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From the Publisher

Dear Reader,

Welcome to the 13th edition of *The International Comparative Legal Guide to: Cartels & Leniency*, published by Global Legal Group.

This publication, which is also available at www.iclg.com, provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to cartels & leniency laws and regulations around the world.

This year, three general chapters cover trends, decisions and judgments in recent cartels cases.

The question and answer chapters, which cover 29 jurisdictions in this edition, provide detailed answers to common questions raised by professionals dealing with cartels & leniency laws and regulations.

As always, this publication has been written by leading cartels & leniency lawyers and industry specialists, to whom the editors and publishers are extremely grateful for their invaluable contributions.

Global Legal Group would also like to extend special thanks to contributing editors Geert Goeteyn, Matthew Readings and Elvira Aliende Rodriguez of Shearman & Sterling LLP for their leadership, support and expertise in bringing this project to fruition.

Rory Smith
Group Publisher
International Comparative Legal Guides

Disincentives to Leniency: Proposals to Revive the Golden Goose

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Introduction

In last year's contribution, we focused on the reasons behind the drop in leniency applications, in particular for global cartels, arguing that ambivalent treatment of leniency applicants had compromised the essential bargain behind the success of leniency programmes, i.e. the necessity for absolute certainty, and had massively raised the costs of applying for leniency. While initially shy about their diminishing inventory of leniency cases, enforcers are increasingly acknowledging the problem. Yet, beyond vague declarations of intent and focusing on promoting other enforcement tools, very little is being done to revive the leniency goose. In this chapter, we recall the ailments leniency programmes are suffering from while proposing some remedies to revitalise these programmes.

The EU Commission's anticartel enforcement activities have benefitted tremendously from its decision to adopt the philosophy behind the US DOJ's highly successful leniency programme and make a clear promise of no fines for the first company to inform on a secret cartel.[1] Since that change, it has come to rely more and more on leniency applications as its prime tool for uncovering cartel activity, to the point where most investigations originate in an immunity application. In addition, leniency has ensured that most Commission decisions survive appeals largely unscathed, despite growing scrutiny from the EU General Court.[2] This, however, owes more to the cooperation of successive leniency reduction applicants than to the immunity applicant, whose evidence alone is rarely sufficient to support a fining decision. In that respect, the EU's Leniency Notice offer of set reduction ranges to subsequent co-operators has proven quite successful at developing sufficient evidence and admissions to make the defence task of the co-conspirators protesting their innocence a proverbial uphill struggle.

Yet, this success is increasingly called into question. The number of immunity applications has reduced considerably over the past two years, particularly for "global" cartels.[3] In addition, practitioners are increasingly querying the value of cooperating with a running investigation.

Where did it all go wrong? Going for multi-jurisdictional leniency has been described, colourfully but not quite untruthfully, as death by a thousand cuts. Some of these cuts are due to developments outside of the EU's control. However, a great many appear to lie in the EU's and its Member States' continued ambivalence towards leniency.

The Travails of the Immunity Applicant

Going for immunity is not an easy decision

This would seem rather obvious, but it bears emphasising that no company ever takes the decision to go for immunity lightly. There is: the fear of prejudice to the company's image with customers, regulators and the general public; the certainty of enormous legal costs (including the need to investigate all of the markets the company is active in, to be certain that no other cartel activity should be disclosed to the authorities for fear that applying for one product triggers further applications by third parties for other products); the fear of retaliation by powerful co-conspirators; the threat of huge civil damages claims awards; the distraction of key personnel from the business of running the company for protracted periods of time; and the generally left unspoken risk of personal retribution for decision-makers who were involved in the conduct, had some knowledge they should have acted on or simply are afraid of being blamed for having been asleep at the wheel – all these factors can be used in what are generally very tense internal discussions as to so many reasons why the company should not go for immunity.

