Cartels are being unveiled and punished across the globe. What were once just US legal measures to combat them, such as whistle-blowing, severe criminal sanctions, extradition, and private damages claims, are now gaining acceptance with legislators and regulators worldwide.

Increased legislation and cartel regulation in many jurisdictions are creating ever-growing concern as fines escalate, regulators co-operate internationally and procedures differ substantially from one jurisdiction to another. *Leniency Regimes* provides an up-to-date analysis of cartel leniency regimes in 32 jurisdictions that will be enlightening for all businesses involved in cross-border activities. It provides general counsel and external advisors with an invaluable tool to navigate through this complex international regulatory web.

Preface Jacques Buhart, *McDermott Will & Emery*

Foreword Cecilio Madero Villarejo, *DG Competition of the European Commission*

Foreword Lisa M. Phelan, *Chief, Washington Criminal I Section Antitrust Division US Dept of Justice*

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ISBN 978-0-414-03945-2

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LENIENCY REGIMES
INTERNATIONAL SERIES
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Published in August 2015 by Thomson Reuters (Professional) UK Limited, trading as Sweet & Maxwell
Friars House, 160 Blackfriars Road, London, SE1 8EZ
(Registered in England & Wales, Company No 1679046.
Registered Office and address for service:
2nd floor, 1 Mark Square, Leonard Street, London EC2A 4EG)
A CIP catalogue record for this book is available from the British Library.

ISBN: 9780414039452

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PREFACE

Jacques Buhart | McDermott Will & Emery

Since the last edition of this book, leniency applications continue to be the most important source of anti-trust investigations. This will likely remain the case in the future. That being said, certain key developments of late are likely to have an impact on leniency programmes. A notable development in this regard is the entry into force of Directive 2014/104/EU 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 (Damages Directive), a key objective of which is to optimise the interplay between private damages actions and public enforcement. To this end the Damages Directive enacts specific provisions designed to protect leniency programmes whilst at the same time encouraging private actions for damages.

First, there is an absolute prohibition on disclosure of leniency statements. This prohibition applies not only to requests for disclosure of copies of leniency statements in the control of a competition authority, but also to copies of the same documents in the hands of other parties to the damages action or even of third parties. This absolute protection applies to the leniency statement itself. With respect to leniency statements the Damages Directive, therefore, leaves no scope for the national judge to perform the so-called "balancing exercise" enshrined in *Pfleiderer* and *Donau Chemie* as to whether they should be disclosed. However, it bears note that "pre-existing information", such as e-mails and minutes of meetings that existed prior to the leniency statement can be the subject of disclosure orders, even if they are referred to in the statement.

Second, with respect to joint and several liability, the Damages Directive provides that an immunity recipient will only be jointly and severally liable to its own direct and indirect purchasers or providers. Other injured parties can only claim damages from an immunity recipient where full compensation cannot be obtained from the other joint infringers. In such case, contributions by the immunity recipient to the liability of other joint infringers must not exceed the amount of the harm caused by the immunity recipient to its own direct or indirect purchasers or providers. To the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers must be determined in the light of its relative responsibility for that harm.

It remains to be seen, of course, whether the Damages Directive has found the optimal balance between public and private enforcement, that is to say, between ensuring that cartelists have adequate incentives to apply for leniency and ensuring that parties injured by the cartel can realistically bring a successful damages action. It cannot be ruled out, for example, that a claimant's ability to obtain disclosure of "pre-existing information" may have a chilling effect on a cartelist's inclination to apply for immunity or leniency, as a consequence of which there may be fewer infringement decisions to rely on for the purposes of bringing a "follow-on" damages claim.

Another major development concerns the continuing trend pertaining to international co-operation in anti-trust enforcement as trans-border misconduct becomes increasingly common. The automotive parts investigation, the largest international cartel case seen to date, represents a good illustration in this regard. Regulators investigating the alleged cartel conduct included the US Department of Justice, the Canadian Competition Bureau, the EU's DG Competition, the Japanese Fair Trade Commission and the Chinese National Development and Reform Commission, to name but a few. Another example of international co-operation can be found in the investigation of investment banks' manipulation of FX rates which began in 2013 and engulfed more than a dozen regulators. The UK's Financial Conduct Authority recently announced that it had "prompted unprecedented global co-operation". Such increased co-operation has no doubt had

a hand in the fact that total cartel fines issued by the world's competition authorities in 2014 reached a new level of USD5.3 billion, up 31% on the previous year's (record breaking) total. Indeed, international co-operation is set to increase with a recent wave of international agreements. Witness in this regard the fact that the JFTC has recently entered into an agreement with the Australian ACCC (2015), and a memorandum of understanding with the Brazilian CADE (2014) while the EU and Switzerland signed an anti-trust co-operation agreement in 2013.

