

Cartels are being unveiled and punished across the globe. What were once just US legal measures to combat them, such as whistle-blowing, severe criminal sanctions, extradition, and private damages claims, are now gaining acceptance with legislators and regulators worldwide.

Increased legislation and cartel regulation in many jurisdictions are creating ever-growing concern as fines escalate, regulators co-operate internationally and procedures differ substantially from one jurisdiction to another. *Leniency Regimes* provides an up-to-date analysis of cartel leniency regimes in 32 jurisdictions that will be enlightening for all businesses involved in cross-border activities. It provides general counsel and external advisors with an invaluable tool to navigate through this complex international regulatory web.

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PREFACE

Jacques Buhart | McDermott Will & Emery

Since the last edition of this book, leniency applications continue to be the most important source of anti-trust investigations. This will likely remain the case in the future. That being said, certain key developments of late are likely to have an impact on leniency programmes. A notable development in this regard is the entry into force of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Damages Directive), a key objective of which is to optimise the interplay between private damages actions and public enforcement. To this end the Damages Directive enacts specific provisions designed to protect leniency programmes whilst at the same time encouraging private actions for damages.

First, there is an absolute prohibition on disclosure of leniency statements. This prohibition applies not only to requests for disclosure of copies of leniency statements in the control of a competition authority, but also to copies of the same documents in the hands of other parties to the damages action or even of third parties. This absolute protection applies to the leniency statement itself. With respect to leniency statements the Damages Directive, therefore, leaves no scope for the national judge to perform the so-called “balancing exercise” enshrined in *Pfleiderer* and *Donau Chemie* as to whether they should be disclosed. However, it bears note that “pre-existing information”, such as e-mails and minutes of meetings that existed prior to the leniency statement can be the subject of disclosure orders, even if they are referred to in the statement.

Second, with respect to joint and several liability, the Damages Directive provides that an immunity recipient will only be jointly and severally liable to its own direct and indirect purchasers or providers. Other injured parties can only claim damages from an immunity recipient where full compensation cannot be obtained from the other joint infringers. In such case, contributions by the immunity recipient to the liability of other joint infringers must not exceed the amount of the harm caused by the immunity recipient to its own direct or indirect purchasers or providers. To the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers must be determined in the light of its relative responsibility for that harm.

It remains to be seen, of course, whether the Damages Directive has found the optimal balance between public and private enforcement, that is to say, between ensuring that cartelists have adequate incentives to apply for leniency and ensuring that parties injured by the cartel can realistically bring a successful damages action. It cannot be ruled out, for example, that a claimant’s ability to obtain disclosure of “pre-existing information” may have a chilling effect on a cartel’s inclination to apply for immunity or leniency, as a consequence of which there may be fewer infringement decisions to rely on for the purposes of bringing a “follow-on” damages claim.

Another major development concerns the continuing trend pertaining to international co-operation in anti-trust enforcement as trans-border misconduct becomes increasingly common. The automotive parts investigation, the largest international cartel case seen to date, represents a good illustration in this regard. Regulators investigating the alleged cartel conduct included the US Department of Justice, the Canadian Competition Bureau, the EU’s DG Competition, the Japanese Fair Trade Commission and the Chinese National Development and Reform Commission, to name but a few. Another example of international co-operation can be found in the investigation of investment banks’ manipulation of FX rates which began in 2013 and engulfed more than a dozen regulators. The UK’s Financial Conduct Authority recently announced that it had “prompted unprecedented global co-operation”. Such increased co-operation has no doubt had

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a hand in the fact that total cartel fines issued by the world's competition authorities in 2014 reached a new level of USD5.3 billion, up 31% on the previous year's (record breaking) total. Indeed, international co-operation is set to increase with a recent wave of international agreements. Witness in this regard the fact that the JFTC has recently entered into an agreement with the Australian ACCC (2015), and a memorandum of understanding with the Brazilian CADE (2014) while the EU and Switzerland signed an anti-trust co-operation agreement in 2013.

