact of applying before the rest. The Finnish Competition Authority mandates that any subjective criteria should not be considered concerning this condition. In the cases where there are more than one applicant, Finnish Competition Authority's *Guidelines on the Application of Articles 8 and 9 of the Act on Competition Restrictions* provide that any differences in the comprehensiveness and preciseness of the information supplied by the undertakings have no significance for the forming of an order of priority.[31] That

[25] See generally, Christopher Harding and Julian Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford: Oxford University Press, 2003), p.216.
[26] Van Uystel, "A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program" (2008) 75(3) *Hosei Kenkyu* 1, 21.
[27] Dirk Schroeder and Silke Heinz, "Requests for Leniency in the EU: Experience and Legal Puzzles", Ch.8 in *Criminalization of Competition Law Enforcement* (Edward Elgar Publishing, 2006), pp.161–164.
[28] Commission Notice on the non-imposition or reduction of fines in cartel cases [1996] OJ C207.
[29] Commission Notice on immunity from fines and reduction of fines in cartel cases, 2002/C45/03 (2002).
[30] OFT, "Leniency and No-action: OFT's Guidance Note on the Handling of Applications" (July 2013), s.3.5, *http://www.oft.gov.uk/shared_oft/reports/comp_policy/OFT1495.pdf* [Accessed April 23, 2014].
[31] Finnish Competition Authority's *Guidelines on the Application of Articles 8 and 9 of the Act on Competition Restrictions (reduction and non-imposition of competition infringement fine)* (2004), s.2.3, *http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?sivu=guidelines-leniency* [Accessed March 26, 2014].

is, regardless of the quality of the revealed information, being the first applicant simply means applying to the authority before the rest.

Not all jurisdictions have an absolute requirement that the applicant must be first. The Austrian leniency programme does not state a requirement of being the first to come forward in order to obtain leniency. There is no indication regarding the ranking order for immunity in the description of its programme.[32] Interestingly, the Korean leniency programme gives applicants the chance to apply collectively[33] in exceptional cases.[34] However, the Korean leniency programme does not let the second cartelist apply in cases of two-participant cartels.[35]

In South Africa, the leniency programme gives choices to the latecomers, i.e. applicants following the first one, either to have a reduction of fines, or to opt for a settlement agreement or a consent order.[36] This unique feature of the South African Competition Commission may be useful in improving the implementation of other leniency programmes as it also gives an incentive to the latecomers to co-operate, potentially improving the strength and efficiency of the investigation, even though they were not first.

Nonetheless, being the first to apply and meet the other conditions of the leniency programme may not always offer a happy ending. For example, the Turkish Competition Authority's Regulation on Active Cooperation for Detecting Cartels addresses two time periods for immunity applications: (1) before the preliminary investigation; and (2) after the preliminary investigation launched, but before the investigation report is received. In the first time period, the applicant will be granted immunity if it meets the relevant conditions. However, in the second time period, the applicant's circumstances are uncertain. Even though the applicant submits a leniency application, the Authority will only grant immunity on the condition that the Authority does not already have sufficient evidence to find the violation at the time of the submission.[37] This increases uncertainty, because applicants have little insight into the evidence that the Authority already has, and creates a considerable disincentive for the would-be applicants. As a very recent example, the Turkish undertaking SODAŞ[38] was not granted immunity even though it met all the conditions but applied in the second time period. Because the Authority determined that it was already in possession of sufficient evidence, the applicant was not granted immunity but received a fine reduction by one-third.[39] This is a good example of the authorities having too much discretion to grant immunity or fine reduction under arguably subjective criteria, which is whether the authority has enough evidence to support a finding of violation.

No further participation in the cartel from the time of disclosure

The CLP requires the would-be applicant to take prompt and effective actions to terminate the illegal activity,[40] and the ECN Model Leniency Programme of 2012 similarly provides that the applicant must end its involvement in the alleged cartel immediately following its application.[41] Even though the goals of both provisions are the same, their formulation reflects a significant difference when it comes to legal certainty. The ECN Model Leniency Programme puts forward a plain and unambiguous requirement to end involvement in the cartel. However, the American formulation states more vaguely that the applicant must "take actions to terminate the illegal activity". This lack of precision was the underlying issue in the *Stolt-Nielsen v United States* case in 2004, the first instance in which the DOJ sought to revoke immunity from a leniency applicant under its CLP. Delving into the case provides more understanding on how this condition has been interpreted.

The case of *Stolt-Nielsen v United States*

Stolt-Nielsen, a Norwegian shipping company, was one of three undertakings involved in a customer allocation cartel in the parcel tanker shipping services market. Through a competition compliance programme, the management realised the risk of the conspiracy and applied to the CLP in November 2002.[42] The DOJ and Stolt-Nielsen entered into an amnesty agreement on January 15, 2003. By this agreement, the DOJ provided Stolt-Nielsen immunity from prosecution for any antitrust violations in the relevant market that took place prior to January 15, 2003, under the assumption that Stolt-Nielsen

[32] *Handbook of the Austria Federal Competition Authority on the Implementation of Section 11 para.3 of the Austrian Competition Act (WettbG)*, *http://www.en.bwb.gv.at /CartelsAbuseControl/Leniency/Documents/Handbook%20leniency_english%20version.pdf* [Accessed March 26, 2014].
[33] Enforcement Decree art.35 specifies the reasons why a collective application is accepted.
[34] Korean Fair Trade Commission's *Notification on Implementation of Cartel Leniency Program* 2009 art4(2). The Korean Fair Trade Commission amended this Notification on January 3, 2012. Collective leniency application terms remained the same, *http://eng.ftc.go.kr/files/static/Legal_Authority/Announcement%20on%20Implementation %20of%20Improper%20Concerted%20acts%20Leniency%20Program_mar%2014%202012.pdf* [Accessed April 3, 2014].
[35] Korean Fair Trade Commission's *Notification on Implementation of Cartel Leniency Program* (2009) art.4(2). The Korean Fair Trade Commission made another amendment on June 22, 2012 to add this rule.
[36] South Africa Competition Commission, *Corporate Leniency Policy Guidelines*, *http://www.compcom.co.za/assets/Uploads/CLP-public-version-12052008.pdf* [Accessed March 26, 2014].
[37] Turkish Competition Authority's Regulation on Active Cooperation for Detecting Cartels 2008 art.4(2).
[38] Turkish Competition Authority's Sodyum Sülfat decision, 12-24/711-199 (May 3, 2012). SODAŞ applied to the leniency programme in the second time period. The Authority used its self-incrementing information. However, it was fined and only granted a one-third fine reduction instead of full immunity.
[39] A similar instance occurred in an ongoing investigation by the Turkish Competition Authority. The leniency applicant was denied full immunity on the grounds that the Authority was already in possession of sufficient evidence to justify the finding of a violation. For confidentiality reasons, the identity of the applicant and the names of the investigated entities are not disclosed because the investigation was pending to the Turkish Competition Authority at the time of writing.
[40] CLP 1993 s.A.2 and s.B.3.
[41] ECN *Model Leniency Programme*, para.13(1).
[42] Stolt-Nielsen also applied for, and received, immunity from the EU's corporate leniency programme. Press Release, "Stolt-Nielsen, S.A., Stolt-Nielsen Group Granted Conditional Amnesty in Parcel Tanker and Inland Barge Investigations" (February 25, 2003), *http://www.stolt-nielsen.com* [Accessed March 26, 2014].