As the enforcement net tightens around cartel conspirators, the development of international co-operation raises several questions such as the extent of information and evidence which can and will be exchanged between competition authorities, and the advisability for leniency applicants to grant procedural or substantive waivers. Finally, it should be noted that leniency programmes including "amnesty/immunity plus" mechanisms, such as the one in the US, may have a ripple effect as leniency applicants for one product may be forced to investigate and apply for leniency for other products not initially envisaged.

More than ever, it is crucial for leniency applicants to co-ordinate their movements on a worldwide level and to consider applying simultaneously for leniency, not only with the most important enforcers, but also in rising jurisdictions such as Brazil or South Africa – jurisdictions which are eager to take on cases even though their resources are not sufficient to pursue all leniency applications or despite the fact that the impact of a cartel on their respective markets is indirect or only limited.

This fifth edition covers countries across all continents: Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Cyprus, Denmark, EU, Finland, France, Germany, Hungary, India, Ireland, Italy, Japan, Mexico, New Zealand, Portugal, Russia, Singapore, South Africa, South Korea, Spain, Sweden, Switzerland, Turkey, UK, Ukraine, and the USA.

Many of these jurisdictions' leniency programmes share common characteristics, such as the availability of rewards not only for the first whistleblower, but also for subsequent applicants; the conditions that must be fulfilled in order to benefit from full immunity, such as not having coerced other companies into joining the cartel, and the existence of a marker system. Such similarities among leniency programmes should enable applicants to succeed more effectively in their simultaneous applications in different jurisdictions, even though differences among these programmes remain.

I would like to thank all the authors, Cecilio Madero and Lisa Phelan, and the team at Thomson Reuters for their efforts in bringing this fifth edition to fruition.

FOREWORD

Cecilio Madero Villarejo | Deputy Director-General of DG Competition of the European Commission

The fight against cartels is a priority for the European Union (EU) and for all anti-trust enforcement agencies around the world. This has been the case for a long time: in the EU, 48% of all the European Commission's decisions adopted between 2004 and 2013 in the anti-trust field were in cartel cases. And this paints only part of the picture, since it does not take into account the achievements of the competition authorities of the EU member states, which have also concentrated their enforcement efforts against cartels.

For such effective enforcement, a well-designed and well-functioning leniency programme is essential. Although not the only source of cases for the Commission, leniency remains the main trigger for new investigations. Three quarters of the Commission's cartel decisions imposing fines adopted between 2004 and 2013 were in cases started by immunity applications.

The Commission's leniency policy is firmly established, with almost 20 years of application. The policy is constantly under review, with the last amendments made in 2006. However, to maintain its effectiveness, it is not sufficient to focus only on the design of the programme. Interaction with other instruments – such as actions for private damages – have a significant impact on the incentives for leniency. It is important to ensure that consistency between those policies contributes to maintaining the effectiveness of leniency programmes generally.

The shaping of the EU policy on actions for private damages for infringements of anti-trust rules has been a long process which (after comprehensive public debates) concluded with the adoption of Directive 2014/104/EU 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 (the Damages Directive). The purpose of the Damages Directive is to make it easier for the victims of anti-trust infringements to claim damages by, among other things, providing them with easier access to evidence. Usually such evidence is part of the investigation files of competition authorities. However, given the self-incriminating nature of leniency applications, their potential disclosure in other jurisdictions' courts might deter companies from coming forward and reporting a cartel under a leniency programme. Therefore, to ensure that companies' incentives for voluntary co-operation remain intact and to preserve the effectiveness of leniency programmes in the EU, the Damages Directive contains a provision that requires member states to ensure that courts cannot order disclosure of leniency statements produced for the purpose of co-operating with competition authorities.

The possibility to submit oral leniency applications to the Commission and some member state anti-trust authorities is also meant to maintain the attractiveness of leniency programmes for those companies that may end up facing private damages actions outside the EU.

International co-operation and convergence also contribute significantly to the development and maintenance of effective leniency policies.

