LENIENCY TO COMBAT HARD CORE CARTELS

POLICY GUIDANCE TO STRENGTHEN THE INDONESIAN COMPETITION FRAMEWORK[1]

March 2, 2018

SUMMARY

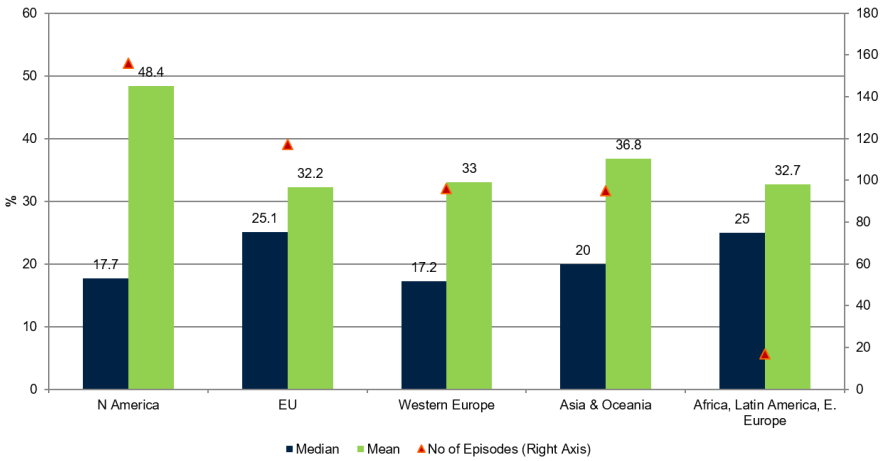
- Indonesia has the possibility of incorporating effective tools to combat cartels in its competition law. Hard core cartels – agreements among competitors to fix prices, divide or share markets, restrict output, rig bids in tenders, or divide or share markets - are the most harmful violation of competition law, burdening consumers (families, businesses and governments) worldwide with multibillion-dollar losses each year.
- International experience has demonstrated the effectiveness of leniency to destabilize and deter hard core cartels, with several jurisdictions introducing leniency programs, or taking measures to strengthen existing ones. The term leniency refers to a system of pardon and reduction of fines and sanctions that would otherwise be applicable to a cartel participant, in exchange for reporting on illegal anticompetitive activities and supplying information or evidence that can strengthen a cartel investigation.
- Leniency programs are effective when there are clear and high sanctions for infringements, the probability to detect a cartel is not low (i.e. competition authorities have the tools to detect cartels), their design reduces the cost of reporting a cartel and rewards the applicant to the highest extent possible, and there is appropriate dissemination and engagement with the business community to encourage use of the program.
- Key concepts underpin a well-designed leniency program including clarity on the practices it covers, rules on conditions to grant immunity and fine reductions to the first and subsequent applicants, evidentiary standards for information received, and rules to ensure transparency, confidentiality, and predictability, among others.
- **Providing for a leniency program in Indonesia's competition law** would be the first step in developing a leniency framework, as the Indonesia framework currently does not include any explicit reference to leniency. Given the nature of leniency (granting a pardon or total immunity to an otherwise infringer), having an explicit provision in the law under Chapter VIII will increase legal certainty, as has been done in many civil law jurisdictions.
- **Circumscribing leniency to hardcore cartels and establishing that hardcore cartels (under Article 11 of the law) are considered per se illegal**, will increase the effectiveness of anticartel enforcement and leniency in line with international practices.
- It is recommended the detail, rules, mechanisms and principles of the leniency program are thereafter expanded through implementing regulations or guidelines by KPPU.

[1] This note was prepared by the World Bank Group's Market and Competition Policy Team under the ongoing World Bank Group's engagement with the Government of Indonesia to contribute to the current discussion on the amendments of the law No. 5 of 1999 concerning the ban on monopolistic practices and unfair business competition.

A. BACKGROUND: the costs of cartels and elements for successful anticartel enforcement

Hard core cartels are the most harmful violation of competition law, burdening consumers worldwide with multibillion-dollar losses each year. Hard core cartels are agreements among competitors to fix prices, divide or share markets, restrict output, rig bids in tenders, or divide or share markets. This violation of competition law harms consumers: by raising prices and restricting supply, cartels make goods and services completely unavailable to some consumers and highly expensive for others.[2] Consumers pay on average 49 percent more, and 80 percent more when cartels are strongest.[3][5] From 1990 to 2005, overcharges by international cartels reached as much as USD $500 billion.[4] Furthermore, 249 cartel cases investigated in 20 developing countries showed that consumer harm from cartels' excess profits was up to 1% of the GDP of various countries.[5] Even though there are records of at least 1500 cartels already broken up in various countries, many cartels remain secret. Even in developed economies, the probability of authorities detecting cartels lies around 10 to 30%.[6] In Indonesia, some anticompetitive agreements between competitors have been investigated by the competition commission (KPPU), but it is likely that many cartels remain secret affecting consumers, business that buy local inputs, and government public procurement as well.

Figure 1: Distribution of cartel episodes and overcharges determined by competition authorities by region



Source: WBG (2017), elaboration on data from Connor, Price-Fixing Overcharges 3rd Edition, 2014 (485 decisions)

[2] For references to empirical studies on the harmful effects of cartels, see World Bank; Organisation for Economic Co-operation and Development. 2017. *'A Step Ahead : Competition Policy for Shared Prosperity and Inclusive Growth. Trade and Deveopment'* Washington, DC: World Bank.

[3] The most comprehensive database of 1530 cartel cases with overcharge estimations at the international level (Connor, 2014) reveals that the mean average overcharge is at least 49%, which is supported by estimations from other authors that find average or mean overcharges above 40% (see (Posner, 2001), (Levenstein & Suslow, 2006)). The same database by Connor also reveals that when cartels operate at peak effectiveness, price changes are 60% to 80% higher than the whole episode. Furthermore, individual cartel estimations have a large range of overcharges, varying from 7% to 42%.

