



Discussion Points

Presented by the Business at OECD (BIAC) Competition Committee to the OECD Competition Committee Working Party No. 3

Challenges and Coordination in Leniency Programs

June 5, 2018

Business at OECD (BIAC) appreciates the opportunity to submit these comments to the OECD Competition Committee Working Party No. 3 for its roundtable on challenges and coordination in leniency programs.

I. Introduction

1. BIAC welcomes the opportunity to contribute to Working Party No. 3's discussion on challenges and co-ordination of leniency programs, a topic of significance to business where there are opportunities to build on best practice internationally. This submission follows a previous BIAC paper on the subject of leniency for subsequent applicants.¹
2. Effective cartel enforcement is vitally important to the business community.
3. Immunity and leniency programs (hereafter "leniency programs") have had a transformative effect in attacking hard core cartels by improving both the chance that they are uncovered and the efficiency with which they can be prosecuted.
4. Cartels with an international dimension require that participants seeking to address their wrongdoing consider applying for leniency programs in multiple jurisdictions.
5. In BIAC's view, in addition to the risk of private enforcement that companies expose themselves to when applying for leniency, as well as the costs of multi-jurisdictional applications, inconsistency between leniency programs fosters uncertainty, imposes additional burdens on potential applicants and ultimately creates system frictions that deter potential applicants from self-reporting. In BIAC's experience, the following factors are among those that companies must weigh when considering applying for leniency:

¹ BIAC, Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the OECD Competition Committee Working Party No. 3—Leniency for Subsequent Applicants (Oct. 23, 2012), available at http://biac.org/wp-content/uploads/2014/05/Final_BIAC_Submission-Leniency_for_Subsequent_Applicant.pdf [hereinafter BIAC Leniency Paper].

- a) The likelihood of private damages actions, including the fact that a leniency application is likely to increase the availability of inculpatory evidence relating to, and may lead to earlier claims against, a leniency applicant, relative to its co-conspirators;
- b) The risk of triggering investigations in jurisdictions without effective leniency programs;²
- c) The risk of liability under other laws in respect of which there is no possibility of leniency, such as money laundering or corruption;
- d) The possibility of actions and sanctions by other regulators, such as additional fines, suspension of licences or challenges to “fit and proper” status of directors;
- e) Disqualification from government contracts or bidding on public tenders;
- f) The risk of individual employee criminal liability in jurisdictions where leniency does not extend to cover this;
- g) Uncertainty as to the coverage of the leniency application, such as regarding any vertical aspects of a violation and as to how the authority will define the scope of the infringement (with the risk the case may be “sliced and diced” in a manner which leaves the applicant exposed in respect of some product segments or subcategories);
- h) The risk of exposure to other types of ancillary administrative sanctions for certain types of cartel (e.g., in the case of bid-rigging cartels, disqualification from participating in other / future public procurement tenders);
- i) The risk of being unable to satisfy conflicting requirements in different jurisdictions, including in relating to conduct of internal investigations, requirements to terminate participation in the cartel immediately and continuing employment of implicated employees;
- j) The risk of not being able to provide sufficient evidence across the full scope of the violation. Detection (by companies and regulators alike) is becoming increasingly difficult as communications have evolved from paper to email (time consuming but ultimately easy to find evidence) and now from email to chatrooms and other more ephemeral systems, meaning that a standard sweep of company systems may not uncover full evidence. This issue is especially problematic in dealing with document-based systems such as the EU;
- k) The disruption to business of participating in the leniency process, as well as external costs of that participation; and
- l) The risk of co-conspirators gaming the system.

² See Carlos Mena-Labarthe, Jaime Barahona U, Vinicius Marques de Carvalho & Eduardo Frade, *The End of Leniency Programs in the Andean Region?*, COMPETITION POL'Y INT'L (Apr. 18, 2018), available at: www.competitionpolicyinternational.com/the-end-of-lenieny-programs-in-the-andean-region. Media reports indicate that the Andean Council for Competition, together with the General Secretariat of the Andean Community (SGCAN) are considering a recommendation by SGCAN staff to fine companies allegedly involved in a cartel the statutory maximum for conduct that was first detected and self-reported to the Colombian and the Ecuadorian competition authorities by the same companies which had cooperated voluntarily with the investigation and applied for the leniency program. If the SGCAN decides to adopt the recommendation, the effectiveness of leniency programs will be adversely impacted as a company doing business in more than one Andean Member State would be unlikely to voluntarily self-report.