At EU level, the ECN Model Leniency Programme (MLP) was developed by DG Competition and the National Competition Authorities of member states within the European Competition Network (ECN) in 2006. The MLP provides a model of procedural and substantive elements which, according to the ECN, every leniency programme should contain. All ECN members have made a political commitment to use their best efforts to align their programme with the MLP. Indeed, the MLP has helped to encourage and guide anti-trust enforcement agencies in the EU to develop or to further improve their leniency programmes as well as to achieve a significant degree of alignment. Since the last edition of *Leniency Regimes*, the

FOREWORD

MLP has been revised. Apart from a significant degree of convergence, the MLP also introduced a summary application system in situations where the Commission is particularly well placed to deal with a case. This system allows immunity and fine reductions for applicants who file with the Commission and enables them file simplified applications with member states' competition authorities. This reserves them a place in the queue, should the case end up being dealt with by a member state authority rather than the Commission.

In our experience, wider international co-operation within the International Competition Network (ICN) is also indispensable. This is natural, given the rapidly increasing number of investigations of worldwide cartels (recent examples are automotive and financial cases), which require the close co-operation of anti-trust authorities around the world. The ICN Cartels Working Group, in which the Commission participates actively, is an important forum for exchanges on how to achieve effective co-operation on cartels between various anti-trust enforcement agencies. In 2014, in order to facilitate the provision of confidentiality waivers for leniency applicants and to increase their uniformity worldwide, the ICN Cartels Working Group also adopted waiver templates and an explanatory note, which DG Competition fully endorsed.

I welcome this fifth edition of *Leniency Regimes*, which contains descriptions of various leniency policies around the world. It also examines the leniency policies in a wider context. Leniency programmes are living tools, the success of which depends on their capacity to adapt to new situations and challenges. Interesting issues appear all the time, for example, the level of protection or the discovery of leniency applications in private damages actions. Each anti-trust enforcement agency deals with them according to the specifics of its legal system, and it is particularly useful to have the varying approaches to those issues compiled in one volume.

I am convinced that this edition, like the previous editions, will not only be a useful practical reference for the anti-trust community (including DG Competition) but also a source of inspiration and reflection on how to maintain the effectiveness of different leniency policies around the world.

FOREWORD

Lisa M. Phelan | Chief, Washington Criminal I Section Antitrust Division United States Department of Justice[1]

More than 20 years ago, when the Antitrust Division of the Department of Justice first set out a clear and transparent leniency programme, it shortly thereafter gathered competition enforcers from jurisdictions around the globe to discuss the value and effectiveness of the concept. It could not have been envisioned at the time of that first gathering how widespread or how successful such programmes would become for detecting and combating cartels.

As someone who began a career investigating and prosecuting cartels in the pre-leniency programme era, I cannot emphasise enough the effectiveness of a thoughtfully designed and implemented leniency regime as a tool for cracking cartels. When coupled with international co-operation on the investigation of cartels with global impact, leniency programmes have enabled the world's enforcers to expose and eradicate dozens of longstanding and perniciously harmful cartels. These cartels, which impacted major consumer industries and affected billions of dollars in national and international commerce, might have otherwise continued for years, draining the world's economies and depriving consumers of fair prices and innovation.

In the context of a criminal enforcement regime like the United States, a leniency programme often brings to enforcers, applicants that are involved in ongoing cartels. These applicants then take law enforcement agents directly inside the cartel, in real time. With the incentive to avoid prosecution, corporations co-operate by bringing witnesses and documents from all over the world and company executives co-operate by wearing wires to price-fixing meetings. Applicants tape record incriminating phone conversations and share with law enforcement agents e-mailed or texted solicitations to collude.

More than 60 jurisdictions have adopted leniency programmes in the past two decades and the international community of enforcers continues to discuss regularly the appropriate criteria and best practices for implementing such regimes. The International Competition Network (ICN) hosts a biennial cartel conference, in different countries around the world to share insights and experiences in implementing leniency programmes. Additionally, many jurisdictions host cartel practitioners from other jurisdictions to study one other's leniency regimes, in order to continually improve them. More mature leniency regimes offer guidance and support to developing ones. A convergence of views and shared best practices are among the goals of the conferences and training exchanges. Still, some variations among leniency regimes remain, as this book illustrates.

