



International  
Competition  
Network

# Good practices for incentivising leniency applications

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Subgroup 1 of the Cartel Working Group

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## Abbreviations

ACCC	Australian Competition and Consumer Commission
CA	Competition Agency
CADE	Conselho Administrativo de Defesa Econômica (Brazil - Administrative Council for Economic Defense)
CMA	Competition and Markets Authority (UK)
CNMC	Comisión Nacional de los Mercados y la Competencia (Spain)
COFECE	Comisión Federal de Competencia Económica (Mexico – Federal Economic Competition Commission)
CWG	Cartel Working Group
DG COMP	Directorate-General for Competition (European Commission)
DoJ	Department of Justice (USA)
FCA	Financial Conduct Authority (UK)
HKCC	Hong Kong Competition Commission
HKMA	Hong Kong Monetary Authority
JFTC	Japan Fair Trade Commission
MFP	Ministerio Público Federal (Brazil – Federal Prosecution Service)
NGA	Non-Governmental Advisor
SFC	Securities and Futures Commission (Hong Kong)
SG1	Subgroup 1
SG2	Subgroup 2

## Country codes

Albania	AL	Germany	DE	Poland	PL
Australia	AU	Greece	GR	Russia	RU
Belgium	BE	Hong Kong	HK	Singapore	SG
Brazil	BR	Hungary	HU	Spain	ES
Canada	CA	Ireland	IE	Sweden	SE
Colombia	CO	Italy	IT	Switzerland	CH
Croatia	HR	Japan	JP	Taiwan	TW
Cyprus	CY	Korea	KR	The Netherlands	NL
Czech Republic	CZ	Lithuania	LT	Turkey	TR
El Salvador	SV	Malaysia	MY	The United Kingdom	UK
The European Union	EU	Mauritius	MU	The United States	US
Finland	FI	Mexico	MX		
France	FR	New Zealand	NZ		

## Introduction

Leniency<sup>1</sup> programmes are an important instrument in the fight against cartels and it is widely recognised that many cartels are only uncovered because of leniency applications. Indeed, they help competition agencies detect and punish cartel participants by shielding the first applicant for immunity from sanctions and, in some jurisdictions, by providing for reduced sanctions for other applicants who cooperate with competition authorities and provide information on the cartel.

As such, it is essential to have proper and efficient leniency regimes across the globe. In this context, the ICN Cartel Working Group<sup>2</sup> has produced a number of documents regarding leniency policies across different jurisdictions.

In 2004, the CWG published the Anti-Cartel Enforcement Manual, which is a compilation of the investigative approaches and enforcement techniques used by ICN Members.<sup>3</sup> The Manual includes a chapter concerning 'Drafting and Implementing an Effective Leniency Programme', which was updated in 2014.

In 2017, the CWG issued another relevant product, the Checklist for Efficient and Effective Leniency Programmes, which features the elements to be taken into consideration when designing or amending national leniency systems.

The 2017-2018 Work Plan of the CWG stated that:

*'Given the reality of different leniency systems among competition authorities at the international level, there would still be the potential that multi-jurisdictional leniency applicants, in practice, would face difficulty/inconvenience/interference to a greater or lesser degree, because of conflicting requirements in system or demands from competition authorities, which could arise in parallel cartel investigations...'*

On that basis, Subgroup 1 ('SG1') carried out a two-year project on leniency:

In the 2017-2018 ICN year, SG1 launched a survey on the 'Key elements for an efficient and effective leniency programme and its application' and sent out a questionnaire to ICN member

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<sup>1</sup> The term leniency means a system of immunity and reduction of fines and sanctions (depending on the jurisdiction) that would otherwise be applicable to a cartel participant in exchange for reporting on illegal anticompetitive activities and supplying information or evidence. Leniency programmes cover both the narrower defined leniency policy (i.e. the written set of rules and conditions adopted by a competition authority) as well as other elements supplementing the policy in a wider environment. See Checklist for efficient and effective leniency programmes (2017); see also the Anti-Cartel Enforcement Manual Chapter 2: Drafting and Implementing an Effective Leniency Policy. In this document, the term 'leniency' covers also total immunity from fines and sanctions, unless otherwise specified.

<sup>2</sup> The mandate of the CWG is to address the challenges of anti-cartel enforcement, including the prevention, detection, investigation and punishment of cartel conduct. At the heart of antitrust enforcement is the battle against hardcore cartels directed at price fixing, bid rigging, market allocation and output restriction. See <https://www.internationalcompetitionnetwork.org/working-groups/cartel/>.

<sup>3</sup> More information on the Anti-Cartel Enforcement Manual can be found on <https://www.internationalcompetitionnetwork.org/working-groups/cartel/investigation-enforcement/>.

agencies and NGAs ('Leniency survey' or 'survey'). The project aimed to explore how certain policies and circumstances influence the willingness of undertakings and individuals to make use of leniency programmes. SG1 received and analysed the replies from 34 Competition Agencies<sup>4</sup> and 43 NGAs representing 19 jurisdictions.<sup>5</sup>

In the 2018-2019 ICN year, SG1 took into account the results of the survey and launched the second phase of the project: 'Steps towards a more efficient and effective leniency programme and its application'. The second phase of the project aimed at identifying incentives and disincentives for undertakings to apply for leniency in the context of multijurisdictional cartel cases, in order to elaborate good practices to incentivise leniency applications. In this second phase of the project, SG1 sent a supplementary questionnaire to explore the interaction between competition enforcement and other regulatory intervention; in this context, it analysed the replies from 29 member agencies<sup>6</sup> and 19 NGAs representing 13 jurisdictions.<sup>7</sup>

This paper reflects the SG1's conclusions on ways to overcome potential leniency challenges stemming from private enforcement, individual sanctions and regulatory interventions and indicates good practices for incentivising leniency applications. It includes the following three sections that summarize the results of the survey and indicate good practices on:

- Interaction between leniency and private enforcement
- Interaction between leniency and individual sanctions
- Interaction between competition enforcement and other regulatory intervention

Each section of the paper contains an introduction setting out the challenges, an overview of existing systems, and recommendations for good practices in respect of each topic. The addenda to the paper include:

- Factsheets with the essential elements of the survey
- An overview table of the different national private enforcement rules
- Responses to the questionnaire on the interaction between competition enforcement and other regulatory intervention

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<sup>4</sup> The CAs that replied to the questionnaire are from the following jurisdictions: Albania, Australia, Brazil, Colombia, Croatia, Cyprus, Czech Republic, El Salvador, the European Union, Finland, France, Germany, Greece, Hong Kong, Hungary, Ireland, Italy, Japan, Korea, Lithuania, Malaysia, Mauritius, Mexico, the Netherlands, New Zealand, Poland, Russia, Spain, Sweden, Switzerland, Taiwan, Turkey, the United Kingdom and the United States of America.

<sup>5</sup> The NGAs who replied to the questionnaire are from the following jurisdictions: Australia, Belgium, Brazil, Canada, United Kingdom, European Union, France, Germany, Greece, Hong Kong, Hungary, Italy, Mexico, the Netherlands, Poland, Singapore, Spain, Sweden and the United States of America.

<sup>6</sup> The CAs that replied to this supplementary questionnaire are from the following jurisdictions: Australia, Brazil, Bulgaria, Canada, Colombia, Croatia, Cyprus, Czech Republic, Germany, El Salvador, the European Union, Hungary, Indonesia, Italy, Japan, Lithuania, Mexico, New Zealand, Norway, Panama, Poland, Portugal, South Korea, Spain, Sweden, Switzerland, Turkey, the United Kingdom and the United States of America.

<sup>7</sup> The NGAs who replied to this supplementary questionnaire are from the following jurisdictions: Belgium, Brazil, Bulgaria, Canada, European Union, Hong Kong, Mexico, Netherlands, Poland, Spain, Sweden, Switzerland and the United Kingdom.

The CWG Co-Chairs wish to express their gratitude to the respondents of the questionnaires, to the drafting teams and to all CA colleagues and NGAs who have contributed generously and in many ways to the preparation of this paper.<sup>8</sup>

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<sup>8</sup> Specific gratitude is owed to the colleagues of the following CAs (in alphabetical order): the ACCC, the CADE, the EU DG COMP, the HKCC, the Hungarian Competition Authority, the Turkish Competition Authority and the UK CMA.

## **1. Interaction between leniency programmes and private enforcement**

### **1.1. Challenges**

Leniency applicants play a key role in revealing secret cartels. However, leniency applicants are likely to be the first – or at least an easier – target for follow-on damages actions. Consequently, this section focuses on two areas of interaction between leniency and private enforcement<sup>9</sup>, namely liability for damages and disclosure of leniency statements.

#### **1.1.1. Liability**

While its co-cartelists may spend many years challenging the infringement decision in court, a leniency applicant may be worse off. Indeed, victims of the cartel infringement may rely on the infringement decision's findings in relation to leniency applicants and may potentially seek damages from each of them for the harm caused by the entire cartel. The risk of being sued first and held liable for the full amount of the cartel damages may be a disincentive for potential leniency applicants to cooperate with competition agencies. This is particularly true in circumstances where there is no prior investigation and therefore an increased likelihood of the cartel remaining undetected.

#### **1.1.2. Disclosure**

In addition, potential leniency applicants might be deterred from cooperating with competition agencies under leniency programmes if self-incriminating statements produced for the sole purpose of cooperating with the competition agencies were to be disclosed in the context of damages actions before civil courts.

The risk of disclosure of self-incriminating statements that could expose cooperating undertakings or their management to damages actions may be an additional disincentive for potential leniency applicants to cooperate with competition agencies. It may also have cross-border effects when victims obtain leniency statements through the rules of one jurisdiction and claim damages in another jurisdiction, potentially a jurisdiction in which the defendant has not even applied for leniency.

These aspects of private enforcement of competition law therefore create tension with public enforcement. Generally, the goal of lawmakers may be to make sure that leniency applicants are at least not worse off than the other co-cartelists. However, the means to achieve this goal are diverse. The reason for this diversity can be found in the different legal traditions as well as the goals of private enforcement in the respective legal system.

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<sup>9</sup> For further information, see the 2019 Chapter of the Anti-Cartel Enforcement Manual on the 'Development of Private Enforcement of Competition Law in ICN Jurisdictions'.



## 1.2. Overview of existing systems

The survey revealed that only one among 35 jurisdictions indicated that it is not possible for victims of cartels to seek damages for the harm suffered.<sup>10</sup> In most of the other 35 jurisdictions, where private enforcement is available, the legislative basis has been in place for many years. Statistics on damages actions for cartel infringements are still difficult to obtain. Nevertheless, many ICN jurisdictions expect that the number of private actions will grow. They acknowledge the fact that leniency programmes are an important tool that must be safeguarded in two ways, i.e. by easing the burden of the leniency applicant from paying damages and limiting discoverability of leniency evidence in damages actions.

### 1.2.1. Liability

From a legal, rather than statistical, perspective, it is noteworthy that 18 among the 34 jurisdictions<sup>11</sup> that allow private enforcement indicated that they have rules in place that would limit or even exclude the liability of leniency recipients in damages actions. All of these rules seem to aim at reducing the risk for leniency programmes which stems from exposing, in an excessive manner, leniency recipients to private enforcement.

In the EU, for example, cartelists are jointly and severally liable for the harm caused by their cartel infringement. This means that each victim can, in principle, obtain full compensation from each cartelist. However, the EU Damages Directive<sup>12</sup> limits the liability of the leniency applicant that has ultimately received full immunity ('immunity recipient'). It stipulates that this immunity recipient is only liable vis-à-vis its direct and indirect purchasers and suppliers. Other victims may exceptionally seek compensation from the immunity recipient when they cannot obtain compensation from the co-cartelists, including those who have applied for leniency but not received full immunity. This exception takes into account the compensatory nature of private enforcement in Europe.

In the US, the legislation provides that leniency applicants face only single damages for the harm caused by cartel activity. This rule constitutes an advantage for cooperating parties since cartelists normally have to pay treble damages, which is a key feature of US antitrust policy. In addition, leniency applicants do not face joint-and-several liability. This means that the applicant is liable only for damages which are attributable to the commerce done by the applicant in the goods or services affected by the violation, not the commerce of other members of the cartel.

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<sup>10</sup> See under '4. Factsheets', table 12.

<sup>11</sup> US, Germany, EU, Greece, Poland, Italy, The Netherlands, Czech Republic, Belgium, Croatia, Spain, Sweden, Hungary, Finland, UK, Lithuania, Mexico, France.

<sup>12</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

In Brazil, the Senate Bill nº 283 of 2016 proposes to change article 47 of Law 12.529/2001 (Brazilian Competition Law). It includes: (i) the exemption of double damages to those who enter into leniency agreements with CADE and provides documents that allows CADE to estimate the damage caused by the anticompetitive conduct; and (ii) the exemption of joint liability to the beneficiaries of the agreements (leniency and cease and desist agreements).

### **1.2.2. Disclosure**

Depending on the legal system, victims of cartel infringements may ask civil courts to order disclosure of documents containing statements from the cartelists or third parties, potentially including competition authorities. If there are applicable rules granting access to documents included in the file of a competition authority, they may also refer to those rules for the purpose of obtaining leniency statements.

In Colombia, the Superintendence, acknowledging this challenge, reduced the risk by keeping confidential the negotiations with benefits of the so-called collaboration programme. In a similar vein, the ACCC uses its best endeavours to protect any confidential information provided by a leniency applicant, including the identity of the applicant. Moreover, the ACCC may be able to claim privilege and/or public interest immunity to protect confidential information from disclosure.

In Korea, the competition authority does not disclose sensitive documentation and in Mexico, the Commission is obliged to uphold the confidential nature of the identity of the economic agent and the individual who apply for the benefits of the leniency programme.

In the EU, there is a harmonised level of protection for leniency statements and settlement submissions in the context of damages actions before the courts of the Member States. According to the Damages Directive, these courts cannot at any time order a party or a third party to disclose any such voluntarily provided statements. This rule also applies to verbatim quotations from leniency statements or settlement submissions included in other documents.

In the US, various rules protect against the discovery of leniency documents from the US Antitrust Division. The Antitrust Division investigates cartel cases through the use of a grand jury, a special jury empaneled in felony criminal cases that determines whether there is probable cause to indict a criminal defendant. Access to matters occurring before the grand jury is tightly controlled by statute. Additionally, various common law privileges protect against disclosure of leniency documents such as the law enforcement or investigatory files privilege for files compiled for law enforcement purposes, the informant privilege, and the privilege for information given on a pledge of confidentiality. The Antitrust Division can also move for a stay of private litigation when the private action creates a risk of interference with a grand jury investigation.

In Brazil, the CADE followed a different approach by issuing Resolution 21/2018 that regulates the access of documents by third parties. The Resolution establishes that, after the administrative condemnation, documents and leniency excerpts explicitly used to motivate the decision can be disclosed. The main objective of the Resolution is to foster private enforcement in a jurisdiction without tradition of this kind of claims.

In Hong Kong, the Competition Ordinance imposes a general obligation on the HKCC to preserve the confidentiality of any confidential information provided to the HKCC. This includes: (i) any information provided by a leniency applicant for the purpose of making a leniency application and/or pursuant to a leniency agreement; and (ii) records of the leniency application process (including the leniency agreement). However, the Competition Commission may be compelled to make disclosure by an order of a court, by law or any requirement made by or under a law.