6. In order to mitigate system frictions and encourage self-reporting, antitrust authorities across multiple jurisdictions should work together to establish clear and consistent policies and procedures for leniency applicants. BIAC would also strongly suggest that agencies consider establishing a one-stop-shop process to set a leniency applicant's marker priority date, to be held for a defined reasonable period, to enable the applicant to perfect and secure markers in accordance with the rules and procedures of each relevant jurisdiction. This would both incentivize leniency applications and avoid rewarding undeserving conspirators who game the system.

II. Benefits of Leniency Programs

7. The primary benefit of leniency programs is the incentive they create for applicants to bring an infringement to the attention of the antitrust agencies in the jurisdictions in which the infringement occurred, and to enable those agencies materially to progress their investigation.³ In BIAC's view, a leniency program which offers appropriate incentives to applicants can improve enforcement to the benefit of the enforcement authority, potential applicants, consumers and businesses generally which are the victims of cartels.

8. For enforcement authorities, leniency programs are the single most effective cartel detection tool available.⁴ In many jurisdictions, effective leniency programs have been responsible for uncovering the majority of large international cartels.⁵

9. For potential applicants, an effective program will offer appropriate benefits in terms of sanctions and appropriate procedures that take account of potential follow-on actions and other risks (as identified in point 5 above),⁶ all of which encourage self-reporting and cooperation. Such a program will be most effective if it is transparent as to its scope and the conditions for participation, and predictable as to its application and outcomes.⁷

10. For consumers and businesses generally, an effective leniency program accelerates the speed with which cartels can be detected and prosecuted, mitigating the scope and duration of the cartel's operation and increasing the likelihood that those harmed can seek redress.

³ BIAC Leniency Paper, *supra* note 1, ¶ 1.2.

⁴ Scott Hammond, Fighting Cartels – Why and How? Lessons Common To Detecting And Deterring Cartel Activity, Address Before the 3rd Nordic Competition Policy Conference (Sept. 20, 2000), available at www.justice.gov/atr/speech/fighting-cartels-why-and-how-lessons-common-detecting-and-deterring-cartel-activity.

⁵ *Id.*

⁶ See e.g., *Communication from the Commission to the European Parliament and the Council—Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives*, ¶ 41, COM(2014) 453 final (July 9, 2014), available at <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52014DC0453> (“The majority of EU Member States provide for sanctions to be imposed on individuals for breaches of competition law, over and above administrative fines on undertakings. If such systems do not provide for leniency for the employees of undertakings which are considering applying for corporate leniency, this may lead to disincentives to cooperate with authorities EU-wide.”) In this vein, the European Commission has often coordinated with UK authorities in order to ensure that employees of companies that are granted immunity by the Commission are also immunized from criminal prosecution in the UK.

⁷ BIAC Leniency Paper, *supra* note 1, ¶ 1.2.

III. Challenges in Coordination of Leniency Programs with Private Enforcement

11. A significant challenge for all leniency policies lies in the need to be aligned with other enforcement policies, including private enforcement. Balancing a leniency program with the overall cartel enforcement framework is crucial to its success.⁸

12. Private enforcement refers to litigation initiated by an individual (rather than an antitrust authority), a legal entity, an organization or a public entity to have a court order the recovery of the damages suffered as a result of an antitrust infringement or impose injunctive relief.⁹

13. While private enforcement can complement public enforcement by strengthening deterrence and empowering victims to tackle anti-competitive behavior, private damage actions can also act as a significant disincentive for companies to apply for leniency.¹⁰

14. Leniency applicants which provide information about a cartel in which they took part not only incriminate other cartel members, but also themselves. This self-incrimination may have negative consequences in follow-on damage litigations in civil courts. An applicant must consider the risk that plaintiffs might get hold of incriminating documents which were created and voluntarily submitted for the leniency applications. Even though an applicant will almost certainly obtain some reduction of the fine by coming forward, at the same time, it opens itself to greater exposure for civil liability, especially should the content of the leniency application or details of it find its way into the hands of the plaintiff.¹¹ An applicant may face earlier claims and, at worst the risk of being found jointly and severally liable, with only the hope of recovering contribution from co-conspirators later on.

