

Unclassified

English - Or. English

18 December 2023

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

Cancels & replaces the same document of 8 December 2023

Global Forum on Competition

Alternatives to Leniency Programmes – Summaries of contribution

- Session II -

7 December 2023

This document reproduces summaries of contributions submitted under Session II of the Global Forum on Competition to be held to be held on 7-8 December 2023.

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

JT03535008

Table of contents

Summaries of contributions	3
Australia.....	4
Brazil	5
BIAC.....	6
Hong Kong, China.....	7
Hungary	9
Italy.....	10
Kazakhstan	11
Latvia.....	12
Mexico	13
Peru.....	14
Poland.....	15
Romania	16
Serbia.....	17
Slovak Republic.....	18
Chinese Taipei	19
Türkiye.....	20
United States.....	21

Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on Alternatives to Leniency Programmes (Global Forum on Competition to be held on 7-8 December 2023, Session II). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

Cartel conduct is, by its nature, secretive and difficult to detect. Detecting cartel conduct remains an ongoing challenge for competition regulators. While many jurisdictions rely on the use of leniency programs to detect cartel conduct, the development and implementation of a diverse range of alternative strategies is an important step in creating a more effective approach to detecting cartel conduct.

The Australian Competition and Consumer Commission's (ACCC) leniency program is set out in the ACCC immunity and cooperation policy for cartel conduct (the Immunity Policy). The Immunity Policy has, for many years, been one of the ACCC's key tools for detecting cartel conduct, providing incentives for businesses and individuals to disclose cartel behaviour.

In recent years, the ACCC has also had a significant focus on developing and implementing a range of methods of proactive cartel detection, to operate alongside the Immunity Policy. The ACCC considers that the ability to detect cartels proactively well as through the Immunity Policy is important to sending a strong message to businesses and individuals that there is a material risk that cartel conduct will come to the attention of the ACCC even if they do not self-report through the Immunity Policy. We consider that this strengthens the ACCC's deterrence message regarding cartel conduct and supports the operation of the Immunity Policy by providing additional incentives for businesses and individuals to self-report.

This paper describes the ACCC's experience with developing and implementing a proactive detection program to support its leniency program. It also discusses how proactive and reactive cartel detection methods may complement or impede leniency programs.

Brazil¹

This paper provides an overview of CADE’s institutional framework related to the implementation of the Leniency Programme and presents reactive and proactive tools used by the antitrust authority for detecting and preventing cartels. Along with the Leniency Programme, these tools are part of the institutional body for detecting and preventing cartels in Brazil. CADE has tools to encourage collaboration in leniency programmes, such as leniency plus and partial leniency agreements, besides other reactive mechanisms, such as a platform to file reports and complaints. Among the proactive tools, the paper presents the “Cérebro Project”, beside other actions that result in the sharing of information and data about cartel practices, which are technical cooperation agreements, industry monitoring, and market studies. CADE also carries out educational and advocacy activities, such as an exchange programme (PinCade), the publication of guidelines, and the training of other authorities. The Brazilian antitrust authority uses all these reactive and proactive tools in a concurrent and complementary manner to create a virtuous feedback loop, thus, forming a solid basis for detecting and preventing cartels.

Keywords: leniency programme; cartels; reactive and proactive tools; CADE

¹ Document prepared by Carolina Saito, Leila Girardi, and Cynthia Bezerra, with comments by Felipe Roquete and data collection by Keila Ferreira. The English version is the work of the in-house translators of the International Unit of CADE: it was translated into English by Ítalo de Medeiros Parente and proofread by Izabel Cristina Medina Brum.

BIAC

Business at OECD (BIAC) is grateful for the opportunity to contribute to the Global Forum on Competition roundtable on alternatives to leniency programs.

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.

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.

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.

BIAC therefore commends OECD for exploring alternatives to leniency to ensure an effective and diversified toolbox for detecting and tackling cartels.

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).

Hong Kong, China

The Hong Kong Competition Commission (**HKCC**) has in place a strong leniency policy which reflects international best practice. Despite this most of the cases HKCC has brought since competition law came into effect at the end of 2015 have **not** involved leniency applicants. We do not consider this to be attributable to a weakness in our leniency policy, or leniency no longer being an effective means of cartel detection. Instead we identify three factors that played a significant role in our lack of leniency applications during the early years of implementation.

1. Lack of clarity as to how effective a new competition authority will be at detecting cartels;
2. Uncertainty as to what the likely penalty for cartel members will be if a cartel is detected; and
3. Hesitancy about being the first business to seek leniency and place ones trust in an untested policy.