In Japan, the JFTC may refuse the inspection or copy of the evidence against a leniency applicant where, for example, the public interest or the public duties of the JFTC could have been harmed. However, in other circumstances, the JFTC cannot refuse the inspection or copy of the evidence unless this is likely to infringe the interests of a third party or unless there are any other justifiable grounds.

### **1.3. Good practices as the result of balancing the incentives of potential leniency applicants in light of private enforcement**

The overview of the relevant rules in the ICN jurisdictions demonstrates that many of these jurisdictions limit the civil liability of leniency applicants and protect leniency statements from disclosure for seeking damages. Both sets of rules can be considered as good practices for safeguarding an efficient leniency programme while allowing victims to receive compensation for the harm suffered. The extent to which it is possible to introduce such rules depends on the legal system of a jurisdiction.

#### ***1.3.1. Easing the burden of the leniency applicant from paying damages***

1. If the legal system of a particular jurisdiction would generally allow for multiple damages, lawmakers in that jurisdiction may consider limiting the liability of leniency recipients to single damages.
2. Other jurisdictions might not have this option because their legal tradition does not allow for multiple damages in the first place. Such jurisdictions can nevertheless ease the burden on leniency recipients. For example, they could introduce rules to make sure that a leniency recipient is not, in general, liable for damages resulting from the commerce of other members of the cartel. In particular, in jurisdictions where joint and several liability for an infringement is the general rule, exceptions may be considered, such as limiting the

contribution to the harm caused to the direct and indirect purchasers or providers of the leniency recipient. Another option may be to introduce a right for a leniency recipient to obtain a contribution of up to 100% from non-leniency applicants so that, in the end, non-leniency applicants will have compensated the victims in full and the leniency recipient will have paid less.

3. Along such broad lines, lawmakers may wish to consider other important details. For example, to apply for leniency, especially in circumstances where the authority is not already aware of the cartel, while at the same time also ensuring that victims can effectively seek compensation for harm resulting from the cartel infringement, lawmakers may choose to only limit the liability of those leniency applicants who are ultimately granted a full reduction of fines.

### **1.3.2. *Limiting discoverability of leniency evidence in damages actions***

4. Another key factor to safeguard the incentives to apply for leniency relates to the protection of statements made in support of a leniency application, whether by or on behalf of an undertaking or natural persons. Again, albeit there are differences in the legal systems governing disclosure, it seems to have become good practice to have rules in place limiting the disclosure of such statements, irrespective of whether they are requested directly from the competition authority or indirectly via courts. These rules are intended to ensure the continued willingness to voluntarily submit evidence to the competition authority, including self-incriminating statements such as leniency applications. They may be complemented by other measures, in order to protect, in a more general way, a competition agency's internal decision-making process and cooperation efforts.
5. When considering limits to the disclosure of evidence for the purpose of private enforcement, it is also important to ensure that both the relevant rules and their application are proportionate. For example, depending on the definitions and interpretations in a given jurisdiction, the protection of leniency statements may only cover the statements themselves or also citations of them.
6. Finally, it seems possible to infer these two strands of good practice for striking the right balance between public and private enforcement on the basis of existing rules across the ICN jurisdictions. However, these good practices will most likely evolve to become more comprehensive and detailed once victims of cartel infringements seek damages even more frequently.

## **2. Interaction between leniency and individual sanctions**

### **2.1. Challenges**

Most ICN jurisdictions which replied to the survey provide that undertakings and individuals (managers and other employees) involved in a cartel can be punished. The sanctions foreseen for individuals can be administrative, criminal or a combination of both.

The obvious aim of sanctioning managers and other employees is to ensure a sufficient level of deterrence.<sup>13</sup> Such a system has a number of different effects:

- It gives undertakings a strong incentive to monitor the conduct of their employees and to ensure that they comply with competition rules, and it provides employees an incentive to resist any pressure to engage in cartel activity. Compliance programmes may be an appropriate tool to prevent anticompetitive conduct.
- In cases where an undertaking is or was involved in a cartel, such a system creates an incentive for employees to reveal information about the cartel and to apply for leniency, either as individuals or, if the system provides that the employees also benefit from leniency given to the undertaking for their undertaking. Such systems are likely to lead to a more effective functioning of leniency programmes as they reward the initiative of revealing cartels to competition agencies.
- However, sanctions against individuals may also have a chilling effect on corporate leniency applications. The risk of exposure to individual sanctions is likely to discourage leniency applications if the leniency programme does not provide for some kind of 'parallelism' as regards the corporate and individual sanctions. In order to avoid such a chilling effect, the parallelism between corporate and individual sanctions may guarantee that employees of undertakings which receive immunity are not punished either.
- In the case of an international cartel, different leniency programmes apply. Some of these programmes may not provide for employees to benefit from the immunity or leniency granted to their employer. In such cases, in view of the possible individual sanctions employees face, they may decide not to apply for immunity or leniency. The presence of diverging leniency systems can therefore be a strong disincentive for leniency applications in cases of international cartels.

### **2.2. Overview of the existing systems**

The ICN 2017-2018 Survey demonstrated that from the point of view of individual sanctions the existing leniency systems worldwide are very diverse. Aspects like: (i) the nature of the sanction

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<sup>13</sup> For more details see: Sanctions in Antitrust Cases, OECD Policy Roundtables 2016, Background Paper by the Secretariat under [https://one.oecd.org/document/DAF/COMP/GF\(2016\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf)

(administrative/civil, criminal or mixed); (ii) the availability and type of lenient treatment for individuals; (iii) the extent of leniency (immunity or reduction); and (iv) the decision-making body for leniency for individuals are worth analysing in this respect.

### **2.2.1. Nature of the individual sanction**

Across jurisdictions, there are differences concerning the individual sanctions, which may be imposed on individuals. From this point of view, administrative (civil), criminal and mixed systems might be differentiated. While some jurisdictions apply only non-criminal sanctions on individuals (e.g. Hong Kong, Lithuania), others apply exclusively criminal sanctions (e.g. Czech Republic, Hungary).

In the majority of the responding jurisdictions, the immunity or reduction of fine for the undertaking implies a reduction of sanctions for individuals, if the corporation or the individuals themselves request it. However, in a few others, the benefits resulting from leniency in the administrative sphere do not generate automatically benefits in the criminal sphere (e.g. in Germany).

The most obvious conflict between leniency and criminal sanctions seems to appear in administrative antitrust regimes where cartel conduct, e.g. bid-rigging, is also prosecuted as a criminal offence falling outside administrative antitrust enforcement. In many such cases, competition agencies can only provide leniency for administrative or civil sanctions, but not for criminal ones. In this context, it cannot be ruled out that the risk of exposure to criminal sanctions can discourage leniency applications and could have a negative effect on the leniency programme concerned.

### **2.2.2. Availability of lenient treatment for individuals in cartel cases – who may apply?**

According to the responses received in the framework of the survey, out of the legal regimes, which may impose criminal or non-criminal individual sanctions, 21 provide for lenient treatment for individuals in some way.<sup>14</sup> In jurisdictions where individuals could face sanctions, it is necessary to provide some sort of lenient treatment also for individuals. There are two main ways of providing leniency for individuals:

- a) Corporate leniency is extended for individuals

One of the basic solutions is that if the leniency applicant is a company, the benefits of the leniency agreement can be extended to its cooperating current and former directors, managers, and employees. However, there are different approaches in each jurisdiction to the fact that a corporate application is automatically extended to the cooperating individuals involved (current or

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<sup>14</sup> Australia, Brazil, Canada, Colombia, Czech Republic, Germany, Greece, Hong Kong, Hungary, Ireland, Korea, Lithuania, Mexico, The Netherlands, New-Zealand, Poland, Spain, Sweden, Turkey, United Kingdom, United States.

former employees, e.g. in Hong Kong,<sup>15</sup> Poland, Hungary, Sweden). The corporate application has to be additionally requested by the company (e.g. in Mexico) or it has to be additionally requested by the individuals with consent of the first-applicant company (e.g. in Brazil).

Most jurisdictions that participated in the survey have rules ensuring that individuals involved in the corporate leniency application process may receive immunity or reduction in individual sanctions. In some of the jurisdictions, the immunity or leniency granted to an undertaking is simply taken into account as a mitigating factor when the individual sanctions are set ('umbrella effect').

b) The individual may request leniency on his/her own

In some jurisdictions, where individuals can face sanctions separately from their company, they may apply for leniency on their own, irrespective of whether their company has done so or not (e.g. in Brazil, Greece, New Zealand, Spain, the United Kingdom, the United States).

Such a system allows individuals to apply for leniency even if they cannot convince their employer to come forward. Moreover, it puts some pressure on employers to approach the competition agency if they want to avoid the loss of immunity because of the prior application by their employees.

### **2.2.3. Decision-making body for leniency for the individuals**

The decision-making body of leniency for individuals is another aspect that differs across jurisdictions.

In some jurisdictions, the competition agency decides about the lenient treatment of the corporation and the individual. In others, the leniency application of the individual is vested on courts or other bodies (e.g. prosecutors).

In some jurisdictions, the responsibility for taking enforcement action (competition agency or other criminal prosecutorial body) depends on the criminal or civil nature of the potential sanctions (e.g. in Australia). In this case, a kind of cooperation between the competition agency (which may grant civil leniency) and the criminal prosecutorial body (which may grant criminal leniency) may exist to 'align' leniency treatment as much as possible.

### **2.2.4. Immunity only or reduction also possible**

There are differences among jurisdictions, as to whether immunity only or also reduction of individual sanctions can be applied for by natural persons, namely:

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<sup>15</sup> In Hong Kong, leniency in the form of immunity is automatically extended to cooperating individuals involved, but in the context of lenient treatment to subsequent leniency applicants, the extension to cooperating individuals is not automatic.

- a) In some jurisdictions, only the first applicant may receive lenient treatment in the form of full immunity (e.g. Australia, Brazil, Canada, Hong Kong, Ireland, the United States).
- b) In some jurisdictions (e.g. Mexico, the Netherlands and New Zealand), the second and subsequent applicants may also receive a certain level of reduction of the fine. In most of these jurisdictions, individuals may enjoy the same level of benefits (e.g. reduction of pecuniary sanctions) which have been granted to their employer applying for corporate leniency.

### **2.2.5. Reliability, predictability and legal certainty of leniency systems which foresee individual sanctions**

Although the various systems described reflect the different policies and legislative choices of each jurisdiction and therefore vary when it comes to details, they all aim to achieve cartel deterrence and making leniency programmes more effective. In this context, many respondents of the 2017-2018 Survey have underlined that reliability, predictability and legal certainty are necessary general features of any leniency programme.

### **2.3. Good practices regarding interaction between leniency and individual sanctions**

1. Leniency programmes should be transparent, reliable and any possible sanctions for individuals as predictable as possible. There should be no excessive burden on individuals in order to qualify for leniency for any kind of individual sanctions.
2. In cases of international cartels, where several jurisdictions may impose sanctions, ICN members with similar cartel enforcement regimes should seize opportunities for convergence of their leniency rules, at bilateral or multilateral level,<sup>16</sup> as regards all types of sanctions for individuals (pecuniary sanctions and criminal sanctions) and other measures such as disqualification.
3. Current and former directors, managers, and employees should be given the right to submit leniency applications, which would protect them from sanctions or lead to lower sanctions on condition that individuals fully cooperate with the competition agency.
4. Corporate leniency applications should 'cover' the conduct of all the qualifying (current and, where appropriate, former) employees of the undertakings involved in the cartel, on condition that they cooperate with the competition agency. This means that cooperating employees would not be punished or their sanction would be reduced in cases where the undertaking, for

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<sup>16</sup> Article of 23(4) of the Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 (known as the ECN+ Directive) foresees protection from individual sanctions to current and former directors, managers and other members of staff of corporate immunity applicants also where the competition agency pursuing the case against companies is in a different EU jurisdiction than the jurisdiction(s) where the individuals may face sanctions. See: [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L\\_.2019.011.01.0003.01.ENG&toc=OJ:L:2019:011:TOC](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2019.011.01.0003.01.ENG&toc=OJ:L:2019:011:TOC)



which they work or used to work, is granted immunity or leniency. This is particularly true where the leniency applicant is the first to apply in circumstances where there is no prior investigation by the authorities.

5. The protection against sanctions or the imposition of more lenient individual sanctions would apply to all types of sanctions (such as, pecuniary sanctions and jail sentence), as well as other measures, such as disqualification.
6. In jurisdictions where an entity other than the competition agency is the final decision-maker regarding an individual's application for leniency, the decision-maker should consult the CA and give due consideration to its recommendations.

### **3. Interaction between competition enforcement and other regulatory intervention**

#### **3.1. Challenges**

The interaction between competition enforcement and other forms of regulatory intervention comes into play where a cartel member contemplating applying for leniency is subject to oversight by other regulator(s) in addition to competition agencies (e.g. banks regulated by the banking or financial services regulator) or is active in public procurement projects. Undertakings involved in international cartels may be also subject to oversight by regulators in different jurisdictions.

This chapter focuses on two areas of regulatory intervention that have been identified to impact on incentives to apply for leniency, namely that of reporting obligations and possible sanctions resulting from a finding of competition law infringements by either the competition agency or the court.

##### ***3.1.1. Reporting obligations***

Reporting obligations to the industry regulator can affect whether the undertaking self-reports to the CA, including the timing of such reporting. As such, reporting obligations to the industry regulator have two impacts on leniency programmes: they can be an incentive for undertakings to apply for leniency, but at the same time, they may create tension in terms of confidentiality obligations towards the CA.

The obligation of a regulated business to notify potential competition law infringements to the industry regulator may work as an incentive for an undertaking to apply for leniency before the CA. This is particularly the case if a mechanism exists whereby the industry regulator could share information relating to the notification with the CA, or if the industry regulator has concurrent jurisdiction and may initiate competition investigations on its own.

At the same time, when a regulated business applies for leniency, tension may arise between its confidentiality obligations under the relevant leniency regime and its reporting obligation vis-à-vis its industry regulator. In this context, leniency applicants risk losing the benefits of leniency if they disclose information about the cartel investigation to industry regulators (e.g. the content of submissions to the CA, or the fact that they received a request for information by a CA).

Such disclosure may also seriously jeopardise the cartel investigation. Indeed, the material and details of the investigation are usually confidential even within the relevant CA, as they are subject to the 'need to know' rule. Disclosing them to industry regulators thus increases the risk of potential leaks or inadvertent disclosures. When a regulator is conducting a parallel investigation in the matter, obtaining material and details from the competition agency investigation could create a duplicate of the agency's file in the regulator's file. This would provide possible access to

the material in different terms, to different parties, at different times, thereby interfering with investigative strategy, leniency incentives and the procedural guarantees foreseen in the competition procedure. Such interactions and risks therefore require careful management by competition agencies and other regulators.

### **3.1.2. Regulatory sanctions**

In addition to any fines and penalties, which may result from a finding of a competition infringement, undertakings may face sanctions or other measures specific to their industries or business activities, such as removal of licenses or debarment from future public procurement bids and projects. This could be a strong disincentive for an undertaking to apply for leniency; in particular, for regulated businesses, which require a license to operate in the relevant industry or market, or for undertakings whose businesses depend heavily on public procurement projects.

