Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2023)30

Unclassified English - Or. English

9 June 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

The Future of Effective Leniency Programmes – Summaries of contributions

13 June 2023

This document reproduces summaries of contributions submitted for Item 5 of the 137th meeting of Working Party 3 on 13 June 2023.

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

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JT03521539

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Summaries of contributions

This document contains summaries of the various written contributions received for the discussion on the Future of Effective Leniency Programmes (137th OECD Working Party 3 meeting on 13 June 2023). When the authors did not submit their own summary, the OECD Competition Division Secretariat summarised the contribution. Summaries by the OECD Secretariat are indicated by an *.

Australia

Detecting anti-competitive conduct remains a challenge for competition regulators. To address this challenge, the Australian Competition and Consumer Commission (**ACCC**) continues to develop is competition enforcement program in line with best practices. This reflects the ACCC's enduring commitment to prioritise cartel conduct and anti-competitive agreements and practices causing detriment to Australia.

For cartel conduct, one of the ACCC's key detection tools has been the implementation of the *ACCC immunity and cooperation policy for cartel conduct* (the **Immunity Policy**). International experience and the experience of the ACCC has shown that effective immunity and cooperation policies encourage businesses and individuals to disclose cartel behaviour. While the Immunity Policy continues to create a pipeline of cartel investigations, a short-term decline in immunity applications in 2020-21 prompted the ACCC to further develop and implement methods of proactive detection.

This paper describes the ACCC's progress towards developing and implementing a proactive detection program. It also covers limitations on the ACCC's use of some investigative tools, recent developments in the ACCC's implementation of the Immunity Policy and its cooperation with international counterparts.

BIAC

Business at OECD (BIAC) appreciates the opportunity to make this written contribution to the hearing on the efficacy of leniency regimes and advancing detection and deterrence of cartel conduct. This paper follows a previous BIAC submission on the subject of challenges and co-ordination of leniency programmes.[1]

> *Clarity, certainty, and priority are critical, as firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximise the incentive for detection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the "best deal", but also that the terms of the deal be as clear as possible at the outset.*[2]

[1] OECD, Roundtable on Challenges and Co-ordination of Leniency Programmes – Note by BIAC, DAF/COMP/WP3/WD(2018)34 (May 23, 2018), https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)34/en/pdf [hereinafter BIAC Note on Leniency Programmes].

[2] OECD, Fighting Hard Core Cartels: Harm, Effective, Sanctions and Leniency Programmes 8 (2002), https://www.oecd.org/competition/cartels/1841891.pdf.

Chile

Leniency was enacted in 2009. However, after more than a decade, there has only been 8 cases based on leniency applications, representing 31% of the total of cartel cases brought before the TDLC since the program was enacted. According to article 39 bis, paragraph 5, of the Chilean Competition Defense Act, the benefits of the leniency program are not available for the organizer of the cartel which coerced the other members of the cartel to participate.

On December 28th, 2017, the TDLC decided the "tissue paper cartel", that dated back to 2000. In 2012, CMPC, the major Chilean paper company, applied for leniency. The FNE granted CMPC the benefit of exemption of fine. Coercion by CMPC to enter the cartel was one of the main defenses of SCA, the other member of the cartel. The TDLC defined "coercion" under Chilean competition law as physical violence or the threat of, or irresistible emotional violence. Those forms of violence nullify the will of the subject, impeding a different course of action.

The Supreme Court revoked the decision, as physical violence or an irresistible force would eliminate the will of the other members, and there can be no agreement without consent. The Court also noted that assimilation of coercion and *vis absoluta*, would be a standard exceeding that of criminal law. Coercion has to be construed as a form of *duress*. A threat of severe economic damage could be a significant pressure and can be deemed as coercion. The Court noticed that the relevant market was a highly concentrated one, where CMPC had a market share around 75%, while SCA never surpassed 24%. SCA could not challenge CMPC's position. CMPC exerted significant pressure on SCA to be a part of the cartel and its threats of making SCA disappear of the market were credible. The final decision was to partially revoke the benefits granted to CMPC, imposing a fine equivalent to 2/3 of the legal maximum. The tissue paper cartel decision is the only one regarding coercion under the leniency program.