15. As increased exposure to civil damage claims is often mentioned as the dominant factor behind a decreased interest in applying for leniency, a consistent effort by authorities to ensure that applicants are not worse off in terms of damage claims compared to other companies that do not cooperate is vital to effective cartel enforcement. To this end, some antitrust authorities have introduced some helpful rules, including: (i) enabling the de-trebling of damages and decoupling of joint and several liability;¹² and (ii) setting forth common standards for disclosure of evidence, limitation periods, passing-on defense, standing of indirect purchasers, quantification of harm, joint liability and consensual dispute resolution.¹³

⁸ OECD, *Challenges and Co-Ordination of Leniency Programmes—Background Note by the Secretariat* ¶ 18 (Apr. 27, 2018), available at [https://one.oecd.org/document/DAF/COMP/WP3\(2018\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf) [hereinafter *OECD Secretariat Paper*].

⁹ *Id.* ¶ 19.

¹⁰ *Id.* at 3.

¹¹ *Id.* ¶ 21.

¹² *OECD Secretariat Paper, supra* note 8, ¶ 23; see also Antitrust Criminal Penalty Enhancement and Reform Act 2004, Pub. L. No. 108-237, 118 Stat. 661 (2004).

¹³ *OECD Secretariat Paper, supra* note 8, ¶ 23; see also Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, 2014 O.J. (L 349) 1.

IV. The International Dimension

16. As of 2018, over 120 countries have enacted antitrust laws. Many of these countries adopted their antitrust laws in the preceding 20 years, signaling recent and rapid growth of antitrust regimes.¹⁴ Currently, more than 60 jurisdictions have leniency programs in place, including all OECD member countries.¹⁵

17. Participants in international cartels will likely not apply for leniency in only one jurisdiction—as one application might trigger a chain of investigations in other jurisdictions—but consider multi-jurisdiction leniency applications. However, multi-jurisdictional applications might impose considerable costs on an applicant company.¹⁶ Even one leniency application is a time-consuming process that requires significant commitment from the reporting company throughout the entire cartel proceeding. The commitment is multiplied in cases of parallel applications.¹⁷ BIAC notes that this complexity does not apply only in respect of major global cartels. Indeed, with the increasing globalization of economies, only a relatively small proportion of markets and hence potential cartels are purely domestic in scope.

18. Among other things, companies that apply for leniency in multiple jurisdictions are required to: (i) provide timely answers to requests to all investigating authorities for additional information that may contribute to the establishment of facts; (ii) make employees and directors available for interviews all over the world; (iii) translate documents; and (iv) make sure that no employee destroys, falsifies or conceals relevant information or evidence related to the alleged cartel as the actions of one rogue employee in any of the jurisdictions investigated could jeopardize the applications in all other jurisdictions.¹⁸

19. In addition, companies must also walk a fine line between (i) disciplining employees who have breached corporate compliance policies whilst not undermining the cooperation some agencies may expect from those employees; (ii) disengaging from the cartel in a manner which satisfies those agencies who insist on immediate termination of the violation while also satisfying those agencies who wish to have the opportunity to conduct surprise investigations, without the tipping-off risk which withdrawal from the cartel may create; and (iii) conducting a full internal investigation in a manner that does not increase the risk of individual employee criminal liability in jurisdictions where leniency does not include such protections. For many companies, the cumulative cost of complying with these requirements and the business disruption caused by the process may outweigh the expected benefits of securing leniency.

20. To ensure that companies are not deterred from self-reporting, antitrust authorities should try to cooperate to eliminate currently incompatible and contrasting requirements and

¹⁴ BIAC, Summary of Discussion Points Presented by the Business and Industry Advisory Committee (BIAC) to the Global Forum on Competition—Roundtable on Fighting Corruption and Promoting Competition ¶ 18 (Feb. 27-28, 2014), available at http://biac.org/wp-content/uploads/2014/05/3-Final_BIAC_Fighting_Corruption_and_Promoting_Competition.pdf.

