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# **Leniency: Good Practices and Lessons Learnt**

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# Case Study

# Case study: the protagonists

- CHIPZ is a US-Headquartered manufacturer of specialist microchips used in the manufacture of highly specialised communications equipment
- The largest purchasers of these microchips are 15 original equipment manufacturers ("OEMs")
- CHIPZ sells to OEMs via distributors
- CHIPZ has around 5 key competitors, who all have sales offices across the same regions as CHIPZ
- CHIPZ GmbH in Munich has received a letter of complaint from a German OEM (FISCH), alleging:
  - CHIPZ and its competitors have been colluding to keep prices to distributors high
  - CHIPZ has told its distributors not to discount its microchips beneath a certain level when selling to OEMs
- The letter states that FISCH is raising the same complaint with other microchip suppliers and distributors, and that, if CHIPZ does not resolve this issue and get prices down, FISCH will consider complaining to the German competition authority

# Case study: conduct

- Evidence uncovered from the interviews and document review is showing:
  - information exchange on future pricing between CHIPZ and its competitors
  - communications between CHIPZ and its competitors to the effect that they should “hold their nerve”, not reduce prices, and police their distributors closely
  - inducements from CHIPZ to its distributors not to discount – e.g. threats of withdrawal of supplies, cutting marketing support etc.
- Conduct appears to have taken place across numerous countries: at least 7 EU Member States including the UK, Germany, Italy, France, plus the US, Brazil, Hong Kong and Japan
- The conduct appears to be ongoing, and has been going on for 9 years
- CHIPZ plays a lead role in encouraging the behaviour – it even appears that CHIPZ was instrumental in starting the original conversations.
- There have been sporadic meetings where all 6 microchip manufacturers were present (every couple of years or so), and the head sales office for each competitor has known about and encouraged the conduct, though the majority of the competitor contacts have occurred at a national level, and all exchanges with distributors have been at a national level

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# Key considerations

# Differences in procedural steps

- Do you have enough information to go to the competition authorities (at least in key jurisdictions)?
  - Putting down a "marker" at an early stage is possible in many jurisdictions, even without documentary evidence (issue of lack of immunity for RPM but cooperation is rewarded)
- If you need or want more evidence, timing is crucial: FISCH is sending the same letter to CHIPZ's competitors so everyone is doing their investigation at the same time. A potential race for immunity
- Different deadlines can mean that, in some jurisdictions, parties need to make full and concrete admissions on liability before a global investigation has actually been concluded. The requirement to make such admissions before the full details of the conduct have been uncovered, and before the conduct has been legally characterised by regulators, can lead to incomplete admissions, or to the creation of an unhelpful precedent for other authorities.
- Is this conduct for which leniency is available? At EU level, the 2006 Leniency Notice applies only to "secret cartels", and not to vertical restrictions or abuse of dominance. However, leniency for vertical restrictions is available at national level in some EU countries.
  - Difficulty where leniency be available for only part of the conduct? E.g. could one apply for leniency for the horizontal conduct but withhold evidence relating to RPM? Need to consider the potential need for protection in front of multiple authorities with different rules. E.g. overarching EC protection with no protection for vertical conduct, likewise no such protection in France and Italy, BUT can have leniency protection for RPM in the UK or Hungary.
- We have seen the benefits for both agencies and parties when one agency takes more of a lead. A cooperation agreement – such as the one between the EU and Switzerland - may facilitate this, provided the parties' rights of defence and confidentiality of business secrets and leniency submissions are safeguarded.

# Other procedural steps

- What options exist for approaching the authorities:
  - No names contact? EU: informal/unofficial process. UK: formal process
  - Over phone, in person? In person in the EU, over the phone in the UK
  - Is the marker procedure available in all countries? Submit certain minimum information, and preserve place in queue
  - How long to perfect that marker? Do we have enough information? Likely c. 3 weeks to perfect in some jurisdictions but possibility to obtain extensions available in many jurisdictions too
  - Form of submission? Not all authorities accept oral submissions
    - Where leniency regimes do not allow oral admissions/leniency statements, companies are less likely to come forward
    - We haven't seen any dialogue taking place between antitrust agencies regarding the format of the submissions: oral submissions are either allowed or they are not.

# Is it possible to obtain immunity/leniency?

- How to avoid tipping off vs full and frank cooperation?
  - Difficult position: sometimes you can obtain the narrative for your marker more quickly with interviews than by a full document review
  - But need to be sure those individuals can be trusted not to pose a tipping off risk. How do you secure their cooperation and confidentiality? Do they require independent legal attorneys?
  - Some authorities would expect / like to be consulted before interviews are undertaken if there is a tipping off risk
  - A balancing act with no perfect answer at this stage. Authorities may have different expectations
  - Take the minimum necessary investigative steps before approaching the authority and discussing next steps - they do not want their own investigation to be compromised before it starts.
- Conduct is ongoing, so all the more likely that others will uncover it
  - Also harder simply to stop the conduct without immunity / leniency protection: a change of conduct, combined with the letters of complaint from customers, may well reveal to other parties that CHIPZ has identified a problem
  - The more experienced authorities are prepared to accept leniency applications relating to ongoing conduct to facilitate investigations across numerous jurisdictions. This is particularly the case where another authority has specifically requested that the conduct should not to be stopped, and where there is good cooperation between the relevant authorities.
- CHIPZ's size and role in cartel
  - Played a key role in instigating the cartel: but the bar for being denied immunity is high. A ringleader, perhaps, but coercion? In likelihood, CHIPZ will not be barred from immunity in the EU
- Confidentiality obligation
  - Differs jurisdiction by jurisdiction. The EU and some EU NCAs are very strict which may raise concerns in cases involving publicly listed companies, upcoming IPOs, or other reports to auditors
  - The fact that immunity or leniency applicants are not allowed to disclose their exposure to an investigation and/or fines can cause significant issues for companies having to make disclosures to auditors, accountants or investors. That would also include mandatory self-disclosures (e.g. for regulated entities to the FCA in the UK)".

# Sanctioning Systems

- Approach to calculating the fine may differ, or may be so similar that arguments re: double jeopardy may be raised
- E.g., calculation of value of sales:
  - Sales of microchips, or also sales of the end communications equipment?
  - Sales in-country or should there be a reflection of market share too?
- Fine modelling - last full FY or averaging?
- Duration - implication for whether the conduct is a single and continuous infringement / conspiracy or multiple infringements/conspiracies
- Some jurisdictions apply an uplift for recidivism
- Leniency position or discount may differ in each jurisdiction
- Leniency plus not available in all jurisdictions
- Cooperation between European competition authorities has been fairly effective, meaning that the cases running in parallel have broadly similar outcomes and the fines are calculated using generally similar proxies.
- Where differences in approach do come up, authorities have to be prompted as to the divergent approaches, and their eventual cooperation with one another can generally lead to a more harmonised approach (e.g., same duration, same legal characterisation of the conduct, similar approaches to fine calculations etc.)

# Criminal liability – no one size fits all

- Are there criminal risks for individuals, and does immunity also cover criminal risks?
  - Even if one makes an application to the EC and the EC will likely seize jurisdiction, CHIPZ still needs to consider individual immunity for the cartel offence in e.g. the UK, but also other EU Member States
  - Immunity for employees does not always apply in the same way – e.g., former employees could be protected in the UK and Hungary but not in the US
  - NB whilst one regime may provide automatic/'blanket' criminal immunity for employees of successful corporate applicants, others may require an individual – even if only tangentially involved – to admit personal liability and to sign to that effect.



**Questions**

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