In these debates, the main argument in favour of going in lies in the certainty of the immunity from fines promise. Unfortunately, that promise no longer weighs as much as it used to, as proponents of a different course of action can point to mounting uncertainties and costs.

Mounting uncertainties

The number of jurisdictions worldwide that have implemented leniency programmes is ever increasing. While the tendency had been to concentrate on a manageable handful of credible enforcers with a proven leniency track record, immunity applicants nowadays must face the real prospect of having to entertain applications to authorities from jurisdictions with less-developed legal systems, a more or less shaky regard for rule of law principles, endemic corruption and/or pronounced protectionist tendencies. Disregarding any such jurisdiction may prove tricky, in particular where the company has a presence or substantial sales in their territory. This is especially so where previous immunity applicants have shown the way to the jurisdiction in question, raising a significant risk that co-conspirators will claim immunity there if the company does not do that first.

The uncertainty thus created only increases when civil consequences are factored in. Once a new country is added to the list of possible recipients of an immunity application, the company must contend with the risk of follow-on civil damages claims in that country. In newer jurisdictions, such actions tend to be under-developed, with more questions than answers, so that it becomes quite difficult for the company to assess the materiality of the risks involved. The more jurisdictions that are added to the mix, the higher the resulting uncertainty.

This topic shows the limits of soft law encouragements from leading jurisdictions through organisations like the ICN. What is needed here are binding rules for comity, case allocation and active cooperation among antitrust authorities that can only be reached through multilateral international agreements, a daunting prospect and one unlikely to happen in the foreseeable future.

For the time being, the only mitigating action would-be leniency candidates can take is to rely on experienced counsel used to navigate the growing complexities of multi-national leniency applications.

Mounting costs

Irrespective of the uncertainties created by the growing list of jurisdictions where an immunity application may have to be entertained, there is certainty on one front: there will be more costs to contend with. Not only in monetary terms, but also in terms of time and resources. The latter should not be underestimated. Having to make witnesses, often in key positions within the company, available for interviews around the globe can cause significant disruptions, in particular since far-away jurisdictions up until now have shown little flexibility in terms of conducting (joint) interviews outside their own jurisdictions.[4] In jurisdictions with a common-law background, having to make witnesses available for weeks of trial can also cause unforeseen problems.

Again, there is little companies can do to avoid this, short of conducting a careful balancing exercise of specific risks and rewards associated with applying for leniency in each of the jurisdictions who offer a leniency programme. Marginal jurisdictions where companies have no presence and non-significant sales may perhaps have to be side-stepped.

Damages litigation does deter, but against going in for leniency

The EU, partly under the impulsion of the Court of Justice,[5] has taken the clear policy decision of encouraging civil damages actions. The premise, that civil damages actions contribute to deterrence and are thus an auxiliary to public enforcement, can be quarrelled with, in light of the fact that virtually all such actions seeking damages for cartel conduct in Europe are and have been follow-on actions, subsequent to the announcement of a public investigation's start or conclusion. Be that as it may, would-be immunity applicants can hardly disregard the risk of follow-on damages claims.

While plaintiffs did not wait for the Damages Directive to start filing for damages in the EU,[6] the new harmonised rules, such as the clarification of statute of limitations rules and the introduction of court-ordered disclosure in countries with no discovery mechanisms, can only increase the number and importance of such actions. The current push for the development of collective action mechanisms will further contribute to this growth.

There is no cap for civil damages. Would-be immunity applicants faced with cartel conduct having involved a significant part of their sales for a considerable period of time may find that the risk of civil damages, plus interest from the origin of the conduct, dwarfs or seriously undermines the benefits of a possible immunity from administrative fines. This, even before any consideration of joint and several liability, so that the Directive's conditional limitation of damages to those incurred by the would-be immunity applicant's own (direct and indirect) customers,[7] may not be enough to offset this risk.

