

Immunity programmes in the EU

Their successes – and potential for failure...

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Outline

1. The success story
2. Create – more - incentives for immunity applicants
3. Increase legal certainty for immunity applicants
4. Leniency
5. Tentative conclusions

A success...

- > Immunity policy has been very successful
- > Everybody has an interest in maintaining the policy as successful as possible
 - > opportunity for companies “to come clean”
 - > critical detection tool for authorities
- > Commission has tried to do that by
 - > making the rules clearer – 2006 Notice
 - > introducing a marker system
 - > harmonising policies within the ECN

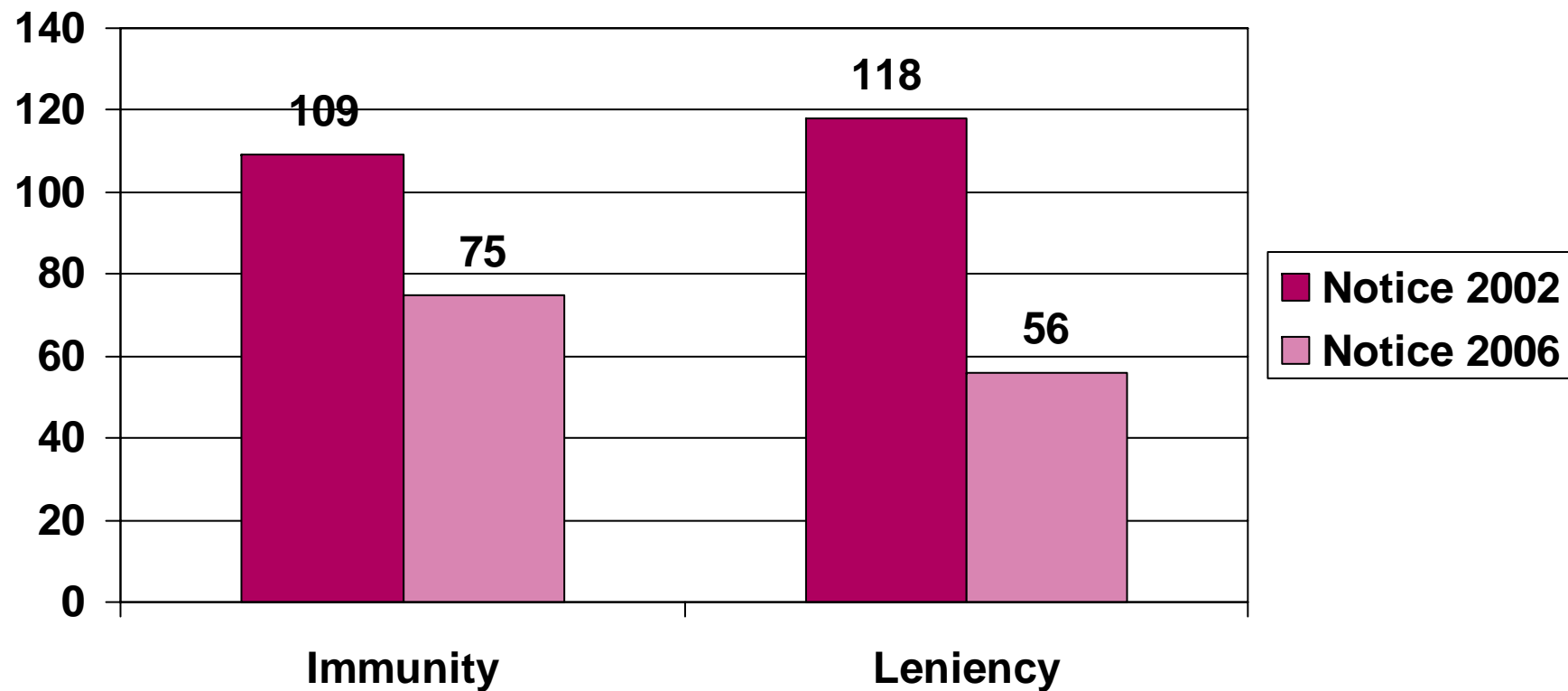
But some key issues...