There seems to be several factors at play that thwarts the effectiveness of the leniency program. A major issue has been the lack of coordination between prosecution under competition law and under criminal law. Another potential element is the fact that leniency does not provide any benefits regarding damages actions. Damages actions could signify a massive economic impact for a company accused of participating on a cartel. The law establishes a shorter procedure, where the discussion is limited to existence and quantification of damages, but only after a final ruling of the competition case. Also, in application of a tort law rule, all members of a cartel, no matter how big or small, are several and jointly liable. If the probability of subsequent civil liability is high enough, incentives for applying to the leniency program are greatly reduced.

The coercion standard set forth by the Supreme Court in the tissue paper cartel case is a significant milestone. It clearly states that legal interpretation of the statute demands more than just an instrumental reading of the requirements of the law, forcing the decision makers to incorporate a minimum moral element in their analysis. It also elevates the factual circumstances of the market as a main concern to assess the credibility and severity of the threats. However, the main question remains related to the standard of proof required.

Colombia

The contribution describes the different amendments introduced to the leniency programme in Colombia directed to increase its effectiveness. The programme has been successful to dismantle cartels during the last decade; however, it was necessary to strengthen and update it to increase the number of applications submitted. Bearing that in mind, the President of Colombia issued Decree 253 of 2022 which reformed the leniency programme, after evaluating the following aspects: **(i)** points of improvement of the current programme; **(ii)** an analysis of which reforms could be useful based on game theory; and **(iii)** a comparative study, evaluating the incentives used by other jurisdictions. As a result, these changes were introduced:

1. **Scope of the leniency programme**

Decree 253 of 2022 broadens the scope of the leniency programme since it allows undertakings, engaged in a coordinated anti-competitive conduct covered by article 1 of Law 155 of 1959, to apply for leniency.

2. **Number of participants**

Decree 253 of 2022 limited the number of participants, as indicates that only three undertakings can participate in the leniency programme.

3. **New timing rules**

Another important reform was the inclusion of a new marker system, establishing different benefits depending on when the application is submitted. Especially, it grants a higher reduction of the potential fines to those who apply for leniency before the statement of objections.

4. **Amnesty plus**

Decree 253 of 2022 increases the percentage of exoneration to the applicant who was not granted with full immunity in an investigation but was able to provide relevant information about other infringements.

5. **Transparent procedure**

Decree 253 of 2022 adds some provisions to strengthen and clarify some aspects of the leniency programme. For instance, it establishes the obligation to cease the anti-competitive conduct when applying for leniency and specifies that applicants are obliged to provide useful evidence related to the anticompetitive conduct to be exonerated from the potential fines.

Croatia

Cartels are by far the most serious infringements of the competition rules. Such agreements are prohibited per se. Cartels are specified by Article 101 of the Treaty on the Functioning of the European Union and by Article 8 of the Croatian competition Act. The difficulty of detecting cartels lies in the fact that they are secret because the participants in the cartel are truly aware of the violation they are committing.

In order to detect and successfully sanction, competition authorities have broad powers. Practice has shown that the introduction of a leniency program, i.e., the cooperation of cartel participants with the competition authorities for the protection of competition, has greatly facilitated the fight against cartels.

This paper deals with the issue of reporting cartels in Republic of Croatia and the realisation of the right to immunity if the participant reports the cartel and realizes all the benefits of the leniency programme for agreeing to cooperate with the competition law authorities for the protection of competition.

The contribution will present the institutes of reporting cartel in Croatian competition law, the leniency programme in detecting cartels, relevant challenges and changes which have been introduced in the leniency program in order to improve its implementation by the last Revised Competition Act 2021, as well as a review of some new legal institutes that were introduced into the Croatian legal system for competition.

France

The French Competition Authority's (hereinafter " Autorité ") leniency programme has recently undergone changes, linked in particular to the transposition of Directive 2019/1 of 11 December 2018 (known as the ECN+ Directive) by Ordinance No. 2021-649 of 26 May 2021 and Decree No. 2021-568 of 10 May 2021, as well as to changes in the legislative environment in domestic law resulting from Law No. 2020-1508 of 3 December 2020.

The leniency procedure has been revised in a number of aspects, albeit to varying degrees.

These changes relate to the conditions of eligibility for a full immunity from financial penalties, the modernisation of the practical arrangements for submitting leniency applications - in particular with the option for undertakings to file such an application online - and the investigation and processing of applications, which now give a greater role to the *Autorité*'s General Rapporteur.

The issues surrounding the interaction between the leniency programme and other mechanisms for enforcing competition rules deserve to be explored in greater detail.

