



ANTI-CARTEL ENFORCEMENT MANUAL

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Chapter 2

Drafting and implementing an effective leniency policy

ICN CWG Subgroup 2: Enforcement Techniques

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1. INTRODUCTION

The purpose of this Chapter is to draw together key practices concerning the drafting and implementation of an effective leniency policy.

A number of “good practices”¹ in regard to drafting and implementing an effective leniency policy have been identified throughout the Chapter. These good practices may assist jurisdictions in their consideration of leniency programs. A compilation of these good practices can be found at Appendix 1: Good practices relating to leniency programs.

The relevance, and therefore likelihood of adoption by jurisdictions, of any particular good practice outlined in this Chapter will be influenced by a jurisdiction’s competition policy and legal system. In some cases certain practices will not be appropriate due to the legal, legislative or political regimes in which those competition agencies operate.

This Chapter replaces the May 2009 version of *Chapter 2: Drafting and Implementing an Effective Leniency Policy* as part of the Anti-Cartel Enforcement Manual.

¹ “Good practices” are generally considered to be practices which work well in the jurisdictions where they are applied, but which may or may not work well in the legal context of another jurisdiction, and, therefore, cannot necessarily be recommended for adoption by other ICN members.

2. DRAFTING AND IMPLEMENTING AN EFFECTIVE LENIENCY POLICY

2.1. What is leniency?

Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel participant in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition agency providing leniency.

The terms “leniency”, “immunity” and “amnesty” are used in many jurisdictions, but the definitions of these terms vary between jurisdictions. For example, under the United States leniency program, “corporate amnesty” and “corporate leniency” are used interchangeably to mean complete immunity from criminal conviction and fines. Other jurisdictions use “leniency” to refer to any reduction in fines up to 100 per cent.

In this Chapter the term “leniency” refers to total immunity and the term “lenient treatment” refers to a reduction in penalty less than full immunity. Decisions that could be considered lenient treatment include, but are not limited to, an agreement to reduce penalties or an agreement not to refer a matter for criminal prosecution.

The term “leniency policy” is used to describe the written collection of principles and conditions adopted by a competition agency that governs the leniency process. A leniency policy is one component of a leniency program. A “leniency program” also includes internal agency processes, for example, how the competition agency implements its leniency policy, including processes for conferring and/or refusing leniency or lenient treatment.

2.2. The benefits of implementing a leniency policy

Many jurisdictions have developed leniency programs because of the benefits that flow from having one. Leniency encourages cartel participants to confess their cartel conduct and implicate their co-conspirators, providing first-hand, direct “insider” information or evidence of conduct. Leniency programs help to uncover conspiracies that would otherwise go undetected and can destabilise existing cartels. They also act as a deterrent to those contemplating entering into cartel arrangements.

In addition, information or evidence can be obtained faster by competition agencies, and at a lower direct cost, compared to other methods of investigation, leading to more efficient resolution of cases, even if additional investigative measures are carried out. To get this information or evidence, the parties who provide it to competition agencies may be promised lower fines, shorter prison sentences, less restrictive orders, or even complete immunity.

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

- Deterrence – making cartel membership less attractive as there is an increased risk that one of the cartel participants will report the existence of the cartel;
- Detection – enabling the discovery of cartels, as there is an increased

- likelihood of the cartel being reported;
- Sanctioning – making punishment of co-conspirators more likely as it provides competition agencies with first-hand, direct “insider” information or evidence that might otherwise be difficult to obtain;
- Cessation – causing cartels to cease operation because one or more of the participants terminates their participation, either because they have applied for leniency or because they are concerned that one or more of their co-conspirators has or will apply for leniency; and
- Cooperation – facilitates international cooperation in cartel investigations as many leniency programs require the leniency applicant to state in which other jurisdictions leniency has been sought and provide a waiver allowing communication between those competition agencies.

The overall objective of a leniency program is to improve the level of compliance with antitrust and competition laws through the increased detection of cartels. The increase in competition resulting from identifying cartels ultimately leads to lower prices, better service and/or more innovative and efficient companies, which benefits consumers. This outcome is consistent with competition agencies’ objectives.

2.3. Prerequisites to adopting an effective leniency policy

Without strong penalties and vigorous enforcement by the competition agency, there is little incentive for cartel participants to self-report their breach of competition laws. The corollary is that no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and sanction.