A bold step is needed here. Recognising that damages actions are based on public enforcement, which itself is dependent in most cases on a leniency applicant bringing the matter to the enforcers' attention, immunity applicants should be granted total immunity from follow-on damages actions. Only actions threatened or initiated before the company goes in for leniency should be exempted. Offering such a clear and unambiguous promise to the immunity applicant will maximise incentives to come in for all cartel participants, as companies will balance the promise of total immunity against the risk of being saddled not only with their share of damages but also that of the immunity applicant, if they fail to be the first to come in. In addition, relevant enforcement agencies would be authorised to transmit to interested parties the full contents of the immunity applicant's application and subsequent submissions.

In addition, the European Commission should actively promote in the ICN the adoption of a similar system in all jurisdictions who have a leniency programme in place.

Inadvertent vexations: of markers and summary applications

Up until now, we have focused on obstacles to leniency that antitrust enforcers in the EU cannot, realistically, do much about. The next set of issues is different, in that the wounds appear largely self-inflicted.

The Commission's policy regarding *markers* is needlessly restrictive. Like much of leniency, the marker system is a US invention. Something, however, may have gotten lost mid-Atlantic. The aim of the marker system is to give a company that has decided to come in for amnesty the assurance that it will retain its amnesty position while it gathers the necessary evidence to substantiate its application. The US DOJ, working under the assumption that it is best served by as-accurate-as-possible amnesty submissions, is prepared to let companies benefit from the protection of their marker for months if necessary. The EU Commission, however, routinely grants a mere three weeks, with extensions for limited periods of time. It is hard to see the rationale for such a restrictive approach, which has led in the past to successful US amnesty applicants losing their immunity status in the EU. Given the comparative length of US and EU enforcement proceedings, it is hard to make the case that the US approach needlessly lengthens the process, quite to the contrary.

This should be an easy one. The Commission should harmonise its marker policies with those of the US DOJ.

Advances towards a *leniency one-stop-shop in Europe* are far too timid. Allocation of cartel cases within the European Competition Network of competition authorities appears to be art, not science. While the Commission, in principle, is the enforcer of choice when cartel conduct spans three countries or more, how the ECN will come out on case allocation in a concrete case is not always straightforward.[8] In addition, the Commission will sometimes take up the more international parts of a case, only to have some NCAs take up more domestic parts, sometimes years later. All this makes it crucial that an immunity applicant be protected everywhere in the EU, against both Commission and NCA enforcement. The freight forwarders case showed that, in the absence of specific EU legislation to this effect, an application to the Commission alone will not protect the company from later NCA enforcement at national level.[9]

To alleviate the burden on immunity applicants being forced on a European tour of NCAs, the ECN tried soft harmonisation. Under these impulses, it became possible to make summary applications in most EU Member States. Some NCAs show flexibility, accepting summary applications over the phone or applications in English. Others demand a trip to their offices or insist on using the local language. And any of them can ask further questions, even where there is little prospect of the Commission relinquishing the case. The cost of these formalities may appear comparatively small but they take precious time from the company at the time where the focus should be on perfecting a marker, developing evidence and possibly on juggling the demands of multiple non-EU jurisdictions, which, contrary to the ECN, do not belong to a supra-national enforcement system. Crucially, they imply needlessly enlarging the circle of those in the know at a time where secrecy is key to the success of public enforcement.[10]

It is therefore particularly disappointing that the proposal for an ECN+ Directive[11] does nothing to ensure a one-stop shop for leniency, but merely enshrines the current non-binding practice developed by the ECN.[12]

Since Member States do not conduct any investigation while the Commission is considering whether to take up a case, there is no convincing rationale for *not providing that Member States should treat applications to the Commission as if they had been made under their domestic leniency regimes, thus automatically securing the immunity applicant's spot without any additional formality, until such time as the Commission decides not to take up (parts of) the case, at which point the immunity applicant gets a deadline for transforming its application to the Commission into an application to the relevant NCA(s).*

