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

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Working Party No. 3 on Co-operation and Enforcement

Executive Summary of the roundtable on Challenges and co-ordination of leniency programmes

Annex to the Summary Record of the 127th meeting of Working Party No 3 on Co-operation and Enforcement

5 June 2018

This Executive Summary by the OECD Secretariat contains the key findings from the discussion held during the 127th Meeting of the OECD Working Party No. 3 on Co-operation and Enforcement of 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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Executive Summary

By the Secretariat*

Working Party No. 3 of the OECD Competition Committee held a roundtable on challenges and co-ordination of leniency programmes on 5 June 2018. Based on the background paper prepared by the OECD Secretariat, written submissions from delegates, and the contributions by expert panellists and delegates to the discussion, the following key points emerged:

1. The success of leniency programmes depends on the jurisdiction's enforcement record as well as on the characteristics of the programme itself. Transparency, predictability and certainty of the requirements for entering the programme and of its benefits are key to an effective leniency programme.

Leniency programmes offer businesses that breach competition law the opportunity to report the infringement and provide information and evidence to the relevant competition authority, in exchange for full immunity or a reduction of antitrust penalties. The delegates and experts agreed that the effectiveness of a leniency programme depends on the following conditions.

First, the authority should have a strong cartel detection record independently of the leniency programme, so that businesses fear that they may get caught in any event if they do not self-report.

Secondly, conspirators that do not apply or not qualify for leniency should receive severe sanctions, so that leniency applicants are better off than non-applicants.

Finally, the leniency programme should be transparent and predictable, so that potential leniency applicants know how to apply, what they need to qualify and what they will gain if they come under the programme (i.e. type and level of immunity from sanctions, and likelihood of receiving these benefits), as well as what they may lose if they do not apply (i.e., type and level of sanctions and likelihood of these sanctions being imposed). The transparency and predictability of a system is the combined result of the clarity and certainty offered by the applicable rules, and the authority's implementation of these rules and general approach to leniency. Jurisdictions with recent competition laws and leniency policies need to define the benefits for applicants clearly in their law, as they do not have a long established track record for businesses to rely on.

2. The specific characteristics of a leniency programme are critical for its success. Full immunity for the first applicant, immunity for both corporation and individuals, protection of the confidentiality of leniency information and availability of a marker system were identified as main factors that can generate incentives to apply.

Specific factors can contribute to the success of the programme by ensuring that potential leniency applicants have incentives to self-report.

* This executive summary does not necessarily represent the consensus view of Working Party No 3. It identifies key points from the discussion at the roundtable, including the views of a panel of experts, the delegates' oral and written contributions, and the background note prepared by the OECD Secretariat.

Delegates agreed that the first-in applicant should receive full immunity from antitrust sanctions. If, in addition, the jurisdiction provides for individual criminal sanctions, these can be an important enhancement to the leniency programme, if the leniency programme protects individuals from those criminal sanctions.

Competition authorities should safeguard the confidentiality of leniency information to the greatest extent possible. Experts pointed out that confidentiality waivers should not be mandatory or a condition for granting leniency. There may be reasons for refusing to grant a confidentiality waiver related to the ability of certain jurisdictions to protect the confidentiality of the information in their files, and the resulting civil damages exposure.

Many jurisdictions find that marker systems (i.e., initial reporting and communications between an applicant and a competition authority to hold the applicant's place in the leniency queue, while the applicant prepares the full leniency file) are useful in facilitating entry into the leniency programme and encouraging more applications.

Several jurisdictions have found that subsequent applications that provide information and evidence that help prove the case are useful, and encourage such subsequent applications by granting fine reductions (but not full immunity) to applicants. In particular, subsequent applications are helpful if (a) they are timely; (b) the applicant fully co-operates and (c) the co-operation adds value to the investigation. High penalties provide an additional incentive to submit a subsequent application, if the applicant can expect a significant penalty reduction. Jurisdictions reported that discretionary generous reductions work better than fixed percentage reductions set by law.

