



# Advancing Collaboration in International Cartel Enforcement

*By Richard Powers & Leah McCoy<sup>1</sup>*  
*(United States Department of Justice)*



Copyright © 2020

Competition Policy International, Inc. For more information visit [CompetitionPolicyInternational.com](https://www.CompetitionPolicyInternational.com)

September 2020

When the United States Department of Justice Antitrust Division's ("Division") leniency program was first adopted over twenty-five years ago, the program had its skeptics. In providing immunity from prosecution for the first company to self-report criminal cartel conduct, the leniency program was innovative, but also raised the eyebrows of career law enforcement officers and prosecutors wary of letting guilty parties "off the hook." But over the last few decades the remarkable success of the Division's leniency program has proved the skeptics wrong. By providing incentives for both corporate and individual members of a cartel to self-report, leniency has become our most important enforcement tool, allowing prosecutors to obtain evidence of a conspiracy from the inside and often helping the Division catch cartelists in the act. The leniency program has allowed the Division to investigate and prosecute cartels that might have otherwise gone undetected, sending culpable individuals to jail and collecting billions in fines from culpable companies. In fact, leniency has been so successful that it has proliferated around the globe; similar programs have been adopted by over sixty other competition agencies.

Since the inception of the Division's leniency program, economic globalization has also led to the globalization of both cartel conduct and enforcement. Cartels frequently cross borders, and culpable companies and individuals often find themselves facing enforcement actions in jurisdictions around the world that were affected by the conspiracy. Over the last few years, members of the defense bar and business community have begun raising concerns about the rising costs of cooperating in multi-jurisdictional investigations. They have pointed out that cooperating in an international cartel investigation now means preparing document submissions for multiple competition agencies, flying executives around the world to sit for interviews, and sometimes confronting conflicting outcomes and private claims for damages across several jurisdictions.

The Division has heard the concerns and is committed to reducing unnecessary burdens on leniency applicants and cooperating companies in cross-border investigations. We want to ensure that we are strengthening and improving our relationships with our international counterparts to maximize the effectiveness of cartel detection, while also ensuring that leniency applicants are able to meet the competing demands in the jurisdictions where they have reported. To that end, the Division examined our own investigative practices to determine how we can work with other competition agencies more efficiently in cases involving the same leniency applicants. Over the last year, we surveyed case staff from across the Antitrust Division's five criminal offices to identify what has worked (and, more importantly, what has not worked) with respect to international cooperation in our own cases. From there, the Division then subsequently developed internal best practices for Division staff to apply when working with other competition agencies.<sup>2</sup>

The international competition community has responded to the concerns as well. In 2017-2018, the ICN Cartel Working Group ("CWG") carried-out a fact-finding survey on leniency, and in 2019 issued the report, "Good Practices for Incentivising Leniency Applications."<sup>3</sup> Based on the survey responses, the report identified incentives and disincentives for companies to apply for leniency in the context of multi-jurisdictional cartel cases. The report focused on three key areas – private enforcement, individual sanctions, and the interaction between competition agencies and other domestic regulators – and identified good practices, policies, and laws or regulations that competition agencies should adopt in their own jurisdictions to improve incentives for leniency applicants in each of these areas.

Following the 2019 report, the CWG spent the last year developing guidance on good practices for international cooperation in matters involving multi-jurisdictional leniency applicants. The "Guidance on Enhancing Cross-Border Leniency Cooperation,"<sup>4</sup> published in July 2020, addresses key areas of coordination between competition agencies with the two parallel aims of (1) making international enforcement efforts more effective and (2) helping to reduce disincentives for

prospective leniency applicants. The guidance is intended to go beyond mere discussion of the cornerstones of successful leniency programs and provide practical tips for the day-to-day issues confronting competition agency case teams as they engage with both leniency applicants and colleagues in other jurisdictions.

"This project - Guidance on Enhancing Cross-Border Leniency Cooperation - expands upon the achievements of the leniency-related projects that have been central to the work of the CWG SG1 in recent years," notes József Sárai of Hungary's Gazdasági Versenyhivatal ("GVH"), who co-chairs the subgroup.

The project was developed and drafted by a team of ICN members, including the Australian Competition & Consumer Commission, Canada's Competition Bureau, Chile's Fiscalía Nacional Económica, Brazil's Conselho Administrativo de Defesa Econômica ("CADE"), the European Commission's Directorate General for Competition, the Hong Kong Competition Commission, the New Zealand Commerce Commission, and the United States Department of Justice Antitrust Division, together with the co-chairs of the CWG's Subgroup 1, Turkey's Rekabet Kurumu and Hungary's GVH. Over the course of the last year, the project team gathered input from other CWG members and Non-Governmental Advisors ("NGAs") about their experiences with cross-border leniency cooperation through the course of two webinars and a panel at the 2019 ICN Cartel Workshop hosted by CADE. CWG members and NGAs also had the opportunity to provide comments on the draft document.