All is not dark: on the way to solve the interaction with criminal sanctions

The Commission's proposal for the ECN+ Directive does contain a provision that would remove a significant obstacle to immunity applications in certain EU Member States. Article 22 of the draft directive provides that "Member States shall ensure that current and former employees and directors of applicants for immunity from fines to competition authorities are protected from any criminal and administrative sanctions and from sanctions imposed in non-criminal judicial proceedings for their involvement in the secret cartel covered by the application, if these employees and directors actively cooperate with the competition authorities concerned and the immunity application predates the start of the criminal proceedings." A number of Member States have statutes criminalising all or certain cartel behaviour (e.g. bid rigging). As leniency is not a known concept in most domestic criminal law proceedings, there was a question mark as to how an immunity grant to the company by an antitrust authority could protect individual employees from criminal prosecution. In many cases, this was resolved through informal, non-binding arrangements with certain public prosecutors, which could be rescinded at any time and also depended on the prosecutors in question remaining at their post. The Commission's proposal therefore constitutes a crucial advance for legal certainty, which hopefully will survive the legislative process.

To Be or Not to Be a Leniency Reduction Applicant

Pros and cons of going in

Like immunity, the decision to cooperate with an ongoing investigation (typically after a dawn raid or the receipt or a request for information) is not a foregone conclusion. Except that the hope of going wholly undetected has now gone, the factors going into the company's decision-making are quite similar to those considered by would-be immunity applicants. However, the hope at this point is only to secure a reduction in the fine and there are potential criminal consequences to consider in several EU Member States and abroad, most importantly in the United States. All this to say that the temptation not to cooperate with the investigation is even greater for would-be applicants for a leniency reduction than it is for companies that see a chance to go for immunity.

The Commission's leniency programme perceived this problem and set about addressing it by offering cooperating companies clear, rank-based reduction ranges a company would be entitled to, provided it contributed information of significant added value to the Commission's investigation.[13] In addition, companies which were the first to provide evidence pointing to the conduct being more serious or having lasted longer than previously known to the Commission would not see these facts being taken into account for their own fines, a mechanism colloquially known as "mini-amnesty".

While this system had serious limitations, developments have substantially eroded the minimal certainty it sought to ensure for would-be co-operators. In addition, opportunities to improve the system are being missed.

Uncertainty is the new policy

There was a time around the turn of the millennium where major antitrust authorities around the globe would make sure to reserve announcements of large fines for the days and weeks immediately preceding leading antitrust conferences, where delegates of these authorities would then regale the audience with updated statistics aiming to show that one's fines were bigger than those of the other. These times have long-passed but it is impossible not to notice a resurgence of the push towards ever bigger, headline-grabbing fines. Whether or not as result of this new trend, one can readily observe a widespread tendency of the Commission to interpret the leniency reduction rules with the single goal in mind of reaching the highest fine possible, with reductions limited as much as possible. The net result is that would-be leniency reduction applicants and their legal advisors are increasingly unsure whether cooperation is worth the risks and efforts it entails.

The *rigidity in reduction ranges* is inherent in the EU's leniency programme. Yet, it has perverse effects, as a company that comes quickly with minimal information that it will never really improve upon, will be advantaged over a company coming slightly later and with much better evidence assembled at much greater effort, which necessarily costs time.[14] Since it is of course impossible to predict one's place in the queue before coming in, the fact that the rules minimally reward extraordinary efforts once first place is no longer available can discourage companies from taking the leniency gamble. Since one's rank is so important, this also increasingly triggers disputes between applicants as to which position each truly deserves.

