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Summary of Discussion of the Roundtable on Challenges and Co-ordination of Leniency Programmes

Annex to the Summary Record of the 127th Meeting of Working Party 3 on Co-operation and Enforcement

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This document prepared by the OECD Secretariat is a detailed summary of the discussion held during the 127th meeting of Working Party 3 on 5 June 2018.

More documentation related to this discussion can be found at www.oecd.org/competition/challenges-and-coordination-of-leniency-programmes.htm.

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Summary of discussion of the roundtable on challenges and co-ordination of leniency programmes

By the Secretariat

1. Introduction

On the 5th June 2018, Working Party No.3 held a roundtable on challenges and co-ordination of leniency programmes chaired by **Professor Frédéric Jenny**.

To introduce the roundtable, the Chair briefly mentioned the crucial role of leniency programmes in the detection and punishment of competition violations. He noted that, however, in the last two to three years, leniency applications have declined in several jurisdictions. The Chair also noted that leniency programmes have not been equally successful in all countries and that it would therefore be interesting to explore the reasons for that. Many jurisdictions are in the process of considering how to make their leniency programmes more attractive and effective; this roundtable is therefore particularly timely.

The Chair explained that the discussion would be organised around the following topics: (1) successes and failures of leniency programmes and their relationship to other enforcement mechanisms, like whistle-blower tools for third party informants and authorities' own intelligence initiatives, like cartel screening; (2) design and operation of leniency programmes, and their relationship to private enforcement and criminal sanctions for individuals; and (3) challenges resulting from the proliferation of competition regimes and leniency programmes around the world, and proposals to improve the co-ordination of programmes.

The Chair introduced the speakers: Catarina Marvão (Assistant Lecturer at the Dublin Institute of Technology), Brent Snyder (Chief Executive Officer of Hong Kong's Competition Commission), and Scott Hammond (partner in the Washington, D.C. office of Gibson, Dunn & Crutcher and co-chair of the firm's Antitrust and Competition Practice Group).

He then called on **Michael Saller** from the OECD Secretariat to give a brief outline of the Secretariat's background paper. Mr Saller mentioned that the main objectives of leniency programmes are to detect and deter anti-competitive conduct, and ensure enforcement efficiency for competition authorities through the production of the evidence on the case by the leniency applicants themselves. The conditions for an effective leniency programme are the authority's own strong cartel detection record, independently of the leniency programme; severe sanctions for conspirators that did not apply or not qualify for leniency; and the transparency and predictability of the leniency programme, so that potential leniency applicants know what they can gain if they apply. Mr Saller mentioned that, in the case of international cartels, the costs of applying for leniency in more than one jurisdictions, the sometimes conflicting requirements that different jurisdictions may impose on applicants so that they qualify for leniency as well as the different marker systems (i.e., initial information and communications between an applicant and a competition authority to hold the applicant's place in line for leniency) increase the costs and risks of leniency applications, and may discourage cartel members from seeking

leniency. Mr Saller finally highlighted the importance of keeping leniency applicants co-operating with the competition authority until the completion of the case.

2. Successes and failures of leniency programmes

Scott Hammond gave a presentation on recent trends in leniency applications and likely reasons for them. He mentioned that, in recent years, in many jurisdictions applications for immunity (by the first-in applicant) and leniency (by subsequent applicants) have declined, possibly because of the costs associated with co-operating and the risk of private damage actions. He stressed that competition authorities need to promote policies and legislation to ensure that their leniency programmes are protected, and that the incentives to apply for immunity or leniency remain in place. Incentives for self-reporting need to be preserved by the authorities themselves through the good faith application of the leniency programme, and the transparent and generous treatment of applicants.