During the early years of enforcement, the HKCC's approach was to (a) put in place the building blocks of a leniency policy that would *in time* become effective; but (b) assume until then cartels would have to be detected without relying on leniency. This has been consistent with our experience.

HKCC's strategy for detecting cartels in its early years included the following elements:

- Be complaint driven – 12 out of our first 14 cases arose from consumer or business complaints.
- Invest in, and be creative with, public awareness initiatives – this included working with a broadcaster to develop a television docudrama series based on our first cases
- Take time to talk to businesses and trade associations – this was typically focused on compliance but also gave rise to queries which indicated anticompetitive conduct which subsequently turned into investigations and enforcement cases.
- Educate lawyers, accountants and other intermediaries – this initiative was also focused on competition law compliance but included a session on identifying whether a business may be a victim of anticompetitive conduct and what to do about it.
- Persuade and equip procurers to be bid-rigging detectors – procurement officials are well placed to identify red flags that might be indicative of bid rigging. But they might not always come forward to share their suspicions with the competition authority. We have been working on building a closer relationship between the HKCC and the procurement community.
- Partner with other public bodies including those with law enforcement powers – cartel conduct may be intertwined with other criminal conduct and therefore useful to work closely with other law enforcement authorities.
- Study certain sectors with a heightened possibility of cartel conduct – we conducted studies into certain sectors which we considered vulnerable to anticompetitive conduct. This was intended to, and did, increase the pressure on those in that sector to seek leniency.

More recently the HKCC has brought a case based on screening a large volume of bid data. We see value in such approaches and working to obtaining bid data from procurers for screening. We are also receiving a growing number of leniency applicants. Nonetheless we continue to see value in the more “foundational” elements set out above.

Hungary

The leniency policy in Hungary was introduced in 2003, its main rules are incorporated in the Hungarian Competition Act. It is harmonised with the ECN Model Leniency Programme.

In recent years in Hungary the number of leniency applications not only remains at the same level but there has been an increase of applications for fine reduction. The majority of the applications are reduction for fines applications, which means that applicants approach the (Hungarian Competition Authority, hereinafter: GVH) once the case has been launched. Although, the number of leniency applications is sufficient, however, it cannot be said about the quality of the content of the applications and of the cooperation of the applicants.

The increasing success of leniency policy is also due in particular to the high degree of ex officio case initiating and detecting by the GVH. Approximately one third of cartel proceedings are based on leniency applications, while two thirds are ex officio cases (not leniency-based cases).

For detecting cartels, the GVH uses a wide variety of tools, which are the following:

1. launching an investigation on the basis of evidence obtained from another separate case,

(to be highlighted: Approximately $\frac{1}{4}$ of the cartel cases have been launched based on evidence obtained during dawn raids carried out in the course of another separate case, proving that it is one of the most successful alternative method besides leniency)

2. evidence provided by an informant ('informant reward scheme'),

(to be highlighted: The vast majority of these submissions is of poor quality or they are not competition law related, they do not qualify as indispensable evidence and the information provided does not enable the GVH to get a court warrant to carry out a dawn raid)

3. information received via Cartel Chat.

4. information provided by a formal or informal complainant,

5. cooperation with other agencies, authorities:

- a possible infringement indicated by the contracting authority,
- indication of the body responsible for the control of public procurement or the public procurement authority,
- infringement reported by law enforcement,

(to be highlighted: the GVH has good professional cooperation and connection with numerous other agencies, and ministries responsible for areas and activities where public procurement cartels might be present or can be detected)

6. detection of market signals, detection of market conditions (this includes monitoring of public procurement data, economic analysis as well)

7. accelerated or common sector inquire.

Italy

The Autorità Garante della Concorrenza e del Mercato (hereinafter also “the Authority” or “the AGCM”) has a strong record of cartel investigations. Its action relies on a reactive/proactive detection policy in order to strengthen cartel deterrence. This effort has led to significant results: since 2016, almost 90% of cartels have been detected upon *ex-officio* investigations³.

Therefore, despite a slight decline in the number of leniency applications in the last few years, the effectiveness of the AGCM’s cartel enforcement has not been undermined.

The Authority’s practice has shown that a combination of reactive and proactive detection tools (such as whistleblower platform, intensive collaboration with other public entities including public prosecutors, whistleblower platform, intensive collaboration with other public entities including public prosecutors’ offices, finance and tax police, public procurement agencies, screening tests), is crucial to preserve and increase incentives for companies to self-report, as well as to discourage the creation and the maintenance of cartels, in the first place.