would fulfil its obligations as stated in the amnesty agreement. The DOJ was to grant immunity from prosecution to Stolt-Nielsen and its employees.[43]

Stolt-Nielsen delivered the "smoking gun" evidence to the DOJ as a result of its obligation to provide full, continuing and complete co-operation throughout the investigation. Ultimately, the agency obtained convictions of the other two members of the cartel and their executives. However, in April 2003, the DOJ announced that it was suspending Stolt-Nielsen's participation in the CLP and considering withdrawing its immunity, based on what the DOJ claimed was credible evidence showing that Stolt-Nielsen continued its participation in the cartel after March 2002, before the date of the amnesty agreement. The DOJ reasoned that Stolt-Nielsen did not take prompt and effective actions to terminate its part in the cartel after it became aware of the anti-competitive activity and thereby breached the amnesty agreement's terms. The situation escalated when the DOJ arrested one of the senior executives of Stolt-Nielsen. Subsequently, Stolt-Nielsen filed a pre-emptive lawsuit seeking to enjoin the DOJ from prosecuting it and its employees under the terms of the agreement and the DOJ then fully revoked Stolt-Nielsen's amnesty in March 2004.

In the ensuing litigation, the district court decided in favour of Stolt-Nielsen, determining that the company had met its obligations under the agreement, and barring the DOJ from prosecuting Stolt-Nielsen for any activity that took place prior to January 15, 2003. On appeal, the US Court of Appeals for the Third Circuit reversed this judgment, but on procedural grounds, finding that the courts could not prevent federal prosecutors from acting before an indictment had been issued, but stating that Stolt-Nielsen[44] and its employees could rely on the amnesty agreement as a defence in any criminal prosecution.[45] The DOJ proceeded to prosecute Stolt-Nielsen for its activities in the cartel. In the resulting criminal trial, the company relied on the amnesty agreement as a reason to reject the DOJ's indictment. The trial court agreed with Stolt-Nielsen and, applying general principles of contract law, determined that the DOJ improperly breached its own obligations under the contract and could not continue to prosecute Stolt-Nielsen.[46]

The DOJ revoked Stolt-Nielsen's conditional immunity on the grounds that Stolt-Nielsen failed to meet one of the conditions stated in the CLP, which is to "take prompt and effective action to terminate its part in the anti-competitive activity". The DOJ interpreted the provision as requiring Stolt-Nielsen to terminate its part in the cartel as of the moment it became aware of the illegal activity. This moment was purported to be in March 2002 for Stolt-Nielsen. As such, the DOJ alleged that Stolt-Nielsen was expected to cease its participation in the cartel as of March 2002.[47]

However, Judge Kauffman, construing the terms of the agreement against the Government as the drafting party (*contra proferentem*) and evaluating what Stolt-Nielsen would have reasonably understood, held that taking "prompt and effective action" does not necessarily mean immediate termination of the participation in the cartel.[48] Rather, he stated that "action" does not indicate a full stop but a process.[49] The judge found that Stolt-Nielsen was prompt and effective enough to terminate its participation in the cartel "right after its application to the DOJ", and fulfilled its obligations under the agreement.[50] Additionally, the judge decided that the DOJ cannot revoke an immunity agreement without complying with accepted standards of contract law in the United States, i.e. by proving a material breach.

Today, most of the leniency regulations worldwide involve the same requirement to terminate participation in the cartel, yet with clearer wording than is found in the CLP and often specifically describing the time by which participation must end. Jurisdictions use wordings such as "bring his participation in the cartel to an end at the time of application for leniency",[51] "end its involvement in the cartel immediately following its application",[52] "terminate its part or participation in the cartel",[53] "refrain from further participation in the alleged activity from the time of its disclosure".[54] The Polish leniency programme even requires a written guarantee in the form of a statement that the enterprise has ceased its participation in the prohibited agreement, specifying the date of cessation.[55]

[43] *Stolt-Nielsen SA v United States* 442 F. 3d 177 (3rd Cir. 2006).
[44] *Stolt-Nielsen* 442 F. 3d 177 (3rd Cir. 2006).
[45] James R.M. Killick, "Leniency, Incentives to Lie and Due Process: the Lessons of the Stolt-Nielsen Case", *Competition Law Insight*, June 3, 2008, p.2.
[46] *United States v Stolt-Nielsen SA* 524 F. Supp. 2d 609 (E.D. Pa. 2007).
[47] These allegations were based mainly on the evidence that two other cartel participants provided against Stolt-Nielsen. Judge Kauffman held that none of the evidence was credible given the potential incentive for vengeance by the reported cartelist competitors to Stolt-Nielsen.
[48] *Stolt-Nielsen* 442 F. 3d 177 (3d Cir. 2006).
[49] *Stolt-Nielsen* 442 F. 3d 177 (3d Cir. 2006).
[50] *Stolt-Nielsen* 442 F. 3d 177 (3d Cir. 2006).
[51] Danish Competition and Consumer Authority's *Guidelines on Leniency for Cartel Activities*, *http://www.kfst.dk/fileadmin/webmasterfiles/konkurrence/Straflempelse/NY_-_2012_08_28_Vejledning_om_straflempelse_for_kartelvirksomhed_-_engelsk.pdf* [Accessed January 22, 2013].
[52] Croatian Competition Authority's Regulation on Immunity from Fines and Reduction of Fines 2009, art.3(4)(2), *http://www.aztn.hr/uploads/documents/eng/documents/legislation/Regulation_on_immunity_from_fines_and_reduction_of_fines_CCA.pdf* [Accessed March 26, 2014].
[53] Israel Antitrust Authority's *Leniency Program*, s.2(g), *http://www.antitrust.gov.il/Files/HPLinks/Leniency%20Program.pdf* [Accessed January 22, 2013].
[54] Competition Commission of Pakistan, Competition (Leniency) Regulations 2007, art.3(ii)(c), *http://www.cc.gov.pk/images/Downloads/leniency_regulations.pdf* [Accessed January 22, 2013].
[55] Polish Competition Authority's *Guidelines of the President of the Office of Competition and Consumer Protection on the Leniency Program* 2007, para.38, *http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/awareness/occpleniencyprogramguidelines.pdf* [Accessed March 26, 2014].