Mr Hammond stressed that it is particularly important to reduce the exposure to private damage claims for companies receiving full immunity (i.e. the first-in applicant). He mentioned the example of the EU directive on actions for damages for infringements of the competition law (Directive 2014/104/EU) which stipulates that the first-in applicant, the company that applies for full immunity, may have its damage exposure limited to single damages, without joint and several liability. In 2004, the US also adopted legislation (the Antitrust Criminal Penalty Enhancement and Reform Act, "ACPERA") that limited the liability of qualifying immunity applicants that satisfied the co-operation requirements of ACPERA to single civil damages (they would otherwise be liable for treble damages) and eliminated joint and several liability for them. Mr Hammond proposed that consideration be given to assessing how private damage actions are affecting incentives for self-reporting, and evaluating the potential benefit of adding incentives through limiting damages for direct harm only, as opposed to direct and indirect harm.

Mr Hammond noted that there is a debate whether or not criminal enforcement, where it has been introduced, has hindered or helped in the deterrence of cartel activity. Still, when leniency programmes protect applicants from both administrative sanctions and criminal sanctions, the introduction of criminal sanctions can be the greatest single incentive to self-reporting. For example, Chile introduced criminal sanctions for cartels and made it clear in the law that the first company to self-report would be protected from both administrative as well as criminal sanctions, thus ensuring predictability and transparency for companies. This increased the attractiveness and use of Chile's leniency programme.

Mr Hammond finally recommended that competition authorities safeguard the confidentiality of leniency information to the greatest extent possible, to keep incentives to self-report.

The Chair remarked that the threat of civil enforcement may deter cartelists from self-reporting, but it may also deter them from entering cartel agreements in the first place; so there may be a trade-off between the efficiency of the leniency programme and the deterrent effect of the risk of civil enforcement.

The **US Department of Justice** (DoJ) then spoke on the Antitrust Division's corporate leniency policy, which has been the DoJ's most effective investigative tool against cartels since its revision 25 years ago. The programme has led to the detection of the world's largest international cartels, and the prosecution of companies and executives that participated in them.

The DoJ mentioned that one of the bigger potential deterrents to self-reporting are the increased costs of reporting, as the number of jurisdictions where companies can and should consider applying for leniency has grown, and applications in multiple jurisdictions naturally raise costs. The DoJ's view is that, as exposure to antitrust enforcement increases around the world, the potential benefits of applying for leniency still outweigh the increasing costs, in particular in systems where the qualifying first-in applicant receives immunity from criminal sanctions. The DoJ tries to reduce burden and cost for leniency applicants by increasing co-operation and co-ordination with other competition authorities receiving parallel leniency applications.

The DoJ referred to the risk of exposure to private damages actions. While ACPERA has limited liability for first-in qualifying applicants to single rather than treble damages, and eliminated joint and several liability with co-conspirators, there are concerns that the benefits of ACPERA are not as significant as hoped. Co-conspirators have been able to reach single damages settlements with private plaintiffs and, in such cases, ACPERA does not make the leniency applicant better off.

The US corporate leniency policy has a certain set of requirements that a company must meet in order to qualify, clearly laid out in the policy. Corporate applicants must admit to criminal antitrust activity. Also, companies must provide full continuing and complete co-operation throughout the investigation.

Japan described the factors which make the Japanese leniency programme effective: 1) a marker system to lower the initial barrier to apply, and provide predictability of the leniency process; 2) leniency for subsequent applicants who provide information and evidence; 3) substantial advantages for the first –in applicant, to keep the incentives to self-report first; 4) protection of the leniency statements from disclosure to courts in private litigation; and 5) transparent written rules on steps and conditions to apply for and receive leniency. The Japan Fair Trade Commission ("JFTC") has a strong detection record, through its own investigations and not based on leniency, which increases the risk of cartelists being caught in any case, and incentivises leniency applications. The JFTC receives about 100 leniency applications per year on average, and leniency applications were submitted in more than 80% of their cartel cases.

Germany introduced its leniency programme in 2000 and revised it in 2006, to increase its transparency and predictability. Currently, about 50% of the Bundeskartellamt's cases result from the leniency applications.

