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UNCTAD MENA PROGRAMME

Regional Economic Integration through the Adoption
of Competition and Consumer Protection Policies,
Gender Equality, Anticorruption and Good Governance

Competition Guidelines: Leniency Programmes



UNITED NATIONS

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Executive summary

Hard-core cartels constitute very serious violations of competition rules. However, they are often very difficult to detect and investigate without the cooperation of an insider. Accordingly, leniency programmes are designed to give incentives to cartel members to take the initiative to approach the competition authority, confess their participation in a cartel and cooperate with the competition law enforcers in exchange for total or partial immunity from sanctions.

This publication, by the UNCTAD Secretariat, seeks to set specific guidelines for countries of the MENA region which envisage adoption or improvement of leniency programmes on competition. The view is to help them achieve a substantive degree of convergence in this field, as a practical way to increase the overall efficiency of the system in their struggle against hard core cartels. To this end, it draws attention to specific considerations for MENA Project countries, such as limits of leniency in small, less-developed markets. It also reflects on how to make leniency programmes attractive for potential whistle-blowers, describes possible procedural guidelines along with cases deserving total or partial immunity, and lists some difficulties encountered in practice.

1. BACKGROUND

Hard-core cartels constitute very serious violations of competition rules. They are often very difficult to detect and investigate without the cooperation of an insider. Historically, insiders turned "whistle-blowers" were dissatisfied employees who took revenge against their former employer by disclosing their participation in a cartel.

In the United States, the original version of the leniency program dates back to 1978. However, it is only after the Antitrust Division revised its "Corporate Leniency Programme" in 1993, that the US leniency programme became fully successful.

To make it easier and more attractive for companies to come forward and cooperate with the Antitrust Division, three major revisions were made to the programme:

- 1) Leniency became automatic for qualifying companies, provided there was no pre-existing investigation;
- 2) Leniency was still made available after the investigation was underway; and
- 3) All officers, directors, and employees who came forward regarding the company were protected from criminal prosecution.

As a result, the US Leniency Programme became the Antitrust Division's most effective investigative tool. Leniency programmes provide unparalleled information from cartel insiders about the origins and inter-workings of secretive cartels.

The success of the Antitrust Division's revised leniency programme led to the adoption of similar voluntary disclosure programmes by other jurisdictions, and after substantive improvements were achieved in Canada and the EU after 2000, the corporate leniency programmes of the United States, the European Union, and Canada came into substantial convergence, which has made it much easier and far more attractive for companies to simultaneously seek and obtain leniency in the United States, Europe, Canada, and in a growing list of other jurisdictions where applicants have exposure.

In the last decade, many other jurisdictions around the world have adopted leniency programmes. Today over 50 jurisdictions have leniency programmes in place. Among MENA Project countries, Egypt and Tunisia have recently adopted

modern leniency programmes in the field of competition policy.

This publication by the UNCTAD secretariat, seeks to set specific guidelines for countries of the MENA region envisaging adopting leniency programmes on competition, with a view to helping them achieve a substantive degree of convergence in this field, as a practical way to increase the overall efficiency of the system in the struggle against hard core cartels.

As can be seen below in Annexes 1 and 2, all countries of the MENA Project which have competition laws have one type or another of leniency envisaged into their legislation. While modern leniency was introduced only very recently in Egypt and Tunisia, the competition laws of Algeria, Jordan and Morocco provide for some degree of leniency for enterprises which have fully cooperated in an investigation with an out-of-court settlement, before the case had been submitted or decided by a Tribunal.

Accordingly, the present guidelines review a set of preliminary considerations that should be taken into account prior to the drafting of a leniency programme, especially when directed at developing countries. These guidelines will be followed by a list of difficulties in practice, which are often encountered by countries in the application of their leniency programme.

1.1. Definition of leniency programmes

Leniency programmes are designed to give incentives to cartel members to take the initiative to approach the competition authority, confess their participation in a cartel and aid the competition law enforcers. The aim is to drive a wedge at the heart of a cartel through its trust and mutual benefit. The reward for the first whistle-blower is generally a large (or total) reduction in penalties and other incentives can be offered to the second whistle-blower and to those who come after, if they bring forward decisive evidence. Effective leniency programmes are aimed at creating a race among conspirators to disclose their conduct to enforcers, in some instances, even before an investigation has begun, and to quickly crack cartels that may have otherwise gone undetected.

1.2. The need for credible sanctions for hard core cartels

Seeking leniency, which brings a cartel to an end, entails sacrificing future cartel profits and, if leniency is not fully granted, possibly suffering penalties. If a cartel is unlikely to be punished, or penalties are small, then certain losses from seeking leniency outweigh the small risk of detection and punishment. Cartel members will tend not to seek leniency and the anti-cartel laws tend to be ignored.

Simply adopting a leniency programme will not ensure that it is going to be effective. Three essential conditions must exist before a jurisdiction can successfully implement a leniency programme:

- a) Competition law must provide the threat of severe sanctions for those who participate in hard core cartel activity,
- b) Members of a cartel must perceive a high risk of detection by competition authorities, and
- c) There must be transparency and predictability to the greatest extent possible regarding the jurisdiction's anti-cartel enforcement, so that market players can predict with a high degree of certainty what the consequences will be if they are caught colluding, and what treatment they can expect if they apply for leniency.

1.3. Administrative versus criminal sanctions

The choice among applying administrative, civil or criminal law to cartels also affects company conduct. Fines imposed under administrative or civil law may be regarded as simply the cost of doing business, especially if the maximum fines at stake are lower than the financial benefits of keeping the cartel running. In such cases, it is essential that fines and the risk of being caught are sufficiently high to discourage businesses from colluding. In addition, the competition authorities need to ensure that fines are imposed on the individuals responsible for the infringements, and are not automatically passed-on to the enterprise's assets and liabilities.