[4] John M. Connor and Gustav Helmers (2006), *Statistics on Modern Private International Cartels,* Working Papers 06-11, Purdue University, College of Agriculture, Department of Agricultural Economics; Michael S. Gal (2008), *Free Movement of Judgments: Increasing Deterrence of International Cartels Though Jurisdictional Reliance*, NYU Law and Economics Research Paper No. 08-44, p.1-2.

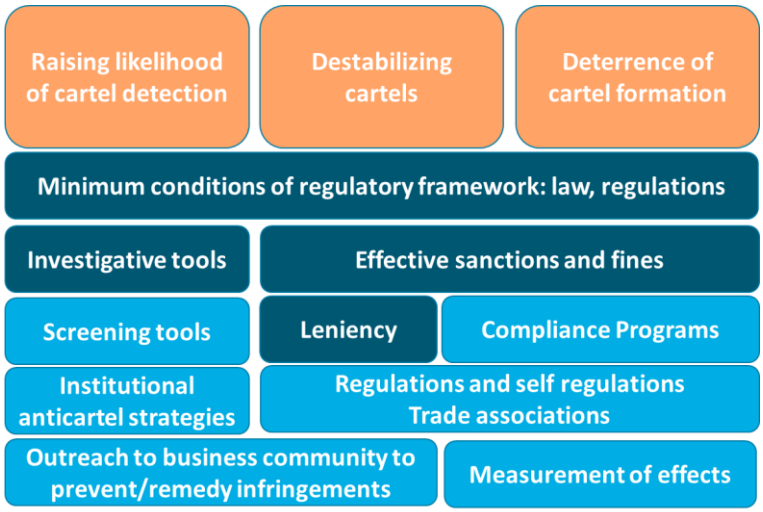
[5] World Bank; Organisation for Economic Co-operation and Development. 2017. *'A Step Ahead : Competition Policy for Shared Prosperity and Inclusive Growth. Trade and Deveopment'* Washington, DC: World Bank. *https://openknowledge.worldbank.org/handle/10986/27527 License: CC BY 3.0 IGO*

[6] See (Miller, 2009) (Combe, et al., 2008)

Leniency programs are one common tool used by competition authorities to destabilize cartels and raise the probability of cartel detection. In the face of the prevalence of hard core cartels, jurisdictions that actively pursue anticartel enforcement have three equally important common goals: first, to heighten the fear of detection using an arsenal of different investigation methods; second, to institute the threat of severe and well-targeted sanctions that will enhance deterrence; and, third, to destabilize existing cartels by incentivizing cartel members to report the wrongdoing and stop anticompetitive practices. *Figure 2* provides an overview of the range of complementary tools to anticartel enforcement, which are most effective when applied in combination.

Leniency programs are effective when there are a number of conditions in place. These include clear and high sanctions for infringements, the probability to detect a cartel is not low (i.e. competition authorities have the appropriate investigative tools to detect and prove cartels), the leniency program's design reduces the cost of reporting a cartel and rewards the applicant to the highest extent possible, and there is appropriate dissemination and engagement with the business community to encourage use of the program.

Figure 2: Objectives and tools for effective anticartel enforcement



Source: WBG, Markets and Competition Policy Thematic Group

Leniency programs are effective when credible sanctions can be imposed for hardcore 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. In this context, cartel members will tend not to seek leniency and the anti-cartel laws tend to be ignored. Simply adopting a leniency program will not ensure that it is going to be effective. Three essential conditions must exist before a jurisdiction can successfully implement a leniency program. First, competition law must provide the threat of severe sanctions for those who participate in hard core cartel activity. Second, members of a cartel must perceive a high risk of detection by competition authorities. Third, 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.

B. LENIENCY: a tool for anticartel enforcement

The term leniency means a system of immunity or pardon and reduction of fines and sanctions (depending on the jurisdiction) that would otherwise be applicable to a cartel participant in exchange for reporting on illegal anticompetitive activities and supplying information or evidence to strengthen a cartel investigation. Leniency programs offer cartel participants reduced fines or total immunity (generally only for the first applicant) if they provide information and evidence of a cartel, and cooperate with the competition authority to investigate, detect, and prove the infringement. Leniency programs provide authorities access to strong evidence at a much lower cost than if other investigative techniques were used, and act as a deterrence to parties considering joining or forming a conspiracy. More than 50 countries have adopted leniency or amnesty programs for cartel conduct.[7] See *Figure 3* for a comparison of implementation of leniency programs in Asia and other selected jurisdictions.[8] The ASEAN Guidelines on Competition Policy also contemplate the establishment of leniency programs.

Figure 3: Comparison of countries with Leniency Programs

	Leniency
Australia	Yes
Brazil	Yes
Chile	Yes
China	Yes
EU	Yes
Germany	Yes
India	Yes
Japan	Yes
Korea	Yes
Laos	Yes *
Malaysia	Yes
Mexico	Yes
Myanmar	Yes *
New Zealand	Yes
Philippines	No
Russia	Yes
Singapore	Yes
South Africa	Yes
Thailand	No
Turkey	Yes
United Kingdom	Yes
USA	Yes
Vietnam	No

*Similar instrument contemplated in law but not operational. *Source: WBG Markets and Competition Policy Database, as of November 2017*

International experience has demonstrated the effectiveness of leniency to destabilize and deter cartels. Studies demonstrate that USA's leniency program reduced the rate of cartel formation by 59% and increased the rate of cartel detection by 62%[9]. Leniency can reduce the average sanctioning process

[7] United Nations Conference on Trade and Development 'UNCTAD MENA Programme Competition Guidelines: Leniency Programmes' New York: United Nations (2016), available at http://unctad.org/en/PublicationsLibrary/ditcclp2016d3_en.pdf
[8] In the last 3 years, the following countries have introduced leniency programs: Kenya, Zambia, Honduras, Peru, and Colombia.
[9] Miller, N. H. (2009) "Strategic Leniency and Cartel Enforcement", American Economic Review 99 (3): 750–68.

by 1.5 years on average, and leniency programs provide strong incentives to the applicant to bring forward any incriminating evidence.[10] A 2011 review of 23 OECD countries found that leniency has a positive effect on competition intensity: leniency policies were associated with a decrease in the industry-level price-cost margin of 3 to 5%[11]. In many jurisdictions cartel activities come to light because of leniency applications. Investigations therefore rely heavily on leniency applicants and the information provided. For example, in South Africa, the Competition Commission uncovered several cartels (some operating for up to 30 years) after it received leniency applications, following an announcement that it would focus on two sectors.[12] In Korea, leniency enabled a larger number of cartel detections due to an increase in the long run "hazard rate" and, as a consequence, led to a reduction in the duration of cartels[13] (Choi, Hahn, 2015).

