



Top Takeaways from ICN Guidance on Enhancing Cross-Border Leniency Cooperation

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In July, the International Competition Network (“ICN”) Cartel Working Group (“CWG”) issued Guidance on Enhancing Cross-Border Leniency Cooperation (the Guidance).² The Guidance was unveiled with a good amount of fanfare in the cartel world, including a U.S. Department of Justice (“DOJ”) press release applauding the Guidance and the DOJ Antitrust Division’s help leading the initiative.³ The Guidance is touted by the DOJ as increasing the effectiveness of international cartel enforcement through better cooperation.⁴

The Guidance begins by contextualizing that as leniency programs for cartel conduct have proliferated around the world, they have not only increased the risk of detection for cartel members but also complicated the enforcement landscape. The Guidance is “intended to provide practical advice for competition agencies to assist them in engaging with other jurisdictions on matters involving multi-jurisdictional leniency applicants, with the two parallel aims of first, making international enforcement efforts more effective and second, helping to reduce disincentives for prospective leniency applicants.”⁵

Significance of the Guidance

The nature of the ICN’s cartel work has always seemed like a bit of a paradox. The very first work product by the CWG, the 2005 Building Blocks for Effective Anti-Cartel Regimes Report, touts a “worldwide consensus” and “truly global effort” against hard-core cartels.⁶ And yet, 15 years later, this assumption of consensus has not led to any recommended practices, the ICN’s “gold standard” or the highest-level consensus work product. Instead, the CWG has focused its resources on developing the ICN’s most extensive line of “how to” work, detailing day-to-day investigative techniques for case handlers and enforcement strategies for agencies in its 11-chapter Anti-Cartel Enforcement Manual.⁷ The manual is based on the idea of espousing “good practices,” defined as “practices which work well in the jurisdiction(s) 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.”⁸ The CWG’s foundation work on leniency and enforcement cooperation make up two of the manual’s chapters.

In the past couple of years, the CWG’s work has pivoted into more direct consensus building on leniency and cooperation. The CWG’s 2017-18 work plan identified “the reality of different leniency systems” and “conflicting requirements in system or demands from competition authorities.”⁹ Using the results of a 2018 member agency survey of leniency practices, in 2019 the CWG produced “Good practices for incentivizing leniency applications.”¹⁰ This effort was a direct response to identified differences in leniency practices that may disincentivize leniency applications. The paper identifies challenges, gives an overview of existing systems and provides “good practice” advice for agencies.

The Guidance is the next step in consensus building, moving from identifying *common* practices to promoting *consensus* practices. It expands on the practices and principles of international cooperation in cartel enforcement contained in previous ICN work products. The Guidance is the ICN’s most extensive discussion of the nuts and bolts of coordination in a multijurisdictional matter involving leniency. It dives deep into the leniency coordination waters, discussing complex issues that may arise and providing suggestions on how to navigate them.

Whom Does the Guidance Help?

The Guidance does not contain anything novel for cartel enforcers in jurisdictions with mature leniency programs such as the U.S., the EU, Canada, Australia, and Brazil, which have significant

experience coordinating in cross-border cartel matters involving leniency. The Guidance will be most helpful for competition agencies that are new to cross-border leniency coordination and those enforcers new to cartel practice. Thus, the overall value is systemic, contributing to a shared framework among enforcers and informing common approaches.

The Guidance can also be valuable to cartel practitioners guiding leniency applicants through complex cross-border cartel investigations. The Guidance discusses the issues and challenges identified by leading global competition enforcers and provides an in-depth view as to how they navigate them. Knowing what cartel enforcers consider will allow companies and their counsel to be best positioned to address agency concerns and considerations. The Guidance can also help companies and practitioners evaluate potential risks of self-disclosure through leniency in multiple jurisdictions with greater clarity about the likelihood of disclosure and coordination.

Guidance General Principles

The Guidance outlines some general principles of international cooperation in cartel matters:

- Cooperation can be beneficial for both competition agencies and leniency applicants.
- Cooperation in cartel cases is voluntary and does not limit an agency's discretion or independence.
- Effective cooperation requires mutual trust and a commitment to relationship building between agencies.

The Guidance encourages agencies to work together to explore ways to share information in cartel matters through:

- Convening regular liaison meetings on a bilateral, regional, or other common basis.
- Forming case-specific networks that encourage proactive sharing of information.
- Establishing the necessary formal frameworks to make such exchanges of information possible through information gateways and international agreements.
- Training agency staff to have a good understanding of the kinds of information that can appropriately be shared with other agencies.

The Guidance discusses some underlying principles of leniency to promote self-disclosure by cartel participants, including:

- Encouraging leniency confidentiality.
- Promoting transparency and predictability.
- Promoting robust communication between agencies early in investigations and at key decision-making points.

Encouraging the exchange of information to facilitate effective collaboration while remaining aware of and respecting the differences in systems (criminal, administrative, civil, etc.), policies (variations in leniency policies), and limitations on ability or willingness to cooperate or exchange information.