The Antitrust Division's leniency programme continues to be a major source of new cartel investigations, and seeking leniency from the Division continues to be the advisable choice for a corporation or individual that has been a participant in a cartel. Given the proliferation of global leniency regimes, however, the costs and complications of simultaneously complying with programmes in numerous jurisdictions has become a real issue. Enforcers need to continue to evaluate the potential impact of this situation and be open to options that could mitigate costs and avoid unintended negative consequences. While companies and executives should not expect minimal costs or consequences to a successful leniency application, it is in no one's interest for enforcers to create barriers or burdens that unnecessarily discourage potential leniency applicants.

[1] The views expressed do not necessarily reflect those of the Department of Justice

FOREWORD

Some practical ways that the Division and its fellow cartel enforcement agencies can work together to minimise the burdens and expenses on leniency applicants were recently outlined in a Division speech[1]. Those steps include:

- Co-ordinating on deadlines and timetables for key co-operation tasks and witness interviews.
- Focusing respective investigations on conduct and effect relevant to each jurisdiction.
- Limiting document demands and maximising use of software search tools.
- Limiting, to the extent possible, the number of times witnesses are interviewed around the world.

Each enforcement agency can and must do what is required to establish cartel violations to the standard of proof in their jurisdiction, and leniency applicants must earn their non-prosecution commitment through complete co-operation[2]. Within that framework, however, both enforcers and applicants can look to accomplish these goals in the most efficient and cost-effective way possible.

With a strong criminal enforcement programme, the Antitrust Division has obtained record criminal fines in recent years. For each of the last several years, more than $1 billion in fines have been imposed by the courts in cartel cases, including more than $3 billion in FY 2015 alone. Widespread multinational cartel conduct in industries like auto parts, shipping and financial services has fuelled these enforcement results in the United States. Participants in these international cartels face consequences in other jurisdictions as well. Dozens of executives from these industries have served jail terms in the US.

These results indicate, however, that cartel conduct has not been sufficiently deterred, either in the US or around the world. There is still much work for competition agencies to do. Leniency programmes, which have proven such a powerful tool in unearthing long-hidden cartels, are more important than ever in the world's fight against cartel conduct. Making those programmes clear, transparent and user-friendly is, and will continue to be, a key goal for enforcers around the globe.

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1 See Brent Snyder, Deputy Ass't Att'y Gen. for Crim. Enforcement, Leniency in Multi-Jurisdictional Investigations: *Too Much of a Good Thing?*, Sixth Annual Chicago Forum on International Antitrust (June 8, 2015), available at *www.justice.gov/opa/speech/deputy-assistant-attorney-general-brent-snyder-delivers-remarks-sixth-annual-chicago*

2 AAG William Baer stated in a recent speech: "Our policy requires complete and continuing co-operation with the division throughout our investigation and resulting prosecutions…Companies unwilling or unable to make the investments necessary to meet these obligations, or those that think they can do so on a timetable of their choosing, will lose their opportunity to qualify for leniency." Bill Baer, Ass't Att'y Gen., Antitrust Div., Prosecuting Antitrust Crimes, Remarks Presented at the Georgetown University Law Center (Sept. 10, 2014), available at *www.justice.gov/atr/file/517741/download*

RUSSIA

Vassily Rudomino, German Zakharov, Ruslana Karimova, Roman Vedernikov & Alla Azmukhanova | ALRUD Law Firm

BACKGROUND

1. What is the relevant legislation concerning leniency policy and who is the enforcing body? Has the enforcing body issued any supplementary guidance in support of the relevant leniency legislation?

There are two leniency programmes which exist in Russian legislation as separate provisions incorporated in the Code on Administrative Offences and in the Criminal Code.

The provisions of the administrative leniency programme are included in the special note to Article 14.32 of the Code on Administrative Offences. Under the Code of Administrative Offences, legal entities engaged in restrictive agreements or concerted practices have an opportunity to take part in a leniency programme under which companies that (i) voluntarily report their own participation in anticompetitive agreements or concerted practices to the Federal Antimonopoly Service (the FAS), (ii) cease their participation in the agreement or concerted practice, and (iii) provide the FAS with documents and information sufficient to establish the fact that the offence was committed, and the FAS did not have these documents or possess this information earlier, are fully relieved from administrative liability. Full immunity is possible in respect of all anticompetitive agreements (for example, cartels, vertical restraints and other anticompetitive agreements).

The FAS is the authorised federal executive authority responsible for among other things the prevention, restriction and suppression of monopolistic activity and unfair competition, and for ensuring that the antimonopoly legislation is observed.

