

Unclassified

English - Or. English

5 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 – Note by BIAC

13 June 2023

This document reproduces a written contribution from BIAC 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-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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JT03520761

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. Introduction

1. Cartel conduct is rightly considered the “most egregious offence against competition laws.”³ Cartel conduct – which takes the form of fixing prices or the limitation of supply – demonstrably reduces competition and increases consumer costs. Importantly, such conduct is not limited to a particular jurisdiction and with the ever-increasing global nature of commerce, cartel conduct, and its impact, spans the globe. Equally, cartels are described as being inherently secretive and deceptive, and accordingly have remained a priority for investigation by competition authorities.⁴ Because of the egregious effects of

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](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>.

³ UNCTAD, The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law Against Hardcore Cartels in Developing Countries – Note by the UNCTAD Secretariat, TD/RBP/CONF.7/4, at ¶ 1 (Aug. 26, 2010), https://unctad.org/system/files/official-document/tdrbpconf7d4_en.pdf.

⁴ Cristina A. Volpin & Peerapat Chokesuwattanaskul, The ‘6Cs Criteria’ for Successful Implementation of Leniency Programmes 2 (2022), https://awards.concurrences.com/IMG/pdf/ee_leniency_cav_pc_70_-edited.pdf?105630/f530bf44f1f87dce142c41e4a9a25d407550f4cfbf7021b1d9bbe446acbde7f. See OECD, The Future of Effective Leniency Programmes – Note by Australia, DAF/COMP/WP3/WD(2023)1, ¶ 26 (May 22, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)1/en/pdf); OECD, The Future of Effective Leniency Programmes – Note by Ireland, DAF/COMP/WP3/WD(2023)6, ¶ 40 (May 25, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)6/en/pdf); OECD, The Future of Effective Leniency – Note by Italy, DAF/COMP/WP3/WD(2023)7, ¶ 10 (May 26, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)7/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)7/en/pdf); OECD, The Future of Effective Leniency Programmes – Note by Mexico, DAF/COMP/WP3/WD(2023)11, ¶ 1 (May 22, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)11/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)11/en/pdf); and OECD, The Future of Effective Leniency Programmes – Note by New Zealand, DAF/COMP/WP3/WD(2023)12, ¶ 4 (May 25, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)12/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)12/en/pdf).

cartels, several OECD member jurisdictions have criminalized cartel conduct and prioritized enforcement against international cartel conduct.

2. The inherent difficulties in uncovering international cartel conduct are well documented.⁵ These difficulties have been exacerbated as commerce has evolved and become more sophisticated. A number of recent papers speak to the challenges in detecting cartel conduct.⁶ The OECD has noted that uncertainties may have arisen as a result of growing complexities of hardcore cartel conduct and sophisticated methods of collusion and factors of competition.⁷

3. During the ten-year period between 2000 and 2010,⁸ most OECD jurisdictions adopted leniency programmes (generally following the footsteps of the manifestly and predominantly successful U.S. leniency policy) that offer reduced, or waived, penalties to applicants who provide competition enforcers with actionable evidence of cartel conduct. The impact of these respective leniency programmes has been dramatic and often immediate.⁹ Leniency programmes have been one of the most important tools for agencies in encouraging companies and/or individuals to self-report cartel conduct. In the U.S. alone, 90% of total antitrust fines imposed followed a leniency application. It is beyond doubt that the programmes remain an important investigative tool that aids successful prosecution and ultimately deterrence of cartel conduct.¹⁰

4. While it has been noted that the number of leniency applications received is an “easier but imperfect proxy to measure the success of [a] leniency programme,”¹¹ BIAC shares the view that leniency regimes remain the most efficient investigative tool that competition authorities possess in the detection, and successful prosecution, of cartel conduct.¹² For this reason, many jurisdictions have placed a demonstrated reliance on leniency programs as a tool to enhance cartel detection and prosecution due to the resource constraints and difficulties faced with non-leniency cases.¹³

⁵ BIAC Note on Leniency Programmes, *supra* note 1, at 3.

⁶ See OECD, OECD Handbook on Competition Policy in the Digital Age (2022), <https://www.oecd.org/daf/competition/oecd-handbook-on-competition-policy-in-the-digital-age.pdf>; OECD, Algorithms and Collusion: Competition Policy in the Digital Age (2017), <https://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>.