This contribution outlines the experience of the AGCM on reactive and proactive detection tools besides its leniency programme. Section 2 describes the recently introduced whistleblowing platform and some first promising results; section 3 illustrates some proactive initiatives put forward to foster *ex-officio* investigation, mainly through an intense cooperation with other national authorities/institutions, the use of screening test, particularly in bid-rigging cases, and an increased and effective international cooperation; section 4 concludes.

³ In line with the 2019 OECD Report reviewing the implementation of and developments with regard to the Recommendation of the Council concerning Effective Action against Hard Core Cartels [[OECD/LEGAL/0294](#)], *ex-officio* investigations covers a variety of sources, such as: complaints from third parties; publicly available information; screening of available data such as public procurement data; information from other investigations; information from other governmental agencies; whistle-blower programmes.

Kazakhstan

The rapid evolution of information technologies and digitalization presents challenges for traditional antimonopoly measures. Kazakhstan implemented a leniency program in 2013 to encourage cartel participants to disclose information, but its effectiveness is hindered by the covert nature of anti-competitive agreements. To address this, the Antimonopoly Authority is exploring a reward system modeled after the EU's, compensating informants for successful detections and penalties.

Automation plays a key role, with the Authority restructuring operations to automate monitoring and analysis of commodity markets. The "Dashboard" serves as a comprehensive analytical tool for 16 key markets, continuously expanding its coverage. The Ormek search information system enhances cartel detection in public procurement by analyzing bidding behaviors. Ongoing updates are crucial to prevent circumvention of antimonopoly controls.

A diversified strategy for identifying cartels involves economic data analysis, information exchange with industry regulators, joint investigations with law enforcement, and the use of indicators and algorithms. This multifaceted approach aims to enhance the effectiveness of identifying and dismantling cartels in Kazakhstan.

Latvia

[1] The Competition Council of Latvia (the CC) has been relying on sources other than leniency for initiating cases for many years and found them to be very effective. By way of an illustration, in the table below we have shown the different sources of information that have resulted in the CC opening a case in the past 10 years and their proportion.

Table 1. Case sources 2013-2023

Source	Number of cases	%
Leniency	5	10.4%
Information received from other law enforcement agencies	4	8.3%
Information received from other (non-law enforcement) government agencies	8	16.7%
Information received from public authorities – public procurement organisers	19	39.6%
Information received from undertakings outside of leniency	5	10.4%
Information received as a result of another administrative process within the CC (<i>ex officio</i>)	6	12.5%
Tip-off + screening	1	2.1%
Total cases opened during this period	48	100%

[2] As can be seen from the above, the two alternatives to leniency that have generated the most cases for the CC over the years have been: (i) notifications received from public authorities – public procurement organisers; and (ii) cooperation with other government agencies. Both of these sources are largely the result of the CC's educational and outreach activities. The CC has found that focusing on education and outreach allows it to capture the widest range of possible infringements while also optimising its resources.

Mexico

Federal Economic Competition Commission (Cofece or Commission)

The Mexican Immunity and Sanction Reduction Programme (or Leniency Programme) has evolved throughout the years to become a solid tool for the detection and investigation of absolute monopolistic practices carried out by the Federal Economic Competition Commission. This contribution provides an overview of the history, evolution, and impact of the Programme, it also discusses the main challenges that the Commission has faced considering the decreasing trends in the number of applications and how it has implemented actions for the Programme to continue being an effective tool. The second part of the contribution explores the alternative methods used by the Commission to detect, investigate, and sanction cartels; mainly formal and informal complaints and other proactive tools such as intelligence and industry monitoring, screenings, education and outreach, and cooperation.

Peru

The Contribution from Peru covers the main aspects of INDECOPI's Leniency Program, the harmful effects that legislation enacted by Congress had on its development, the steps taken by INDECOPI to avert such effects and the enactment of a new piece of legislation which corrected many of flaws of the previous one.

Poland

Detection is a complex subject and we believe it is useful to make a division into: (a) early detection (i.e. detection *sensu stricto*); (b) detection aimed at finding an infringement (i.e. detection *sensu largo*). The former focuses on obtaining or finding an initial lead (information, evidence) that provides enough grounds to conduct a dawn raid. The latter focuses on collecting evidence that goes beyond what is strictly needed to conduct a dawn raid.

We further believe that detection instruments should not be looked at in isolation: various instruments can supplement and reinforce each other. For instance, a higher probability of non-lenieny whistle-blowing may provide additional incentives to file leniency, as non-lenieny whistle-blowing may destabilise cartels. In general, however, it is also important to remember that the number of leniency should not be treated as the best proxy of an effective enforcement system: when deterrence is perfect, no cartels are formed, and hence there is no room for leniency – the ultimate goal is to generate sufficient deterrence levels, not achieving high leniency rates. This is obviously not to say that dropping (global) leniency rates should be ignored.