Most civil law jurisdictions provide detailed provisions for leniency programs in the primary competition law. For example, in South Korea and Japan the primary law includes details covering the objectives, scope and procedural aspects of the leniency program. In most common-law jurisdictions, provision for leniency programs is either referred to in the competition law and then expanded through implementing regulations or guidelines (for example Kenya), or solely provided for in guidelines or regulations with no reference to leniency in the primary legislation. See *Annex 1* for specific language embedding leniency in competition laws from selected jurisdictions.

Recommendations for Indonesia

1) *Include an express provision in the law[14] that can give KPPU the powers to design a leniency program and at the same time provide legal certainty to the business community.*

   Currently, the competition legal framework in Indonesia does not allow for a predictable and sound leniency program, although allowing for a clear legal framework to implement a leniency program would be very valuable for consumers and the whole economy.

   Given the legal system in Indonesia, it is recommended that Indonesia adopt an approach like Kenya or Korea, by including reference to leniency in the competition law under Chapter VIII of the Competition Law (Law of the Republic of Indonesia No.5 of 1999) (See Box 1). Ideally, the law should state what is the definition of leniency, who can apply and for what infringements. For example, the following text could be included: *"The Authority may operate a leniency program*

[10] Brenner, S. (2005) "An Empirical Study of the European Corporate Leniency Program", Humboldt-University Berlin

[11] Klein, G. (2011). Cartel destabilization and leniency programs–Empirical evidence. ZEW-Centre for European Economic Research Discussion Paper, (10-107).

[12] By 2016, more than 500 leniency applications have been received by the Competition Commission, primarily as the result of a fast-track leniency and settlement process, introduced in 2011 for disclosures of bid-rigging and collusion in construction. Purfield, Catriona Mary; Hanusch, Marek; Algu, Yashvir; Begazo, Tania; Martinez Licetti, Martha; Nyman, Sara. 2016. *South Africa economic update : promoting faster growth and poverty alleviation through competition (English)*. South Africa economic update; issue no. 8. Washington, D.C. : World Bank Group, http://documents.worldbank.org/curated/en/917591468185330593/South-Africa-economic-update-promoting-faster-growth-and-poverty-alleviation-through-competition. See also, UNCTAD (2010) 'The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries' available at http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf

[13] Choi, Y. J and K. S. Hahn, *How does a corporate leniency program affect cartel stability? Empirical evidence from korea*, Journal of Competition Law & Economics, Volume 10, Issue 4, 1 December 2014, Pages 883–907.

[14] Law of the Republic of Indonesia No.5 of 1999 Concerning the Ban on Monopolistic Practices and Unfair Business Competition.

where a business actor that voluntarily discloses the existence of actions prohibited under Article 11 and cooperates with the Authority in the investigation of the alleged violation may not be subject to all or part of the sanctions that could otherwise be imposed under this law."

2) *Take complementary measures to ensure the effectiveness of the leniency once introduced, including adjusting provisions on sanctions in the law, improving tools and resources for detecting and proving cartels, and building the credibility of the system.*

   KPPU's reputation as an effective authority in carrying out investigations, stopping anticompetitive practices and imposing proportionate sanctions is essential to create a credible threat to cartels.

Box 1: Embedding leniency in the competition law – Kenya and Korea

Kenya
89A. (1) The Authority may operate a leniency programme where an undertaking that voluntarily discloses the existence of an a greement or practice that is prohibited under this Act and co-operates with the Authority in the investigation of the agreement or practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.
(2) The details of the leniency programme under subsection (1) shall be set out in the guidelines of the Authority.

Source: Kenya Competition Act No.12 of 2010

Korea
Article 22-2 (Reduction, Exemption, etc. for Voluntary Reporters)
(1) With respect to the persons falling under the following subparagraphs, the corrective measures under Article 21 or the surcharge under Article 22 may be mitigated or exempted:
1. Persons who have reported voluntarily on the fact of unfair collaborative acts;
2. Persons who have cooperated in the investigation by means of furnishing evidence
(2) The Fair Trade Commission and public officials thereof shall not supply or divulge information and data related to voluntary reporting or giving report, such as the identity, detail of information, etc. of the persons who have reported voluntarily or cooperated except for the cases prescribed by Presidential Decree, such as the cases necessary for the execution of litigation
(3) Matters necessary for the scope of persons to be mitigated or exempted under paragraph (1), standard or extent of mitigation or exemption and detailed matters regarding prohibition of supply and disclosure of information and data pursuant to paragraph (2) shall be determined by Presidential Decree.