⁷ OECD, The Future of Leniency Programmes: Advancing Detection and Deterrence of Cartels – Background Note, DAF/COMP/WP3(2023)1, at ¶ 74 (Apr. 25, 2023), [https://one.oecd.org/document/DAF/COMP/WP3\(2023\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2023)1/en/pdf) [hereinafter OECD 2023 Background Note].

⁸ OECD, OECD Competition Trends 2022, at 44 (2022), <https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf>.

⁹ *Id.* at 45.

¹⁰ Scott Hammond, Cornerstones of an Effective Leniency Program, Address Before the before the ICN Workshop on Leniency Programs 2 (Nov. 22-23, 2004), <https://www.justice.gov/atr/speech/cornerstones-effective-leniency-program>.

¹¹ OECD 2023 Background Note, *supra* note 7, ¶ 11.

¹² BIAC Note on Leniency Programmes, *supra* note 1, ¶ 8; see also UNCTAD, *supra* note 3, ¶ 8 (describing the aim of leniency programmes as to “drive a wedge through the trust and mutual benefit at the heart of a cartel”). See also Australia Note on Leniency Programmes, *supra* note 4, at 2.

¹³ OECD 2023 Background Note, *supra* note 7, ¶ 15-17.

5. BIAC submits that leniency regimes which comply with well-established procedurally objective features encourage applicants to self-report cartel conduct.¹⁴ Furthermore, OECD has previously submitted that the significant costs associated with multi-jurisdictional applications may deter business in some cases from applying for leniency where there is a material lack of consistency across jurisdictions.¹⁵

6. This is evident to such a degree that in recent years the legitimacy and efficacy of leniency programs has been called into question. As the OECD notes, the aggregate number of leniency applications received in all jurisdictions cited in a recent study decreased from 577 in 2015 to 210 in 2020. There has also been a concomitant reduction in the number of cartel decisions worldwide.¹⁶

7. BIAC submits that the decline in multi-jurisdictional leniency applications may be attributed to manifest risks posed by a multitude of factors, which include private enforcement, the costs associated with multi-jurisdictional applications, and, ultimately, the inconsistency between leniency programmes across different jurisdictions and the lack of certainty created by enabling an effective confluence between administrative, private and criminal enforcement.¹⁷ In this regard, failure to adherence to predictable procedural steps¹⁸ and, in particular, a lack of consensus among agencies as to the rules on the protection of legal privilege over leniency submissions further disincentivize corporates from applying for leniency across multiple jurisdictions.

8. The impact of these factors on leniency regimes internationally before providing any potential remedial measures which ought to be considered is addressed below.

¹⁴ Leniency regimes generally consist of the following key features:

the cartel member who first brings to light the existence of a cartel to competition authorities is rewarded with immunity from administrative penalties ordinarily arising out of such conduct;

some jurisdictions allow for a reduction in the value of a fine based on the level of cooperation given by subsequent leniency applicants;

there are no limitations to who may be granted leniency; however, it is generally accepted that companies initiating, leading or coercing others to engage in the cartel will be precluded from obtaining leniency;

upon applying for leniency, the applicant is generally required to cease its involvement in the cartel, maintain secrecy as to the fact that it has made an application for immunity and fully cooperate with the competition authority to obtain all relevant evidence in its investigation of the cartel;

the leniency applicant must provide the competition authority with evidence that sufficiently demonstrates the existence of the cartel as well as its members;

leniency applicants must provide the relevant competition authority with a “complete and comprehensive account of all facts as possible, supported by all available evidence, in a timely manner” (emphasis added); and

information and evidence may be presented by the leniency applicant orally or in writing or both.

¹⁵ OECD 2023 Background Note, *supra* note 7, ¶¶ 70-73.

¹⁶ OECD Competition Trends 2022, *supra* note 8, at 12.

¹⁷ BIAC Note on Leniency Programmes, *supra* note 1, ¶ 5.

¹⁸ See ABA Section of Antitrust Law, Assessment of Global Competition Agency Implementation of ABA Best Practices for Antitrust Procedure – Report by the Procedural Transparency Task Force (April 29, 2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2019/sal-procedural-transparency-2019-04-29.pdf.