This project is a significant achievement for the ICN CWG, and the Division was honored to help lead the development, along with the project team members and CWG Subgroup 1 co-chairs noted above. We recognized the significance of this issue from the review of our own practices last year, and our internal findings helped inform our contributions to the project. The diversity of the project team and interest in the project from NGAs and other ICN members demonstrates the importance of the increased focus on preserving leniency incentives, and we hope that this guidance will help agencies across the globe to implement effective leniency practices.

The guidance aims to provide helpful advice to all competition agencies, no matter the size or experience of the agency. As the Division has learned through the course of this project and the development of our own internal best practices for international cooperation, even competition agencies with well-developed leniency programs can find ways to improve. For competition agencies that may not have extensive experience in cross-border collaboration, the guidance is written as a step-by-step checklist that flows through the full course of an investigation.

One member of the project team, Hong Kong's Competition Commission ("HKCC"), describes the real-world impact of the project. Jindrich Kloub, Executive Director (Operations) explains that "the HKCC has benefited greatly from insights and practical experiences shared by other competition agencies during the process of developing and drafting this ICN CWG project on cross-border leniency cooperation. As a relatively young agency, the HKCC has been promoting its leniency programme (which was introduced simultaneously with the full commencement of Hong Kong's competition legislation in late 2015), and such discussions, with both agencies similarly young and those more experienced, have been invaluable." Recently, in April 2020, the HKCC published a revised leniency policy for undertakings, introducing incentivizing changes such as the removal of a previous requirement for the HKCC to seek an order from the Court declaring a contravention by the leniency applicant on the basis of a statement of agreed facts, distinguishing between Type 1 and Type 2 leniency, as well as introducing a new leniency policy for individuals. "We believe these changes bring Hong Kong's leniency regime more in line with the international best practices that are advocated within the ICN CWG," notes Mr. Kloub.

Marcus Bezzi, Executive General Manager, at the Australian Competition and Consumer Commission, adds that “it has been enlightening to listen to, and learn from, the experiences of our international counterparts throughout this project. The guidance aims to share this crucial information with the broader international audience in an easily navigable format.”

The areas of focus in the guidance are: baseline principles of leniency that are necessary for collaboration, effective communication between competition agencies, exchange of information through waivers and other tools, and coordination of investigative steps throughout the life-cycle of a case. The CWG’s 2017-2018 survey on leniency incentives found that one of the key disincentives affecting leniency applicants is the impact of sanctions that may be imposed by other regulators or prosecutors in a jurisdiction, outside of the competition agency. In response, the guidance also addresses how competition agencies can more effectively collaborate with other domestic regulators as they are engaging with other competition agencies.

During the process of developing the guidance, other CWG members, and NGAs shared their experiences of international cooperation, both positive and negative. Two particular lessons learned have been first, the importance of building trust – both between leniency applicants and competition agencies, and among competition agencies engaging in cooperation – and second, the importance of communication between competition agencies throughout a case. With regard to the first lesson, the guidance highlights throughout the key elements of building trust between leniency applicants and competition agencies, including confidentiality and transparency. The guidance also stresses the significance of mutual trust as a starting point for competition agencies to engage in cooperation, and includes practical suggestions for relationship building. With respect to communication between competition agencies – a topic for which most agencies intrinsically understand the “why” – the guidance addresses in detail the “when, how, and what” of effective communication strategies that have been learned from the years of experience of the project’s team members.

“Working on this project has really helped our agency to focus, not only on ways to make the cross-border leniency applications more efficient and effective, but also to highlight ways in which we can more effectively cooperate with our international colleagues at all stages of the investigative process,” observes Mr. Bezzi.

With this new chapter in the story of leniency that began over twenty-five years ago, the Division and fellow project team members hope this guidance will help foster deeper collaboration among competition agencies on international cartel matters and continue to preserve this vital tool for cartel enforcement for decades to come.

---

<sup>1</sup> Richard Powers, Deputy Assistant Attorney General for Criminal Enforcement and Leah McCoy, International Counsel, United States Department of Justice, Antitrust Division.

<sup>2</sup> Special thanks to Jacklin Lem, Assistant Chief in the Division’s San Francisco Office, and Eytayo St. Matthew-Daniel, Assistant Chief in the Division’s New York Office, for their significant contributions on the internal review effort.

<sup>3</sup> The 2019 report is available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-lenieny.pdf>.

<sup>4</sup> The Guidance is available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf>.