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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Global Forum on Competition

ALTERNATIVES TO LENIENCY PROGRAMMES

Session II - Call for country contributions

7-8 December 2023

This document is a call for country contributions for Session II of the Global Forum on Competition to be held on 7-8 December 2023. GFC participants are invited to submit their contributions by **27 October 2023** at the latest.

JT03525020

TO ALL GLOBAL FORUM PARTICIPANTS

Re: Roundtable on "Alternatives to Leniency Programmes"
22nd Global Forum on Competition (7-8 December 2023)

Dear GFC Participant,

The Global Forum on Competition (GFC) will hold a roundtable discussion on Alternatives to leniency programmes on 7 December 2023.

Over the past decade, several OECD roundtables have specifically discussed issues related to leniency programmes. Most recently, in June 2023, WP3 discussed The Future of Effective Leniency Programmes, and in June 2018, the Challenges and co-ordination of leniency programs.

Leniency programmes are often perceived as an effective method to detect cartels. Many competition authorities, however, do not have leniency programmes or their programmes are not sufficiently effective, yet these competition authorities still successfully identify cartel activities. Implementing an effective leniency programme requires establishing deterrence through enforcement, compelling cartel members to come forward with evidence of the existence of the cartel. Therefore, it is crucial for authorities to detect cartels even in the absence of a leniency programme or if they have an ineffective program.

Various data sources, including the OECD Competition Trends 2023, indicate a general decline in leniency applications around the world over the last few years, affecting most jurisdictions. According to this data, and unless the number of undetected cartels has actually decreased (which is difficult to measure with certainty), a decrease in leniency applications could pose a serious challenge to competition authorities, requiring them to rely more heavily on other detection tools.

Therefore, authorities' detection toolboxes should include other reactive methods, such as complaints by competitors and/or consumers and whistleblowing programmes, as well as proactive detection tools, such as education and advocacy programmes, national and international case analysis and industry monitoring and market studies, agency co-operation, as well as more advanced technology-led screening programmes, both structural and behavioural. When utilizing these methods together, authorities might want to consider a holistic approach that takes into account the potential conflicts between the methods.

Past discussions at the OECD (see OECD 2013 roundtable on Ex officio cartel investigations and the use of screens to detect cartels) and ICN (see ICN Cartel Working Group 2019, on Enforcement Techniques) stressed the importance of a mixed cartel detection policy, complementing leniency programmes with other reactive detection measures in addition to proactively seeking out cartels and launching ex officio investigations. This session is an opportunity to explore in depth alternatives to leniency programmes, namely reactive and proactive detection tools.

In particular, it will discuss:

- Experiences with proactive and reactive cartel detection tools, besides leniency;
- How alternative methods can be combined with leniency to benefit each other;
- The existence of potential conflicts between different methods and with leniency; and
- What alternative methods are most successful in the absence of leniency.

The alternative methods to leniency may be more costly and resource-intensive than leniency applications, requiring effective intelligence function making full use of the agency's investigatory powers. This roundtable will be an opportunity to discuss the various alternatives to leniency imply for competition authorities and whether they are consistent with each other (and with leniency). alternatives which can replace leniency, and what are the alternatives which are creating a potential conflict with leniency (such as could be the case for the whistleblowing programmes).

The objective of this roundtable is to comprehensively examine the policy stance approach to a diversified detection strategy, focusing on the advantages and challenges that each method raises in relative terms. It is relevant to examine whether the existence of alternative ways of uncovering cartels (including through civil enforcement) may have made leniency programs become less central in cartel detection; what role can advocacy (developing the public awareness) play in uncovering cartels, if any; and what kind traditional sources of information (for example annual reports, or reports prepared for the securities regulators) can be used to uncover cartels.

Rather than discussing each individual detection method in themselves, delegates are encouraged to come prepared to discuss the policy approach to a diversified detection strategy in a comprehensive perspective. This entails an exploration of the extent to which these methods align with one another, how they interact with leniency programs, and their potential to reshape the cartel detection policy. The success of this roundtable will greatly depend on the written contributions submitted by delegations.

In order to assist you with the preparation of your contribution, I refer you to the questions in the attached Annex. We would encourage you to submit a written contribution that describes your experience or views on Alternatives to leniency programmes.

Should you wish to provide a contribution, please inform the Secretariat by **Friday 29 September 2023**. Written replies to this call for contributions are due by **Friday 27 October 2023** accompanied by a short summary of the content to enable the Secretariat to the session in a timely manner. Please note that not meeting this deadline may result in your contribution not being distributed to delegates in a timely fashion in advance of the meeting.