As the enforcement net tightens around cartel conspirators, the development of international co-operation raises several questions such as the extent of information and evidence which can and will be exchanged between competition authorities, and the advisability for leniency applicants to grant procedural or substantive waivers. Finally, it should be noted that leniency programmes including "amnesty/immunity plus" mechanisms, such as the one in the US, may have a ripple effect as leniency applicants for one product may be forced to investigate and apply for leniency for other products not initially envisaged.

More than ever, it is crucial for leniency applicants to co-ordinate their movements on a worldwide level and to consider applying simultaneously for leniency, not only with the most important enforcers, but also in rising jurisdictions such as Brazil or South Africa – jurisdictions which are eager to take on cases even though their resources are not sufficient to pursue all leniency applications or despite the fact that the impact of a cartel on their respective markets is indirect or only limited.

This fifth edition covers countries across all continents: Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Cyprus, Denmark, EU, Finland, France, Germany, Hungary, India, Ireland, Italy, Japan, Mexico, New Zealand, Portugal, Russia, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, UK, Ukraine, and the USA.

Many of these jurisdictions' leniency programmes share common characteristics, such as the availability of rewards not only for the first whistleblower, but also for subsequent applicants; the conditions that must be fulfilled in order to benefit from full immunity, such as not having coerced other companies into joining the cartel, and the existence of a marker system. Such similarities among leniency programmes should enable applicants to succeed more effectively in their simultaneous applications in different jurisdictions, even though differences among these programmes remain.

I would like to thank all the authors, Cecilio Madero and Lisa Phelan, and the team at Thomson Reuters for their efforts in bringing this fifth edition to fruition.

FOREWORD

Cecilio Madero Villarejo | Deputy Director-General of DG Competition of the European Commission

The fight against cartels is a priority for the European Union (EU) and for all anti-trust enforcement agencies around the world. This has been the case for a long time: in the EU, 48% of all the European Commission's decisions adopted between 2004 and 2013 in the anti-trust field were in cartel cases. And this paints only part of the picture, since it does not take into account the achievements of the competition authorities of the EU member states, which have also concentrated their enforcement efforts against cartels.

For such effective enforcement, a well-designed and well-functioning leniency programme is essential. Although not the only source of cases for the Commission, leniency remains the main trigger for new investigations. Three quarters of the Commission's cartel decisions imposing fines adopted between 2004 and 2013 were in cases started by immunity applications.

The Commission's leniency policy is firmly established, with almost 20 years of application. The policy is constantly under review, with the last amendments made in 2006. However, to maintain its effectiveness, it is not sufficient to focus only on the design of the programme. Interaction with other instruments – such as actions for private damages – have a significant impact on the incentives for leniency. It is important to ensure that consistency between those policies contributes to maintaining the effectiveness of leniency programmes generally.

The shaping of the EU policy on actions for private damages for infringements of anti-trust rules has been a long process which (after comprehensive public debates) concluded with the adoption of Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (the Damages Directive). The purpose of the Damages Directive is to make it easier for the victims of anti-trust infringements to claim damages by, among other things, providing them with easier access to evidence. Usually such evidence is part of the investigation files of competition authorities. However, given the self-incriminating nature of leniency applications, their potential disclosure in other jurisdictions' courts might deter companies from coming forward and reporting a cartel under a leniency programme. Therefore, to ensure that companies' incentives for voluntary co-operation remain intact and to preserve the effectiveness of leniency programmes in the EU, the Damages Directive contains a provision that requires member states to ensure that courts cannot order disclosure of leniency statements produced for the purpose of co-operating with competition authorities.

The possibility to submit oral leniency applications to the Commission and some member state anti-trust authorities is also meant to maintain the attractiveness of leniency programmes for those companies that may end up facing private damages actions outside the EU.

International co-operation and convergence also contribute significantly to the development and maintenance of effective leniency policies.

