

Unclassified

English - Or. English

14 September 2022

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

Cancels & replaces the same document of 17 August 2022

LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Strengthening incentives for leniency agreements

– Note by the Secretariat –

27-28 September 2022

This document was prepared by the OECD Secretariat to serve as material for the discussion under Session I of the Latin American and Caribbean Competition Forum that will take place on 27-28 September 2022 in Rio de Janeiro, Brazil.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documents related to this discussion can be found at oe.cd/lacfcf.

If you have questions on this document, please contact:
Ms. Lynn Robertson (Lynn.Robertson@oecd.org).

JT03502317

Session I: Strengthening incentives for leniency agreements

- Note by the Secretariat-*

1. Introduction

1. Most jurisdictions around the world have adopted leniency programmes. These programmes offer cartel members the opportunity to report their illegal conduct and provide information and evidence of the infringement in exchange for full immunity or a reduction of antitrust penalties. By offering amnesty to the first cartel member who self-reports, and a more lenient treatment to subsequent applicants, leniency programmes are intended to induce cartel members to come forward and disclose the existence of a cartel, and to provide evidence of their involvement in the conspiracy (OECD, 2014).

2. The most important objective of every cartel enforcement policy is to detect hard-core cartels that might otherwise go undetected. Leniency programmes elicit confessions, provide direct evidence about other participants, and leads that can be useful for investigators to uncover additional evidence. Through leniency programmes, evidence is obtained more quickly, and at a lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. Parties who self-report are promised lower fines, shorter sentences, less restrictive orders, or even complete amnesty, depending upon the jurisdiction.

3. Leniency programmes have increased significantly the number of detected cartels in many jurisdictions. They seem to have also facilitated the successful prosecution of cartel cases by providing competition agencies with hard evidence of competition law infringements (OECD, 2014). However, leniency applications have been declining in recent years leading to concerns about the continued effectiveness of this tool over time.

2. Leniency programmes in Latin America and the Caribbean

4. The successful implementation of these programmes in other jurisdictions has incentivized the countries of Latin American and Caribbean (LAC) to adopt them as well. By 2021, 13 jurisdictions (out of 14) in the region had already introduced and implemented leniency policies (OECD, 2022).

3. Decline of leniency applications

5. Functioning leniency policies substantially add to the detection rate of a given antitrust authority and, in combination with sufficiently high sanctions imposed, contribute to the overall level of deterrence of cartels (OECD, 2014).

* This note was written by Daniel Segalovich, Intern at OECD Competition Division, with comments provided by Lynn Robertson, Antonio Capobianco and Ori Schwartz.

6. Nonetheless, the number of leniency applications declined during the period 2015 to 2020 across the globe. In LAC, leniency applications were 68.6% lower in 2020 than in 2015 (OECD, 2022). OECD research points out several possible explanations for a decline in leniency programmes. However, these explanations may vary by jurisdiction and sector and can depend a range of specific circumstances and factors.

3.1. Lack of sufficient incentives to apply for leniency

7. Some countries in Latin America and the Caribbean continue to prohibit the ringleader of the cartel to apply for leniency. This prohibition may undermine the effectiveness of the leniency programme, by reducing the incentives to apply for leniency, and creating administrative complexities (OECD, 2016). First, since it can be difficult to establish the leader of the cartel, companies that are unsure about who initiated the cartel may be reluctant to come before the agency and would rather take the risk of losing potential benefits. Second, it is likely that leadership within the cartel will have changed depending on the time period, making it difficult to establish the leader and preventing companies from applying. Third, new management may come to the company, find out about the conduct, but be reluctant to apply for leniency if they are the ringleader. Fourth, allowing the leader to apply for leniency may actually provide further deterrence, as other cartel members may be reluctant to accept the invitation to participate in the cartel if they know that the leader may turn them in to the agency. Fifth, ringleaders may have the best evidence available to present to the agencies (OECD, 2016).

