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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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**Summary of Discussion of the Roundtable on The Future of Effective Leniency
Programmes: Advancing Detection and Deterrence of Cartels**

Annex to the Summary Record of the 137th meeting of Working Party 3

13 June 2023

This document prepared by the OECD Secretariat is a detailed summary of discussion of the Roundtable on The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels, held by Working Party 3 on 13 June 2023.

More documents related to this discussion can be found at
www.oecd.org/competition/the-future-of-effective-leniency-programmes-advancing-detection-and-deterrence-of-cartels.htm

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Summary of Discussion of the Roundtable on The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels

By the Secretariat

1. Introduction by the Chair

On 13 June 2023, the OECD Competition Committee held a roundtable on the future of effective leniency programmes chaired by Jonathan Kanter.

The Chair introduced the discussion and welcomes **Bill Baer**, former Director of the Bureau of Competition at the U.S Federal Trade Commission (FTC), former Assistant Attorney General of the Antitrust Division at the U.S. Department of Justice (DOJ), and current Visiting Fellow, Governance Studies, at the Brookings Institution.

The Chair introduced the Mr. Baer, who has overseen leniency implementation in the United States since its inception in 1993. He then asked the Speaker to clarify whether he had any financial interest or relevant clients that should be disclosed to the audience.

The Chair asked Mr. Baer to share his experience with the first leniency programmes that were introduced.

Mr. Baer explained that although the DOJ had a leniency programme in its books, they were never applied in practice. In 1993, the programme was revised, and a simpler and more practical version was introduced, including significant rewards for applicants which overcome the prisoner's dilemma. This led to increased interest in self-reporting among cartelists, and the initial leniency programmes began functioning more straightforwardly.

The Chair asked about the potential benefits for leniency applicants in this programme.

According to **Mr. Baer** the immediate benefit was an exemption from any criminal conviction and clear record for all cooperating employees. That meant that private practitioners could point at evident incentives for self-reporting, without needing to threaten the companies and employees in order to obtain their cooperation.

The Chair asked about the mechanisms that were used to detect violation prior to the enactment of modern leniency programme.

Mr. Baer referred to a non-systematic investigative approach in which violations detected in one area would bring evidence of a violation in a different one. Leniency programme changed this approach.

The Chair wondered whether leniency programmes reached all levels of organizations, including applicants from senior positions.

Mr. Baer clarified that it was precisely senior executives who were most interested in leniency programme. But also, mid-level employees. Ultimately, all employees were incentivised to apply for leniency.

The Chair asked whether there was an expectation for leniency applicants to remain confidential so that shareholders and investors would not be aware of their involvement.

Mr. Baer explained that initially, companies expect confidentiality, but due to securities laws and cooperation obligations, their involvement may become public during a trial.

He also explained that the U.S government initially oversold the benefits of leniency to foreign authorities and companies. As more jurisdictions implemented their own leniency programmes, enforcement in international cartels became more complex and costly for companies due to varying procedures. Leniency coordination efforts among jurisdictions were pursued, but they remained imperfect. As a result, private practitioners, found it challenging to promote leniency as a solution for their clients. In the U.S, the option of being held liable for damages played a key role in the development of leniency programmes. The regime granted protection from damages to applicants who cooperated with civil plaintiffs. However, this regime ended up giving leverage to plaintiffs, who increasingly decided to not settle with leniency applicants. Overall, during this period, cooperation across jurisdictions on leniency became challenging, the role played by defence lawyers grew more sophisticated, and some other tools to detect cartels lost prominence.

The Chair asked the Speaker to clarify the evolution of leniency from a defence counsel perspective, asking whether it became more complicated to advise on self-reporting.

Mr. Baer answered that indeed, it became more challenging to advise on self-reporting, especially in undetected cartels where the costs of leniency could outweigh benefits. Furthermore, he claimed that the U.S leniency programme overfocused on criminal sanctions and ignored damages to be repaid to the victims of the cartel.

The Chair asked his thoughts on the fact that within antitrust investigations and leniency programmes, employees that have been found to commit wrongdoings are not necessarily removed from their positions, unlike in other areas of white-collar crime.