At EU level, the ECN Model Leniency Programme (MLP) was developed by DG Competition and the National Competition Authorities of member states within the European Competition Network (ECN) in 2006. The MLP provides a model of procedural and substantive elements which, according to the ECN, every leniency programme should contain. All ECN members have made a political commitment to use their best efforts to align their programme with the MLP. Indeed, the MLP has helped to encourage and guide anti-trust enforcement agencies in the EU to develop or to further improve their leniency programmes as well as to achieve a significant degree of alignment. Since the last edition of *Leniency Regimes*, the

FOREWORD

MLP has been revised. Apart from a significant degree of convergence, the MLP also introduced a summary application system in situations where the Commission is particularly well placed to deal with a case. This system allows immunity and fine reductions for applicants who file with the Commission and enables them file simplified applications with member states' competition authorities. This reserves them a place in the queue, should the case end up being dealt with by a member state authority rather than the Commission.

In our experience, wider international co-operation within the International Competition Network (ICN) is also indispensable. This is natural, given the rapidly increasing number of investigations of worldwide cartels (recent examples are automotive and financial cases), which require the close co-operation of anti-trust authorities around the world. The ICN Cartels Working Group, in which the Commission participates actively, is an important forum for exchanges on how to achieve effective co-operation on cartels between various anti-trust enforcement agencies. In 2014, in order to facilitate the provision of confidentiality waivers for leniency applicants and to increase their uniformity worldwide, the ICN Cartels Working Group also adopted waiver templates and an explanatory note, which DG Competition fully endorsed.

I welcome this fifth edition of *Leniency Regimes*, which contains descriptions of various leniency policies around the world. It also examines the leniency policies in a wider context. Leniency programmes are living tools, the success of which depends on their capacity to adapt to new situations and challenges. Interesting issues appear all the time, for example, the level of protection or the discovery of leniency applications in private damages actions. Each anti-trust enforcement agency deals with them according to the specifics of its legal system, and it is particularly useful to have the varying approaches to those issues compiled in one volume.

I am convinced that this edition, like the previous editions, will not only be a useful practical reference for the anti-trust community (including DG Competition) but also a source of inspiration and reflection on how to maintain the effectiveness of different leniency policies around the world.

FOREWORD

**Lisa M. Phelan | Chief, Washington Criminal I Section Antitrust Division
United States Department of Justice¹**

More than 20 years ago, when the Antitrust Division of the Department of Justice first set out a clear and transparent leniency programme, it shortly thereafter gathered competition enforcers from jurisdictions around the globe to discuss the value and effectiveness of the concept. It could not have been envisioned at the time of that first gathering how widespread or how successful such programmes would become for detecting and combating cartels.

As someone who began a career investigating and prosecuting cartels in the pre-lenieny programme era, I cannot emphasise enough the effectiveness of a thoughtfully designed and implemented leniency regime as a tool for cracking cartels. When coupled with international co-operation on the investigation of cartels with global impact, leniency programmes have enabled the world's enforcers to expose and eradicate dozens of longstanding and perniciously harmful cartels. These cartels, which impacted major consumer industries and affected billions of dollars in national and international commerce, might have otherwise continued for years, draining the world's economies and depriving consumers of fair prices and innovation.

In the context of a criminal enforcement regime like the United States, a leniency programme often brings to enforcers, applicants that are involved in ongoing cartels. These applicants then take law enforcement agents directly inside the cartel, in real time. With the incentive to avoid prosecution, corporations co-operate by bringing witnesses and documents from all over the world and company executives co-operate by wearing wires to price-fixing meetings. Applicants tape record incriminating phone conversations and share with law enforcement agents e-mailed or texted solicitations to collude.

More than 60 jurisdictions have adopted leniency programmes in the past two decades and the international community of enforcers continues to discuss regularly the appropriate criteria and best practices for implementing such regimes. The International Competition Network (ICN) hosts a biennial cartel conference, in different countries around the world to share insights and experiences in implementing leniency programmes. Additionally, many jurisdictions host cartel practitioners from other jurisdictions to study one other's leniency regimes, in order to continually improve them. More mature leniency regimes offer guidance and support to developing ones. A convergence of views and shared best practices are among the goals of the conferences and training exchanges. Still, some variations among leniency regimes remain, as this book illustrates.