While criminal law may impose substantial fines on companies, sanctions on individuals and more, it serves as a reflection of societal judgement directed at improper conduct. Thus, criminal law gives leniency programmes additional leverage since penalties may include jail sentences for individuals. Criminal law prosecution, however,

imposes higher costs and constraints. The higher standard of proof required, the greater the demand for more resources. If a different agency prosecutes crimes, coordination and priorities must be worked out between that authority and the competition authority.

Jurisdictions are increasingly criminally prosecuting hard core cartels. This is the case, for example, in Australia, Brazil, Canada, the United Kingdom and the United States. In Egypt, all violations to competition law, including the prohibition of cartels, fall under criminal law. This is not always the case in the other MENA project countries.

1.4. External events that might induce applications for leniency

After a period during which a cartel has been stable, some external events may cause nervousness among its members and lead some to be tempted to apply for leniency. This can be the result of new harsher anti-cartel legislation being introduced, or stricter implementation by competition authorities. It can follow the arrival of new non-cartel member competitors who drive market prices down, reducing the attractiveness of the agreement. This can also be the result of a technological breakthrough which disrupts previous conditions, making collusion suddenly unattractive. A takeover of one of the cartel members by an outsider company may also lead the new owners to discover the existence of a cartel and wish to disband it. If such events occur, cartel members may suddenly race to apply for leniency before others do.

1.5. International cooperation

In an increasingly globalized economy, cartels often do not stop at national borders, so cartel investigations can be conducted internationally. Accordingly, many competition laws have adopted the "effects principle", which widens the scope of application of national laws to all activities, including extra-territorial, which have effects on the national territory. There is also a growing worldwide consensus that international cartel activity is harmful to economies and consumers everywhere, and that international cooperation in competition enforcement is essential. This is especially true when it comes to investigating hard core cartels in international markets.

One interesting development in this respect is the International Competition Network's (ICN) Cartel

Working Group. Launched in 2004, this working group seeks to identify the best investigative techniques and policy approaches from around the world. The ICN has assisted cartel enforcers in developing cross-border relationships that have resulted in real-time coordination among enforcers conducting parallel investigations of the same cartel. In addition, the proliferation of effective leniency programmes has resulted in an increasing number of applicants seeking leniency simultaneously in multiple jurisdictions. Enforcers can then coordinate investigative steps, share – with the applicant’s consent – information provided by a mutual leniency applicant, and coordinate searches.

2. PRELIMINARY CONSIDERATIONS FOR MENA PROJECT COUNTRIES

2.1. Weak action against cartels in developing countries

In many developing countries, Governments may not be fully convinced by the priority attributed to fighting cartels. Competition law might give priority to checking vertical restraints including abuse of dominance and abuse of economic dependence, rather than horizontal restraints such as cartels.

Many laws of the MENA region place much emphasis on notifying and controlling concentrations of market power. Hence, limited resources of competition authorities may be fully utilized to examine mergers and acquisitions with very little resources left to deal with detecting and sanctioning possible cartels. In fact, countries with a high degree of State intervention and monopolies, which are exempted from competition law, may have little scope left for dealing with cartels. As indicated above in the introduction to this chapter, a leniency programme would be ineffective unless cartels are actively and significantly sanctioned. If that precondition is not met, then it might be better to forego a leniency programme.

In most MENA Project countries, the competition authority broadly depends on the Ministry in charge of Commerce. Most decisions are directly taken by the Minister, after consulting the competition authority. In some important cases, such as authorising a merger to take place, the Minister may actually overrule the decision of the competition authority on grounds of employment security, competitiveness of domestic industry or in application of industrial policy.

While the competition authority has limited financial and human resources, competition law often does not apply to settlements to which Government is a party, and other Government institutions are sometimes disinclined to cooperate on cartel enforcement. In particular, sectoral regulators are keen to defend their territory and seldom cooperate with the competition authority. Rather, they reject its interventions and make their own decisions, often encouraging cartel-like approaches, in order to favour, or at least to allow the incumbent firm (ex-state monopoly) to survive in the new "competitive" environment. Moreover,

anti-cartel enforcement tends to be weak since evidence is often located abroad.

2.2. Whistle-blower on a market of a developing country

In developing countries where considerations of trust and personal relations tend to play an important role in business, and where business circles are relatively small and familiar, social or informal penalties (as opposed to official sanctions even including a jail sentence) for those who self-report against collusion could be quite significant. Social penalties could include boycott and even violence. As relationships are tightly interwoven, acting as an informer would result in social exclusion, perhaps even physical harm. Unofficial measures may also undermine competition authority investigations. Such a situation may increase the relative importance of informal penalties, and thus decrease the attractiveness of formal penalty reductions under a leniency programme.

Another limitation in applying for leniency by some cartel members in developing countries is the fact that some might belong to the so-called informal economy. Given the high-percentage of informal economy in developing country economies, some cartel members might be part of the informal economy, and thus be unwilling to come into the open by applying for leniency in a cartel case. For them, coming out into the open could imply heavy sanctions for tax evasion, eventually money laundering and other important liabilities.