The head of the FAS is appointed by and subordinated directly to the Prime Minister of the Government of the Russian Federation. There are eight deputy heads. The FAS consists of a central office and 84 regional offices which are located all over the Russian Federation. The central office investigates cases with a larger economic impact or involving national economic issues, and is responsible for organising law enforcement activities and supporting the functioning of the system in general, including legislative work, analytical work and the creation of methodological guidance for investigations, international co-operation, budgetary support, education measures. The FAS is composed of a number of departments responsible for legislation enforcement.

Criminal leniency rules are provided for in the Criminal Code of the Russian Federation as a special note to Article 178, which establishes liability for entering into cartel agreements. Recently certain amendments were made to this article excluding criminal liability for abuse of a dominant position. The criminal leniency programme is administered by the Ministry of Internal Affairs (MIA) and the FAS simultaneously.

Currently there are no special regulations or guidance from the FAS in support of the relevant leniency legislation.

2. What are the basic tenets of the leniency programme? Is leniency available for competition law violations other than cartels?

Russian legislation provides for two types of leniency programmes: administrative and criminal.

Administrative leniency programme

Under the Code on Administrative Offences, a legal entity participating in a cartel can benefit from a leniency programme pursuant to which companies are exempted from liability. Russian leniency rules only provide for full, not partial, immunity

from administrative fines. In order to qualify for immunity a company must be the first company to satisfy all the following conditions:

- Voluntarily reports to the FAS about its entering into anticompetitive agreements or execution of concerted practices.
- Ceases participating in the agreements or concerted practices.
- Submits information and documentary evidence.
- Provides, at the time of the report, the FAS with new relevant information and documents relating to the offence.
- Provides information and documents to the FAS which are sufficient to establish that the conduct in question qualifies as an offence.

The immunity decision is taken by the FAS.

In practice, leniency can be applied for after the FAS has started its investigation and before a decision is issued by the FAS commission reviewing the relevant case.

Additionally, if an undertaking receives immunity from administrative liability, its managers also receive immunity from administrative liability. Individuals seeking such immunity are therefore not required to make a separate application.

The Administrative leniency programme covers anticompetitive agreements (including cartels) and concerted practices.

Criminal leniency programme

The procedure for the criminal leniency programme is regulated by the Russian Criminal Code and the Russian Code of Criminal Procedure. Criminal leniency rules are applicable to individuals only. Under Russian legislation, companies cannot be subject to criminal liability.

Two main conditions for applying the criminal leniency programme are: (i) contribution to the investigation, and (ii) compensation for the relevant damage caused by the cartel agreement.

Criminal prosecutions are handled by a law enforcement office – the Ministry for Internal Affairs (MIA) – on the basis of information provided by the FAS beforehand.

A party who escapes administrative liability through the leniency programme does not automatically escape criminal liability. These two processes exist in parallel.

An application for leniency from criminal liability must be made separately from an application for administrative leniency. The applicant must turn himself in to the police.

The application for leniency will only be effective if the following criteria are met:

- It is made voluntarily.
- The police are not already aware of the offence.
- The person actively assisted in uncovering the crime.
- The person offers compensation for damages.

No immunity will be granted if an application is filed on behalf of several parties to an anti-competitive agreement.

3. Is there an "immunity plus" or "amnesty plus" option? If not, in practice, can a leniency applicant receive a reduction of its fine for its participation in a first cartel if it reports its participation in a second, unrelated cartel?

Russian legislation does not provide for an "immunity plus" or "amnesty plus" option.

There is no option where the applicant can be relieved from liability for participation in the first cartel if he reports about a second cartel.

4. How many cartel decisions involving leniency applications have been rendered since 1 January 2013? How many companies have received full immunity from fines during that period?

In Russia the FAS has only begun to actively develop this programme since 2013. In 2013, the FAS registered 29 leniency applications on the basis of the note to Article 14.32 of the Code of Administrative Offences. In comparison, in 2012 there were only 13 leniency applications.

There are no examples of the application of criminal leniency rules so far. The exemption from administrative liability in accordance with the administrative leniency programme does not automatically lead to exemption from criminal liability. Therefore, criminal leniency is not granted automatically even if administrative immunity has been obtained. Both the FAS and MIA are independent bodies and should apply their respective administrative and criminal leniency programmes independently.

5. What is needed to be a successful leniency applicant? Is documentary evidence required or is testimonial evidence sufficient (can an applicant be awarded leniency by providing the enforcing body with testimonial evidence only)? How are "useful contributions" or "added value" defined? Is there any sanction for misleading or incorrect leniency applications?

