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Leniency Programs - The Devil Is In The Details

Marcin Trepka & Martyna Wurm
K & L Gates (Warsaw)

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Introduction

The important role of leniency in cartel enforcement in Europe, but also around the world is undeniable. In the European Union (EU), almost all Member States (except Malta) have introduced their own national leniency policies. There is also a separate leniency program in place at EU level. Leniency applications have traditionally played a significant role in the detection and prosecution of cartels in the EU, including in the most recent high profile cases decided by the European Commission (EC), i.e. trucks, automotive bearings, euro interest rate derivatives (EIRD) and TV and computer monitor tubes which ended with total fines amounting to 2.93 billion EUR, 953.3 million EUR, 824.6 million EUR, and 1.41 billion EUR respectively.

Existing leniency policies in different jurisdictions seem, in principle, similar. In the EU these similarities between leniency programmes are the result of soft harmonisation that has taken place over the years through cooperation by the EU national competition authorities (NCAs) within the framework of the European Competition Network (ECN) Model Leniency Programme[2]. All leniency regimes offer comparable incentives for potential applicants, i.e. immunity from fines (and in jurisdictions with criminal liability for competition law infringements usually immunity from prosecution) for the first applicant revealing the cartel activity and proportional fine reduction for any subsequent applicants (usually up to 50% of a fine reduction). The applicants are required to cease their participation in the cartel and cooperate with the relevant competition authority throughout the investigation.

The differences between the leniency programmes relate mainly to the "marker" system, as well as the availability and scope of leniency for individuals. As there is no single leniency programme in the EU, leniency programmes operated by the NCAs on the one hand and by the EC on the other are autonomous and independent of one another. This means that in cases of international or EU/EEA-wide cartels separate applications for leniency must be made in all jurisdictions concerned. This article aims to present the most important discrepancies between leniency policies that are of significant practical value to leniency applicants.

Leniency in different jurisdictions – most significant differences

Marker system

Most leniency programmes provide for a marker system[3]. Markers were the subject-matter of the OECD's roundtable on the "Use of Markers in Leniency Programs"[4]. In most jurisdictions, a marker is understood as an instrument protecting the place in the queue for leniency of an applicant that has not yet gathered the evidence necessary to formalise an immunity application. When applying for a marker, an applicant is only required to submit some basic information about the cartel activity. Then the applicant will have to perfect the application by supplementing the initial information to bring it up to the standard required to qualify for immunity within the timeframe prescribed by the relevant law or competition authority. Some leniency programmes do not explicitly use the word "marker"; however, this does not mean that they do not provide for this instrument in fact. For example, the Polish leniency scheme uses the term "abridged application", while in Germany, the marker is called "declaration of willingness to cooperate" (*Erklarung der Bereitschaft zur Zusammenarbeit*). Under the Turkish and Finnish leniency programmes, the applicant can

make a request for additional time for submitting the information and evidence and completing the application. Despite the different terminology, all these mechanisms have the same purpose as a marker request.

Depending on the jurisdiction in which the marker request is submitted, a marker is either granted automatically to the applicant submitting the required information, or at the discretion of the relevant authority. The EC has adopted the latter approach, which aims to maintain a race between companies to submit the most valued evidence, rather than a race to simply secure a place in the queue for leniency.

A marker request is usually made in writing by fax, e-mail or in person. However, in some jurisdictions like Australia or Hong Kong it can be submitted only by telephone (leniency hotline). Some leniency programmes allow requesting a marker on an anonymous basis (also referred to as hypothetical) without revealing the applicant's identity until the marker is granted (e.g. in Canada and Australia). In the USA it is possible to obtain an anonymous marker for a few days. This is not the case in the EU, where hypothetical applications can be made only in relation to a full leniency application, and not a marker request.

The time limit for perfecting a marker application differs depending on the jurisdiction. Usually it is determined by the relevant competition authority on a case-by-case basis. The factors that can influence the length of the time period required to perfect the application are, among others, the volume, format and location of documents, the number and the workplace of the employees involved in the cartel activity, as well as the stage of the investigation at the time of the request. In some jurisdictions markers are granted for both first-in applicants fighting for immunity and subsequent applicants entitled to fine reductions (e.g. Germany, Netherlands, Norway, Turkey, UK, Canada), while in some others a marker is only granted to the first-in applicant (e.g. Croatia, Finland, Italy, EU, Australia, USA).

Significant added value test

The qualifying requirements regarding the first applicant are rather similar in most jurisdictions – generally it has to be the first undertaking to inform the competition authority about the cartel conduct, or to submit evidence enabling the authority to prove the existence of the cartel. More differences appear to exist in relation to subsequent applicants. Contrary to appearances, the timing of the application is not a key factor in determining the amount of the reduction of the fine. The same or even greater importance is attributed to the value of the evidence submitted and its usefulness in establishing the existence of a cartel. The value of the evidence is assessed against the information and evidence already in the possession of the authority. Therefore, with every submission of new evidence the chances of subsequent applicants to add significant value to the case diminish.