Source: Korea Monopoly Regulation and Fair Trade Act

C. HOW TO DESIGN AN EFFECTIVE LENIENCY PROGRAM DESIGN

i. Scope of the leniency program

Leniency programs are generally targeted to discover secret agreements that are known to have negative effects on consumers; therefore, these programs focus only on hard core cartels. [15] Given the high costs of hard core cartels for the economy and the limitations of competition authorities' instruments to discover and prove cartels, granting immunity and/or fine reductions to infringers is warranted. In cases of non-hardcore cartels such as cooperation agreements among competitors for R&D, the effects on

[15] Some few jurisdictions include also vertical agreements under the scope of leniency programs; for example, Poland, Austria, and United Kingdom (limited to price fixing). https://www.competitionpolicyinternational.com/leniency-programs-the-devil-is-in-the-details/

consumers are not clear; and in the case of practices (abuse of dominance and anticompetitive vertical agreements) that involve an affected party, the affected parties have the incentives to report the alleged infringements to the authority (i.e., the practice is not secret). The European Competition Network (ECN) '*Model Leniency Programme*' scope of application only covers cartels and does not apply to other agreements. Similarly, the International Competition Network (ICN) 'checklist for efficient and effective leniency programme' covers cartels. ICN further describes cartels as '*secret horizontal agreements*'[16] as they thrive on trust and secrecy amongst its members. Leniency programs are therefore more relevant and effective as a tool against hardcore cartels as they seek to break that trust by encouraging violators to confess and implicate their co-conspirators, providing first-hand, and direct "insider" evidence of conduct that the other parties to the cartel want to conceal, in exchange for reduction or total immunity from sanctions.[17] When coupled with the risk of detection and threat of severe sanctions, leniency programs introduce an ingredient that will contribute to the instability of hardcore cartels by providing a powerful incentive to break ranks from the cartel and report the wrongdoing.[18]

Furthermore, in line with international practices hardcore cartels are considered per se illegal (*See Figure 3*). This means that proving the existence of an understanding, agreement or concerted action among competitors is enough to establish an infringement and merit a sanction. Most competition legal frameworks consider hardcore cartels as per se infringements and do not require to prove intention of generating a negative effect on competition. The ASEAN Guidelines on Competition Policy also consider *"identifying specific "hardcore restrictions", which will always be considered as having an appreciable adverse effect on competition (…), which need to be treated as per se illegal."*[19]

Figure 4: Comparison of countries that consider hardcore cartels as per se illegal

	Hardcore cartels' prohibition	Other horizontal agreements
Australia	Per se	Rule of reason
Brazil	Per se	Rule of reason
China	Rule of Reason	Rule of Reason
EU	Per se	Rule of Reason
Germany	Per se	Rule of Reason
India	Per se	Rule of reason
Indonesia	Rule of Reason	Rule of reason
Japan	Rule of Reason	Rule of reason
Korea	Rule of Reason	Rule of reason
Laos	Per se	Rule of Reason
Malaysia	Per se	Rule of Reason
Mexico	Per se	Rule of Reason
Myanmar	Unclear	Rule of reason

[16] International Competition Network 'Checklist for efficient and effective leniency programmes' available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1126.pdf

[17] See the Anti-Cartel Manual, issued by the International Competition Network, available at http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/manual.aspx

[18] See Gregory J. Werden, Sanctioning Cartel Activity: Let the Punishment Fit the Crime, EUR. COMPETITION J. (March 2009); and Scott Hammond, former Deputy Assistant Att'y General for Crim. Enforcement, Antitrust Div., Depart. of Justice, Presentation at The 24th Annual National Institute on White Collar Crime, The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades (Feb. 25, 2010), available at http://www.justice.gov/atr/public/speeches/255515.htm

[19] Available at http://www.asean.org/storage/images/2012/publications/ASEAN%20Regional%20Guidelines%20on%20Competition%20Policy.pdf

	Hardcore cartels' prohibition	Other horizontal agreements
New Zealand	Per se	Rule of reason
Philippines	Per se	Rule of Reason
Russia	Per se	Rule of reason
Singapore	Per se	Rule of reason
South Africa	Per se	Rule of reason
Thailand	Rule of Reason	Rule of Reason
Turkey	Per se	Rule of Reason
UK	Per se	Rule of reason
USA	Per se	Rule of reason
Vietnam	Rule of Reason	Rule of Reason

Source: WBG Markets and Competition Policy Database, as of November 2017

Recommendations for Indonesia

3) *Narrow down the application of leniency to hardcore cartels by circumscribing it to Article 11 of Indonesia's Competition Law.*

   This would balance the costs and benefits of implementing leniency and prevent granting leniency for practices that can be uncovered by the KPPU and might not have negative effects on competition.

4) *Amend Article 11 of the Competition Law to ensure hardcore cartel infringements are per se illegal, ensuring consistency with international best practices and considering that hardcore cartels are the most harmful anticompetitive practice.*

ii. Benefits for cartel applicants

In order to encourage the use of the leniency program, the benefits for companies in terms of the reduced sanctions have to be clearly stipulated. The first applicant receives full immunity or pardon and 100% reduction of administrative fines. In order to strengthen a cartel case, competition authorities usually extend a lenient treatment to the second and following applicants as long as the evidence submitted adds significant value to the investigation. Furthermore, competition authorities generally make leniency available when they are not aware of the cartel or when additional evidence would be gathered to strengthen an open investigation. In countries where individuals can be liable to competition infringements, leniency has also to be explicit on whether individuals can apply for leniency.

a. **Immunity:** 'Full immunity' refers to a complete (100%) reduction of fine. The term 'partial immunity' refers to a reduction of fine lower than full immunity. To encourage applicants to come forward, full immunity should only be offered to applicants when the competition authority was unaware of the cartel, or when it was aware but did not have sufficient evidence to proceed with the case. Full immunity should only be offered to the first applicant – this is the main advantage of being first through the door. If the second (and subsequent) applicants would be treated similarly to the first, then there would be little or no incentive in rushing to apply for leniency – each cartel member could simply wait until they suspect that a first application has been made.

b. **Reduction of fines:** Subsequent leniency applicants may be eligible to a reduction in fines, mostly up to 50%, depending on the quality of the information they provide the competition agency and the

timing of that information. This further compels cartel participants to compete to cooperate with investigations as it *mostly applies to the second and, in some cases, subsequent applicants with the degree of fine reduction decreasing per additional applicant*. Just like with immunity, the competition authorities should develop guidelines for the reduction of fines that should depend on (i) evidentiary threshold – the evidence must significantly add value to the investigations; (ii) number of rewarded applicants and degree of reduction – the authority should determine whether the reduced fine is provided to only the second or including subsequent applicants; and range of fine reduction depending on their rank.[20] In some jurisdictions, settlements policy for fine reduction complement leniency that is only provided to the first applicant; for example in the case of South Africa. It is important to fine tune the treatment to subsequent applicants to avoid undermining the incentives to be the first applicant[21].

c. **Corporate versus individual leniency:** In some jurisdictions, individuals are liable for cartels, along with the company in which they work. Sanctions for participation may include fines, imprisonment, and temporary or permanent bans from acting as a director or officer of a company. Leniency programs in such jurisdictions 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.

