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**Executive Summary of the roundtable on the Future of Effective Leniency Programmes:
Advancing Detection and Deterrence of Cartels**

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

By the Secretariat¹

On 13 June 2023, the OECD Competition Committee held a roundtable to discuss The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels. Considering the background note prepared by the OECD Secretariat, the written contributions, as well as the discussion with experts and delegates, the following key points emerged:

1. An increasing number of jurisdictions have a leniency programme in place today .

In recent years, most cartel investigations were initiated by an immunity/leniency applicant, signalling the importance of this strategic detection tool. Consequently, the success of leniency programs has catalyzed a growing number of jurisdictions to either implement or actively pursue the adoption of a leniency program within their legal frameworks.

While leniency programs have gained traction over the years, their effectiveness requires additional conditions which can only materialise over time. During the initial period of enforcement, jurisdictions should strategically diversify their cartel detection approaches, acknowledging the potential low volume of leniency applications in nascent programs. It is essential to complement leniency with a credible threat of uncovering cartel conduct independently of leniency, often through ex officio investigations.

As a result, there usually is a positive correlation between a leniency program's age and the number of leniency applications. Mature leniency programs tend to lead to increased application rates. The belief in the efficacy of leniency, coupled with a genuine threat of uncovering cartel conduct, reinforces the need for a comprehensive, lasting, and multifaceted approach to fighting cartels.

2. Despite the success of this tool, amnesty/leniency applications have decreased over the last years. This decline cannot be attributed to a single factor but appears to result from a combination of several elements.

Despite the wide dissemination of leniency programs, OECD data detected a downward trend in applications by roughly 65% between 2015 and 2021.² While this trend seems to have stopped and the number of applications in 2022 is again on the rise in many jurisdictions, the roundtable discussed the possible reasons for such a decline.

One important factor mentioned is the **growing complexity** of cartels and consequently of leniency applications. This complexity has been driven by sophisticated collusion methods, the blurred line between lawful and anticompetitive practices, and the adoption of digital tools such as algorithms for collusion. Moreover, international enforcement co-operation, extended investigation periods and heightened legal scrutiny have further compounded this

¹ This Executive Summary does not necessarily represent the consensus view of the Competition Committee. It does, however, encapsulate key points from the background note, the discussion, and the delegates' written submissions.

² OECD (2023), OECD Competition Trends 2023, OECD Publishing, Paris, <https://doi.org/10.1787/bcd8f8f8-en>.

complexity, imposing increased administrative burdens, higher legal fees, and rising application costs on companies and individuals. These challenges ultimately discourage cartelists from seeking leniency.

This complexity has also led to **longer duration** of antitrust proceedings, particularly in cases involving international cartels or when leniency programs lack co-ordination across jurisdictions. This may further discourage pursuing leniency.

Another significant factor that may have contributed to the decline is the impact of **private enforcement**, which deters cartelists from seeking immunity because that could raise their overall liability under both public and private enforcement. Leniency applicants face a heightened risk of damage claims, as competition authority decisions typically become final against them earlier than for other parties, making them more susceptible to joint and several liability with other cartelists.

For this reason, legislators often limit the civil liability of leniency applicants. These limitations may include exempting applicants from being held jointly and severally liable with other cartelists and limiting the amount of damages payment. Private enforcement introduces complexities and uncertainties that may discourage cartelists from pursuing leniency. The risk of facing damage claims even after receiving immunity is a significant concern. While leniency shields them from public enforcement penalties, applicants may remain exposed to private enforcement actions with substantial financial consequences. Additionally, the potential disclosure of leniency statements during the public enforcement phase can dissuade firms from considering leniency, as it may have unintended consequences in private enforcement proceedings.

The apprehension concerning costly and complex legal battles, coupled with uncertainties regarding the outcomes of follow-on and standalone actions, may influence cartelists' willingness to co-operate with authorities.