Vertical agreements

The main reason for introducing leniency programmes is to facilitate the detection and termination of cartel infringements - the most difficult to uncover (due to the secret nature of the arrangements) and most harmful to market competition. Leniency programmes have evolved and nowadays some of them also cover competition infringements arising from vertical agreements. This is the case for instance in Poland, where leniency applies to both horizontal and vertical agreements. In the UK leniency in relation to anti-competitive vertical agreements is limited only to price fixing. In jurisdictions like Germany and Finland vertical agreements are not explicitly covered by a leniency programme; the NCAs can, however, at

their discretion grant lenient treatment to an applicant involved in such behavior. In cases where leniency is contemplated in connection with vertical agreements covering more than one jurisdiction, the question of whether or not leniency for vertical agreements is available in each of these jurisdictions might be of significant practical importance.

Leniency for individuals

Another important issue is whether leniency in a particular jurisdiction is also available to individuals and what the resulting implications for the undertakings are. Generally, in jurisdictions where individuals can be fined separately from the company for cartel activity, they are given the right to apply for leniency independently from the undertaking. As a rule, a leniency application made by a company covers also individuals provided that they cooperate with the competition authority in the course of the investigation. It does not work the other way around, i.e. a leniency application by an individual will not cover the relevant undertaking involved. In some countries cartel activity is subject to criminal liability including imprisonment (e.g. Norway up to 6 years, Russia up to 7 years, Australia up to 10 years, Canada up to 14 years, USA up to 10 years, and Japan up to 5 years). Other countries introduced criminal sanctions only for specific offences, usually for bid rigging (e.g. Austria, Hungary, Italy, and Poland). In some jurisdictions criminal liability, regardless of whether it applies to all competition law infringements or only specific ones, is not covered by the leniency programmes for individuals. The best examples are Germany and Poland, where for bid rigging companies face competition fines, while individuals face criminal charges. Nevertheless, only companies can benefit from leniency for this particular offence. These issues are of particular significance for individuals involved in anti-competitive conduct and should be taken into account when considering leniency applications by or covering individuals.

Conclusions

Leniency is an important instrument in the collection of cartel evidence. To be mutually beneficial to competition authorities and applicants, leniency policy must enable the competition authorities to prove the existence of a cartel, while at the same time providing legal certainty for potential applicants by encompassing transparent and predictable rules. In other words, a balance between the authorities' powers and the legal certainty for applicants is key to a successful leniency policy, which would encourage undecided or simply distrustful potential applicants to come forward and disclose the existence of unlawful activity. Legal certainty is undermined when leniency filings are required in more than one country, where each competition authority exercises its discretionary powers independently.

The authorities have wide discretion in deciding the amount of time for the applicants to perfect the marker, which is usually assessed on a case-by-case basis (although in certain common law countries this term is rather predictable or specified - e.g. Canada - usually 30 days, Australia - max. 28 days, USA - usually 30 days). By comparison to other international regimes, the leniency programmes in the EU do not allow for a marker request on a hypothetical basis, or requesting a marker by phone. There is often a possibility to contact the authority anonymously; however, in order to get a marker, the applicant has to identify itself. The hypothetical application introduced to the European Commission's programme

applies only to formal applications. The European approach is obviously beneficial for the authorities; however, it puts the applicant in an uncertain position, as one will normally find out about the band of the fine reduction for which one qualifies after the assessment of the evidence, and very often only at the end of the proceedings. Improvement in this field might be a milestone in creating a new era of leniency in cartel detection.

Big things often start slowly, however. And a good starting point for the discussion has been made at the OECD roundtable on the use of markers in leniency programs and at the recent proposal of the ICC Competition Commission Cartels & Leniency Task Force to the ICN for a one-stop-shop for leniency markers[5], which is an initiative towards the establishment of international cooperation among competent authorities in the field of markers. The proposed mechanism, if adopted, will allow a potential applicant to become the first undertaking to file in all the jurisdictions concerned. Importantly, it does not involve mutual recognition of the leniency application, but only of the marker application; therefore the competition authorities' discretion to grant leniency is preserved.

[1] Marcin Trepka is a member of the global Antitrust, Competition and Trade Regulation practice at K&L Gates where he spearheads the competition team in Warsaw. Martyna Wurm is an associate in the K&L Gates Warsaw office and a member of the Antitrust, Competition & Trade Regulation Practice.

[2] http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

[3] In Europe a marker system is not available for example in Denmark and Russia.

[4] See Use of Markers in Leniency Programs: http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en.

[5] A one-stop-shop system for leniency markers will enable an applicant to reserve its place in the queue for leniency in all jurisdictions participating in the system by applying for the marker in only one of them: http://www.iccwbo.org/Data/Policies/2016/ICC-Proposal-to-ICN-for-a-one-stop-shop-for-leniency-markers/.