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

- **High risk of detection and serious sanctions being imposed** – Competition agencies have to demonstrate a commitment to vigorous investigation of cartels using robust investigatory powers. Those participating in cartels must perceive that, first, there is a real risk of detection and that, second, in the absence of a leniency application, enforcement action and the imposition of sanctions is certain to follow. This will encourage cartel participants to come forward before they are caught. There are further benefits if a leniency program can create a race between cartel participants to be “first through the door” and/or ahead of others that may be eligible for lenient treatment (including between a company and its employee).
- **Sanctions imposed are significant** – The sanctions imposed on cartel participants who are not part of the leniency program, including both companies and individuals, must be significant. If sanctions are inadequate, cartel participants will not come forward as the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants must be less than the cost of getting caught.

- **Transparency and certainty** – There must be transparency and certainty in the operation of a leniency policy. Competition agencies need to build the trust of leniency applicants and their attorneys by consistently applying the leniency policy. A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.

2.4. Incentives and disincentives to self-report

Leniency programs provide an opportunity for companies to put an end to their cartel participation, report anticompetitive conduct and receive leniency or lenient treatment.

When considering whether to self-report, a company or individual is likely to undertake a cost benefit analysis in order to determine their “best option”. When drafting and implementing a leniency policy it is important for a competition agency to consider not only whether its leniency program has the right incentives, but also whether its leniency program contains any disincentives discouraging cartel participants from reporting their cartel conduct.

The cost benefit calculation is also affected by the proliferation of jurisdictions imposing sanctions for the same conduct and the resulting overall level of fines.

Competition agencies need to safeguard the incentives to apply for leniency by:

- ensuring that higher sanctions and other negative consequences are applied to non-co-operators;
- ensuring that co-operators are not disadvantaged because of their cooperation;
- providing certainty regarding the use of information provided by the applicant if the leniency application is rejected;
- considering what conditions should be imposed upon the leniency applicants;
- considering what benefits are provided to leniency applicants and what conditions are imposed upon subsequent applicants; and
- providing certainty regarding the application of any predecessor-successor scheme to future owners of an entity that has been involved in a cartel.

Attorneys who have represented leniency applicants in the past have raised the following issues as inhibiting potential applicants from self-reporting:

- uncertainty about the ability to obtain leniency after an investigation has commenced;

- inability of the leniency applicant to anonymously explore with a competition agency whether leniency is available;
- with respect to fine determination, and having regard to more jurisdictions asserting jurisdiction in international cartel cases, the risk of (i) double or multi-counting/indirect sales on the same volume of commerce and/or (ii) in the context of bid-rigging, ascribing sales of the successful bidder to unsuccessful bidders;
- exposure to civil litigation in multiple jurisdictions, particularly class action litigation;
- absence of “amnesty plus” credit;
- absence of a marker system;
- absence of a “first through the door” policy;
- absence of an exemption from debarment from government contracting;
- lack of standard form letters setting out obligations and protections for both the leniency applicant and the competition agency, unless such obligations and protections follow clearly from the leniency program itself;
- absence of a clear confidentiality policy setting out how a competition agency will deal with information that it receives from a leniency applicant. This includes on what terms the competition agency will cooperate with other enforcement bodies and/or its international counterparts, and whether the information can be accessed by discovery processes initiated by third parties; and
- a requirement to establish all the elements of an offence before receiving conditional leniency.

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

The leniency programs that currently exist display a number of differences. The features that exist in one jurisdiction may not be readily transposed to another because of legal obligations, and/or because of the need for the leniency program to remain compatible with other elements of competition policy or general public policy.

As a general rule, leniency should be available in circumstances both where the competition agency is unaware of the cartel and where the competition agency is aware of the cartel, but the competition agency does not have sufficient evidence to proceed to adjudicate or prosecute the cartel. Lenient treatment should be available where the application facilitates the competition agency's ability to prove the cartel.

As noted above, there must be transparency and certainty in the implementation of a leniency policy. A leniency applicant needs to be able to foresee with a high degree of

certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies and the application of such policies are clear, comprehensive, up-to-date and well publicised.