The *vagaries of added value assessment* create even more uncertainty. Because ranking matters so much, the Commission is increasingly willing to downgrade early-comers or to bar latecomers from any advantage, by ruling that the evidence they provided had no significant added value to its investigation. Companies with little to provide are thus effectively encouraged not to come in and to take their chances at fighting it out, or even of being dropped altogether from the investigation in the name of speed and expediency. Expediency can play further tricks on cooperating companies. Imagine,[15] for instance, a company that spends considerable time developing evidence that the cartel started at a much earlier date than known to the Commission. In theory, this should reward it with the top reduction in its range and mini-amnesty for the additional period it brought to the Commission's attention. However, the Commission may decide that it would be easier, faster and/or safer not to use this evidence and to go for a shorter period. All the applicant has to show for the considerable effort in developing the evidence then is a much lower reduction within the applicable band than it could have hoped for, or even no reduction at all, leading it to question whether taking the leniency bargain was worth it at all.

To counter these disincentives, significant added value should be assessed on the basis of the intrinsic value of the evidence, rather than on the Commission's decision to make concrete use of this evidence or not. In addition, small, marginal cartel participants should not be penalised if they can only bring an incomplete view of the cartel activity: companies should obtain the top of the range reduction, as long as they can show that they have taken all reasonable measures to gather all relevant evidence available to them.

In addition, leniency reduction applicants hoping to benefit from that status are faced with *great reluctance on the part of the Commission to grant mini-amnesty* and to give concrete content to that status once granted. In part, this is due to the change introduced in the 2006 Leniency Notice, as point 26 now reserves this treatment to applicants which are the first to submit *compelling* evidence used by the Commission to establish additional facts increasing the gravity or the duration of the infringement.[16] However, the Commission also interprets restrictively what it views as facts increasing the gravity of the conduct. For instance, without adducing specific proof to that effect, the Commission will posit that conduct it deems to be "global" truly spans every country on the planet, so that compelling evidence that the conduct actually encompassed a continent not mentioned in the rest of the Commission's file will be disregarded as not increasing gravity of the conduct. Finally, even if the applicant passes these hurdles, it is unlikely to benefit, since the Commission, in deviation from the fining guidelines' promised treatment of leniency reductions, will take mini-amnesty into account before applying the 10% overall fining cap, not after. If the fine exceeds the cap, the applicant will not see any concrete benefit from mini-amnesty.[17]

The conditions for mini-amnesty should be relaxed: (1) bringing evidence on specific EU countries and products should be rewarded if no evidence on these was available to the Commission, irrespective of whether conditional immunity has been granted for a scope encompassing all countries and all products; (2) the deduction of the turnover associated with the additional countries/products should be applied to the fine calculation after application of the 10% fining cap; and (3) a situation of mini-amnesty should trigger a 5 to 15% automatic increase in the fine reduction (+15% for first-in; +10% for second-in; and +5% for all subsequent leniency reduction applicants).

The uncertain promise to leniency reduction applicants is increased by the *inability to predict whether they will be offered the opportunity to settle* with the Commission. The Commission's settlement mechanism brings leniency reduction applicants closer to the position they are in when they reach a plea deal with the US DOJ, whereby they obtain a downward departure from the fine (and reduced jail time) in exchange for cooperation with the DOJ investigation and an admission of guilt. While the absence of any formal link between leniency status and settlement opportunity ensures that companies can go for one but not the other, for most leniency applicants settlement makes a lot of sense: the company's cooperation makes it unlikely that it would be able to prove its innocence and settling brings legal certainty quicker and affords the opportunity to discuss the main aspects of the case in a less confrontational setting, while adding an additional 10% to the reduction it is entitled to under the Leniency Notice. The Commission has always reserved to itself the discretion to decide whether or not to offer settlements. However, the mutual benefits of this procedure and the generally positive experience with the mechanism had raised hopes that settlements would become the norm. The Commission's policy decision not to offer the chance to explore a settlement when it is clear from the start that not all the defendants will agree to settle has dispelled these hopes. The refusal to entertain such mixed proceedings[18] (settlement with some parties, normal adversarial proceedings with the others) means that would-be leniency applicants cannot include the possibility to obtain a settlement (and the extra 10% reduction) in their decision-making whether to go for leniency, as they know that this possibility is subject to there being no holdouts among future defendants, which is entirely beyond their control and wholly unpredictable. This is regrettable since a reasonable hope of an additional 10% reduction for settling can be key in convincing would-be leniency applicants that are unsure about the quality and extent of valuable evidence they have to offer and/or how many companies have already gone in and claimed the most interesting reduction ranges. Without a reasonable prospect of being offered a settlement, many such companies may decide to forego leniency.

