

ICN Cartel Working Group Subgroup 1 webinars

Leniency incentives and disincentives

Moderator: Ms. Marisa Tierno-Centella (DG COMP)

- 1) Ms. Anne Krenzer (FR)
- 2) Mr. Alden Caribé de Sousa (BR)
- 3) Mr. Subrata Bhattacharjee (CA)
- 4) Ms. Kala Anandarajah (SG)
- 5) Mr. Johan Ysewyn (BE)

Commentator: Mr. Marc Barennnes (LU)



Speaker 1 - Ms. Anne Krenzer (FR)

Survey on leniency applications

Anne KRENZER

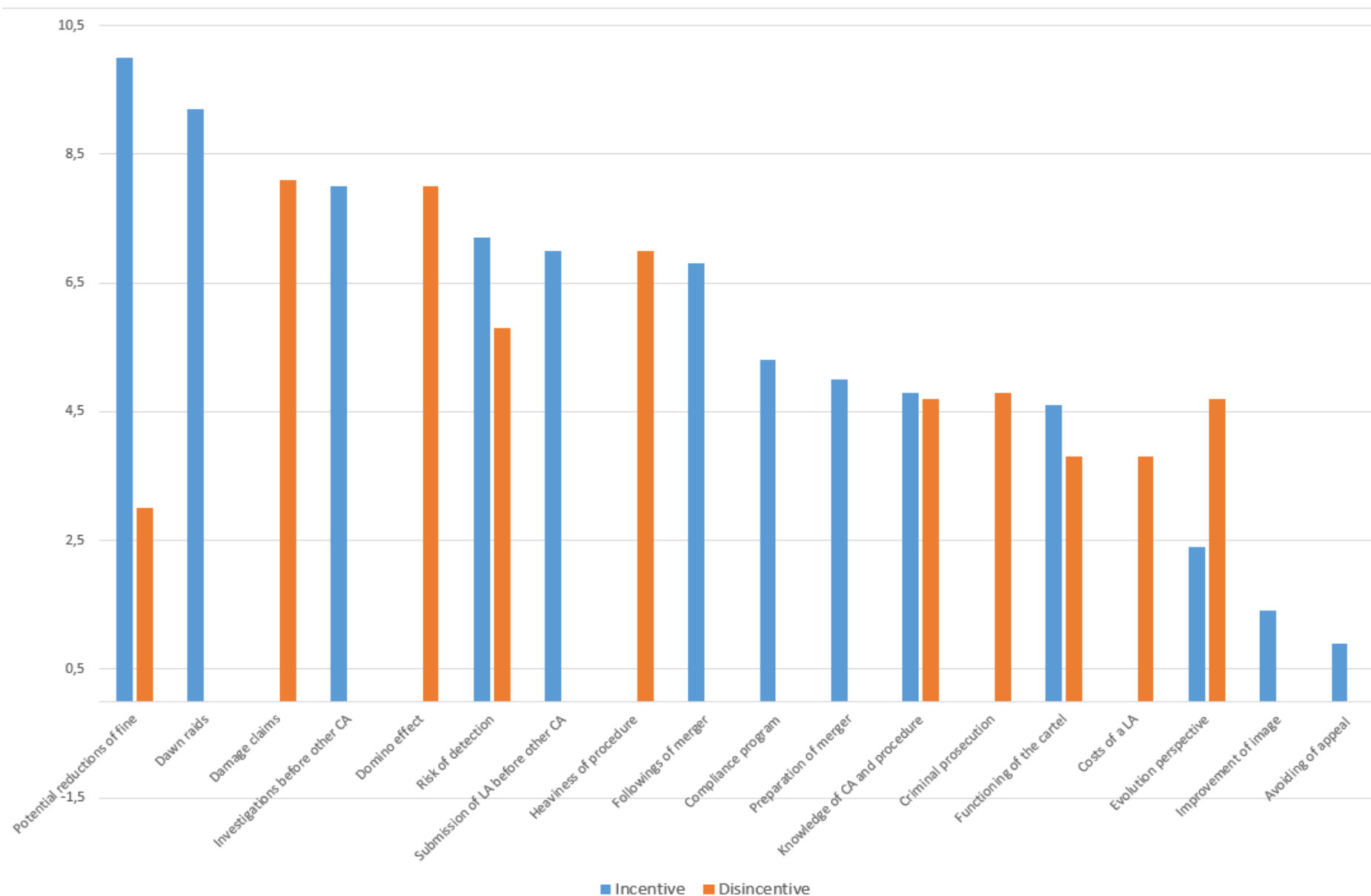
*Advisor to the Head of investigations
Leniency & European Liaison Officer
Autorité de la concurrence*

19 September 2018

Background of the survey

- 2 waves of sending of questionnaires (undertakings (2016) + lawyers (2018))
- Close to 500 addressees in total:
 - Undertakings having submitted LAs to the European Commission,
 - Lawyers based (at least professionally) in Belgium, France, Germany and the Netherlands.
- Objective:
 - Collecting opinions on leniency programs in general in order:
 - To learn about the experience of leniency practitioners,
 - To better prevent potential difficulties in practice, in order to improve the procedures and facilitate access to the leniency program.
 - Comparison with leniency survey published in 2014 in order to detect any evolution

Incentive/Dissuasive factors



Evolution: Increase of significance of the consequences of a LA for the applicant

- Increase of Type 2 applications (reduction of fine) would go along with decrease of Type 1 applications (immunity of fine) :
 - Reaction to increasing risk of damage claims
 - Adopting a new strategy of defense (“ready to jump”)
- Significant increase of threats and retaliation against the leniency applicant

Speaker 2 - Mr. Alden Caribé de Sousa (BR)

LENIENCY AND PRIVATE ENFORCEMENT

19/09/2018

ICN Webinar Incentives
and Disincentives to
Leniency Agreements –
Private Enforcement

Private Enforcement (?)