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

It is good practice to make leniency and lenient treatment available where the leniency applicant facilitates the competition agency's ability to prove a cartel

It is good practice to make leniency available both where the competition agency is unaware of the cartel and where the competition agency is aware of the cartel, but the competition agency does not have sufficient evidence to proceed to adjudicate or prosecute

The following practices are divided into two groups: those frequently encountered in leniency policies, and those which are used less frequently.

2.5.1. Frequently-occurring features of leniency programs

- Leniency is granted to the first eligible leniency applicant who self-reports its involvement in a cartel and provides sufficient information or sufficient evidence about the cartel.
- A “marker” system, or the practice of reserving a place for a leniency applicant for a defined period of time whilst it conducts further internal investigation and attempts to perfect its application for leniency. The leniency applicant's position is reserved for an agreed amount of time in the queue, usually on the condition that it provides further information or evidence within this time period. Therefore, the leniency applicant receives a “marker,” which provides certainty and clarity for potential leniency applicants and encourages a race to contact the competition agency.
- Provision for an anonymous leniency approach in order to allow a leniency applicant to discuss the particular circumstances of a case and the availability of leniency in these circumstances. Prior consultation is a common practice, however safeguards may be needed to avoid the risk of parties “gaming the process” and the competition agency in order to determine whether the competition agency has an open investigation.
- Provision for leniency for the first eligible leniency applicant to submit an application before an investigation has begun.

- Leniency or lenient treatment for leniency applicants that come forward after an investigation has begun.
- The proffered information to perfect a marker can be made in hypothetical terms.
- A confidentiality policy setting out how a competition agency will deal with information or evidence that it receives from a leniency applicant, including on what terms the competition agency will cooperate with other enforcement bodies and/or its international counterparts and setting out the confidentiality obligations upon the leniency applicant.
- The requirement for full and frank disclosure of relevant information or evidence by the leniency applicant to be eligible for, or to sustain, an application for leniency and/or lenient treatment.
- An ongoing requirement for the leniency applicant (and its employees) to cooperate fully and on a continuous basis, including updating and correcting all information and evidence promptly even after an admission of guilt is provided.
- A requirement that the leniency applicant cease participation in the cartel conduct unless, where this is permitted by law, instructed or expressly allowed otherwise by the competition agency.
- A requirement that the leniency applicant has not coerced others, instigated the cartel, or acted as the ringleader of the cartel.
- A requirement to fully and expressly accept the existence of a conspiracy and the participation of the applicant in it.

2.5.2. Less-frequently occurring elements of leniency programs

- *“Amnesty Plus”*: A proactive antitrust enforcement strategy aimed at attracting leniency applications by encouraging companies already under investigation for one cartel to report other cartels unknown to the competition agency. Generally an amnesty plus policy means a leniency applicant that does not qualify for leniency for the initial cartel under investigation, but discloses a second cartel, and meets the leniency program requirements for the second cartel, will receive leniency for the second offence and lenient treatment for its participation in the first offence.
- *“Penalty plus”*: This provides that if a leniency applicant participated in a second cartel and does not report it under the amnesty plus policy, the sentencing authority will consider the company’s, and any of its culpable employees’, failure to report the conduct voluntarily as an aggravating sentencing factor.
- *Waiver*: A requirement to provide waivers that allows the competition agency to discuss the leniency application with its relevant international counterparts.

- *Restitution*: A requirement for the leniency applicant to make restitution to injured parties.
- *Affirmative leniency/lenient treatment*: The practice of a competition agency approaching a company - which at the time may not even know that it or its competitors are under investigation – inviting it to cooperate and seek leniency. This is not possible in some jurisdictions where it would be considered as discriminatory treatment between different companies.
- *Uncovering facts previously unknown*: In some jurisdictions, where total immunity is no longer available, if a company applies for a reduction of the applicable penalty and provides information or stand-alone evidence relating to additional facts which were previously unknown to the competition agency and which have a direct bearing on the gravity or the duration of the offence, then these facts will not be taken into account when setting the fine against it, provided that it meets the other conditions for lenient treatment.
- *Withdrawal of evidence after a rejected immunity application*: in some jurisdictions where a leniency application has been considered by the authority and the agency has determined that it is insufficient to qualify the applicant for leniency, the applicant has the opportunity to, within a reasonable time; withdraw the evidence it submitted from the competition agency. If it is not withdrawn it can be used during any subsequent investigation by the competition agency.