Singapore mentioned the three key reasons for the success of its leniency programme: 1) the programme is clear, and the competition authority helps leniency applicants to qualify under the programme, so that they are not worse off for having self-reported; 2) the market, in particular antitrust counsel in international cartels, is aware of the programme and the way it works; and 3) the competition authority lets companies know of the programme when it investigates them. 40% of Singapore decisions on anti-competitive agreements were based on leniency applications. Singapore also has a whistleblowing programme for third party informants, which complements their leniency programme.

Latvia has received 12 applications since 2013. In 2016, the competition authority conducted a survey which revealed that 76% of the surveyed undertakings were not aware of the leniency programme. SMEs in particular are not familiar with the policy, ways of collecting evidence internally and steps to apply. In 2017 and 2018, the Latvian competition authority increased its advocacy on cartels, sanctions, and the leniency process, and what to do if a company has participated in a cartel, including how to collect internal evidence

and how to contact the competition authority. The authority also issued guidelines on the leniency application process and conducted training in co-operation with anti-corruption and procurement agencies.

Croatia explained that most of the competition authority's cartel-related decisions were not confirmed by the administrative court. This has made their leniency programme less attractive, as applicants are not clear what they would gain by applying for leniency. In addition, leniency applicants are reluctant to apply for leniency because it is difficult to predict the amount of damages they may be exposed to. Moreover, there is a risk that leniency applicants in Croatia can be sued in another country for damages. Croatia has received two leniency applications since 2010, in the same case.

Israel had one major case based on a leniency application, the tree-pruning cartel (conviction of 17 tree-pruning contractors for rigging of bids for large-scale contracts with the Israeli electricity company and with two municipalities). The applicant was granted immunity under the leniency programme, and agreed to record meetings or phone conversations with other co-conspirators. Those recordings helped the authority's investigators to obtain a court order to tap the phones of several co-conspirators. The recordings and documents that the constructor provided were the core evidence for the case. The Israeli leniency programme has not worked very well, however, as certain conditions of the programme may create legal uncertainty regarding the outcome of a leniency application. Israel is considering eliminating the condition that disqualifies cartel leaders and repeat offenders from applying for leniency, to encourage applications and increase legal certainty on the outcome of a leniency application.

Brazil explained that SMEs do not usually apply for leniency programme. This may be due to: 1) lack of awareness of antitrust laws and the leniency programme; 2) less access to legal advice, and lack of compliance programmes; and 3) reputational risks if they apply, as reporting to the authority implies recognizing participation in an unlawful activity, which may become known in the market. The industries in which leniency applications are more common are construction (because of the Car Wash investigation), and automotive parts and electronic components (because of the international cartels in these two sectors, which also affect Brazil). More than 50% of leniency applications are in these three industries.

Chinese Taipei recently introduced a whistleblowing programme to encourage third parties, especially company employees, who are aware of illegal concerted actions to report them, and receive a financial reward. The informant who provides evidence that leads to the successful investigation of cartel activities could receive 5%-20% of the fines, depending on the strength of the evidence. Until now, the authority has granted four rewards amounting to about US$22,000.

The **United Kingdom** described their initiatives to raise awareness of the leniency programme. The UK Competition and Market Authority ("CMA") has undertaken a lot of advocacy work including an e-learning module to help public procurement professionals spot bid rigging and a digital media campaign in 2017. The CMA has also taken measures to step up its cartel intelligence function to complement leniency, including introducing a dedicated cartels hotline and an informants' rewards scheme. About half of CMA's cases are based on their intelligence-led activities and referrals both from within the CMA and from other agencies.

Lithuania published guidelines on leniency in 2008 and since then the Lithuanian Competition Council ("CC") received five applications. The CC has looked at the other ways to uncover cartels, including co-operation with the Special Investigation Service

("SIS") and the Public Procurement Authority ("PPA"). The CC had several cases in which it used wire-tapping received from the SIS. The CC also trains staff from the PPA, using the OECD Guidelines on Fighting Bid Rigging in Public Procurement. The CC has access to the PPA's database to run cartel screens, using the results as indications for potential infringements.

3. The design and operation of leniency programmes

The Chair turned to the design of leniency programmes, introduced by Catarina Marvão.