¹⁵ OECD Secretariat Paper, *supra* note 8, at 3.

¹⁶ *Id.*

¹⁷ *Id.* ¶ 39.

¹⁸ *Id.* ¶ 40.

to mitigate the complexity and costs of multi-jurisdictional leniency applications as much as possible. In dealing with leniency applications, for example, each authority could focus only on the harm a cartel has inflicted on their particular jurisdiction. Authorities could also better coordinate deadlines and timetables for key tasks and witness interviews. Finally, antitrust authorities may also be able to ease the burden of the applicant by allowing oral testimony from participants instead of only requiring written documents. This would help applicants who have found written evidence for one jurisdiction but not for another to rely on witness testimony in those critical jurisdictions.¹⁹

21. In addition to the costs of multi-jurisdictional applications, the multiplication of possible sources of investigation and sanctions can make it more difficult for a company to self-report by applying for leniency. For many years after the scope and benefits of the 1993 U.S. amnesty program were first revealed, the balancing of risk—i.e., risking criminal sanctions versus applying for amnesty—effectively drove the leniency decision in favor of self-reporting in almost any case involving U.S. jurisdiction. The situation is no longer necessarily so clear as the international landscape has developed with increasing risks and sometimes less clear and consistent benefits.²⁰ Indeed, the current international landscape has been described “as a jigsaw puzzle where not even the number of pieces—let alone the overall picture to be achieved—is apparent.”²¹ Such a situation is sub-optimal from both the agency and business perspectives.

22. Incentives to self-report will be maintained if the leniency programs available to applicants are consistent across jurisdictions, to the extent possible given the different legal, procedural and sanctions regimes. Managing different and sometimes even conflicting regulatory requirements inevitably increases the burden on companies considering applying for leniency. In practice, when an individual leniency program requires the production of information faster than the international norm or imposes processes that are outside the international norm or are likely to produce discoverable material, there is less of an incentive for global companies to self-report.

23. Antitrust authorities should communicate with their peers wherever possible to decide on common policies, such as on whether to allow the continuation of cartel conduct to enable agency preparation of the case, or aligning deadlines, or having a common approach on protection of information included in a leniency file. Giving companies more certainty and helping them to fulfill their duties of cooperation will increase the attractiveness of multi-jurisdictional applications.²²

24. In this regard, several jurisdictions are currently assessing the effectiveness of their leniency programs. While many of the changes—both those already implemented and those that are in the proposal stage—are intended to enhance the efficacy of individual leniency

¹⁹ *Id.* ¶ 44.

²⁰ BIAC Leniency Paper, *supra* note 1, ¶ 5.1.

²¹ BAKER & MCKENZIE, GLOBAL CARTELS HANDBOOK xciv (Mobley and Denton eds, Oxford Univ. Press) (2011).

²² OECD Secretariat Paper, *supra* note 8, ¶ 49.

programs, they may also adversely affect the coordination of leniency programs across multiple jurisdictions. BIAC respectfully submits that in considering changes to leniency regimes, authorities should weigh the benefits of international consistency and alignment, which incentivize applications in multijurisdictional cases, against procedures which may be more finely tuned to domestic procedural consideration, but which create greater uncertainty and so discourage them.

V. Recent and Proposed Changes to Leniency Programs

A. Updates to the United States Department of Justice’s “Frequently Asked Questions”

25. On January 17, 2017, the U.S. Department of Justice (DOJ) published an update to its *Frequently Asked Questions* issued in 2008. In this new version, the DOJ specified the conditions a) for granting “anonymous markers,” short-term markers with the requisite information about the industry but without naming the company seeking the marker; and b) under which current and former employees can receive immunity.²³

26. While the updated language enhances clarity for potential immunity applicants, it may also deter applicants from self-reporting, as the DOJ has signaled that it is less willing to accept anonymous markers without being provided more complete information up front, or to grant conditional leniency to current employees who are determined to be highly culpable.

B. Proposed Changes to the Canadian Competition Bureau’s Immunity Program

27. In October 2017, the Canadian Competition Bureau (CCB) announced a public consultation on proposed changes to its Immunity Program.²⁴ Amongst other things, the proposed changes would a) eliminate the “paperless process” at the proffer stage; and b) videotape witness interviews on a routine basis at early stages of an investigation.