Controversial request

Interestingly, though in tension with the general rule and the aims of many competition authorities, the competition authorities can request that the applicant not cease its participation in the cartel and participate in the regular meetings as usual. The UK's OFT, for its part, assumes that such a direction from competition authorities would be rare.[56] When this strategy is used, it serves the purpose of avoiding the suspicion that would arise among the remaining cartelists by the sudden decision by one to leave the cartel. Most leniency programmes allow for this option so as to not "wake the dragon" and allow the other cartelists to conceal and destroy evidence. In other words, it aims to protect the element of surprise of any forthcoming inspections.[57] This derogation from the general rule is deemed in the public interest according to the Explanatory Notes of the ECN Model Leniency Programme. The German Leniency Programme takes a step further from the others and requires the applicant to continue its participation in the cartel unless Bundeskartellamt orders otherwise.[58]

When the general rule applies, that is, when the applicant must end its participation in the cartel, it can be difficult to avoid the other cartelists' attention. In most cartels, the participants hold regular meetings, which may be once a year or once a month. The leniency applicant must find an excuse not to attend these regular meetings or for not returning email messages and phone calls. Ysewyn suggests some excuses for not attending the cartel meetings, such as sending employees on holiday, telling the other cartelists that there is an internal organisation meeting taking place, etc.[59]

No coercion of others to join and no leadership role in the cartel

A third requirement common to most leniency programmes is that the applicant must not have coerced others to be party to the cartel, or have taken steps to lead the cartel. These criteria narrow the range of potential leniency applicants by categorically excluding certain cartel members ab initio. Unlike the other requirements, this requirement is not something that the would-be leniency applicant is expected to do or not do as of the application date but rather is something it must not have done before. In the ECN Model Programme, cartelists who coerced others to join the cartel cannot even apply for leniency, let alone being eligible for immunity.

There are different applications of this requirement. Most of the jurisdictions exclude coercers while some, such as Germany or Greece, exclude the sole ringleaders as well[60] or, like Italy, do not narrow the eligible applicant range in any way.[61] Table 1 displays the approaches of some of the jurisdictions included in the International Competition Network.

Table 1: A selection of ICN jurisdictions and their exclusion criteria

Jurisdiction	Coercer	Initiator/ringleader/originator
Australia	√	√
Austria	√	
Brazil[62]		√
Canada	√	
Croatia	√	√
Czech Republic	√	√
Denmark	√	
France	√	
Germany	√	√
Greece	√	√
Israel	√	√
Ireland	√	√
Italy		
Korea	√	
Lithuania	√	√
New Zealand	√	
Pakistan	√	
Slovak Republic	√	√
Turkey	√	
UK	√	
US	√	√

The 1996 EU Leniency Notice rejected immunity for the coercers, the instigators or the undertakings with a determining role in the cartel.[63] However, the EU Commission received criticism about the ambiguity of the terms of "instigator" and "determining role" as it was not very easy to find out the facts in all cases.[64] In the

[56] OFT Guidance, "Leniency and No-action" (July 2013), s.4.44.
[57] OFT Guidance, "Leniency and No-action" (July 2013), s.4.44.
[58] Notice 9/2006 of the Bundeskartellamt on the Immunity from and Reduction of Fines in Cartel Cases, 2006, para.7: "He must end his involvement in the cartel immediately on request by the Bundeskartellamt." See *http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/06_Bonusregelung_e_Logo.pdf* [Accessed January 22, 2013].
[59] J. Ysewyn, "Immunity and Leniency in the EU: Is the Tail Wagging the Dog?", Fourth Annual Conference of Global Competition Law Centre, Brussels, 2008, p.14.
[60] ECN *Model Leniency Programme* 2012, p.3.
[61] Notice on the non-imposition and reduction of fines under s.15 of Law 287 of October 10, 1990 (as modified by Resolution 21092 of May 6, 2010, published in Bulletin 18 of May 24, 2010).
[62] Clear ringleader: there will be no clear leader if two or more parties are properly considered equals in the conduct. For example, if in a two-firm conspiracy each firm played an equal role in the operation of the cartel, both firms are potentially eligible for leniency. Finally, the fact that an undertaking is a market leader does not necessarily entail that it is the ring-leader of the cartel.
[63] EU Leniency Notice 1996.
[64] D. Jarret Arp and Christof R.A. Swaak, "Immunity from Fines for Cartel Conduct under the European Commission's New Leniency Notice" (2002)16 *Antitrust* 59, 63.

2006 EU Leniency Notice, only coercer undertakings are excluded from the leniency programmes and even they are still eligible for reduction of fines.[65]

Even though the literal meanings of the terms "coercer", "initiator", "instigator", "originator" or "leader" are plain, it is hard to discover whether an undertaking is one of them at the time of application. Problems may emerge if the undertakings reveal self-incriminating information and afterwards the competition authority finds out or alleges that the applicant has coerced the other cartelist undertakings. For the applicant undertakings, it would certainly be painful to undergo the subsequent lawsuits and revocation risks. Therefore, this condition for conditional immunity increases the legal uncertainty up to high levels and constitutes a serious threat for the would-be applicants' desire for application and a huge disincentive for would-be leniency applicants, affecting the success of the whole programme.

On the other hand, none of the leniency programmes provide a precise description of coercion and they do not pinpoint when a competition authority should determine whether or not the applicant was a coercer or leader within the cartel. In a system that relies on undertakings to come forward, and therefore must offer fairness and certainty, it is unworkable to expect applicants to wait until the post-application period to know with any certainty whether they are considered a coercer within the cartel. In the post-application period, absent more precise definitions and guidance, the competition authority should err in favour of the leniency applicant, regardless of the fact that it is or may be the coercer. This is especially true in cases where the competition authority was unaware of the cartel before the applicant came forward, given the greater benefit that accrues to the competition authority and the greater risk that was undertaken by the applicant.

For example, 3M Turkey filed a leniency application with the Turkish Competition Authority in 2010 with self-incriminating information about a cartel in the market for traffic signs and markings. Upon assessing the application, the Turkish Competition Authority launched an investigation concerning nine undertakings, including 3M Turkey, and granted 3M Turkey conditional immunity. During the investigation, the case handlers eventually alleged, among other things, that 3M Turkey was the coercer of the reported cartel and should not qualify for immunity.[66] They recommended that the Turkish Competition Board revoke 3M Turkey's conditional immunity and grant fine reductions up to one-half. At the end of the investigation, in 2012, the Turkish Competition Board decided that there was no violation of the competition law and therefore did not impose any fines on any of the defendants.[67] That said, the decision did not address the revocation of the conditional immunity and the case handlers' allegations of coercion, leaving continued uncertainty about the circumstances under which leniency applicants will be considered coercers.

To that end, while almost all jurisdictions adopt the condition of not being the coercer or leader of the cartel in order to obtain immunity, timing and legal certainty are sensitive issues here. Obviously, it is not easy or always possible to detect whether the applicant meets this condition in the beginning, and the authorities, after granting conditional immunity to the applicant, may define it as "coercer" upon the evidence the applicant itself reveals. Therefore, one of the most workable solutions is for the authorities to elaborate on the definition of this condition and the methods used to determine the real coercers. Another suggested solution is that competition authorities around the world may even consider eliminating this condition altogether to increase the number of applications and to eliminate some eligibility problems beforehand.

Total disclosure and continuous and complete co-operation

Leniency regulations typically require the leniency applicant to provide "full, frank and truthful disclosure"[68] and carry out "genuine, full and continuous cooperation"[69] throughout the investigation. Logic dictates the same, i.e. that the leniency applicant should co-operate with the competition authority and provide relevant documents that are available to the applicant undertaking, when one considers that the leniency applicant receives immunity from prosecution and/or from administrative fines. However, co-operation is easier said than done. Co-operation with the competition authority throughout the investigation period is likely to be time-consuming and difficult, given that investigations often last more than a year, and full and frank disclosure of information and documents can equate to huge volumes of information.

