

**SLIDE 1**

*[ICN Curriculum Module II-2]*

**SLIDE 2**

RICHARD WHISH: Hello. I am Richard wish, a professor of competition law at king's college London and I am the presenter of the ICN module on leniency program and leniency policy. In the course of what follows, you will also be hearing from officials from a number of competition authorities around the world, and you will also see some re-enactment of hypothetical cartel meetings. Let's begin with the discussion of what we mean by leniency policy and leniency program.

Leniency is a general term that refers to a system in which a firm that is in a cartel receives a total or partial exoneration from the penalty that would otherwise have been imposed upon it in return for reporting its cartel membership to a competition authority.

It is probably sensible at the outset to explain that different terminology is used in different parts of the world when discussing this subject.

We often hear about the so-called 'whistleblower' – this typically refers to the first firm that reports the existence of a cartel to a competition authority. The whistleblower is often totally exonerated from any penalty – this is sometimes referred to as an 'amnesty', that is the expression that is particularly used in the United States. In Europe, we tend to prefer the expression 'immunity', but these two words, amnesty and immunity, for these purposes really mean the same thing.

In many countries penalties may be reduced for firms that provide useful evidence to a competition authority about a particular cartel, even though they were not the actual whistleblower – that is to say the first firm to expose the existence of the cartel. Such firms can be said to receive 'leniency', in the sense of a smaller penalty than would otherwise have been the case.

Just to be clear, in this video we will discuss both immunity – the total exoneration from penalties – and leniency in the sense of lower penalties than would otherwise have been imposed. However, when we talk about a 'leniency programme' or about 'leniency policy' we are referring both to total and to partial exoneration from penalties.

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RICHARD WHISH: It is important at the outset to establish what precisely the key cornerstones of an efficient leniency program are. There is fairly widespread agreement about this nowadays. The first is that there should be severe sanctions for members of a cartel who do not report them to a competition authority. The second is that it should be clear that there is a high degree of likelihood that participants in cartels who do not report them to a competition authority will be discovered and punished. The third requirement is that the leniency programme itself should be transparent and

predictable so that firms understand precisely how the process of making an application to a competition authority will work.

#### **SLIDE 4**

**RICHARD WHISH:** What are the benefits of implementing a leniency policy? We have to remember it is not easy for competition authorities to detect cartels. Firms that enter into cartels – for example price fixing or sharing of markets – often know that what they are doing is illegal and that they should take precautions in order to prevent detection.

An effective leniency policy provides incentives to firms that are in cartels to go to the competition authority and provide details of what they have been doing. This means that the competition authority gets first-hand, direct inside evidence of what has been taking place, while the firm in question gets a total or partial reduction in its penalty. This is a ‘win-win’ situation if it means that the competition authority can punish the other members of the cartel and the leniency application gets a total or partial reprieve

It is worth adding that the very fact of there being a leniency policy in place may in itself destabilise the cartel. In the end, if the leniency policy works well in practice, this will mean that the competition authority will detect and punish more cartels; the deterrent effect of the law is increased, because it can be demonstrated that cartels will be detected and punished; and this leads to greater competition – or to put the point another way, to fewer cartels – with all the benefits that competition brings: lower prices, better service, more innovation and greater choice for consumers.

Let's take a look now at an imaginary cartel meeting.

#### **SLIDE 5**

*[In a meeting]*

**CARTELIST A (Alexander):** So, I'm sure he will be here in about 5 minutes. Ah, there he is. Peter! Glad you can make it, thanks for coming. Great, please come in.

**CARTELIST B (Peter):** Sorry guys, my plane was so late.

**CARTELIST A (Alexander):** Please, don't worry. Thank you all for your patience. Let's get started. I spoke to Jeff in Johannesburg recently and it looks very worrying. The prices of raw materials are rising again, and we are struggling with excess capacity.

**CARTELIST C:** That's really bad.

**CARTELIST B (Peter):** Yes, and on top of this our customers are playing us one against the other to get the best prices, we are really feeling the squeeze.

CARTELIST A (Alexander): I don't think any of us can afford to play that game any longer, and I think it's time to go back and take a look at our previous arrangement.

CARTELIST B (Peter): Could you be more precise...?

CARTELIST A (Alexander): We all raise our prices globally, and in conjunction with that, we stop approaching one another's clients and stick to our own territory. I thought we had an agreement on this, it was working. And then we started selling customers from one another.

CARTELIST B (Peter): Do you have any concrete figures?

CARTELIST A (Alexander): Yes, in order to retain our current profit margin we need to raise the end price by at least an average of 3%. Does everyone agree? If so, then remember this only works if we are disciplined about not approaching one another's clients.

So my proposal would be to go for a raise of 2% in Europe, 4% in Asia, 3% in the Americas and a 2% raise in Africa.

If we are all agreed than let's start next month. So we don't raise any suspicion, I'd suggest we do it the way we did it last time – I'll go first, then you guys follow two weeks later.

We have to stay in touch, so, let's meet again next month and let's see if this arrangement is working. In case of any questions, call each other on your private mobiles. Do not e-mail! Better to avoid leaving any traces of this discussion and arrangement...

*[In a hotel room]*

CARTELIST B (Peter): No, everything is ok, I'm just a bit concerned, because Alex was suggesting that we all raise prices again.

Yeah, pretty much straight away, similar to what we did before...

I have to admit that I'm not really happy with this arrangement. It's always very risky... I think I have to give the lawyers a call....

Anyway, I'll be back in time tomorrow - yes promised, kiss...