The Antitrust Division's leniency programme continues to be a major source of new cartel investigations, and seeking leniency from the Division continues to be the advisable choice for a corporation or individual that has been a participant in a cartel. Given the proliferation of global leniency regimes, however, the costs and complications of simultaneously complying with programmes in numerous jurisdictions has become a real issue. Enforcers need to continue to evaluate the potential impact of this situation and be open to options that could mitigate costs and avoid unintended negative consequences. While companies and executives should not expect minimal costs or consequences to a successful leniency application, it is in no one's interest for enforcers to create barriers or burdens that unnecessarily discourage potential leniency applicants.

¹The views expressed do not necessarily reflect those of the Department of Justice

FOREWORD

Some practical ways that the Division and its fellow cartel enforcement agencies can work together to minimise the burdens and expenses on leniency applicants were recently outlined in a Division speech¹. Those steps include:

- Co-ordinating on deadlines and timetables for key co-operation tasks and witness interviews.
- Focusing respective investigations on conduct and effect relevant to each jurisdiction.
- Limiting document demands and maximising use of software search tools.
- Limiting, to the extent possible, the number of times witnesses are interviewed around the world.

Each enforcement agency can and must do what is required to establish cartel violations to the standard of proof in their jurisdiction, and leniency applicants must earn their non-prosecution commitment through complete co-operation². Within that framework, however, both enforcers and applicants can look to accomplish these goals in the most efficient and cost-effective way possible.

With a strong criminal enforcement programme, the Antitrust Division has obtained record criminal fines in recent years. For each of the last several years, more than \$1 billion in fines have been imposed by the courts in cartel cases, including more than \$3 billion in FY 2015 alone. Widespread multinational cartel conduct in industries like auto parts, shipping and financial services has fuelled these enforcement results in the United States. Participants in these international cartels face consequences in other jurisdictions as well. Dozens of executives from these industries have served jail terms in the US.

These results indicate, however, that cartel conduct has not been sufficiently deterred, either in the US or around the world. There is still much work for competition agencies to do. Leniency programmes, which have proven such a powerful tool in unearthing long-hidden cartels, are more important than ever in the world's fight against cartel conduct. Making those programmes clear, transparent and user-friendly is, and will continue to be, a key goal for enforcers around the globe.

¹ See Brent Snyder, Deputy Ass't Att'y Gen. for Crim. Enforcement, *Leniency in Multi-Jurisdictional Investigations: Too Much of a Good Thing?*, Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), available at www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago

² AAG William Baer stated in a recent speech: "Our policy requires complete and continuing co-operation with the division throughout our investigation and resulting prosecutions...Companies unwilling or unable to make the investments necessary to meet these obligations, or those that think they can do so on a timetable of their choosing, will lose their opportunity to qualify for leniency." Bill Baer, Ass't Att'y Gen., Antitrust Div., *Prosecuting Antitrust Crimes*, Remarks Presented at the Georgetown University Law Center (Sept. 10, 2014), available at www.justice.gov/atr/file/517741/download

SPAIN

Jaime Folguera, Antonio Guerra & Tomás Arranz | Uría Menéndez

BACKGROUND

1. What is the relevant legislation concerning leniency policy and who is the enforcing body? Has the enforcing body issued any supplementary guidance in support of the relevant leniency legislation?

The Spanish leniency programme is regulated by Articles 65 and 66 of Law 15/2007, of 3 July 2007, on the Defence of Competition (the Competition Law) and section 7 (Articles 46 to 53) of Regulation on Defence of Competition approved by the Royal Decree 261/2008, of 22 February 2009 (the Competition Regulation). In 2013, the authority published a Leniency Notice aimed at enhancing the transparency and the predictability of its actions.

Competition rules in Spain are enforced by the National Markets and Competition Commission (the *Comisión Nacional de los Mercados y la Competencia* or CNMC). The CNMC was created in 2013 as a result of the merger of several regulatory authorities. The former body responsible for enforcing the competition rules was the National Competition Commission (*Comisión Nacional de la Competencia* or CNC). In addition, certain regions also have authorities to enforce the competition rules in their respective territories.

2. What are the basic tenets of the leniency programme? Is leniency available for competition law violations other than cartels?

