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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Foreword Cecilio Madero Villarejo, *DG Competition of the European Commission*

Foreword Lisa M. Phelan, *Chief, Washington Criminal I Section Antitrust Division US Dept of Justice*

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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 cartelist'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

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

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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 Justice[1]

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-leniency 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.

[1] The 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 speech[1]. 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-operation[2]. 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.

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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*

HUNGARY

Chrysta Bán | Bán S. Szabó & Partners

BACKGROUND

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

Competition law in Hungary is regulated by Act LVII of 1996 on the Prohibition of Unfair Trade Practices and Restriction of Competition (as amended) (the Competition Act).

The Competition Act grants the Office of Economic Competition (the Competition Office) permission to act as the administrative authority in Hungary on all issues which fall within the scope of the Competition Act. The independent decision-making body of the Competition Office is the Competition Council which enforces the leniency programme.

The amendment of the Competition Act (Act No. XIV 2009 on the modification of Act No. LVII of 1996) effective from 1 June 2009 brought the Hungarian leniency programme onto a statutory footing, introducing modifications to the previous policy taking into account the Model Leniency Programme issued by the European Competition Network in September 2006 and the Commission Notice on immunity from fines and reduction of fines in cartel cases (the Commission Notice).

In addition to this statutory enactment, the president of the Competition Office issues, from time to time, revised explanatory notes on the practical implementation and application of the rules of the leniency policy (the Explanatory Notes).

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

The leniency policy creates an incentive for cartel members to reveal cartel activity to the authority.

According to section 78/A of the Competition Act, the Competition Council exempts the applicant from the entire amount of the fine (or grants a reduction of the fine) if the applicant reveals satisfactory information on activity constituting a violation of section 11 of the Competition Act (or Article 101 of the Treaty on the Functioning of the European Union) through an agreement or concerted practice resulting in direct or indirect price fixing, market allocation (including bid rigging) or establishing quotas in the field of manufacturing or sales.

The regulations provide for two possibilities: complete exemption from the fine or a reduction of the fine. A complete exemption from the fine is possible for the cartel member who applies first to the authority and provides evidence sufficient:

- For the Competition Office to obtain a court order for an on-site dawn raid.
- Which enables the illegal activity to be established, provided in each case that the applicant also meets other conditions detailed in the Competition Act.

A reduction of the fine is possible for cartel members who cannot be exempted from the fine, but who provided evidence to the authority that significantly contributed to the establishment of the cartel. This latter category covers different levels of fine reduction, ranging between 20 to 50%, depending on the circumstances, timing and content of the information and the efficiency of the assistance provided to the authority.

Leniency in Hungary is available only in the event of cartel activity.

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?

Neither "immunity plus" nor "amnesty plus" programmes exist in Hungary. A reduction of the fine is not possible for reporting another, 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?

There are no public statistics available which state definitively how many decisions involving cartels have been rendered since 1 January 2013. However, according to information obtained on an informal basis, since 1 January 2013 there were around five decisions based on leniency applications and in which full immunity or fine reductions were granted.

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?

There are no specific requirements with respect to the type of evidence required. Evidence is assessed with respect to its novelty and valued on the basis of how much it contributed to the discovery of the cartel and the establishment of the illegal activity under investigation. Theoretically, testimonial evidence is sufficient. Nevertheless, the leniency applicant has an obligation to provide all material evidence in its possession.

Accordingly, the evidence supplied by a "first in" applicant has to be substantial enough to enable the Competition Office to obtain a court order for a dawn raid, or, for ongoing proceedings, must be new to the Competition Office and sufficient to establish the illegal activity. For second and subsequent applicants, the evidence provided has to represent "substantial added value" with respect to the evidence already in the possession of the Competition Office.

The overall circumstances of the case and the information and evidence already available to the Competition Office will determine whether the information qualifies as "substantial added value" and whether the applicant is eligible for a fine reduction. The Competition Office places greater weight on direct and contemporaneous evidence over evidence which is indirect or has been compiled at a later date. The value of the evidence is also influenced by supporting evidence from other sources.