8. Furthermore, the threshold to grant immunity to the first applicant either in law or in practice is relatively high in every Latin American and Caribbean country. Several laws in the region require the applicant to provide information and evidence that demonstrates the cartel in order to sign a leniency agreement. In practice, when negotiating with applicants, some authorities demand documents, which can be difficult to obtain, to prove the conduct and not just information on meetings or locations, which have the potential for dawn raids (OECD, 2016)

9. The competition community widely acknowledges that allowing subsequent applicants to receive substantial benefits will weaken the incentives to come in first. If the second to come may still receive a substantial reduction, cartel members may prefer, if allowed, to come in later in the investigation. Agencies have tackled the problem by establishing a significant difference between the benefits for the first and second applicants (OECD, 2016). However, cartel members that are not the first in the door can still contribute to the successful investigation and prosecution of a cartel. In jurisdictions that have an amnesty policy, co-operation from cartel members that lost the race for immunity is generally achieved using early termination procedures. These procedures, for example, settlements or plea bargaining, allow companies that did not qualify for immunity to obtain favourable treatment in exchange for admission of guilt (or non-contestation of the authority's case) and co-operation (OECD, 2014).

10. Some jurisdictions in the region, either by law or in practice, require the applicant, in order to start the procedure, to sign a written document accepting its participation in the cartel and providing basic information about the conduct (OECD, 2016). However, requiring companies to produce written corporate statements may be a disincentive for cartel participants to come before the agency, especially in an international cartel where a company from the United States (US) may be involved. Indeed, written applications recognising cartel conduct and providing evidence may place a US company in a sensitive position, as US discovery rules in the context of an antitrust private action allow Courts to order the disclosure of written documents produced by the defendant, including leniency corporate statements (OECD, 2016).

11. Other issues that can affect the level of leniency applications include:

3.2. Lack of independent detection risks

12. A high risk of detection may incentivise cartel participants to come forward voluntarily. Since a firm's incentive to enter into such programmes rests on its perceived risk that cartel conduct has the potential to be detected independently by the authority, it is important that authorities also use pro-active detection tools to launch so-called ex-officio cartel investigations. Ex officio investigations therefore not only help to find infringements, but also, by increasing the threat of detection, strengthen leniency programmes. However, if an authority relies too heavily, or even exclusively, on a leniency programme, cartelists may start doubting the authorities' capacity to detect cartels on their own (OECD, 2018)

13. Despite the need for combining pro-active and reactive methods, the number of ex-officio cartel investigations has also declined in all regions, including the Americas, over the period 2015 to 2020 (OECD, 2022).

3.3. Low level of fines

14. Ideally, fines should outweigh the potential cartel yields so that they cannot be regarded as a "cost of doing business". If expected cartel gains are higher than the expected fine, rational companies might not consider applying for leniency nor abstain from engaging in cartel activities (OECD, 2018).

15. Well-designed and administered leniency programmes increase the probability of detection and undermine trust among cartel participants. However, poorly designed leniency programmes that provide too generous reductions in fines will be exploited thereby reducing deterrence. Some scholars claim that cartels may exploit leniency programmes by considering leniency applications in their strategy in order to maximize the benefits of fine reduction (OECD, 2016a).

16. Within the last 20 years, there has been a worldwide trend to increase fines against companies as well as against individuals (OECD, 2018). However, although cartel fines increased by 56% during the period 2015-2019 worldwide, they decreased by 11.5% annually over the same period in the Americas (OECD, 2022).

3.4. Criminalisation

17. Leniency programmes do not operate in a vacuum (OECD, 2019). Therefore, it is essential to assess the relationship between criminalisation and leniency. There is an open debate about whether criminalisation trends hamper or enhance the effectiveness of leniency, and in particular of administrative leniency programmes (OECD, 2020). Applying criminal sanctions, and especially the threat of jail time for individuals, is regarded as essential to induce individuals to confess and provide crucial evidence and thus enhances the effectiveness of a leniency policy. However, criminalisation might actually not only hinder companies from applying for leniency if they are not sure to qualify for immunity but also prevent applicant firms from gathering evidence for its leniency application as employees facing prosecution may be less likely to co-operate with on-going leniency investigations (OECD, 2018).