The leniency programme allows the CNMC to grant exemptions from payment of fines or reductions in the amount of fines (where someone has already benefited from the exemption or for other reasons the applicant does not qualify for full exemption) to undertakings or individuals who inform the CNMC about the existence of a cartel and their participation in the conduct. The leniency application must include substantive evidence that contributes to the establishment of facts and to bringing or advancing an investigation.

The leniency programme applies only to cartels, which the Competition Law (Fourth Additional Provision) defines as: “any secret agreement between two or more competitors which has as its object price fixing, establishing production or sales quotas, market sharing, including bid rigging, or import or export restrictions”. However, the Leniency Notice of the CNC widened its scope and included other types of horizontal conducts such as joint boycotts or exchanges of information on prices or projected amounts.

Although the application of the leniency programme to activities other than conduct foreseen in the Competition Law is controversial, the former CNC has considered exchanges of information to be equivalent in nature to price-fixing cartels and applied the leniency programme to them. According to recent investigations, the CNMC will likely follow the same path.

3. Is there an “immunity plus” or “amnesty plus” option? If not, in practice, can a leniency applicant receive a reduction of its fine for its participation in a first cartel if it reports its participation in a second, unrelated cartel?

There is no immunity plus or amnesty plus option under the Spanish leniency programme. It is not likely that a leniency applicant will receive any additional reduction in relation to a first cartel if it reports its participation in a second unrelated cartel.

4. How many cartel decisions involving leniency applications have been rendered since 1 January 2013? How many companies have received full immunity from fines during that period?

Between January 2013 and March 2015, the CNMC published six decisions in cases where the leniency programme was applied and granted full immunity to the first applicant in all these cases. However, during this period, other leniency applications have been rejected by the CNMC since they did not contribute significant added value to the investigation.

In addition, in at least two pending cases the CNMC has received leniency applications.

5. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient (can an applicant be awarded leniency by providing the enforcing body with testimonial evidence only)? How are “useful contributions” or “added value” defined? Is there any sanction for misleading or incorrect leniency applications?

The first leniency applicant to provide the CNMC with sufficient information to establish the existence of a cartel or to enable the CNMC to order an inspection will be eligible for full immunity. The CNMC will not grant the exemption if at the time of the application it already has enough information on the conduct and does not need to rely on the submission of the applicant.

Undertakings which do not qualify for full exemption may still apply for a reduction of the fine. The CNMC will consider that an application adds value if it makes a significant and conclusive contribution to the investigation as compared to the information already in the possession of the CNMC and facilitates the investigation in demonstrating the existence and scope of the cartel.

The applicant must provide the CNMC with all relevant evidence at its disposal or information on the evidence which might be obtained through an investigation. This includes all contemporaneous evidence in the applicant's possession, such as, minutes, annotations, e-mails or any other documents that refer to the cartel. In theory, testimonial evidence could be sufficient in the absence of any other evidence. However, the CNMC may reject the application if the content of the application is insufficient or incomplete.

PROCEDURE

6. What are the practical steps required to apply for leniency? Is it possible to have an initial anonymous contact with the enforcing body before actually applying for leniency or do parties have to give full disclosure of their identity at any time?

In practice, it is possible to approach the CNMC on a no-name basis before filing the application in order to obtain assistance on how to submit the application and to try to get confirmation on whether the first position is still available.

Once the application is filed and all evidence documentation has been provided, the Director for Competition of the CNMC will resolve whether to grant a conditional exemption to the applicant before an inspection is carried out.

7. Is there a marker system?

Please see below.

7.1 If so, is it available to all leniency applicants to secure their rank or only to the first in line?

A marker system properly so called does not exist in Spain. However, applicants may submit an application and request for additional time to provide the evidence or testimonies which support the application. In this case, the CNMC will issue a receipt certifying the register entry date and time. Once the additional information is submitted, the filing date will be deemed to be the date of the initial application. If the evidence is not submitted within the time limit granted by the CNMC but later, the filing date for the application will be deemed to be the last date on which the evidence is submitted.

The order of receipt of the applications will be set according to the register entry date and time both in relation to immunity exemptions and applications for the reduction of a fine.