On a more local level, the leniency programme implemented in our jurisdiction never led to large numbers of applications. Against this backdrop, we thus had additional incentives to look for other ways of increasing detection (and possibly indirectly also leniency filings): one of such ways was to make non-lenieny whistle-blowing easier and more attractive in our jurisdiction.

Romania

Leniency programs are a powerful tool to detect cartels and support cartel enforcement and are often perceived as the primary, or, in some cases, the only method to detect cartels. Romanian legislation set the framework for a leniency program since 2009 and is convergent to the European Model of Leniency. Following the experience gained, aimed to boost the leniency program, in 2019 RCC amended the legislation and brought more clarity about basic concepts. As a result of a limited practical experience with leniency, the RCC shifted a part of its efforts towards improving other instruments that can have as a result an efficient detection of cartels.

Therefore, having a constant preoccupation with the need to detect complex cartel cases, the RCC increased its efforts in developing alternative channels and instruments for obtaining relevant information, such as the settlement procedure, the Whistleblower Platform, the Big Data Platform and the cooperation within the Bid-Rigging Module (MLT).

Serbia

The Commission for Protection of Competition (hereinafter CPC) uses a wide array of alternatives to leniency programs, consisting of both reactive (complaints) and proactive tools (analysis of competitive conditions, sector inquiries and screening). Having such a wide toolkit has enabled the CPC to initiate *ex officio* investigations regardless of leniency or whistleblower applications and all of these alternatives have shown results when it comes to initiating investigations.

Since the establishment of competition laws and the competition authority, detection of collusion has predominantly been based on alternatives to leniency programs. The track record of the authority shows examples of successful detection of collusion in bidding and non-bidding markets alike. Most cases of horizontal collusion in Serbia were based on proactive tools, followed by complaints and finally leniency.

From the perspective of the CPC, all of the tools used for detecting competition infringements in Serbia are mutually complementary and do not create conflicting incentives for perspective leniency applicants.

In detecting cartels, the CPC independently developed a detection method or screen, which combines structural and behavioural elements. This screen has already shown results in detecting concerted practice in non-bidding markets without relying on leniency, whistleblower programs, sophisticated software or cooperation with other public authorities. The CPC is continuously working on improving its detection method by expanding the key indicators to look for in each segment of the screen. The goal is to find a working model which could be used as a basis for screening for collusion with the idea to flag potential markets where collusion could arise and monitor for signs of potential collusion in these markets as it arises.

In order to increase awareness of competition rules compliance and the possibility of leniency, the CPC has increased its outreach activities over the past two years. As these activities have been relatively recent, it is too early to assess whether the education and outreach efforts will result in an increase in reports of cartel activity and an impact assessment of these activities has not been made so far. The only visible impact of these activities so far has been the significant rise in interest the business community has shown in competition rules.

Slovak Republic

The contribution focuses on the various tools and methods used by the Antimonopoly Office of the Slovak Republic (AMO) and its experience with the implementation of such tools in cartel investigations. The contribution also examines legislative amendments and developments over years and the practice of the AMO and their effect on number of the leniency applications.

After analysis of submitted leniency applications, following factors were observed as having an impact on the number of applications. Ex officio investigations, number of conducted dawn raids, confirmation judgments from the courts, introduction of the whistleblower programme and bidder exclusions are some of the factors that contribute to increase of number of leniency applications. We have also noticed that cartel investigations in the EU countries are one of the factors that encourages leniency submissions in our jurisdiction as well. To our opinion, the sanction in the form of bidder exclusion has in certain markets also effect on incentives of undertakings to apply for leniency. However, AMO has mostly relied on ex officio investigations over the years. The cooperation with different auditing, controlling institutions plays also quite an important role in uncovering cartels. The use of evidence gathered in criminal investigations might be a very important element for the future.

Inspections and the leniency programme remain key tools for cartel detection in the Slovak Republic. Leniency programme is still relatively attractive for entrepreneurs - it brings strong benefits for the applicant in the form of no sanction/reduced sanction, automatic immunity from criminal prosecution and immunity from punishment of exclusion from participation in public procurement. Other tools for cartel detection, such as whistleblowing, screening tools, or criminal enforcement of cartels have not yet proved to be more significant alternatives to leniency programme.