A related challenge, which competition agencies or regulators may face, is that sanctions or other measures, such as the removal of a license or a prohibition to bid, may lead to a temporary reduction or even the complete removal of competition in the market concerned. In particular, this may pose a problem in markets with few participants or if many of the existing market players participated in the prosecuted or penalised cartel.

## **3.2. Overview of existing systems**

### **3.2.1. Reporting obligations**

Obligations to notify potential competition law violations to industry regulators (excluding sector competition regulators such as telecoms and utilities) are uncommon among the jurisdictions that responded to the questionnaire.<sup>17</sup> The only jurisdiction which responded with such a reporting obligation is the United Kingdom.<sup>18</sup>

On the other hand, a number of jurisdictions have requirements for regulators to report potential competition law infringements to the competition agency.<sup>19</sup> Where no legal obligations exist, there are also mechanisms (such as Memoranda of Understanding) between regulators and

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<sup>17</sup> See under '6. Summary of responses to the questionnaire on the interaction between competition enforcement and other regulatory intervention (July 2018)'.

<sup>18</sup> In the United Kingdom, certain regulators with concurrent powers to enforce competition law expressly require regulated firms to notify them if it has or may have committed an infringement of competition law. The CMA is not aware of any cases in which the obligation to report potential competition law violations to a regulator had dissuaded a potential applicant from applying for leniency. If anything, it would seem reasonable to assume that the requirement to notify competition violations to a regulator would encourage parties to apply for leniency, particularly where (as in the case of the concurrent regulators in the UK) a regulator and the national competition authority have concurrent jurisdiction to apply competition law and can share information with each other for this purpose.

<sup>19</sup> E.g. Belgium, Brazil, Japan, Portugal, the US.

competition agencies to share information or coordinate in taking action against antitrust infringers.<sup>20</sup>

### **3.2.2. Sanctions**

Based on the questionnaire's responses, 17 jurisdictions indicated that there are possible sanctions or other measures that could result from a finding by either the competition agency or the courts that a company has breached competition laws. A further 5 jurisdictions replied that such resulting regulatory sanctions are available but it is not entirely clear how regulatory sanctions would apply to competition law infringements, as there are no examples to date.

The most common form of such sanctions is debarment or restrictions on future public projects, for a certain period.<sup>21</sup> In some situations, removal of licenses is also an available sanction.<sup>22</sup>

For jurisdictions which have such possible sanctions in place, responses generally suggest that they may constitute a disincentive for leniency applications, albeit to varying degrees, depending on a number of factors. One key factor is whether there are protections for the leniency applicant from such sanctions.

In Lithuania, tenderers that have engaged in collusive agreements may be excluded from public procurement procedures by the contracting authority. However, Lithuania also has protections in place for leniency applicants, namely that undertakings granted full immunity with respect to their competition violations are protected under legislation from disqualification in public procurement projects. A very similar solution exists in Hungary, where the Act on Public Procurement releases debarment if leniency has been granted to the undertaking. In Japan, a company is usually disqualified from bidding for government contracts for a certain period of time after the JFTC finds a violation and takes legal action against it. Each governmental agency decides whether it disqualifies competition law infringers from its projects, and how long the disqualification period should be, based on its own policy. However, in order to ensure the functioning of the leniency programme, the JFTC's relevant guideline recommends that such disqualification periods be reduced by half for a leniency applicant. This proposed guideline was adopted by the central government ministries and is generally complied with by most agencies.

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<sup>20</sup> E.g. Colombia, Italy, Lithuania, New Zealand, Poland, Turkey, UK.

<sup>21</sup> E.g. Australia, Canada, Hungary, Japan, Lithuania, South Korea, US.

<sup>22</sup> E.g. Brazil, Panama.

### **3.3. Good practices regarding the interaction between leniency programmes and other forms of regulatory intervention**

#### ***3.3.1. Education initiatives for regulators to increase risk of detection by regulators***

Although not many jurisdictions impose reporting obligations on regulated companies, some jurisdictions require industry regulators to report potential competition law infringements to the competition agency.

1. In general, a higher risk of detection incentivises more leniency applications.<sup>23</sup> It is a good practice for competition agencies to devote resources to educational initiatives for other regulators and public procurement professionals (e.g. training, non-collusion certificates and clauses for procurement professions). Indeed, this will enhance the possibility of detection by procurement bodies and other regulators, thereby incentivising regulated companies to seek leniency before the competition agency.<sup>24</sup>

#### ***3.3.2. Protection from or discounts in regulatory sanctions for leniency recipients***

2. In order to mitigate this disincentive, it is a good practice to grant leniency recipients either full protection or discounts from debarment from future procurement projects.<sup>25</sup> This is particularly true where the leniency applicant is the first to come forward in circumstances where there is no pre-existing investigation. In concentrated markets, such an approach may benefit competition because former cartelists can continue to compete.

#### ***3.3.3. Enhanced cooperation and communication between competition agencies and other regulators<sup>26</sup>***

3. In situations where protections and discounts cannot be set out formally in legislation, rules or memoranda of understanding, enhanced cooperation and communication between competition agencies and other regulators would still be useful in working out

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<sup>23</sup> An exception to this principle is when an undertaking fails to report to the regulator on the cartel risk when this was due. In this situation, the undertaking may fear regulatory sanctions for failing to report the matter so much that it may decide to hide the behaviour completely. In such a scenario, the conduct would not be reported to the competition agency at all, irrespective of how good the leniency programme is, because of regulatory sanctions.

<sup>24</sup> Such educational initiatives have been pursued by jurisdictions including Australia and Hong Kong.

<sup>25</sup> E.g., In the US, under the DOJ Antitrust Division's Corporate and Individual Leniency Programmes, leniency applicants are granted full immunity and do not receive a conviction, and as a result, would not face debarment. In Spain, there is still no experience with this, but the exemption for leniency applicants should encourage applications.

<sup>26</sup> See also the Chapter on Relationships between Competition Agencies and Public Procurement Bodies, ICN CWG Subgroup 2: Enforcement Techniques, of the Anti-Cartel Enforcement Manual of April 2015.

ways to mitigate associated disincentives or offset some of the harm to competition that may result from regulatory sanctions.<sup>27</sup>

4. In the course of a cartel investigation against companies subject to regulatory oversight, competition agencies should allow investigated companies to put them in contact with the respective regulators, in order to avoid situations that could put the cartel investigation at risk.
5. Regulators should not be required to reproduce the competition agency's file in order to conduct their own investigation: they can use their own investigative powers to request relevant information to conduct their own investigation.<sup>28</sup>

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<sup>27</sup> See for example the Memoranda of Understanding between the UK CMA and the FCA in relation to their concurrent competition powers and the single queue system to ensure greater clarity and certainty for regulated bodies when considering an application for leniency.

<sup>28</sup> In the United Kingdom, sector regulators have concurrent powers to enforce competition law alongside the CMA in their respective regulated sectors. The CMA may share information, including leniency applications, with other competent concurrent regulators for the purpose of determining whether they have jurisdiction to exercise competition powers and, if so, whether they wish to exercise them in the particular case. The disclosure of a leniency application in that context would be subject to applicable laws, including the relevant provisions of the Concurrency Regulations, and the specific Memorandum of Understanding between the CMA and that regulator. The Memoranda of Understanding contain restrictions preventing the sector regulators from using that information for purposes other than their powers to enforce competition law.

## 4. Factsheets

### Based on the 2017-2018 ICN CWG SG 1 Survey on the key elements for an efficient and effective leniency programme and its application

#### 4.1. General overview of leniency systems

##### 4.1.1. General characteristics of leniency regimes

###### The coverage of leniency regimes

Based on the replies of the responding competition agencies, the leniency systems of the responding jurisdictions show quite an interesting picture.<sup>29</sup>

Table 1 – The coverage of leniency regimes (replies of agencies)

Practice covered by the leniency	No. of replies	Jurisdictions
Price fixing	34	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MU, MX, MY, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Market sharing	34	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MU, MX, MY, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Bid rigging	34	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MU, MX, MY, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Output restrictions	34	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MU, MX, MY, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Vertical violations	14	AU, BR, CH, CO, CY, HK, HU, KR, LT, PL, RU, SE, TW, UK <sup>30</sup>
Other	6	BR, EU, FR, HK, KR, MX

<sup>29</sup> Please note that readers should not use the information in this section as a guide in place of the relevant jurisdictions' published legislation and guidance.

<sup>30</sup> In the UK, only resale price maintenance is covered.

## The elements of leniency policies

Based on the replies of the responding competition agencies, the elements of the leniency policies differ from one jurisdiction to another.

Table 2- **The elements of leniency policies** (replies of competition agencies)

<b>Elements of leniency policy</b>	<b>No. of replies</b>	<b>Jurisdictions</b>
Immunity for uncovering a cartel unknown to the competition agency	32	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IT, JP, KR, LT, MY, MU, MX, NL, NZ, PL, RU, SE, TR, TW, UK, US
Immunity for cartels which are already under the investigation of the competition agency	30	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, KR, LT, MX, NL, NZ, PL, RU, SE, TR, TW, UK, US
Partial immunity <sup>31</sup>	19	AL, CH, CO, CZ, ES, EU, FI, FR, HK, HU, IT, KR, LT, MY, NL, NZ, TR, TW, UK
Reduction of fines for subsequent leniency applicants	31	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IT, JP, KR, LT, MY, MU, MX, NL, NZ, PL, RU, SE, TR, TW, UK
Other ('Amnesty Plus')	8	AU, BR, CO, HK, IT, TR, UK, US

<sup>31</sup> As defined in the ICN 2017 Leniency Checklist: Partial immunity: If a party (already qualifying for a reduction of fines) is the first to disclose facts previously unknown by the agency that extend the gravity or duration of the conduct under investigation, it will also qualify for immunity regarding that resulting portion of the sanction.'



## Conditions of leniency

When we look through the replies of the responding competition agencies, the conditions required to get leniency/immunity are very similar in every jurisdiction, except for the requirement for the applicant to disclose its participation in the cartel and the applicant's continuation in the cartel if the competition agency requires it.

Table 3 - **Conditions of leniency** (replies of agencies)

Conditions of leniency	No. of replies	Jurisdictions
Sincere cooperation with the competition agency, providing evidence about the cartel	33	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, KR, LT, MY, MU, MX, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Full and frank explanation throughout the whole procedure	33	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, KR, LT, MY, MU, MX, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Termination of the participation in the cartel	31	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, KR, LT, MY, MU, MX, NL, NZ, PL, RU, SE, TW, UK, US
Continuation of the participation in the cartel if the competition agency so requires	21	AL, AU, CO, CY, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, LT, MU, MX, NL, NZ, TR, UK
Evidence shouldn't be destroyed, falsified or concealed	32	AL, AU, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MY, MX, NL, NZ, PL, RU, SE, SV, TR, TW, UK, US
Leniency applicant should not have coerced other undertakings to participate in the cartel	28	AL, AU, CH, CO, CY, CZ, DE, ES, FI, FR, GR, HK, HR, HU, IE, JP, KR, LT, MY, MU, NL, NZ, PL, SE, TR, TW, UK <sup>32</sup> , US
Leniency applicant should not disclose its participation in the cartel	17	AL, AU, CO, CY, CZ, DE, ES, FI, FR, GR, HK, HU, KR, NL, NZ, TR, UK
Leniency applicant should admit its participation in the cartel	30	AL, AU, BR, CH, CO, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MY, MX, NL, NZ, RU, SV, TR, UK, US

<sup>32</sup> In the UK, this requirement is only a condition to qualify for immunity from penalties. Applicants who have coerced other undertakings to participate in a cartel and meet all the other conditions of leniency, may still qualify for a reduction in penalty.

## Procedural aspects of the leniency policies

Table 4 - Procedural aspects of the leniency policies (replies of agencies)

Procedural Elements of Leniency Policies	No. of replies	Jurisdictions
Markers are available	31	AU, BR, CH, CO, CY, CZ, DE, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MY, MU, MX, NL, NZ, PL, RU, SE, TR, TW, UK, US
Anonymous approaches are possible	22	AU, CH, CY, DE, FI, HK, IE, HR, IT, JP, LT, MU, MX, NL, NZ, PL, RU, SE, TR, TW, UK, US
Hypothetical applications are allowed	14	AU, CY, CZ, EU, IE, IT, HR, NL, NZ, PL, TR, TW, UK <sup>33</sup> , US
Leniency application may be revoked – evidence still remains available for the competition agency for later use	16	AU, CH, DE, IE, EU, FI, FR, HR, JP, KR, LT, MX, NL, NZ, TW, US
Leniency application may be revoked – evidence does not remain available for the competition agency for later use	15	BR, CO, CY, CZ, EU, FR, GR, HK, HU, IE, IT, LT, NZ, PL, ES
Summary applications are possible for international cases	17	AU, CZ, DE, FI, FR, GR, HR, HU, IE, IT, LT, NL, PL, ES, SE, TW, UK <sup>34</sup>
Written application is necessary	11	AL, CO, CY, HR, JP, LT, MU, MX, RU, SV, TR
Oral application is possible	25	AL, AU, BR, CZ, DE, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, MY, MU, NL, NZ, ES, SE, TR, TW, UK, US
Protection from disclosure of self-incriminating statements <sup>35</sup>	22	BR, CH, CO, CZ, DE, ES, EU, FI, FR, GR, HK, HR, IE, IT, JP, KR, MY, LT, NL, SE, TR, UK
Leniency plus <sup>36</sup>	13	AU, BR, CH, CO, HK, IT, KR, MU, NZ, PL, TR, UK, US
Penalty plus <sup>37</sup>	3	CH, NZ, US
Exchange of leniency information between competition authorities is possible (through waivers)	28	AU, BR, CH, CY, CZ, DE, ES, EU, FI, FR, GR, HK, HR, HU, IE, IT, JP, KR, LT, MY, MX, NL, NZ, PL, RU, SE, UK, US

<sup>33</sup> This relates to applications for confidential leniency guidance.

<sup>34</sup> This is only true of applications that are made in parallel to the European Commission.

<sup>35</sup> See point 8/f) of the Leniency Checklist.

<sup>36</sup> See point 9 of the Leniency Checklist.

<sup>37</sup> See point 9 of the Leniency Checklist.

#### 4.1.2. Key elements – incentives

Under the heading ‘Key elements – incentives’, the questionnaire listed several elements which might act as incentives for leniency applications.