7.2 If so, what initial information has to be made available in order to qualify for a marker and what conditions apply to the perfection of a marker? Are there any set deadlines for the perfection of a marker? If deadlines are discretionary, what is the average length of time given by the enforcing body to perfect a marker?

The applicant should provide the authority on the initial filing date with the relevant information for identifying the applicant and other participants in the cartel, a description of the cartel and a list of the leniency applications that have been submitted before other competition authorities in relation to the same cartel. The application will be deemed to be complete once all supporting evidence has been submitted.

Deadlines for the completion of the submission are discretionary. The average length of time is approximately 15 days.

TIMING/BENEFIT

8. What are the benefits of being “first in” to apply for leniency? Is full immunity available for the first applicant?

The first undertaking to provide the CNMC with sufficient information to establish the existence of a cartel or to enable the CNMC to order an inspection is eligible for full immunity (provided that it meets certain substantive conditions and co-operates with the CNMC).

9. What are the consequences of being “second” to apply for leniency? If applicable, what benefits (including the level of fine reduction) can be expected by a leniency applicant in “second position”?

The second applicant may benefit from a reduction of the fine between 30 and 50% provided that the application provides added value.

10. Can subsequent leniency applicants be given beneficial treatment? If so, is there a limit to the number of subsequent applicants who may receive such beneficial treatment? If applicable, what benefits (including the level of fine reduction) can be expected by subsequent applicants?

The third applicant may benefit from a reduction of between 20 and 30% of the fine to be imposed. For all subsequent applicants, a reduction of up to 20% may be granted by the CNMC. The Spanish leniency programme does not foresee additional benefits for leniency applicants.

PARENTAL LIABILITY

11. Are there any aspects related to parental liability that have played a role in the granting of leniency to applicants and/or their former or current parent companies? Does a former parent company benefit from its former subsidiary's leniency application for practices implemented by this former subsidiary, which applied for leniency after being divested?

The benefits of leniency will be available for the applicant undertakings, their representatives and the persons on their executive bodies who participated in the cartel. Leniency applications may be also filed by the undertaking which controls another cartel participant. Therefore, in order to ensure that a (current or former) parent company benefits from the leniency it should be included in the application.

SCOPE OF LENIENCY

12. What specific conditions must be met in order to benefit from leniency or immunity?

Sufficient information to establish the existence of a cartel or to enable the CNMC to order an inspection is needed to be eligible for immunity. A successful applicant for reduction of the fine should provide information which makes a significant and conclusive contribution to the investigation.

12.1 Can ringleaders or coercers receive leniency or full immunity?

Applicants who have coerced other undertakings to join the cartel cannot receive immunity from fines, but only a reduction in fines. An applicant that has just executed the mechanisms of the cartel, such as inviting other undertakings to join, coordinating the functioning or even assuming the leadership, can still qualify for immunity.

12.2 Are there any specifically stated requirements, such as an obligation to “co-operate fully and on an ongoing basis” and what do such requirements entail?

Leniency applicants must co-operate fully, continuously and diligently with the CNMC until the conclusion of the proceedings in order to maintain the conditional exemption or reduction of the fine. The duty to co-operate entails the obligation to provide the CNMC with all information and evidence related to the cartel, remaining available to respond to requests for information, ensuring the availability of officers and employees and refraining from destroying information. In addition, the leniency applicant must not reveal to a third party that it has obtained conditional immunity or a reduction of the fine before the issuance of the statement of objections.

If the Director for Competition considers that the applicant has not fulfilled its co-operation duties, he will propose to the Council of the CNMC that it not grant immunity or a reduction of the fine.

12.3 Does the enforcing body require the leniency applicant to cease participation in the cartel conduct after its application?

If at the time the application is filed the cartel remains in operation, the applicant must state its intention to cease its participation. In such a situation, the CNMC may authorise the applicant to continue indispensable contacts and actions for maintaining the appearance of the cartel and not to alert other participants.

13. Is there any guarantee of obtaining the final benefit of a leniency application (immunity or reduction of fine) if a leniency applicant co-operates fully with the enforcing body?