In addition, international cartel members might have less incentive to apply for leniency in a small jurisdiction where the risk of being caught and penalties are relatively low. The risk of having information leaking from one country to another may be perceived as higher within a less-developed country and uncertainty as to the degree of leniency might be greater felt in a developing country. Hence, a cartel member within an international cartel, ranging from developed to developing countries, might be tempted to seek leniency in the developed jurisdictions and to forego any attempts in the smaller, developing countries. Moreover, the existence of "out of court settlement" in developing countries like is the case in Algeria and others, might be considered a further reason not to apply for leniency and to seek settlement instead.

2.3. Need for convergence of leniency programmes in MENA Project Countries

Another consideration is that leniency in one country might be hampered by lack of leniency or different treatment of cartels altogether, in another. In the MENA Project countries, three countries, Egypt, Morocco and Tunisia, have recently introduced leniency programmes. Jordan applies leniency only for the first to inform about the existence of a cartel. Algeria does not have a leniency programme as such, but applies out-of-court settlement with the possibility of leniency. Lebanon and Palestine, which do not have competition law, hence, do not have any anti-cartel enforcement at all.

It is important to note that similar or convergent leniency programmes may be mutually reinforcing. A simultaneous application of leniency programmes by multiple jurisdictions, along with a waiver to allow the exchange of confidential information, allows coordinated investigations against the remaining cartel members. For this reason, competition authorities usually encourage applicants for leniency to apply simultaneously for leniency to other jurisdictions, as applicants are questioned as to whether they have or intend to apply for leniency elsewhere.

On the other hand, a leniency programme may be weakened if another jurisdiction imposes significant penalties and lacks an effective leniency programme. This effect occurs whether the second jurisdiction entirely lacks such a programme or has one that is unappealing, for example, because its leniency policy is not transparent and tends to be unpredictable. The threat of punishment in the second jurisdiction discourages applicants to proceed to the first. Consider the situation where jurisdiction A has a well-designed leniency programme, but jurisdiction B has none, or an unattractive one. If applying for leniency to A increases the risk of punishment in B, then applying to A will be less attractive. Of course, such negative spillovers will not exist if punishment in the second jurisdiction is trivial or highly unlikely.

Hence, uncertainty as to the final outcome of anti-cartel action in one country as compared to another might discourage actors from seeking entry into a leniency programme which might end up turning against the whistle-blower's interests in another country.

Moreover, incompatible conditions may discourage seeking leniency in multiple jurisdictions – e.g. one jurisdiction may require the applicant to continue within the cartel to gather evidence or safeguard the investigation while another requires immediate cessation. Requirements that create disadvantages for applicants in a second jurisdiction discourage the application process.

It is, therefore, clearly in the interest of MENA Project countries to work hand in hand to increase cooperation in their struggle against cartels, and to make every effort to achieve convergence in their treatment of hard core cartels and in the establishment of mutually compatible leniency programmes.

In this respect, it might be useful to take into account the "European Union's European Competition Network (ECN) Model Programme" of leniency, which contains a model for a uniform system of so-called "summary applications". By filing a summary application, the applicant for leniency in one EU member country protects his/her position at the European Commission level as well.

3. MAKING LENIENCY ATTRACTIVE FOR WHISTLE-BLOWERS

For a leniency programme to be successful, it must be made attractive for potential whistle-blowers. Among the main conditions are the level of sanctions and risks of staying in a cartel, as opposed to the advantages of informing the competition authority.

3.1. Immunity

In order to encourage whistle-blowing, most leniency programmes offer immunity to leniency applicants when the competition authority was unaware of the cartel and also when it was aware, but did not have sufficient evidence to proceed with the case. This is the main advantage of being first through the door. If the second applicant would be treated similarly to the first, then there would be less incentive in rushing to apply for leniency. Each cartel member could wait until they suspects that a first application has been made.

3.2. Predictability

To induce leniency applications, both "the carrot and the stick" must be important. The penalty, if there is no leniency, and the reduction in penalty if one is granted leniency, must be large and predictable. "Penalty" within this text does not refer to the maximum penalty in statute books, but what is expected to be imposed taking into account actual penalties imposed in past cases, actual settlement policies, and expected delays in administering penalties. Some degree of predictability of penalties, with and without leniency, is necessary to enable potential applicants to calculate roughly the cost and benefit of seeking leniency.

Predictability may be further increased by eliminating prosecutorial discretion. If an applicant meets certain clearly stated conditions, then leniency should be automatically granted. Such would also increase the perception of fairness and non-favouritism.

3.3. Corporate leniency and leniency for individuals

In a growing number of jurisdictions, individuals are liable for collusion, along with the enterprise in which they work. Sanctions for participation in a

cartel may include fines, imprisonment, and temporary or permanent bans from acting as a director or officer of a company. Leniency programmes in jurisdictions where individuals may be sanctioned, typically grant immunity from prosecution to cooperating individuals at the relevant company at the same time as they grant leniency to the company.

If individuals are not granted immunity from prosecution simultaneously with their company, they may influence corporate decision-making away from seeking leniency out of concern, in part, for their own circumstances. Some leniency programmes allow individuals to apply for leniency independently of the company where they work or have been employed.

3.4. Protection from private damage action

In a rapidly growing number of countries, conviction in a public competition case, even though considered public enforcement, may be followed by private lawsuits for antitrust damages, thus, private enforcement. A company and its employees obtaining full immunity from penalties in the first case might still be liable to pay damages in the following private case. Such a situation would obviously undermine incentives to self-report for leniency in the first instance.

To this end, law enforcers can attenuate the negative spillovers by reducing the information available to follow-up actions and modifying incompatible or disadvantageous requirements imposed on leniency applicants. Some competition authorities keep the identities of companies granted leniency as "confidential" in perpetuity. Many accept oral corporate statements and reserve them confidential.