An administrative application must be in writing and can be submitted in any form (but must contain the information and documents required for establishing the fact that the offence was committed). Although there is no publicly available guidance regarding the form of application, the FAS will offer a sample application upon request.

An application for criminal leniency can be made either in writing (in any form) or orally. In any event, the police will draw up a report. There are no requirements on the scope of information or documents to be provided when making the application.

Both in administrative and criminal leniency, the evidence (written or oral) must be sufficient to establish the offence. However, the decision on whether the documents and oral report are sufficient or not is made by authorised body in each case.

PROCEDURE

6. What are the practical steps required to apply for leniency? Is it possible to have an initial anonymous contact with the enforcing body before actually applying for leniency or do parties have to give full disclosure of their identity at any time?

An administrative application must be submitted either to the central office of the FAS, or to one of its territorial agencies. In the latter case, the territorial agency will inform the central office and then follow its instructions on how to handle the application.

Administrative applications must be filed by either (i) the company's CEO, or (ii) a person acting under a power of attorney issued by the company with express authority to submit an application.

The administrative application must be in writing and can be submitted in any form (but must contain the information and documents required for the grant of immunity). Although there is no publicly available guidance regarding the form of the application, the FAS will offer a sample application on request.

Applicants for leniency under the administrative programme are expected to provide information and documents (such as agreements, minutes, notes and correspondence) which:

- Are sufficient to determine that an offence has been committed.
- Evidence that the applicant refused to take part, or stopped participation in, the anti-competitive agreement or concerted action.

The FAS registers administrative applications in the register of leniency applications kept by the FAS anti-cartel department. It issues a receipt to the applicant confirming the date and the exact time of submission of the application and the list of documents attached to it. There are no publicly available FAS regulations detailing the procedure for the review of leniency applications. In practice, they are reviewed in conjunction with the review of the case on Competition Law infringement. The final decision on granting immunity is issued simultaneously with the final decision on the infringement.

Accordingly, the general procedures and timetable for the initiation and review of infringement cases, set out by the Competition Law, apply. The proceedings must be started within one month of the application being submitted and this period can be extended by two months if the submitted information and documents are not sufficient to determine that there was an offence.

The FAS has three months to review the case and issue the final decision following the date of an order on starting proceedings.

If the FAS needs additional information, the three-month period can be extended, but by no more than six months.

The timing for the review of infringement cases outlined above is set out in Articles 44 and 45 of Federal Law No. 135-FZ.

Currently there are no special provisions in the Russian Criminal Code or Russian Criminal Procedural Code setting out procedures or timetables in relation to the criminal leniency programme. It is expected that the applicable rules will be detailed by the amendments to the Russian Criminal Code.

7. Is there a marker system?

Russian legislation does not provide for a marker system. In other words the applicant does not have an opportunity to provide part of the information within the leniency application first, and then collect and present the rest of information later within a designated period, making sure that his rank (and respective marker) will be secure for this period.

According to Russian law, the full complete information necessary to establish the violation needs to be presented with the initial leniency application.

7.1 If so, is it available to all leniency applicants to secure their rank or only to the first in line?

Not applicable.

7.2 If so, what initial information has to be made available in order to qualify for a marker and what conditions apply to the perfection of a marker? Are there any set deadlines for the perfection of a marker? If deadlines are discretionary, what is the average length of time given by the enforcing body to perfect a marker?

Not applicable.

TIMING/BENEFIT

8. What are the benefits of being "first in" to apply for leniency? Is full immunity available for the first applicant?

Administrative leniency programme

Article 14.32 of the Code of Administrative Offences states that the first applicant applying for leniency is granted full immunity. Therefore, second and further applicants are not granted any immunity. Full immunity is the only benefit and it is only available to the first applicant who satisfies all the necessary conditions.

Criminal leniency programme

The Criminal Code provides that an applicant can receive immunity from criminal liability for its CEO and, directors if participation in a cartel has not resulted in (and cannot be qualified as) commission of any other criminal offence.

9. What are the consequences of being "second" to apply for leniency? If applicable, what benefits (including the level of fine reduction) can be expected by a leniency applicant in "second position"?

Formally, as has been mentioned, leniency is not applicable to the second applicant.