Mr. Baer explained that this is because successful leniency applications require cooperation among employees within the company. Such cooperation would not be possible if there is a threat of layoff for those responsible of the wrongdoings.

The Chair emphasised that in antitrust wrongdoings, there are typically various co-conspirators, and leniency programmes allow to uncover them simultaneously.

Mr. Baer explained that precisely because the broad connections and networks involved in cartels, giving up the right to prosecute the employees of one specific company within antitrust investigations was not such a big loss compared to other criminal prosecutions.

The Chair asked to elaborate on his argument regarding the loss of benefits from leniency.

Mr. Baer presented a series of reasons for this loss. First, lawyers are getting more strategic in their clients' leniency applications, being careful of how cooperative the self-reporting is and withholding information. Second, leniency applications are not well regarded by juries and perceived by the public as unfair within the U.S common law criminal procedures.

The Chair invited Mr Baer to expand on the idea that agencies have become overly reliant on leniency while other cartel detection tools are falling behind.

Mr. Baer argued that most U.S cartel investigations had resulted from leniency applications, while the challenges of self-reporting kept growing and companies became more reluctant due to their exposure to civil damages. At the same time, alternative detection tools atrophied.

The Chair argued that incentives to self-report started to decline as alternative detection mechanisms faded and the risk of exposure decreased. This has led to a trend in which leniency applications are declining.

Mr. Baer agreed that without strong alternative detection tools, the incentive for self-reporting is diminished. Together with the growing complexity of leniency applications, this could explain the decline mentioned by the Chair.

In light of this decline, **the Chair** asked Mr Baer to share recommendations for the international antitrust community.

Mr. Baer advocated for complementary tools beyond leniency, such as whistleblowing, hotlines with increased training, or strike forces supervising potential bid-rigging. Specifically, he proposed educating government officials and private sector buyers so that they do not fall victim to price fixing or bid-rigging conspiracies. Regarding accountability for wrongdoers, Mr. Baer argued that criminal procedures already hold them accountable enough. The removal of leniency protection would be a mistake, despite the need for increasing accountability.

The Chair inquired about potential international coordination in connection with criminal enforcement.

Mr. Baer argued that increased coordination and cooperation across jurisdictions would involve sharing the details of the leniency applicant, thereby increasing risks of self-reporting and disincentivizing leniency. However, if the downside risks of leniency become global, there would be a greater incentive to seek leniency in the first place. What is relevant is that if there are strong alternative detection tools, the incentives for self-reporting increase.

The Chair asked Mr Baer what he thought of data analysis and other proactive tools that could complement leniency in the detection of cartels.

Mr. Baer agreed with the relevance of proactive detection mechanisms, such as data analytics and artificial intelligence, especially as economic tools grow more sophisticated. He proposed more frequent engagement with industrial organization economists to screen economic activity.

The Chair wondered whether there might be alternative criminal prosecution tools and programmes to educate prosecutors on the detection of cartels.

Mr. Baer gave the example of training programmes by the FTC and the DOJ, which have focused on educating officials on cartel detection and reporting to the agencies. He also advocated for incentivizing cartel victims to come forward and report, by highlighting the benefits.

Regarding current levels of engagement with the cartel defence bar, Mr. Baer found it to be appropriate. Their demands should be taken into account, but also understood as a one-sided demand by company representatives who want to minimise the impact of wrongdoing.

The Chair argued that while incentivizing firms to self-report, they should not receive as many benefits that it appears they are being rewarded for their wrongdoings. Then, the Chair asked Mr. Baer to share his views on ephemeral messaging services and their impact on investigations.

Mr. Baer made a point that the challenges of ephemeral messaging will also just like AI tools complicate antitrust investigations.

The Chair agreed that AI and new technologies are becoming increasingly relevant and pose challenges in proving antitrust violations. In the framework of leniency investigations, companies will need to be held accountable for the wrongdoings and collusive behaviour of their algorithms.

Both the Chair and Mr. Baer agreed on the importance of educating the judicial system and other enforcement agencies on the challenges posed by algorithms and AI in antitrust enforcement.