Recommendation for Indonesia

5) *Include clear provisions in the law on whether leniency will be only granted to the first applicant or subsequent applicants, and whether it is available to individuals as well as enterprises*.

   The details of the exact amount of fine reduction for applicants and further clarifications can be developed in regulations or guidelines.

iii. Other considerations

The following factors, generally spelled out in regulations and leniency guidelines, are key to ensure effective use of a leniency program:

a. **Evidentiary standards for information received:** The value of the evidence to be submitted by the applicant depends on the time and order of the application. The value of evidence is important in determining whether an applicant will ultimately be granted full immunity, and for subsequent applicant, the extent to which the fine is reduced. For the first applicant before commencement of the investigation or any formal actions, the information about the cartel conduct should be sufficient to enable the initiation of the proceedings. Once an investigation has commenced, evidence from the first applicant should enable proof of cartel conduct, or the finding of an infringement, or enable significant progress in the investigation – for example the initiation of a dawn raid. For subsequent applicants, the evidence provided must have a significant added value to the case, or provide information unknown to the authorities.

[20] ICN (2017). "Checklist for Efficient and Effective Leniency Programmes." http://www.internationalcompetitionnetwork.org/uploads/library/doc1126.pdf
[21] OECD (2012), Leniency for Subsequent Applicants, OECD Policy Roundtable, p. 5.

b. The importance of marker systems: In principle, when a leniency application is filed, the applicant must join to it all cartel-related information including any supporting evidence based on the evidentiary threshold. This is known as a full or formal application. Collecting the required evidence can be a long process. It is recommended that the leniency program therefore has a system where an applicant can obtain a marker before the formal leniency application process is filed. A marker will confirm the applicant's place in the queue for leniency and sets a time limit, with some degree of flexibility, for the submission of information and evidence that meets the relevant threshold for obtaining leniency. Marker systems are also important for subsequent applicants: in the event the first applicant fails to cooperate, meet the requirements of the leniency program, or withdraws their application, the second applicant may then be eligible for full immunity. A marker system also helps the competition authority keep track of each applicant's place in the queue, which may be important when calculating fines.

c. Transparency, confidentiality, and predictability. Table 1 summarizes key principles competition authorities should consider when designing a leniency program in order to safeguard the integrity of the leniency program.

Table 1: Making leniency attractive to applicants - key principles

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 considering 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-favoritism.
No less advantageous position	leniency programs should be designed to avoid that the leniency applicants are placed in a less advantageous position than cartel participants who do not cooperate with the competition authority.
Transparency	Leniency programs should allow applicants to know the basic facts, mechanisms, and procedures affecting them as the investigation progresses. Transparency is a key element for improving both the quality of the evidence presented by applicants as well as the reasoning on which the competition authority bases its leniency decisions.
Accessibility	Guidance on the leniency program should be publicly available to all persons and undertakings. Potential applicants should be encouraged to contact the competition authority to seek information, guidance and clarification on the leniency program. The basic legal and economic consequences of participating in a cartel, the benefits of leniency and the steps to obtain it should be explained in a clear, simple manner.
Confidentiality	Leniency programs should include strictly observed mechanisms and controls to protect the confidentiality of potential and actual applicants at all stages of the investigative process. This includes setting-up safeguards such as the possibility for oral leniency applications to protect leniency applicants from information leaks and disclosure, and establishing rules and administrative practices ensuring protection of self-incriminating statements contained in leniency applications both inside and outside the competition authority (e.g. towards other agencies, bodies and third parties).
Flexibility	Within the leniency framework, each application should be considered on a case-by-case basis. This is necessary given the different conducts and facts involved in each case and the need to properly asses the information provided by the leniency applicant. However, the circumstances under which the competition authority may exercise discretion should be clearly stipulated guidelines or regulations. By narrowing the competition authority's scope of discretion, applicants are provided with more legal certainty.
Protection from private damage action	In many countries, a company and its employees obtaining full immunity from penalties in the first case might still be liable to pay damages in a following private case. Such a situation would obviously undermine incentives to self-report for leniency in the first instance. To this end, leniency frameworks can be designed to reduce the information available for follow-up actions and modifying incompatible or disadvantageous requirements imposed on leniency applicants. For example, some competition authorities keep the identities of companies granted leniency confidential in perpetuity, or accept oral corporate statements and reserve them as confidential.

Source: Guidelines for a Comprehensive and Effective Leniency Program to Competition Authorities, WBG Competition Policy Team, 2015

Recommendation for Indonesia

6) *Develop implementing regulations and guidelines to operationalize the leniency program and build capacity of KPPU.*

Areas to be covered by regulations or guidelines, include:

- **The scope of the leniency program** i.e. whether it will apply to corporations and/or individuals, to first or subsequent applicants. Regulations could also clarify the types of infringements covered by the leniency program (i.e. hardcore cartels) in case the law is not clear on this.
- **Evidentiary thresholds and evidentiary standards** for obtaining full and partial/reduced immunity.
- **Behavioral and legal requirements for applicants** to obtain benefits of the leniency program, including providing guidance on what is considered cooperative behavior.
- **Mechanisms to ensure key principles** including transparency, predictability, confidentiality and protection from private action damages.
- **Procedural aspects of the leniency program**, including informal/anonymous contacts with KPPU; availability of a marker to protect applicants' places in the queue for immunity or reduction of fines); procedures for revoking leniency if necessary; the form of applications (written or oral) protection to private plaintiffs from disclosure of self-incriminating statements provided under leniency; procedures for handling information on closely related leniency applications; and handling information in the case of withdrawal/refusal of the application.