RICHARD WHISH: Obviously, it is a very major step for a firm to take to decide to blow the whistle on a cartel to a competition authority. It will do so taking into account a variety of pros and cons, most obvious pros, being that the whistleblower can hope to earn total immunity from any penalty.

*[At the lawyer's office]*

CARTELIST B (Peter): Is it illegal?

LAWYER: Yes, you might have a serious problem here. What you have described is a cartel, which is against competition laws, and competition agencies around the world may soon be looking into your practices. You may be facing quite a hefty fine, not to mention the possibility of an investigation being launched against you personally, and depending on the scope of the cartel, you may even face a jail sentence...

CARTELIST B (Peter): But I wasn't the instigator....

LAWYER: But that is of no consequences to the authorities. You are a participant in a cartel and that is enough.

CARTELIST B (Peter): Well, maybe things got a bit out of control. So what would you suggest I can do now?

LAWYER: We would need to establish which jurisdictions the cartel involves and in that way which authorities may be interested in its investigations. In the meantime, you could apply for leniency which would lead to a reduction in fine. And if you are the first member in the cartel to apply, you may get full immunity from fines. A decision on the benefits to apply for this would, however, have to be made by your company as quickly as possible, because time is really working against you on this.

RICHARD WHISH: In order to qualify for immunity it is central for the firm in question to be the first to pass through the door of the competition authority. The second is that it must offer complete and genuine cooperation throughout the process.

It is worth adding one of the points, however. In some jurisdictions a firm that coerced others entering into a cartel or who acted as the ringleader of the cartel may not be entitled to immunity at all.

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ERIC VAN GINDERACHTER (Director, Cartels Directorate, DG COMP): The EU leniency regime was introduced in 1996 and, subsequently, amended and improved in 2002 and 2006. Today the conditions for granting immunity from fines are clearly defined in a Commission Notice from 2006 (the so-called Leniency Notice).

The Leniency Notice mentions that in order to obtain immunity, the leniency applicant has to:

First, be the first undertaking to submit information and evidence about a cartel affecting the EU.

Secondly, provide information that a) either allows the Commission to carry out targeted inspections in connection with the cartel or b) allows the Commission to prove an infringement of EU cartel legislation.

Thirdly, disclose its own participation in the cartel.

It is highly important for a cartelist to be first through the door to cooperate with the Commission since companies further in the queue can only receive reductions of their fines, no full immunity from fines.

Experience has shown that granting full immunity only to the first one may indeed create a dynamic which destabilizes cartels and creates a race amongst cartelists to disclose their conduct to enforcers. This is also reflected in the success of the Commission's leniency regime with an important part of the investigations being triggered by immunity applications.

Before going a bit more into the different scenarios for immunity and the conditions to be met in order to qualify for such immunity, it should be underlined that the immunity provided by the Commission covers corporate administrative sanctions. This is normal since it is the only type of sanctions the Commission can impose.

The Commission's Leniency Programme contains two different evidential thresholds for granting immunity depending on the timing of the application, which is crucial. Immunity can be granted if the cartelist provides "insider information" on a cartel at a time when the Commission does not yet have sufficient information to launch inspections.

In that scenario, the immunity applicant should provide the Commission with information that allows it to carry out what we call a "targeted inspection", meaning precise information is been given as to what to look for and where and to whom.

According to the Notice, this is an "ex ante" assessment. This means that it is irrelevant whether the inspection following the application will be successful or whether an inspection will be carried out at all. The assessment will be made exclusively on the basis of the type and quality of the information submitted by the applicant.

However, the applicant should at the same time not take any measures "that could jeopardize the inspections" when preparing its immunity application. The Commission services have the practice of discussing with an applicant the collection and submission of information and evidence. In such discussions, the applicants are able to raise any queries they have e.g. on the immunity thresholds but also on measures they intend to take to collect evidence which may "tip off" the other cartelists.

After inspection, immunity can also be granted after the Commission has already carried out an inspection concerning the alleged cartel or when the Commission has sufficient evidence in its possession to do so.

In this case, the applicant needs to submit information and evidence which will enable the Commission to find the infringement. The threshold for such finding is high and corresponds to the threshold required for the Commission to be able to adopt an infringement decision. Consequently, it is much higher than the threshold for immunity in the "pre-inspection" situation.

In practice, immunity is normally granted under the first scenario. That means before the investigations have begun.

RICHARD WHISH: So we now know that in order to qualify for immunity a firm must be the first to enter through the door of a competition authority. We have also heard that for example in the European Union, it is central for that firm to provide the Commission with evidence which enables it to launch an investigation or to adopt an infringement decision.

We have also heard that leniency applicants must comply with a number of other obligations. One of these is the provision of evidence. How exactly the evidence is to be provided may differ from one country to another but we can identify some common threads.

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*[What exactly must an immunity applicant provide to benefit from immunity?]*

DIOGO THOMSON DE ANDRADE (General Superintendent, Brazilian competition authority, CADE): The question about information individuals must submit to authority is a very interesting issue faced by the authorities around the world. The question is interesting because often the applicants and the lawyers don't have complete information regarding their conduct at the time of the application. Otherwise they must act with diligence, and speed to ensure first that it will obtain the marker, then to maintain the marker, providing the information required; and finally to sign the agreement.

So what do they submit to the authority? Once the information is available, it should be immediately referred to the authority, even if there are still some doubts about the relevance to the case. So it's good to give to the authority details that were most important when the company decided to enter into the cartel agreement.