Mr. Baer emphasised the importance of expanding existing general statutory provisions (mostly in common law countries) so that they cover new developments such as algorithmic collusion.

2. Questions from delegations

The Chair proceed to open the floor to delegations. He explained that a first part of the roundtable would focus on questions to the Speaker, and a following part would be dedicated to countries to present their own leniency experiences.

Spain highlighted the differences in leniency practices between the U.S and other jurisdictions. Spain asked the Chair and Mr. Baer to reflect on the recent U.S leniency reform, which demands companies to self-report in a prompt manner. Without this promptness, which is upon the agencies to assess, the benefits of leniency are not granted. The Spanish delegation also asked whether U.S officials considered the global impacts of their decisions, given that many international cartels operate within the U.S.

The Chair clarified that the promptness requirement was introduced to prevent potential abuse of the leniency programme. Its purpose is to discourage companies from withholding information and encourage them to report wrongdoing as soon as they become aware of it. Subsequently, the Chair invited Manish Kumar, Deputy Assistant Attorney General for Criminal Enforcement at the U.S DOJ Antitrust Division, to share his views.

Mr. Kumar added that the promptness requirement was intended to allow companies an opportunity to conduct internal investigations before requesting leniency. Positive experiences seem to validate the effectiveness of the promptness requirement. The new requirement also aimed at increasing the agencies' capacity to conduct certain types of covert investigative activities.

Finland asked about the possibility of not granting leniency to ringleaders.

Mr. Baer explained that US leniency policy does exclude ringleaders, but he was not aware of it ever being invoked. In his own experience, he never encountered clients who could qualify as such.

Australia asked Mr. Baer what he thought of the global decline of leniency applications and whether he had any theories to explain it. They also briefly mentioned Australia's approach to dealing with ringleaders in cartel cases, emphasizing a focus on coercion.

Mr. Baer pointed to a lack of clear empirical evidence to explain the decline in leniency but argued that the increasing costs of applications could be an explanation. In this regard, there has been a change in the risk-reward calculation for leniency applicants.

The United Kingdom asked for a clarification on the future of cartel detection beyond leniency and the potential of data-driven tools.

Mr. Baer emphasised the importance of investing in the education of private customers and government officials to increase detection. Leniency has become less valuable of a tool, and therefore, agencies should invest in alternative techniques.

The European Union asked for a clear timeframe for the changes in leniency that Mr. Baer had presented, specifically when the programme got "more complicated".

Mr. Baer referred to the mid and late 2000s, when the new leniency regulation was introduced in the U.S, as the starting point for a series of changes that made leniency applications more sophisticated and expensive.

Hungary asked whether the decline in the quantity of leniency applications had been matched by a decline in their quality, reflecting the experience of Hungarian authority.

The Chair said that in his experience, leniency applications were being used as insurance policies rather than genuine efforts to disclose wrongdoings. These applications often came with poor levels of cooperation, which can only be improved with strong parallel detection mechanisms. The Chair then asked the Speaker about the role of senior executives in self-reporting.

Mr. Baer explained that factors such as shareholder exposure and reputational damage might have made senior executives reluctant to self-report.

Mexico followed up on Australia's question and asked whether the observed decline in leniency applications referred to both international and domestic cartels.

Mr. Baer restated his previous argument that there is an overall downward trend in leniency applications that is caused by the increase costs of leniency applications.

Mr. Kumar added that concerning domestic cartels, the number has been fluctuating and it is hard to generalise an overall trend.

3. Country experiences

The Chair opened the third part of the discussion, during which delegations were invited to share their own experiences with cartel detection and leniency programmes.

U.S presented its experience, where industry participants have been encouraged to report when they detect collusion in their supply chains when purchasing inputs. It could be useful to invite private sector operators to report collusion by their suppliers.

Republic of Türkiye explained that in its jurisdiction, no significant decline in leniency applications had been observed, and asked whether cultural values could have an impact on leniency trends.

Mr. Baer noted that he was not aware of any direct evidence suggesting the impact of cultural values on the success of leniency, but referred to the Japanese experience, which was marked by initial fears of businessmen not self-reporting due to cultural values.