BUT

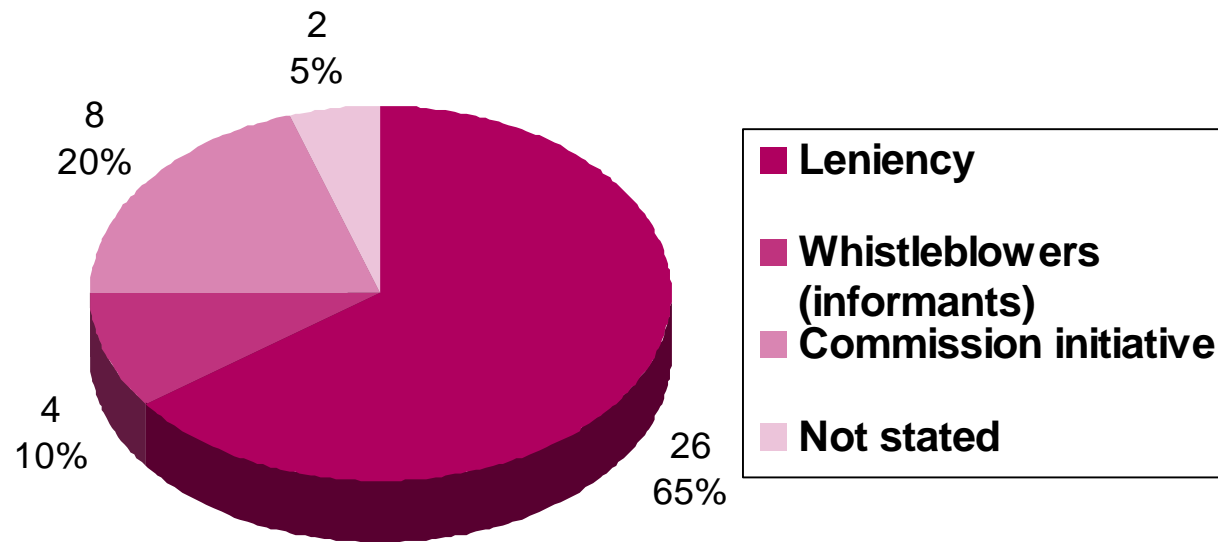
- > To maintain the success rate, authorities need to do two things:
 - > create – more - incentives for cartel participants to decide to come in and apply for immunity
 - > gives as much certainty as possible to applicants that have decided to come in, that they will obtain and keep immunity

1. The success story - Some statistics

Immunity and leniency applications – 2002 Notice and 2006 Notice



65% of EU decisions are based on immunity applications...



Based on cartel decisions adopted since 1 January 2003 until 31 December 2009

2. Create – more - incentives for immunity applicants

To seek immunity or not to seek immunity?

Bi-polar decision

- > Stop the activity – complying with the case-law on what stopping actually means – and let the statute of limitations run
 - > Key risk – you risk tipping off other cartel members and give them the opportunity to go in

- > Seek immunity from every jurisdiction where the company faces exposure

Immunity - What are the pro's?

- > Immunity from fines
- > Immunity from criminal prosecution
- > Smoother relations with the authority
- > Shows high compliance standard
- > Possibly better reaction from the press and investors

Immunity - What are the con's?

- > Loosing the chance of it “never coming out”
- > Risk of damage claims; no more scope to contest participation in the infringement. Only contestation of causal link and amount of injury
- > “Domino effect”, e.g. through amnesty plus
- > Omnibus question in the US
- > Risk of criminal prosecution in countries where there is no immunity (e.g. bid-rigging in Germany or France)
- > Awkward choices with clearly implicated employees – dismissal vs. retention to obtain cooperation credit
- > “Lethal leverage” – full cooperation
- > Risk of “missing a jurisdiction”

What could the Commission/NCA's do to further increase the pro's?

- > Civil actions : give immunity from civil actions to the immunity applicant – See US (detraining of damages)
- > Introduce an amnesty plus-system?
- > Introduce a universal marker system within the EU
- > Provide criminal immunity where relevant

A sidenote on markers – The practice

- > Some markers rejected (10/17 granted – Commissioner Kroes San Francisco ABA Cartel conference)
- > Often very short deadlines between marker and perfection
- > Important to go beyond what is required by the list in the 2006 Notice and
 - > give examples of the evidence that could become available
 - > explain the internal steps to be taken during the marker period
 - > explain and justify the time needed for each step

A sidenote on markers – What could be improved?

- > Accept markers as much as possible
- > Synchronise procedure with US/Canada/other marker jurisdictions
 - > Need for detailed information at the marker stage?
 - > Synchronise perfection timeline with US/Canada/other marker jurisdictions?