Leniency reduction applicants should always be offered the possibility to settle with the Commission, irrespective of the attitude of other defendants.

The harsh treatment of cooperating fringe players

A reasonable analysis of the likely benefits of cooperating with the Commission's investigation in the hope of obtaining a substantial leniency reduction shows these benefits to be increasingly shrouded with uncertainty. Large competitors who have reasons to believe that they may have played a key role in the conduct may find it easier to cooperate in such circumstances, as they may reason that they will be fined anyway and may as well take the leniency gamble as even a small percentage reduction for them can entail a large absolute amount of money, which is well worth the effort and expenditure of cooperation.

For fringe players, the equation looks very different: for them, the effort and expenses required for cooperation are very significant. At the same time, their size and/or limited involvement in the conduct means that there are chances they may be dropped from the investigation. The official Commission policy is that it will prosecute every company against which it has evidence of participation in the cartel conduct under investigation. The reality appears somewhat different. For a non-transparent combination of expediency and evidentiary considerations,[19] the Commission routinely drops certain fringe players. But there is one category of fringe players that is never dropped, and that is the ones who have decided to cooperate with the investigation under the leniency programme.

This is an issue that companies who believe they were mere fringe players should carefully consider before taking any decision. Particularly so because the Commission does not treat fringe players that it does prosecute particularly well. For a number of reasons,[20] the Commission deems it expedient to consider that fringe players are always part of the same single and continuous infringement as the main cartelists, even where it concedes that the fringe was not and could not have been aware of the conduct of the main cartelists. The Commission is then careful to note in its decision that the conduct of the fringe was more limited, but the impact of these qualifications on joint and several liability for damages is left for national courts to determine, once again increasing uncertainty for fringe players. The Commission may grant a fine reduction accounting for the fringe player's lesser involvement as a mitigating circumstance, but this a limited reduction that does not always reflect the difference between fringe and main conduct. The problem is further compounded that, by definition, fringe players only have a limited knowledge and understanding of the cartel activities, so their chances of obtaining the top of the range reduction in their leniency reduction band are in practice quite limited (unless the Commission would adopt our proposal above as regards the way it determines and rewards added value).

The Commission must review its policy towards fringe players and better reflect their limited involvement in, and knowledge of, the cartel.

Conclusion

The decision to cooperate under applicable leniency programmes is always delicate. In the face of mounting evidence of a drastic reduction in applications, competition authorities would do well to reflect on what can be done to restore the certainty that made leniency such a resounding success. Some potential solutions require an amount of international cooperation that cannot be expected in the foreseeable future. This chapter does, on the other hand, illustrate that some course corrections are well within grasp.