Information such as:

- What product and market and the type of the conduct?
- Which companies or competitors were involved in the conduct?

- Who attended the meetings or who was responsible for contact other companies?
- What are the benefits of the cartel?
- What are the penalties for companies who do not respect the agreement?
- Who was responsible for monitoring compliance and why other companies do not comply with the cartel agreement?
- What is the story of the conduct?

Once the information is reported, it is crucial that the applicant has means to prove what he said. So, how to prove it? By giving to the authority written reports about the agreements, meetings files, evidence of the occurrence of the meeting, such as restaurant reservations, travel services accounts, notebooks, business cards, or evidence about the conversations and decisions made by the cartel like records of calls, testimonials, and etc.

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**RICHARD WHISH:** Even after a firm has been granted conditional immunity, it must continue to offer complete and genuine cooperation. It is not sufficient simply to blow the whistle and then to sit back and do nothing further. This is a very important point from a competition authority's perspective.

*[What is the role of the immunity applicant throughout the investigation?]*

**COMPETITION COMMISSION OF SOUTH AFRICA:** Once an application for immunity is made, it may be conditionally granted subject to the full cooperation of the applicant during the investigation and prosecution of the cartel.

Final immunity is only granted at the end of these proceedings. It is important that a relationship of trust be established between an immunity applicant and the competition authority, especially after the granting of the conditional immunity.

Remember, cooperation itself is often undefined. The immunity applicant is expected to provide honest and expeditious cooperation.

Cooperation may manifest itself in many ways and there can be no exhaustive list. Each case must therefore be determined on its own merits and based on the requirements of each national jurisdiction.

Let me know flag the most important elements which are largely universal, the most important rule of thumb is that the immunity applicant must refrain from any conduct that may prejudice the investigation and prosecution of the cartel, and when in doubt it must consult the competition authority. This means that amongst other things the applicant must not inform any third parties, including other cartel members, about its immunity application.

In case the applicant is obliged to report to other bodies – for example if disclosure is mandated by the stock exchange – the applicant must advise the competition authority of these requirements.

The competition authority may, at the beginning, oblige the applicant to cease the cartel conduct immediately or may allow further cartel participation in case such discontinuation could tip off other cartelists. In order for it to fulfil its obligations, the applicant must ensure the full cooperation of its employees throughout the process.

The immunity applicant must not destroy, falsify or conceal information, evidence and documents relevant to the cartel activity.

The immunity applicant must not make misrepresentations concerning the material facts of the cartel activity or act dishonestly.

Whilst each competition authority may have a slightly different approach to the subject of continuous cooperation, there are some practical indicators of cooperation, namely:

- Attending meetings and interviews with the competition authority;
- Submitting statements, evidence, documents and information;
- Decoding and explaining shortcuts, acronyms, and encryptions which may have been used by the cartel members;
- Acceding to the request for supplementary evidence, documents and information;
- Conducting its own internal investigations and reporting the findings to the Competition Authority;
- Making witnesses available and tracing witnesses that may have since left their employment; and
- Providing truthful testimony during the investigation and proceedings.

In conclusion, the most important duty that the applicant has is to provide cooperation to the best of its ability in good faith.

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**RICHARD WHISH:** Effective substantive rules, for example on the type of evidence to be provided and the need for complete and genuine cooperation. However, it is also important to ensure that the procedural aspects of the leniency programme are also thought through very carefully. Potential leniency applications need to be absolutely clear about the procedures to be followed. From a competition authority's point of view, it is necessary to consider whether to establish a system of 'markers' and if so how such markers can be 'perfected'. Another consideration is whether firms should be permitted to make 'hypothetical' application about possible cartels. Another issue is the form in which a leniency application should be made and, specifically, whether it should be made in writing or orally.

*[Immunity – Application procedure]*

MARCUS BEZZI (Australian Competition and Consumer Commission, ACCC): I would like to explain some common immunity or leniency application procedures.

Firstly, hypothetical applications: many agencies including the ACCC encourage people to approach the agency on a hypothetical basis. In this situation, people can contact the agency and enquire about whether if the cartel existed they might be able to apply for immunity in relation to that cartel.

Agencies don't confirm or deny the existence of any investigation into a cartel conduct but will advise prospective applicants if a first-in marker is available for particular cartel conduct.

Most agencies use a marker system. A marker allows a limited amount of time for an applicant to gather the information necessary to demonstrate that they satisfy the requirements for conditional immunity. As long as a person holds the marker for a particular cartel conduct, no other person involved in the same cartel will be allowed to take the person's place in the immunity queue. Even one who is able to satisfy all conditions immediately. This means that it is not necessary for the person to have assembled a complete record of the cartel conduct to hold first place in the queue. After marker, an application for conditional immunity or leniency is made. If an applicant decides to lodge a full application for immunity, the grant of full and on-going immunity may be conditional on an applicant, firstly been first-in, secondly providing full disclosure and cooperation, and next using the best endeavors to ensure that all relevant directors, officers and employees cooperate. And, finally, not having coerced others to participate in a cartel or having been the clear leader of the cartel.

In summary, these are the common procedural steps in dealing with leniency or immunity:

- Firstly approach the agency and request a marker.
- Secondly, lodge a formal application for immunity within the time required
- Next the application would be assisted by the agency.
- And then, in a case of jurisdictions with a separate criminal prosecutor, the agency will often make recommendations to the prosecutor.
- Next, a decision to grant or deny an application is made, and communicated to the applicant.