Leniency Agreement Ordinary Content

CARTEL LENIENCY CORNERSTONES (Hammond)

- a) Severity of punishment;
- b) Probability of Detection;
- c) Transparency and legal certainty about the agreement

INTERNATIONAL BENCHMARKS

19/09/2018

ICN Webinar Incentives
and Disincentives to
Leniency Agreements –
Private Enforcement

UNITED STATES

Mature system (*95% of antitrust cases are private actions*)

Key points:

- Treble damages (economic incentive – dominant deterrence effect over the compensation effect);
- Joint and several liability;
- Exclusion of passing-on defence (in favour of direct purchaser(s))
- Class actions and follow-on actions

EUROPEAN UNION

Directive 104/2014

Key Points:

- Only full compensation (refuse of punitive damages)
- Possible for defendants to invoke passing-on of overcharges
- SME and immunity recipient: joint and several liability limited to direct and indirect purchasers, others: subsidiary. Compensation Settlements: asymmetric regimes
 - Binding effect of public enforcement decisions

Table

19/09/2018

ICN Webinar Incentives
and Disincentives to
Leniency Agreements –
Private Enforcement

Private actions are possible?	Yes.	Incentive to apply to leniency to undermine potential consequences
	No.	Incentive to apply to leniency because of legal certainty
Private actions are usual/likely? (if possible)	Yes	Incentive to apply to leniency to undermine potential consequences
	No.	Potential applicants should be almost indifferent based precedents rather the law
Immunity to Treble Damages (if likely)	Yes	Incentive to apply to leniency to undermine potential consequences
	No	Potential applicants should consider a disincentive
Exclusion of joint and several liability to immunity recipient (or limited to direct and indirect purchasers)? (if likely)	Yes	Incentive to apply to leniency to undermine potential consequences
	No	Potential applicants should consider a disincentive
Disclosure of evidences provided by the immunity recipient (if likely)	Yes	Potential applicants should consider a disincentive (adjustable, according to the moment)
	No	Potential applicants should consider a incentive (adjustable, according to the moment)

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and Disincentives to
Leniency Agreements –
Private Enforcement

Thank You!

Alden Caribé de Sousa

**General Coordinator of Leniency Unit in CADE-
BRA**

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Speaker 3 - Mr. Subrata Bhattacharjee (CA)

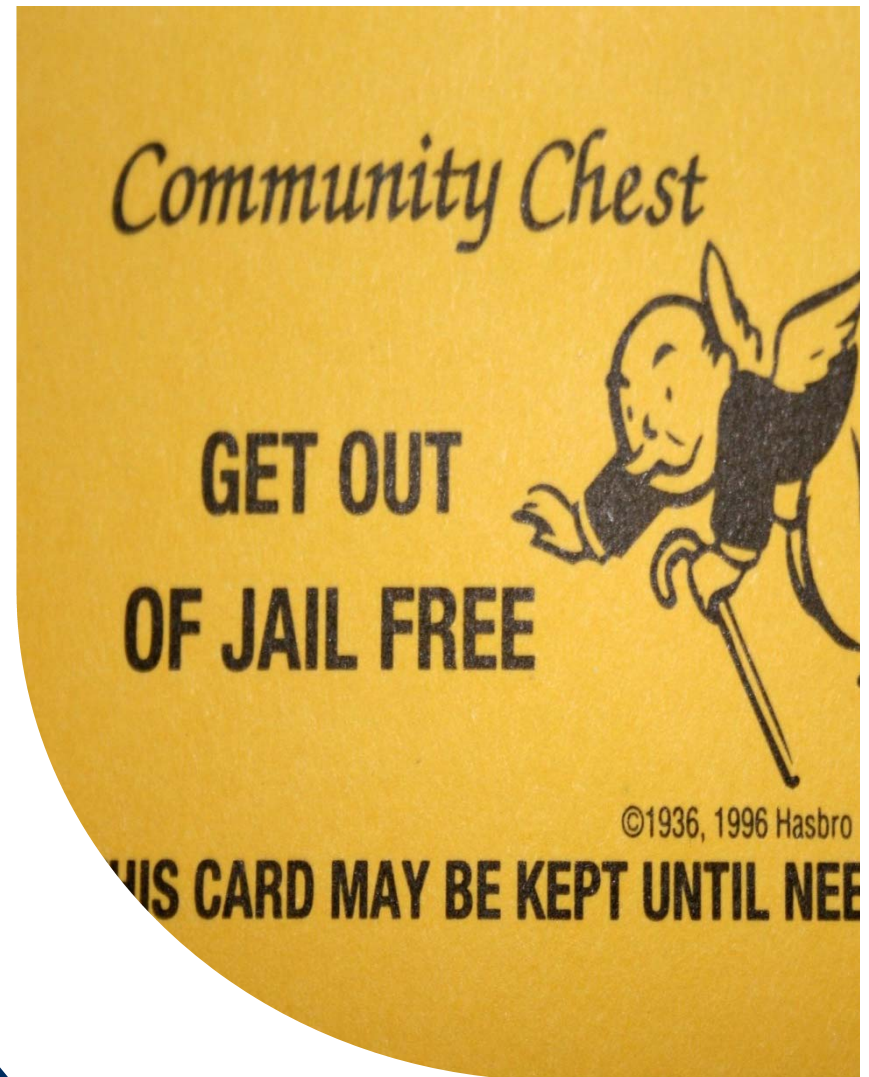
CWG SG1 WEBINAR

Leniency Incentives and Disincentives in Canada

Presented By

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September 19, 2018



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A Successful Leniency Program Requires:

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Effective Sanctions

- From the applicant's perspective, the key incentive for leniency is to avoid significant criminal sanctions.
- Fines – how high is high enough?
- Jail/custodial sentence for individuals – Not all jurisdictions have a history of jail time for cartel offences.