However, before doing so, it is important to highlight the importance of an effective leniency regime.

2. Hallmarks of an Effective Leniency Regime

9. To ensure that leniency regimes remain effective, they require certainty, transparency, predictability and, most importantly, must be highly beneficial for the applicant (relative to the alternative of not applying). For a corporate entity or individual to fulfil all of the obligations contained in a leniency programme, there must be a clear concomitant set of attainable requirements coupled with measurable safeguards for prospective applicants to follow. In this regard, the guiding principles outlined by the Secretariat are decisive for the buy-in by businesses.¹⁹ These guiding principles are clarity, commitment from both sides, credibility, confidentiality, cooperation and coordination between authorities, as well as context and culture.²⁰ Applicants need an objective process coupled with the combination of strong benefits and a robust deterrence regime which punishes illegal conduct in a manner which appears to greatly outweigh the risk of not applying. Crucial to this is maximizing the difference between the benefits of the applicant and the harm to the non-applicants when incentivizing applications. If the leniency regime is not formulated in accordance with these guiding principles, leniency applicants will, in deciding whether to proceed with a leniency application, weigh up the uncertainty of obtaining an unattractive leniency with the prospects of fully defending the matter.

10. The primary objective of an enforcement regime is the detection and prosecution of cartel conduct. Leniency regimes are essential to the success of competition authorities in doing so. Functioning leniency regimes incentivize the cooperation and trust of the leniency applicant to allow the agency to effectively and efficiently uncover, end and punish the cartel, for the ultimate benefit of consumers. Undoubtedly, this is done through fostering the creation of a mutually beneficial trust relationship between competition authorities and companies willing to disclose wrongdoing. By disclosing cartel conduct to competition authorities (which the relevant authority would not have been able to uncover itself), leniency regimes benefit both companies and foster robust enforcement, often allowing agencies to obtain key evidence and, importantly, access potential witnesses.²¹ The disclosure of such evidence creates great risk and significant uncertainty for leniency applicants. The decision, therefore, to apply for leniency is not to be taken lightly and instead poses a substantial commercial risk to the prospective applicant.²²

11. Accordingly, BIAC stresses that competition authorities must strike a balance between achieving certainty and predictability in the leniency application process (including obligations on agencies to adhere to the principles contained in the ABA's Procedural Transparency Task Force Report²³ and consistent application of the rules in relation to legal privilege) with the collateral risks which arise in relation to the subsequent

¹⁹ Volpin & Chokesuwattanasul, *supra* note 4, at 19-21.

²⁰ *Id.*

²¹ UNCTAD, Competition Guidelines: Leniency Programmes 1 (2016), https://unctad.org/system/files/official-document/ditccplp2016d3_en.pdf.

²² Corlia van Heerden & Monray Marsellus Botha, *Challenges to the South African Corporate Leniency Policy and Cartel Enforcement*, 2 TSAR 308, 311 (2015), available at <https://ssrn.com/abstract=2873073>

²³ ABA, *supra* note 18.

administrative and judicial proceedings (i.e., jurisdictional uncertainties, high administrative hurdles, the length of time involved in a cartel investigation, and potential private damages claims, as well as the risk of criminal prosecution) with the need to demonstrate a real risk of prosecution and associated heavy penalties should an applicant not seek to apply for leniency.

12. In order to ensure the longevity of an effective leniency programme, competition authorities must seek to implement a policy that adequately addresses and ameliorates the risks highlighted above, thereby providing applicants with greater predictability, credibility, commitment, and certainty during and subsequent to the application process.²⁴ Ultimately, a combination of these factors will lead to the harmonisation of leniency regimes internationally.²⁵

3. Effects of Private Enforcement and Criminal Prosecution on the Efficacy of Leniency Regimes

13. Despite wanting to end and alert competition authorities to cartel conduct, one of the most significant deterrents to businesses applying for leniency in multiple jurisdictions is the lack of certainty and consistency among the jurisdictions. Even for a cartelist wanting to “do the right thing,” the leniency programme and associated collateral risks (e.g., private enforcement, uncertainty over legal privilege, divergence between regimes, and actions by/against individuals involved) all contribute to the uncertainty, making the decision over whether to apply for leniency much more complex. This is patently not the result that competition authorities want. Rather, agencies should want the incentives to notify to be strong and clear.