With this in mind, the protection of whistleblowers in France has recently been strengthened by the Act of 21 March 2022, which facilitates reporting and extends the protection awarded to whistleblowers. A decree of 3 October 2022 also designates the *Autorité* as the body competent to receive alerts concerning anti-competitive practices.

The possibility of combining the leniency programme with the settlement procedure is another example of such interaction. In this case, the *Autorité* is mindful of the need to preserve the attractiveness of the leniency procedure, by not granting a reduction of fine under the settlement procedure that could exceed the partial exemption granted to the leniency applicant.

Lastly, the relationship with the regime applicable to actions for damages that may be brought by the victims of anti-competitive practices, as well as with the mechanism for exempting from criminal penalties individuals who have "*played a personal and decisive role in the design, organisation or implementation*" of such a practice, is a topical issue in the debates among competing authorities at European level.

Germany

The Bundeskartellamt's Leniency Programme is still a powerful detection tool. Key witnesses continue to play a crucial role in uncovering and prosecuting illegal cartels. Although the number of leniency applications is to be interpreted with caution, because it says little about the success of a leniency programme, it can be noted that in Germany, the number of leniency applications has declined. In view of its importance the decrease in leniency applications is alarming. From the German perspective, this downward trend is mainly due to the remaining liability risk in private damage claims. Therefore, the incentives to collaborate with the competition authorities should be strengthened again and Germany participates with great interest in the discussion on possible ways to do so. However, leniency programmes are not the only source which can lead to the detection of cartels. A mix of all instruments will ensure effective cartel detection and enforcement.

Hungary

The leniency policy in Hungary was introduced in 2003, its main rules are incorporated in the Hungarian Competition Act. It is harmonised with the ECN Model Leniency Programme.

Leniency policy in Hungary has not been as successful as it was the case between 2000-2020 in Western Europe, however, while in Western Europe the number of leniency applications declined dramatically in the last five years, in Hungary the number not only remains at the same level but there has been an increase of applications for fine reduction in the last years.

The increasing success of leniency policy is also due in particular to the high degree of ex officio case initiating and detecting by the (Hungarian Competition Authority, hereinafter: GVH). Approximately one third of cartel proceedings are based on leniency applications, while two thirds are ex officio cases.

For detecting cartels, the GVH uses a wide variety of tools, which are the following:

- separate unit for cartel detection within the Authority,
- ex officio detection, on the basis of information obtained from another separate case,
- evidence provided by an informant (‘informant reward scheme’),
- information received via Cartel Chat.
- information provided by a formal or informal complainant,
- a possible infringement indicated by the contracting authority,
- indication of the body responsible for the control of public procurement or the public procurement authority,
- infringement reported by law enforcement,
- detection of market signals, detection of market conditions (this includes monitoring of public procurement data, economic analysis as well),
- accelerated sector inquiry.

Although, the number of leniency applications is sufficient, however, it cannot be said about the quality of the content of the applications and of the cooperation of the applicants.

Undertakings frequently submit applications which are not elaborated to the extent expected but rather are general acknowledgements of a cartel conduct. In some cases, the applicants even say that they are not sure if they committed an infringement, but if the GVH establishes the infringement, they are willing to acknowledge it. Applicants sometimes lack active cooperation, but would rely on the fact findings of the GVH, and would only acknowledge that evidence found by the authority as the evidence of their cartel.

India

Cartels hatch in secrecy with the ultimate objective of maximising business gains by fixing prices, restricting output, limiting supply, or other similar restrictive practices. Cartels reduce a firm's incentive to compete, innovate, and offer new products and services at competitive prices. Due to such consequential consumer harm, competition agencies all over the world are developing tools and framework to detect cartel(s) and discourage such conduct(s). Leniency, also referred to as amnesty or immunity scheme, is one such tool, the effectiveness of which has been tested across jurisdictions.

At present, most competition authorities across the world have leniency/immunity frameworks in place to detect and deter cartels. In India, the leniency framework was introduced in 2009, with the enforcement of Section 46 of the Competition Act, 2002 and related regulations. This note elaborates the Indian leniency programme which is also known as the lesser penalty framework. Apart from detailing the mechanism, it also brings forth some recent cartel cases decided by the CCI which involved leniency applications. In line with the international best practices and in furtherance of the objective of busting cartels, the recent 2023 amendment to Indian competition law introduced the concept of Leniency Plus.

Ireland

The Irish Competition and Consumer Protection Commission ("the CCPC") prepared a submission under the above heading for consideration at the OECD Competition Committee Roundtable on 13 June 2023.