Moreover, principles of international comity suggest that courts would not order documents to be produced if they were to bring harm to another jurisdiction's law enforcement. To reduce the spillover effect of private civil antitrust lawsuits in the United States, the 2004 Antitrust Criminal Penalty Enhancement and Reform Law inter alia reduced leniency recipients' liability from treble to the actual amount of damages. In France, however, the competition authority accepts to preserve confidentiality, within the limits of its national and EU obligations during the procedure, and up to the time when statements of objections are sent to the parties concerned. Moreover, it is clearly stated

that partial or total immunity accorded to a company does not protect it from civil consequences which may follow an infringement of article L.420-1 of the Code of Commerce and/or article 101 TFEU. It nevertheless considers that leniency is among the legitimate considerations that justify not transmitting to the Court incriminating evidence against individuals working for a company that has benefitted from leniency, and who might also be subject to civil action.

3.5. Risks related to corruption

There is a need to ensure that during the leniency process, corruption will not take place. An official may, for example, place a condition for obtaining leniency on getting a bribe. In one case which was reported in the press, a high-level competition official attempted to extort a bribe from a potential leniency applicant, who reported the extortion to the police and the bribe-seeker was convicted. However, for countries envisaging the adoption of leniency programmes, it is clearly important to ensure that safeguards are adopted in the law, to avoid such circumstances.

4. GUIDELINES ON PROCEDURE

4.1. Informal contact

Many programmes allow potential applicants to probe, often anonymously, as to whether they might qualify before applying. For example the Dutch, French and German competition authorities have established a position of "leniency counsellor", who can be approached anonymously by companies or their lawyer, to inform them about the leniency procedure, participate in company hearings and provide technical assistance in full confidentiality. The leniency counsellor also cooperates with other competition authorities concerned by demands for multi-jurisdiction leniency applications.

4.2. Formal leniency application: obtaining a marker

Most leniency programmes have a "marker" system. The marker establishes the applicant's place in the queue, but the threshold of disclosure and cooperation requirements must be fulfilled before a deadline.

In the US, for example, in order to obtain a marker for a company, counsel must:

- a) Report some information or evidence indicating that the company it represents has engaged in a criminal antitrust violation;
- b) Disclose the general nature of the conduct discovered;
- c) Identify the industry, product, or service involved in terms that are specific enough to allow the Antitrust Division to determine whether leniency is still available and to protect the marker for the applicant; and
- d) Identify the client.

Under the EU ECN model leniency programme, a company wishing to make an application for immunity may initially apply for a 'marker'. A marker protects an applicant's place in the queue for a given period of time and allows it to gather the necessary information and evidence in order to meet the relevant evidential threshold for immunity. The competition authority has discretion as to whether or not it grants a marker. Where a marker is granted, the authority determines the period within which the applicant has to 'perfect' the marker by submitting the information required to meet the relevant evidential threshold for immunity.

If the applicant perfects the marker within the set period, the information and evidence provided will be deemed to have been submitted on the date when the marker was granted.

To be eligible to secure a marker, the applicant must provide the competition authority with its name and address as well as information concerning:

- a) The basis for the concern which led to the leniency approach;
- b) The parties to the alleged cartel;
- c) The affected product or products;
- d) The affected territory or territories;
- e) The duration of the alleged cartel;
- f) The nature of the alleged cartel conduct; and
- g) Information on any past or possible future leniency applications to any other competition authorities within or outside the EU in relation to the alleged cartel.

In France, once the company decides to launch a formal application, it addresses its request to the Rapporteur général in writing, by completing a standard form, sent by registered letter with receipt, which will serve as marker of the date and hour of receipt of the application for leniency. The application can also be made orally, on appointment with the Rapporteur (Rapporteur general) who will duly indicate the date and time of hearings in the official minutes. This will be the "marker", an essential measure to certify that the company was the first to provide the competition authority with the necessary information to be in a position to apply for leniency.

To apply for leniency, the company must declare its name and address, and provide clear information about the specific products and the geographical market covered by the cartel, identify the other members of the cartel, the nature of the agreement and its estimated duration, as well as all the leniency applications the company has, or intends to submit to other competition authorities.

4.3. Who qualifies for leniency?

In order to qualify for leniency under the EU ECN programme, the applicant must satisfy the following cumulative conditions:

- a) Before making an application for leniency to the competition authority, the applicant must not have destroyed evidence falling within the scope of the application or disclosed, directly

- or indirectly, the fact or any of the contents of the application it is contemplating, except to other competition authorities, including any competition authority outside the EU;
- b) Immediately following its application for leniency, the company must end its involvement in the alleged cartel, except if requested by the competition authority to continue its involvement in order to preserve the integrity of the competition authority's inspections; and
 - c) It is essential the cooperation with the competition authority be genuine, total and permanent as soon as the application is submitted to the Competition Authority until the conclusion of the case, which means:
 - 1. Promptly provide to the competition authority all relevant evidence and information elements in its possession or that it would be aware of;
 - 2. Remain at their disposal to respond quickly to any requests that, in the opinion of the competition authority, could help to establish the facts;
 - 3. Ensure that all personnel are available for questioning, such as employees and current directors, and to the extent possible, former employees and directors;
 - 4. Not allowed to destroy, falsify or conceal relevant information or evidence;
- 5. Not allowed to disclose the existence or content of its application before the Competition Authority has communicated its objections to the parties (except agreement of that authority) and;
 - 6. Not have taken steps to coerce another company to join a cartel. Any company that has taken steps to force one or more other companies to join or to remain in a cartel must, in principle, be excluded from the benefit of immunity.