Annex 2 provides brief guidance on practical application of leniency provisions. Additionally, non-legislative supportive measures and initiatives could be adopted to strengthen the effectiveness of the leniency program including: education and awareness-raising of the illegality of cartels in general and the leniency program specifically; promotion of leniency and compliance programs; and promoting the results of leniency.

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Annex 1 – EXAMPLES OF LENIENCY PROVISIONS IN COMPETITION LAWS FROM SELECTED JURISDICTIONS

Jurisdiction/reference	Language
Korea Monopoly Regulation and Fair Trade Act	*Article 22-2 (Reduction, Exemption, etc. for Voluntary Reporters)* *(1) With respect to the persons falling under the following subparagraphs, the* ***corrective measures*** *under Article 21 or the surcharge under Article 22* ***may be mitigated or exempted****:* *1.* ***Persons who have reported voluntarily on the fact of unfair collaborative acts;*** ***2. Persons who have cooperated in the investigation by means of furnishing evidence*** *(2) The Fair Trade Commission and public officials thereof shall not supply or divulge information and data related to voluntary reporting or giving report, such as the identity, detail of information, etc. of the persons who have reported voluntarily or cooperated except for the cases prescribed by Presidential Decree, such as the cases necessary for the execution of litigation* *(3) Matters necessary for the scope of persons to be mitigated or exempted under paragraph (1), standard or extent of mitigation or exemption and detailed matters regarding prohibition of supply and disclosure of information and data pursuant to paragraph (2) shall be determined by Presidential Decree.*
Japan Antimonopoly Act Article 7-2 (10) – (11)	*"****(10) Notwithstanding the provisions of paragraph (1), the Fair Trade Commission may not order an enterprise that is to pay a surcharge pursuant to the provisions of paragraph (1) to pay the surcharge if the enterprise falls under both of the following items:*** ***(i) the enterprise is the first among the enterprise who committed the relevant violation to individually submit reports and materials regarding the facts of the violation to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission*** *(excluding when the reports and materials are submitted on or after the Investigation Start Date (or the date on which the enterprise received an advance notification in connection with the violation if neither the measure listed in Article 47, paragraph (1), item (iv) nor the measure provided in Article 102, paragraph (1) was taken; the same applies in the following item, the following paragraph and paragraph (25)) for the case connected with the violation).* *(ii) the enterprise has not committed the relevant violation since the Investigation Start Date for the case connected with the violation.* *(11) In a case under paragraph (1), the Fair Trade Commission is to reduce the relevant surcharge by fifty percent of the surcharge calculated pursuant to the provisions of paragraph (1) or paragraphs (5) to (9) inclusive, if the enterprise falls under items (i) and (iv) of this paragraph, or by thirty percent of the surcharge calculated pursuant to the provisions of paragraph (1) or paragraphs (5) to (9) inclusive, if the enterprise falls under items (ii) and (iv) or items (iii) and (iv) of this paragraph:* *(i) the enterprise is the second among the enterprise who committed the relevant violation to have individually submitted reports and materials regarding the facts of the violation to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission (excluding when the reports and materials are submitted on or after the Investigation Start Date for the case connected with the relevant violation).* *(ii) the enterprise is the third among the enterprise who committed the violation to have individually submitted reports and materials regarding the facts of the violation to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission (excluding when the reports and materials are submitted on or after the Investigation Start Date for the case connected with the relevant violation).* *(iii) the enterprise is the fourth or fifth among the enterprises that committed the violation to individually submit reports and materials regarding the facts of the violation (excluding reports and materials related to the facts already ascertained by the Fair Trade Commission through the report provided in Article 45, paragraph (1), or the measures as provided in paragraph (4) of the same Article, or other means) to the Fair Trade Commission pursuant to the provisions of the Rules of the Fair Trade Commission (excluding when the reports and materials are submitted on or after the Investigation Start Date for the case connected with the relevant violation).* *(iv) the enterprise has not committed the relevant violation since the Investigation Start Date for the case connected with the relevant violation."*
Swedish Competition Act	*Article 12* *Leniency from an administrative fine may be granted to an undertaking that has infringed a prohibition contained in Chapter 2, Article 1 or in*

Jurisdiction/reference	Language
Chapter 3, Article 12 - 15	*Article 101 of the Treaty on the Functioning of the European Union, if the undertaking is the first to notify the infringement to the Swedish Competition Authority and if it is only as a result of the information contained in the notification that the Authority has obtained sufficient material to take action against the infringement.* ***When the Swedish Competition Authority already has sufficient material to take action against the infringement, leniency from an administrative fine may be granted to an undertaking that has infringed the said prohibitions, provided*** ***1. the undertaking is the first to provide information that results in it being possible to establish that the infringement has occurred, or*** ***2. the undertaking has facilitated the investigation of the infringement to a very significant extent in some other way.*** *Leniency from an administrative fine may not be granted to an undertaking that has compelled another undertaking to participate in the infringement. In cases referred to in the second paragraph leniency from an administrative fine may not be granted if* *1. another undertaking has been given a respite period pursuant to Article 14 a, first paragraph and the information required for leniency has been provided before the expiry of the respite period, or* *2. a declaration pursuant to Article 15 has been made.*
The Danish Competition Act Section 23(a)	*23 a.-(1)* ***Anyone who acts in breach of Section 6 of this Act or Article 101(1) TFEU by entering into a cartel agreement shall upon application be granted withdrawal of the charge that would otherwise have led to a fine or imprisonment being imposed for participating in the cartel, in case the applicant, as the first one, approaches the authorities about the cartel, submitting information that was not in the possession of the authorities at the time of the application, and who*** ***i) before the authorities have conducted an inspection or a search regarding the matter in question, gives the authorities specific grounds to initiate an inspection or conduct a search or inform the police of the matter in question; or*** ***ii) after the authorities have conducted an inspection or a search regarding the matter in question, enables the authorities to establish an infringement in the form of a cartel.*** *(2) Withdrawal of the charge shall be granted only if the applicant* *i) cooperates with the authorities throughout the entire course of the case;* *ii) brings his participation in the cartel to an end no later than by the time of application, and* *iii) has not coerced any other party into participating in the cartel.* *(3) If an application for withdrawal of the charge does not meet the requirements set out in subsection (1)(i) or (ii), the application shall be treated as an application for reduction of the penalty as set out in subsection (4).* *(4) Anyone who acts in breach of Section 6 of this Act or Article 101(1) TFEU by entering into a cartel agreement shall be granted a reduction of the fine that would otherwise have been imposed for participation in the cartel, if the applicant* *i) submits information about the cartel that constitutes significant added value compared to the information already in the possession of the authorities, and* *ii) satisfies the requirements specified in subsection (2).* *(5) The penalty reduction for the first applicant who satisfies the requirements set out in subsection (4) shall be 50 per cent of the fine that would otherwise have been imposed on the party concerned for participating in the cartel. The penalty reduction for the second applicant who satisfies the requirements of subsection (4) shall be 30 per cent. The penalty reduction for subsequent applicants who satisfy the requirements of subsection (4) shall be up to 20 per cent.* *(6) Applications for leniency shall be submitted to the Competition and Consumer Authority. In cases where the State Prosecutor for Serious Economic and International Crime has charged persons or undertakings or initiated criminal investigations into an alleged infringement in the form of a cartel, an application for leniency may also be submitted to the State Prosecutor for Serious Economic and International Crime.* *(7) An application filed under subsection (6) shall be considered according to the following procedure:* *i) the authority that receives the application as set out in subsection (6) shall issue an acknowledgement of receipt.*