The Director for Competition of the CNMC will issue a declaration granting conditional immunity or a reduction of the fine before the dawn raid is carried out or before the statement of objections is served. If the Council of the CNMC considers that applicants have fulfilled their co-operation duties, leniency benefits will be maintained.

13.1 At what stage during the procedure, can a leniency applicant become certain of the benefit he will get from his leniency application (rank in the leniency queue and fine immunity/reduction)?

Before a dawn raid is carried out or before the statement of objections is served, provided that it fulfils its co-operation duties. However, the Council of the CNMC might decide to reject the application even when conditional immunity or a reduction has been granted by the Directorate for Competition. In such a case, the Council should give the applicant the opportunity to submit written observations.

13.2 What are the possibilities of later leniency applicants moving to a higher position in the leniency queue as a result of the added value they may be able to offer in comparison to earlier leniency applicants? Please provide references to cases where this may have occurred.

The amount of reduction of the fine will depend on the order of receipt of the applications. However, if an applicant does not contribute significant added value, its position will remain open for subsequent applicants.

OTHER CONSEQUENCES

14. What effect does leniency granted to a corporate entity have on the entity's employees? Does it protect them from criminal and/or civil liability?

The applicant can extend its application to its legal representatives and to the persons who belong to the executive bodies that have taken part in the cartel. The CNMC will extend the leniency benefits to such individuals provided that they co-operate with the investigation. The leniency programme only covers the liability in relation to the administrative fines to be imposed by the CNMC.

15. If individual employees are potentially exposed to administrative or criminal sanctions, is there a separate leniency/whistleblowing system available for individual employees? If so, please explain the system and the interaction between corporate and individual leniency.

There is no separate system for individuals. However, within the scope of the leniency programme, individual employees may obtain the same benefits as undertakings.

Spanish antitrust law does not foresee criminal sanctions. Despite this, certain types of competition offences may be subject to criminal prosecution, but this has been scarcely applied by Spanish courts.

16. Does qualifying for leniency affect the possibility to appeal the decision by which the leniency is granted (are leniency applicants prevented from appealing certain aspects of the decision and if so which ones)?

Once the investigation is concluded and the CNMC has adopted a final decision, the leniency beneficiaries are no longer bound by the co-operation duty and therefore are free to appeal the decision.

17. Has there been any landmark case law that has led to a reversal of the leniency originally granted in the decision under appeal?

In the professional hairdressers cartel, the then Council of the CNC decided not to grant a reduction of the fine to the second leniency applicant against the proposal of the Directorate of Investigation, since it considered that the information provided by that company did not contribute added value. On appeal, the court considered that the Council should have previously informed the applicant of its intention to reject the conditional reduction of the fine, so that the undertaking had the opportunity to submit written observations. In applying the judgment, the CNC decided to grant the reduction of the fine.

18. Does the granting of leniency prevent third parties from seeking civil damages or protect the leniency applicant in whole or in part from further private enforcement?

Leniency statements are granted a special confidential status, but leniency applicants currently have no other protection against civil damages actions.

Notwithstanding the above, the Directive 2014/104/EU on antitrust damages actions (antitrust damages directive) states that immunity recipients are jointly and severally liable to injured parties other than their direct or indirect purchasers or providers only where full compensation cannot be obtained from other undertakings that were involved in the same infringement.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

19. Is confidentiality afforded to the leniency applicant and other co-operating parties? If so, to what extent?

The final decision that puts an end to the investigation will not make references to the leniency statement and will redact any reference to the pages of the file that contain such statements.

19.1 Is the identity of the leniency applicant/other co-operating parties disclosed during the investigation or only in the final decision?

The submission of a leniency application and the identity of the applicant are treated as confidential by the CNMC. Only after the notification of the statement of objections do other parties have access to the leniency statements and to the identity of the applicant. The final decision will identify the leniency applicants.

19.2 Is information provided by the leniency applicant/other co-operating parties passed on to other undertakings under investigation?

Other undertakings under investigation are given access to leniency statements and evidence documentation only after the statement of objections is served. However, copies of leniency statements are not provided.

19.3 Can a leniency applicant/other co-operating party request anonymity or confidentiality of information provided, such as business secrets?