As a representative example, the Australian leniency legislation[70] provides many details of what is considered to be "full, frank and truthful disclosure" and co-operation. Below are some of Australia's requirements, which are similar to those found in other jurisdictions, in varying degree of detail:

- Providing full details of all known facts relating to the cartel conduct: information on when the cartel arrangements operated;

[65] EU Leniency Notice, p.13.
[66] Case handlers also alleged that 3M failed to co-operate with candour during the whole investigation process and requested the Competition Board to revoke 3M's immunity. The following section will explain 3M's position against these allegations.
[67] Turkish Competition Authority, *3M Turkey* decision, 12-46/1409-461 (September 27, 2012).
[68] Australia ACCC *Immunity Policy Interpretation Guidelines* 2009, s.3.2, *http://www.accc.gov.au/content/item.phtml?itemId=879795&nodeId=eb2cc256f6140a0f6a026e3b9aae9db9&fn=Immunity%20policy%20interpretation%20guidelines.pdf* [Accessed January 22, 2013].
[69] *Handbook of the Austria Federal Competition Authority on the Implementation of Section 11 para.3 of the Austrian Competition Act (WettbG)*, *http://www.en.bwb.gv.at/CartelsAbuseControl/Leniency/Documents/Handbook%20leniency_english%20version.pdf* [Accessed March 26, 2014].
[70] Australia ACCC *Immunity Policy Interpretation Guidelines* 2009, s.3.2.

who was involved; who had knowledge of the arrangements; how the arrangements began; and how they were implemented, details of meetings, etc.

- Not disclosing to third parties any dealings with the authority: no disclosure without the consent of the authority, except where required to do so by law. If disclosure is required, the authority must be notified.
- Providing all evidence and information in the applicant's possession or available to it: regardless of location, the applicant should provide that information regarding the cartel conduct for the duration of the investigation and any subsequent court proceedings, promptly and at the applicant's own expense.
- Using its best endeavours to comply with any timetables set by the authority.
- Being available: making relevant corporate directors, officers and employees available, upon the request of the authority and in a timely fashion to respond to queries and attend interviews.
- Responding fully, frankly and truthfully to all inquiries of the authority.
- Using their best efforts to secure and promote the ongoing, full and truthful co-operation: all current and former directors, officers and employees should use their best efforts for the duration of the investigation and any subsequent court proceedings. This obligation includes:
  - — encouraging these persons to provide any information relevant to the cartel conduct;
  - — facilitating these persons appearing for interviews or testimony; and
  - — encouraging these persons to respond fully, frankly and truthfully to all questions asked in interviews.

As is apparent, the co-operation requirement goes well beyond providing the relevant basic information to the competition authority. In other words, the leniency applicant will not be entitled to immunity by just providing evidence and some information at the time of application, but it must also continuously work with the competition authority, including by providing full details of all known facts relating to the cartel, maintaining the secrecy of the leniency application from third parties, and co-operating with the competition authority throughout the investigation period. The way that varying jurisdictions approach these sub-requirements is assessed below from a critical point of view.

Providing full details of all known facts relating to the cartel

In most of the leniency programmes, to qualify for immunity (or reduction of fines, as the case may be), the leniency applicant must submit information covering several particular topics, such as the nature of the alleged cartel, the product markets affected by the cartel, the duration of the cartel, names of the cartelists, and the dates, locations, and participants of the cartel meetings. Besides this information, the applicant is expected to submit other information and documents available to it about the cartel activity. The European Union acknowledges that "upfront certainty" with respect to the information and evidence required by the EU Commission from the applicant is necessary to encourage the cartelist undertakings to apply.[71]

Under the EU 2006 Leniency Notice,[72] a successful applicant for immunity must submit "information and evidence" that, in the Commission's view, will enable it to: (1) carry out targeted inspections[73]; or (2) find an infringement of art.101 TFEU.[74] For the evidence and information to be sufficient for the Commission to carry out a "targeted inspection" or to find an infringement, the applicant must provide: (a) a detailed description of the alleged cartel arrangement[75] insofar as it is known to the applicant at the time of the submission; and (b) any other evidence relating to the alleged cartel in possession of the applicant or available to it at the time of the submission, including in particular any evidence contemporaneous to the infringement.[76]

In the US system, the DOJ practice does not require actual evidence at the outset but instead demands a good "cartel story".[77] Indeed, in the absence of incriminating documents, a successful amnesty applicant could base its proffer wholly on oral statements, if the employees are credible.[78] Corroborating evidence is required at the next step, i.e. after the applicant is granted conditional immunity. Once the DOJ hears and accepts the "story",

[71] Jatinder S. Sandhu, "The European Commission's Leniency Policy: A Success?" (2007) 28(3) E.C.L.R. 148, 153.
[72] Commission Notice on Immunity from fines and reduction of fines in cartel cases [2006] OJ C298/19, *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:298:0017:0022:EN:PDF*.
[73] As noted above, this threshold does not exist under the Leniency Regulation.
[74] See EU Leniency Notice, para.8.
[75] This description must include, insofar as known to the applicant at the time of the submission, a description of, e.g., the aims, activities and functioning of the cartel; the product or service concerned, the geographic scope, the duration of and the estimated market volumes affected by the alleged cartel; the specific dates, locations, content of and participants in alleged cartel contacts, and all relevant explanations in connection with the pieces of evidence provided in support of the application. EU Leniency Notice, para.9(a).
[76] See EU Leniency Notice, paras 9(a) and (b), 10, and 11.
[77] *Model Corporate Conditional Leniency Letter*, para.2; and *Antitrust Division Manual*, 4th edn, pp.102–104.
[78] G.R. Spratling, D. Jarret Arp and Alexandra J. Shepard, "Making the Decision: What to Do When Faced with International Cartel Exposure-Developments Impacting the Decision in 2006", p.69, Presented at the American Bar Association's Section of Antitrust Law and International Bar Association 2006 International Cartel Workshop (February 2006).

it investigates and develops the case by seeking and interviewing witnesses, etc., in order to expand and complete the picture.[79]

Finland also has a tolerant and expansive approach regarding the information to be provided, similar to the system in the United States. In Finland, immunity eligibility does not require that the information supplied by the undertaking contain wholly comprehensive evidence of an "existence of a competition restraint" and "the involvement of those who have committed the infringement", if the undertaking has no knowledge of all the related facts at the time of the submission.[80] While most of the jurisdictions stipulate such information to be provided, the Finnish Competition Authority may accept an application in the absence of this significant information. Indeed, an applicant-friendly approach has also been adopted by Finland for the next stage of the application as well. That is, an undertaking which has acted in good faith does not lose its possibility of obtaining immunity even if the information may prove partially defective or inaccurate.[81] However, under Finland's leniency guidelines, immunity will be revoked if there is a deliberate failure to supply the Finnish Competition Authority with information related to the restraint.[82]