14. The decision to bring a leniency application in any given jurisdiction is a significant risk undertaken by an organisation. In this regard, companies expose themselves to the risks of sizeable costs in investigating and preparing multi-jurisdictional applications (accompanied by the uncertainty in relation to the race to be the first applicant), inconsistencies across different leniency programmes, as well as to private enforcement in the form of civil damages and criminal liability for individuals.²⁶ While criminal enforcement programmes might have deterrent effects on cartel conduct, the risks associated with criminal prosecutions certainly disincentivise business from bringing leniency applications, particularly in multi-jurisdictional cartels (implicating potentially uncertain outcomes of such applications, thus possibly exacerbating the overall risks to the corporation and its executives).²⁷

15. Most importantly, companies wishing to apply for leniency in respect of cartel conduct face a significant risk that the information provided to the relevant competition authority in respect of the conduct increases the “availability of inculpatory evidence”

²⁴ See Volpin & Chokesuwattanaskul, *supra* note 4.

²⁵ Harmonization of leniency regimes is particularly important given that many jurisdictions rely on international cooperation and intelligence sharing in their detection and enforcement of multijurisdictional cartel conduct. See Australia Note on The Future of Effective Leniency Programmes, *supra* note 4, ¶ 34.

²⁶ BIAC Note on Leniency Programmes, *supra* note 1, ¶ 5.

²⁷ OECD, Criminalisation of Cartels and Bid Rigging Conspiracies – Note by BIAC, DAF/COMP/WP3/WD(2020)20 (June 2, 2020), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2020\)20/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2020)20/en/pdf).

against the company and relevant individuals, especially in the context of follow-on private damages or criminal trials, and additionally raises the risk that the information provided triggers investigations in jurisdictions which do not have effective leniency regimes.²⁸

16. In several leading jurisdictions, a direct result of the strengthening of private enforcement in relation to cartels led to a decline in leniency applications.²⁹ In this regard, it is important to highlight the *Recommendation of the Council concerning Effective Action against Hard Core Cartels*, which describes that protection of leniency statements and settlement submissions from disclosure for purposes of civil redress is essential to ensure the “right balance between public enforcement by competition authorities and private enforcement by victims of cartels.”³⁰ While many jurisdictions appear to adopt measures to limit civil liability of leniency applicants,³¹ BIAC submits that the risks of civil liability in international cartels, coupled with the other factors which deter firms from entering into leniency regimes have resulted in fewer leniency applications being brought in respect of cartel conduct. Moreover, some of these measures have not proven to be as effective as intended.³²

17. In addition to the risk of facing civil redress, there are several jurisdictions which impose criminal penalties on individuals for involvement in cartel activities. A prime example of the effect of imposition of criminal liabilities is seen with reference to South Africa’s leniency regime. The introduction of criminal liability – coupled with the inability for individuals to apply for immunity – added a new dimension to competition law enforcement, namely the introduction of criminal enforcement authorities and courts in the enforcement of competition related crimes. Following the introduction of criminal liability in 2016, there was an immediate decrease in the number of leniency applications received by the South African competition authorities, as well as resultant negative effects on the imposition of administrative liabilities.

18. Notably, the risk of criminal sanctions disincentivizes leniency applications, making it increasingly difficult for competition authorities to investigate and enforce cartel conduct which will persist but-for a leniency application.

²⁸ BIAC Note on Leniency Programmes, *supra* note 1, ¶ 5.

²⁹ OECD Competition Trends 2022, *supra* note 8, at 47-48; Volpin & Chokesuwattanaskul, *supra* note 4, at 5.

³⁰ OECD, Recommendation of the Council concerning Effective Action against Hard Core Cartels, [OECD/LEGAL/0452](https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452) (2019), <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0452>.

³¹ See OECD 2023 Background Note, *supra* note 7, at 16 (providing useful insight which shows a general decreasing trend in leniency applications received following the introduction of private damages claims). While the Background Note describes it is not possible to draw a causal link based on the data available, BIAC further submits that risks associated with private damages are certainly a consideration given by business. The risks associated with private damages have also been addressed in submissions on this topic. See OECD, The Future of Effective Leniency Programmes – Note by Lithuania DAF/COMP/WP3/WD(2023)10, ¶ 17 (May 15, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)10/en/pdf); Note by Italy on Leniency Programmes, *supra* note 4, ¶ 17; and OECD, The Future of Effective Leniency – Note by Poland, DAF/COMP/WP3/WD(2023)13, ¶ 48 (May 22, 2023), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2023\)13/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2023)13/en/pdf).

