

Unclassified

English - Or. English

30 November 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

Alternatives to Leniency Programmes – Contribution from BIAC

- Session II -

7-8 December 2023

This contribution is submitted by BIAC under Session II of the Global Forum on Competition to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: oe.cd/atlp.

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JT03533005

Alternatives to Leniency Programmes

- Contribution from BIAC -

1. Introduction

1. *Business at OECD* (BIAC) is grateful for the opportunity to contribute to the Global Forum on Competition roundtable on alternatives to leniency programs.
2. As a preliminary point, BIAC wishes to express its wholehearted support for anti-cartel enforcement and the various methods employed by agencies to unearth and sanction cartels.
3. Businesses benefit from competition on the merits, which ensures that they are rewarded properly for their efforts. Since individual businesses are far more likely to be a victim of a cartel than a perpetrator, the business community strongly supports both cartel prevention and cartel detection and enforcement. In this context, BIAC recognizes that “prevention is better than cure” and that the primary aim of anti-cartel enforcement is ideally to deter and avoid violations in the first place, to the benefit of the economy, consumers, and the business community. BIAC has consistently endorsed robust and sophisticated internal compliance programs, which seek to prevent serious violations or at least detect them and allow for self-reporting, thus complementing and amplifying the antitrust agencies’ own compliance efforts.
4. Leniency programs are obviously a crucial tool in the fight against cartels.¹ BIAC nonetheless acknowledges, without qualification, that leniency is fundamentally a cartel detection tool and not an automatic “right” of defendant companies, even for those companies seeking to self-report and draw a line under illegal conduct.
5. BIAC therefore commends OECD for exploring alternatives to leniency to ensure an effective and diversified toolbox for detecting and tackling cartels.
6. Our response covers the following:
 - Reactive methods (Section II);
 - Proactive methods (Section III); and
 - Prevention through education and advocacy and sharing of best practice (Section IV).

¹ BIAC recently expressed its views that a decline in leniency applications may be due to private enforcement; the costs associated with multi-jurisdictional applications; the inconsistency between leniency programmes across different jurisdictions and the lack of certainty created by enabling an effective confluence between administrative, private, and criminal enforcement. There is a critical need for clear guidelines on the specific criteria and steps necessary to obtain first in immunity and second in leniency. See OECD, *The Future of Effective Leniency Programmes – Note by BIAC*, DAF/COMP/WP3/WD(2023)31 (June 5, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)31/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)31/en/pdf).

2. Reactive Methods

2.1. Complaints

7. BIAC recognizes that complaints are a critical route for bringing cases to the attention of agencies. Businesses and consumers need to have a channel that they can trust in which to raise their concerns.

8. To maximize the highest number of quality complaints, BIAC considers it is best practice to have clear guidance on complaints procedure covering every aspect – from standing and minimum requirements to confidentiality etc.

9. Guidance should also cover the receipt of anonymous complaints which BIAC believes should not have the same probative value as complaints by identified companies and should not in themselves establish a violation.²

10. It is also helpful for agencies to offer potential complainants the option of both a formal route (perhaps conferring procedural rights on a complainant) and a more informal route which has lower requirements (and does not confer procedural rights).

11. BIAC appreciates that agencies will often receive a large number of complaints and that they need to strike a difficult balance in order to take on the right cases. However, there can be a (mis)perception that it is the better-resourced groupings (e.g., those with political muscle) in certain sectors (e.g., digital) that tend to have their complaints pursued.

12. Agencies can address this misperception and help drive quality complaints across key sectors by publishing clear requirements for meeting the threshold to open an investigation and then by regularly publicizing in mainstream channels:

- Enforcement priorities (which may change); and
- Explanations as to why cases were pursued (or not).

13. Guidance for businesses and their legal representatives on how to improve the quality of complaints would also be useful. See, in connection with this, Section IV below regarding the role of education and agency advocacy in driving compliance (as well as complaints).

2.2. Whistleblowing

14. BIAC endorses the proliferation of whistleblowing hotlines, which encourage individuals to come forward and report antitrust infringements direct to agencies, in some cases in return for financial reward.

15. Agencies may also look to develop leads more proactively in sectors that are most vulnerable to cartelization by undertaking targeted outreach work in those sectors. These mechanisms add extra pressure for companies who now potentially face a leniency race against their own employees as well as co-cartelists.