So now we can sum up the requirements that a firm must fulfill if it is to apply for immunity

- The first is that it must be the first through the door of the competition authority.
- The second is that it must provide complete and genuine cooperation throughout the process.
- The third is that and it must provide the competition authority with the evidence that is needed for its purposes.

RICHARD WHISH:

Obviously when a firm is considering whether to make a leniency application, it will be heavily influenced by the sanctions that could be imposed upon it if it is found to have infringed the law. The more serious the sanctions, the greater the incentive to blow the whistle.

Sanctions may vary from one jurisdiction to another, and that in itself can affect the content of the leniency program. Let's take a look at the position in Australia and then we will go on and see what happen in the US.

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*[Immunity from cartel penalties and fines in Australia]*

MARCUS BEZZI: I would like to talk today about three things: (i) several and criminal sanctions that apply for breaches of cartel laws in Australia, (ii) the way individuals and corporation can get immunity from prosecution, and (iii) how we deal with employee cooperation with cartel investigations.

Firstly, I will explain what criminal and civil sanctions can be imposed on individuals in Australia.

Individuals and corporations face civil and criminal liability for their involvement in cartel conduct in markets affecting Australians, Australian businesses and Australian consumers. For individuals, the criminal cartel offences are punishable by imprisonment of up to 10 years, and of fines of up to 220,000 Australian dollars per contravention. Under the civil prohibition, individuals may be liable for pecuniary penalty of 500,000 dollars per contravention.

Corporations face fines of up to 10 million dollars, 3 times the gain, or 10% of turnover, whichever is the highest. An individual may be disqualified for managing a corporation if found to have contravened the anti-cartel provisions.

There is also a range of other remedies under the law, such as compensation to victims of cartels, injunctions, adverse publicity orders, and other appropriate orders that the court may make. The ACCC has two policies that apply in relation to cooperating parties in civil matters. The ACCC's immunity policy provides conditional immunity to the first eligible applicant who cooperates with the ACCC. The conditional immunity applies to ACCC initiated civil proceedings.

The ACCC receives all applications for immunity and leniency. It is responsible for making a decision on whether to grant immunity from civil proceedings for cartels matters under the immunity policy, and leniency from civil proceedings for enforcement that is under cooperation policy.

The Commonwealth Director of Public Prosecutions, the CDPP, is responsible for granting immunity from criminal proceedings for cartels matters. The CDPP's decision is based on a recommendation from the ACCC. The ACCC's cooperation policy for enforcement matters applies more broadly to the ACCC's competition and consumer protection activities.

The cooperation policy applies generally to ACCC enforcement matters in the cartel context if one party has immunity under the immunity policy, a second and subsequent applicant might be considered for lenient treatment under the cooperation policy.

Australian law now forbids corporations from indemnifying employees for penalties flowing from their involvement in cartel conduct. In the application for immunity that the ACCC grants to a corporation, we will extend to any named, current or former directors, officers, and employees of the corporations who also request immunity. Those people must also satisfy the relevant requirements under our policy. The ACCC may also extend derivative immunity in respect of corporations that are wholly or partly owned or controlled by the immunity applicant.

Derivative immunity provided to an individual as a current director, officer or employee will continue even if they leave the corporation. However, if an individual fails to comply with their obligations, the ACCC may revoke their immunity. The ACCC may then use this statement for information in any civil action against that person.

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*[Immunity from cartel penalties and fines in the US]*

GARY SPRATLING (Partner at Gibson, Dunn & Crutcher LPP): In the international cartel enforcement arena, a noteworthy difference among jurisdictions relates to whether individuals face personal legal exposure; and in particular, imprisonment for cartel conduct. In fact, this may be the most significant remaining difference among jurisdictions that treat cartel conduct as a serious legal infringement - a difference that affects the scope, operation and incentive structure of leniency policies.

Under United States law, individuals who are convicted of cartel conduct can face up to 10 years in prison and a fine of up to \$1 million. Although last year, for a combination of reasons, there was a reduction in the number and length of prison sentences imposed on cartel violations in the United States, the overall trend in recent years is one reflecting an emphasis on pursuing individuals criminally - with greater numbers of individuals prosecuted, longer periods of incarceration, and a greater frequency of imprisonment.

The DOJ's Leniency Policy provides the ultimate protection for companies and their employees that choose to self-report a violation before an investigation has begun: no criminal prosecution, no conviction, and no fine for the company *and* non-prosecution for all of the company's directors,

officers, and employees who admit their involvement in the illegal activity with candor and completeness and provide full, continuing and complete cooperation to the Antitrust Division throughout its investigation.

If the threat of incarceration of business executives is the greatest deterrent to cartel conduct, then the promise of immunity from criminal prosecution and no prison for those executives is the greatest incentive for coming forward and self-reporting.

In conclusion, in my own experience, both in government and the private bar, the Antitrust Division's premise has been vindicated time and again.

For undertakings and individuals alike, the threat that individuals will be imprisoned is a “game changer” that causes organizations and individuals to focus in a more serious way on avoiding cartel conduct, or if the conduct has occurred, to take advantage of a leniency policy, come forward, report the conduct, and in the hope of executives avoiding jail.

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*[At the lawyer's office]*

CARTELIST B (Peter): Having weighed up all the pros and cons of the situation, my company has decided that we definitely should go ahead and apply for immunity immediately.

LAWYER: Right. Yeah, that would be good. OK. We will check if immunity is still available and send through an application for a marker.