Ms Marvão suggested that the EU leniency programme as implemented seems to be more generous than what an optimal leniency programme would be according to research, in terms of both the level of fine reductions granted and the fact all subsequent applicants that co-operate receive fine reductions. About 52% of all cartel conspirators fined in the EU receive some fine reduction. In addition, research shows that recidivists are more likely to report a cartel and on average receive a larger leniency reduction. There is some evidence that firms take turns in reporting cartels; the same firms collude and a different firm reports a cartel at different times. Ms Marvão noted that research has shown that there is no conflict between leniency programmes and compensation for cartel damages. Private enforcement can improve the effectiveness of the leniency programme if the liability for damages of the first-in successful applicant is limited or eliminated. To improve anti-cartel enforcement, Ms Marvão recommended less generous leniency programmes, harsher penalties, which might include introduction of criminal sanctions, and facilitating damage claims.

Mr Hammond mentioned that during his time at the DoJ, there was no international cartel or large domestic cartel case that was first detected and initiated through private damage actions, and later came to the attention of the DoJ that subsequently investigated the conduct and prosecuted. The majority of large cartel investigations were detected by leniency programmes. Private damages create a significant disincentive in engaging in cartel activity and are part of the sanctions against cartel activity; however, while redress is important, detection, resulting from leniency, is more important for deterrence. He also noted that prison sentences against company executives have a significant deterrent effect on cartel activity.

Hungary introduced in 2009 markers for all types of leniency applications (1/A for immunity before the case is initiated, 1/B for immunity in on-going cases, 2 for the reduction of fines). A large number of markers for 1/B and 2 applications were submitted. However, Hungary abolished 1/B and 2 markers in 2013, as it was hoped that the abolition of markers in on-going cases would encourage companies to submit 1/A applications for immunity before the competition authority has opened a case, and thus facilitate the detection of secret cartels. Hungary is however considering re-introducing markers for 1/B-type and 2-type applications to help it establish cartel infringements, as the abolition did not increase the number of 1/A applications.

Canada is considering revising its immunity and leniency programs to ensure they build cases that are "prosecution-ready" and obtain full and timely co-operation from applicants. To achieve "prosecution-readiness", the Canadian Competition Bureau ("Bureau") proposed tightening eligibility to require that applicants have credible and reliable evidence on all of the elements of the offence, and that they provide sworn audio or video witness statements at an advanced stage of the investigation. The Bureau also proposed a tighter schedule for disclosure and a process to address legal privilege claims.

Korea introduced a leniency programme in 1997. In 2005, Korea revised the leniency rules to enhance predictability by reducing the discretion of the Korean Fair Trade Commission ("KFTC"). Now the first-in applicant receives full immunity, whereas before the revision the KFTC had discretion in setting the reduction. Also, ringleaders became eligible for leniency, to eliminate doubts on whether the applicant might be considered to be the cartel leader and thus ultimately ineligible. However, coercers are not eligible. Since 2005, applications have been increasing. Until 2005, the KFTC had only one cartel case on average per year detected through leniency. From 2005 to 2016, leniency applications increased significantly and accounted for around 65% of cartel cases. The Korean competition law requires that leniency applicants fully co-operate with the KFTC until the end of the case and provide sufficient evidence to prove the cartel; otherwise, the KFTC has the discretion not to grant leniency.

Singapore grants full immunity to leniency applicants when the competition authority was not aware of the infringement or the cartel conduct before the leniency application. However, it has discretion to decide on penalty reductions of up to 50% for subsequent applicants. In general, applicants who co-operate get a generous reduction, provided that (a) the application is timely; (b) the applicant fully co-operates and (c) the co-operations adds value to the investigation. Since firms know that the authority is fair and generous when these requirements are met, and given that penalty reductions are discretionary, they are incentivised to co-operate to receive the 50% reduction. Singapore's penalties can be high, which provides an additional incentive to seek a reduction of penalty.