16. There is a risk that this extra pressure could lower the incentive for a company to investigate potential violations itself. This would be the case if a company feared that an employee might learn of a potential violation through internal investigations, only then to seek to approach the authority individually, whether for immunity or a financial reward where available. In such circumstances, this could mean that the individual takes first place

² Case C-411/04 P, Salzgitter Mannesmann GmbH v. Comm'n, 2007 E.C.R. I-959.

in the queue for immunity (or might at the very least bring the violation to the attention of the agency) and potentially preclude corporate immunity.

17. In practice, however, BIAC does not believe that the incentive to investigate internally has been lowered by the possibility of whistleblowing to agencies. Instead, it is BIAC's experience that businesses continue to invest resources in internal compliance culture (triage, monitoring, investigation, hotlines, use of AI) to encourage employees to flag suspected wrongdoing internally as a first step.

18. Overall, corporate incentives to conduct internal investigations are also more likely to remain intact where:

- The agency demonstrates an ability to identify baseless or vexatious complaints, e.g., from a disgruntled employee;
- The leniency regime is designed such that, even though the agency may have some information about a cartel, it can still provide immunity upon the receipt of more detailed/higher quality information, which one might expect is more likely to be the case when it is provided by a company (following a more comprehensive internal investigation that compares and contrasts the evidence available on a holistic basis), rather than a single employee;³ and
- There is a reliable system for checking on a “no-names”/hypothetical basis whether the agency is already aware of the violation in question and for providing a marker/place in the leniency queue.

19. Another option – as seen in Hungary – is to take steps to prevent “gaming” of the system by an individual who might be “tipped off” through being interviewed as part of internal investigations. In order to prevent the employee from seeking to “monetize” the opportunity (and prevent the internal investigation from being carried out in the first place), the Hungarian competition authority does not offer a financial reward to the individual whistle-blower if the individual failed to use an internal corporate whistleblowing where this was freely available, and the company took appropriate actions once the infringement was reported to it.

20. BIAC also invites reflection on whether SMEs might be put at a disadvantage compared to larger companies in that SMEs may not have access to the same resources to create internal self-reporting mechanisms and therefore may be more reliant on cultivating a culture of compliance to bring infringements to light. If this were the case, then there would, it seems, be an argument for extending the benefits of immunity to SME companies whose employees self-report in advance of (or without) reporting internally to the company.

³ An example of this approach would be “Type B” leniency in the United Kingdom where the Competition and Markets Authority has the discretion to award corporate immunity even though there may be a pre-existing investigation (prior to the statement of objections). See OFT, Applications for Leniency and No-Action in Cartel Cases OFT's Detailed Guidance on the Principles and Process, OFT1495 (July 2013), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf.

3. Proactive Methods

3.1. Market Investigations

21. “Market investigation” is a broad term. These kinds of inquiries can take myriad forms and, from country to country, may focus on different features, seek different outcomes, and provide for different types of remedies.

22. BIAC supports, in principle, the idea of antitrust agencies being able to use a “diagnostic” tool, e.g., to look at a sector panoramically where it is thought that market features, as opposed to particular business conduct, may be preventing markets from functioning optimally.

23. However, as a tool for detecting and enforcing against anti-competitive conduct by firms, BIAC respectfully points out that market investigations do not appear to be the most obvious or efficient tool. That is because they are, by definition, likely to be broad in application and conducted over an extended period which can consume management resources unnecessarily.

24. BIAC respectfully considers that the use of market investigations must be principled, proportionate, and transparent. For example, antitrust agencies should publish clear criteria for launching market investigations. It is helpful to have “light touch” variants – which might operate like a phase one merger review before requiring agencies and businesses to commit a large amount of resources.

25. Business should also be given an opportunity to comment on the scope of a proposed market investigation to help ensure that the agency’s resources are directed to the correct issues from the outset.

26. Agencies should also have clear procedural rules and safeguards for conducting market investigations. Businesses need to be provided with a meaningful ability to contest theories of harm and remedies. That is particularly important when the investigation can lead to “extreme” outcomes – e.g., divestment of assets etc. which may affect one market player (even though the investigation purports to relate to the wider sector).

27. Market investigations must not be employed because they offer an “easier trigger” for enforcement action. Naturally, market investigations may often reveal reasonable grounds for investigating anti-competitive conduct, but those investigations should be carried out independently of the market investigation and be subject to the procedures and safeguards applying to standalone enforcement investigations.⁴

3.2. Cooperation With Other Agencies

28. BIAC recognizes that inter-agency cooperation provides a chance to check with other agencies (including non-antitrust) for salient facts and emerging enforcement trends – as issues often replicate across sectors, neighboring markets, and geographies.