These general principles are important for setting the baseline for discussions among enforcers in cartel matters involving leniency. The principles stress the important balance agencies must strike – cooperating with and helping other enforcers, while at the same time promoting self-disclosure by cartel participants and ensuring that leniency applicants are not worse off globally for reporting their conduct to one or more competition enforcement agencies.

Top Takeaways for Competition Enforcers

The Guidance will be most helpful for cartel enforcers that are new to cross-border investigations involving leniency. Here are some of the key takeaways for enforcers:

- 1) **Confidentiality and communication build trust with agencies and leniency applicants.** The Guidance spends a lot of time discussing the importance of confidentiality and the practical aspects of seeking waivers and the limitations on communication and information exchanges with and without waivers. The length of discussion and the sensitivity given to these issues underscore the importance, particularly for agencies new to leniency and international cooperation, of maintaining confidentiality as a means of building trust with other agencies and leniency applicants in order to encourage both international cooperation and leniency applications. In short, demonstrating an internal commitment to confidentiality and a sound leniency process is one of the best things to do to attract healthy bilateral cooperation.
- 2) **You can't always get what you want.** The Guidance stresses throughout that while cooperation among cartel enforcers is important, agencies must always balance the desire to cooperate with the need to protect leniency confidentiality and promote leniency self-disclosure. In addition, the Guidance points out many areas where different legal systems, policies and laws can be barriers to cooperation or exchanging information or evidence.
- 3) **Ask questions to understand similarities and differences.** The Guidance points out many areas of possible divergence between jurisdictions in leniency and cartel programs, policies, and legal systems. While agencies may not be able to change these differences, they cannot ignore them either. The Guidance encourages having discussions early and often with fellow enforcers in other jurisdictions in order to explore areas of difference and potential impediments to cooperation for better understanding.
- 4) **Coordination may start out strong and dissipate over time.** The Guidance realistically explains the types of coordination agencies can expect at the various stages in an investigation, and notes that coordination in later stages of an investigation may be challenging given the variation in legal systems and timing issues. The Guidance contains helpful explanations of the value of coordination at each stage, including the sanctions stage, and the challenges to coordination agencies face at each stage. For example, coordinated steps that could lead to a cross-border investigation being deemed a "joint" investigation raise sensitivities in the U.S.
- 5) **Coordination with noncompetition agencies is critical to leniency success.** The Guidance finishes by discussing coordination with domestic and foreign noncompetition agencies and regulators, such as anticorruption, procurement or fraud enforcers, local police, and securities or financial services regulators. The experience and tips provided in the Guidance are helpful to agencies navigating cross-border cartel investigations involving noncompetition offenses or in regulated industries. Given that most competition agency leniency programs cover only competition offenses, such coordination is critical to promoting leniency self-reporting where the scope of conduct goes beyond leniency or may be otherwise regulated.

Top Takeaways for Companies and Counsel

While the Guidance is directed at ICN member competition agencies, it provides many helpful insights for companies that uncover cartel conduct and are considering seeking leniency, or those that are facing cartel investigations in multiple jurisdictions. Counsel advising corporations in cartel matters will gain a better understanding of how competition and other enforcers are likely interacting with one another as well as what those enforcers might expect from leniency applicants. Here are some of the key takeaways for companies and their counsel facing international cartel investigations or considering applying for leniency:

- 1) **Leniency applicants control the confidentiality of the information they provide.** The Guidance stresses at many points that maintaining confidentiality of leniency information is critical to promoting self-reporting. This is a good thing for companies worried that if they seek leniency in one jurisdiction they will be “outed” globally. But understanding how disclosure in one jurisdiction could become known in another jurisdiction through cooperation is a critically important part of a corporation’s difficult decision whether and where to seek leniency. Note, for example, that in the U.S., leniency confidentiality applies only to the identity of and information provided by the first company to self-report, whereas the protections may apply to second and subsequent leniency applicants in the EU and other jurisdictions that have a tiered leniency approach. The Guidance talks extensively about waivers of confidentiality and provides a helpful, high-level view of differing waiver practices. One important distinction noted is that the U.S. does not recognize the need for “procedural” waivers to talk logistics with other countries, but other jurisdictions will recognize such limited waivers. This can be helpful information to clarify when asked for waivers in multiple jurisdictions.
- 2) **Agencies have lots of ways to talk strategy and share “nonconfidential” information or “non-leniency” information.** Section 2 of the Guidance discusses the various types of nonconfidential information agencies can share in cartel investigations that do not require a waiver. Some practitioners might be surprised at the length of this list. Section 3, after discussing waivers at Section 3.2, discusses ways that agencies can share information from sources other than leniency applicants, including various information gateways, international agreements and mutual legal assistance (“MLAT”) treaties. This is helpful for practitioners preparing to engage with cartel enforcers or prepping witnesses, to know other possible sources of information.
- 3) **Agencies typically do not exchange hard evidence provided by a leniency applicant.** The Guidance discusses agency sharing of evidence in cartel investigations and notes, “Agencies normally do not physically exchange documents provided by leniency applicants. It is a good practice for each agency to request documents separately.”¹¹ This statement is important and dispels a common misconception by those outside agencies or those new to cartel work that cooperating cartel enforcers are sending documentary evidence back and forth. Enforcers typically get documents directly from leniency applicants due to potential admissibility concerns and evidentiary or discovery-related downsides. This should be welcome news to companies contemplating seeking leniency since it underscores that the company will typically retain control of the documentary evidence without consenting to divulge to another agency.
- 4) **Coordination of fines and sanctions may be helpful.** There is an interesting discussion starting on page 19 in the Guidance about the coordination of case outcomes and, particularly, the coordination of fines and sanctions and avoiding “double counting.” The Guidance talks about the benefits for agencies of coordinating fines and sanctions and gives several examples of when such coordination took place, including the EU *maritime car* case,