3. Increase legal certainty for immunity applicants

The problem

- > end 2009: 184 immunity applications
- > end 2009: 80 conditional immunity decisions

Explanation

- > several cartels covered by one conditional immunity decision
- > time between application and decision
- > national cases
- > not provided the necessary information and evidence

Conditions – Notice 2006

1. Be the first (point 8) – only for immunity
2. To submit evidence enabling EC to carry out a targeted inspection or to find an infringement (point 8)
3. Not to have coerced other undertakings (point 13)
4. To end involvement in the infringement (point 12 b)
5. To cooperate throughout the procedure (point 12 a)
6. Not to destroy, falsify or conceal evidence while contemplating application (point 12 c)

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Evidence – What needs to be provided?

- > Corporate statement applying for immunity (often oral) – excruciating detail
- > Other evidence: contemporaneous documents
- > Targeted inspection (maps; names; dates; etc.)
- > Explanation of the documents: to take position (new)

Evidence – In practice high burden

But constraints:

- > The company only has a one-sided view of the cartel, i.e. its own view
- > The company has a number of constraints:
 - > no home-raids
 - > data protection rules
 - > HR constraints
 - > specific constraints in the context of joint ventures

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End cartel participation...

... immediately following application

- > Tension between the requirement to cease participation and the risk of signalling
- > "...except for what would, in the Commission's view, be reasonably necessary to preserve the integrity of the inspections."
 - > Issue in marine hoses

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Cooperation obligation

To cooperate “genuinely, fully, on a continuous basis and expeditiously”

- > No disclosure to anyone without agreement from the Commission – no tipping off! (*Italian Raw Tobacco*)
- > Not to destroy, falsify or conceal evidence while contemplating the application
- > Respond to questionnaires; make staff available for interviews; also retired employees

Cooperation obligation

- > What about the rogue individual?
- > Destruction of evidence
 - > When does one start contemplating making an application?
- > Application of condition needs to be assessed very carefully
 - > Ultimately Commission only sanctions non-compliance with cooperation obligation in extreme circumstances (see *Italian Raw Tobacco*)

4. Conditions for leniency

Significant added value

- > Guidance in the 2006 Notice but still a case-specific evaluation
- > Some examples:
 - > facts that enable the Commission to enlarge the scope of its decision (geographic area, duration,...)
 - > evidence that strengthens the Commission's ability to prove the infringement, such as: written contemporaneous evidence, incriminating evidence directly relevant to the facts in question, compelling evidence that does not require corroboration (but compelling nature not precondition)
- > Extremely case-specific

Leniency – The longer it takes, the less likely leniency is given...

Case	Inspections	Leniency	Reduction
International Removals (Decision March 2008)	16 September 2003	26 September 2003 (Allied Pierre) - Accepted	50%
Professional Videotape	28/29 May 2002	28 June 2002 (Fuji)	40%
		22 October 2004 (Maxell)	20%
Marine Hoses (Decision January 2009)	2 May 2007	Manuli – 4 May - Accepted	30%
		Parker ITR – 17 July – Not accepted	0%
		Bridgestone – 7 December 2007- Not accepted	0%

...and the lesser the leniency percentage

“In determining, pursuant to point 23 of the Leniency Notice, the percentage of reduction of the fine for which [the leniency applicant] qualifies within the [relevant] band, the Commission has taken into account the extent to which the evidence submitted represented added value but also the time at which [the leniency applicant] submitted this evidence. In this respect, the Commission notes that [the leniency applicant] filed its leniency application over a year and a half after the Commission carried out surprise inspections and only after the Commission had sent detailed requests for information to the undertakings investigated.” (Bitumen Spain; see also Professional Videotape)

30-50%	40%
20-30%	25%

5. The race in practice

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Source: MLex

6. Tentative conclusions

- > Purpose of immunity programme : uncover cartels
- > Immunity applicants should be encouraged to come forward
 - > Make it simple to put markers down
 - > Give time to find evidence/interview
 - > Make the evidential burden manageable
 - > Assess the cooperation obligation sensibly
 - > Take into account the limitations on the companies
- > Predictability of outcome is key for companies

- > Commission is very much frontloading the process
- > Quantity and quality of evidence drives the process
- > New obligations add complexity to the decision-making process of companies
- > Cooperation obligation is high during process

The bottom line...

- > ... expectations for immunity applicants are becoming higher?
Predictability of outcome lower?
- > Is it becoming more difficult to obtain immunity?
- > Is the Commission making it as easy as they could/should for companies to come forward?

“(...) we will tilt our program in favour of finding ways to make companies eligible for our program rather than looking for ways to keep them out.”

(Scott Hammond, Director of Criminal Enforcement, Antitrust Division, US DoJ
("Cornerstones of an Effective Leniency Program", paper presented at the ICN Workshop
on Leniency Programs)

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