Unlike Singapore, the **JFTC** has no discretion in deciding the penalty reductions of subsequent applicants. For example, the second-in applicant receives automatically a fixed 50% reduction and the third, fourth and fifth a 30% reduction as long as they submit applications before the JFTC starts its investigation, regardless of the degree of co-operation or the quality of evidence submitted. The fixed non-discretional reductions increase the transparency and predictability of the Japanese leniency programme and incentivise subsequent leniency applications, but do not encourage such subsequent applicants to provide full co-operation. Therefore, Japan is considering granting the JFTC with discretion on the amount of penalty reductions, according to the degree of co-operation, the time and added value of the evidence, or the degree to which the evidence contributed to establishing the case.

Spain explained the pros and cons of leniency for individuals and specified that, given that, according to Spanish regulations, managers and representatives might be fined, natural persons may also be beneficiaries of the leniency programme. The possibility for individuals to qualify for leniency is considered an additional incentive for companies to try to be the first applicant.

Poland mentioned that leniency applicants only co-operate with the authority during the administrative proceedings before the competition authority and are not willing to support the authority in court proceedings. Poland is considering whether to make it a condition for leniency that the applicant continue to co-operate in court cases against the authority's decision.

Brent Snyder agreed that fixed benefits for subsequent applicants reduce the incentive to co-operate fully. In the US, the DoJ has been able to incentivise co-operation without providing defined benefits in terms of a guaranteed percentage of penalty discount, and deciding discounts on the facts of each investigation. However, the DoJ has a long track record of predictability. This means that companies can check the benefits that other applicants have received and estimate what their reward for co-operation may be. In Hong

Kong, where the competition law and leniency policy have been in effect for two years, potential subsequent applicants do not have sufficient past information. Hong Kong is undertaking a review of its leniency policy and will likely set defined benefits for subsequent applicants as well as allow some flexibility in deciding penalty reductions, maybe overlapping benefits for the second and following applicants, to create a race for better co-operation and higher benefits independently of the order of submitting the subsequent applications.

Mexico's competition authority COFECE does not reveal the names of the leniency applicant to public prosecutors, as immunity protects successful leniency applicants from both administrative and criminal sanctions.

Chile introduced criminal enforcement in 2016, and protects successful leniency applicants from both administrative and criminal sanctions. In 2017, Chile issued new leniency guidelines, which received comments from national and international business bodies (the Chilean Bar Association, the American Bar Association and the International Bar Association), the DoJ as well as the Chilean criminal prosecutors. The guidelines set out the cases where the antitrust prosecutor may bring a criminal claim.

Scott Hammond remarked that the DoJ believes transparency in terms of how investigations would be opened, sanctions on offenders and the steps and conditions of the leniency programme would attract leniency applications, since companies would know what sanctions could be imposed if they did not take advantage of the leniency programme. If sanctions are clear and sufficiently severe, companies would not engage in cartel activity.

The **European Commission** ("Commission") commented on the balance between encouraging actions in damages and public competition law enforcement including through leniency programmes. Public and private enforcement are complementary. On the one hand, strong public enforcement is a precondition for private enforcement, as in the EU damages actions are usually follow-on actions. On the other hand, the risk of compensation can deter cartel activity. The EU directive on actions for damages for infringements of the competition law (Directive 2014/104/EU) protects public enforcement through safeguarding the confidentiality of leniency statements and eliminating joint and several liability for cartel damages for the first-in applicant. The Commission relies on information by second and third applicants to prove cases to the exacting standards of the European Court of Justice, and therefore rewards them with penalty reductions if they bring added value to the case. The Commission considers that the corporate fines that it imposes are deterrent.

4. Challenges resulting from the proliferation of competition regimes and leniency programmes around the world

Brent Snyder opened this part of the discussion. He noted that the keys to an effective leniency programme are a fear of detection, the risk of severe sanctions, and a transparent and predictable leniency policy. Fear of detection requires a track record of bringing successful investigations without leniency to create incentives for companies to self-report. A percentage of the leniency applications that the DoJ receives is submitted after the DoJ has started the investigation and knowledge of that investigation goes public. Mr Snyder stressed that individual criminal sanctions are an important enhancement to a leniency programme, if the leniency programme protects individuals from those criminal sanctions.