A contrasting example from Europe is the Slovak Republic. The Antimonopoly Office of the Slovak Republic is very strict about the necessary information to be provided by a leniency applicant. If, for instance, the first applicant does not submit evidence "sufficient to prove the violation" and consequently the second applicant does submit information and evidence that leads to a targeted inspection that proves the violation, the Antimonopoly Office has the right to grant immunity only to the second undertaking.[83] Such a rule does not provide any certainty for the applicants. The risk of not being granted conditional immunity after the first applicant provides information to the Antimonopoly Office is harsh, considering the constitutional rights forfeited. Moreover, even if the first applicant could have submitted more robust evidence later, it would not be granted the conditional immunity as the second applicant would have already obtained the immunity in its place.[84]

Providing all evidence and information in its possession or available to it

The test in the United States for whether an applicant has supplied sufficient information is whether the applicant presents credible evidence that would demonstrate to an objective fact-finder (that is, a hypothetical judge or jury) that its employees or agents participated in an agreement with a competitor to fix prices, rig bids or allocate markets. Assuming the applicant terminated the infringing conduct as soon as it was discovered or, at least, by the time of the application (the crux of the issue in the *Stolt-Nielsen* case), the application will not be revoked if the applicant co-operates in good faith. This includes conducting a reasonable internal investigation to uncover relevant documents and identify all individuals with relevant information, and then promptly disclosing the results to the DOJ.

The good faith element of the DOJ's requirement regarding disclosure of information means that even if relevant evidence were inadvertently overlooked that is later discovered by the authority, an applicant would not necessarily lose its amnesty. As long as the applicant did not have knowledge of this evidence after a good faith and reasonably thorough internal investigation, did not hold back evidence intentionally, and did not destroy or conceal evidence, the leniency application would still be accepted and the applicant will be exempt from penalties.[85]

The DOJ has no "decisive evidence" or "minimum requirements to be fulfilled" in their leniency programme and, so long as the leniency applicant's co-operation directs the DOJ to additional incriminating evidence, the application will be accepted.[86]

The EU Commission's approach is stricter than the United States in regard to the information that must be provided in the beginning. The EU Leniency Notice expressly states that the applicant must submit all of the evidence and information that is known to it, in its possession, or available to it "*at the time of the application*" (emphasis added).[87] The applicant can be exempted only for the outstanding information that it acquires after the application, including information that may come out of an ongoing internal investigation. Still, the EU Commission's memo on frequently asked

[79] Julian M. Joshua, "That Uncertain Feeling: The Commission's 2002 Leniency Notice", European University Institute, Robert Schuman Centre for Advanced Studies, EU Competition Law and Policy Workshop/Proceedings (2006), p.8.
[80] Finnish Competition Authority's *Guidelines on the Application of Articles 8 and 9 of the Act on Competition Restrictions* 2004, s.2.4.
[81] Finnish Competition Authority's *Guidelines on the Application of Articles 8 and 9 of the Act on Competition Restrictions* 2004, s.2.4.
[82] Finnish Competition Authority's *Guidelines on the Application of Articles 8 and 9 of the Act on Competition Restrictions* 2004, s.2.4.
[83] Antimonopoly Office of the Slovak Republic, "Non-imposing or Reducing a Fine in Some Types of Agreements Restricting Competition pursuant to Article 38 paras 11 and 12 of the Act" (2006), para.18.
[84] Antimonopoly Office of the Slovak Republic, "Non-imposing or Reducing a Fine in Some Types of Agreements Restricting Competition pursuant to Article 38 paras 11 and 12 of the Act" (2006), para.18.
[85] See *Model Corporate Leniency Letter*, *http://www.justice.gov/atr/public/criminal/239524.htm* [Accessed March 26, 2014]; "Virgin Keeps Immunity in Price-Fix Probe", *Financial Times*, November 8, 2011 (OFT declined to revoke the immunity agreement because Virgin's failure to provide the additional emails was not "non co-operation such as to warrant the revocation of the Virgin Atlantic's immunity"); EU 2006 Leniency Notice, para.12(c) (providing that one of the additional conditions that the immunity applicants have to meet is when contemplating making its application to the Commission, the undertaking must not have destroyed, falsified or concealed evidence of the alleged cartel).
[86] See speech of Scott D. Hammond, "Detecting and Deterring Cartel Activity through an Effective Leniency Program" (November 2000), *http://www.justice.gov/atr/public/speeches/9928.pdf*; see also speech of Scott D. Hammond in March 2001, "When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual's Freedom?" (March 2001), *http://www.justice.gov/atr/public/speeches/7647.htm* [Both accessed March 26, 2014].
[87] See EU Leniency Notice, paras 9 and 11.

questions on the revised Leniency Notice leaves room for the exception for submissions after the initial application.

Moreover, applicants have to co-operate with the EU Commission "genuinely, fully, on a continuous basis, and expeditiously" after the submission of their immunity application.[88] This obligation includes providing the EU Commission "promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it".[89] In other words, applicants are expected to continue to disclose relevant information even after the application. Importantly, as stated above, the EU Commission acknowledges that, at the time of the application, the applicant's internal investigation may still be ongoing and that, therefore, it accepts that an applicant can also submit evidence after the initial application for immunity.[90]

In the *Chloroprene Rubber* case,[91] the EU Commission granted conditional immunity to Bayer but subsequently considered revoking it on the basis that it was not clear if Bayer had met its obligation to provide the EU Commission with all evidence available to it. The EU Commission found that Bayer had not provided "expeditiously and spontaneously" all available evidence and that Bayer's behaviour had slowed the EU Commission's investigation. But the EU Commission also found: (1) that it was "undisputable that Bayer's contribution triggered the EU Commission's investigation"; (2) that Bayer's failure to provide certain documents was not the result of an unwillingness to genuinely co-operate; (3) that Bayer provided the missing evidence as soon as it was prompted by the Commission; and (4) that Bayer's co-operation increased when the Commission offered more precise guidance as to what was required. The Commission concluded that it would have been "disproportionate" to withdraw immunity given the "special circumstances of the case" and awarded full immunity to Bayer.

More recently, in the *Medikal Gaz Cartel* case in Turkey,[92] Berk Gaz was the first applicant to file for leniency to reveal a bid rigging cartel between 38 undertakings in 17 geographic markets for medical gas. After Berk Gaz's application, the Turkish Competition Authority carried out on-site inspections at Berk Gaz and other defendants' premises where it found new evidence that had not previously been disclosed by Berk Gaz. Convinced that Berk Gaz had nonetheless provided sufficient documents and information, while also fulfilling the other conditions set out in the Leniency Regulation, the Board granted full immunity to Berk Gaz, in spite of the fact that the new evidence uncovered at Berk Gaz during the on-site inspection shed further light on the investigation. To avoid doubt, the Board did not consider revoking Berk Gaz's immunity during the investigation.