3. PRACTICAL ASPECTS IN ADMINISTERING AN EFFECTIVE LENIENCY PROGRAM

3.1. Purpose of markers in a leniency program

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

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

If internal investigations by the leniency applicant fail to disclose a breach of the law, the marker may be withdrawn, revoked or allowed to lapse by the competition agency.

Some competition agencies extend the marker beyond those “first through the door” under their leniency policy. Such competition agencies provide for the queuing of potential leniency applicants and consider that having such a queue assists in ensuring continued cooperation of the leniency applicant that currently holds the first-in marker and securing cooperation and information or evidence from other parties to the cartel.

3.1.1. Extensions to the marker period

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

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

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

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

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

3.1.2. Considering an application for leniency

Leniency applications are based on a model whereby cartel participants self-report their conduct in exchange for leniency. While always jurisdiction specific, there are a number of criteria that the agencies typically apply when considering whether to grant leniency/lenient treatment:

- *Order of application:* Many competition agencies adopt a “first through the door” policy whereby the first eligible leniency applicant is given a marker regardless of the quality of the information or evidence provided, if the application is received before the competition agency has commenced a cartel investigation. The leniency applicant must later perfect its application by providing more detailed information or evidence to support a grant of leniency. Leniency may also be available for the first eligible leniency applicant after an investigation has commenced if the leniency applicant satisfies additional requirements.
- *Quality of evidence provided:* Lenient treatment may be available to second and subsequent leniency applicants depending upon the quality of the evidence provided to the competition agency and the degree of cooperation forthcoming.
- *Continuous and genuine cooperation:* The leniency applicant, in most jurisdictions, needs to satisfy certain conditions in exchange for leniency. These conditions include providing full cooperation and ceasing participation in the cartel (unless permitted to behave differently by the competition agency).
- *Role played in cartel:* In most jurisdictions, certain types of leniency applicants are not eligible for immunity because of the role they have played in the cartel (for example coercer, ringleader or instigator).

It is good practice for the requirements for leniency to include full and frank disclosure of relevant information or evidence and ongoing cooperation by the leniency applicant, and if applicable, the leniency applicant's employees

3.2. Forms of application for leniency

There are essentially two forms of leniency applications:

- Written; and
- Oral.

An important consideration in deciding which form of leniency application to implement is the competition agency's ability to maintain the confidentiality of the application and any information or evidence provided by the leniency applicant in support of their leniency application.

3.2.1. Written applications

Written applications are used in many jurisdictions. However, potential leniency applicants may be reluctant to make a written application due to fear of private damages actions, including class actions, arising out of the application or a fear that any documents supplied may be discoverable by parties in private civil actions in the jurisdiction leniency is sought and/or in other jurisdictions. Some jurisdictions are attempting to address this issue by limiting the information requirements for written applications or through secrecy and access to file rules.

3.2.2. Oral Applications

Oral applications for leniency have developed in response to the potentially self-incriminating nature of providing a written application. Many jurisdictions now use a "paperless process" under which leniency applicants are not required to generate and provide written submissions/statements, but are required to provide all pre-existing documents. Submissions/statements are still provided during a paperless process (for example by way of tape recording or oral statement). Where oral statements by the leniency applicant receive greater confidentiality protections than a written application, a paperless process may increase an incentive to apply for leniency.

Where competition agencies have a concern about their ability to protect the confidentiality of, and limit third party access to, information or evidence provided by a leniency applicant, consideration should be given to changes to the relevant legal framework and other steps that can be taken to improve the protections around this sensitive information.

3.3. Dealing with second and subsequent leniency applicants

The question of dealing with second, subsequent and amnesty plus applicants and whether they will receive lenient treatment under a leniency policy or under an agreement outside the leniency program should be considered. In some jurisdictions the maximum level of lenient treatment that the second applicant can receive is fixed (for example 50%). Whereas, in other jurisdictions the level of lenient treatment that second and subsequent leniency applicants can be granted depends on a number of elements, including the speed of the subsequent applicants approach and/or the quality of the information or evidence the subsequent applicant provides. It may also be tied to factors such as complete acceptance of responsibility for cartel behaviour and other mitigating factors. Provision of lenient treatment is generally subject to the same cooperation requirements as leniency.