Nevertheless, according to the FAS methodological recommendations, fines may be decreased for the second and further applicants up to the following percentages:

- Up to 40% of the basic fine if the person (or entity) guilty of the formation of a cartel agreement has complied with the FAS order before completion of the proceedings.
- Up to 20% of the basic fine if despite the fact of a cartel agreement a person's (or entity's) behaviour shows that it does not perform the cartel agreement and its behaviour may be qualified as competitive.

- Up to 10% of the basic fine if a person (or entity) is not an initiator of a cartel agreement or was forced to participate in it.

The basic fine amount is calculated as one-fifteenth of the maximum fine for a particular kind of offence multiplied by the multiplying ratio of gravity of the offence and its duration.

It is important to note that this programme is a recommendation and does not need to be followed by the FAS when rendering a decision.

The second and subsequent companies filing an application for release from liability may expect minimum penalties to be imposed, but they cannot be released from liability for a criminal offence.

10. Can subsequent leniency applicants be given beneficial treatment? If so, is there a limit to the number of subsequent applicants who may receive such beneficial treatment? If applicable, what benefits (including the level of fine reduction) can be expected by subsequent applicants?

Please see the answer to the previous question.

PARENTAL LIABILITY

11. Are there any aspects related to parental liability that have played a role in the granting of leniency to applicants and/or their former or current parent companies? Does a former parent company benefit from its former subsidiary's leniency application for practices implemented by this former subsidiary, which applied for leniency after being divested?

Russian legislation does not provide for any aspects related to parental liability regarding leniency regimes. Moreover, according to Russian law, only a company (or individual) which committed an offence can be held liable. Consequently, only the company (or individual) which applied for leniency might benefit from the grant of immunity.

SCOPE OF LENIENCY

12. What specific conditions must be met in order to benefit from leniency or immunity?

There are no specific conditions for receiving leniency. A person/entity should meet the general requirements described in the response to question 1 above.

12.1 Can ringleaders or coercers receive leniency or full immunity?

According to Russian legislation any person or entity that has met the requirements provided by Russian law described in the response to question 1 may receive immunity. The law does not draw a distinction between ringleaders or coercers of a cartel and other participants when it comes to the leniency application.

12.2 Are there any specifically stated requirements, such as an obligation to "co-operate fully and on an on-going basis" and what do such requirements entail?

Yes, an obligation on an applicant to "co-operate fully and on an on-going basis" is indicated in Article 14.32 of the Code on Administrative Offences. This requirement means that documents and evidence provided by an applicant must be sufficient for establishing the fact that the cartel actually existed. Moreover, the company (or individual) shall provide further assistance to the authority within the investigation process, if necessary.

12.3 Does the enforcing body require the leniency applicant to cease participation in the cartel conduct after its application?

Yes, according to Russian legislation one of the requirements for receiving leniency is the refusal by an applicant from further participation in the cartel. This is a mandatory requirement for receiving leniency.

13. Is there any guarantee of obtaining the final benefit of a leniency application (immunity or reduction of fine) if a leniency applicant co-operates fully with the enforcing body?

Please see the response to question 12.1.

13.1 At what stage during the procedure, can a leniency applicant become certain of the benefit he will get from his leniency application (rank in the leniency queue and fine immunity/ reduction)?

The decision about whether the company (or individual) received immunity will most likely be issued together with the final decision in relation to the investigation.

13.2 What are the possibilities of later leniency applicants moving to a higher position in the leniency queue as a result of the added value they may be able to offer in comparison to earlier leniency applicants? Please provide references to cases where this may have occurred.

Formally, according to Russian legislation later leniency applicants are not entitled to receive immunity except for a possible reduction of a fine as described in response to question 9.

OTHER CONSEQUENCES

14. What effect does leniency granted to a corporate entity have on the entity's employees? Does it protect them from criminal and/or civil liability?

According to Russian legislation, leniency granted to a corporate entity does not automatically release its officials (usually the CEO) from criminal liability. There is no dependence between leniency granted in administrative and criminal procedures.

15. If individual employees are potentially exposed to administrative or criminal sanctions, is there a separate leniency/whistleblowing system available for individual employees? If so, please explain the system and the interaction between corporate and individual leniency.

Please see the response to question 14.

16. Does qualifying for leniency affect the possibility to appeal the decision by which the leniency is granted (are leniency applicants prevented from appealing certain aspects of the decision and if so which ones)?

The Competition Law does not set down any limitations regarding appeals of FAS decisions. The FAS decision may be appealed with an arbitration court or a court of general jurisdiction.

17. Has there been any landmark case law that has led to a reversal of the leniency originally granted in the decision under appeal?