³² See John M. Taladay, *Why ACPERA Isn’t Working and How to Fix It*, CPI ANTITRUST CHRON. (Jan. 2019), <https://ssrn.com/abstract=4053932>.

4. The Impact of Contradictory Jurisdictional Regimes and International Cooperation on the Efficacy of Leniency Regimes

19. Cartels often operate on an international basis, with anti-competitive conduct having a simultaneous negative effect on multiple jurisdictions. Additionally, with the introduction of competition regimes in various jurisdictions, there is an inherent risk of a “multiplication of possible sources of investigations” which deter companies from self-reporting cartel conduct in other jurisdictions.³³ As described by one commentator, “The impact of [leniency] programs on international antitrust enforcement has been immense: agencies worldwide have seen a major uptick in the number of cartel cases before them; the leniency option (or threat) has altered the way that counsel advise their clients about suspected cartel activity; and slowly, but surely, the threat of detection brought by these programmes has acted as a deterrent to corporations.”³⁴

20. As a result, the complexity and costs of applying for leniency continues to increase, which has a negative effect on the incentives for companies to admit to cartel activities.³⁵ Agencies should strive to make the incentives for a successful leniency application sufficiently certain and robust in order to mitigate the degree of uncertainty associated with the process.

21. BIAC further highlights the risk-based assessment that is generally undertaken by multinational entities which intend on making applications for leniency in multiple jurisdictions. In this regard, BIAC notes that companies will consider factors such as costs, administrative burdens, and the level of enforcement by each relevant competition agency and that often, leniency applicants tend to single out jurisdictions in which it faces the least risk when making a leniency application.

22. Moreover, BIAC notes that the efficacy of leniency regimes is significantly undermined, as companies are deterred from applying for leniency, where the cartel conduct has an effect in jurisdictions that lack a leniency regime or that have an ineffective, inconsistent, and uncertain leniency programme.³⁶

23. The risks associated with uncertainty related to co-operation between international agencies are heightened when coupled with the risks of civil redress and criminal liability as described above.

³³ OECD, Leniency for Subsequent Applicants – Note by BIAC, DAF/COMP(2012)25, at 161 (2012), <https://bit.ly/42mLZjQ>.

³⁴ John Taladay, *Time for a Global “One-Stop Shop” for Leniency Markers*, 27 ANTITRUST 43, 43 (Fall 2012), <https://ssrn.com/abstract=4053900>.

³⁵ This is especially so “in jurisdictions where the scope and effect of the cartel is unclear in the earliest stages of the investigations.” *Id.* See also OECD, Use of Markers in Leniency Programmes – Note by the Secretariat, DAF/COMP/WP3(2014)9 (Mar. 24, 2015), [https://one.oecd.org/document/DAF/COMP/WP3\(2014\)9/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2014)9/en/pdf).

³⁶ UNCTAD, *supra* note 3, at 8-9. See also R. Hewitt Pate, International Anti-Cartel Enforcement, Address Before the 2004 ICN Cartels Workshop (Nov. 21, 2004), <https://www.justice.gov/atr/file/517921/download> (“occasionally members of international cartels did not apply for amnesty in one jurisdiction because they had greater exposure in another jurisdiction that did not have a transparent and predictable amnesty policy”).

5. Decrease in Prosecutions

24. While the overall decline in the prosecution of cartels can be attributed to significant advances made in agencies' enforcement initiatives, and thus increased awareness of the illegality and attendant risks of cartel conduct within the business communities globally, BIAC submits that a great deal can also be attributed to the adherence by business to general corporate antitrust compliance.³⁷ There is within this a critical point as to the confluence between sound leniency policies and corporate compliance. In most of the leniency regimes, the concomitant conditional obligation of ensuring implementation of a robust corporate compliance mechanisms has indirectly reduced cartel conduct on those jurisdictions.³⁸

25. Both of these developments have had an impact on the use of corporate leniency mechanisms in most of the major antitrust jurisdictions. In addition, the significant and recent evolution as to what may or may not now constitute hard core cartel conduct (which the leniency process was originally designed to uncover) has in many instances created a sense of ambiguity and subsequently frustrated the use of corporate leniency regimes internationally.