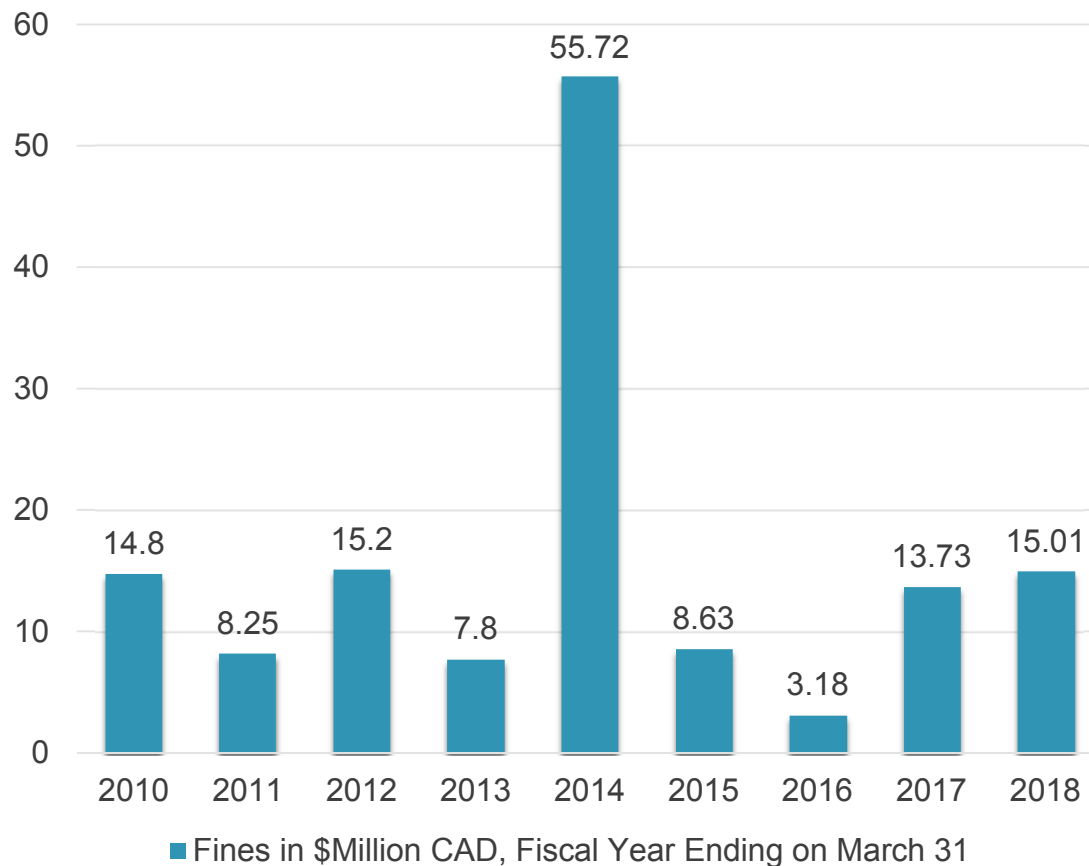
Consistent Enforcement

- Solid enforcement record further encourages cooperation.

Canada: Criminal Enforcement Figures

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TOTAL FINES



\$30M (FY 2014)

- Bid-rigging, Yazaki Corp. (Auto-parts cartel)

\$13M (FY 2017)

- Bid-rigging, Showa Corp. (Auto-parts cartel)

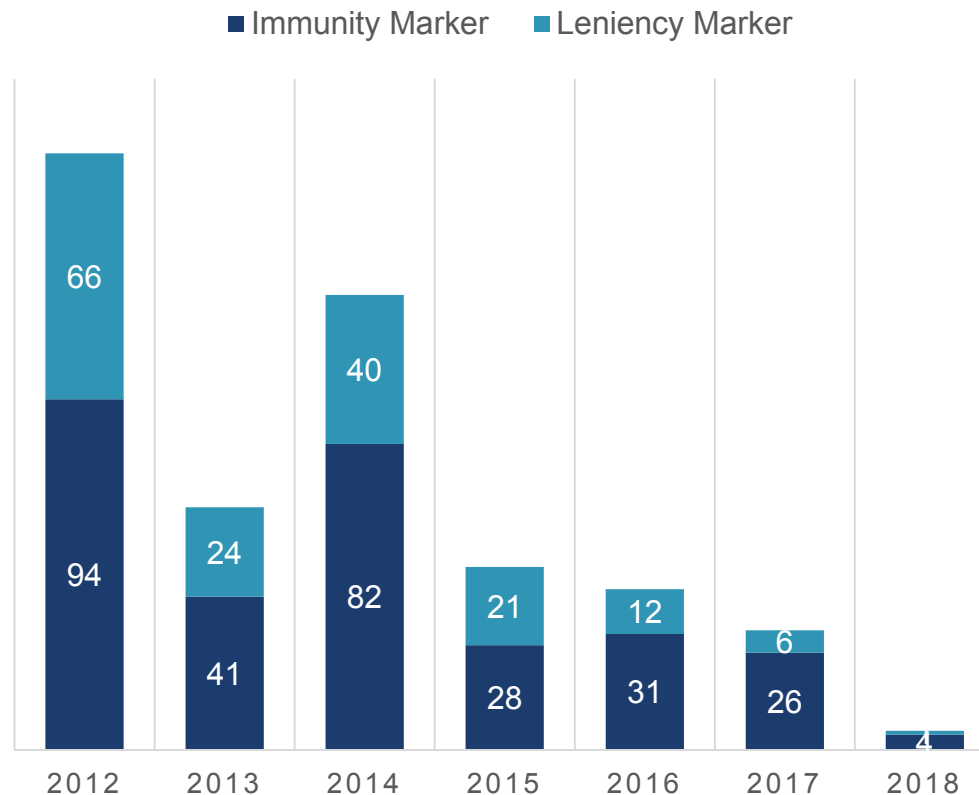
\$12.5M (FY 2012)

- Price-fixing, DomFoam & its affiliates (Domestic polyurethane foam cartel)

Canada: Criminal Enforcement Figures

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IMMUNITY AND LENIENCY MARKERS



Prison Sentence

Prison sentences have not been imposed in Canada so far for cases that involve international cartels. Some degree of success in domestic cases.



Questions?



Thank You

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Speaker 4 - Ms. Kala Anandarajah (SG)

RAJAH & TANN | *Singapore*

RAJAH & TANN ASIA

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CWG SG1 WEBINAR - ICN

LENIENCY INCENTIVES & DISINCENTIVES IN SOUTH-EAST ASIA

Kala Anandarajah, Partner/Head, Competition & Antitrust And Trade

19 September 2018

CAMBODIA | CHINA | INDONESIA | LAO PDR | MALAYSIA | MYANMAR | PHILIPPINES | SINGAPORE | THAILAND | VIETNAM

LENIENCY REGIME



Singapore	Malaysia	Indonesia	Vietnam	Philippines
<ul style="list-style-type: none"> • Leniency program implemented 	<ul style="list-style-type: none"> • Leniency program implemented 	<ul style="list-style-type: none"> • No formal leniency/immunity • Under consideration – still undecided if 100% immunity should be offered. • But KPPU has previously reduced fines for parties that whistle-blew on cartel. 	<ul style="list-style-type: none"> • 2017 draft competition law contain provisions on leniency – if passed, will take effect in 2019 	<ul style="list-style-type: none"> • Competition Act requires a leniency program to be developed • Commission is expected to issue a separate set of leniency rules soon
Cambodia	Lao	Myanmar	Thailand	Brunei
<ul style="list-style-type: none"> • Act not yet in force 	<ul style="list-style-type: none"> • Act allows for leniency but no formal leniency program implemented yet. 	<ul style="list-style-type: none"> • Competition Act allows for leniency but no formal process introduced yet. 	<ul style="list-style-type: none"> • No leniency introduced in the new Trade Competition Act that came into effect 2017. • But note that leniency was one of the amendments that were considered. 	<ul style="list-style-type: none"> • Competition Order requires leniency regime but no formal program implemented yet.

DIFFERENCES IN LENIENCY PROGRAMS – WHERE TO & WHO’S TALKING?