4.4. Summary applications

In the EU, in order to alleviate the burden associated with multiple parallel applications, the ECN Model Programme contains a model for a uniform system of "summary applications". By filing a summary application, the applicant protects their position under the leniency programme of the national competition authority concerned for the alleged cartel for which they have submitted, or is in the process of submitting, a leniency application to the European Commission.

This does not exempt leniency applicants from applying for leniency in other, non-EU jurisdictions affected by the cartel. However, the applicant has no guarantee they will receive immunity in another jurisdiction, even if they secure a conditional leniency letter in their own jurisdiction.

5. EXAMINATION OF THE APPLICATION FOR LENIENCY

Within the deadline established at the time of the submission of the application for leniency, for example 30 days in the US, the company or its counsel transmits the information and evidence documents to the competition authority, on the basis of which, a report is submitted to the applicant for leniency and to the officials of the competition authority in charge of hearings to decide if leniency may be granted.

5.1. Conditional leniency

Following the hearings, the competition authority issues a conditional leniency letter. Although many of the leniency requirements are fulfilled only during the criminal investigation, applicants want prior assurances that they will receive non-prosecution protection at the conclusion of the investigation on the condition that they fulfill the requirements of the leniency programme.

To receive a conditional leniency letter, the applicant must admit his/her participation in a criminal antitrust violation involving price fixing, bid rigging, capacity restriction, or allocation of markets, customers, or sales or production volumes.

Leniency is granted conditionally. It may be withdrawn if the applicant does not comply with the ongoing cooperation requirements. Although uncertainty about conditions that trigger withdrawal may reduce a programme's predictability, by not withdrawing leniency from in-compliant applicants, risks undermining the entire programme.

5.2. Final leniency letter

Once all the conditions of the conditional leniency letter have been satisfied, a final leniency letter confirms that the leniency application has been granted. In that letter, the competition authority specifies if it offers total or partial immunity to the applicant. In case of partial immunity, it indicates the exact level of immunity.

6. TOTAL IMMUNITY FOR FIRST IN

Many leniency programmes demand “full and frank disclosure and ongoing cooperation by the applicant, and if applicable, the applicant’s directors, officers and employees.” They also typically require the applicant to stop cartel activities, although some competition authorities may order applicants to continue so as to aid proceedings against the other cartel members.

Leniency programmes may differ as to who may qualify for total immunity. Most applicants qualify both in cases where the competition authority is unaware of the cartel and in the case where it is aware, but has insufficient evidence to proceed. Many offer full immunity or total leniency exclusively to the first applicant, in order to press potential whistle-blowers to rush to be “first through the door”. Some also offer leniency to a second or third person as an incentive, but with reduced leniency. Many leniency programmes exclude those who coerced other cartel members or were ring leaders.

6.1. Before investigation is launched

In the US, for example, “Type A Leniency” will be granted to a company reporting illegal antitrust activity before an investigation has begun, especially when the DOJ is unaware of the cartel, if the following six conditions are met:

- a) At the time the company comes forward, the Antitrust Division has not received information about the activity from any other source;
- b) Upon the company’s discovery of the illegal activity, it takes “prompt and effective action to terminate its participation in the activity”;
- c) The company “reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation” to the Antitrust Division throughout the investigation;
- d) The confession of wrongdoing is “truly a corporate act”, as opposed to isolated confessions of individual executives or officials;
- e) Where possible, the company makes restitution to injured parties; and
- f) The company did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

If the company does not meet all six of the Type A Leniency conditions, it may still qualify for leniency

if it meets the conditions of Type B Leniency, which may be granted after an investigation has begun.

It should be noted that the EU ECN model is very similar, as it offers so-called Type 1 A leniency for the first company that provides the competition authority with sufficient evidence to enable it to carry out targeted inspections in connection with an alleged cartel. Type 1 B leniency is for the first company that submits evidence which in the CA’s view may enable the finding of an infringement of Article 101 TFEU in connection with an alleged cartel.

6.2. After investigation has begun

In the US, a company will qualify for leniency even after the Antitrust Division has received information about the illegal antitrust activity, under so-called Type B Leniency, whether this is before or after an investigation is formally opened, if the following conditions are met:

- a) The company is the first to come forward and qualify for leniency with respect to the activity;
- b) At the time the company comes in, the Antitrust Division does not have evidence against the company that is likely to result in a sustainable conviction;
- c) Upon the company’s discovery of the activity, it took prompt and effective action to terminate its part in the activity;
- d) The company reports the wrongdoing “with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation”;
- e) The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
- f) Where possible, the corporation makes restitution to injured parties; and
- g) The Antitrust Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the disclosing company’s role in the activity, and when it came forward.

6.3. Expanded leniency protection

It should be noted that in the US, only the first company which applies for leniency will be given total immunity. However, US, leniency protection can be expanded if, during the course of its internal investigation, an applicant discovers

evidence that the anticompetitive activity was broader than originally reported, for example, in terms of its geographic scope or the products covered by the conspiracy. In such case, the applicant's leniency protection may be expanded to include the newly discovered conduct.

6.4. One case brings another cartel to light

Leniency programmes make use of the fact that companies typically supply many markets and hence, cartel behaviour learned in one market can be applied in others. Certain provisions encourage members of a cartel under investigation to disclose additional cartels in which they are involved.

In the US, for example, the so-called "Amnesty Plus" provision makes it possible for a company under investigation for one antitrust conspiracy, for which it was too late to obtain leniency, "to receive benefits in its plea agreement for that conspiracy by reporting its involvement in a separate antitrust conspiracy".