The following table shows the elements listed in the questionnaire and the jurisdictions represented by the respondent competition agencies and NGAs that graded each of the elements:

Table 5 – Key elements - incentives

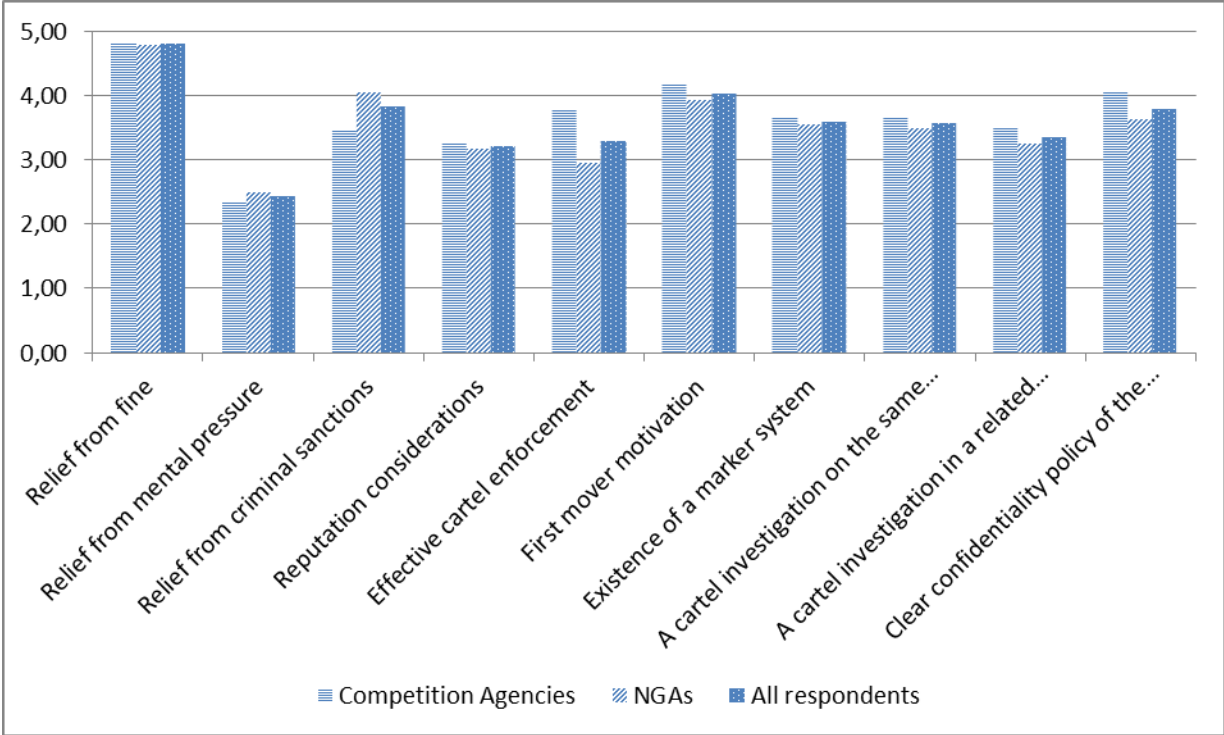
Elements	Competition agencies		NGAs <sup>38</sup>	
	No. of replies	Jurisdictions	No. of replies	Jurisdictions
Relief from fine	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Relief from mental pressure	27	AL, AU, BR, CO, HR, CY, CZ, FI, FR, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Relief from criminal sanctions	23	AL, AU, BR, CO, HR, CY, CZ, FR, HU, IE, IT, JP, KR, MY, MU, MX, PL, RU, ES, SE, CH, TW, NL	40	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK5, HU, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Reputation considerations	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	42	AU1, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3

<sup>38</sup> The replies of more than one NGA from the same jurisdiction appear with the code name of that jurisdiction numbered (e.g. AU1, AU2 etc.).

Effective cartel enforcement	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	42	AU1, AU2, BE, BR1, BR2, BR3, CA, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
First mover motivation	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Existence of a marker system	29	AL, AU, BR, CO, HR, CY, CZ, FI, R, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	42	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
A cartel investigation on the same market in another jurisdiction	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
A cartel investigation in a related sector by the national competition or regulatory agency	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	42	AU1, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Clear confidentiality policy of the competition agency	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, MY, NZ, PL, RU, ES, SE, CH, TW, NL	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3

Competition agencies and NGAs were asked to grade the listed elements according to the influence they perceive such elements have in the decision to apply for leniency ('1' means less influential while '5' means very influential). The responses to the questionnaire provided by both the competition agencies and NGAs and the grades are summarised in the chart below:

Chart 1



**Table 6 – Some additional ideas to incentivise leniency applications**

<p>Incentives concerning enforcement agencies</p>	<ul style="list-style-type: none"> <li>- Preparedness of agencies to take a view on the essential features of a cartel and then settle without circling back and prosecuting similar cases at a later stage (UK NGA)</li> <li>- Reputation of and experiences with the relevant agency (and interpretation of scope of interpretation of duty to cooperate) (NL NGA)</li> </ul>
<p>Incentives concerning leniency programmes and/or enforcement regimes</p>	<ul style="list-style-type: none"> <li>- Prior experience of regime (UK NGA)</li> <li>- Whistleblowing systems (whether financially rewarded or not), given the direct threat of current or former employees reporting wrongdoing (HU CA, FR CA)<sup>39</sup></li> <li>- Limitation of/protection from civil liability (DE NGA, HK CA)</li> <li>- Avoiding treble damages and joint and several liability (BE NGA)</li> <li>- Improved co-existence of leniency programmes and damages actions by: (i) excluding discoverability in damages actions; (ii) granting leniency applicants a conditional rebate on damages in return for helping victims bring claims against all cartel members; (iii) removing joint liability of leniency applicant; (iv) removing joint and several liability of immunity recipient if other cartelists are solvent; (v) introducing a right for the immunity recipient to obtain up to 100% contribution from non-leniency recipients (MY CA)</li> </ul>
<p>Incentives concerning stakeholders</p>	<ul style="list-style-type: none"> <li>- Compliance Programmes (BR NGA)</li> <li>- Obligation to report wrongdoing in other jurisdictions (BR NGA)</li> <li>- Due diligence process during merger operations (FR CA)</li> <li>- To send a message to internal staff that infringement of competition laws will not be tolerated (HK NGA)</li> <li>- Leniency application by the same undertaking (group of undertakings) on the same market in another jurisdiction (HU NGA)</li> <li>- Leniency application by the same undertaking (group of undertakings) in a related sector (HU NGA)</li> <li>- Company culture, i.e. where company has a strong compliance, zero tolerance ethos (SE NGA)</li> <li>- Minimising reputational damage (EU NGA)</li> <li>- Reducing risks of derivative lawsuits by shareholders on failure of leniency-application at the right time (JP CA)</li> </ul>
<p>The remaining reasons acting as incentives</p>	<ul style="list-style-type: none"> <li>- International cooperation (ES CA)</li> <li>- Taking over of an undertaking suspected of anticompetitive conduct</li> </ul>

<sup>39</sup> On the other hand, according to an NGA, the existence of whistleblowing systems may discourage companies from conducting internal investigations if there are concerns that employees may report conduct under internal investigation before the company is ready to do so.

	<p>(CZ CA)</p> <ul style="list-style-type: none"><li>- International cooperation ensuring that cases are only pursued by the agencies in the jurisdictions directly affected (BE NGA)</li><li>- The promotion of the leniency programme which has been done through radio and internet (MX NGA)</li><li>- Promotion and distribution of information regarding the programme and its benefits (MX CA)</li><li>- More information about competition law requirements and the leniency procedure itself (LT CA)</li><li>- Press releases and advertisements in media (ES CA)</li></ul>
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### 4.1.3. Key elements – disincentives

The questionnaire explicitly listed several elements that might act as disincentives deterring leniency applications. Those elements, together with the names of the jurisdictions represented by respondent competition agencies and/or the NGAs opting for the relevant element, are set out below:

Table 7 - Key elements – disincentives

Elements	Competition Authorities		NGAs <sup>40</sup>	
	No. of replies	Jurisdictions	No. of replies	Jurisdictions
Exposure to private enforcement	27	AL, AU, BR, CO, HR, CY, CZ, FI, FR, HK, HU, IE, IT, JP, KR, LT, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Exposure to criminal sanctions	24	AL, AU, BR, CO, HR, CY, CZ, FI, FR, HU, IE, IT, JP, KR, MU, MX, PL, RU, ES, SE, CH, TW, NL, TR	41	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Exposure to individual sanctions or other consequences (other than criminal)	27	AL, AU, BR, CO, HR, CY, CZ, FI, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR	41	AU1, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Fear of being labelled a traitor	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR, SV	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Reputation	29	AL, AU, BR, CO,	43	AU1, AU2, BE, BR1, BR2, BR3, CA,

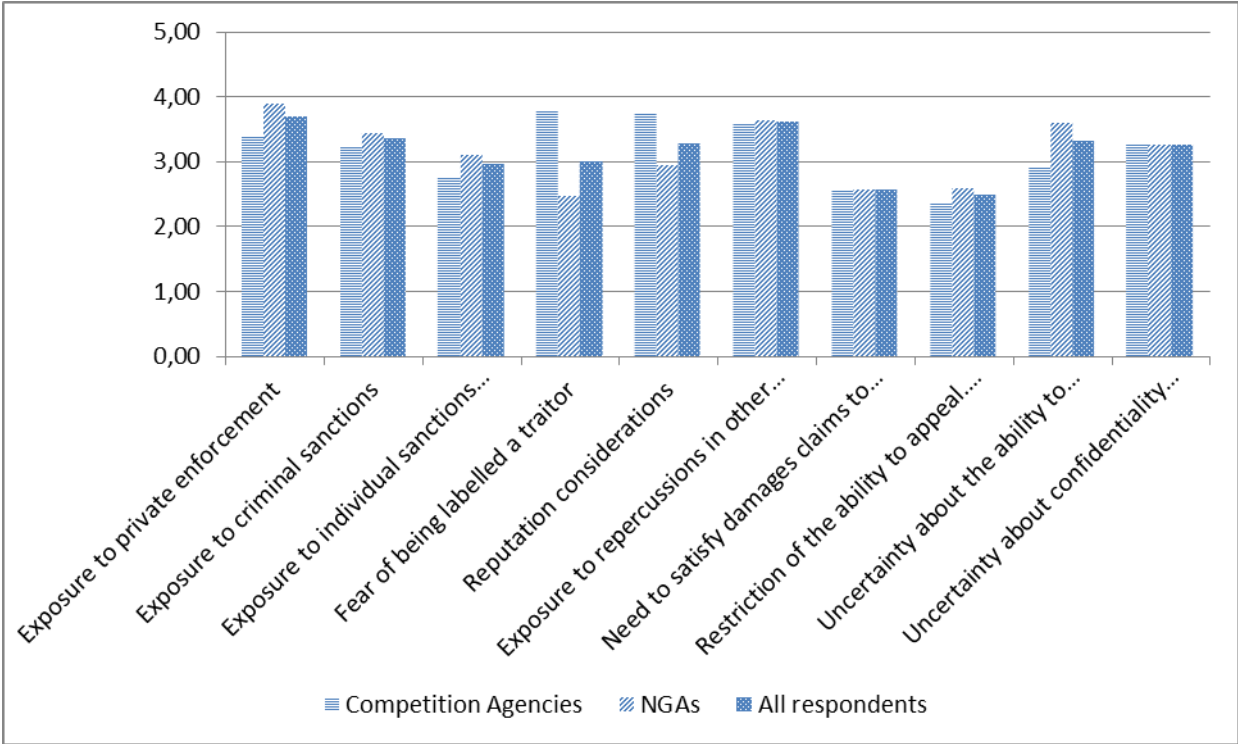
<sup>40</sup> NGAs are not necessarily referring exclusively to their experience of leniency programmes within their own jurisdictions.



considerations		HR, CY, CZ, FI, FR, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR, SV		EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Exposure to repercussions in other sectors or jurisdictions (follow-on investigations by the competition authorities or by investigations related to other crimes e.g. corruption, money laundering or others)	29	AL, AU, BR, CO, HR, CY, CZ, FI, FR, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR, SV	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Need to satisfy damages claims to qualify	25	AL, AU, BR, CO, HR, CY, CZ, FI, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL	35	AU1, AU2, BE, BR2, BR3, CA, EU2, FR, DE1, DE2, GR, HK2, HK3, HK5, HU, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, NL, UK1, UK2, US1, US2, US3
Restriction of the ability to appeal (If the rest appeal successfully, the leniency applicant is the last man standing)	26	AL, AU, BR, CO, HR, CY, CZ, FI, FR, HK, HU, IE, IT, JP, KR, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3
Uncertainty about the ability to obtain leniency	30	AL, AU, BR, CO, HR, CY, CZ, FI, FR, DE, HK, HU, IE, IT, JP, KR, LT, MY, MU, MX, NZ, PL, RU, ES, SE, CH, TW, NL, TR, SV	43	AU1, AU2, BE, BR1, BR2, BR3, CA, EU1, EU2, FR, DE1, DE2, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL1, PL2, PL3, SG, ES1, ES2, ES3, ES4, SE1, SE2, NL, UK1, UK2, US1, US2, US3

The respondents were requested to grade the elements from 1 to 5 (1 meaning 'less influential' and 5 meaning 'very influential'). The responses and the grades are summarised in the below chart:

Chart 2



In addition to those elements overtly listed in the questionnaire as disincentives, the respondents had the opportunity to cite further disincentives under 'other category of disincentives'. These elements can be grouped into various categories as shown in the following table:

Table 8 – Other categories of disincentives

<p>Disincentives concerning enforcement agencies</p>	<ul style="list-style-type: none"> <li>- Reputation of the national competition agency (NL NGA)</li> <li>- High standards of the competition agency to grant leniency (BR NGA)</li> <li>- Lack of confidence in the administrative authorities (MX NGA)</li> <li>- Credibility of the national competition agency (ES NGA)</li> <li>- Lack of certainty about the approach to investigation and exercise of discretion (UK NGA)</li> <li>- Absence of leniency programme in other relevant jurisdictions (HU NGA)</li> <li>- Uncertainty about the eligibility for leniency. (EU CA)</li> </ul>
<p>Disincentives concerning leniency programs and/or</p>	<ul style="list-style-type: none"> <li>- Lack of benefits that are appealing enough for the potential applicants (SV CA)</li> <li>- Lack of leniency benefits for subsequent applicants (SV CA)</li> </ul>

enforcement regimes	<ul style="list-style-type: none"> <li>- Lack of full or partial immunity from fines (AL CA)</li> <li>- Absence of possibility for oral leniency applications (EU CA)</li> <li>- Access to file for plaintiffs (NL NGA)</li> <li>- Waiver of attorney-client privilege discovery in civil proceedings (US NGA)</li> <li>- Absence of criminal sanctions for cartel conduct (NZ CA)</li> <li>- A strong judicial review annulling decisions taken and fines imposed by the competition agencies in cartel cases (ES CA)</li> <li>- Absence of compensation to a leniency party to offset private action damages (HK NGA)<sup>41</sup></li> <li>- Absence of a 'one-stop shop' for leniency applications regarding international cartels (MX NGA)<sup>42</sup></li> <li>- In bid-rigging cases, consequences of leniency application on future prohibition to bid for contracts with public authorities (ES NGA)</li> </ul>
Disincentives concerning stakeholders	<ul style="list-style-type: none"> <li>- Lack of knowledge/awareness regarding the leniency programme (SV CA, HK NGA, IE CA, MY CA, MX NGA, ES NGA)</li> <li>- Cost of providing full cooperation to national authority for the duration of investigation (HK NGA)</li> <li>- Fear of retaliation from competitors (HK CA)</li> <li>- Limited access to the leniency programme, including cost implications of legal advice (MX NGA)</li> <li>- Inconsistent and/or lack of proper legal advice from lawyers (due to radical change from the adversarial/litigation approach to cooperation under leniency with the competition agency to prove the cartel) (MU CA)</li> <li>- First to have a decision and be singled out as only participant (UK NGA)</li> </ul>
The remaining reasons acting as disincentives	<ul style="list-style-type: none"> <li>- Cultural: e.g. effect of the former planned economy system in Hungary (HU CA)</li> <li>- Culture in general (CY CA)</li> <li>- Sociological reasons: cooperation with the State implies support for undemocratic regime due to former Communist background (PL NGA)</li> </ul>

<sup>41</sup> Here, one of the NGAs from Hong Kong mentions the idea of enabling the competition agency to provide compensation to the relevant party as an incentive to file a leniency application without creating incentives for collude-and-report strategies.