Endnotes

1. See Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ C 298, 8 December 2006, pp. 17–22 (hereinafter the 2006 Leniency Notice). The 2006 Leniency Notice is a revised version of the 2002 Leniency Notice, which made a key contribution to uncover and put an end to numerous hard core cartels. The revised 2006 Leniency Notice entered into force on 8 December 2006.
4. The General Court will probe for reasoning mistakes and will test the Commission's evidence on the margins (not accepting the full duration or product or geographic scope, for instance), but in the majority of leniency cases, the core of the Commission's findings will survive.
3. No recent statistics have been published on this development. According to different sources, the number of immunity applications would have decreased by 50% at least between 2014 and 2016. Authorities are not keen on publicising this fact and more recent figures are not available.
4. In light of the reasons given (domestic law constraints; differences in legal regimes; and focus of interviews), this situation is unlikely to evolve fast, although incremental improvements should be possible (verified video-conferencing, joint common interview followed by break-away sessions, etc.).
5. Judgment of 20 September 2001, *Courage Ltd v Bernard Crehan* and *Bernard Crehan v Courage Ltd and Others*, C-453/99, EU:C:2001:465.
6. Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, 5 December 2014, pp. 1–19 (hereinafter the Damages Directive).
7. Damages Directive, para. 38.
8. For example, the *bathroom fixtures cartel* was dealt with at EU level (*Bathroom Fittings and Fixtures*, COMP/39092, Commission Decision (2010), OJ C 348, 29 November 2011, pp. 12–17) while the *flour mill cartel* investigations led to four separate decisions by National Competition Authorities (see decisions concerning anticompetitive agreements in the packaged flour sector: *Autorite de la Concurrence*, Decision of 13 March 2012, 12-D-09; *Nederlandse Mededingingsautoriteit*, Decision of 16 December 2010, in case 6306; *Bundeskartellamt*, Decision of 27 May 2013, B11 – 13/06; and *Belgische Mededingingsautoriteit/Autorite de la Concurrence Belge*, Decision of 12 March 2014, 13-IO-06 Meel).
9. Judgment of 20 January 2016, *DHL v Autorità Garante della Concorrenza e del Mercato*, C-428/14, EU:C:2016:27.
10. The decision to file summary applications in a number of Member States will require involving additional people, if for reasons of languages alone, at the applicant itself and/or at its chosen law firm (or firms), as well as directly involving a number of NCA officials. While there is no reason whatsoever to impugn the honesty or professionalism of any of the people involved, common sense and experience teach that the risks of inadvertent or deliberate leaks can only increase when the circle of trust goes from 10 to 50 people or more and from three to over a dozen different organisations, all of which are susceptible to cyberattacks.
11. Proposal for a Directive of the European Parliament and of the Council to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market (hereinafter the ECN+ Directive).
12. Article 21 of the ECN+ Directive. Note the requirement to submit all summary applications to NCAs within five working days of the original application to the Commission, in order to benefit from the date and time of the original application. Thus, part of the week following the grant of a marker is lost in needless repetitions of the same basic information, when the applicant is under extreme time pressure to perfect its short-time marker.
13. See 2006 Leniency Notice, para. 26.
14. One need only look at Commission decisions showing the "first-in", entitled to a reduction of 30 to 50%, and the "second-in", entitled to a reduction of 20 to 30%, tied at a 30% reduction to understand that the second-in's evidence deserved a much better treatment.
15. Though there is nothing imaginary about this example.
16. See 2006 Leniency Notice.
17. The Commission bases this extraordinary position on a narrow reading of the Leniency Notice, whereby mini-amnesty is not seen as leading to a reduction in the fine (despite it being listed in point 26, which discusses the reductions leniency applicants are entitled to). The Commission claims this view is supported by the General Court's judgment in *Fra.bo* (Judgment of 24 March 2011, *Fra.bo SpA v European Commission*, T-381/06, EU:T:2011:111). A review of that judgment shows this finding to be an *obiter dictum*, which was not necessary for the Court's ruling, and which was consequently not examined by the Court of Justice on appeal (Judgment of 12 July 2012, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) – Technisch -Wissenschaftlicher Verein*, C-171/11, EU:C:2012:453).
18. The Commission remains willing to consider continuing with a settlement, if some of the participants abandon the proceedings while they are already under way.
19. The Commission is understandably under no obligation to explain why it does not prosecute certain companies.
20. Coates, *Defining a single and continuous infringement in cases with asymmetrical participation*, 21st Century Competition, 31 May 2016, provides a thoughtful justification for this policy. Yet, it seems other alternatives that better reflect that the conduct of the fringe is distinguishable from that of the main players would be possible in many cases.

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