Chinese Taipei

Since the leniency program came into effect in 2011, businesses remain reluctant to apply as a result of the influence of traditional culture in industries and concerns around confidentiality in spite of well-established confidentiality rules in place. Therefore, the CTFTC has adopted multiple reactive and proactive tools to detect cartel behavior.

The informant reward programme is considered as a complementary measure to the current leniency programme in terms of case numbers. Due to its simplicity and accessibility as well as lower risk of identity exposure, there has been an upward trend in terms of number of application for the informant reward programme in recent years. Regarding timeliness, media news has been one of the most effective channels for the CTFTC to acquire industry related information quickly. In addition to reactive measures, the CTFTC has built a monitoring programme to actively monitor industry developments in selected sectors, and formed the inter-agency task force with other governmental agencies to conduct joint inspections.

The combination of the above tools is expected to equip the CTFTC for effective cartel enforcement and discourage businesses from engaging in cartels.

Türkiye

Difficulty in detecting cartels, which are more secretive in nature compared to other antitrust violations, makes cartel detection an existential problem for competition authorities. Leniency is one of the answers to that problem.

Turkish Competition Authority (TCA) follows two main principles while reviewing leniency applications: “transparency” and “interpretation in favour of the applicant”. With those principles TCA aims “i) Ensuring legal certainty, ii) Enabling undertakings to predict whether they will receive full immunity, iii) To encourage applications, iv) Not to put the applicant at a disadvantage”.

Leniency is not the primary method of TCA for cartel detection but complaints is. In last fourteen years cartels detected with complaints are more than half of all the cartels detected. It is also clear that TCA have a preference favouring reactive methods over proactive methods or at least reactive methods seem to be more effective.

Considering that TCA's resources are limited, it is not surprising that proactive methods are given more importance than reactive methods. More industry monitoring means that there will be less time to open cases based on complaints.

It can be said that the lack of alternative methods will reduce the number of leniency applications. If the probability of cartel detection is low without leniency, there will be less deterrence. Leniency is not substitute to alternative methods but rather complementary.

In the implementation of the Turkish leniency program, a conflict arises with the mechanism of settlement rather than alternative methods of cartel detection. Turkish competition law allows settlement and leniency to be accepted simultaneously. In addition to this, TCA also can accept leniency applications both during and after preliminary investigations even if the documents provided by the applicant does not have a significantly added value.

In order to solve this issue TCA have prepared a draft to amend the Leniency Regulation. With the amendment, the definition of "document that creates added value" will be added to the Leniency Regulation. This is not the only change that amendment brings. With the amendment, cartel facilitators will be eligible for leniency, various measures will be introduced to encourage applicants and application periods will be regulated quantitatively.

As a natural consequence of these changes, the opportunity to access evidence with the highest probative power provided by leniency may expand and deterrence in terms of the formation of cartels may increase.

United States

From the WP3 in June 2023

The Antitrust Division of the United States Department of Justice is deploying an aggressive array of investigative techniques and proactive strategies to ratchet up the risk of detection for cartelists engaged in fixing prices, rigging bids, and allocating customers and markets. The relationship between detection and defection is important for purposes of antitrust enforcement.

The Antitrust Division's leniency program¹ is a pillar of antitrust enforcement in the United States. The longstanding success of the leniency program is predicated on the idea that a cartel member will defect from a secret price-fixing or bid-rigging conspiracy and disclose the illegal conduct to authorities. The concept of defection is commonly used in game theory in reference to the prisoner's dilemma to describe the choice to confess to authorities and betray a co-conspirator.

Detection is therefore an exogenous risk that cartelists cannot control through group cohesion alone. This Submission focuses on how antitrust enforcers in the United States and around the world can take steps to increase the external risks of detection that in turn create mounting pressure towards defection within a cartel.

This Submission is divided into three sections:

- First, the importance of detection risk in destabilizing cartels and the interplay between detection and defection in the context of a leniency program. This includes revisiting the familiar prisoner's dilemma scenario mentioned above and discussing how law enforcement action can add players to the game and alter the incentives in favor of defection. (Section 2.)
- Second, how antitrust enforcers can use the full panoply of detection tools, investigative techniques, and proactive strategies to uncover anticompetitive conduct. This includes affirmative strategies and policy changes to encourage whistleblowers and complainants that will further threaten cartel cohesion. (Section 3.)
- Third, why law enforcement coordination at the international level bolsters the threat of detection and punishment for cartels. This includes intelligence sharing before investigations begin and consultations as investigations and prosecutions commence. (Section 4.)

¹ U.S. Dep't of Justice, Antitrust Division, Leniency Policy and Procedures and other related documents are available at <https://www.justice.gov/atr/leniency-program>.