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

3.4. Where leniency applicants have sought leniency in other jurisdictions

Most jurisdictions encourage leniency applicants to approach other relevant jurisdictions that have leniency policies. It is in the leniency applicant's interest to seek leniency in other relevant jurisdictions because, even though the information or evidence provided to the competition agency is held on a confidential basis, the subsequent investigations and any court action mean the alleged conduct will become public. In addition, when leniency applicants apply simultaneously in multiple jurisdictions, they often grant, or may be required to grant, waivers to allow the jurisdictions to share leniency information with each other, avoiding duplication for the leniency applicant and allowing the jurisdictions to conserve resources and expedite investigations.

It is good practice where applicable, for competition agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred

3.5. Protection of information

A confidentiality policy setting out how a competition agency will deal with information or evidence that it receives from a leniency applicant, including on what terms the competition agency will cooperate with its international counterparts, needs to be considered when drafting an effective leniency policy.

The protection of leniency information or evidence is necessary to allay fears that such information or evidence may be used against the leniency applicant in private

civil actions or shared with another government agency, foreign or domestic, which may use that information or evidence against the applicant without providing leniency. The potential for third party discoverability of materials provided to a competition agency in relation to a leniency application is an ongoing concern for leniency applicants.

Depending on the leniency policy, if a competition agency revokes a leniency applicant's conditional leniency for failure to meet all the requirements of the conditional leniency, the competition agency may be free to use all information or evidence obtained from that former leniency applicant in the investigation and prosecution of that former leniency applicant. This demonstrates the importance of drafting clear rules and conditions that a leniency application should follow to gain leniency.

Such protections are not meant to inhibit a competition agency's investigation into the cartel. There are limits to the steps that a competition agency can take to protect the identity of leniency applicants, for example in industries with limited numbers of competitors, as their identity may be inferred from the competition agency's investigation.

It is good practice to encourage a leniency applicant to provide a waiver that allows a competition agency to discuss the application with relevant counterpart agencies and cooperate on parallel investigative processes

It is good practice to keep the identity of the leniency applicant and any information or evidence confidential unless the leniency applicant provides a waiver, the competition agency is required by law to disclose the information or evidence, or the leniency applicant discloses its application

3.6. Responsibility for the leniency program within a competition agency

A clear contact point for leniency applications is essential for an effective leniency program. This can be achieved by designating and publicising a responsible individual or establishing a dedicated cartel unit to receive the applications. Having an individual responsible for administering the leniency policy may enhance the transparency and consistency in the application of the leniency policy and processes. If a leniency applicant may contact more than one person in a competition agency, it is important for each point of contact to track the exact time of the application or request for a marker, as leniency applicants may apply very close in time and there must be a record of which leniency applicant applied first.

Whatever method the competition agency chooses, the overarching goal is to ensure consistent, predictable and transparent implementation of the leniency

policy.

3.7. Clear requirements for leniency applicants to cooperate with the competition agency

Providing and strictly enforcing the cooperation requirements that leniency applicants must fulfil in order to receive and retain leniency is likely to ensure ongoing cooperation and enable the competition agency to complete its investigation and any associated enforcement activities.

To assist in managing this issue, competition agencies have adopted a number of approaches, including:

- clear description of the requirements for full cooperation, which then need to be communicated to leniency applicants and published;
- clear and concise standard form letters and protocols; and
- a demonstrated preparedness to deal with non-compliance with the cooperation requirements, such as by revoking a marker, withdrawing leniency or filing obstruction of justice (or similar) charges.

Competition agencies typically demand complete and continuing cooperation from applicants seeking leniency. Further investigation will be needed to locate all the cartel participants and assemble the necessary evidence to adjudicate or prosecute, and leniency applicants are particularly well placed to assist in that process.

Leniency applicants are often asked to undertake specific tasks, which then provide a mechanism for competition agencies to assess their level of cooperation. Failure to complete these tasks may have implications on their leniency status. The tasks will depend on the competition agency, the legal system under which it operates, and the leniency policy, but may include:

- forensic imaging of computers of relevant employees;
- providing telephone records of employees;
- making current employees available for interview; and
- providing records to assist in locating former employees.