The paper contains a discussion of the current legislation in the Irish State, with proposed amendments being brought about by the transposition of the ECN+ Directive into Irish Law.

A short overview is provided of the tools of detection which the CCPC currently have at their disposal for detecting cartel behaviour, as well as of new developments and tools that the CCPC are developing to aide their detection of cartels.

The CCPC views detection tools, including immunity programmes and/or leniency policies, as an important part of the battle against cartel conduct, especially hard-core cartels, which currently constitutes a criminal offence within the Irish State and will remain as such.

The CCPC's Cartel Immunity Programme has been a successful part of the CCPC's detection of cartels and therefore the commencement of the new administrative competition law enforcement regime, with the new Administrative Leniency Policy (alongside the existing criminal competition law enforcement regime and Cartel Immunity Programme) should further increase the incentive for cartel participants to come forward with information.

Plausible possibility of detection without leniency or immunity applications must also play a part. Therefore, additional efforts by the CCPC, such as establishing a standalone Cartels Division, with a Section dedicated to Immunity/Leniency and Case Stream, as well as additional tools, like an anonymous whistleblowing platform and a tool for screening for bid-rigging, will also play important roles in advancing detection and deterrence of cartels in Ireland, including bid-rigging.

The CCPC will continue to treat hard-core cartel conduct, such as price fixing, market sharing and bid-rigging as extremely serious and will continue its role in detecting, deterring and prosecuting cartels to the full letter of the law, using all resources available to it, including immunity and leniency applications.

Italy

The Autorità Garante della Concorrenza e del Mercato (hereinafter also “the Authority” or “the AGCM”) welcomes this roundtable as an opportunity to share its experience about proactive cartel detection tools and leniency policy, the challenges faced in the effort to preserve and increase incentives for companies to self-reporting.

The AGCM has long relied on a proactive detection policy in order to strengthen cartel deterrence and encourage self-reporting by companies. This effort has led to significant results: since 2016, almost 90% of cartels have been detected upon ex-officio investigations. Following a slight decline in leniency applications in the last few years, although overall in line with international trends, the AGCM has adopted a set of comprehensive and complementary measures and initiatives in order to strengthen its cartel detection tools, including the creation of a dedicated directorate (“Cartels, Leniency and Whistleblowing”) and the introduction of a whistleblowing platform. Moreover, a recent legislative provision providing for the protection of leniency applicants from criminal liability that may arise in bid-rigging cases is expected to have a significant impact in further promoting the use of leniency programmes.

Section 2 describes the proactive initiatives put forward to foster ex-officio investigation (specifically for bid-rigging case); section 3 illustrates some trends in the number of leniency applications in Italy and analyses possible explanations for the decrease observed over the last five years; section 4 describes what has been done to reinvigorate leniency programmes; section 5 concludes.

Japan

Leniency program in Japan has been applied in a lot of cases since its introduction in January 2006. In the meantime, there has been several amendments of the Antimonopoly Act, including a revision in 2020 for introducing the reduction system for cooperation in the investigation.

Under the reduction system, when the Japan Fair Trade Commission (JFTC) imposes administrative fine for a violation, it reduces the fine rate according to the degree of cooperation of enterprises in the JFTC's investigation. The reduction system is aimed at increasing the incentive for leniency applicants to cooperate in the investigation of the JFTC after the application.

Regarding the initiatives to detect violations, the JFTC is to utilize the information obtained during market surveys for case detection based on the individual consent of the informant, and if a suspected violation of the Antimonopoly Act is identified, the JFTC conducts specific case investigations.

As another initiative for detection, the JFTC is to exercise its authorities under Article 40 of the Antimonopoly Act for detection, when it is considered as necessary and reasonable. Article 40 of the Antimonopoly Act allows the JFTC to order enterprises or their personnel to appear before the JFTC or to submit reports, information or materials as necessary.

Such initiatives were made public as a Statement in June 2022.

Kazakhstan

One of the primary responsibilities of the Agency for Protection and Development of Competition of the Republic of Kazakhstan is to prevent, detect, investigate, and combat violations of competition legislation in the Republic of Kazakhstan.

The leniency program serves as a crucial instrument for identifying cartels and promoting the enforcement against anticompetitive behavior. It entails a scenario where a market participant, who has committed an administrative offense in the form of an anticompetitive agreement or concerted action, proactively approaches the antimonopoly authority of the Republic of Kazakhstan before an investigation takes place.