• • • •

RAJAH & TANN ASIA

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Singapore	Malaysia	Philippines
<ul style="list-style-type: none"> • Leniency available for “cartel activity”, which are “agreements which have as their object the prevention, restriction or distortion of competition within Singapore”. 	<ul style="list-style-type: none"> • Leniency available for enterprises what have admitted their involvement in infringing s4(2) of the Act (e.g. price fixing, market sharing, bid rigging). 	<ul style="list-style-type: none"> • Only open to participants of anti-competitive agreements set out in 14(a) & 14(b) of the Act (i.e. price fixing, bid rigging, market allocation, restricting price competition, etc.) • Not available for general “agreements which have the object or effect of substantially...restricting competition”
<ul style="list-style-type: none"> • Cartel initiator/coercer only entitle to a maximum reduction of 50% in financial penalties 	<ul style="list-style-type: none"> • Cartel initiator/coercer not entitled to 100% reduction in financial penalties, but otherwise no fine reduction limit imposed. 	<ul style="list-style-type: none"> • Cartel initiator/coercer not entitled to immunity, but unclear if it may be entitled to 100% reduction in financial penalties via leniency
<ul style="list-style-type: none"> • Have to refrain from further participation in cartel (except as directed by CCCS) 	<ul style="list-style-type: none"> • No requirement to refrain from further participation in cartel as pre-condition for leniency 	<ul style="list-style-type: none"> • Have to take “prompt and effective action” to terminate participation in cartel



FAST TRACK PROCEDURE (FTP)

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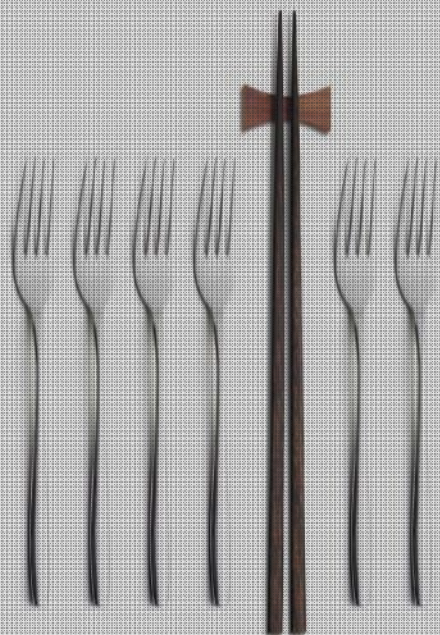
- 10% reduction in financial penalties in exchange for Parties' admission of liability for infringement
 - Vs. Commitments process – No admission of liability
- Applies to Section 34 Prohibition AND Section 47 Prohibition
- Can apply in conjunction with leniency – Discounts are cumulative
- Four stage process – initiation, discussion, agreement and acceptance

FTP ≠ Leniency ≠ Commitments

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Speaker 5 - Mr. Johan Ysewyn (BE)

Immunity and Leniency Survey 2018



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NEW YORK SAN FRANCISCO SEOUL SHANGHAI SILICON VALLEY WASHINGTON

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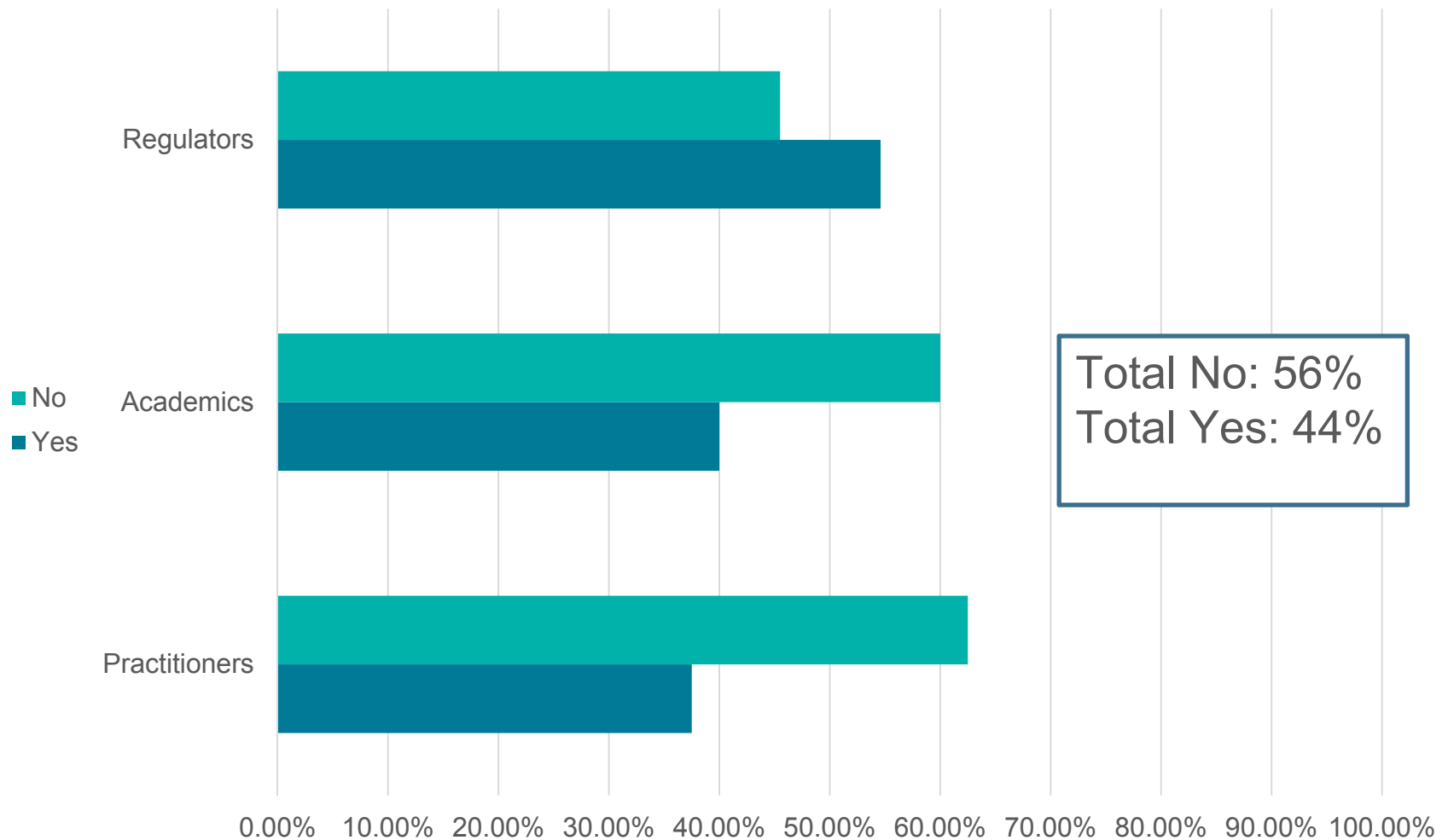
Introduction to the survey