Strict enforcement of the cooperation requirements of the marker and leniency processes will provide a strong incentive for leniency program participants to promptly respond to competition agency requests.

It is good practice to have maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles, responsibilities and contact information for competition agency officials involved in the implementation of the leniency program

3.8. Implementation of leniency decisions

Some jurisdictions have a conditional leniency policy, which requires ongoing cooperation throughout the course of investigation and any subsequent enforcement action. In many jurisdictions, the final leniency decision does not take place until the end of the enforcement process.

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

3.9. Closing an investigation where there is a leniency applicant

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

In these circumstances, depending on the competition agency and their leniency policy, it may be appropriate to hold indefinitely the leniency applicant's place in the marker queue. This practice is not followed in some jurisdictions. It may also be appropriate to grant final immunity where administrative action or adjudicated proceedings has not and will not occur. Further, it may be appropriate to allow the leniency applicant to withdraw their application.

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

3.10. Making leniency work in a bifurcated enforcement model

A bifurcated enforcement model typically refers to the situation where the investigative/administrative and prosecutorial roles are divided between two different agencies.

Bifurcation of responsibilities in respect of cartel matters may introduce some unpredictability and uncertainty regarding the leniency program, particularly the application and decision-making process. This may be compounded if the investigating agency and the prosecuting agency are separate and have separate and differing leniency policies.

It is good practice, in a bifurcated system where different authorities are responsible for the investigation and prosecution of cartels, respectively, for authorities to have consistent leniency policies, a shared philosophy about the seriousness of cartel conduct, shared priorities toward prosecuting cartel activity and open and constant communication

3.11. Making leniency work in a parallel civil and criminal model

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

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

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

3.12. Leniency as an ongoing investigatory tool

There is no doubt that, given the right environment, a leniency policy can be an efficient and effective means of detecting, investigating and prosecuting or adjudicating cartel conduct.

Some jurisdictions are authorised to go further by asking leniency applicants to continue their conduct in an undercover capacity to enable the competition agency to collect information or evidence about their co-conspirators, for example, by recording meetings or telephone conversations or providing information or evidence to enable an agency to utilise its investigative powers, such as searches or wiretaps.

In other jurisdictions, the leniency applicant is required to cease all cartel activities

immediately or be allowed to maintain certain cartel activities or a passive role in the cartel contacts to ensure the competition agency's investigation is kept secret. In some jurisdictions, covertly recorded conversations are not admissible as evidence. These divergences may cause difficulties both for the leniency applicant and competition agencies when simultaneous leniency applications are made in jurisdictions with differing rules on this issue.

It is good practice for competition agencies to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, have been imposed (this may assist coordination between competition agencies)

4. EDUCATION AND AWARENESS RAISING

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

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

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

In a bifurcated system, leniency policies should be published on the websites of the competition agency and/or authority responsible for the investigation of cartels, as well as the authority responsible for the prosecution⁵. This helps to demonstrate that both the competition agency and/or authority has undertaken a shared responsibility and commitment to active enforcement of competition law through, *inter alia*, promoting the use of the leniency program. A Memorandum of Understanding should be signed providing a clear understanding of the parties' respective roles and responsibilities at the investigative and prosecution stages.

A consultation process during the launch and/or any subsequent review of a leniency policy can also be used as a method of drawing attention to, and encouraging dialogue on, the program. Legal firms will often publish articles and express their views on the matter in a variety of domestic fora, including mainstream legal journals and the general media. These sources help broaden the scope of awareness of the leniency program.

Education and awareness campaigns often include targeted publications and position papers, speeches and presentations at conferences by senior competition agency officers⁶. Business, consumer and government organisations can be invited to information sessions and road shows can be organised to raise

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

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

EC in the EU; http://europa.eu/rapid/press-release_MEMO-06-357_en.htm?locale=en and

http://europa.eu/rapid/press-release_MEMO-06-469_en.htm?locale=en Department of Justice's Antitrust Division in the U.S.;

<http://www.justice.gov/atr/public/criminal/239583.htm>

⁴ In Poland and the Netherlands: http://www.uokik.gov.pl/en/competition_protection/leniency_programme/

http://www.nmanet.nl/nederlands/home/Bedrijven/Clementie/Film_Clementie_in_kartelzaken.asp

In the EU:

http://ec.europa.eu/competition/consumers/index_en.htmlhttp://www.nmanet.nl/nederlands/home/Bedrijven/Clementie/Film_Clementie_in_kartelzaken.asp

⁵ Canada and Ireland (and soon also Australia)

⁶ Such as a paper presented in New Zealand "Altered States: Co-operation between Cartel & Commerce Commission", 7th Annual Competition Law & Regulation Review, 2007

awareness of the leniency policy, targeting for example industry bodies and/or trade associations.