Jurisdiction/reference	Language
	ii) the competent authority, as referred to in subsection (8) below, shall issue a conditional assurance containing a statement of whether the requirements in subsections (1) or (4) are satisfied, and stating whether at this point there is reason to reject the application because the requirements in subsection (2) are not found satisfied. *iii) when the case has been finally examined and assessed, the competent authority shall indicate, as set out in subsection (9), whether the applicant satisfies the requirements in subsection (2) and, if so, grant leniency in accordance with the conditional assurance issued to the applicant under paragraph ii).* *(8) The conditional assurance shall be issued by the authority that received the application under subsection (6). Before the conditional assurance is issued under subsection (7)(ii), it shall have been discussed between the Competition and Consumer Authority and the State Prosecutor for Serious Economic and International Crime. A conditional assurance for withdrawal of the charge may only be issued if the authorities agree to do so.* *(9) An assurance of withdrawal of the charge under subsection (7)(iii), shall be issued by the State Prosecutor for Serious Economic and International Crime after consultation with the Competition and Consumer Authority. An assurance of a penalty reduction under subsection (7)(iii), shall be issued by the authority that, in the case in question, issues an administrative notice of a fine or brings the case before the courts. Before an assurance of a penalty reduction may be issued, the other authority shall be consulted.* *(10) Different undertakings cannot submit a joint application for leniency, unless the applicants are associated members of a group of companies and the application specifies the companies that it is intended to comprise.* *(11) An application from an undertaking or an association shall automatically cover current and former board members, senior managers and other employees, provided that each person satisfies the requirements in subsection (2). When the case has been finally examined and assessed, the competent authority as set out in subsection (9) shall indicate whether each party satisfies the requirements in subsection (2) and, if so, grant leniency in accordance with the conditional assurance issued to the undertaking or association under subsection (7)(ii).*
Brazil Competition Law Chapter VII	***Art. 86. CADE, by means of the General Superintendence, may enter into leniency agreements, with the extinction of any punitive action of the public administration or reduction from one (1) to two thirds (2/3) of the applicable penalty, under the terms of this article, with natural persons or legal entities that cause violation to the economic order, provided that they effectively cooperate with the investigations and administrative proceeding resulting from such cooperation****:* *I – The identification of the other persons involved in the violation; and* *II – The obtainment of information and documents proving the informed or investigated violation* *§ 1 The agreement referred to in the caput of this article may only be executed if the following requirements are cumulatively fulfilled:* *I – the company is the first to be qualified in relation to the informed or investigated violation;* *II – the company completely ceases its involvement in the informed or investigated violation, as of the date the agreement is proposed;* *III - the General Superintendence does not have sufficient evidences to guarantee the conviction of the company or natural person at the time the agreement is proposed; and* *IV – the company confesses to having participated in the tort and fully and permanently cooperates with the investigations and administrative proceeding, appearing, under its expenses, whenever required, to all procedural acts, until the conclusion thereof.* *§ 2 In relation to the natural persons, they may enter into leniency agreements provided that requirements II, III and IV of § 1 hereof are complied with.* *§ 3 The leniency agreement entered into with CADE, by means of the General Superintendence, shall set forth the conditions necessary to guarantee effective cooperation and useful result from the proceeding.* *§ 4 The Court shall, upon the judgment of the administrative proceeding, once the compliance with the agreement is verified:* *I – determine the extinction of the punitive action of the public administration in favor of the transgressor, if the settlement proposal has been submitted to the General Superintendence without prior knowledge of the notified violation; or* *II – in the other cases, reduce the applicable penalties from one (1) to two thirds (2/3), observing what is set forth in Art. 45 of this Law, also considering the classification of the penalty the effective cooperation provided and transgressor's good faith in the compliance with the lenience agreement.*