<sup>42</sup> One of the Mexican NGAs suggests that it is time to consider the possibility of a 'one-stop shop' for leniency applications regarding international cartels.

**4.2. Interaction between leniency and other policies**

**4.2.1. Leniency to be applied in more jurisdictions**

**Problems stemming from different leniency rules in different jurisdictions**

As regards the question, whether the respondent has faced any problem due to the differences between the rules or parameters of leniency programmes, 72 replies resulted in the outcome listed in the table below.

**Table 9- Problems stemming from different leniency rules in different jurisdictions**

Have you ever faced problems stemming from the different rules / parameters of leniency programmes of different jurisdictions?				
	Yes		No	
Total	22		50	
CAs	4	BR, CO, EU, US	27	AL, AU, HR, CZ, SV, FI, FR, HK, HU, IE, IT, JP, KR, LT, MU, MX, NL, NZ, PL, RU, ES, SE, CH, TW, TR, UK, MY
NGAs	18	AU1, AU2, BE, BR1, BR2, CA, UK, EU1, DE1, DE2, FR, HK1, HK4, HU, NL, PL1, SE2, US2	23	BR3, EU2, GR, HK2, HK3, HK5, IT, MX1, MX2, MX3, MX4, MX5, MX6, MX7, PL2, PL3, SG, ES1, ES2, ES3, SE1, US1, US3

**4.2.2. Impact of the regulators’ reporting obligation on leniency**

The questionnaire inquired about the problems the respondents may have experienced concerning the reporting-based cooperation obligation of other regulatory bodies.

**Table 10 - Potential problems stemming from the obligation of other regulators to notify the potential competition law violations to the competition agency**

Have you ever faced problems stemming from the obligation of other regulators to notify a potential competition law violation to the competition agency?				
	Yes		No	
Total	8		59	
CAs	1	TW	28	AL, AU, BR, CO, HR, CZ, EU, FI, FR, HU, IE, IT, JP, KR, LT, MU, MX, MY, NL, NZ, PL, RU, ES, SE, CH, TR, UK, US
NGAs	6	BE, MX1, PL3, ES2, ES3, UK1	32	AU, BR1, BR2, BR3, CA, DE1, DE2, EU1, EU2, FR, GR, HK1, HK2, HK3, HK4, HK5, HU, IT, MX2, MX3, MX4, MX5, MX6, MX7, NL, PL1, PL2, ES1, SE, UK2, US1, US2

#### **4.2.3. Leniency/plea bargaining vs. individual sanctions**

##### **Availability and regime of leniency/plea bargaining for individuals**

All 76 respondents except one provided answers to the question whether the opportunity of leniency/plea bargaining exists for individuals in their respective jurisdictions. According to the responses, the number of jurisdictions allowing individuals to apply for leniency/plea bargaining is almost the same as those which do not present individuals with such options.

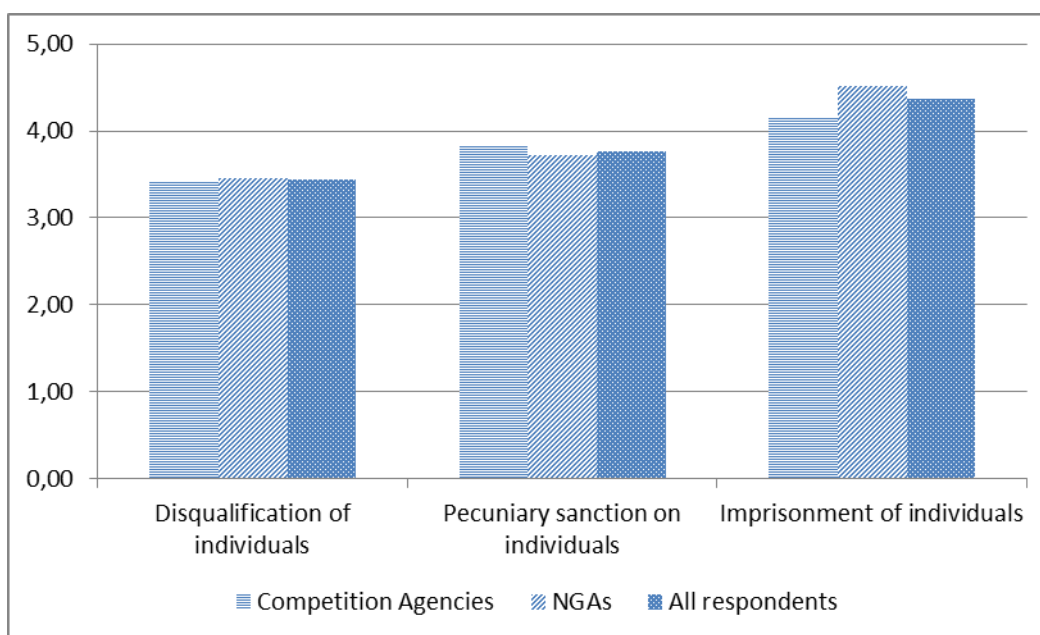
**Table 11 - Availability of leniency to individuals by jurisdiction**

Is leniency available to individuals in your jurisdiction?	Total	Jurisdictions
Yes	18	AU, BR, CA, CO, DE, ES, GR, HK, KR, LT, MX, NL, NZ, PL, SE, TR, UK, US
No	16	AL, CH, CY, CZ (immunity against criminal prosecution), EU, FI, FR, HR, IE (immunity against criminal prosecution), IT, JP, MU, MY, RU, SV, TW
Mixed responses	1	HU

### Comparison of individual sanctions

Further exploring the influence individual sanctions have on the advance of corporate leniency applications, the questionnaire asked respondents to rate sanctions or other measures, such as pecuniary sanctions, imprisonment and disqualification, in terms of their relevance to the aforementioned end. The respondents were given a scale from 1 to 5 where '1' corresponds to 'not relevant at all' and '5' reflects 'very high relevance'. The responses have split up in the following way, as presented in the chart below (the first three 'most appreciated' individual sanctions).

Chart 3



#### 4.2.4. Private enforcement of competition law and private damages

The questionnaire asked a number of questions, exploring the relationship between leniency and private enforcement.

##### **General: availability of private actions**

Across all responses by competition agencies and NGAs, a total of 36 countries/regions were represented. Only one stated that private enforcement of competition law and private damages was not possible in their jurisdiction, indicating a 'Yes' result of 97%. Most respondents indicated that there is a legislative basis for the right to private damages which has been in place for many years – often more than 10 years, and in some cases for significantly longer than that.

**Table 12 – Jurisdictions where private enforcement of competition law and private damages are possible**

	Yes	No
Is private enforcement of competition law and private damages possible?	AL, AU, BE, BR, CA, CO, HR, CY, EU, FI, FR, DE, GR, HK, HU, IE, IT, JP, KR, LT, MU, MX, NZ, PL, SG, ES, SE, CH, TW, TR, UK, US, CZ, NL	RU

**Table 13 – Availability of rules releasing or easing the burden of the leniency applicant from paying damages**

	Yes	No
Are there rules releasing or easing the burden of the leniency applicant from paying damages in your jurisdiction?	BE, CZ, DE, ES, EU, FI, FR, GR, HR, HU, IT, LT, MX, NL, PL, SE, UK, US,	AL, AU, BR, CA, CO, CY, HK, IE, JP, KR, MU, NZ, CH, TW, TR,

## 5. Overview of the different national private enforcement rules

(The national existing rules as confirmed by the ICN member agencies)

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
Albania						
Australia	Section 82 Competition and Consumer Act 2010				Sections 155AAA, 157B and 157C of the Competition and Consumer Act 2010	The ACCC will use its best endeavours to protect confidential information provided by a leniency applicant being disclosed to third parties or published more generally, except as required by law or as necessary in the conduct of civil proceedings or criminal prosecution. In relation to criminal matters disclosure obligations may also require disclosure of such information
Austria	Cartel Act of 2005 ('KartG'), Section		Sections 37e(3), 37h(3) KartG,		Section 37k(4) KartG	



Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
	37c Abs 1, General Civil Code ("AGBGB") Sections 1295(1), 1311 sentence 2		Section 37e(4), 1 <sup>st</sup> and 3 <sup>rd</sup> sentence KartG			
Belgium	Code of Economic Law ('CDE'), art XVII. 72		CDE, art XVII. 86, Paragraph 3, CDE, art XVII. 90, Paragraph 1, first sentence and Civil Code, art. 2262bis, Paragraph 1, second sentence  CDE, art XVII. 87, Paragraph 1 and paragraph 2, first subparagraph		CDE, art XVII. 79, Paragraph 2	
Brazil			Senate Bill nº 283 of 2016 proposes to change article 47 of Law 12.529/2001 (Brazilian Competition Law)			
Bulgaria	Law on protection of competition (LPC), Art. 105		LPC, Articles 115(4) and 111(3)  LPC, Art. 116		LPC, Art. 118(5)	
Canada	Section 36 of the Competition Act		N/A		Paragraph 220 of the Immunity and Leniency Programs	This is a policy (not a law)

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
Colombia	<p>Class actions: Articles 2 and 3 of Law 492 of 1998.</p> <p>Civil liability actions: article 2341 of the Civil Code, before civil judges.</p>		<p>Decree 1523 of 2015: -Article 2.2.2.29.2.2 (numbers: 1, 2 and 3) -Article 2.2.2.29.4.1</p>	<p>- Full amnesty to the first applicant - A reduction of 30 % up to 50 % of the sanction to the second applicant. - Up until 25 % of a sanction reduction to the third and the rest of the applicants. The “first in” applying for leniency benefits can earn an additional 15% reduction by disclosing the existence of a different cartel in another market. “Facilitators” may receive extra benefits when revealing the existence of a restrictive practice, different from a cartel.</p>	<p>2.2.2.29.4.3 of Decree 1523 of 2015</p> <p>Paragraph 2 of Article 15 of Law 1340 of 2009</p>	
Croatia	Act on Damage		DA, Art. 14 (2),		DA, Art. 9 (1)1	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
	Claims for the Breach of Competition Law ('DA'), Art. 5 (1)		Competition Act, Art. 69 a (6)  DA, Art. 14 (3) and (5)			
Cyprus	The Law on Actions for Damages for Infringements of Competition Law of 2017, Law 113(I)/2017 ('Law 113(I)/2017'), Article 4(1)		Law 113(I)/2017, Articles 11(4) and 10(1)  Law 113(I)/2017, Art. 11(5)		Law 113(I)/2017, Article 6(4)(a)	
Czech Republic	Act on Actions for Damages in the field of Competition Law, and on Amendment to the Act No. 143/2001 Coll., on Protection of Competition and Amendments to Certain Acts ('ZNSHS'), Section 4(1)		ZNSHS, Section 6(1), (2)  ZNSHS, Sections 5(2) and 6(3)		ZNSHS, Section 15(1)	
Denmark	Act No 1541 of 13 December 2016 on the processing of actions for damages relating to infringements of		DIC Sections 8(4), 15(6)  DIC Section 8(5)		DIC Section 5(3), first sentence	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
	competition law, ('DIC') Section 3(1), first sentence					
Estonia	Competition Act (CA), Section 78		CA, Sections 78 <sup>4</sup> (4), 78 <sup>7</sup>  Law of Obligations Act, Sections 69, 137, CA, Section 78 <sup>4</sup> (5), first sentence		CA, Section 78 <sup>8</sup> (4), pt. 1	
European Union	Article 3(1) of the Damages Directive		Article 11 (4)-(6) of the Damages Directive		Article 6(6)(a) of the Damages Directive	
Finland	Act on Damages in the field of competition law (1077/2016) ('LKV'), Section 2(1)		LKV, Section 4(2) LKV, Section 10, Tort Liability Act (412/1974) ('VL'), Chapter 6, Section 3 LKV, Sections 5(1) and 4(2), VL, Chapter 6, Section 2		LKV, Section 8(4)	
France	French Civil Code ('C.civ. '), Art. 1240  French Commercial Code ('C.com. '), Art. L. 481-1		C.com., Art. L. 481-11, C.com., Subpara. 6 Art. L. 482-1  C.civ., Art. 1317, C.com., Sent. 2 Art. L. 481-9, C.com., Art. L. 481-12		C.com., Subpara. 2 Art. L. 483-5	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
Germany	Act against Restraints of Competition ('CA'), Articles 33 (1), 33a (1)		CA, Article 33e (1) and Articles 33h (1), (3), (4), (8) and 33e (2)  CA, Articles 33d (2) and (4), 33e(3)		CA, Article 33g (4) 1 and Article 89c	
Greece	Law No 4529/2018 – Transposition into Greek legislation of Directive 2014/104/EU ('L.4529'), Art. 3		L.4529/2018, Articles 10(4 and 7) and 8(3)  L.4529/2018, Art. 10 (6)		L.4529/2018, Art. 6(5)(a) and (c)	
Hong Kong	Competition Ordinance, Part 7, in particular Section 110	Follow-on action by private parties in principle only possible after a finding of a contravention by courts in Hong Kong in proceedings initiated by the Hong Kong Competition Commission (HKCC).	Competition Ordinance, Section 80		- Competition Ordinance, Sections 125 and 123  - Hong Kong Competition Commission (HKCC)'s Leniency Policy, Paras. 5.5 and 5.7	Under Competition Ordinance, Section 126 (1) (b) and (d), the HKCC may be compelled to make a disclosure by an order of a court, by law or any requirement made by or under a law. Confidential information (which may include self-incriminating statements) may also be disclosed if agreed with the leniency applicant:

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
						Paras. 5.5 and 5.7 of Leniency Policy.
Hungary	Act V of 2013 on the Civil Code ("CC"), Art. 6:519  Act LVII of 1996 on the Prohibition of Unfair Trading Practices and Unfair Competition ('CA'), Art. 88/D(1)		CA, Articles 88/H and 88/I		CA, Art. 88/N(1)b	
Ireland	European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017 ('Regulation') 4(1)		Regulation 10(4), Limitation period: general rules in the Statute of Limitations Act 1957  Regulation 10(5)		Regulation 6(4)	
Italy	Civil Code, Art. 2043		Legislative Decree No 3 of 19 January 2017 ('Lgs.D. 3/2017'), Art. 9(3) and (4)  Civil Code, Article 2055, 2 <sup>nd</sup> paragraph, Lgs.D. 3/2017, Art. 9(5)		Lgs.D. 3/2017, Art. 4(5)	
Japan	Civil Code, Article 709, The Antimonopoly Act Article 25				- Antimonopoly Act, Art. 52(1) - Civil Procedure Code, Art. 220	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
					(iv)(b)	
Korea					Monopoly Regulation and Fair Trade Act, Art. 22-2	Information related to leniency application may be provided to the Court under the consent of the leniency applicant or when it is necessary for the execution of the litigation as an exception
Latvia	Competition Law ('CL'), Article 21, part one		CL, Article 21, part 7, Civil Law, Articles 1895, 1902-1906 CL, Article 21, part 8 and part 9		Civil Procedure Law ('CPL'), Article 250.-67, part 1, Clause 1	
Lithuania	Law No XIII-193 of 12.1.2017 amending the Law on Competition No VIII-1099 (Register of Legal Acts, 2017, No 2017-01075) (KIPI), Articles 44(1) and 2(13)		KIPI, Articles 45(2), 49(1) pt (3), 49(2) KIPI, Article 46(1), (2) and (4), Civil Code, Article 6.279(2)		KIPI, Articles 21(8) pt (2), (10), 53(5) and (9)	
Luxembourg	Law of 5 December 2016 on certain rules		Law of 5 December 2016, Article 7,		Law of 5 December 2016, Article 4,	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
	governing actions for damages for infringements of competition law and amending the amended law of 23 October 2011 on competition ("Law of 5 December 2016"), Article 8, 1 <sup>st</sup> subparagraph, Civil code, Article 1382		paragraph 3, Limitation periods: Civil Code, Article 2262, Commercial Code, Article 189  Civil Code, Art. 1213, 1214,  Law of 5 December 2016, Article 7, paragraph 4		paragraph 3, point a)	
Malaysia						
Malta	Competition Act, Schedule Article 27A, Article 4(1)		Competition Act, Schedule Article 27A, Article 11(4)  Article 11(6)		Competition Act, Schedule Article 27A, Article 6 (5)	
Mauritius						
Mexico					FECL, Art. 103	Without identifying the leniency applicant, documents provided in the context of the leniency process may be disclosed, especially during the administrative proceeding to allow