26. The complexity in determining whether conduct is an actual contravention has been the subject of a number of recent OECD papers.³⁹ It is clear, however, that recent enforcement initiatives by the major agencies internationally demonstrates that what was previously considered competitively benign conduct now constitutes hard core cartel conduct.⁴⁰ Given the state of flux as to whether or not conduct is an outright contravention, corporates are now faced with a shift from classic easily-definable cartels to a complex new breed of cartel conduct focused on collusion in nascent non-price based type contraventions including social and governance issues (ESG) or algorithmic collusion.⁴¹ Accordingly,

³⁷ OECD, Competition Compliance Programmes – Note by BIAC, DAF/COMP/WP3/WD(2021)25 (May 31, 2021), [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)25/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)25/en/pdf) [hereinafter BIAC Compliance Program Note].

³⁸ See, e.g., the corporate leniency policies of Canada, the U.S., South Africa, Brazil, Hong Kong, Australia, the Philippines, Chile, Peru, and India.

³⁹ See, e.g., OECD, Algorithms and Collusion, *supra* note 6; OECD, Ex Officio Cartel Investigations and the Use of Screens to Detect Cartels, DAF/COMP(2013)27 (July 7, 2014), <https://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>; OECD, Hard Core Cartels (2000), <https://www.oecd.org/daf/competition/cartels/2752129.pdf>.

⁴⁰ See, e.g., Press Release, Eur. Comm'n, Antitrust: Commission fines truck producers € 2.93 billion for participating in a cartel (July 19, 2016), https://ec.europa.eu/commission/presscorner/detail/en/IP_16_2582; and Press Release, Eur. Comm'n, Antitrust: Commission fines producers of washing powder € 315.2 million in cartel settlement case (Apr. 13, 2011), https://ec.europa.eu/commission/presscorner/detail/en/IP_11_473. See also Jurgita Malinauskaitė, *Competition Law and Sustainability: EU and National Perspectives*, 13 J. OF EUR. COMPETITION L. & PRAC. 336, 336 (2022).

⁴¹ Cartels were previously uncovered in what was generally considered to be established sectors, such as the sugar, construction, and engineering industries. As the references suggest, the type of conduct now forming the subject of multiple prosecutions has evolved to include collusion in relation to standards set by other regulatory agencies in emissions standards. These evolving forms of conduct have resulted in companies and competition authorities being forced to grapple with conduct which would traditionally not be defined as collusive but rather considered potentially pro-competitive. See OECD, Environmental Considerations in Competition Enforcement – Background Paper by the Secretariat, DAF/COMP(2021)4, at 22 (Nov. 19, 2021), [https://one.oecd.org/document/DAF/COMP\(2021\)4/en/pdf](https://one.oecd.org/document/DAF/COMP(2021)4/en/pdf). See also Press Release, Eur. Comm'n,

determining what actually constitutes a contravention of the respective statute forces corporations and their legal counsel to question whether or not to apply for leniency in the first place.

6. Corporate Leniency Regimes and Corporate Compliance

27. In previous BIAC submissions, and as discussed in previous OECD Roundtables, BIAC submits that the implementation and maintenance of effective antitrust compliance programs, while expensive and complex, has a positive correlation in reducing subsequent contraventions by those who have implemented the programmes.⁴²

28. An effective corporate compliance program facilitates early detection of misconduct, associated termination of the conduct, and prevention of negative consequences associated with the conduct. BIAC submits that good compliance programs allow companies to detect violations and bring forward marker applications to competition authorities swiftly, where applicable.⁴³