Jurisdiction/reference	Language
	§ 5 In the case described in item II of § 4 of this article, the penalty over which the reducing factor shall incur shall not be higher than the lowest penalty applicable to the other transgressors, in relation to the percentage established for the application of the fines referred to in item I of Art. 37 of this Law. *§ 6 The effects of the leniency agreement shall be extended to companies of the same group, de facto or de jure, and to their directors, administrators or employees involved in the violation, provided they enter into it jointly, respecting the imposed conditions.* *§ 7 The company or natural person that does not obtain, during the investigation or administrative proceeding, qualification to enter into the agreement referred to in this article, may enter into with the General Superintendence, until the case is submitted to trial, a lenience agreement related to another violation, of which Cade has not prior knowledge.* *§ 8 Under the terms of § 7 of this article, the transgressor shall benefit from reduction of one third (1/3) of the penalty applicable to him in that case, without prejudice to obtaining the benefits mentioned in item I of § 4 this article about the new reported violation.* *§ 9 The agreement proposal referred to in this Article is considered confidential, except in the interest of the investigations and the administrative proceeding.* *§ 10. The rejection of the proposed leniency, of which no disclosure shall be made, shall not be considered a confession as to the facts nor recognition of the wrongfulness of the conduct under analysis.* *§ 11. The application of this Article shall observe the rules to be issued by the Court.* *§ 12. In case of failure to comply with the leniency agreement, the beneficiary will be unable to enter into a new leniency agreement for a period of three (3) years as of the trial date.* *Art. 87. In crimes against the economic order, as defined by Law No. 8137, of December 27th, 1990, and other crimes directly related to cartel conduct, such as defined by Law No. 8666, of June 21st, 1993, and the ones defined in article 288 of Decree-Law No. 2,848, of December 7th, 1940 - Penal Code, the execution of a leniency agreement under this Law, determines the suspension of the statute of limitations and prevents denunciation from being offered in relation to the leniency beneficiary agent.* *Sole paragraph. Once the leniency agreement has been complied with by the agent, the punishments for the crimes set forth in the caput of this article shall automatically cease.*
Kenya Competition Act Article 89A	*89A. (1) The Authority may operate a leniency programme where an undertaking that voluntarily discloses the existence of an agreement or practice that is prohibited under this Act and co-operates with the Authority in the investigation of the agreement or practice, may not be subject to all or part of a fine that could otherwise be imposed under this Act.* *(2) The details of the leniency programme under subsection (1) shall be set out in the guidelines of the Authority.*

ANNEX 2 – LENIENCY PROGRAM IMPLEMENTATION – GUIDANCE FOR COMPETITION AUTHORITIES

i. Generic leniency application process

While each jurisdiction is unique, there are certain key generic steps in leniency application processes, summarized in Box 1.

Box 2: Generic leniency application process

In jurisdictions where a marker can only be granted to the first-in applicant, there are two processes: one for the first-in applicant who can be given a marker and another one for subsequent applicants. The status of non-first-in applicants is put on hold until the agency takes a position on the first application. If the first application is not accepted and the applicant is not granted conditional immunity, a subsequent application for immunity will be considered. Otherwise, the subsequent applicants will not be eligible for full immunity but only for a fine reduction. In jurisdictions where a marker can also be granted to subsequent applicants, there is a single process, as the applications are handled simultaneously. However, in both cases, it is common practice to submit an alternative application i.e. to apply for immunity and to ask the competition agency, in the event immunity is not granted, to process the application as the application for a fine reduction. The key stages of a leniency application include:

1. ***Initial contact*** — the applicant can usually contact the competition agency anonymously and seek information about the application process, or sometimes even about the availability of a marker.
2. ***Request for a marker*** — a shortened application which includes general information about the cartel along with a request for additional time to submit a formal application.
3. ***Formal application*** — full application containing all the relevant information and supporting evidence with the difference depending on the required Evidence threshold.
4. ***Evidence threshold*** — the evidence that has to be submitted by the applicant depending on whether the applicant seeks immunity before the commencement of an investigation or any formal actions, or after the commencement of investigation or any formal actions, or whether the applicant seeks a fine reduction.
5. ***Confirmation of receipt*** — confirmation of submission of the application in the form of a request for a marker or formal application or confirmation of submission of evidence, specifying the time and date of the submission of the application or information / evidence.
6. ***Conditional leniency*** — conditional assurance that the requirements for leniency are met, and issued after initial assessment of the application in the form of a conditional leniency agreement, conditional leniency letter or conditional confirmation of compliance with the conditions, depending on the jurisdiction. The decision is conditional upon fulfilment of the requirements and cooperation with the agency.
7. ***Final decision on leniency*** — a final decision of the competition agency or court depending on the jurisdiction and whether the requirements and duty of cooperation are fulfilled. The final decision can also take the form of a leniency agreement.

Source: A user-guide for filing leniency applications worldwide, International Chamber of Commerce, 2016

It is important to note that throughout the proceedings, each applicant must cooperate with the competition authority and comply with requirements. Typical requirements and elements of cooperation are summarized in Table 2 below.

Table 2: Requirements and duty to cooperate for leniency applicants

Requirements	The applicant must end its participation in the cartel, unless otherwise instructed by the competition authority to avoid raising suspicions among other cartel members.
	The applicant must refrain from discussing the existence of the application and any of its content.
Cooperation	Attending meetings with the competition authority
	Submitting statements, evidence, documents and information to the competition authority
	Ensuring employees, managers and directors are available for interviews
	Not destroying, falsifying or concealing evidence
	Answering the competition authority's requests
	Conducting an internal investigation, if necessary

Source: A user-guide for filing leniency applications worldwide, International Chamber of Commerce, 2016

ii. Overcoming practical difficulties

In applying a leniency procedure, competition authorities may face several 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. Table 1 provides a snapshot of some common difficulties, which can be mitigated to some extent through developing appropriate guidelines, regulations or other mechanisms, in observance of the principles outlined above, for example cooperation frameworks with police or public prosecutors.

Table 3: Practical difficulties with leniency programs

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.
Unavailability of persons cited	Sometimes the persons implicated – that acted on behalf of the company - have left the company applying for leniency, either because of retirement, bad health, or new job with a competitor, etc. and the leniency applicant company cannot force a former employee to cooperate with the competition authority.
Determination of significant value-added	Per 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.
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 favor, and to hide certain elements which may weigh not in their favor. 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, to ensure that the interventions are be better targeted.
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 program.
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.
Leniency programs 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, 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 because of private damage action. Therefore, serious thought needs to be given to resolving this problem.

Source: Adapted from competition Guidelines: Leniency Programmes, UNCTAD 2016