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	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
						for the right of defence (due process of law) to alleged wrongdoers
New Zealand					Official Information Act 1982, sections 6(c) and 5	During private litigation, the High Court will determine whether documents can be disclosed
Poland	Act of 21 April 2017 on claims for damages caused by infringement of competition law ('CFD'), Article 3,  Polish Civil Code('CC'), Article 361		CFD, Articles 5(2), 9(1), (2)  CFD, Article 5(3), Civil Code, Article 441(2),(3)		CFD, Article 18(1)	
Portugal	Law 23/2018, Article 3(1)		Law 23/2018, Articles 5(4) and 6(3)  Law 23/2018, Article 5(5)-(7)		Law 2/2018, Article 14(5)(a)	
Romania	Government Emergency Ordinance No. 39 of 31 May 2017 on actions for damages in cases of		GEO No. 39/2017, Articles 11 (4), 10(3) and (4)  GEO No. 39/2017, Article 11 (5)		GEO No. 39/2017, Article 6 (9) a)	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
	infringement of competition provisions, as well as for the amendment of the Competition Law No. 21/1996 ('GEO No. 39/2017'), Article 3 (1)					
Russia		Lack of legislative guidance for damage calculation				
Singapore						
Slovakia	Act No 350/2016 Coll. laying down rules relating to the exercise of claims for compensation for harm caused by an infringement of competition law and amending Act No 136/2001 Coll. on the protection of economic competition and amending Slovak National Council Act No 347/1990 Coll. on the organisation of		Act No 350/2016, Article 6(7)  Act No 350/2016, Article 6(3) and (4)		Act No 350/2016, Article 16(1)(a)	

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
	Ministries and other central government bodies of the Slovak Republic, as amended, as amended ('Act No 350/2016'), Article 3(1)					
Slovenia	Prevention of Restriction of Competition Act ('ZPOmK-1'), Art. 62, para. 1, Obligations Code ('OZ'), Art. 131, para. 1, Civil Procedure Act, Art. 76, para. 1		ZPOmK-1, Art. 62.i, paras. 1 and 2  OZ, Articles 404, 405, ZPOmK-1, Art. 62.i, para. 3		ZPOmK-1, Art. 62.a, para. 1, pt. (b)	
Spain	Law 15/2007, of 3 July, on the Defense of Competition ('Law 15/2007'), Article No. 72(1)		Law 15/2007, Articles No. 73(4), 74(1)  Law 15/2007, Article No. 73(5)		Law 1/2000, of 7 January, of Civil Proceedings ('LEC'), Article No. 283bis(i)(6)(a)	
Sweden	Antitrust Damages Act ('KSL'), Chapter 2, Section 1		KSL, Chapter 2, Sections 2 and 4  KSL, Chapter 4. Sections 1 and 2(1)		KSL, Chapter 5, Section 5, first paragraph, point 1	
Switzerland					Federal Act on Administrative	Federal Act on Administrative

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	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
					Procedure, Arts. 26-28 G	<p>Procedure, Art. 27 G:</p> <p>(1) The authority may refuse to allow the inspection of the files only if: (a) essential public interests of the Confederation or the cantons, and in particular the internal or external security of the Confederation, require that secrecy be preserved; (b) essential private interests, and in particular those of respondents, require that secrecy be preserved; (c) the interests of an official investigation that has not yet been concluded so requires.</p> <p>(2) Any refusal to allow inspection may only extend to the documents that must remain</p>

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
						confidential. (3) At no time may a party be refused the right to inspect his own submissions, the official documents he has submitted in evidence or rulings issued to him; he may be refused the right to inspect the transcripts of his own statements only if the investigation has not yet been conclude
Taiwan					Freedom of Government Information Law, Art. 118	
The Netherlands	Dutch Civil Code('DCC'), Article 6:162		DCC, Article 6:193m (4), Article 6:193s  DCC, Articles 6:193n, 6:102, 6:101, 6:10		Dutch Code of Civil Procedure('DCCP'), Article 846 (1)(a)	
Turkey					Access to File Communiqué, Art.	Oral explanations can only be seen at

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
					7(2)	the premises of the Turkish competition Authority
United Kingdom	Competition Act 1998 ('CA 1998'), s. 47A, 47B, 47C and 47D	Section 54(1) of Competition Act 1998 and Schedule 8A, paragraphs 3(1) & (2), allow claims to be made in relation to concurrent regulation infringement decisions.	CA 1998, Sched. 8A, para. 15, para. 18(1) and (2)  CA 1998, Sched. 8A, paras. 38 and 16 Civil Liability (Contribution) Act 1978, ss. 1(1) and 2(1), Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, s. 3(2)		CA 1998, Sched. 8A, para. 28(b)	
United Kingdom (Gibraltar)	Fair Trading (Damages for Infringement of Competition) Rules 2016 ('FTR 2016'), r. 3 (1) & (2)		FTR 2016, r. 19(3), rules on ordinary limitation periods  FTR 2016, r. 27(1) and (2), FTR 2016, r. 20(1) and (2)(a) and (c)		FTR 2016, r. 11(3)	
United States of America	Clayton Act, 15 U.S.C. §15 (a) and Sherman Act, 15 U.S.C. §1	Competition law in the United States authorises the award of treble damages, plus attorney's fees, to private litigants.	Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA), See note to 15 U.S.C. §1, Public Law 108-237,			Pre-existing documents that are produced to the government as part of a leniency application do not receive confidential

Categories Jurisdiction	Availability of private enforcement of competition law		Availability of provision(s) benefitting leniency applicants		Availability of protection of leniency statements	
	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks	Relevant Provision(s)	Remarks
			title II, Section 213			treatment simply because they were produced to the government in support of a leniency request. However, access to materials obtained through a grand jury investigation are protected from disclosure by the grand jury secrecy rule and various common law privileges apply to the government's investigative files.

## 6. Summary of responses to the questionnaire on the interaction between competition enforcement and other regulatory intervention (July 2018)

1 (a) Is there any mechanism in your jurisdiction whereby regulated bodies have an obligation to notify potential competition law violations to their regulator?

Yes	No, but indirectly	No, but need to report to CA or certain sector competition regulator (e.g. telecoms)	No <u>obligation</u> , but have other mechanisms to coordinate/collaborate	No
1. EU NGA 4 (re: UK) <sup>43</sup> 2. UK 3. UK NGA	1. Australia 2. HK NGA 1 3. HK NGA 2 4. HK NGA 3 5. HK NGA 4 (arguably a Yes)	1. Croatia, 2. Hungary, 3. Mexico NGA 1	1. El Salvador	1. Belgium NGA, 2. Brazil 3. Brazil NGA 4. Bulgaria NGA 5. Canada, 6. Canada NGA 7. Colombia, 8. Cyprus 9. Czech Republic 10. Germany 11. EU DG Comp (not at EU Level) 12. EU NGA 1 13. EU NGA 2 14. EU NGA 3 15. Indonesia 16. Italy 17. Japan 18. Lithuania 19. Mexico 20. Mexico NGA 2 21. Netherlands NGA, 22. New Zealand, 23. Norway 24. Panama 25. Poland 26. Poland NGA 27. Portugal 28. South Korea 29. Spain 30. Spain NGA 1 31. Spain NGA 2 32. Sweden 33. Sweden NGA 34. Switzerland 35. Switzerland NGA (unless contractual) 36. Turkey CA 37. US DoJ

<sup>43</sup> Only 'significant' infringements of the competition law require notifications.



**1 (b) Is there any mechanism in your jurisdiction whereby regulatory bodies have an obligation to notify potential competition law violations to the CA?**

Yes	No, but indirectly	No legal obligation, but have MOUs or other mechanisms to coordinate/collaborate	No
<ol style="list-style-type: none"> <li>1. Belgium NGA (EU NGA 5)</li> <li>2. Brazil</li> <li>3. Brazil NGA<sup>44</sup></li> <li>4. EU NGA 3<sup>45</sup></li> <li>5. Japan</li> <li>6. Portugal</li> <li>7. Spain<sup>46</sup></li> <li>8. Spain NGA 1<sup>47</sup></li> <li>9. UK<sup>48</sup></li> <li>10. US DoJ<sup>49</sup></li> </ol>	<ol style="list-style-type: none"> <li>1. Bulgaria NGA</li> <li>2. HK NGA 3</li> <li>3. Mexico NGA 1</li> <li>4. Spain NGA 2<sup>50</sup></li> </ol>	<ol style="list-style-type: none"> <li>1. Australia</li> <li>2. Canada</li> <li>3. Colombia</li> <li>4. Croatia</li> <li>5. Czech</li> <li>6. El Salvador</li> <li>7. EU DG Comp (not at EU Level<sup>51</sup>)</li> <li>8. EU NGA 4 (on UK)</li> <li>9. HK NGA 1<sup>52</sup></li> <li>10. HK NGA 2</li> <li>11. Hungary</li> <li>12. Italy</li> <li>13. Lithuania</li> <li>14. Mexico</li> <li>15. New Zealand</li> <li>16. Poland</li> <li>17. Poland NGA</li> <li>18. Turkey</li> <li>19. UK NGA</li> </ol>	<ol style="list-style-type: none"> <li>1. Australia</li> <li>2. Canada NGA</li> <li>3. Cyprus</li> <li>4. Germany</li> <li>5. EU NGA 1</li> <li>6. EU NGA 2</li> <li>7. HK NGA 4</li> <li>8. Indonesia</li> <li>9. Mexico NGA 2</li> <li>10. Netherlands NGA</li> <li>11. Norway</li> <li>12. Panama<sup>53</sup></li> <li>13. South Korea</li> <li>14. Sweden</li> <li>15. Sweden NGA</li> <li>16. Switzerland</li> <li>17. Switzerland NGA</li> </ol>

<sup>44</sup> BRAZIL: Civil servants have duty to report/notify. For crimes (e.g. cartels), regulatory bodies must inform not only CA but also criminal authorities, Failing to do so they could be charged with criminal offences themselves.

<sup>45</sup> EU: Article 37(1) of Directive 2009/72/EC of the European Parliament and the Council of 13 July 2009 concerning common rules for the internal market in electricity, which provides that regulatory authorities in electricity sector have the duty of informing the CAs of practices that may be relevant to certain anticompetitive practices.

<sup>46</sup> SPAIN: Prior legislation before the combining of sectoral regulators into one single competition authority contained such obligations. Separately, public sector bidding bodies also have obligation to inform the CNMC regarding potential bid-rigging cases.

<sup>47</sup> SPAIN: Public sector tender awarding bodies' obligation to notify.

<sup>48</sup> UK Concurrency regime: Regulation 4 of the Competition Act 1998 (Concurrency) Regulations 2014 specifies that a concurrent regulator must notify the CMA in writing of a potential competition law violation where the concurrent regulator proposes to exercise any of the 'prescribed functions' in the legislation, and vice versa.

<sup>49</sup> US: But only in relation to government procurement contracts, not others.

<sup>50</sup> SPAIN: 2 chambers within CNMC (no formal obligation).

<sup>51</sup> EU: DG Comp may benefit from existing obligations within the Member States either directly or via exchanges with the national authorities.

<sup>52</sup> HK: Concurrent jurisdiction between HKCC and Communications Authority.

<sup>53</sup> PANAMA: Requests the support only but no obligation.

**1 (c) Is there any obligation on regulated bodies to disclose potential competition law violations to its regulator before notifying any other body? i.e. if a company came in for leniency to a CA, would it breach part of its regulatory requirements by not having notified the regulator first (or, at least, at the same time)?**

Yes	No		No, but...
	1. Australia 2. Belgium NGA 3. Brazil 4. Brazil NGA 5. Bulgaria NGA 6. Canada 7. Canada NGA 8. Colombia 9. Croatia 10. Cyprus 11. Czech Republic 12. Germany 13. El Salvador 14. EU DG COMP (but possibly yes at member state level) <sup>54</sup> 15. EU NGA 1 <sup>55</sup> 16. EU NGA 2 17. EU NGA 3 18. EU NGA 4 (on UK) <sup>56</sup> 19. HK NGA 2 20. HK NGA 3 21. Hungary	22. Indonesia 23. Italy 24. Japan 25. Lithuania 26. Mexico 27. Mexico NGA 1 28. Mexico NGA 2 29. Netherlands NGA 30. New Zealand 31. Norway 32. Panama 33. Poland 34. Poland NGA 35. Portugal 36. South Korea 37. Spain <sup>57</sup> 38. Spain NGA 1 39. Spain NGA 2 40. Sweden 41. Sweden NGA 42. Switzerland 43. Switzerland NGA 44. Turkey	1. HK NGA 1 <sup>58</sup> 2. HK NGA 4 <sup>59</sup> 3. UK NGA <sup>60</sup> 4. UK <sup>61</sup>

<sup>54</sup> EU DG COMP: Potential tension between reporting obligation and confidentiality in leniency.

<sup>55</sup> EU NGA 1: Ditto

<sup>56</sup> EU NGA 4: Although FCA requires prompt notification, this does not prevent a regulated body from applying for leniency at the CMA prior to notification.

<sup>57</sup> SPAIN: In fact leniency applicant must confirm to the CNMC that it has not disclosed, directly or indirectly before the Statement of Objections, to third parties other than EU or other Competition Authorities (if applicable) , its intention to present the leniency application or its content.

<sup>58</sup> HK NGA 1: Regulated bodies are required to report compliance breaches to Securities and Futures Commission ('SFC')/Hong Kong Monetary Authority ('HKMA') promptly (HKCC note: nothing in answer to say whether it is required to do so before notifying any other body).

<sup>59</sup> HK NGA 4: No rule that regulated body must disclose to regulator before notifying any other body, there are examples where contemporaneous notification may be required (SFC requires 'immediate' notification).

<sup>60</sup> UK NGA: Regulated firm required to notify FCA as soon as it becomes aware that a significant infringement has or may have occurred – in practice the FCA would be informed either first or at the same time as the leniency application is made.