The rate of reduction of the fine is 30 to 50% for the first applicant meeting the above requirements, 20 to 30% for the second applicant and a maximum of 20% for any further applicant meeting the requirements, provided in each case the applicant satisfies further conditions discussed below.

The applicant must furnish all the evidence it has in its possession in connection with the case. Partial disclosure will not make the candidate eligible for immunity or a fine reduction. This requirement makes it unlikely that an oral statement would be sufficient for an application for immunity or fine reduction.

In addition to providing contemporaneous evidence and of the value required above, the Competition Act sets forth further requirements and conditions which have to be met by each applicant in order to be eligible for immunity from or reduction of a fine.

The filing of misleading or incorrect information may establish the basis for criminal proceedings against the person filing such information.

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?

There are three different ways to file a leniency application:

- An application is filed with all required information.
- The applicant files an incomplete form (marker application), in which case the Competition Office will set a deadline for the completion of the information.
- A local leniency application is filed in parallel to the filing of a leniency application at the European Commission.

The application must include the name of the applicant, the description of the cartel, including its character, time frame, the affected products and geographical territory and the names of the other participants. The application must name those European Economic Area (EEA) countries (if applicable) in which it is likely that further evidence can be discovered, as well as the competition authorities where the applicant filed or plans to file a leniency application. The document must be accompanied by the required attachments including all available evidence and explanations, as well as, the names of companies and private persons who participated in the cartel and/or may possess evidence in connection with the cartel.

Anonymous applications are not accepted and there is no regulation that would allow any initial anonymous contact with the Competition Office. The application may be filed in writing, or may be presented orally by the representative of the applicant. In both cases, the application must be filed with the Discovery Office of the cartel department of the Competition Office. The application has to be filed in Hungarian language, except in the case of a summary application related to proceedings with the European Commission which may be filed in English, German or French. Foreign language documents need to be translated into Hungarian, except documents in English, German or French.

A full application has to include information sufficient to justify a court order for an on-site dawn raid, or, if filed at a later stage of the proceedings, enough evidence to establish the illegal cartel.

Applications containing evidence sufficient to establish the cartel may be filed at any time during the proceedings, provided that no one has filed an application enabling the Competition Office to conduct a dawn raid.

In order to be eligible for the reduction of a fine, the applicant has to file evidence with the Competition Office that contributes significant added value relative to the evidence already in the possession of the Competition Office.

Undertakings may not file a joint application except where they are members of the same group. The controlling company may file the application on behalf of each group company involved in the cartel activity without a power of attorney from the companies involved.

The Competition Act does not provide for any informal proceedings that could take place before an application is filed. Nevertheless, in practice, an enquiry on a no-name basis cannot be excluded.

7. Is there a marker system?

If the applicant is unable to provide all the required information and evidence at the time of the application, it may file an incomplete application. A marker application protects the place of the applicant in the potential queue of leniency applicants, while providing additional time for the applicant to prepare a complete application.

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

Marker applications are only available for the first in line and only if the authority has no knowledge of the cartel, or has insufficient information to acquire a court order for a dawn raid. A marker application can be filed only at a point when the Competition Office has not had enough information yet to receive a court order for a dawn raid.

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?

An application for a marker must include the name and seat of the applicant, the description of the illegal act, its time frame, the affected products and geographical territory and the name of the participating companies. The brief has to name those EEA countries (if applicable) in which it is likely that further evidence can be discovered, as well as the competition authorities where the applicant filed or plans to file a leniency application. It has to include an explanation of why the applicant is unable to provide further information on the evidence and an undertaking according to which it will provide the evidence by the deadline set by the Competition Office. The Competition Act does not specify the length of any extension. In practice, the Competition Office allows a maximum one month for the completion of the application.

TIMING/BENEFIT

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

Only the leniency applicant who qualifies as "first in" is eligible for exemption from the entirety of the fine, provided it meets all the other requirements discussed in question 12. Furthermore, only the first leniency applicant is eligible for exemption from criminal sanctions, both as an undertaking, and for its individuals, provided, again, that they meet the preconditions of release from criminal liability, as discussed in detail in questions 14 and 15.