29. It is typically in both the interests of the investigating agency and investigated parties to share information to ensure consistent approaches taken by agencies to the same fact patterns.

⁴ For example, the multiple, stand-alone enforcement actions in the EU following the 2007 final report on the sector inquiry into energy.

30. To ensure procedural fairness, the mechanism for collaboration should be formal and have clear protections for confidentiality. If agencies are using informal methods, then there should also be transparency, e.g., in agency guidelines, about the limits of what may be exchanged.

3.3. Screening

31. BIAC supports the use of agency screens as a filter, identifying sectors or practices deserving of further scrutiny. This is of particular use in relation to procurement.

32. Naturally, the result of screening should be a starting point and not be treated as evidence in itself of anticompetitive behavior.

33. BIAC invites agencies to consider whether they can share with the business community ways of screening for anticompetitive behavior. Improving detection rates across the economy can only help to eradicate anti-competitive behavior more comprehensively. Such guidance might usefully include tools for screening a company's own operations for compliance (which might, for example, include tips on how to monitor modern, ephemeral communications, which is always complicated) and its procurement activities (to screen for bid-rigging).

34. While BIAC appreciates that agencies may not instinctively wish to share all their learnings/tips for cartel detection (they are, after all, the official enforcers), BIAC considers that there may be scope to share some guidance, which would multiply the positive prevention and compliance impact of agency efforts.⁵ Businesses have every incentive to detect infringements, not only for self-reporting purposes, where possible, but at the very least to cease such infringements and draw a line under anti-competitive behavior.

4. Prevention Through Education and Advocacy and Sharing of Best Practice

35. BIAC recognizes that the underlying aim of anti-cartel enforcement is to eradicate cartels in the first place. Certainly, the proactive and reactive methods described above will facilitate detection. But it is universally acknowledged that prevention is preferable to finding a cure.

36. There is a large amount of proactive education and outreach that antitrust agencies can do to prevent intentional and inadvertent violations of competition law. For example, agencies can ensure that their enforcement and advocacy efforts are given adequate exposure in mainstream media. Periodic surveys of sectors/compliance officers can be conducted and repeated, with the results being analyzed and published.

37. Without doubt, many agencies are extremely effective in this regard. Over the past decade, BIAC has observed an enormous increase in the compliance ambitions of businesses, many of which invest heavily in internal education and compliance.

38. But given that competition policy seeks, not just more and higher fines, but greater levels of compliance, the question is how to “amplify” that compliance.

⁵ BIAC notes that the CMA used to provide access to a screening tool, but the guidance was withdrawn in 2020. See Guidance About the Cartel Screening Tool, Competition & Mkts. Auth., <https://www.gov.uk/government/publications/screening-for-cartels-tool-for-procurers/about-the-cartel-screening-tool>.

39. BIAC considers that there is a larger role for agencies to play in this regard, e.g., by sharing their observations over time and best procedural practices.

40. Particular attention should be paid to areas where businesses struggle, e.g., monitoring/investigating suspected violations when modern “ephemeral” communications are being used, such as WhatsApp, Signal, Telegram, etc.

41. Some agencies have produced guidance on how they expect companies to secure evidence and this could be harmonized. That guidance also needs to consider the challenges presented by a patchwork of national data privacy rules which can add to the technical challenges of reviewing these forms of communication. Indeed, to amplify the efforts of business to be compliant, global antitrust agencies could work with their data privacy counterparts to provide clear and consistent guidance, e.g., on how to monitor chats without infringing data privacy rules.

42. Periodic reports/retrospective studies into the drivers of compliance and non-compliance would also serve to distil key learnings from recent enforcement, i.e., get to the heart of the practical/legal issue and highlight trends/commonalities across enforcement work (e.g., same trigger, driver of non-compliance).

5. Conclusion

43. BIAC commends the OECD for exploring alternatives to leniency to ensure an effective and diversified toolbox for detecting and tackling cartels. Since individual businesses are far more likely to be a victim of a cartel than a perpetrator, the business community strongly supports both cartel prevention and cartel detection and enforcement.

44. With businesses redoubling internal compliance efforts and having every incentive to investigate and detect infringements, an open and pro-active approach by the agencies to share detection tips and screening best practice will help to multiply detection and thus amplify compliance.