<sup>61</sup> UK: Ditto

**1(d) If yes to any of the situations in (a) to (c) above, based on the experience in your jurisdiction, has this obligation affected the willingness of potential applicants to apply for leniency? Can you provide examples?**

Yes	No	Not Aware / Don't Know	N/A	
1. EU DG COMP <sup>62</sup>		1. Australia	1. Belgium NGA	18. Mexico
2. EU NGA 1 <sup>63</sup>		2. Colombia	2. Brazil	19. Mexico NGA 1
3. HK NGA 1 <sup>64</sup>		3. EU NGA 3	3. Brazil NGA	20. Mexico NGA 2
4. HK NGA 4 (on UK) (incentivised)		4. EU NGA 4 (on UK)	4. Bulgaria NGA	21. Netherlands NGA
5. Japan (1b obligation may incentivise)		5. HK NGA 4 (on HK)	5. Canada	22. New Zealand
6. Spain NGA 1 (N/A) <sup>65</sup>		6. UK CMA <sup>67</sup>	6. Canada NGA	23. Norway
7. UK NGA <sup>66</sup>		7. US DoJ	7. Croatia	24. Panama
			8. Cyprus	25. Poland
			9. Czech	26. Poland NGA
			10. El Salvador <sup>68</sup>	27. Portugal
			11. EU NGA 2	28. South Korea
			12. HK NGA 2	29. Spain
			13. HK NGA 3	30. Spain NGA 2
			14. Hungary	31. Sweden
			15. Indonesia	32. Sweden NGA
			16. Italy	33. Switzerland
			17. Lithuania	34. Switzerland NGA <sup>69</sup>
				35. Turkey

<sup>62</sup> EU: Such circumstances affect the course of the proceedings, particularly in the case of financial markets; procedures can be complicated due to parallel investigations and potentially conflicting obligations (reporting vs confidentiality).

<sup>63</sup> While no such obligations at EU level, as a general matter, such obligations could well have a chilling effect on the willingness of a company.

<sup>64</sup> HK: ‘Domino’ effect being considered; uncertainty over confidential information treatment by HKCC which has been taken into account in considering leniency application.

<sup>65</sup> SPAIN: May foster coordination but may deter seeking leniency.

<sup>66</sup> UK: Interaction is complex, e.g. information available at a time may trigger notification but insufficient for a leniency application, but then the FCA could open an antitrust investigation (or to share with CMA which might investigate), then the regulated firm may be concerned that Type A leniency may not be available even if would be first to apply.

<sup>67</sup> UK: But if any, should be reasonable to assume that it would incentivise.

<sup>68</sup> No leniency application has been filed.

<sup>69</sup> Assume that even if consider, obligations seem vague in view of relatively open regulation and would not outweigh benefits of leniency.

**2 (a) In your jurisdiction, are there possible sanctions by regulators on a company (e.g. removal of licences or debarment from future tenders) resulting from a finding by the CA and/or the courts (whichever applicable) that the company has breached competition laws? Can you provide examples?**

Yes (by regulators/procuring authorities)		No	Not Aware / Not identified	Maybe / Others –regulatory sanctions but not clear if comp law breach would qualify / Likely Yes but no examples to date /concurrent jurisdictions
1 Australia	12 Norway	1.Belgium	1.Bulgaria	1. Colombia
2 Brazil	13 Panama	NGA	NGA	2. EU NGA 4 (on UK)
3 Brazil NGA	14 Poland	2.Czech	2.Cyprus	3. HK NGA 1
4 Canada	15 S Korea	3.El Salvador	3.Croatia	4. HK NGA 2
5 Canada NGA	16 Spain	4.Indonesia	4.EU NGA 1	5. HK NGA 3
6 Germany	17 Spain NGA 1	5.Mexico	(not at EU	6. HK NGA 4
7 EU NGA 3	18 Spain NGA 2	NGA 2	level)	7. Netherlands NGA
8 Italy	19 Sweden	6.Portugal	5.EU NGA 2	8. Poland NGA
9 Japan	20 Sweden NGA		(not at EU	9. Hungary
10 Lithuania	21 Switzerland		level)	10. Turkey
11 Mexico NGA 1	22 Switzerland		6.New	11. UK CMA
	NGA		Zealand	
	23 US DoJ			

**Yes - Comments:**

**Australia:** Corporate regulator: disqualification of individuals from managing positions; public procurement: excluded from public projects for a period of time; individuals may not be eligible for licenses requiring ‘Fitness and Properness’.

**Brazil:** In oil market (removal of license, unless it would lead to shortage – in Guapore cartel, all petrol stations were involved and this was lifted after CADE recommended to National Agency of Petroleum to dismiss the removal of license to avoid a greater harm to the city).

**Brazil NGA:** Ineligibility for financing and participation in certain biddings for >5 years, etc.

**Canada:** May face debarment from future tenders if convicted of offences; Integrity Regime introduced by Canadian Government for federal government contracts.

**Germany:** Only contracting authorities have the opportunity to exclude an economic operator from participation in a procurement procedure, e.g. where the contracting authority has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition. As of 2020, contracting authorities will be able to consult a federal public procurement register, which will register certain exclusion grounds.

**EU NGA 3:** EU public procurement rules allow contracting authorities in EU Member States to exclude bidders if they have committed an infringement.

**Italy:** Guidelines of the Anti-Corruption Authority stipulates that CA decisions concerning serious antitrust infringement having an impact on public contracts and implemented in the same relevant market should be considered by the procurement agencies with a view to possible debarment.

**Japan:** Enterprise usually disqualified from bidding for government contracts for a period of time after JFTC finds a violation against it. However, the period is reduced by half for the leniency applicant. Each government agency has discretion on this but most agencies comply with this guideline adopted by government ministries set out above.

**Lithuania:** May be excluded from public procurement by contracting authority; but undertakings granted full immunity are protected under this. Further, disqualification and fine may be imposed on the CEO, but if he/she may be exempted from fine, if the CEO applied for leniency himself or if the undertaking he is representing applied.

**Mexico NGA 1:** examples include electricity, banking, intellectual property trademark prohibition etc.

**Norway:** Procurers may exclude. 'Asphalt' case.

**Panama:** Ministry of Trade and Industry must close license if punished twice for monopolistic practices, no e.g. to date.

**South Korea:** Head of central government agency can place restrictions on qualification in public tendering (not > 2 years); registration may be cancelled, if two occasions of penalty within 9 years from the date of first penalty imposition.

**Spain:** Not only for competition cases.

**Spain NGA 1:** Not sanctions as such, but debarment from public procurement.

**Sweden:** Discretion, not automatic disqualification in public procurement.

**Sweden NGA:** Discretion, not automatic disqualification in public procurement, 'self cleaning' possible

**US:** Government contractors can be debarred or suspended under both US federal and state law-based on conviction for an antitrust offense, typically bid-rigging.

#### **Not Aware / Not identified - Comments:**

**Mexico NGA 2:** Sanctions are imposed by CAs, not company regulators.

#### **Maybe - Comments:**

**EU NGA 4 (on UK):** Not aware of circumstance where FCA has imposed sanctions on a regulated firm, relying solely on a CMA infringement decision. However, in practice, FCA may also open its own investigation and impose sanctions in respect of the same conduct.

**HK NGA 1:** ‘Fitness and Properness’ requirements on regulated intermediaries by the SFC/HKMA; no example to date.

**HK NGA 2:** ‘Fitness and Properness’ requirements on regulated intermediaries by industry regulators (e.g. SFC, Insurance Authority).

**Netherlands NGA:** not regulators, but public authorities may exclude certain operators when there are plausible indications to conclude anticompetitive agreements were entered into, or of grave professional misconduct etc.

**Hungary:** No “sanctions” as such, but debarment for public procurement is applicable (however companies may be able to escape debarment by “self cleaning”).

**Turkey:** Yes for electricity market and public procurement; never been applied; Turkish CA can send non-binding opinion to regulators.

**2(b) If yes, based on the experience in your jurisdiction, has the possibility of such sanctions affected the willingness of potential applicants to apply for leniency? Can you provide examples?**

Yes / Have been considered/advised clients/expect this to be important, etc.		No / Don't think so / Hard to estimate / Don't know
1. Brazil <sup>70</sup>	11. Mexico NGA 1	1. Australia <sup>85</sup>
2. Canada <sup>71</sup>	12. Norway	2. Lithuania <sup>86</sup>
3. Canada NGA	13. Poland NGA <sup>79</sup>	3. Panama
4. EU DG COMP <sup>72</sup>	14. Spain <sup>80</sup>	4. Poland <sup>87</sup>
5. EU NGA 4 (on UK) <sup>73</sup>	15. Spain NGA 1 <sup>81</sup>	5. South Korea
6. HK NGA 1 <sup>74</sup>	16. Spain NGA 2	6. Switzerland
7. HK NGA 3 <sup>75</sup>	17. Sweden <sup>82</sup>	7. Switzerland NGA <sup>88</sup>
8. Italy <sup>76</sup>	18. Sweden NGA <sup>83</sup>	8. Turkey <sup>89</sup>
9. Japan <sup>77</sup>	19. US DoJ <sup>84</sup>	
10. Mexico <sup>78</sup>		

<sup>70</sup> BRAZIL: It increases severity of the penalty and can be an important factor.

<sup>71</sup> CANADA: Difficult to assess but reasonable to conclude that it is taken into consideration.

<sup>72</sup> EU: Some positive effect in fact, as it may trigger cooperation. However, sanctions might affect the outcome of the case; e.g. parties in some jurisdictions may be more willing to acknowledge certain facts and keep secrecy over some others to avoid loss of licenses or debarment.

<sup>73</sup> UK: Firm of NGA has advised clients active in financial services sectors of the risks associated with applying leniency with the CMA (may face sanctions under FCA powers).

<sup>74</sup> HK: Financial regulator sanctions.

<sup>75</sup> HK: Not aware of example but expect that this would be important consideration.

<sup>76</sup> ITALY: No examples because provision introduced recently, but consider this to affect willingness.

<sup>77</sup> JAPAN: Hence the proposal made by JFTC to government agencies to reduce debarment period by half.

<sup>78</sup> MEXICO: Possible positive impact from provision of equivalent leniency in corruption cases (GALL) – allowing coordination and hence incentivise leniency application (to benefit from reduction on both applicable sanctions)

<sup>79</sup> POLAND: Exclusion from future tenders as well as potential criminal liability.

<sup>80</sup> SPAIN: Disqualification from public tenders as a new sanction (since Oct 2015) raises deterrence effect and makes companies more cautious when setting up/entering cartel; but leniency applicants will be exempted.

<sup>81</sup> SPAIN: No experience yet, but exemption should encourage applications.

**2 (c) What are the challenges faced by your agency when seeking to remove or mitigate such sanctions (if applicable)?**

**Australia CA:** Considers strong criminal and civil penalties sufficiently mitigate against deterrence of such sanctions.

**Brazil CA:** Avoiding shortage in market from removal of licenses.

**Canada CA:** Bureau not involved in setting sanctions by regulators, but had lobbied government departments for lenient treatment of immunity and leniency applicants.

**Canada NGA:** Bureau is trying to convince the federal government to change its debarment policy.

**EU DG COMP:** DG Comp does its utmost to protect leniency applicants from being exposed in other jurisdictions via discovery.

**HK NGA 1:** No guidance as to the cooperation / transparency as to the relationship between HKCC and financial regulators.

**HK NGA 2:** May be difficult for HKCC to restrict application of regulatory provisions (disciplinary actions etc.).

**HK NGA 3:** Regulator discretion whether a regulated entity is 'fit and proper', difficult for HKCC to influence another regulator with jurisdiction over the regulated entity, unless there were some guidance or 'softer' comfort, e.g. Memorandum of Understanding.

**Italy CA:** CA sent an opinion to Anti-Corruption Authority regarding debarment, seeking to limit debarment to CA's definitive decisions or those no longer subject to judicial review (and to exclude unfair practices).

**Mexico NGA 1:** CA has issued opinions to regulators.

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<sup>82</sup> SWEDEN: Some indications that the risk of being disqualified from future public procurements may be a reason for not seeking leniency.

<sup>83</sup> SWEDEN: No specific examples, but would be particularly true of companies heavily reliant on sales to public sector, and exacerbated in cases where it was not clear cut that an infringement had occurred

<sup>84</sup> US: Debarment/suspension is dependent upon conviction. Leniency applicant is granted full immunity, but leniency is only available to first-in for companies that are not eligible for leniency, facing debarment may be a disincentive. DOJ's model plea agreements provide that DOJ will advise appropriate officials of defendant's cooperation for the regulatory agency to consider before determining to disbar. See US DOJ Model Corporate Plea Agreement template wording (see para 18) available at <https://www.justice.gov/atr/file/889021/download>. DOJ has been told this language helps companies mitigate some concerns regarding debarment.

<sup>85</sup> AUSTRALIA: ACCC's immunity and cooperation policy only provides protection from action taken with respect to cartel laws, not against consequential sanctions by other regulators.

<sup>86</sup> LITHUANIA: Expect not to be affected because of the measures in place to protect undertakings and individuals; but no examples yet.

<sup>87</sup> POLAND: Also because of criminal liability.

<sup>88</sup> SWITZERLAND: Consider this risk to be low against benefits of leniency, other higher risks = civil claims etc.

<sup>89</sup> TURKEY: No example, assume effect to be minimal, compared with other factors such as criminal sanctions.

**Norway CA:** Discretion lies in regulator (only one case; discretion with procurer; debarred for 2 years).

**Poland CA and Poland NGA:** Cannot mitigate criminal risks.

**2 (d) Has your agency experienced, in practice, particular issues arising from such sanctions resulting from sector specific regulatory frameworks or imposed by other regulators (e.g. where sanctions on cartelists eliminate competition in the market, or where such sanctions put the CA under pressure)? If so, how did your agency deal with these issues?**

Yes	No / Not aware / Maybe, but not important
1. Brazil <sup>90</sup>	1. Australia
2. EU NGA 3	2. Canada
	3. EU DG Comp
	4. Czech
	5. HK NGA 2
	6. HK NGA 3
	7. Japan
	8. Lithuania <sup>91</sup>
	9. Spain NGA 2 <sup>92</sup>
	10. Sweden
	11. Switzerland
	12. UK

**3 Are there any other areas where regulatory rules (public or private) or statements by regulators have (or could have) added an incentive or disincentive to parties to apply for leniency?**

**Australia:** ACCC’s educational initiatives with procurement professionals and other regulators, as well as non-collusion declarations in tender documents increase the risk of detection by other regulators, thus incentivising leniency application.

**Brazil:** There are claims from the Federal Prosecution Service (‘MFP’) that CADE should impose greater sanctions considering the harm that a cartel produces. To avoid that such claims result in a disincentive to leniency signatories and to mitigate this kind of pressure, the MFP has a close cooperation with CADE, and is involved in the negotiations/signing of many leniency agreements.

**Brazil NGA:** Brazilian Anti-corruption Act adds incentives for leniency.

**Croatia:** Promote leniency in events (e.g. conferences, workshops etc. by CA or regulators).

<sup>90</sup> BRAZIL: CADE punished all petrol stations of the city of Guapore for collusion, and had to recommend National Agency of Petroleum to dismiss the removal of licenses as all stations were involved.

<sup>91</sup> LITHUANIA: The Competition Council even encourages debarment.