Japan presented legislative improvements aimed at improving the incentives for enterprises to cooperate. including the removal of the upper limit on the number of leniency applicants and a reduction rate based on the degree of cooperation and the quality of materials submitted. This reduction system is typically used in bid-rigging cases and aims to improve the quality and quantity of information submitted by leniency applicants.

The Chair mentioned the U.S debarment policy, under which criminal convictions impede future roles and awards in government procurement.

New Zealand stressed that leniency is a useful tool, but it is only one among many detection tools. Since the criminalization of cartels in 2021, the country has seen a significant increase in leniency applications. Cartel enforcement is yielding positive results In New Zealand, and the country has successfully implemented an anonymous whistleblower programme.

Norway shared previous concerns about the decline in leniency applications and emphasised that sanctions alone will never be sufficient to deter breaches of competition law. Leniency remains a useful tool as long as there is a credible threat of detection. The delegate argued that whistle-blower programmes provide a relevant source of information that should not be demotivated. They also asked about potential sanctions to the business leaders behind cartels. Finally, the delegate asked on further clarification on the impact of private enforcement on the decline of leniency applications.

The Chair explained that lower risks of non-disclosure have led to a decrease in the incentives for cooperating. Investments in detection and strong consequences for wrongdoing should ensure the effectiveness of leniency.

Mexico presented a consistent share of leniency shares in its detection of cartels. Furthermore, the delegate explained their leniency programmes have been refined to establish a more consistent and clear framework. This enables the provision of a more consistent definition of cooperation and its consequences. Mexico has also implemented stricter penalties for cases of non-cooperation, and has been pursuing alternative detection strategies, including dawn raids, whistle-blower channels and an intelligence unit.

Lithuania agreed with Mexico on the importance of alternative detection tools and explained that it has been experiencing an increase in leniency applications rather than a decline. This increase could be attributed to a slower implementation of private enforcement in the country. The delegate also argued in favour of cooperation with other government agencies and contracting authorities which have detected bid-rigging. Lithuania introduced the Lithuanian whistle-blower programme, which offers rewards for individuals providing information on the wrongdoing.

The Chair explained that declining leniency applications have forced agencies to invest in alternative detection mechanisms.

Latvia shared Lithuania's point regarding the importance of cooperation with various government agencies. In Latvia, most cartels are detected within public procurement and tenders. For this reason, the competition agency has established a close relationship with the anti-corruption agency, which possesses strong investigative powers, and it is able to share information to the competition agency, which has been granted access to a database on public documents with the competition agency. Educational programmes on procurement have been used to raise companies' awareness of potential violations of competition law.

Italy shared its poor experience with leniency programmes. Some measures to counteract this poor leniency performance include the recent implementation of a whistleblowing platform, the reorganization of the competition authority with the creation of a new directorate focusing on leniency and whistleblowing, and the granting of criminal immunity to leniency applicants in bid-rigging.

Hungary explained how it has seen a higher number of whistle-blowers compared to leniency applicants. However, the quality of information submitted by whistle-blowers has been poor and does not qualify as indispensable evidence. As a result, the authority has resorted to compliance programmes to increase companies' awareness of competition law infringements. The delegate explained that most of Hungarian cartel investigations are initiated ex-officio and emphasised the importance of alternative detection tools.

Spain presented its success in detecting numerous cartels through its leniency programme and explained that the creation of an economic intelligence unit which reviews public procurement data has allowed a strong ex-officio enforcement. Reports from other authorities have also assisted the Spanish competition authority. Spain has introduced

criminal immunity for individuals reporting wrongdoings, applied procurement bans on those involved in serious infringements, incentivised compliance programmes, and established a whistle-blower channel. Lastly, the delegate noted that the impact of private enforcement and damages on Spanish leniency programmes remains uncertain.

The Chair noted that the global effort to combat procurement collusion has led to increased bid rigging investigations and prosecutions across jurisdictions, highlighting the positive impact of international cooperation and the potential for new detection tools to yield tangible results.