CARTELIST B (Peter): Sorry, there is one thing I am still not totally clear on. And now you have explained it to me in details, but could you please repeat: what happens with the information we have sent to an authority in one country is then shared with other authorities? And how do these authorities cooperate with each other?

RICHARD WHISH: Competition authorities do cooperate with one another in so far as they are permitted to do so by law in their efforts to combat international cartel behavior. Many cartels are transnational in scope, and so it is inevitable that sometimes more than one competition authority may be interested in taking action against the same cartel.

Cooperation may be particularly valuable where it can take place prior to the launch of surprise inspections on the alleged cartelists.

The European Union has entered into formal arrangements with a number of competition authorities for cooperation in international competition law enforcement – for example the US, Canada, Korea and Japan.

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*[Cooperation between competition authorities - coordinated investigation strategy]*

TAKIJIRO KONO (Japan Fair Trade Commission): As for international cartel cases, it is not rare that an enterprise concerned submits an immunity application to a competition authorities in multiple jurisdictions at the same time. In that case, cooperation between competition authorities may take place.

One of the typical schemes is designing investigation's strategy. When the investigation is still covered, competition authorities put a big emphasis on gathering and preserving evidences as much as possible, while preventing cartel participants from destroying evidence.

Competition authorities exchange their views about for example, date, time, persons and places to conduct the investigations. To make it fully effective, it may be necessary to exchange information obtained from the immunity applicant. In this phase, waiver plays a significant role. Waiver, given to a competition authority by the immunity applicant, enables the authority to provide with other authorities not only the identity of the applicant but also specific information submitted from the applicant.

Generally speaking, if there is not waiver, competition authorities may not be allowed make such information provision because the identity of the applicant and specific information of the applicant are considered to be a secret for the enterprise in many cases.

Violation to a confidentiality obligation is subject to criminal or administrative penalties in many jurisdictions. It is true that, without waiver, competition authorities could exchange general information such as the outline of the alleged violation because such kind of information is not considered to be a secret for the enterprise. However, it is also true that there must be quite a few international cartel cases where such general information exchange is not sufficient to make the investigation successful. Therefore, I would like to say again waiver from the immunity applicant plays pivotal role at pre-inspection stage.

Lastly, but not at least, once immunity is obtained from relevant competition authorities, cooperation between the authorities will not place the applicant to the worst position. In other words, never undermining the position of the immunity applicant.

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RICHARD WHISH: A specific additional point worth noting is that, within the European Union, cooperation also takes place between the European Commission and all the national competition authorities of the member states within the context of the European Competition Network.

*[Cooperation within the European Competition Network]*

BRUNO LASSERRE (French competition authority, *Autorité de la Concurrence*): As you know, anti-cartel fight is considered as a number one priority by most, if not all members, of the European competition network. ICN members have realized quite early on that putting national leads together was an efficient way to detect cartel cases of European dimension. And the *Car glass* case of 2008 is one of the most convincing examples.

Among all tools at the disposal of competition authorities, leniency programs have played a key and fast-growing role. Only 4 ICN members had such a program a decade ago. Today, 26 of them have adopted since.

The adoption of leniency programs has received strong political support, both at national and European levels, which has indirectly forced to convergence and consistency. The ICN Model Leniency Program of 2006 was drafted by the French Authority and the UK Office of Fair Trading played a crucial role in this respect.

This Model Leniency Program helps to prevent discrepancies between national programmes by setting up a framework of substantive and procedural principles that insures a convergent handling of applications across Europe. This, in turn, also encourages applications at the national level. Is the today situation ideal? Certainly not, we need continue improvements. For example, in multijurisdictional cases triggered by leniency applications before either the European Commission or one or several competition authorities, reallocation is a sensitive matter, because each ICN member will strive to preserve position on the applicant and the attractiveness of its own leniency too. Special attention must be also given to the exchange of information in relation with leniency applications.

Another aspect of the issue is the mechanism of summary applications. It is a short leniency application form that can be addressed to national competition authorities under the ECN model program when a leniency application is fined primarily with the European commission. It is intended to protect the position of leniency applicants at the national level while a decision is being made on the allocation between the European and national levels. Today, most of the competition authorities use summary applications. This mechanism, however, does not address all types of reallocations and this is an issue that we are working on.

ECN members also reflect on ways to coordinate national laws as to better protect leniency documents from third parties' disclosure. But this is eventually something that nationals will have to decide. Looking back, I think that Europe has left into a modern, consistent and efficient system of leniency programs. We will make every effort to improve it, even further in the future. But looking back, I'm convinced that what we have made together is one of the best examples of a fast-growing and fruitful cooperation mechanism.

RICHARD WHISH: So now we have heard about some of the important questions that members of the European competition network have to consider. There are others, of course.

One for example is the complex relationship that exists between systems that treat the cartelisation of markets as a criminal offence and so-called administrative systems, such as that of the European Commission's, that use an administrative model to enforce the law against cartels

Another complicated issue is the relationship that exists between the rules that provide for the enforcement of the law against cartels and civil law claims for damages brought by the victims of those cartels.

Let's now move to a different issue. Most competition authorities investigating cartels would begin the process by conducting dawn raid.

*[Dawn raid in the company of Cartelist A]*

LAWYER (of Cartelist A): This inspection is taking place because your company is under suspicion of being involved in a Cartel... As your lawyer I need to know all the facts.

CARTELIST A (Alexander): Well, we obviously talk to each other... we run into each other all the time at conferences and things.... This is a small world.... And yes, we talked a bit about prices...