The primary objective of the leniency program is to enhance antitrust compliance by encouraging increased disclosure of cartels and concerted actions. This, in turn, benefits society by fostering greater competitiveness among market participants.

The leniency program mechanism was introduced in Kazakhstan's antimonopoly legislation in 2013 and remains in effect. However, over the course of a decade, the leniency program has demonstrated its ineffectiveness within the Kazakhstani market.

The antimonopoly authority in Kazakhstan is actively re-engineering its operations, placing emphasis on the automation of monitoring and analyzing commodity markets, including procurement activities and tenders.

Future plans involve enhancing the information system by implementing automated notifications from the subsystem itself, alerting the antimonopoly authority to detected signs of cartel collusion.

Latvia

The Competition Council rarely receives leniency applications for full immunity. More often, it receives applications for a reduction in fine after dawn raids have already been conducted. As a result, the Competition Council has had to rely on other sources of intelligence for initiating cases, most notably other government agencies (the Corruption Prevention and Combating Bureau, the Procurement Monitoring Bureau) and public authorities (as public procurement organisers). In addition, an important part of the Competition Council's work is raising awareness of prohibited agreements and the possibility to apply for leniency to encourage reporting of possible issues to the Competition Council.

The scope of the leniency programme in Latvia was expanded in 2022 to include vertical agreements relating to resale price maintenance and restrictions on passive sales. The aim of these amendments was to broaden the circumstances in which undertakings can apply for leniency, thereby improving the Competition Council's ability to detect these types of restrictions.

Lithuania

This Note overviews the legal framework for the leniency programme in Lithuania, the number of leniency applications and their dynamics as well as presumable reasons thereof. The Note also touches upon practical difficulties that arise in applying the existing legal framework. It discusses the role of the competition authority in strengthening the effectiveness of leniency programme.

In the view of the Lithuanian Competition Council, despite moderate increase of the number of leniency applications, other detection tools and investigative approaches will retain their significance aiming at effective detection of anticompetitive agreements.

Mexico

The Mexican Immunity and Reduction of Sanctions Programme (or Leniency Programme) was implemented in 2006 by the former Federal Competition Commission (CFC for its initials in Spanish). This contribution presents an overview of the evolution of the Leniency Programme, its adaptation as a result of a major constitutional reform on competition matters, and the introduction of harsher sanctions for cartel agreements, as well as its current state as an effective tool to detect and deter cartel conducts in the Mexican markets. Furthermore, the contribution establishes the current challenges of the Programme and how it interacts with other detection tools such as data and economic analysis tools, intelligence tools, a mailbox for anticompetitive practices, among others. Finally, this contribution explains the importance of international cooperation for the detection of anticompetitive practices.

New Zealand

Since November 2004, the New Zealand Commerce Commission (NZCC) has operated a cartel leniency policy. The key feature of the policy is that a participant in cartel conduct can report the conduct to the NZCC and cooperate with the resulting investigation, in return for the NZCC's agreement not to bring civil proceedings against them. The policy has worked successfully, and a significant proportion of cartel proceedings brought by the NZCC are as a result of the leniency programme.

In New Zealand, we usually receive between four and eight leniency applications per year, though in 2022 we received 19. We understand this increase is inconsistent with global trends.

In April 2021, cartel conduct became subject to criminal sanctions in addition to civil. The threat of criminal sanctions (e.g. potential imprisonment) makes the benefits of a leniency policy more tangible. As the competition regulator, the NZCC can grant leniency from civil proceedings to an individual or company but we are unable to grant criminal immunity. This power lies with the New Zealand Solicitor-General.

Although leniency is a valuable and effective tool, we are wary of being too reliant on it as the only method to detect cartel conduct. We also use the following tools to detect potential cartel conduct, to complement the leniency programme:

- an anonymous whistle blower reporting system on the NZCC website;
- a more traditional complaints system which allows the public to email or phone;
- a confidential informants policy (more comprehensive policy/programme is currently being developed);
- running regular outreach programmes; and
- referrals from other parts of the NZCC and other government agencies.

We are also looking to increase our intelligence gathering capabilities across our competition enforcement function, including in cartels. This includes building an intelligence team that looks at human intelligence as well as examining data, trends along with specific requests for discrete pieces of intelligence from case teams.

The NZCC leniency policy is working well, with a steady number of applicants making use of the benefits that the policy offers. However, we recognise that this could easily change, and are wary of being too reliant on leniency as a detection tool. We are continually looking at new ways we may be able to detect conduct and at how we can improve the tools that we already use. This includes looking at our external stakeholder engagement and how we can encourage individuals, businesses and other organisations to recognise cartel conduct and come forward with relevant information.