The Turkish Competition Authority was expected to follow this precedent in subsequent leniency applications. However, in the above-mentioned 3M Turkey case, after granting 3M Turkey conditional immunity, the case handlers recommended revoking it on the grounds that the information 3M Turkey provided was not sufficient. While 3M Turkey provided all the information available to it at the time of application, and used its best efforts to co-operate with the Authority afterwards, the case handlers were not convinced. Notwithstanding the case handlers' approach, because the Turkish Competition Board decided there was no violation of competition law on the merits, the co-operation issue was not addressed.[93]

In view of the foregoing, most of the leniency regulations do not require the applicant to submit all information and documents about a cartel or all information and documents that could be discovered as a result of an on-site inspection. Suggesting otherwise would lead to the conclusion that the leniency applicant should be deprived of immunity in all cases where it did not provide all the evidence that was uncovered during the subsequent investigation. Given that this would be unreasonable, the leniency regulations generally admit that: (1) the information and documents submitted by the applicant may not be used as evidence against the applicant in another criminal or other proceeding after the leniency application; and (2) further evidence may be discovered after the leniency application has been submitted.

This standard, adopted by most of the leniency regulations, involves an element of discretion and judgment on the applicant's part, to determine the documents that the applicant thinks are relevant to establishing a potential competition law violation. Competition authorities should not condemn an applicant simply because the information or documents that it discovered as a result of the investigation do not match those submitted by the applicant as part of the leniency application. Reasonable minds may differ about whether the information or documents in question establish a competition law violation. Otherwise, there would be no need for the competition authorities to conduct an investigation at all, if an undertaking were required to submit all information and documents obtained during the course of an investigation in its leniency application.

[88] See EU Leniency Notice, para.12.
[89] See EU Leniency Notice, para.12(a)(1).
[90] See, e.g., European Commission press release of December 7, 2006, "Competition: revised Leniency Notice — frequently asked questions", MEMO/06/469 ("Therefore, if the applicant comes across or can obtain information or evidence listed in point 9 after its initial submission, it should provide those for the Commission. This also means that if the applicant has not completed its internal inquiries due to risk of leaks prior to a conditional immunity decision and/or a Commission inspection, the applicant should complete such inquiries directly thereafter, unless the Commission otherwise requires"), *http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/469&format=HTML&aged=0&language=EN&guiLanguage=en* [Accessed March 26, 2014].
[91] EU Commission, *Chloroprene Rubber*, Case COMP/38629 (December 5, 2007), *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38629/38629_1056_4.pdf* [Accessed March 26, 2014].
[92] Turkish Competition Authority, *Medikal Gaz* decision, 10-72/1503-572 (November 11, 2010).
[93] See Turkish Competition Authority, *3M Turkey* decision, 12-46/1409-461 (September 27, 2012).

The purpose of this approach, adopted in most of the jurisdictions, is to facilitate leniency applications and to avoid discouraging leniency applications for fear that they might be rejected for failure to provide the adequate level of information.[94] This is particularly appropriate because leniency programmes provide an incentive to the applicant to file promptly upon learning of a possible violation, to avoid a co-conspirator from filing first, meaning that typically there is no time to conduct a full review of all possibly relevant documents.[95]

Not disclosing the leniency application to third parties

The co-operation condition generally includes the obligation to avoid disclosing the content or existence of the leniency application[96] or the undertaking's intention to apply for leniency[97] to others before an investigation is launched, or in some jurisdictions before the statement of objections is issued.[98] Competition authorities, however, in cases where it is necessary, can give consent to the leniency applicant to disclose the application to the others. In the cases where disclosure is required, competition authorities in general must be notified prior to the applicant releasing any information.

In Europe, in the *Italian Raw Tobacco* case, the EU Commission successfully revoked conditional immunity on the basis of the applicant disclosing the application to the other cartelists. Deltafina, an Italian company active in the processing of raw tobacco and in the market for processed tobacco, was part of a cartel in the Italian raw tobacco market between 1995 and 2002.[99] It was the first of the three cartelists to blow the whistle and submit a leniency application to the EU Commission. After an initial assessment, the EU Commission granted Deltafina conditional immunity.

However, subsequent to Deltafina's application, the EU Commission found that Deltafina had voluntarily revealed to its main competitors that it had applied for immunity before the Commission could carry out surprise inspections.[100] Because Deltafina had thereby breached its obligation to keep its immunity application confidential, the EU Commission revoked Deltafina's conditional immunity in 2005.[101] The European Commission's decision did acknowledge Deltafina's contribution in establishing the infringement and regarded it as justifying a 50 per cent reduction in Deltafina's fine.[102] The General Court of the European Union upheld the Commission's withdrawal of Deltafina's conditional immunity in September 2011.[103] The General Court observed that an undertaking seeking to benefit from full immunity from fines on the basis of its co-operation may not fail to inform the EU Commission of relevant facts of which it was aware and which are capable of affecting, if only potentially, the conduct of the administrative procedure and the efficacy of the Commission's investigation.[104] In other words, the General Court emphasised that the applicant's obligation to not disclose the leniency application to the other undertakings is capable of affecting the administrative procedure and consequently the application's validity. Deltafina appealed the General Court's decision to the Court of Justice of the European Union on November 18, 2011. The Court of Justice case was still pending at the time of writing.[105]

The *Italian Tobacco* case was the first decision where the Commission revoked conditional immunity at the end of the procedure, after granting conditional immunity in the beginning.[106]

Co-operation throughout the investigation period

The General Court in the *Italian Raw Tobacco* case stated that in order to be granted immunity, which constitutes an exception to the principle of personal liability for infringement of the competition rules, an undertaking must, inter alia, co-operate with the Commission throughout the administrative procedure.[107] According to

[94] Gökşin Kekevi, "Kartellerle Mücadelede Yeni Dönem: Pişmanlık Yönetmeliği" in Kerem Cem Sanlı (ed.), *Rekabet Hukuku Yaptırım Politikasında Yeni Dönem — Ceza ve Pişmanlık Yönetmelikleri* (İstanbul Bilgi Üniversitesi, 2009), p.57.
[95] Kekevi, "Kartellerle Mücadelede Yeni Dönem: Pişmanlık Yönetmeliği" in *Rekabet Hukuku Yaptırım Politikasında Yeni Dönem* (2009), p.57.
[96] Autorité de la Concurrence (Franch Competition Authority), *Procedural notice relating to the French Leniency Programme* (March 2009).
[97] Czech Republic Competition Authority, *Notice of the Office for the Protection of Competition of 4 November 2013 on Application of Article 22ba (1) of the Act on the Protection of Competition*.
[98] For instance, Croatia Competition Agency, Regulation on Immunity from Fines and Reduction of Fines; Autorité de la Concurrence (French Competition Authority), *Procedural notice relating to the French Leniency Programme* (March 2009); Italian Competition Authority, Notice on the Non-imposition and Reduction of Fines under Section 15 of Law 287 of 10 October 10, 1990.
[99] Croatia Competition Agency, Regulation on Immunity from Fines and Reduction of Fines; Autorité de la Concurrence (French Competition Authority), *Procedural notice relating to the French Leniency Programme* (March 2009); Italian Competition Authority, Notice on the Non-imposition and Reduction of Fines under Section 15 of Law 287 of 10 October 10, 1990.
[100] Case COMP/C.38.281/B.2 — *Raw Tobacco Italy* (2005), paras 408–460, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38281/38281_508_1.pdf* [Accessed March 26, 2014].
See also European Commission Press Release, "Commission fines companies €56 million for cartel in Italian raw tobacco market" (October 20, 2005) (IP/05/1315), *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:353:0045:0049:EN:PDF* [Accessed March 26, 2014].
[101] Case COMP/C.38.281/B.2 — *Raw Tobacco Italy* (2005), paras 408–460, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/38281/38281_508_1.pdf* [Accessed March 26, 2014].
See also European Commission Press Release, "Commission fines companies €56 million for cartel in Italian raw tobacco market" (October 20, 2005) (IP/05/1315), *http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:353:0045:0049:EN:PDF* [Accessed March 26, 2014].
[102] See Case COMP/C.38.281/B.2 — *Raw Tobacco Italy* (2005), paras 385–398.
[103] *Deltafina SpA v European Commission* (T-12/06) September 9, 2011.
[104] *Deltafina*, September 9, 2011.
[105] *Deltafina SpA v European Commission* (C-578/11 P), January 28, 2012. Opinion of Advocate General Sharpston was delivered on March 27, 2014, in the judgment before the Court of Appeals (*Deltafina SpA v European Commission* (C-578/11 P). Advocate General proposed the Court to dismiss the appeal.
[106] Please also see "Court upholds fine on Deltafina despite revealing cartel (Case Comment)", *EU Focus* (2011).
[107] General Court, Press Release 87/11, p.2, *http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-09/cp110087en.pdf* [Accessed March 26, 2014].