LAWYER (of Cartelist A): Well, if that's true you may wish to consider cooperating with the competition authority. We can check but I am pretty sure that full immunity is probably no longer available, but such cooperation could potentially reduce your fine.

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RICHARD WHISH: Much of the discussion so far has been about immunity – situations where a firm is totally exonerated from any penalty in return for bringing the existence of a cartel to the attention of a competition authority. However, it is important to understand that there are also circumstances in which a firm may, in return for cooperation, be given a reduction in its penalty, as opposed to total immunity.

As a general proposition the obligations of a leniency applicant seeking a reduction in its penalty are similar to those of an immunity applicant. However it is always important to look at the rules of any particular system to understand precisely what may be available to a leniency applicant.

What we are going to do now is to hear speakers from the EU, Japan, the US and Germany, and we will notice quite a number of specific features about each system, and how reductions of penalties are determined.

## **SLIDE 17**

*[Reduction of fines – EU Perspective]*

KRIS DEKEYSER (European Commission): Under the Commission's 2006 Leniency Notice, companies that do not win the race for full immunity but still cooperate with the Commission's investigation may benefit from a reduction of fines that would otherwise be imposed on them.

In order to qualify for such a reduction of fines, the applicant has first to disclose its own participation in the cartel, secondly fully cooperate with the Commission, and thirdly contribute to the Commission's ability to prove the infringement by supplying new (valuable) evidence.

Let's see first what the cooperation conditions are. They are basically the same ones as for an immunity applicant except for the coercer test. This means that the leniency applicant has to:

- Cooperate with the European Commission genuinely, fully and on a continuous basis from the time it submits its application throughout the administrative procedure.
- It should also terminate its involvement in the suspected infringement immediately, unless the Commission agrees otherwise to preserve the integrity of the inspections.
- Not destroy, falsify or conceal evidence of the alleged cartel and also not disclose the existence and content of its application, except to other competition authorities where parallel applications are made.

In order to qualify for reduction, the new evidence provided by the applicant needs to represent significant added value compared to the evidence already in the Commission's file at the time of the submission of this new evidence.

In practice, it means that evidence submitted by an applicant has so called "SAV" (significant added value) if it strengthens by its very nature and its level of detail, the Commission's ability to prove the alleged cartel.

The choice of the concept of "SAV" as a threshold for reduction of fines encourages the race between cartelists to cooperate since the chances for the next applicant to add SAV to the investigation considerably diminishes with every new submission.

Moreover, the reward for cooperation depends on the order in which the successful applicants meet the "SAV" thresholds:

- The first undertaking to provide significant added value will be granted a reduction with a band of 30 to 50%;
- The second one will get a reduction within a band of 20 to 30%; and
- Subsequent companies may get a reduction of up to 20%.

You see that, contrary to other anti-cartel enforcement regimes, there is no limitation in the European Commission's leniency program as to the number of undertakings applying for a reduction of the fine and benefiting from such a reduction. But the later you come, the more difficult it is, of course, to still provide SAV and to get indeed a reduction. Therefore, companies who consider cooperating have every interest to do so as soon as possible.

The exact level of reduction within a given band is determined at the very end of the procedure and depends on (i) the time at which the evidence was submitted so the timing of the cooperation and (ii) and the extent to which the submitted evidence represents SAV (in other words the quality of the evidence and the cooperation).

How does the Commission carry out its assessment in this regard? A guiding principle in that respect may be to consider to what extent the applicant provided the five 'W's of the cartel: who, what, when, where, why. And to complete the picture, one should also add 'how'.

In practice, there are several elements, between others equally important, that the Commission takes into account:

- Contemporaneous evidence, such as minutes of cartel meetings made at the time of the infringement has a greater value than evidence subsequently established, such as statements of facts made at the time of the application.
- Incriminating evidence directly relevant to the facts in question, such as the internal minutes of a phone call showing an agreement on price will generally be considered of greater value than evidence of indirect relevance, such as a record that the phone call took place.
- Evidence which can prove a fact on its own without requiring corroboration from other sources will have more value than evidence which has to be confirmed or backed up. The Commission will find more valuable "compelling, stand alone" evidence than for instance a corporate statement uncorroborated by other pieces of evidence.

Finally, if an applicant provides 'compelling' evidence that increases the gravity or the duration of the infringement under investigation, the Commission will not take these additional facts into account when setting the fine for that undertaking. We call this "partial immunity".

## **SLIDE 18**

*[Reduction of fines – Japanese perspective]*

TAKUJIRO KONO (Japan Fair Trade Commission): The Japan Fair Trade Commission, JFTC, levies surcharges against enterprises participating in cartels. In the years the applications are made the investigation has started and the day meet requirements, JFTC makes its decision 30% reduction of surcharges.

This rate of reduction surcharges is the same in all the successful applications. Let me explain the major requirements: first of all, the deadline of the application of the reduction surcharge shall be the day that is past by 20 days from investigation starting day.

Secondly, company shall submit a written report which is called "Form No. 3" with relevant materials to the JFTC by the deadline. In form No.3, a company must write down the description of the act, the period of the act, names and positions of individuals involved and how they implement the act. It must be written down in Japanese language and if a discovery procedure in other countries is an issue, a company may substitute an oral reporting for substantial parts of Form No.3.

For the application to be accepted, Form No. 3 must be submitted by facsimile. No other methods are accepted. This limitation is only applied to Form No.3 reporting. So documentary evidence can be submitted by other methods, such as direct delivery; registered mail. However, if two or more companies apply for reduction, the order of application shall be determined according to the order of submission of Form No 3.