- Survey created as a short on-line user friendly questionnaire which takes 10 minutes to complete
- Jointly with the Brussels Schools of Competition
- Focus on EU immunity and leniency (except for EU 29 competition authorities)
- Survey was open between 17 April and 25 May 2018, including various extensions to encourage participation
- Wide variety of different groups – distinction between external counsel, CEO's and GC's, academics and authorities
- Received many positive messages in response from all groups regarding the survey initiative and a significant interest in the results

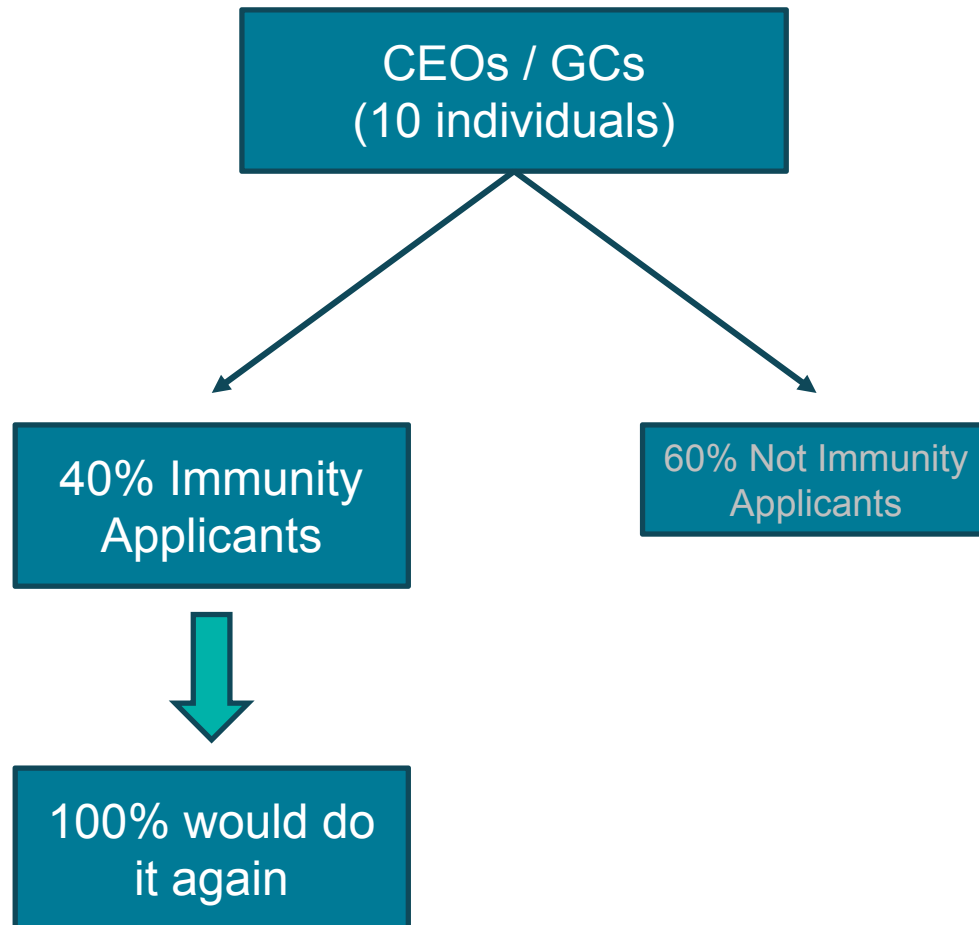
Questions

- **Question 1** : Have you seen a decline in immunity applications in the last 5 years? And why?
- **Question 2** : Have you seen a decline in leniency applications in the last 5 years? And why?
- **Question 3** : Do you expect the overall success of the EU immunity & leniency regime to decrease in the coming years?
- **Question 4** : How can the attractiveness of the EU immunity & leniency regime be improved?
- **Conclusions**

Question 1: Have you seen a decline in immunity applications in the last 5 years?

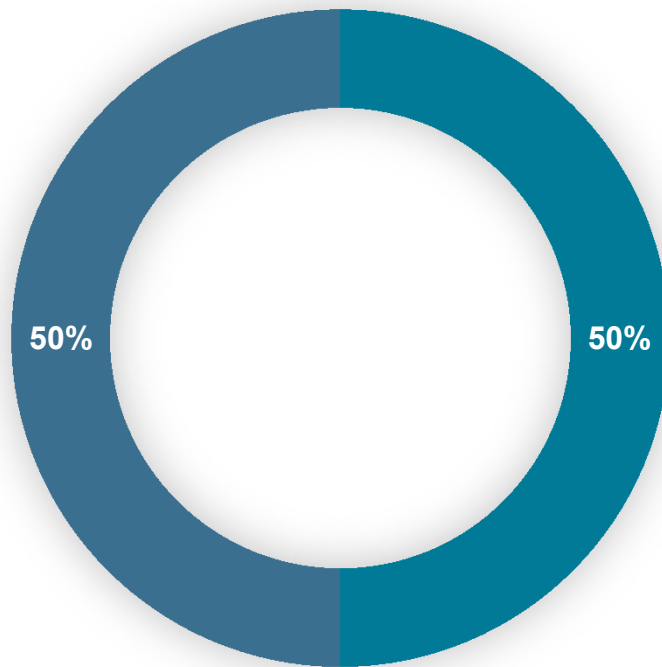


Specific question 1 for CEO's and GC's : Confronted with the same fact pattern, would you go for immunity again?



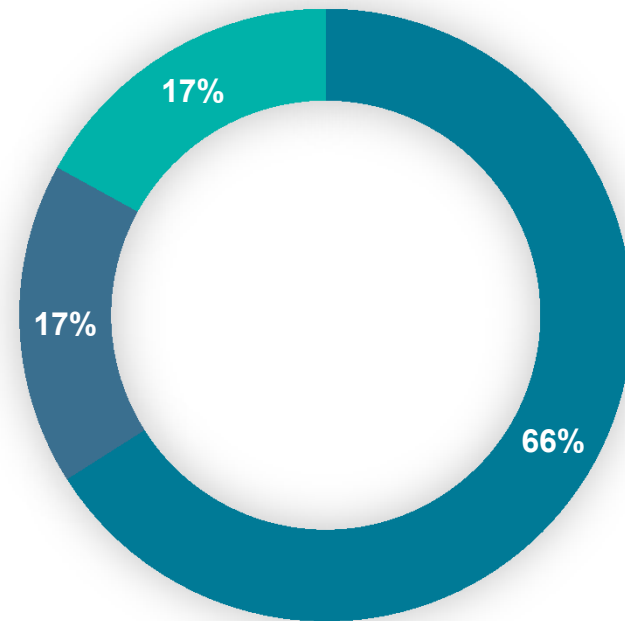
Has there been a decline in immunity applications in the last 5 years: Main reason