The Competition Office will grant immunity to the undertaking for the entire fine if:

- The undertaking is the first to submit information and evidence previously unknown to the Competition Office about a cartel which enables the Competition Office to obtain a court order for a dawn raid.
- In proceedings which have already commenced, the undertaking is the first to submit new evidence and information which enables the Competition Office to find an infringement, provided that the Competition Office did not have, at the time of the submission, sufficient evidence to establish an infringement.

In addition, the applicant has to meet all of the following requirements:

- It has to provide the Competition Office with all information and evidence it has in its possession without altering its content.

- It has to fully co-operate, in good faith, on a continuous basis throughout the entire procedure with the Competition Office (the actual content of such requirement is discussed in question 12).
- It has to discontinue its involvement in the cartel following the submission of evidence and no later than the time agreed upon with the Competition Office, except if the Competition Office orders the applicant to continue its participation in the cartel.
- It must not announce the fact and content of the leniency application to anyone without the prior consent of the Competition Office.
- It must not have taken steps to coerce other undertakings into participating in the infringement and operating the cartel agreement. (With regard to ringleaders, see the answer to question 12.)

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"?

A "second" applicant who co-operates with the authority, but is not eligible for immunity may be entitled to a reduction of the fine if the evidence provided to the Competition Office constitutes significant added value.

The rate of reduction of the fine is 30 to 50% for the first applicant meeting the above requirements, 20 to 30% for the second applicant and a maximum of 20% for any further applicant.

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?

A third applicant for leniency may receive a reduction in the amount of the fine of between 20 to 30%, if the evidence it provided has "substantial added value" in the proceedings and the undertaking meets the requirements described in question 12. Any subsequent applicant providing evidence of substantial added value for the proceedings and meeting the requirements described in question 12 may be granted a fine reduction of up to 20% of the fine.

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?

A parent company may apply for leniency on behalf of the group, including its subsidiaries. The leniency application of a subsidiary does not affect the parent company, and only relates to the wrongdoing of the subsidiary. A former parent company does not benefit from its former subsidiary's leniency application for practices implemented by this former subsidiary.

SCOPE OF LENIENCY

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

12.1 Can ringleaders or coercers receive leniency or full immunity?

Applicants who coerced another undertaking into participating in the cartel are not eligible for immunity. However, there is no regulation that excludes coercers from obtaining fine reductions. Ringleaders come under the same rule as coercers, provided that they coerced other participants. If they did not coerce other participants, ringleaders would also be eligible for immunity and/or reduction of the fine.

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?

Immunity from or reduction of a fine will be granted only to an undertaking which:

- Ceases its cartel activity immediately following the filing of its application, except in those cases and to the extent where the Competition Office considers the continuation of certain activities necessary to the success of the proceeding. This request by the Competition Office is limited to the point in time at which a successful dawn raids can be carried out at the premises of other undertakings involved in the case. The Competition Office may not compel the undertaking to continue its activity in order to collect more evidence.
- Fully and continuously co-operates with the Competition Office. According to the Explanatory Notes, within the scope of the co-operation obligation, the Competition Office primarily expects the applicant: (i) to transfer to the Competition Office in due time all information and evidence that is in its possession; (ii) to be available and react immediately to any further information request of the Competition Office; (iii) to do its best, to the extent possible, to make its current and past employees and officers available for testimony; (iv) to not destroy, falsify or conceal any information or evidence; (v) to act in good faith even prior to filing the application, for example, may not notify other undertakings about the fact or content of the leniency application.
- The applicant may not announce or publish the fact or content of the leniency request without the prior consent of the Competition Office.

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

The applicant must cease its cartel activity immediately following the filing of its application, except in those cases where the Competition Office considers the continuation of certain activities necessary to the success of the proceeding. This request by the Competition Office is limited to the successful execution of dawn raids at other undertakings involved in the case. The Competition Office may not compel the undertaking to continue its activity in order to collect more evidence.