"Carrots and sticks" may be applied as follows:

- a) "Amnesty Plus" encourages a company under investigation for one cartel to apply for leniency with respect to another, and earn not just a penalty reduction in respect of the newly disclosed cartel, but also in respect of the cartel already under investigation;

- b) "Penalty Plus" increases penalties if a company could have taken advantage of "Amnesty Plus" but did not, and the cartel is later discovered and successfully prosecuted; and
- c) Persons who are witnesses under oath in a cartel investigation are asked an "omnibus question" as to whether they know about cartel activity in any other market than the one at hand. Being subject to perjury penalties, this gives them a greater incentive to disclose other cartels.

Such carrots and sticks tactics have been very successful in discovering cartels in a chain of investigations. For example, in the US, vitamin cartels were uncovered one after the other in a chain of investigations concerning 12 separate vitamin markets. An investigation into the lysine cartel led to one in citric acid, then to sodium gluconate, to sodium erythorbate, etc.

7. REDUCED IMMUNITY

In the EU ECN model, companies that do not qualify for immunity under Type 1 applications, may still benefit from a reduction of any fine that would otherwise have been imposed under a so-called "Type 2 Application".

7.1. Significant value-added

Such reduced immunity may be obtained by companies which provide the competition authority with evidence which, in the authority's view represents "significant value-added" relative to the evidence already in the authority's possession at the time of the application.

"The concept of 'significant value-added' refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the competition authority's ability to prove the alleged cartel."

7.2. Amnesty Plus

Similarly, in the US, partial immunity may be obtained under the "Amnesty Plus" leniency provision as follows:

"The size of the Amnesty Plus discount depends on a number of factors, including:

- 1) The strength of the evidence provided by the cooperating company in the leniency product;
- 2) The potential significance of the violation reported in the leniency application, measured in such terms as the volume of commerce involved, the geographic scope, and the number of co-conspirator companies and individuals; and
- 3) The likelihood the Division would have uncovered the additional violation absent the self-reporting, i.e., if there were little or no overlaps in the corporate participants and/or the culpable executives involved in the original cartel under investigation and the Amnesty Plus matter, then the credit for the disclosure would be greater. Of these three factors, the first two are given the most weight."

7.3. Degree of immunity

In order to determine the appropriate level of reduction of the fine, the competition authority takes into account the time at which the evidence was submitted, including whether the applicant

was the first, second or third, etc. undertaking to apply for leniency, and its assessment of the overall value added to its case by that evidence.

Reductions granted to an applicant following a Type 2 application shall not exceed 50% of the fine which would otherwise have been imposed.

In France, in line with the EU ECN model, the degree of immunity will depend on the time at which the evidence was submitted, whether the applicant was the first, second or third, etc. to apply for leniency, and its assessment of the overall value added to its case by the evidence provided.

In any event, the reduction of the fine will not exceed 50% of the penalty it would have been imposed if it had not benefited from Type 2 leniency. Taking into account the conditions listed above, the French Competition Authority gives the following indications as to the extent to which it may apply reduced immunity from fines:

- a) For the first company providing significant value-added evidence, a reduction of 25 to 50% may be provided;
- b) For the second company applying for leniency in this case, a reduction of 15-40% may be provided; and
- c) For any other company providing significant value-added evidence, the maximum reduction would be 25%.

These amounts may differ somewhat, as the Austrian Competition Authority has indicated that it applies reductions of 30-50% for the first company providing significant value-added, 20-30% for the second, and a maximum 20% for others.

7.4. Distinction between leniency and settlement

Leniency, also called settlement, is relevant at an earlier stage, before the competition agency is aware of the cartel or, under some programmes, before it has sufficient evidence to proceed, e.g., to court. By contrast, settlement is an agreement between the parties after the agency has concluded its investigation but before the adjudicating body has reached a decision. Settlement is aimed at reducing the cost and delays of adjudication.

Penalty reductions under a settlement process can undermine the effectiveness of the leniency programme. Too large expected settlement

discounts reduces the attractiveness of the leniency offer – e.g. the European Commission aimed to limit the undermining effect by capping settlement discounts at 10%, in contrast with leniency discounts of up to 100%.

8. DIFFICULTIES IN PRACTICE

In applying a leniency procedure, competition authorities may face a number of problems, emerging mainly from the divergence of interests between the competition authority and the applicant for leniency. For the competition authority, it is necessary to keep in balance the due respect for the rights of the leniency applicant on the one hand, with the efficiency of the investigation and the deterring effect of the rules on the other.

8.1. Deficiencies of evidence offered

A leniency application may contain insufficient evidence, or evidence contradicting other evidence obtained by the competition authority. In the case of evidence insufficient to undertake a targeted inquiry, the applicant will not be granted a reduction of the sanction.

If the evidence produced is unfaithful, the applicant will be denied leniency. However, it is often very difficult for the competition authority to verify the truthfulness of certain declarations. For example, assurances by the applicant that they were not a leader of the cartel, nor did they pressure other enterprises to become members can be difficult to assess.

8.2. Unavailability of persons cited

Sometimes the persons implied have left the company applying for leniency, either because of retirement, bad health, or new job with a competitor, etc. and the leniency applicant cannot force a former employee to cooperate with the competition authority. The former employee may now be employed by a competitor and risks being penalised if they cooperate with the former employer, or they might be scared of having to pay damages.

8.3. Determination of significant value-added

According to the EU Commission's definition, a significant value added is one that provides evidence reinforcing the capacity of establishing the existence of the cartel. However, the members of the cartel obviously do everything possible to hide any evidence of their participation. Hence, the difficulty for the leniency applicant is to establish strong enough evidence. The "value-added" they

may bring forward is often very weak. To what extent should the competition authority reward such evidence?