No.

18. Does the granting of leniency prevent third parties from seeking civil damages or protect the leniency applicant in whole or in part from further private enforcement?

Formally, Russian legislation (Civil Code of the Russian Federation and the Competition Law) provides for the possibility to recover civil damages for antimonopoly infringements but there is no established relevant practice. As a general rule, we assume that receiving immunity will not bar third parties from seeking civil damages.

PROTECTION AGAINST DISCLOSURE/CONFIDENTIALITY

19. Is confidentiality afforded to the leniency applicant and other co-operating parties? If so, to what extent?

There are no rules on identity disclosure. In practice, the identity of a leniency applicant may become known to other parties when the FAS issues an order to start proceedings or issues a decision to impose a fine.

Under FAS internal rules, a confidentiality regime is assigned to all leniency applications automatically so no special confidentiality request needs to be made.

There are no special rules relating to disclosure or confidentiality in relation to the criminal leniency programme.

19.1 Is the identity of the leniency applicant/other co-operating parties disclosed during the investigation or only in the final decision?

Please see the response to question 19.

19.2 Is information provided by the leniency applicant/other co-operating parties passed on to other undertakings under investigation?

No, as a general rule, such information is not passed on to other undertakings under the investigation.

19.3 Can a leniency applicant/other co-operating party request anonymity or confidentiality of information provided, such as business secrets?

Yes, an applicant may request that certain information be marked as confidential, and for official use only, so formally all leniency applications receive the benefit of confidentiality, at least initially.

20. Is leniency in any way affected by any bi-lateral/multi-lateral co-operation to which your jurisdiction is a party?

No, we are not aware of such cases. Despite the fact that the FAS actively co-operates with foreign antitrust agencies in the sphere of combating cartels, no co-operation documents regarding leniency have been executed so far.

21. Is the evidence submitted by the leniency applicant protected from transmission to other competition authorities? If so, how?

Since there are no formal co-operation and exchange of information agreements in respect of leniency, we assume that the transmission of evidence, especially that marked as confidential, is not possible.

22. To what extent can information submitted by the leniency applicant (transcripts of oral statements or written evidence) become discoverable in subsequent private enforcement claims?

Since the practice of civil claims is not developed in Russia, it is not possible to estimate whether and to what extent information submitted by the leniency applicant might be discoverable.

22.1 Can the claimant seeking indemnification of antitrust damages in follow-on actions provide to the court this information where he only had access to it because he was party to the previous proceedings before the competent antitrust authority?

We assume such information might be presented to the court, providing that the court will also treat it as confidential.

22.2 Can this information be subjected to discovery orders in a private enforcement claim before domestic or foreign courts? Are there any precedents?

Formally, we assume such information may be discoverable (at least in relation to domestic courts). However, there is no practice so far. As for foreign courts, we assume it is not possible since there are no formal co-operation and exchange of information agreements with respect to leniency.

22.3 Can this information submitted in a foreign jurisdiction be subjected to discovery orders in the domestic courts?

See above question 22.2 regarding foreign courts.

RELATIONSHIP WITH THE EUROPEAN COMMISSION'S LENIENCY NOTICE AND LENIENCY POLICY IN OTHER EU MEMBER STATES

23. Does the enforcing body accept summary applications in line with the ECN Model Leniency Programme?

The ECN Model Leniency Programme has not status in Russia.

24. Does the policy address the interaction with applications under the Commission Leniency Notice? If so, how?

Not applicable.

25. Does the policy address the interaction with applications for leniency in other EU member states? If so, how?

Not applicable.

RELATIONSHIP WITH SETTLEMENT PROCEDURES

26. If there are settlement procedures in your jurisdiction, what is the relationship between leniency and such settlement procedures? Are their possible benefits cumulative?

Not applicable.

REFORM/LATEST DEVELOPMENTS

27. Is there a reform underway to revisit the leniency policy? What are the latest developments?

Russian legislation and practice regarding the leniency programme and competition law generally is still in the process of being formed and that is why changes are being introduced on an ongoing basis. For example, in March 2015 an amendment was introduced to the Criminal Code excluding the possibility to bring persons to criminal liability for abuse of a dominant position.

Now it is planned to develop a mechanism for recovering civil damages for antitrust violations since the relevant practice has not been formed yet.

In general, we assume that would be a positive step if the FAS adopted relevant methodological guidance describing the leniency procedure and all sensitive questions in detail.

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