18. This may be especially true in Latin America where the handling of the administrative and criminal investigations by different agencies could involve delays. Such delays may compromise legal certainty for the investigated parties or protectionist economic regimes that had been protecting local producers for decades (OECD, 2016).

3.5. Public and private enforcement

19. Although the aims of public and private enforcement differ, they are essentially related and mutually reinforcing (OECD, 2015). Private antitrust damage actions can complement public enforcement regimes by strengthening the deterrence effect and empowering victims to tackle anti-competitive behaviour (OECD, 2018).

20. Private damage actions can act as a disincentive for companies to come forward and indeed, may be the most important reason behind the decline in leniency applications in some jurisdictions (OECD, 2021). Leniency applicants who provide information about a cartel in which they took part not only incriminate other cartel members, but also themselves. This self-incrimination may have negative consequences in follow-on damage litigations in civil courts. It is therefore necessary to balance the attractiveness and effectiveness of leniency and settlement programmes with private parties' access to information collected by competition authorities (OECD, 2015). Competition laws in the Latin America and Caribbean region generally provide strict confidentiality protections to leniency applicants, with regard to their identities and to the evidence submitted within the terms of the programme (OECD, 2016).

21. However, an applicant must consider the risk that plaintiffs could get hold of incriminating documents that were created and voluntarily submitted for the leniency application (OECD, 2018).

3.6. Leniency and debarment

22. Despite the co-ordination between competition authorities and relevant agencies, leniency programme may not provide any protection to leniency applicants with respect to debarment rules. Competition authorities should ensure that the possibility of debarment does not deter companies from self-reporting cartel activity with information on cartel activity. However, although competition authorities are confident of the benefits of leniency programmes, preventing administrative agencies such as procurement agencies from applying debarment rules to leniency applicants may be challenging, thus undermining incentives to apply for leniency (OECD, 2016a).

4. Issues for Discussion

1. What is the trend in your jurisdiction regarding leniency applications? Is there a growth or decline in the number of applications over recent years?
2. What do you attribute to the causes behind this trend?
3. If leniency applications are declining, have you taken initiatives to address this trend?
4. What are the incentives to apply for leniency in your jurisdiction? What advocacy efforts have you undertaken to explain the leniency programme and the risks associated with anticompetitive acts, including guidelines and campaigns?
5. What is your sanctioning policy? Do you believe it is coherent with and supportive of your leniency policy? If not, describe the issues.
6. Describe your policies regarding ex officio investigations and their relationship to your leniency programme. Have these policies contributed to the attractiveness of your leniency programme?

References

- OECD. (2014). *Use of markers in leniency programmes – Note by the Secretariat*. Retrieved from [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)9&docLanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&docLanguage=en)
- OECD. (2015). *Relationship between Public and Private Enforcement – Note by the Secretariat*. Retrieved from [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2015\)14&docLanguage=en](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2015)14&docLanguage=en)
- OECD. (2016). *Leniency programmes in Latin America and the Caribbean: Recent experiences and lessons learned – Background paper by the OECD*. Retrieved from [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2016\)5&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)5&docLanguage=En)
- OECD. (2016a). *Sanctions in Antitrust Cases – Background Paper by the Secretariat*. Retrieved from [https://one.oecd.org/document/DAF/COMP/GF\(2016\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2016)6/en/pdf)
- OECD. (2018). *Challenges and co-ordination of leniency programmes – Background Note by the Secretariat*. Retrieved from [https://one.oecd.org/document/DAF/COMP/WP3\(2018\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf)
- OECD. (2019). *Review of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels*. Retrieved from <https://www.oecd.org/daf/competition/oecd-review-1998-hard-core-cartels-recommendation.pdf>
- OECD. (2020). *Criminalisation of cartels and bid rigging conspiracies: a focus on custodial sentences – Background note by the Secretariat*. Retrieved from [https://one.oecd.org/document/DAF/COMP/WP3\(2020\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2020)1/en/pdf)
- OECD. (2021). *Competition Compliance Programmes*. Retrieved from <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf>
- OECD. (2022). *OECD Competition Trends 2022*. Retrieved from <https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf>