The ever more bumpy road towards lenient treatment

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There is no doubt that the introduction of amnesty or leniency programs in an increasing number of jurisdictions has been an important step in the fight against cartels. The majority of cartels that have been fined over the last 10 to 15 years have come to the attention of the relevant authorities via applications for lenient treatment. Over the years, many companies confronted with the possible liability and very negative fall-out of being involved in a cartel (such as high fines and "jail time" for individuals), have chosen to confess and hand in evidence of illegal conduct to the authorities in exchange of lenient treatment. In particular for listed companies, an application for lenient treatment was "the right thing to do" in the context of damage control that could lead to no or reduced fines and jail time. In addition, cooperating with authorities and confessing illegal conduct was considered to be acting as a "good corporate citizen".

However, there are growing doubts whether this success story will continue. Several developments have made it increasingly important for companies (and individuals) to seriously weigh the up- and downsides of making an application under these programs before doing so.[1] These developments vary from the uncertainty of which conduct qualifies for lenient treatment, the significant increase in follow-on damage litigation, the related efforts by plaintiffs to get access to the authorities' files (and leniency materials), the role and exposure of individuals and the larger number of programs around the world leading to the multiplication of multi-jurisdictional risks. In short, the road towards lenient treatment has gotten bumpy and there are no real signs that work is under way to remove (some of) these bumps. This will have considerable implications for enforcers who instead of actively seeking out cartels have had the luxury of sitting back and waiting until the next leniency applicant steps in the door with "chapter and verse" on a cartel.

In an effort to examine some of the most important complications and to stimulate the debate on the possible implications and necessary changes to the system that could keep leniency programs attractive, we have invited several experts to elaborate on a particular topic that plays a role in the success of these programs.

Competition law practitioners **Marc Hansen** and **Sven Völcker** look at the reasons for success of the leniency programs and elaborate on the new and emerging uncertainties in the effectiveness of leniency programs. Against the backdrop of the increasing number of considerations not to apply for lenient treatment, they raise the important question whether enforcers can (and probably should) become active "hunters for cartels" again.

Canadian practitioner **Casey Halladay** looks at the implications of multiple enforcers fining cartel conduct and the likely risk of double-counting sales and over-penalizing cartel participants which may impede leniency applications. He notes that

1 See Christof R.A. Swaak & Rein Wesseling, "Reconsidering the leniency option: if not first in, good reasons to stay out", 36 E.C.L.R. 346 (2015) and Romina Polley, "Is the continued success of leniency in cartel cases in danger? Some comments from a private practitioner's perspective", CPI Antitrust Chron., Sept. 2015 (1), pp. 2-11.

the lack of transparency and predictability surrounding a cartel member's total potential liability may impede its willingness to voluntary self-report its conduct.

Subsequently, experienced practitioners **Mark Leddy** and **Elaine Ewing** highlight the need and related cost for leniency applicants to file in an increasing number of jurisdictions and call upon the enforcers who led the way to more robust enforcement around the work to take the lead in implementing a more sensible and coordinated approach to international cartel investigations among the world's enforcers.

Practitioners **Kyriakos Fountoukakos**, **Kim Dietzel**, **Stephen Wisking** and **Kira Krissinel** examine the persistent calls for (and related litigation on) disclosure of sensitive information and the possible chilling effect on leniency. Plaintiffs seeking damages in follow-on actions put pressure on authorities and judges to provide access to authorities' files and in particular sensitive information that was handed in by leniency applicants.

Catarina Marvão and **Giancarlo Spagnolo** give a somewhat critical public interest perspective of what are perceived as the pro's and con's of leniency programs. They notice a trend towards an excessive use of leniency as a substitute for investigative effort and point out that the real disadvantage of leniency policies for society is the risk of authorities "abusing" the amount of leniency awarded so as to win more cases faster, at the cost of higher prosecution costs and lower deterrence.

Criminal law practitioners **Michael O'Kane** and **Nicholas Querée** examine whether individual criminal liability in Ireland and the UK have discouraged prospective leniency applicants. And last but not least **Pablo Amador Sánchez** and **Kevin Hendriks** who both work at the Leniency Office at the Dutch Authority for Consumers & Markets, provide their views on the question which conduct is welcome in a leniency program?

These contributions make it absolutely clear that leniency programs are facing real challenges. This should be a concern for both authorities and cartel participants interested in coming forward with a confession. The success of leniency programs in uncovering cartels warrants a serious discussion on how to address these challenges. It is not constructive to take the position that cartel participants shouldn't complain too much about the burden and complications attached to applying for lenient treatment as they shouldn't have been involved in cartels in the first place. Leniency programs are an important enforcement tool and the workings and attractiveness of these programs should be taken seriously.