Furthermore, the discussion emphasised the risks associated with **uncoordinated leniency programs in multi-jurisdictional** investigations. While the fear of sanctions from multiple competition authorities may incentivise firms to self-report, the absence of a one-stop-shop for leniency applications means that firms applying in one country may still face prosecution in others.

Lastly, **policies on settlements** may affect the effectiveness of leniency programs by reducing incentives for cartelists to come forward and cooperate if the rewards from co-operating under the settlement policy are too generous. This may lead to deterrence issues and decreased cartel detection.

3. Jurisdictions faced with a decline in leniency applications are implementing necessary reforms within their leniency programs. This is imperative to ensure the ongoing effectiveness of these programs in uncovering and penalizing cartel activities.

To address this issue, policymakers often adopt measures designed to protect leniency applicants. One common approach is limiting the civil liability of these applicants. This involves shielding them from joint liability with other cartelists and restricting access to their leniency statements. These protective measures aim to maintain the incentives for companies to come forward and co-operate with authorities while maintaining a balance between public and private enforcement.

In the face of declining leniency applications, it is paramount to preserve the effectiveness of leniency programs. These programs play an essential role in detecting and prosecuting cartels, making it crucial to ensure their continued functionality. Measures such as introducing personal liability for business leaders involved in cartels, revisiting limits on

the number of leniency applicants, and creating a more consistent and clear framework can contribute to achieving this goal.

Achieving the correct equilibrium in fine reduction mechanisms when engaged in a settlement procedure is also crucial. These mechanisms should maintain the incentives for leniency applications while also encouraging companies to opt for settlements. This balance needs to account for various factors, primarily fostering cooperation between companies and competition authorities.

It is important to keep in mind that cultural factors play a significant role in the decision to seek leniency. As a result, there may not be a one size-fits-all approach that works for every jurisdiction.

4. One of the critical factors in ensuring the effectiveness of leniency programs is the ability to create strong incentives for companies to come forward and report anticompetitive behavior voluntarily. This is where increasing the threat of detection plays a pivotal role. By enhancing the likelihood that cartel activities could be uncovered and prosecuted, competition authorities can encourage companies to proactively seek leniency. This proactive stance benefits both the authorities and the companies involved.

The threat of detection revolves around the idea that the risk of being caught engaging in anticompetitive practices should outweigh any potential gains from participating in a cartel. This threat serves as a powerful deterrent, dissuading firms from entering into anticompetitive agreements in the first place. It sends a clear message that cartels will not go unnoticed and will face severe consequences when uncovered.

To function optimally, leniency programs must strike a delicate balance between providing attractive incentives for self-reporting and maintaining a credible threat of detection. The risk of facing substantial fines and penalties, combined with the possibility of criminal charges for individuals involved, can be a strong incentive for firms to seek leniency. This rational incentive stems from the understanding that leniency offers a way to mitigate the potentially devastating consequences of cartel involvement.

An overreliance on leniency at the expense of proactive detection has been identified as a major contributor to the declining trend, as this combination reduces the likelihood of catching infringers and affects their incentives to self-report.

Moreover, while leniency programs offer a framework for companies to voluntarily disclose their involvement in cartels, an important element for antitrust enforcement is proactive detection of cartels through independent ex officio investigations. These investigations, initiated by competition authorities, play a significant role in uncovering cartels that might otherwise go unreported. Ex officio investigations serve as a fundamental tool in supplementing leniency initiatives, ensuring a more comprehensive approach to cartel detection. By instigating these independent inquiries, competition authorities send a strong signal that they are actively monitoring markets and are not solely reliant on leniency applications for cartel discovery.

5. Ensuring varied tools for uncovering antitrust violations is essential, including both proactive and reactive detection approaches. In recent years, progress has been achieved in the development of innovative detection tools beyond traditional leniency programs.