Before the statement of objections is issued, leniency applicants may raise confidentiality issues, in relation to their business secrets, contained in leniency documents.

20. Is leniency in any way affected by any bi-lateral/multi-lateral co-operation to which your jurisdiction is a party?

The CNMC may contact other competition authorities to whom the applicant has submitted or intends to submit a leniency application (which must be identified in the leniency applications). In addition, the CNMC will inform the European Commission about any leniency application in relation to a cartel that is capable of affecting trade between EU member states.

21. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities? If so, how?

Under the European Competition Network, the CNMC may make information available to other members of the network. However, this information will not be used by other members of the network as the basis for starting an investigation.

22. To what extent can information submitted by the leniency applicant (transcripts of oral statements or written evidence) become discoverable in subsequent private enforcement claims?

The CNMC will not provide copies of the statements of the leniency applicants in civil damages actions. Along the same lines, leniency applicants are allowed to refuse to provide copies of their leniency statements made during investigation proceedings. However, national courts are able to order the disclosure of evidence that exists independently of the proceedings of the competition authority (pre-existing information).

22.1 Can the claimant seeking indemnification of antitrust damages in follow-on actions provide to the court this information where he only had access to it because he was party to the previous proceedings before the competent antitrust authority?

Interested parties in the proceedings can see leniency statements, but are not allowed to make copies. The CNMC will not provide copies of the statements of the leniency applicants in civil damages actions. In addition, the antitrust damages directive states that member states shall ensure that leniency statements obtained by parties to the previous proceedings are deemed to be inadmissible in actions for damages.

22.2 Can this information be subjected to discovery orders in a private enforcement claim before domestic or foreign courts? Are there any precedents?

There is no completely equivalent provision to discovery in Spain. Given the confidential nature of leniency applications, undertakings are not subject to the disclosure of their statements in civil damages claims. Besides, the antitrust damages directive states that member states shall ensure that national courts cannot order a party or a third party to disclose leniency statements for the purposes of actions for damages.

Discovery orders of foreign courts will be governed by the laws of the relevant country, but the CNMC will not provide copies of the leniency statements, either to national or to foreign courts.

SPAIN

22.3 Can this information submitted in a foreign jurisdiction be subjected to discovery orders in the domestic courts?

Where the leniency application submitted in a foreign jurisdiction is given confidential status, the refusal to provide such documents to a national court will be deemed justified.

RELATIONSHIP WITH THE EUROPEAN COMMISSION'S LENIENCY NOTICE AND LENIENCY POLICY IN OTHER EU MEMBER STATES

23. Does the enforcing body accept summary applications in line with the ECN Model Leniency Programme?

Summary applications within the European Competition Network are expressly foreseen in Spain.

24. Does the policy address the interaction with applications under the Commission Leniency Notice? If so, how?

The CNMC will contact the European Commission in relation to leniency applications on cartels that may affect the trade between EU member states in order to determine the authority that is best placed to investigate.

25. Does the policy address the interaction with applications for leniency in other EU member states? If so, how?

Leniency applicants have to inform the CNMC about applications submitted in relation to the same cartel to the competition authorities of other countries. According to the Leniency Notice, the CNMC will inform the European Commission if the leniency applicant has indicated that it has applied for leniency (or intends to apply) before the competition authority of other member state. Information on the leniency application may be made available to the competition authorities of other member states pursuant to the rules of the European Competition Network.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

26. If there are settlement procedures in your jurisdiction, what is the relationship between leniency and such settlement procedures? Are their possible benefits cumulative?

A settlement procedure properly so called does not exist in Spain. However, in a few cases the CNMC has granted a reduction of the fine to companies that did not contest the statement of objections and to companies which did not qualify for a reduction of the fine under the leniency programme, but co-operated with the investigation.

REFORM/LATEST DEVELOPMENTS

27. Is there a reform underway to revisit the leniency policy? What are the latest developments?

The antitrust damages directive was signed into law in October 2014. The transposition of the directive into the Spanish legal system is likely to entail certain regulatory amendments before 27 December 2016 in relation to access to leniency statements in actions for damages.

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