<sup>92</sup> SPAIN: Not aware of cases, but ban is likely to reduce or even eliminate competition in the affected market.



**EU DG COMP:** Sometimes public statements made by financial regulators are assimilated by regulated bodies as if they contained legal obligations. These can potentially create dysfunctions or conflicts of confidentiality duties. It definitely affects the behaviour of the parties reporting and seeking leniency, but we cannot clearly state that it affects precisely their willingness to cooperate. This type of double-reporting obligation could create tensions, as the leniency applicant is willing to disclose more to the regulator, but cannot do so without prior consent of DG COMP.

**EU NGA 1:** Situations were unclear whether particular conduct amounts to a competition law infringement; or whether the CA would consider it sufficiently important in light of its own enforcement priorities.

**EU NGA 3:** Risk of regulatory sanctions obviously affects the incentives for an undertaking to apply for leniency (e.g. interest rate cartels). Risks relating to enforcement of accounting/ tax rules may be considered by prospective leniency applicants as there is fear that public information about the cartel may trigger an investigation into possible tax evasion and other criminal charges (considered relatively minor compared to the antitrust enforcement risks and the possible benefits of leniency). Also interplays with labour law (undertakings may be required to decide early during internal investigation whether to proceed to the summary dismissal of any employees/directors): may be an incentive since a leniency application may allow the company to delay the dismissal to use the knowledge of the employee, but may also act as a disincentive, since opting for early dismissal to avoid breaching labour law may make leniency at a later stage more difficult.

**HK NGA 1:** Impression that some industries may be shielded by its specialist industry regulator to defend industry interests → disincentive to consider leniency as first-line reaction, but rather to engage with the specialist industry regulator on informal basis only.

**Mexico CA:** The possibility to coordinate both corruption and antitrust leniency programmes creates incentives for companies to apply for leniency under both; necessary to strengthen communication channels between COFECE and Secretariat of Civil Service.

**Mexico NGA 1:** National Anti-corruption System ('SNA') was created in July 2016 with own leniency programme for corruption actions. However, the SNA's leniency programme under no circumstance reduces criminal liability (unlike COFECE's leniency programme) → disincentive; by aligning the two programmes, incentives increase.

**Mexico NGA 2:** Public regulatory rules in financial and insurance sectors may help incentivise.

**UK CMA:** CMA produced sets of materials and guidance on how concurrency interacts with leniency, e.g. restrictions on use of information provided (only on competition law enforcement), single queue for leniency, guidance on case allocation. These provide undertakings with greater transparency and certainty around how the concurrency regime interacts with the leniency regime.

**US DoJ:** The US DOJ's Leniency Programme does not protect applicants from criminal prosecution by other prosecuting agencies for offenses other than criminal antitrust violations. For example, a leniency applicant that bribed foreign public officials in violation of the Foreign Corrupt Practices Act receives no protection from prosecution by any other prosecuting agency, regardless of whether the bribes were also made in furtherance of the reported antitrust violation. In addition, a leniency application does not discharge reporting obligations to other agencies. Leniency applicants with exposure for both antitrust and non-antitrust crimes should report to the relevant prosecuting agencies.

## 7. Annex 1 - ICN CWG Questionnaire on key elements for an efficient, effective leniency programme and private anti-cartel enforcement

(20 July 2017)

### Introduction

The 2017/2018 work programme of the ICN Cartel Working Group has two elements in relation to leniency policies of the ICN member institutions, namely:

1. 'Key elements for efficient and effective leniency programme and its application' – SG1 project and,
2. 'Development of a new chapter on private anti-cartel enforcement (including its interaction with leniency programmes) for the Anti-Cartel Enforcement Manual' – SG2 project.

Concerning 1: Given the reality of different leniency systems among competition authorities at international level, there would still be the potential that multi-jurisdictional leniency applicants, in practice, would face difficulty/inconvenience/interference to a greater or lesser degree, because of conflicting requirements in systems or demands from competition authorities, which could arise in parallel cartel investigations.

The CWG 2016-2017 'Leniency Checklist for an efficient and effective leniency programmes' was the starting point of this project. This survey aims at exploring to what extent the different jurisdictions meet the suggestions/requirements of the 'Leniency Checklist' as well as experiences of NGAs and agencies on this issue. The end product will also endeavour to identify common focal elements of leniency programmes including ways with which competition agencies can handle situations of leniency applications made to several competition authorities.

Concerning 2: Although the SG2 project is mainly focused on the private enforcement aspects of cartel rules, it obviously interacts with leniency policies. To avoid the duplication of questionnaires addressed to the CWG members, it seemed rational to combine the two projects – at least concerning this joint questionnaire.

Consequently, this questionnaire requests data and information for both the SG1 and SG2 projects. Moreover, some of the questions are addressed to CAs, while another group of questions request the reply of NGAs.

You are kindly requested to complete the questionnaire by **15 September 2017!**

Should you have any questions, please contact us on the following email addresses:  
[ICN\\_Cartels\\_SG1@gvh.hu](mailto:ICN_Cartels_SG1@gvh.hu); [tancatalcali@rekabet.gov.tr](mailto:tancatalcali@rekabet.gov.tr); [siun.okeeffe@acm.nl](mailto:siun.okeeffe@acm.nl);  
[kachalin@aaanet.ru](mailto:kachalin@aaanet.ru);

**Name of the respondent:**

Country: .....

Competition authority: .....

NGA: .....

Name of contact person: .....

Email address of contact person: .....

**Questionnaire**

**Replies for the questions of I. are requested from the CAs only. All other questions are requested from both the CAs and from the NGAs.**

**General questions**

**I. General parameters of the leniency system**

**Please indicate, among** the elements below, which ones are characteristics of your leniency regime (several elements may be indicated!):

1. The leniency regime covers the following types of competition law violations:

- price fixing;
- market sharing;
- bid rigging;
- output restrictions;
- vertical violations;
- other (namely: .....)

2. The leniency regime provides (several elements may be indicated!):

- immunity only for uncovering a cartel to the competition authority, thereby enabling it to deploy a certain level of investigative powers (for instance to obtain a prior judicial warrant or other authorisation to carry out an unannounced inspection);
- immunity also for cartels which are under the investigation of the competition authority without the help of a previous immunity applicant, but in which the applicant supplies thorough evidence (enabling the competition agency to prove the infringement);

- partial immunity<sup>93</sup>;
  - reduction of fines for subsequent applicants to the extent that they still provide evidence with significant added value;
  - other (please specify)
3. In order to get leniency/immunity, the applicant (several elements may be indicated!):
- has to cooperate sincerely with the competition authority, providing information and/or documents which evidence the cartel;
  - has to provide full and frank explanations throughout the whole process;
  - has to end its participation in the cartel;
  - has to continue its participation in the cartel if the authority directs it to;
  - should not have destroyed, falsified or concealed evidence;
  - should not have coerced other undertakings to participate in the cartel, whenever applicable;
  - should not disclose its participation in the cartel;
  - should admit its participation in the cartel;
4. Which following elements are part of your leniency regime(several elements may be indicated!):
- markers are available;
  - anonymous approaches are possible;
  - hypothetical applications are allowed;
  - leniency application may be revoked with the evidence submitted being used against the leniency applicant at a later stage;
  - leniency application may be revoked without the evidence submitted being used against the leniency applicant at a later stage;
  - summary applications are possible for international cases;
  - written application is necessary;
  - oral application is possible;
  - protection from disclosure of self-incriminating statements provided under leniency;
  - leniency plus<sup>94</sup>;
  - penalty plus<sup>95</sup>;
  - exchange of leniency information between competition authorities is possible (through leniency waivers).

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<sup>93</sup> 'Leniency Checklist' CWG 2017 Project, see under: <https://icn2017.concorrenca.pt/downloads/materials/CWG-Checklist-Leniency-Programmes.pdf>

<sup>94</sup> see point 9 of the Leniency Checklist

<sup>95</sup> see point 9 of the Leniency Checklist

## II. Key elements – incentives

In your opinion, which aspects stimulate leniency applications? Please grade the elements from 1 to 5 ('1' means less influential while means '5' very influential).

Incentives for leniency	1	2	3	4	5
Relief from fine					
Relief from mental pressure					
Relief from criminal sanctions					
Reputation considerations					
Effective cartel enforcement					
First mover motivation					
Existence of a marker system					
A cartel investigation on the same market in another jurisdiction					
A cartel investigation in a related sector by the national competition or regulatory agency					
Clear confidentiality policy of the competition agency					
Other 1 (please specify) .....					
Other 2 (please specify) .....					

### III. Key elements – disincentives

In your opinion, which aspects deter leniency applications? Please grade the elements ('1' means less influential while means '5' very influential).

Disincentives for leniency	1	2	3	4	5
Exposure to private enforcement					
Exposure to criminal sanctions					
Exposure to individual sanctions (other than criminal)					
Fear of being labelled a traitor					
Reputation considerations					
Exposure to repercussions in other sectors or jurisdictions (follow-on investigations by the competition authorities or by investigations related to other crimes like e.g. corruption, money laundry or others)					
Need to satisfy damages claims to qualify					
Restriction of the ability to appeal. (If the rest appeal successfully, the leniency applicant is the last man standing.)					
Uncertainty about the ability to obtain leniency					
Uncertainty about confidentiality policy					
Other 1 (Please specify): .....					
Other 2 (Please specify): .....					

### INTERFERENCE OF LENIENCY AND OTHER POLICIES

#### A. Leniency to be applied for in more jurisdictions

- In your opinion to what extent, does the obligation to file leniency applications in more than one jurisdiction affect the willingness of potential applicants to apply for leniency? (Score the importance of this aspect on a scale between 1 to 5 - '1' being not relevant at all, '5' reflecting very high relevance)

1	2	3	4	5

- Have you ever faced a problem stemming from different rules / parameters of leniency programmes of different jurisdictions?

Yes  No

In the affirmative: indicate, which parameter(s) of the leniency programme caused problem?  
 Please give a half page description of the case and the  
 problem .....

3. Add your comments if any:

.....

**B. Relationship between leniency and ex officio case initiations (effective cartel enforcement by the competition agency)**

1. In your opinion to what extent does a high number of ex officio cartel investigations initiated by the competition agency affect the willingness of potential applicants to apply for leniency? (Score the importance of this aspect on a scale between 1 to 5 - '1' being not relevant at all, '5' reflecting very high relevance)

1	2	3	4	5

2. Have you – as competition agency – ever faced a problem of low number of leniency applications? To what extent do you attribute this to the low number of ex officio cartel cases?

Yes  No

In the affirmative: Please give a half page description of the case and the problem

.....

3. Add your comments if any:

.....

**C. Impact of the regulators' reporting obligation on leniency**

1. In your opinion to what extent is the leniency application willingness of potential applicants influenced by the obligation of the regulators (public procurement agencies, sectoral regulators, etc.) to notify the potential competition law violations to the competition agency?(Score the importance of this aspect on a scale between 1 to 5 - '1' being not relevant at all, '5' reflecting very high relevance)

1	2	3	4	5

2. Have you ever faced a problem stemming from the obligation of the regulators to notify the potential competition law violations to the competition agency?

Yes  No

In the affirmative: Please give a half page description of the case and the problem



.....

3. Add your comments if any:

.....

**D. Leniency/plea bargaining vs individual sanctions**

1. Is leniency (plea bargaining) available for individuals in your jurisdiction?

Yes  No

In the affirmative, please explain the relevant rules on leniency-related plea bargaining:

.....

2. If no leniency is available for individuals, in your opinion to what extent do sanctions on individuals influence the corporate leniency application willingness of potential applicants in general? (Score the importance of this aspect on a scale between 1 to 5 - '1' being not relevant at all, '5' reflecting very high relevance)

1	2	3	4	5

3. Please score the importance of the following types of individual sanctions in this respect ( '1' being not relevant at all, '5' reflecting very high relevance):

Type of sanction	Score
Disqualification of individuals	
Pecuniary sanction on individuals	
Imprisonment of individuals	
Other 1 (please identify)	
Other 2 (please identify)	
...	

4. Add your comments if any:

.....

**E. Leniency vs private enforcement**

1. Are private enforcement of competition law and private damage claims possible in your jurisdiction?

Yes  No

If yes,

What are the legal foundations for private anti-cartel enforcement and damage recoupment in your jurisdiction?

For how long does your jurisdiction have legal provisions for private enforcement?

Do you have any statistics on the growth of private damage claims in your country after the introduction of legal provisions for private enforcement?

If your reply to Q E/1 is affirmative, is private enforcement frequent/increasing in your jurisdiction?

frequent

In how many percent of all cartel cases does private enforcement take place? .....%

increasing

2. If your jurisdiction does not have the legal provisions for private enforcement and damage claims, what are the reasons for it (e.g. conflict with other statutes, resistance of judges, inability to calculate damage, dispersed, unskilled and unorganized victims, lack of training of the lawyers' corps, other)?

3. If your jurisdiction does not have legal provisions for private anti-cartel enforcement, does your jurisdiction consider introduction of the legal provisions for private enforcement?

Yes  No

If yes, why?

What are your expectations form the introductions of the private enforcement?

4. In your opinion to what extent do private enforcement and the threat of payment of damages influence the potential leniency applicants' willingness in general? Score relevance of this aspect on a scale between 1 to 5 ('1' being not relevant at all, '5' reflecting very high relevance)

1	2	3	4	5

5. In your jurisdiction's law, is there an article which releases or eases the burden of the leniency applicant from paying damages?

Yes  No

In the affirmative please explain the article

.....

6. Which kind of solution(s) would you suggest to eliminate or at least offset the disincentives to apply for leniency arising from the private enforcement of competition law?

Please elaborate!

.....

7. Does your competition authority have a role in private enforcement/compensation? What effect does the authority decision have on civil judges' decisions?

.....

8. Do you reward cartelists who offer compensation to victims of a cartel? If so, please describe, how?

.....

9. How damages to private parties from cartel activity are calculated in your jurisdiction in situations of:

Identifiable circle of victims

.....

Unidentifiable circle of victims

.....

10. Who calculates damages?

.....

11. Who makes a decision about damage recoupment? What are the roles of competition authority, court, claimants, defendants, lawyers in this process? How do they interact?

.....

12. Are there provisions protecting against the disclosure of leniency documents in private enforcement questions? Please quote!

.....

**F. Relationship between Leniency and Settlement**

1. In your opinion to what extent, is the willingness of potential applicants influenced by the existence of settlement/plea bargaining (early termination) mechanisms? (Score the importance of this aspect on a scale between 1 to 5 - '1' being not relevant at all, '5' reflecting very high relevance)

1	2	3	4	5

2. ! Have you ever faced a problem stemming from the non-existence of settlement/plea bargaining (early termination) mechanisms?

Yes  No

In the affirmative please explain this problem!

.....

3. Does your agency play a role in damages calculation in private enforcement actions?

Yes  No

In the affirmative please explain the procedure of the involvement of your agency with references to the relevant laws!

.....

5. Add your comments if any:

.....

**G. Other**

1. Can you identify further elements which detain leniency applications? If so, to what extent (on a scale between 1 to 5, '1' being not relevant at all, '5' reflecting very high relevance)?

Please elaborate!

.....

2. Can you identify elements / measures which incentivise leniency applications? If so, to what extent (on a scale between 1 to 5, '1' being not relevant at all, '5' reflecting very high relevance)?

Please elaborate!

.....