One important tool that competition authorities have includes raising awareness about the harm of cartels through **education and outreach** efforts. Competition advocacy and outreach initiatives aim to educate businesses, other domestic agencies, and sector regulators about the illegality and harmful consequences of cartel behavior, along with

techniques for its detection. This, in turn, contributes to an increase in cartel reporting to the agencies, both through leniency applications and other reactive channels. Agencies employ various means to raise awareness of their cartel programs, including publications, media articles, websites, and public speaking at conferences. Tailored educational campaigns, such as presentations to specific industry groups or procurement officials, can further enhance cartel detection. This extends to education for consumers, the broader business community, and specific groups like procurement divisions and other government agencies.

Another tool increasingly used by agency is the use of **cartel screens** that leverage digital datasets. These screens analyse market characteristics and firms' behavioral patterns to identify cases of potential anticompetitive conduct. With the growing availability of data and advancements in data collection and analysis technologies, authorities have developed more sophisticated screening methods for the detection of cartels and other antitrust violations.

Additionally, authorities are making their **complaint** process more user-friendly and secure for complainants. This entails creating a safer environment for firms and individuals who wish to report antitrust violations. Moreover, imposing reporting obligations on national authorities, such as procurement authorities or public prosecutors, when they suspect cartel activities, can encourage more complaints that may lead to investigations.

Whistleblowing tools have proven effective, enabling employees to anonymously report antitrust violations. These programs often (but not always) include financial incentives for those who come forward, mitigating the potential risks of retaliation. Many competition authorities have introduced digital whistleblowing platforms tailored specifically for antitrust violations, thereby expanding the range of tools available for detecting and addressing anticompetitive practices.

6. A significant challenge for competition authorities is striking the right balance between maintaining the efficiency of leniency programs and encouraging the use of alternative detection methods.

Leniency programs have demonstrated their efficacy in disclosing cartels, typically demanding fewer resources compared to alternative detection methods. However, it is important to note that leniency programs, though resource-efficient, still necessitate a certain allocation of resources. This requires competition authorities to carefully allocate resources to achieve a balanced approach between different detection tools.

Another intricate challenge involves navigating the potential clash between leniency programs and whistleblowing initiatives. While both mechanisms encourage reporting of antitrust violations, they come with distinct requirements and implications. Competition authorities need to establish clear protocols and mechanisms to harmonize these two avenues, ensuring that they work in tandem rather than at odds.

7. Although it is challenging to strike the optimal balance between maintaining the efficiency of leniency programs and the use of alternative detection methods, these tools can work synergistically, particularly when they provide leads that lead to a leniency applicant after the start of an investigation. A key detection strategy in cartel detection involves international co-operation between competition authorities, as well as domestic co-operation with government agencies, including procurement authorities and public prosecutors. This is particularly important in bid-rigging cases.

By collaborating with agencies responsible for public procurement, competition authorities can harness the insights and intelligence gathered during their investigations, thereby

gaining a more comprehensive understanding of potential cartel activities. Such co-operation can significantly expedite the detection of cartels.

The international dimension of cartels further emphasizes the importance of co-operation among competition agencies. Many cartels operate across borders, making it challenging for a single jurisdiction to effectively detect and investigate them. Formal or informal co-operation between international competition agencies enable the exchange of information, sharing of best practices, and coordination of enforcement efforts. These collaborative measures are instrumental in enhancing cartel detection, as they allow authorities to identify, investigate, and prosecute more effectively international cartels that might otherwise evade scrutiny.

Collaboration with government agencies and contracting authorities brings a wealth of data and intelligence that can be pivotal in cartel detection. By sharing such data with competition authorities, a more comprehensive picture of potential cartel activities can be painted. Leveraging this collective knowledge allows for quicker, more effective responses to anticompetitive practices and helps build cases that stand up to legal scrutiny.

Cooperative efforts not only contribute to cartel detection but also streamline the investigation process. Competition authorities can avoid duplicative efforts and focus resources on cases with the highest potential for prosecution. This efficiency is particularly crucial in tackling cross-border cartels, where collaboration among multiple jurisdictions is essential. By pooling resources and expertise, agencies can ensure that cartels are not only detected but also brought to justice swiftly and effectively.