the Canada-U.S. *Nishikawa* case¹² and the U.K.-DOJ *Marine Hose* dispositions¹³ involving the prosecution of the same individuals in the U.S. and U.K. These examples of creative resolutions can be helpful to companies negotiating settlements in multiple jurisdictions. Note again that in the U.S. only the first company to self-report can obtain leniency, so second and subsequent companies may be negotiating plea agreements in the U.S. while seeking leniency in the EU and elsewhere where they have tiered leniency systems providing for possible reduced fines for second and subsequent applicants.

- 5) **Coordination with other domestic and foreign regulators is likely.** Section 6 of the Guidance, starting on page 22, discusses coordination with other noncompetition agencies and regulators, both domestic and foreign. Corruption, bribery and fraud issues often arise in cartel matters and leniency programs, and handling them can be complex, particularly since leniency programs typically cover only cartel conduct and other regulators must be involved to reach dispositions of all conduct. This has become an increasingly important area, as cartel investigations in markets such as financial services have involved a growing number of noncompetition regulators around the world. The insights provided to enforcers here can be particularly helpful for practitioners advising clients on cross-border matters involving both cartel and noncartel conduct.

Conclusion

The ICN's Guidance on Enhancing Cross-Border Leniency Cooperation is a helpful resource that should be a "must read" for cartel enforcers as well as companies and practitioners navigating the complex waters of cross-border cartel investigations involving leniency. The international enforcer community has long demonstrated a strong, shared support for leniency programs to detect and prosecute hard-core cartels. Much work has been done by the DOJ and like-minded ICN partners across the world in promoting the benefits of sound leniency programs.¹⁴ This most recent ICN guidance attacks some of the gaps between programs in different jurisdictions, recognizing some of the differences in application that can work against effectiveness. It is a welcome attempt to bring convergence to the multijurisdictional leniency thicket of different rules and procedures and could be a hopeful sign for future ICN consensus recommendations related to cartel practices.

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- ² ICN Guidance on Enhancing Cross-Border Leniency Cooperation, June 2020, available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf>.
- ³ U.S. DOJ Antitrust Division Press Release, "Antitrust Division Applauds New International Leniency Guidelines," July 10, 2020, available at <https://www.justice.gov/opa/pr/antitrust-division-applauds-new-international-leniency-guidelines>.
- ⁴ Antitrust Division Press Release.
- ⁵ ICN Leniency Guidance, at 3.
- ⁶ ICN Building Blocks for Effective Anti-Cartel Regimes (2005), at 5, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_BuildingBlocks.pdf.
- ⁷ See List of ICN Leniency Materials, available at <https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/>.
- ⁸ Compilation of "Good Practices" from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group (2016), at 5, available at https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMGoodPractices.pdf.
- ⁹ ICN Cartel Working Group 2017-2020 Work Plan, at 6, available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/WorkPlan2017-20CWG.pdf>.
- ¹⁰ ICN Good Practices for Incentivising Leniency Applications (2019), available at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf>.
- ¹¹ Guidance at 18.
- ¹² U.S. DOJ Antitrust Division Press Release, "Nishikawa Agrees to Plead Guilty and Pay \$130 Million Criminal Fine for Fixing Prices of Automotive Parts," available at <https://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive>.
- ¹³ U.S. DOJ Antitrust Division Press Release, "Three United Kingdom Nationals Plead Guilty to Participating in Bid-Rigging Conspiracy in the Marine Hose Industry," available at https://www.justice.gov/archive/atr/public/press_releases/2007/228561.htm.
- ¹⁴ See "Cornerstones of an Effective Leniency Program," speech by Scott D. Hammond before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), available at <http://www.justice.gov/atr/public/speeches/206611.htm>; Antitrust Division leniency policy speeches, available at <https://www.justice.gov/atr/leniency-program>; and ICN List of Leniency Materials, available at <https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/>.