At an advanced stage of the inquiry it becomes increasingly difficult for whistle-blowers to bring any substantive value-added. The leniency applicant does not know the level of evidence already available to the competition authority, so they may not easily estimate the level of evidence necessary for it to constitute substantive value-added. Depending on the leniency applicant's goodwill and efforts, the competition authority may still accept to award limited leniency.

8.4. Difficulties encountered during investigations

During an investigation resulting from a leniency application, coordination with the whistle-blower is essential. They are the informant from within the cartel, and this allows the competition authority to better target its investigations. However, the competition authority must be aware that the informant might try to orient the investigation in their favour, and to hide certain elements which may weigh not in their favour. The competition authority should be careful to always keep control of the investigation and to ensure the informant will remain active even when they believe that they will benefit from immunity.

When preparing the investigations, the competition authority must decide whether it is best to act fast, in a dawn raid for example, in order not to lose the surprise effect and maximize its chances to find evidence, or if it is best to take more time to coordinate the investigation with the informant, in order to ensure that the interventions are better targeted.

8.5. Keeping an application for leniency secretive

During the investigation, the leniency applicant is obliged not to disclose his/her position of informant. For the competition authority, it is not always easy to maintain secrecy. For example, if the competition authority needs to produce a declaration of the whistle-blower to obtain a search warrant, the other members of the cartel will easily guess that he has applied for leniency.

Disclosure of this information can have positive or negative results on the investigation. The other members of the cartel might then be less

motivated to apply for leniency, and as they are less motivated to cooperate, it might be more difficult to win a case. Also, if they believe it is too late to apply for leniency, they might engage for an out-of-court settlement, which could hamper the effects of the leniency programme.

8.6. Informing the applicant for leniency of the progress of the investigation

The competition authority might need to inform the leniency applicant about certain results of the investigation in order to request that they provide further information on new issues emerging from the investigation.

This situation might pose certain difficulties for the competition authority:

- a) It should not provide the leniency applicant with certain sensitive business secrets of his/her competitors;
- b) The leniency applicant might find out that the competition authority has evidence that certain information they have provided is false; and
- c) The leniency applicant might be tempted to use this information to manipulate the

interpretation of the results of the investigation by the competition authority.

8.7. Leniency programmes versus private enforcement

Competition laws may provide for private damage suits, after the public case has been decided. For example, EU Directive 2014/104 aims at strengthening private actions for damages on infringements to competition rules.

However, as discussed above, if leniency applicants who receive full or partial immunity from public enforcement do not receive such immunity from the private enforcement that might follow, they might consider it too dangerous to cooperate in a public case, if this will lead to heavy damages having to be paid as a result of private damage action. Therefore, serious thought needs to be given to resolving this problem. As seen above, some competition authorities refrain from allowing access to evidence they have obtained from whistle-blowers.

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ANNEX 1

Leniency Programmes in MENA Project countries having competition laws

As can be seen below, MENA Programme countries having competition laws all have some sort of leniency. While Algerian law provides for the possibility to reduce or even eliminate the fine for enterprises who cooperate willingly with the investigation and undertake not to infringe the law through an out-of-court settlement, other MENA Project countries have specific leniency programmes for those who assist the competition authorities to disclose and provide evidence in cartel cases, in addition to provisions related to settlement.

In Egypt, violators who take the initiative to inform the Authority of offences and submit the supportive evidence may be fully exempted from the sanction as from the 2014 amendments to Law No.3 of 2005.

In Jordan, the Court may mitigate the punishment of a violator of the provisions of Articles 5, 6, 8, 9, and 10 of Competition Law No.33 of 2004 if such violator provides to the Directorate information leading to the uncovering of such practices.

In Morocco, Article 41 of Law 104-12 provides for total or partial exemption of fines for a violator of Article 6 (collusion), if they contributed to disclosure of a violation the Competition Council was unaware of.

In Tunisia, Law 36 of 15 September 2015 provides for a detailed leniency programme in Article 26, which allows the whistle-blower to be totally exempted from the sanctions if they permit the disclosure and brings evidence against a cartel which the Competition Council was unaware of, or if they bring evidence on an infringement the Competition Council was aware of, but was unable to prove. A partial exemption of the sanction may be granted if the applicant for leniency brings significant value-added to the evidence in the hands of the competition council, if the firm undertakes significant efforts to bring back competition into the market, and they do not oppose in any way the infringement(s) it is accused of.

In order to determine the degree of reduction of the fine, the Competition Council takes into account the order, such as the first, second...to denounce, and the date of submission of the information, as well as the degree of importance, a significant value-added, of the evidence put forward. A Governmental Decree adopted after proposal of the Minister of Commerce fixes the procedure for demanding a partial or total reduction of the fine.

Algeria	Ordinance No 03-03 of 19 July 2003 on Competition	Article 60: The Competition Council may decide to reduce the amount of the fine or to not pronounce fines against companies that, during the investigation of the case concerning them, recognize the offenses alleged against them, collaborate to accelerate it and commit to no longer perpetrate any offenses related to the implementation of the provisions of this Ordinance.
Egypt	Law No.3 of 2005 on Protection of Competition and Prohibition of Monopolistic Practices + Amendments to Laws 190/2008 and 193/2008 + 2014 Amendments	Article 26: As amended by Law 190/2008. In case of any crimes committed that are mentioned in articles 6 and 7 of this Law, the court may exempt up to the half of the sanction decided thereby* (see below). This refers to violators who take the initiative to inform the Authority of the offence and submit the supporting evidence, and for those whom the Court considers to have contributed to disclosing and establishing the elements of the offense at any stage of the inquiry, search, inferences gathering, interrogation and trial processes. *2014 Amendments offer full and mandatory leniency for the first applicant who comes forward to ECA.