The OECD webpage on Alternatives to leniency programmes (short URL oe.cd/atlp) will be the primary vehicle for conveying documentation and related links on this subject. It will become available soon on the main roundtables page at www.oecd.org/daf/competition/roundtables.htm (see the GFC website: oe.cd/gfc). Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on that site.

The Secretariat will compile short summaries of the written contributions to be distributed before the meeting. Please submit a short summary (no more than one page) together with your contribution.

All communications regarding documentation for this roundtable should be sent to Ms. Angélique Servin (email: angelique.servin@oecd.org). All substantive queries should be sent to Ms. Tal Arnon (email: tal.arnon@oecd.org).

Annex - Suggested questions for consideration in written contributions

This Annex provides a list of questions for consideration in preparing a written contribution. A contribution does not need to cover every question, and you may wish to address issues not listed here. You are encouraged to refer to relevant cases, examples, reforms and studies to illustrate your answers. Please prepare your contribution as an integrated essay rather than a list of answers to questions.

Recent trends on leniency and their reasons

- Is there a leniency programme in place in your jurisdiction? For how long?
- If so, how effective has it been over the last 10 years, and has the effectiveness changed over time?
- If its efficiency has declined, what factors do you think might be responsible for this shift? Could the use of alternative detection methods, aside from leniency programs, be contributing to this change?
- In what ways have alternative detection methods complemented or synergized with leniency programs in your jurisdiction?
- Have you encountered any conflicts or challenges between different detection methods, or conflicts with leniency, while pursuing cartel investigations?
- How has your jurisdiction balanced the potential resource-intensive nature of alternative methods against their effectiveness in uncovering cartels?

Other reactive detection tools besides leniency programmes

- Besides leniency programmes, have you got any other reactive detection tool in place?
- What is your complaints making process? What methods do you use to analyse the complaints?
- Have you got a whistleblowing programme in place? How effective has it been? Has it been recently reformed?
- If you have a programme, do you provide financial rewards? If not, why? Have you ever considered this option?
- Have there been instances where the introduction of financial rewards within whistleblowing programs has posed ethical or practical challenges?
- In your views, how do these programmes affect the leniency programme, in particular firms' incentives to seek leniency?
- Are there any challenges or limitations associated with these tools that you have encountered during their implementation?
- What measures are in place to ensure the protection of whistle-blowers and complainants from potential retaliation? How does this impact the willingness of individuals to come forward with information?

Proactive detection tools

- What proactive cartel detection tools do you have in place?
- What is the ratio of cartels detected via reactive vs proactive tools?
- Have any of your proactive detection tools resulted in investigations?
- What raised the red flag that prompted the investigation?
- What further investigation was necessary to find conclusive evidence for conviction?

Proactive detection tools: Education and outreach

- What education and outreach tools do you have in place?
- Did you use different education and outreach tools (tailored education efforts) to address different audiences?
- Did your education and outreach efforts result in an increase in reports of cartel activity to the authority? If they have, through which means have these reports been submitted?

Proactive detection tools: Co-operation with other agencies

- Do you have any formal/informal collaborations with other agencies (domestic and international) in the area of cartel detection?
- Did any of the collaborations result in investigations?
- What major challenges arise when collaborating with agencies from different jurisdictions? and how are these challenges managed?

Proactive detection tools: Intelligence and industry monitoring

- Which proactive intelligence and industry monitoring mechanisms tools do you have in place?
- Do these tools primarily focus on a specific sector or industry, or are they broadly applicable?
- Have any of these tools resulted in the initiation of investigations?
- Can you share examples of successful outcomes directly attributed to the insights provided by these detection tools?
- Have you used any public documents (for example annual reports, or reports for the securities regulators) to detect a cartel? If so, what kind of documents was used? and how was it used?
- How do you ensure the accuracy and reliability of the information gathered from intelligence and industry monitoring tools?
- Are there any challenges or limitations associated with these tools that you've encountered during their implementation?

Proactive detection tools: screening

- Do you use screens for cartel detection? If so, what screens do you have in place?
- If you have screening programmes in place, are these structural and/or behavioural?
- Do you face resource and data collection challenges for running cartel screens?
- What other challenges arise when using screens for cartel detection?
- When developing screens, did you co-operate with other regulators, such as central banks, securities commissions, treasure departments and other oversight authorities that detect manipulation and frauds other than cartels?
- With the evolving landscape of technology and communication, how has your jurisdiction adapted its strategies to incorporate advanced technology-led screening programs for cartel detection?