The discussion showed that authorities could preserve incentives for self-reporting through their good faith application of the leniency programme, and the fair treatment of applicants.

3. The risk of actions for civil damages may deter cartel activity but may lower incentives to apply for leniency. Jurisdictions should be aware of the impact that private enforcement may have on the incentives to self-report and should adopt appropriate measures to protect the effectiveness of public enforcement.

Public and private enforcement are complementary. On the one hand, public enforcement is a precondition for private enforcement, as damages actions are often follow-on actions. On the other hand, the risk of compensation can deter cartel activity.

The delegates discussed the extent to which private damage actions diminish incentives for self-reporting. Applicants provide information about a cartel in which they took part and expose themselves to damage actions, should the content of the leniency application find its way into the hands of the plaintiff. For this reason, many jurisdictions have limited the liability for damages of the first-in successful applicant.

For example, the EU directive on actions for damages for infringements of the competition law (Directive 2014/104/EU) stipulates that the first-in applicant is not subject to joint and several liability. The US Antitrust Criminal Penalty Enhancement and Reform Act limits the liability of qualifying immunity applicants that satisfy the co-operation requirements of the programme to single civil damages (they would otherwise be liable for treble damages) without joint and several liability.

4. The proliferation of competition regimes and leniency programmes around the world creates both opportunities and challenges for the success of leniency programmes. Lack of co-ordination and conflicting requirements across jurisdictions may increase uncertainties regarding the benefits of multiple leniency applications and therefore affect the incentives of potential applicants in cross-border cartel cases.

As competition regimes multiply around the world, companies engaged in international cartels expose themselves to enforcement by an increasing number of competent authorities. If cartel members wish to consider applying for leniency they must, first, identify all competition authorities that may have jurisdiction in relation to the infringement and, secondly, understand and assess the requirements to apply for leniency with each of those authorities, at least with a summary application, at best simultaneously. Each authority will then perform its respective investigation under its own rules.

Multiple applications mean that potential applicants should not only bear the costs and burden of these applications but also comply with the sometimes dissimilar or conflicting co-operation requirements sought by different competition authorities to grant leniency (which may mean that an applicant may not qualify in the end in certain jurisdictions). More applications may also entail greater exposure to damages claims. As a result, incentives to apply for leniency may decrease, as the risk of not satisfying leniency requirements in some jurisdictions may deter potential applicants from seeking leniency in any of them.

Several delegations submitted that applications for immunity (for the first-in applicant) and leniency (sanction reductions for subsequent applicants) have declined. The downturn in subsequent applications is not new, as the costs of applying for leniency in multiple jurisdictions without the benefit of full immunity have diminishing returns. The downturn in immunity applications, however, is more recent and may be explained by the increasing co-operation conditions imposed by competition authority to qualify (which create uncertainty about whether the application will be successful), and the increased exposure to civil damages claims.

At the same time, the potential benefits of multiple applications may still outweigh the increasing costs, in particular when, in the relevant jurisdictions, the qualifying first-in applicant receives immunity from individual sanctions and limits its liability for damages.

5. Convergence of leniency programmes and enforcement co-operation among competition authorities can reduce the costs and burden of leniency applications and help maintain incentives to apply.

Delegates discussed the value of greater convergence of leniency policies and better enforcement co-ordination to maintain incentives to apply for leniency. For example, convergence on the requirements to obtain a leniency marker would help. Leniency applicants facing different marker standards and requirements must understand all of them to assess whether they can apply and receive leniency in all jurisdictions in which they are potentially exposed to antitrust liability.

Greater co-ordination between enforcers during investigations can create cost efficiencies, and help limit investigation fatigue and inconsistencies. Co-ordination can involve aligning deadlines and timetables for key tasks, streamlining information requests and conducting joint or consecutive witness interviews. The benefits of co-ordination include saving of investigative resources, avoiding duplicate requests, speedier and more focused investigations, and ensuring that investigating agencies do not miss critical information. There are benefits for the applicants, too, including the ability to satisfy the information needs of more than one authorities at the same time.