7. Recommendations Aimed at Restoring the Status Quo

29. BIAC acknowledges that cartel conduct is the most egregious competition law violation and agrees that such conduct must never continue unabated. However, regulators must evaluate the primary objectives in implementing a corporate leniency regime, including to detect and achieve administrative penalties against cartelists or to criminally prosecute cartelists. If the former, it is evident from recent and global trends that the likely opportunity to obtain total immunity from criminal prosecution is a fundamental consideration for any firm considering applying to a corporate leniency regime. While this may be achieved in a number of manners, the procedural aspects required to achieve such an outcome must, itself, conform to the hallmarks of a successful leniency program. BIAC submits that full immunity from criminal prosecution should be afforded to the first individual leniency applicant, similar to the positions already adopted in several jurisdictions including Australia, Canada, Ireland, the United Kingdom, and the United States.⁴⁴

30. It is noted that private enforcement, and the risk that corporate leniency applicants incur towards the likelihood of follow-on damages, is also a considerable factor for the decrease in global corporate leniency applications, as such damages may largely outweigh

Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars (July 8, 2021), https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581.

⁴² BIAC Compliance Program Note, *supra* note 37; OECD, Competition Compliance Programmes 16 (2021), <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf> (noting key jurisdictions which place a positive obligation on parties to implement a compliance policy include Canada, the U.S., Brazil, Hong Kong, Australia, the Philippines, Chile, Peru and India).

⁴³ PETER WHELAN, THE CRIMINALIZATION OF EUROPEAN CARTEL ENFORCEMENT: THEORETICAL, LEGAL AND PRACTICAL CHALLENGES 62, 136-137 (2014) (noting the impossibility of knowing the number of undiscovered cartels). *See also* Note by Italy on Leniency Programmes, *supra* note 4, ¶ 19.

⁴⁴ Volpin & Chokesuwattanaskul, *supra* note 4, at 13.

any administrative penalty imposed against it. Similar to the recommendation for criminal prosecution, BIAC submits that the first cartel member to submit a leniency application should be, wholly or largely, exempted from civil liability, with effective procedural mechanisms to ensure this as a practical outcome – not just a theoretical one. This approach has also recently been posited by the head of Germany’s Bundeskartellamt to incentivize leniency applications.⁴⁵ Furthermore, BIAC submits that a successful leniency applicant should only be held liable in respect of the damages suffered by its own customers or suppliers, effectively limiting their civil damages to those parties to whom they directly or indirectly procured to or from, as opposed to all of those that have been damaged by the cartel as a whole.⁴⁶ Alternatively, the successful applicant should only be held jointly and severally liable for the customers and suppliers of the other cartel members when civil damages cannot be recovered from them, such as in their bankruptcy.⁴⁷

31. In instances of international cartels, those jurisdictions that have similar cartel regimes should converge their corporate leniency programs at either a bilateral or multilateral level, specifically in respect of individual criminal and pecuniary sanctions.⁴⁸ The suggestion that a global “one-stop-shop” for marker applications has also been made to ensure that a potential leniency applicant reserves their application in all jurisdictions to which the cartel extends. The implementation of a global one-stop-shop for corporate leniency markers would benefit both competition authorities and applicants. In this respect, leniency applicants would be able to efficiently secure a marker in all jurisdictions impacted by the cartel and developing competition authorities would be able to learn of cartel violations significantly sooner but-for the global marker regime.⁴⁹ Moreover, the implementation of a global marker regime merely signifies the merging of procedures and does not prejudice the independence of the differing competition authorities and, as a result, competition authorities would retain their discretion as to whether to prosecute the cartel or not.⁵⁰ A global marker application regime would also address concerns regarding competition authorities requiring differing degrees of information in order for the granting of a marker and would provide a greater degree of certainty to marker applicants.⁵¹

⁴⁵ Reinhard Kowalewsky, *Cartel Office suspects collusion between Apple and Amazon.*, RHEINISCHE POST (Jan. 2, 2022), https://rp-online.de/wirtschaft/kartellamtschef-mundt-ueber-seinen-kampf-gegen-die-macht-von-facebook_aid-64912079 (in German).

⁴⁶ See, e.g., Act Against Restraints of Competition, § 33e(1) (Gesetz gegen Wettbewerbsbeschränkungen, GWB).

⁴⁷ See, e.g., *id.*, § 33e (1) sentence 2, (2).

⁴⁸ Int’l Competition Network, Good Practices for Incentivising Leniency Applications 16 (Apr. 30, 2019), <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf> [hereinafter ICN Good Practices].

⁴⁹ Taladay, *supra* note 34, at 46.