Poland

Detection is a complex subject and we believe it is useful to make a division into: (a) early detection (i.e. detection sensu stricto); (b) detection aimed at finding an infringement (i.e. detection sensu largo). The former focuses on obtaining or finding an initial lead (information, evidence) that provides enough grounds to conduct a dawn raid. The latter focuses on collecting evidence that goes beyond what is strictly needed to conduct a dawn raid.

We further believe that detection instruments should not be looked at in isolation: various instruments can supplement and reinforce each other. For instance, a higher probability of non-leniency whistle-blowing may provide additional incentives to file leniency, as non-leniency whistle-blowing may destabilise cartels. In general, however, it is also important to remember that the number of leniency should not be treated as the best proxy of an effective enforcement system: when deterrence is perfect, no cartels are formed, and hence there is no room for leniency – the ultimate goal is to generate sufficient deterrence levels, not achieving high leniency rates. This is obviously not to say that dropping (global) leniency rates should be ignored.

On a more local level, the leniency programme implemented in our jurisdiction never led large numbers of applications. Against this backdrop, we thus had additional incentives to look for other ways of increasing detection (and possibly indirectly also leniency filings): one of such ways was to make non-leniency whistle-blowing easier and more attractive in our jurisdiction.

Portugal

The fight against cartels is one of the main priorities of the Autoridade da Concorrência – Portuguese Competition Authority (AdC), given the serious harm they cause to the economy and consumers.

The Portuguese Leniency Programme has been an important enforcement tool since its inception and the recent growing number of leniency applications have helped maintaining a strong enforcement agenda as regards cartel activity in recent years.

While leniency plays a key role as a detection tool and the recent leniency numbers in Portugal have been encouraging, the leniency programme is complemented with a range of proactive detection tools and investigative approaches in order to increase the likelihood of cartel detection.

These include cartel screening, outreach initiatives, better interaction with complainants, and strengthening relationship with sectorial regulators. This mixed approach appears to be key to achieve a vigorous enforcement activity of competition agencies.

For example, cartel screening has contributed to effective investigations by (i) allowing the confirmation of *indicia* and evidence received through complaints, (ii) providing substantiated arguments used in obtaining judicial warrants to perform dawn raids, and (iii) providing substantiated arguments allowing the AdC to formally initiate proceedings.

In terms of outreach initiatives, the countrywide initiative “Combatting Bid-Rigging in Public Procurement” has contributed to a significant increase of the complaints received concerning public procurement, ultimately leading to sanctions of public procurement cartels, for example in the provision of railway maintenance services, health services, surveillance and security services, and teleradiology services.

Furthermore, using web scraping tools developed by its digital team, the AdC has gathered online information on products from a large array of sectors, using data to substantiate decisions to open investigations, as well as to request warrants for dawn raids.

In addition, reinforcing the relationship with sectorial regulators, including through the sharing of information, may also contribute to a successful enforcement strategy against anticompetitive behaviour. For example, the AdC has entered into bilateral protocols with sectorial regulators for the purpose of strengthening cooperation in the context of enforcement of competition rules. The fruitful cooperation between the AdC and sectorial regulators also contributes to a more robust knowledge of markets.

Romania

Increasing the detection of complex cartel cases is a constant preoccupation for the Romanian Competition Council for more than 10 years. Because the leniency program, although established by legislation since 2009, has offered modest and delayed results, the Romanian competition authority invested its efforts in the identification and/or development of new channels for obtaining relevant information and instruments (software, platform, constant meetings with other authorities) in order to have an efficient ex-officio detection of cases, especially of cartels.

Slovak Republic

The contribution focuses on the developments in the legislation and the practice of the Antimonopoly Office of the Slovak Republic (AMO) and their effect on number of the leniency applications. After analysis of submitted leniency applications, following factors were observed as having an impact on the number of applications. Ex officio investigations, number of conducted down raids, confirmation judgments from the courts, introduction of the whistleblower programme and bidder exclusions are some of the factors that may affect an increased number of the applications. We have also noticed that cartel investigations on the markets in the EU countries are one of the factors that encourages leniency submissions in our jurisdiction as well. Requests for a reduction of the fine occur more frequently than full leniency applications. Parties usually decide to cooperate and ask for partial leniency when they are aware about the AMO activities/findings. In that cases, the leniency application is usually followed by the settlement. To our opinion, this approach is affected also by bidder exclusion sanction. However, AMO has mostly relied on ex officio investigations over the years. The cooperation with different auditing, controlling institutions plays quite an important role in uncovering cartels. The use of evidence gathered in criminal investigations might be a very important element for the future.