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?

If the applicant meets all the conditions of the Competition Act, the applicant must be granted immunity or a fine reduction, provided that the applicant: (i) acts in all respects in accordance with the requirements of the law; (ii) fully co-operates throughout the entire proceedings with the Competition Office; (iii) provides all evidence it has in its possession; (iv) does not

disclose the fact and content of the leniency application ; and (v) ceases its cartel activity at the time agreed upon with the Competition Office.

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)?

The Competition Office deals with each application individually, in the order in which they were received. The authority issues a decision granting conditional immunity or a conditional fine reduction to the applicant depending on whether its application is accepted as "first in", second or as a subsequent application. However, the granting of immunity or a fine reduction is only awarded at the end of the proceedings.

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.

Moving to a higher position would be only possible if an applicant that has a higher standing is disqualified from receiving immunity or fine reduction. The mere fact that an undertaking provides more valuable information, in our view, does not change the ranking of an applicant.

OTHER CONSEQUENCES

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

Only cartels which relate to public procurement tenders and concession contracts are subject to criminal punishment. For cartels in these areas, the persons acting on behalf of the undertaking in the cartel, or being involved in the decision-making process, whether an officer or an employee, are subject to criminal sanctions.

According to the modification of the Criminal Code in 2012, executive officers, employees, members and supervisory board members of the company are exempted from criminal liability, or their penalty may be reduced without limitation, in the event the company filed for leniency with the authorities in due time.

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.

In order to gain immunity individually from criminal punishment the person who is punishable has to report to the criminal authority personally at a stage when the criminal authority does not yet have knowledge of the criminal act.

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

The Competition Act does not prevent the leniency applicant from appealing against the decision to grant immunity or any other aspect of that 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?

There has been no such decision in Hungary.

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?

The effect of granting immunity is limited to administrative proceedings, it does not provide immunity from civil law liability. Nevertheless, the Competition Act provides that the applicant who received immunity may refuse payment of a civil law claim, as long as the damages can be collected from other participants in the cartel. The lawsuit for damages against the undertaking enjoying immunity must be suspended until the decision of the Competition Office in the antitrust matter becomes final and binding.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

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

Please see the response to questions 19.2 and 19.3

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

The identity of the leniency applicant is held confidential by the Competition Office until the end of the proceedings and only the final decision reveals the identity of the applicant.

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

The leniency statements and any other voluntary declarations of the applicant ("protected documents") have to be treated confidentially, that is, only the investigating officer, the members of the Competition Council, the president of the Competition Office and the judge may have access to them. Another party under investigation and its representative may have access to these protected documents only (i) after completion of the investigation, or following the date set by the Competition Council, and (ii) following a decision by the Competition Council that is issued only in the event that the party requires access to the protected document, otherwise it is unable to exercise its legal rights.

Other documents, including evidence filed by the applicant can be accessed only by the other parties under investigation and their representatives after the completion of the investigation. They are allowed to take copies and notes of such documents. The Competition Council may grant access to specific documents to a party or its representative before the completion of the investigation, where this does not jeopardise the effectiveness of the proceedings.

In addition to the above, the Competition Office may deny access to the documents filed in the proceedings in the event that access to such information may jeopardise the success of the proceeding in particular with regard to leniency.

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

Under the Competition Act, it is not possible to apply for leniency on an anonymous basis.

On the other hand, the party under investigation may request, based on protection of business secrets, the confidential treatment of some documents by establishing why the given document qualifies as a business secret. Leniency applicants, may also use this to limit access to confidential information to the other parties in the proceedings. In practice, confidentiality is granted only to the extent that it does not jeopardise other participants' rights of defence. If the request for confidential treatment of certain business secrets is granted by the Competition Office, the applicant must file both a confidential and a non-confidential version of the same document.

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

Other than Regulation 1/2003 EU on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, we are unaware of any such agreement or co-operation.