the General Court, the applicant undertaking should demonstrate a "genuine spirit of cooperation".[108] While this is easy to say, it is not easy to understand the concept of "genuine spirit". Regardless, it is clear that the principle of ongoing co-operation is very important to most jurisdictions. In the leniency guidelines issued by the Polish Competition Authority, for example, there is only one sentence, written in bold characters: "**The applicant is obliged to cooperate with the President of the Office from the moment of submitting the leniency application**."[109]

In the *Exotic Fruit (Bananas)* case, the EU Commission granted conditional immunity to Chiquita for its participation in a banana cartel.[110] However, it subsequently considered revoking the immunity on the basis that: (1) Chiquita might not have fully co-operated with the Commission during its investigation[111]; and (2) Chiquita might not have terminated the infringement at the time of its application for immunity.[112] The Statement of Objections in this case points out that the infringement at issue did not fully conform to the description provided in Chiquita's leniency application by stating that:

> "It is not sufficient that the immunity applicant enables the Commission to launch the investigation and thereafter provides only the information that the Commission explicitly requests. It is the responsibility of the applicant to come forward with its account of the facts buttressed by evidence and to demonstrate that it cooperates genuinely, fully, on a continuous basis and expeditiously. The Commission needs to remain neutral and abstain from leading the applicant and can hence only present factual questions to the applicant."[113]

However, the decision confirmed that Chiquita contributed to the investigation and triggered the Commission's investigation, even if it did not provide information about the infringement. In discussing the duty to co-operate, the decision notes that it was not sufficient to merely provide enough information to launch an investigation and then to only respond to explicit follow-up requests. Rather,

> "it is the responsibility of the applicant to come forward with its account of the facts buttressed by evidence and to demonstrate that it cooperates genuinely, fully, on a continuous basis and expeditiously".[114]

The Commission, moreover, should only ask "factual questions" of the applicant.

Ultimately, the Commission concluded that: (1) Chiquita had met its duty of co-operation; and (2) it could not be demonstrated with certainty that the last collusive contact involving Chiquita occurred after the date of its immunity application. The Commission found it significant that Chiquita had provided several submissions that related to the relevant violation and also that it was Chiquita's information that triggered the investigation in the first place. The Commission therefore granted full immunity to Chiquita in its final decision.[115]

The *Chiquita* case reflects that the applicant may be expected not only to respond to requests but also to be proactive in identifying issues to the investigating authority. The principle of continuous co-operation is understandable but sufficiently open-ended that it adds to the burden of the applicants and increases the potential for legal uncertainty. Applying to the leniency programmes may be worthwhile but is also time-consuming, because the applicant first must race to the door of the competition authority, then before catching its breath, it must provide the competition authority with all available documents relating to the reported cartel. However, this is still not enough to be granted full immunity at the end of the whole procedure, because throughout the process, the applicant and its executives must be at the disposal of the competition authority to answer all questions, identify issues, comply with the authority's timelines, and co-operate with it for any other request.

Problems with the revocation of conditional immunity

It is generally accepted that stiff punishments for violating competition rules, such as participating in cartels, creates deterrence. Indeed, in the United States, cartelists are subject to treble damages in private antitrust cases for precisely that reason. However, in order to boost the deterrence effect, leniency programmes have proven to be extremely effective, despite the fact that they let some anti-competitive conduct go unpunished. Indeed, in the *Italian Raw Tobacco* case, the General Court observed that leniency programmes are based on the idea that the interests of the public in ensuring that secret cartels are

[108] General Court, Press Release 87/11, p.2, *http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-09/cp110087en.pdf* [Accessed March 26, 2014].
[109] Polish Competition Authority, *Guidelines of the President of the Office of Competition and Consumer Protection on the Leniency Program*.
[110] Case COMP/39482 — *Exotic Fruit (Bananas)* (2011), *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf* [Accessed March 26, 2014].
[111] Case COMP/39482 — *Exotic Fruit (Bananas)* (2011), para.351, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf* [Accessed March 26, 2014].
[112] Case COMP/39482 — *Exotic Fruit (Bananas)* (2011), para.350, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf* [Accessed March 26, 2014].
[113] Case COMP/39482 — *Exotic Fruit (Bananas)* (2011), para.351, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf* [Accessed March 26, 2014].
[114] Case COMP/39482 — *Exotic Fruit (Bananas)* (2011), para.351, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf* [Accessed March 26, 2014].
[115] Case COMP/39482 — *Exotic Fruit (Bananas)* (2011), paras 345–352, *http://ec.europa.eu/competition/antitrust/cases/dec_docs/39482/39482_3130_4.pdf* [Accessed March 26, 2014].

detected and punished outweigh the interest in fining those undertakings that co-operate with the Commission, by enabling it to pursue and prohibit such cartels.[116]

In this regard, leniency regulations should facilitate applications and minimise situations where potential applicants are discouraged to file for leniency for fear that their applications might be rejected for slight failures to meet the conditions or because the requirements themselves are ambiguous. In any event, as a matter of policy, revoking conditional acceptance into the leniency programme should be exceptional. Labelling a leniency application as insufficient just because, for instance, the applicant did not provide everything that was discovered further into the investigation would undoubtedly have the unintended effect of discouraging leniency applications. Fortunately, the leniency enforcement policies of many jurisdictions corroborate this principle, as explained above.

Indeed, the very limited circumstances under which a revocation should occur are further supported by the reality that leniency applicants take significant risks at the time of filing applications. Then, during the ensuing phases of the investigation, they must aid the authority's efforts to uncover more damning evidence. In many jurisdictions, leniency applications also open the door to private litigation with potentially huge financial penalties and additional investigations by other competition authorities, which may have access to the original leniency application itself.