South Africa

The Competition Commission of South Africa (“CCSA”) welcomes the opportunity to contribute to this important discussion about the future of leniency programmes and support the call for competition agencies to strengthen their leniency regimes by focusing more on proactive tools to detect potential violations of competition laws. Without proactive tools, competition authorities will miss cases simply because no one reported them.

Spain

Since its introduction in 2008, the **leniency programme** has been vital for the detection of cartels in Spain. To this day, 46% of the 116 sanctioned cartels are the result of leniency applications.

One of the particularities of the Spanish antitrust system is the possibility of imposing sanctions on executives involved in a cartel. Since 2016 there are precedents in a total of 11 cases. In return, the Spanish leniency regime also allows them to benefit from immunity or reduction.

However, **indicators show in recent years a decrease** both in the number of cartels sanctioned and in the number of leniency applications. Spain has faced this reality through a wide range of actions.

Several **legislative reforms** have recently come into force in Spain. An example of this is the granting of criminal immunity to leniency applicants. Although participating in a cartel does not constitute a criminal offence in Spain, various criminal offences can fall within the concept of a cartel. Since 2022, criminal immunity is available and tied to a prior leniency application.

Another significant legislative measure is the exclusion of leniency applicants from the **ban on contracting with public bodies**, which according to Spanish law may be imposed on those who seriously infringe competition law.

The CNMC has also published in 2020 a **guide on regulatory compliance,** allowing an additional reduction of fines to companies that implement antitrust programmes.

Apart from these actions, with a direct impact on the leniency programme, the CNMC has minimised the risk of overreliance on the leniency programme. 2018 saw the creation of the **Economic Intelligence Unit (EIU)**, a multidisciplinary division designed to provide support in areas where further data analysis of collusive patterns is needed. In doing so, it has developed a public procurement database and data screening tools based on Artificial Intelligence and Big Data. It has also reinforced the use of Open-Source Intelligence (OSINT) and Human Intelligence (HUMINT) to accurately identify investigated subjects.

A final mention should be made to the recently passed **Whistle-blower regulation,** which amends our Competition Act completing, along with complaints and applications for immunity, the range of communication channels available for the detection of anti-competitive practices.

Türkiye

With the increased enforcement efforts against cartels, competition agencies have adopted and revised their leniency programs over the years. When it is compared with other countries, the leniency program can be considered relatively new in Türkiye. It started to be implemented in Türkiye in 2009. Undertakings can benefit from the leniency program either by gaining full immunity and not receiving a fine, or by obtaining a reduction in the fine. With the latest amendments made on Act No 4054 as a part of the efforts to align Türkiye's competition policy legislation to the European Union (EU) and introducing the settlements procedure, undertakings had the opportunity to apply to both the leniency program and the settlement procedure simultaneously.

In this context, so as to increase the effectiveness of the leniency program, the examination powers of the Board should be expanding and establishing mechanisms for the protection of whistleblowers. In addition to the active cooperation mechanism, which has an important place in the detection of cartels, in some cases, the price or other competitive parameters of the undertakings are subjected to economic analysis and it is examined whether the numerical data show similarities' with the market structure where competition is prevented, distorted or restricted, are restricted. However, there is no tool that monitors the markets independently of any preliminary inquiry or investigation process to detect the cartels. On the other hand, the Turkish Competition Board (TCB) has the competence to examine, investigate and investigate ex officio. As a result, it is possible to say that there are no any tools or cartel monitoring method, expect leniency program, designed to detect cartels or other anti-competitive practices in Türkiye.

The numbers of the leniency program applications to the Turkish Competition Authority (TCA) from 2009 to 2023 are 2; 1; 2; 4; 4;3; 4; 1;4; 3; 3 and 1 respectively. So it can be inferred that the number of the application to the TCA in the scope of active cooperation is not a desired level when it is compared with the EU and application trends has not changed in appreciable manner in times.

When all the information explained in detail above is evaluated together, there are some crucial reasons need to be handled to increase the efficiency and effectiveness of leniency program in Turkiye.

Firstly, if the competition authorities have sufficient resources to detect large numbers of active cartels without leniency program, conversely effectiveness of the leniency program will be increased. So quantitative and qualitative capacity of the TCA should be increased gradually to attain these purposes.