There is a limitation of the number of the applications. First, the total number of application before and after the investigation has started is no more than 5. The number of application after the investigation has started is no more than 3. For example, if applications are made by 3 companies before the investigation has started, the rooms remained vacant are only 2. Likewise, if the JFTC receives 4 applications before the investigation is started, only one company will successfully apply for reduction surcharges.

The information from the applicant must include the facts other than those already ascertained by the JFTC. Unlike other jurisdictions' leniency programs, there is no consideration of the authority about the degree of added value as evidence. Finally, since its inception in 2006, the JFTC leniency program has made great success.

## **SLIDE 19**

*[Reduction of fines - US perspective]*

GARY SPRATLING (Partner at Gibson, Dunn & Crutcher LPP): As is widely acknowledged, transparency and predictability in how enforcement authorities will treat companies and individuals that self-report and cooperate is very important to the success of cartel enforcement regimes in individual jurisdictions as well as cartel enforcement globally.

This is obviously true for a company that is the first to report a cartel and, thus, may be eligible for complete immunity from fines under applicable leniency policies. But, predictability is just as important for companies who are considering reporting and cooperating when another firm already has secured leniency and, thus, 100% protection from fines is no longer available.

Enforcers take varying approaches to providing prospective second-in, third-in, or fourth-in and so on cooperators with an indication of how their cooperation may translate into reduced fines. The European Commission, of course, has promulgated an approach followed by many other jurisdictions; namely, establishing as an official component of its leniency policy particular fine discount bands.

The US DOJ, by contrast, does not have a stated policy setting forth discount bands. Indeed, the official leniency policy does not even affirmatively address how cooperators who come in after immunity has been granted will be treated.

However, the U.S. does have a sentencing system that utilizes very detailed and highly structured sentencing guidelines and an enforcement practice of resolving fines and other aspects of criminal dispositions through plea agreements.

In the last 25 years, more than 90% of defendants charged with criminal antitrust offenses chose to enter into plea agreements with the US DOJ Antitrust Division.

Since in the United States cartels are criminal offenses, United States Sentencing Guidelines are the starting point for determining a company's fine for a cartel violation, just as is the case for all other criminal offenses. The Sentencing Guidelines, a 600-page instruction manual for how to compute sentences for organizations and individuals for all types of crimes, have specific rules for antitrust offenses. To summarize those antitrust rules briefly, a company's base fine is generally 20% of the volume of US commerce affected by the cartel during the entire duration of the cartel.

The base fine is then multiplied by minimum and maximum multipliers corresponding to the company's culpability score, which is based on factors such as number of employees, the involvement in or tolerance of the offense by high-level personnel, the company's prior criminal history, any obstruction of justice by the company, and the company's cooperation and acceptance of responsibility.

The Sentencing Guidelines methodology typically yields a range where the maximum fine for any defendant is double the minimum fine; for example, minimum \$200 million, maximum \$400 million, or minimum \$500 million, maximum \$1 billion.

However, the Sentencing Guidelines have a provision that, on the motion of the government only, companies can receive reductions in fines to levels *below* the (so-called) *minimum* Guidelines fine,

referred to as "downward departures," if the companies provide cooperation and significantly advance the investigation.

It is at this point that the US system becomes a hybrid, as the determination of a defendant's fine transitions from a computation that is formula-based to one that accommodates discretionary reductions, ranging from a few percentage points to (in rare cases) more than 50%, based on the government's assessment of the timing and value of the defendant's cooperation, as long as the ultimate fine is approved by the court.

I often get the question whether, in the absence of published discount guidelines, counsel to potential post-immunity cooperators are able to make informed, reliable predictions of how a client may benefit if they "come in" in second, third or fourth place.

The answer is yes. While the US approach is different, it provides experienced counsel with the ability to predict with considerable accuracy how later-arriving cooperators will be treated. This predictability is true because the US approach is based on two important practices by the Antitrust Division.

The first is a commitment by the Division to negotiating proportional resolutions with comparably situated parties. Proportional not only among defendants in the instant matter, but also across matters, and over time.

The second practice is transparency, which enables the private bar to observe the way the DOJ is applying its policy of comparable treatment, and how the DOJ has arrived at the discounts from Sentencing Guidelines fines given to defendants for cooperation in various circumstances.

Before concluding, there is an important observation to be made: in comparing the U.S. approach with the EC and comparable approaches, it is useful to remember that the fact that the U.S. prosecutes individuals adds a wrinkle to the process.

The Antitrust Division regularly insists on "carving out" from the company's protection in the plea agreement a certain number of individuals who will then face criminal exposure and be required to deal separately with the government. Companies that come in earlier and provide more valuable cooperation will see fewer executives "carved out" for jail sentences and will also see those executives receive shorter periods of incarceration.

In conclusion, predictability and reliability depend entirely on overall consistency and coherence of decisions enforcers make. Whether one is looking at fine discount bands, stated fining guidelines, sentencing policies, plea agreements or speeches, the basic lesson we all know repeats itself: Actions speak louder than words.

**SLIDE 20**

*[Reduction of fine - German perspective]*

CHRISTOF VOLLMER (German competition authority): In 2006, the Bundeskartellamt introduced its new Leniency Programme. It is today one of the most successful Leniency Programmes of the World.

One pillar of this success story is the marker system. The application process always starts with a marker – be it an application for immunity or an application for a reduction of fine.