Criminal sanctions are not the only individual sanctions that can be imposed. Hong Kong, for example, does not have criminal sanctions but has individual fines and disqualification.

Mr Snyder highlighted that the proliferation of public and private enforcement across the world has changed the calculation for companies in deciding whether to self-report. Companies engaged in international cartels have to seek leniency in an increasing number of jurisdictions in order to protect themselves from potential enforcement. This means greater time and expense, and greater exposure to damages claims.

Mr Snyder stressed the need for greater convergence of leniency policies and co-ordination of enforcement to maintain incentives to apply for leniency. For example, convergence on the requirements to obtain a leniency marker would help. Leniency applicants are exposed to different marker standards and requirements, and must navigate all of them to ensure that they can get leniency in all of the jurisdictions in which they are potentially exposed. Some jurisdictions require little information to grant a marker and some require a lot of information; some require written proffers and some do not. The risk of not satisfying the requirements in some jurisdictions may be a significant disincentive to seek leniency in any of them. The one-stop-shop marker system that business community has advocated for is a useful suggestion, but not viable, especially in jurisdictions that have criminal sanctions, because they are unlikely to cede their criminal prosecutorial discretion and powers. Greater standardisation is however possible, and should be considered.

Mr Snyder also referred to the need for judiciousness in the scope of investigation and the demands vis-à-vis leniency applicants. Mr Snyder remarked that confidentiality waivers should not be a mandatory condition for granting leniency. Confidentiality is essential for the success of leniency programmes. If leniency applicants do not agree to a confidentially waiver, they may have good reasons for doing so, typically related to the ability of certain jurisdictions to protect the confidentiality of their information, as well as the resulting civil damages exposure. Confidential information belongs to the leniency applicant who should decide whether it wishes to grant a waiver.

Finally, greater co-ordination between enforcers during investigations can create cost efficiencies and limit witness fatigue and the risk of inconsistent statements. Co-ordination can consist in conducting joint interviews, or making witnesses available in one place at one time.

BIAC stressed that exposure to civil damages affect decisions to seek leniency; therefore, limiting the consequences of private damage actions for the first-in applicant is very important. In addition, the first-in applicant should get full immunity and be sure that it will get it. BIAC clarified their suggestion for a one-stop-shop marker system: only the first-in applicant could seek priority to determine whether a leniency marker was available from the jurisdictions where it applied.

Australia and **New Zealand** presented their informal and formal co-operation. The two agencies have a long history of co-operating in competition investigations. Almost identical substantive rules (including on leniency), information gateway provisions and inter-agency co-operation agreements support their co-operation. They have two or three large investigations each year where they work closely together, and numerous smaller cases; common leniency applications and confidentiality waivers facilitate many cases. They co-ordinate information requests to applicants and interviews of potential witnesses, as well as outcomes. The benefits of good co-operation include prioritisation of resources, speedier and more focused investigations, ensuring that neither agency has missed anything critical. Benefits for the applicants are the ability to satisfy the information needs of both authorities

at the same time, rather than having to respond to duplicate requests or make their staff available for witness interviews twice.

Colombia described their soft papers cartel case. The Colombian competition authority found a cartel based on dawn raids and a leniency application; the applicant received full immunity, and the other cartel members were fined. The authorities of Peru and Chile also found a cartel in the soft papers market and imposed sanctions. The competition authority of Ecuador, however, sent the leniency information submitted to it to the General Secretariat of the Andean Community, claiming it was a regional cartel. The Andean Community, that has no leniency programme, started investigations on the cartel, including against the leniency applicant in Colombia. This case risks harming the leniency policies of all involved jurisdictions, if leniency applicants cannot be sure that the information that they provide is protected, and their immunity stands.

The Chair thanked the experts and the delegations, and closed the session.