Practitioners



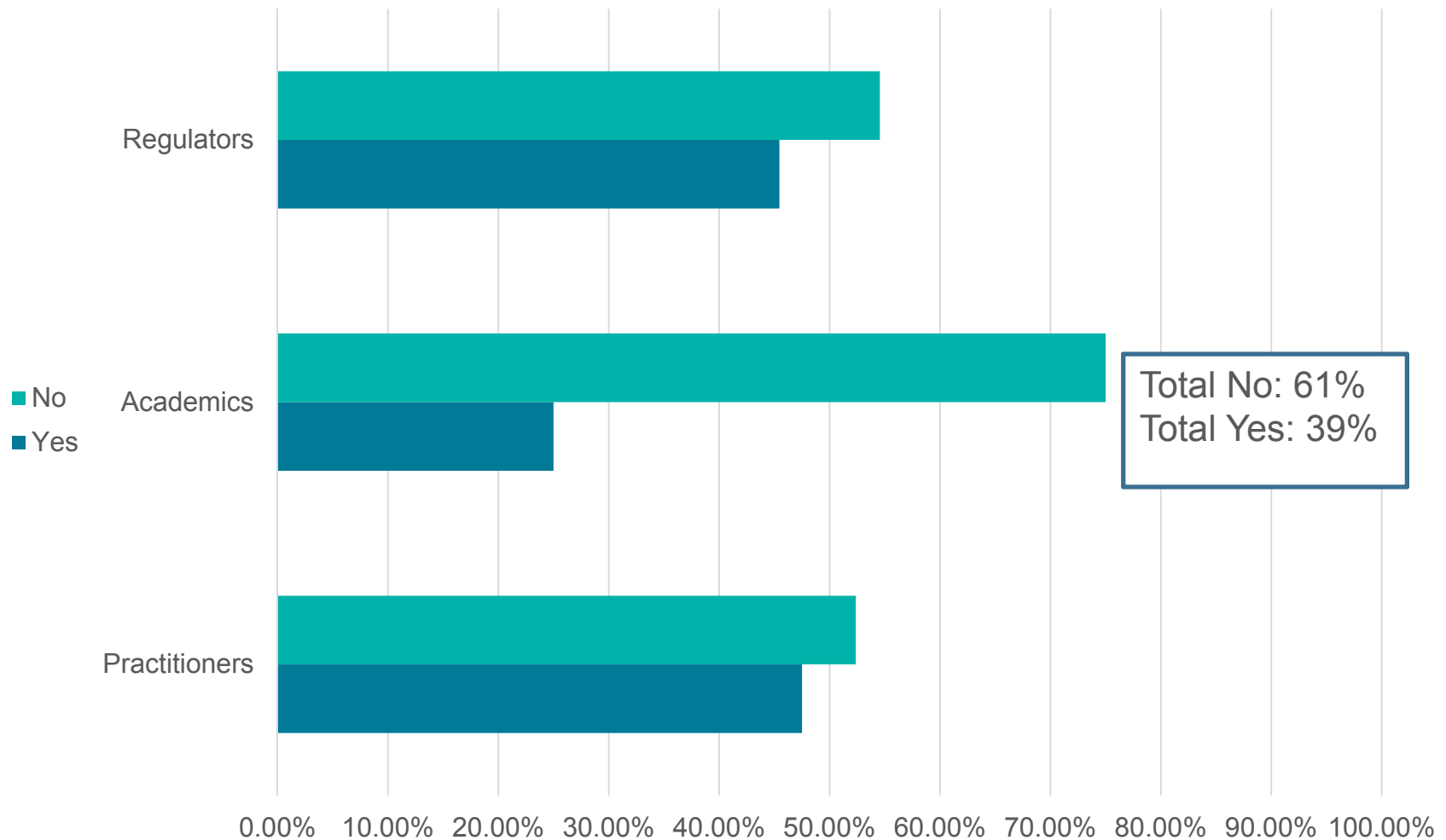
- Uncertainty around the cartel concept
- Civil damages

Regulators

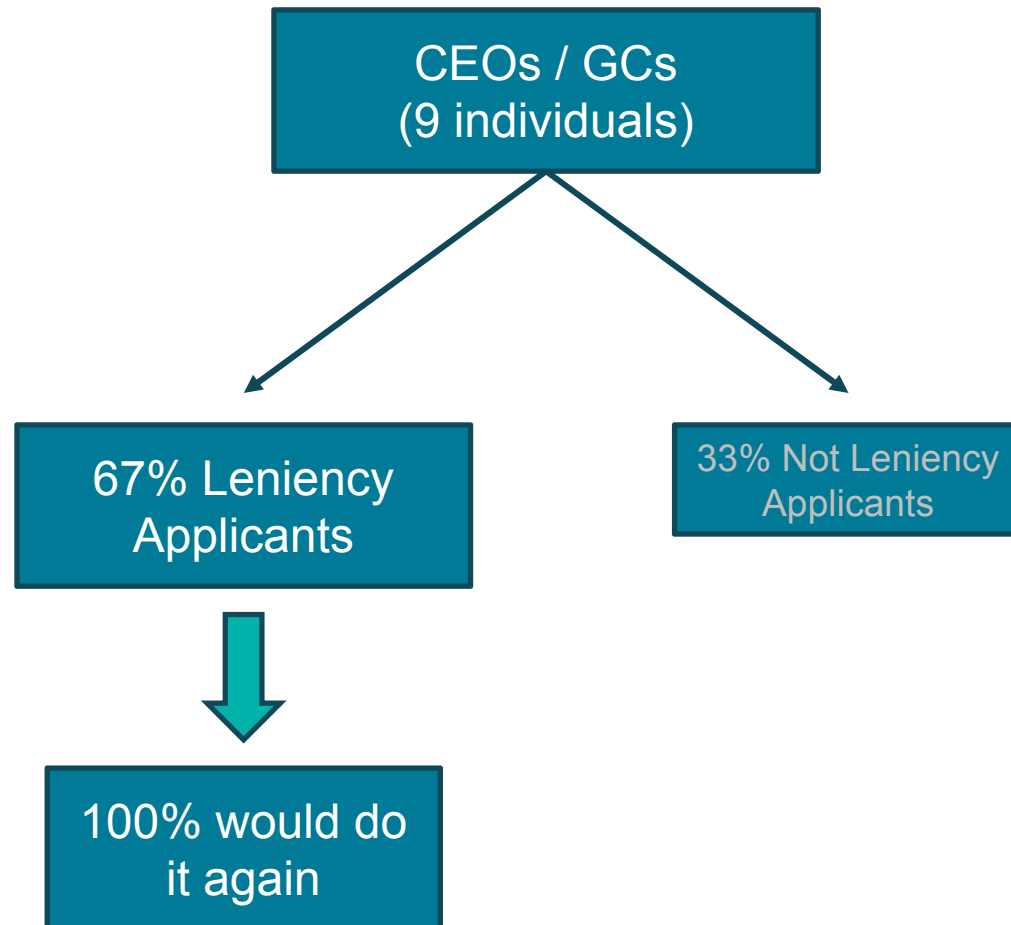


- Civil damages
- Uncertainty regarding reductions
- Relations with competitors

Question 2: Have you seen a decline in leniency applications in the last 5 years?