The importance of the self-incriminating information that a leniency applicant provides to a competition authority was emphasised by Judge Kauffman in the *Stolt-Nielsen* case, when he compared the relative benefits that the parties derived from the leniency agreement:

> "Using highly incriminating evidence produced by Stolt-Nielsen and its employees, including the 'combined lists' provided by Wingfield, the Division obtained the benefit of its bargain — it successfully dismantled the cartel and secured guilty pleas from Stolt-Nielsen's co-conspirators which included prison terms and fines totaling $62 million. Defendants, however, have not been afforded the benefit of their bargain."[117]

Thus, competition authorities should ensure that leniency applicants can expect to obtain "the benefit of their bargain" in stepping forward. Anything that would make an undertaking hesitate to reveal an illegal cartel is not favourable for a successful leniency programme.[118] Indeed, to maximise the effectiveness of leniency programmes, there are two main criteria[119] that they should meet. One of them is "transparency" and the other is "interpretation in favour of the applicant".[120]

Transparency is "one of the most important facets of leniency programs".[121] The undertaking that applies for leniency should be confident that it will benefit from amnesty. This will ensure that it provides documents or information that would be helpful for the competition agency to accurately assess the application and that are indicative of any signs of infringement. In order to encourage an undertaking to voluntarily submit itself to admitting an infringement, the relevant competition authority ought to provide transparency to that undertaking about its status in the leniency programme. Moreover, the information that is requested from the undertaking should be clearly set out, leaving no room for doubt on the part of the applicant.[122] Similarly, the conditions that must be met in order to obtain immunity should be precisely defined, with as much explanatory guidance as possible, so that the undertaking can assess its risks at the outset. The existence of numerous, vaguely defined conditions gives competition authorities more avenues to potentially revoke immunity, increasing legal uncertainty for the applicants, and acting as an enormous deterrent to participation in a leniency programme. The applicant should not have any doubt about its status, which will encourage it to fully co-operate with the competition authority.[123]

Another crucial principle is "interpretation in the favour of the applicant." In the *Stolt-Nielsen* case, for example, the court construed the leniency agreement in favour of Stolt-Nielsen, in part because of the risks involved in providing self-incriminating information to the Government.[124] Governments also have considerable power over the applicants, given their prosecutorial powers. In light of the risks and this power imbalance, applicants should be given the benefit of the doubt in evaluating whether they have complied with the terms of the leniency application.

As observed in the United States, amnesty applications significantly increased in number after the amendment of the leniency regulation in 1993.[125] The increase is the result of the amendment's general policy of accepting the two principles noted above. Because leniency agreements are bilateral contracts in the US system, the Government cannot abrogate that agreement without a significant

[116] General Court, Press Release No.87/11, p.2.
[117] *Stolt-Nielsen* 524 F. Supp. 2d 609 (E.D. Pa. 2007).
[118] Joshua, "That Uncertain Feeling" (2006), p.3.
[119] Kekevi, *ABD, AB ve Türk Rekabet Hukukunda Kartellerle Mücadele* (Ankara: 2008), p.65.
[120] Ass. Prof. Dr Kerem Cem Sanlı, *Rekabet Hukuku Yatırım Politikasında Yeni Dönem Ceza ve Pişmanlık Yönetmelikleri*, On İki Levha Yayıncılık (2009), p.59.
[121] Joseph E. Harrington Jr, "Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion", Department of Economics, Johns Hopkins University Baltimore (January 31, 2006), *http://www.jftc.go.jp/cprc/koukai/sympo/2005report.files/CPDP-18-E.pdf* [Accessed March 26, 2014].
[122] Freshfields Bruckhaus Deringer, *Response dated October 27, 2006 to the Commission of the European Communities DG Competition Consultation on the Draft Commission Notice on immunity from fines and reduction of fines in cartel cases* published on September 29, 2006, *http://ec.europa.eu/competition/cartels/legislation/files_leniency_consultation/fbd.pdf* [Accessed March 26, 2014].
[123] Kekevi, "Kartellerle Mücadelede Yeni Dönem: Pişmanlık Yönetmeliği" in *Rekabet Hukuku Yaptırım Politikasında Yeni Dönem* (2009).
[124] *Stolt-Nielsen* 524 F. Supp. 2d 609 (E.D. Pa. 2007).
[125] Kekevi, "Kartellerle Mücadelede Yeni Dönem: Pişmanlık Yönetmeliği" in *Rekabet Hukuku Yaptırım Politikasında Yeni Dönem* (2009).

reason, let alone an unreasonable one, and then cannot break the contract unless a court agrees that there has been a material breach.[126] This deal seems to equally distribute the benefits and obligations should immunity be granted in the end.

Competition authorities must be careful to balance the need to punish anti-competitive conduct with the enormous benefits that leniency applications can provide, in terms of uncovering cartels and making investigations more efficient. While immunity should not be granted too freely, nonetheless any action that needlessly jeopardises potential applicants' willingness to appear before and co-operate with the competition authority will undermine the success of the programme. This includes the failure to adequately define the conditions of granting immunity and tight-fisted approaches to granting immunity. In addition, aggressive efforts by competition authorities to revoke immunity on weak grounds or in borderline cases can be seriously damaging to the principles of transparency and interpretation in favour of the applicant. The competition authorities should take this into consideration when evaluating leniency applications and attempt to revoke immunity only in extraordinary cases.

Conclusion

Leniency programmes in the many different countries examined within this study stipulate several conditions which are closely modelled after each other. The leniency applicants are expected to meet these conditions in order to be granted immunity from fines and/or other prosecutions. While these conditions are undoubtedly necessary for immunity, the expectations of the competition authorities are sometimes too high and leniency applicants find themselves on a fool's errand in attempting to satisfy them. Revocation of immunity is an enormous consequence for not satisfying the competition authority, with potentially devastating consequences to the success of leniency programmes.

A leniency applicant may have provided a competition authority with thousands of pages of self-incriminating evidence, have stopped attending cartel meetings and have kept all these confidential. Regardless of all the efforts of the leniency applicant, which takes the huge risk of facing the consequences of leveraging criminal or civil procedures on the basis of a finding of an antitrust violation, the competition authority still has the discretion to revoke its conditional immunity on the grounds of dissatisfaction of another condition listed in the leniency regulation. However, considering the high expectations of the authorities and the comprehensiveness of the conditions, the leniency applicant carries a heavy burden to convince the authorities that it deserves immunity in the end.

Taking away a bit of the competition authorities' discretion in relation to immunity should be the starting point for establishing a more predictable leniency practice. After that, the conditions should be described in detailed guidelines in order to eliminate the gap of uncertainty. As Scott Hammond[127] noted:

> "Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of a corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program."[128]

A final suggestion for more sustainable leniency programmes would be for promulgated and detailed guidelines regarding the concepts that are not clearly defined in the regulations. No undertaking will apply for immunity if it cannot make an extensive risk assessment with respect to immunity. Thus, this study suggests, among other things, that detailed guidelines on unclear concepts and terms would be helpful to explain the conditions attached to leniency programmes in detail. This will have a positive impact on the open-ended and ill-defined discretion of the competition authorities to make immunity determinations. Ultimately, this will enhance the certainty, and consequently the effectiveness, of the leniency programmes.

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