⁵⁰ *Id.*

⁵¹ *Id.* See also OECD 2023 Background Note, *supra* note 7, at 25 (“To secure immunity in a global cartel, cartelists may need to submit several applications before different competition authorities. This process may be burdensome and, once they have broken the trust among cartelists and begun a race to apply for leniency, they may run the risk of not being the first immunity applicant before one or more authorities. At the global level, building on the use of one-stop-shops in parent law, OECD (2022) proposes a model in which a cartel member can set a marker with one body or designated jurisdiction, which would notify all affected jurisdictions. The marker would establish priority in all jurisdictions.”).

32. Additionally, in respect of leniency applicants facing increased risks of adverse civil redress in follow-on litigation elsewhere, BIAAC advocates for the good practices laid down by the International Competition Network, namely that leniency regimes should include mechanisms to ease the burden on leniency applicants from paying damages as well as to limit the discoverability of leniency evidence in actions for damages.⁵² BIAAC further stresses the importance of these principles being applied equally in relation to criminal liability that individuals may face.

8. Conclusion

33. BIAAC submits that effective cartel prosecution remains the most critical aspect of competition law enforcement. While leniency regimes are undoubtedly one of the most important mechanisms available to competition enforcement agencies,⁵³ the OECD Secretariat's Background Paper for this roundtable highlights the manifest decrease of leniency applications, in recent years.⁵⁴

34. BIAAC is not in a position to opine on whether there are generally fewer cartels active internationally (and hence a decrease in leniency applications), whether cartelists have become more sophisticated, such that they perceive the risk of being detected and successfully prosecuted as being low, or whether stronger corporate compliance and cultural shifts have reduced the incidence of cartel offenses. Indeed, all of the above may be true.

35. While agencies may themselves in turn become more sophisticated in detecting cartel conduct, without the benefit of a leniency applicant, the fact that cartel prosecutions globally appear to also have decreased suggests that this would not be a primary reason for the reduction in leniency applications.

36. As discussed above, there are, however, several factors which are key considerations in assessing whether a potential leniency applicant ought to pursue with a leniency application as opposed to either hoping the cartel will not otherwise be detected or defending the matter, should it be prosecuted. These include (a) the risk of both civil liability and criminal prosecution; (b) the increased number of jurisdictions that need to be considered (when dealing with international cartels); and (c) the importance of due process and certainty.

37. While it may not be possible to conclude that the decline in the use of leniency regimes may be attributed to a single factor, BIAAC submits that maximizing the use of leniency could result from addressing several inhibiting factors.⁵⁵ These include (a) private enforcement; (b) the costs of multi-jurisdictional applications; (c) inconsistency between leniency programmes across different jurisdictions; and (d) the lack of certainty created in

⁵² ICN Good Practices, *supra* note 48, at 11-12.

⁵³ BIAAC Note on Leniency Programmes, *supra* note 1, at 2.

⁵⁴ OECD 2023 Background Note, *supra* note 7, at ¶ 128.

⁵⁵ *Id.*, ¶ 131 (“it is not possible to draw definitive conclusions as to the isolated impact of specific policy changes on the number of leniency applications. Therefore, it is important to consider them alongside other factors, such as the application of criminal sanctions, the costs arising from administrative burdens and the growing complexities of cartels, the impact of settlements, the risks arising from un-coordinated leniency programs across jurisdictions, and the interplay with other policy areas sanctioning multi-agent offences (e.g., corruption, public procurement)”).

precluding an effective confluence between administrative, private and criminal enforcement.⁵⁶

38. It bears emphasis that the lack of consistency in the application of a number of administrative law principles among the jurisdictions in which leniency applications would be notified further disincentivizes corporates. In this regard, a lack of adherence to predictable procedural steps⁵⁷ and, in particular, a lack of consensus among agencies as to the rules on the protection of legal privilege over leniency submissions, further disincentivize corporates from applying for leniency across multiple jurisdictions.

39. Notwithstanding these challenges, leniency regimes remain a vital tool to the successful detection and prosecution of cartel conduct, and BIAC would endorse a greater harmonization across jurisdictions regarding the scope, process, and consequences of filing leniency applications.

⁵⁶ BIAC Note on Leniency Programmes, *supra* note 1, at 2.

⁵⁷ See ABA, *supra* note 18.