Secondly, the fines must be deterrent. From 2009, when the leniency program started in Türkiye, to 2023 on cartels were at most 5, the fines imposed %. It was well below the 10% fine that could be applied in theory and far from being deterrent for undertakings.

The third topic that may increase the effectiveness of leniency programs is the awarding of rewards to whistleblowers. Additionally, limiting the compensation liability of the undertakings applying for the leniency program will increase the number of leniency applications.

The fourth reason to be highlighted is that other and final reason is that undertakings are not very willing to apply for a leniency program since they avoid paying compensation after a leniency program

The other and final reason is that international cooperation related to detect the cartels or any other anti-competitive practice is quite limited and should be improved to uncover the cartels.

United Kingdom

The UK Competition and Markets Authority (CMA) welcomes the opportunity to contribute to the OECD's Roundtable 'the Future of Effective Leniency Programmes: Advancing Detection and Deterrence'.

There is a clear relationship between the risk of detection of cartels, effective enforcement against - and the level of sanctions for - those involved in cartel activity, and leniency. Participants in cartel activity are more likely to apply for leniency if there is a real risk that the cartel will be detected, that there will be effective enforcement action and that sanctions will be significant.

The CMA's leniency policy continues to play an extremely important role in the detection and investigation of cartels in the UK, as well as in the deterrence of cartel activity (see further section 5 below). Indeed, the existence of an effective leniency policy can, in and of itself, destabilise a cartel since each cartel participant is aware that the other parties to the cartel have an incentive to be 'first through the door' for immunity.

However, the CMA also has an established programme for detecting cartels independently of any leniency application. As a result of our continuous focus on our intelligence development toolkit, approximately half of CMA cartel cases have been and continue to be 'intelligence-led' or 'own initiatives' cases (by which we mean the investigation did not result from a report by a business participating in the cartel under our leniency programme).

As the risk of detection and the consequences of cartel activity are increasing in the UK, including through use of the CMA's proactive detection tools and increased sanctions, this in turn increases the incentives for businesses and individuals to comply with the law, or to apply for leniency.

This paper is structured as follows:

1. first, we describe the CMA's enhancement of its proactive detection and investigation toolkit (which increases the risk of getting caught);
2. second, we outline the increased sanctions for cartel activity in the UK (which increases the consequences of getting caught);
3. third, we explain how international cooperation contributes to effective enforcement and detection of cartels; and
4. finally, we reflect on the UK leniency regime and our proposed review to ensure that it remains as effective as it can be as a means of detection and deterrence.

United States

The Antitrust Division of the United States Department of Justice is deploying an aggressive array of investigative techniques and proactive strategies to ratchet up the risk of detection for cartelists engaged in fixing prices, rigging bids, and allocating customers and markets. The relationship between detection and defection is important for purposes of antitrust enforcement.

The Antitrust Division's leniency program[3] is a pillar of antitrust enforcement in the United States. The longstanding success of the leniency program is predicated on the idea that a cartel member will defect from a secret price-fixing or bid-rigging conspiracy and disclose the illegal conduct to authorities. The concept of defection is commonly used in game theory in reference to the prisoner's dilemma to describe the choice to confess to authorities and betray a co-conspirator.

Detection is therefore an exogenous risk that cartelists cannot control through group cohesion alone. This Submission focuses on how antitrust enforcers in the United States and around the world can take steps to increase the external risks of detection that in turn create mounting pressure towards defection within a cartel.

This Submission is divided into three sections:

- First, the importance of detection risk in destabilizing cartels and the interplay between detection and defection in the context of a leniency program. This includes revisiting the familiar prisoner's dilemma scenario mentioned above and discussing how law enforcement action can add players to the game and alter the incentives in favor of defection. (**Section 2.**)
- Second, how antitrust enforcers can use the full panoply of detection tools, investigative techniques, and proactive strategies to uncover anticompetitive conduct. This includes affirmative strategies and policy changes to encourage whistleblowers and complainants that will further threaten cartel cohesion. (**Section 3**.)
- Third, why law enforcement coordination at the international level bolsters the threat of detection and punishment for cartels. This includes intelligence sharing before investigations begin and consultations as investigations and prosecutions commence. (**Section 4.**)

[3] U.S. Dep't of Justice, Antitrust Division, *Leniency Policy and Procedures* and other related documents are available at https://www.justice.gov/atr/leniency-program.