Jordan	Competition Law No.33 of 2004 + Amendment to Law No. (18) of 2011	Article 25: (...) B The Court may mitigate the punishment of a violator of the provisions of Articles 5,6,8,9, and 10 of this Law if such violator provides to the Directorate information leading to the uncovering of such practices.
Lebanon	No Competition Law	
Morocco	Law No. 104-12 on Freedom of Prices and Competition June 30, 2014.	Article 41: Total or partial immunity from sanctions can be granted to a company or organization which, with others, implemented a practice prohibited by the provisions of Article 6 of this Law if it helped establish the reality of the prohibited practice and to identify the perpetrators, by providing the information which the Competition Council or the administration did not previously have. (...)
Palestine	No competition Law	
Tunisia	Law No. 36 of 15 September 2015 concerning the Reorganization of Competition and Prices	Article 26: The Competition Council may, after hearing from the Government Commissioner, as provided by this article, grant full exemption or reduction of the sanction to any party to a cartel or to an anti-competitive agreement. Total exemption from any sanction is granted to the first person to provide: <ul style="list-style-type: none">- Information which the administration or the Competition Council did not previously possess and that enables it to conduct an investigation into violations of competition in a given market; or- Decisive evidence that allows the Administration or the Competition Council to establish the existence of an anticompetitive practice previously known to them without being able to prove it. The partial exemption of the penalty is awarded to any person who: <ul style="list-style-type: none">- Provides evidence that contributes a significant added value to the evidence that the administration or the Council already had; or- Does not dispute, in an unequivocal manner, the existence and content of the practices alleged against him/her; or- Who takes the initiative to implement measures that lead to restore competition in the market. To determine the level of reduction of sanctions, the Competition Council shall take into account the rank and date as to when the application was submitted and the extent to which the elements bring a significant added value. The procedures for submitting applications for full exemption from punishment or reduction are determined by governmental decree upon proposal by the Minister for Trade.

ANNEX 2

Settlement in MENA Project Countries

In many competition systems, there is the possibility for parties to solve a pending lawsuit before any implication of the Court. In some countries, an out of court settlement can also take place during a judicial intervention, which is thereby canceled. In general, an out-of-court settlement may be reached between the authorities and the defendant in exchange for a "settlement" or heavy fine, which settles the case, with no possibility of recourse.

In MENA Project countries, this is provided for in the competition laws of Egypt (Article 21 provides that the competent Minister may settle a case before a final judgment is rendered), Morocco (Article 93 concerning only goods and services which prices are regulated, provides that the authority can settle a case before being transmitted to a Court). In Tunisia, Article 73 of the new Law excludes the possibility of settlement by the Minister for anti-competitive actions and concentrations under articles 5, 7, 8, 9, 10 of the Law. For the rest, the Minister can conclude a settlement before the final decision of a Court, by which the action annuls all sanctions and cannot be subject to recourse. However, the amount of the settlement cannot be less than 50% of the amount fixed by the administration, and the violator is still responsible for any damages resulting from the violation.

Algeria		Not Found
Egypt	Law No.3 of 2005 on Protection of Competition and Prohibition of Monopolistic Practices	Article 21: (...) The Competent Minister or the person delegated by him/her may settle with regard to any violation, before a final judgment is rendered, in return for the payment of an amount not less than double the minimum fine and not exceeding double its maximum. The settlement shall be considered a waiver of the criminal lawsuit filing request and shall result in the lapse of the criminal lawsuit relevant to the same case subject to suing.
Jordan	The Competition Law No.33 of 2004 + Amendment to Law No.18 of 2011	Not Found
Lebanon	No competition Law	
Morocco	Law No. 104-12 on Freedom of Prices and Competition + Law No. 20-13 of August 7, 2014	Article 93: Violations of the provisions of Title VII (goods, products and services whose price is regulated) of this Law and the texts adopted for its implementation may be concluded either by settlements, administrative penalties or criminal sanctions. The authority empowered to proceed with out-of-court settlements and to impose administrative sanctions will be established by regulation. Article 94: Only the authority referred to in Article 93 above has the right to proceed with a settlement. (...) The right to settle cannot be exercised after the file has been forwarded (...) to the competent court of first instance. Article 95: The settlement passed without reserve cancels the action of the administration. (...) Article 96 The settlement must be in writing (...).

Palestine	No competition Law	
Tunisia	Law No. 36 of 15 September 2015 concerning the Reorganization of Competition and Prices	<p>Article 73 :</p> <p>With the exception of breaches to the provisions of Articles 5, 7, 8, 9, 10 and 69 of this law and upon request of the offender, the Minister of Trade may, before public action is initiated, or the case has been taken to Court, authorize the conclusion of a settlement, as long as a final judgment has not been delivered. During the period of accomplishment of settlement procedures and the deadlines fixed for its execution, the prescription deadlines will be suspended. The execution of the settlement results in the ceasing of public action and the discontinuance of the proceedings or of the judgement or execution of the sentence.</p> <p>The amount of the settlement does not release the offender from the obligations under the law or their liability for any damage which may be caused to others because of the offense.</p> <p>The settlement cannot be less than 50% of that requested by the administration. It cannot be lower than the minimum threshold of the penalty provided by this Law.</p> <p>The settlement irrevocably binds the parties and will not be subject to appeal for any reason whatsoever.</p>