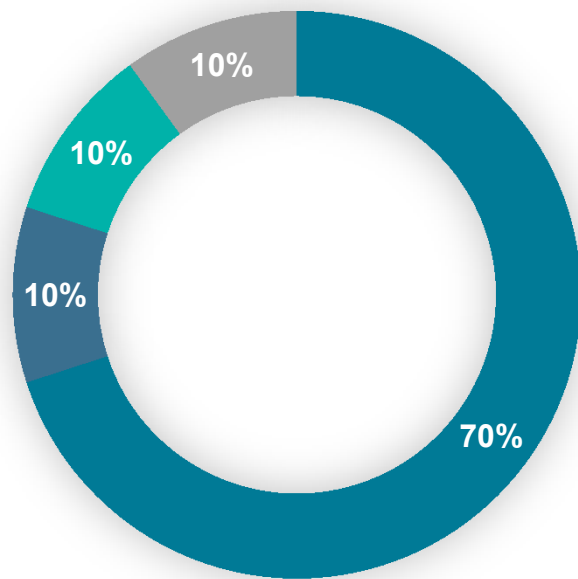


Specific question 2 for CEOs and GCs: Confronted with the same fact pattern, would you go for leniency again?



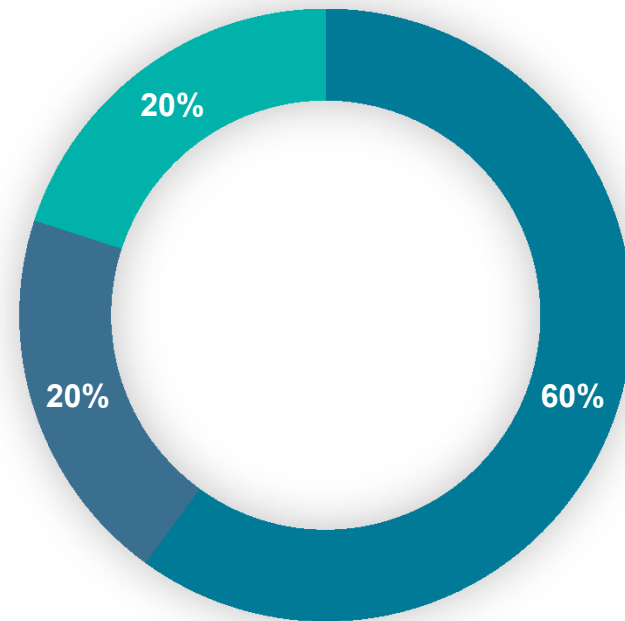
Has there been a decline in leniency applications in the last 5 years: Main reason

Practitioners



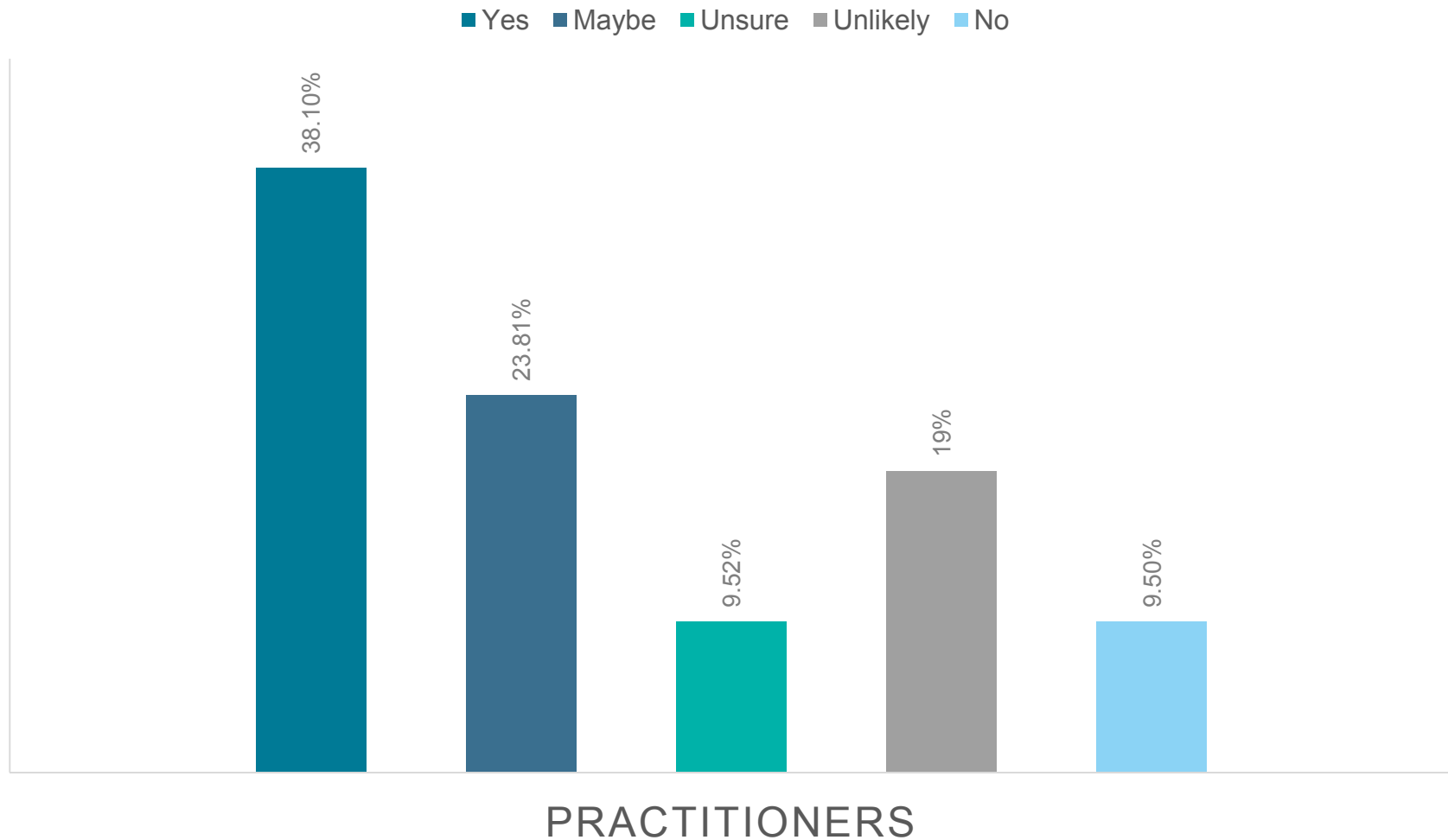
- Civil damages
- Uncertainty regarding reductions
- Uncertainty around the cartel concept
- Bad experience with the authorities