The timing of the placement of the marker is decisive for the status of the application. The marker can be placed verbally or in writing, in German or in English. The marker can also be placed during an ongoing inspection and this is what often happens. Applications may come in within minutes.

The marker must contain details about:

- First, the type and duration of the infringement,
- Second, the product and geographic markets affected,
- Third, the identity of those involved
- And fourth, at which other competition authorities applications have been or are intended to be filed.

The Bundeskartellamt immediately confirms to the applicant in writing that a marker has been placed, stating the date and time of receipt. Besides, the Bundeskartellamt sets a time limit of a maximum of 8 weeks for the drafting of an application.

In his application, the applicant must submit information which makes a significant contribution to proving the offence. All evidence gathered during an inspection will not be considered as evidence submitted by the applicant.

Documents proving the infringement should be presented if available. If no such documents are available, it might be sufficient to name the employees involved in the cartel agreement and willing to appear for an interview and to testify the information.

The application can also be filed verbally and/or in English. If the Bundeskartellamt accepts an application in English the applicant is obliged to provide a written German translation without undue delay.

The Bundeskartellamt initially only informs the applicant of his ranking and that he is in principle eligible for a reduction. This is due to a full and continuous cooperation of the applicant with the Bundeskartellamt.

A decision on a reduction is made at the earliest after perusal and examination of all the information and evidence obtained by an earlier inspection and/or by other leniency applicants. In most of the cases, the Bundeskartellamt informs the applicant after having filed the statement of objections on the concrete amount of the reduction.

The Bundeskartellamt can reduce the fine up to 50%. The amount of the reduction is based on the evidentiary value of the application and its ranking. The ranking of the application is of essence, but it is only one element for the Bundeskartellamt to be taken into account. There have been cases where an application with a lower-ranking but better evidentiary value got a higher reduction than an application with a prior ranking but poor evidentiary value.

## **SLIDE 21**

**RICHARD WHISH:** Obviously a firm who makes a leniency application to a competition authority is incriminating itself by doing so, submitting that it has taken part in an illegal behavior.

We have been hearing about the kind of evidence that they will have to provide to the competition authority. Let's now hear about the making of corporate statement from the European commission perspective.

*[Corporate statements - EU perspective]*

**MARISA TIERNO CENTELLA** (Deputy Head of Unit, Cartels Directorate, DG COMP):

A corporate statement is a detailed description of the applicant's knowledge of the cartel prepared specifically for the purpose of the leniency application.

Given their role, corporate statements must contain detailed information on the key elements of the cartel. For example, its purpose, the companies and individuals involved and the description of the conduct at stake. Other types of information such as financial data, corporate information or business secrets should be excluded from corporate statement.

The European Commission accepts both written and oral corporate statements. Let me remark that, from our perspective, they are both equal in terms of their probative value; their treatment during the access to file; and the determination we will show in protecting them against disclosure. However, the applicant may feel more comfortable to give an oral statement in a situation where it fears private damages claims.

In practical terms, delivering an oral statement requires that the applicant, usually represented by its legal counsel, comes to the Commission to dictate the statement and have it audio recorded. Such an audio recording is further transcribed and verified by the lawyer for its accuracy. What is important

here is that both the recording and the transcript are Commission documents to which access is strictly limited.

During the access to file, the parties to the proceedings will get full access to both written and oral corporate statements. While such access guarantees their rights of defence, it is granted only at the Commission's premises and no copies can be made. This is all to ensure that the Commission keeps control over corporate statements and that they do not become public.

The reason for our practice is that, as I mentioned earlier, third party litigants may seek access to corporate statements made pursuant to a leniency application. In this context, it must be stressed that a successful leniency programme must sufficiently reassure potential applicants that corporate statements will be protected from disclosure. Otherwise, the disclosure of such voluntarily provided statements could seriously undermine the effectiveness of a leniency programme and the fight against cartels. In particular, while the right to compensation cannot be ignored, entities that cooperate with the competition authority cannot be put in a worse situation in respect of civil claims than cartel members which refuse cooperation.

Furthermore, owing to the mutually reinforcing nature of public and private enforcement, it is in the best interest of, on the one hand, the public enforcer and, on the other hand, private litigants that corporate statements are well protected since it is owing to effective public enforcement that private damages actions are made possible and become more common.

## **SLIDE 22**

RICHARD WHISH: I think we have learned by now that the design of any leniency system needs to be thought through very carefully. We have to create maximum incentives for firms to blow the whistle, which would apply for leniency, and we also have to avoid any disincentives. Let's think of some particularly important points.

The first is that it should be possible for firms to obtain automatic immunity rather than this lying in the discretion of the competition authority.

The second is that competition authorities ought to establish a marker system whereby a leniency applicant knows that he can preserve his position in the queue.

The third very important point is the leniency applicant who wish to know that any statement that it makes will not be disclosed either to an another competition authority or for example to third parties without the consent of the leniency applicant

Another point is that it has been discovered in practice that it is desirable to allow leniency applicant to make their statement orally rather than in writing. This can be very important for example in the event of a court seeking discovery of written documents.

Two final points are worth making. The first is that it is sensible in practice to allow leniency applicants to approach a competition authority even after that authority has commenced an investigation.

And the final point is that it is sensible to have a system in which a firm can make a hypothetical inquiry about how any leniency application might be dealt with in practice.

So, we hope that this video has enabled you to understand better what a good leniency program would look like. And remember, an effectively leniency program should mean fewer cartels, and more competition.