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

In accordance with the Competition Act, the Competition Office may not use the information and evidence provided by the applicant in the context of a leniency application that makes the Competition Office eligible for a court order for a dawn raid for any purposes other than the leniency proceedings until the issuance of the decision granting conditional immunity/leniency. If the application is rejected, or the applicant withdraws its application, the Competition Office has to give back all documents and evidence to the applicant.

The above rule does not apply to those who apply for immunity at a later stage or for the reduction of the fine. The Competition Office may use this information from the time of the receipt of the information, and thereafter, also if the application is rejected.

With respect to competition authorities in the European Union, Regulation 1/2003 EU on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty is binding on the Competition Office. In accordance with Article 12, the Competition Office is entitled to share any information or evidence, including confidential information, with other EU authorities.

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

Please see below.

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?

The Competition Act clearly states that protected documents (such as leniency statements) accessed by parties under

investigation in a proceeding may be used only in the administrative proceedings relating to that investigation. Furthermore, parties in a proceeding may access protected information only upon a special ruling of the Competition Council and only upon the condition that the party undertakes that it will respect the confidentiality of the information.

Information which is not confidential may be used in other proceedings.

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

Discovery, as known and regulated in common law jurisdictions, is not available under Hungarian law.

Third persons, even if involved in related litigation, whether in Hungary or abroad, do not have direct access to the files held by the Competition Office. The Competition Act specifically states that third persons may not have access to the leniency statement and the voluntary declarations made by an applicant (protected documents).

Under section 190(2) of the Civil Procedure Act, the court in civil law proceedings may, upon request from the party, oblige the counterparty to provide certain documents which are in its possession, provided that under civil law rules it should provide such documents in court proceedings. Based on this rule, discovery of evidence and other non-protected documents is possible, however, it is unclear whether protected documents fall into this category.

Furthermore, the court may request the transfer of certain documents from administrative authorities (for example the Competition Office) or other courts under section 192 of the Civil Procedure Act including the protected documents filed by the applicant in cartel related cases.

However, section 88/B(9) of the Competition Act states that in civil law proceedings for leniency statements, the rules on business secrets apply. According to the rules of section 192(3) of the Civil Procedure Act, in the case of business secrets, the judge has to ask for consent before making available trade secrets to another party involved in the litigation. In the event consent is denied, the content of the leniency statement will not be available to any person other than the judge. Furthermore, information which qualifies as a business secret cannot be used as evidence in the proceedings.

Other documents, which do not qualify as protected documents may be subject to discovery. The scope of such discovery may be limited by requesting confidential treatment of business secrets. Applicants and other parties in Competition Office proceedings may request that the information which qualifies as a business secret be treated as confidential. This rule contributes to protecting sensitive information. On the other hand, it cannot be excluded that the judge in the civil law proceedings will re-qualify the nature of the documents and make a different ruling on what qualifies as a business secret. With respect to protected documents the judge does not have this discretionary right.

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

Discovery, as known in common law systems, is not part of the Hungarian law. We assume that if the Hungarian court were to approach the foreign court for information, protected documents (such as the leniency statement made at the Competition Office of Hungary) would come under the protection discussed under point question 22.2, namely, that in civil litigation it has to be treated as a business secret. In this case, unless the right to have business secrets protected from disclosure is waived, the protected document will not be available to the parties and cannot be used as evidence.

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?

The applicant may simultaneously file an application with the European Commission and the Hungarian Competition Office.

The applicant must inform the Competition Office if it has filed or plans to file other leniency applications with other competition authorities.

Filing a preliminary application ensures that the applicant secures its position for leniency with the Hungarian authority, if the European Commission decides not to pursue the case. The grant of actual immunity is subject to the applicant providing all supplementary information and evidence requested by the Competition Office when launching its proceedings.

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

See the answer to question 23 above.

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

The law does not address the interaction with applications made in other EU member states. It clearly states that application of the leniency policy does not provide the applicant with immunity from fines imposed by other competition authorities.

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?

There are no specific rules relating to leniency and settlement procedures in Hungarian law.

REFORM/LATEST DEVELOPMENTS

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

We are unaware of any plans to reform the current regime in the near future.

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