Croatia explained that its leniency programme, in place for over a decade, offers immunity and fine reductions to companies involved in cartels, with recent amendments that change personal liability. Also, it promotes leniency through education and seminars and uses settlement submissions. Cooperation agreements, access to public procurement data, and algorithmic tools aid cartel detection, contributing to effective competition.

Chile explained that the leniency programme has been useful, but it has not been highly successful. Some of the problems encountered in its enforcement relate to uncertainty regarding the connections between leniency and criminal law. Chile applies an exception in its programme where cartel ringleaders do not benefit from leniency provisions. Lastly, the delegate argued that the country has never experienced a surge in leniency applications, mainly due to the complicated and unclear connections with criminal law.

Australia presented the example of its data review tool, which examines data already held by the competition authority to detect potential cartels. In addition to this tool, Australia also engages in public education and outreach to external agencies to increase detection.

Germany shared its significant decline in leniency applications, leading it to develop alternative detection tools. Germany's leniency programme has been updated in 2021, with a focus on transparency and predictability to make it easy to navigate for applicants. The German government also supports the idea of protecting applicants from private enforcement to ensure the successful implementation of leniency programmes.

Ukraine mentioned its cooperation efforts among enforcement agencies, which have allowed for an increase in the threat of cartel detection and therefore led to a rise in leniency applications.

BIAC emphasised the importance of transparency and predictability of leniency programmes to ensure that applicants come forward and self-report.

Chinese Taipei agreed with Mr. Baer's argument that leniency must be accompanied by alternative detection tools. In addition to ex-officio enforcement and leniency, Chinese Taipei also has an antitrust reward programme, in which all citizens can provide information relevant to investigations and receive rewards (based on the usefulness of the information provided).

Singapore inquired about opinions on how to scale up the use of paid informant schemes without getting overwhelmed by new applicants who are simply seeking financial rewards without providing high quality evidence.

The Chair clarified that the US does not have a rewards scheme and emphasised that having more than one source of information is always helpful to avoid favouritism or bias concerns.

India presented its leniency programme, which, since 2017, covers individuals and grants a full reduction in penalty amounts to the first collaborator. The Indian programme is based on two steps: in a first stage, the applicant provides basic information, and if the authority

is satisfied, the applicant is then allowed to share substantive information on the cartel. Since 2017, 60% of uncovered cartels have been detected through leniency.

The European Commission reported a recent increase in leniency applications, likely attributable to strong enforcement efforts just before the uplift, resuming dawn raids after COVID-19 lockdowns and some recent publication on the topic. Ex-officio enforcement has benefited from cooperation between authorities through mutual sharing of information and whistle-blower channels.

Türkiye has also engaged in active cooperation and has built an economic analysis unit that examines prices and other competitive parameters to detect infringements, even in the absence of circumstantial evidence.

The United Kingdom explained that it operates a financial rewards scheme offered to individuals who provide information to the authority, along with protection. The UK efforts have included collaboration with private sector employees or former employees who may hold relevant information. The competition authority has also encouraged public procurers to present suspicious evidence. On-going legislation aims to mandate the exclusion of cartelists from future procurement, though it won't apply to immunity applicants (those who report first). The delegate also agreed with the importance of international cooperation.

Romania shared its recent increase with leniency applications, mostly from companies that self-report only after a formal investigation has already been launched and dawn raids have occurred. The delegate explained that cultural factors might discourage firms from reporting wrongdoings. In this cultural context, Romania has promoted its settlement programme as a complement to leniency, as companies seem to be more attracted to it. New regulations aim to prevent companies from strategically resorting to these settlement programmes.

France presented a fluctuating number of leniency applications since the enactment of its leniency programme in 2001, although a recent upward trend has been observed. The expansion of the digital economy has led to sophisticated cartels, which according to the French delegate demand equally sophisticated leniency programmes. Applicants are expected to provide high-quality materials and guide the agency through their submission. Despite its success, the leniency procedure was revised due to complaints about its length. It has been subsequently revised and simplified, with successful results.

4. Conclusion

The Chair thanked participants and emphasized the importance of successful detection to ensure the effectiveness of leniency programmes.