Business cards⁷ containing the salient points of the leniency policy, the website address for the leniency policy, as well as any “leniency hotline” number can be printed and distributed by case officers/investigators in the normal course of business.

Press articles and/or releases focusing on successful cartel prosecutions arising from leniency applications (where confidentiality is not breached) are also a good way to draw attention to the leniency policy, especially if such prosecutions involve high fines and even prison sentences in jurisdictions with criminal sanctions. Many competition agencies also publish their cartel decisions, including the reasoning for the specific reductions in sanctions, for cases of leniency or lenient treatment.

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

It is good practice to encourage leniency applications through education and awareness campaigns, as well as transparency of leniency decisions

⁷ In Ireland

APPENDIX 1: Good practices relating to leniency programs

The following list reflects good practices common to many ICN members. This list is meant to provide a concise summary of common and widely reported practices relating to the drafting and implementation of effective leniency policies. The list does not purport to present all possible practices. Practices used will depend on the peculiarities of each jurisdiction's cartel regime and the particular circumstances of each legal system.

It is good practice:

- to make lenient treatment available where the leniency applicant facilitates the competition agency's ability to prove a cartel;
- to make leniency available both where the competition agency is unaware of the cartel and where the competition agency is aware of the cartel, but the competition agency does not have sufficient evidence to proceed to adjudicate or prosecute;
- to use markers in the leniency application process because time is of the essence in making a leniency application and grant extensions to marker periods where a leniency applicant is making a good faith effort to complete its application in a timely manner;
- to ensure that markers and extensions to marker periods maintain the incentives on cartel participants to self-report their involvement in a cartel;
- for the requirements for leniency to include full and frank disclosure of relevant information or evidence and ongoing cooperation by the leniency applicant, and if applicable, the leniency applicant's employees;
- to provide for lenient treatment (less than full leniency) for second and subsequent cooperating cartel participants;
- where applicable, for competition agencies to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred;
- to encourage a leniency applicant to provide a waiver that allows a competition agency to discuss the application with relevant counterpart agencies and cooperate on parallel investigative processes;
- to keep the identity of the leniency applicant and any information or evidence provided by the leniency applicant confidential unless the leniency applicant provides a waiver, the competition agency is required by law to disclose the information or evidence, or the leniency applicant discloses its application;
- to have maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures and practices governing applications for leniency, the conditions for granting leniency and the roles,

responsibilities and contact information for competition agency officials involved in the implementation of the leniency program;

- to ensure that certainty for leniency applicants is maintained where investigations involving leniency applicants are closed;
- in a bifurcated system, where different authorities are responsible for the investigation and prosecution of cartels, respectively, for authorities to have consistent leniency policies, a shared philosophy about the seriousness of cartel conduct, shared priorities toward prosecuting cartel activity and open and constant communication;
- in a parallel system, it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential leniency applicants;
- for competition agencies to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, if any, have been imposed (this may assist coordination between competition agencies); and
- to encourage leniency applications through education and awareness campaigns, as well as transparency of leniency decisions.

APPENDIX 2: Leniency Policies

The following is a list of leniency policies⁸ of competition agencies of ICN members:

Albania	Italy
Australia	Japan
Austria	Korea
Bosnia and Herzegovina	Latvia
Brazil	Lithuania
Canada	Mexico
Colombia	Netherlands
Croatia	New Zealand
Czech Republic	Norway
Denmark	Poland
EFTA	Portugal
European Commission	Singapore
Finland	Slovakia
France	South Africa
Germany	Spain
Greece	Sweden
Hungry	Switzerland
Iceland	Turkey
India	United Kingdom
Ireland	United States
Israel	

⁸ The list is provided for reference only. Competition agencies and their websites should be consulted directly to ensure that the leniency policy is the "official" and current version.