Regulators



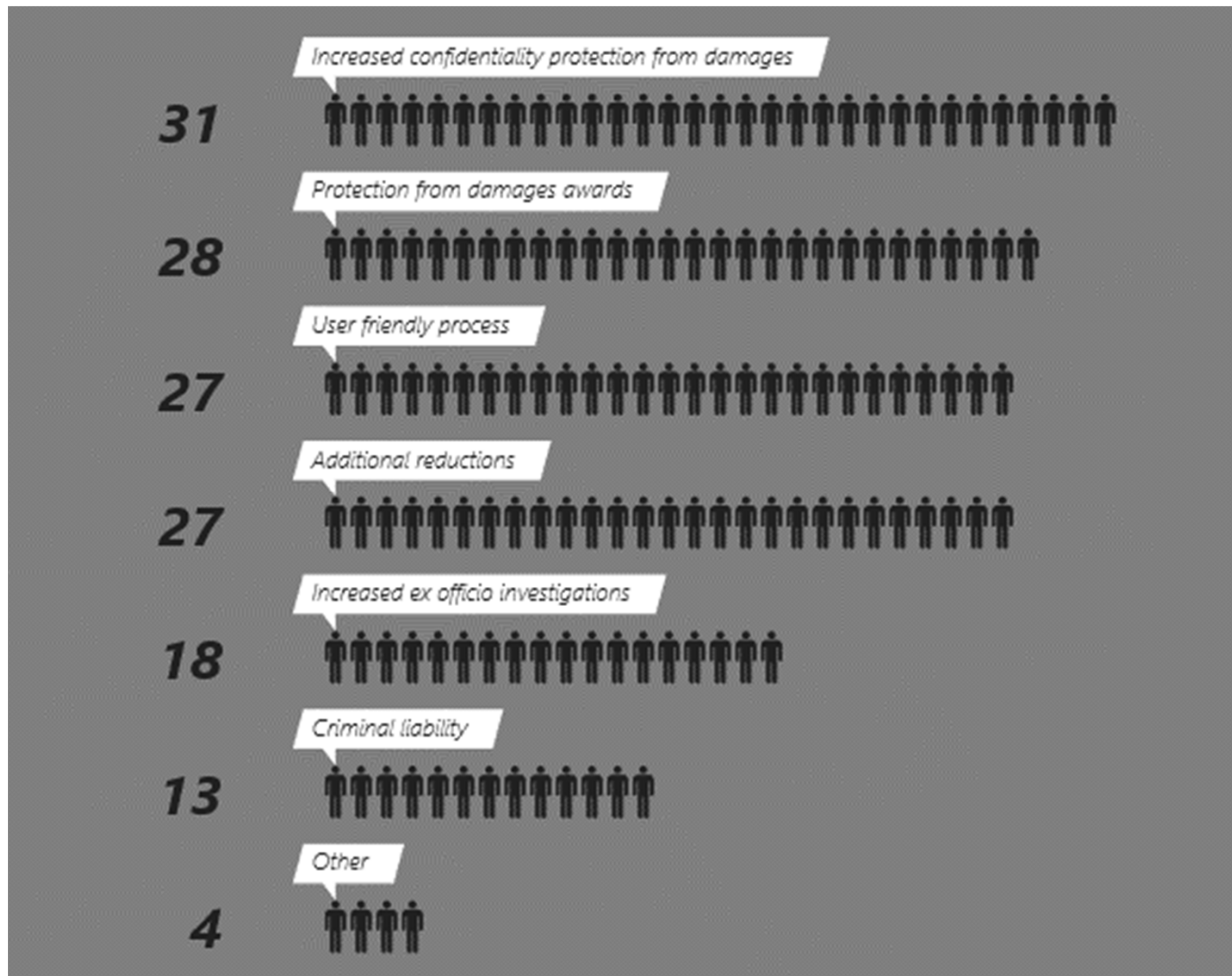
- Civil damages
- Uncertainty regarding reductions
- Relations with competitors

Question 3: Do you expect the overall success of the EU immunity & leniency regime to decrease in the coming years?



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Question 4: How can the attractiveness of the EU immunity & leniency regime be improved? (Combined results)



Conclusions - general

- Going forward, the majority of practitioners believe the overall success of the EU regime will decrease in the coming years
- The most and least popular ways of increasing the attractiveness of the regime were not (very) surprising
 - The most popular option overall was protection from damages, closely followed by increased confidentiality protection
 - A more user-friendly process came in as a close third (the most popular choice for practitioners, while the least for regulators)
 - The least popular option overall was increased frequency of ex-officio investigations (no votes from CEOs/GCs, while most popular with regulators), followed by criminal liability (favoured by academics)

Next steps?

- Where do we go from here?
- There are things we as practitioners can do:
 - National level surveys
 - Coordinate with other practitioners to achieve further insights
 - Undertake surveys involving electronic voting at conferences
- There are things you as competition regulators can do:
 - National level surveys
 - ECN investigation and co-operation
 - ICN investigation and co-operation
 - Open exchange of results at an EU level
 - Public support and endorsement from regulators to encourage wider participation

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Commentator - Mr. Marc Barennnes(LUX)

Marc Barennnes*
Référéndaire, General Court
Court of Justice of the EU

Leniency incentives and disincentives: A Court's view

ICN Webinar, 19 September 2018

Some general remarks

Leniency, along with settlement procedures, reduced significantly the number of appeals before the EU Courts

Leniency changed dramatically the nature of appeals before the EU Courts

One unaddressed question

Does the power of the Courts to review leniency decisions adopted by NCAs provide for an incentive or a disincentive to apply for leniency?

Some general findings

The existence of a right to an in-depth judiciary review over leniency issues may be considered as providing an **additional incentive to apply for leniency**

1 -The EU courts played an **essential role in shaping the European Commission leniency** program (legal basis, value of oral evidence, access to documents, amounts of reduction etc)

2-The right of the EU General Court not only to control the legality of the fine but also to review its appropriateness **increases legal security and fairness in the best interest of both NCAs and applicants**

** All views expressed are strictly personal*