28. Commentators from the Canadian Bar Association (CBA), American Bar Association (ABA) and International Bar Association (IBA) made submissions that the CCB’s proposed amendments to its Immunity Program may bring the Immunity Program out of step with leniency programs in other jurisdictions.²⁵

²³ U.S. Dep’t of Justice, Antitrust Div., *Frequently Asked Questions about the Antitrust Division’s Leniency Program and Model Leniency Letters* (Jan. 26, 2017), available at www.justice.gov/atr/page/file/926521/download.

²⁴ Competition Bureau, *Proposed Revisions to Immunity Program Under the Competition Act*, s.24 (Oct. 26, 2017), available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04316.html.

²⁵ Canadian Bar Ass’n, *Competition Law Sec., Re: Competition Bureau’s Proposed Revisions to the Immunity Program* (Jan. 22, 2018), available at [www.cba.org/Our-Work/Submissions-\(1\)/Submissions/2018/Janvier/Competition-Bureau-s-Proposed-Revisions-to-the-Imm](http://www.cba.org/Our-Work/Submissions-(1)/Submissions/2018/Janvier/Competition-Bureau-s-Proposed-Revisions-to-the-Imm); ABA Secs. of Antitrust Law & Int’l Law, *Comments of the American Bar Association Sections of Antitrust Law and International Law in Response to the Canadian Competition Bureau Request for Public Comments Regarding its Draft Immunity Program Bulletin* (Jan. 19, 2018), available at www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_salsil_20180119.pdf; Int’l Bar Ass’n,

29. At present, the CCB's paperless process is similar to the practice of the DOJ's and other antitrust agencies.

30. As a result of feedback from its initial public consultation noted above, on May 8, 2018 the CCB issued a revised draft of its proposed amended immunity and leniency programs for further public consultation.²⁶ The revised draft goes some way to accommodate the concerns expressed in regard to the initial proposal, including the maintenance of a paperless process when the CCB is dealing with the proffers of applicants and the videotaping of witness interviews only at later stages of the investigation.

31. We understand that the CCB will continue to engage in an ongoing and constructive dialogue with various stakeholders in order to ensure that the changes it ultimately ends up making to its Immunity Program are in the best interests of effective application of Canadian law and international enforcement co-operation.

C. Discussions on the Reform of Japan's Surcharge System

32. In April 2017, the Antimonopoly Act Study Group convened by the Japan Fair Trade Commission (JFTC) released its report on the administrative surcharge system in 2017.²⁷ The report recommended, *inter alia*, amendments to the leniency program in order to make it less rigid for potential applicants.

33. Under the current system, incentives (i.e., a reduction on the surcharge) are only provided to the first five companies to come forward, provide relevant information and cooperate in the investigation. It has been suggested that this system does not give wrongdoers an incentive to cooperate after a certain point.

34. To address these concerns, the report advocates eliminating the limit on the number of applicants that can receive a reduction on the surcharge. It also encourages the JFTC to be given greater discretion to determine precise reduction rates based on its evaluation of the evidence voluntarily submitted by applicants.²⁸

35. While eliminating the limit on the number of applicants may incentivize additional parties to come forward, providing the JFTC with enhanced discretion may reduce the program's predictability, particularly for companies assessing penalties in various jurisdictions.

Antitrust Comm., Ref. Proposed Amendments Canadian Competition Bureau's Immunity Program (Jan. 22, 2018), available at www.ibanet.org/Document/Default.aspx?DocumentUid=3EDD365E-33AB-44D5-80EE-5C5CA9623FB8.

²⁶ Competition Bureau, Draft Immunity and Leniency Programs under the Competition Act (May 8, 2018), available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04359.html.

²⁷ JAPAN FAIR TRADE COMM'N, REPORT OF THE STUDY GROUP ON THE ANTIMONOPOLY ACT (Apr. 2017), available at www.jftc.go.jp/en/pressreleases/yearly-2017/April/170425.files/170425-3.pdf.

²⁸ Baker McKenzie, Latest Developments in Discussions on the Reform of the Surcharge System: Publication of the Antimonopoly Act Study Group Report (Sept. 20, 2017), available at www.bakermckenzie.co.jp/wp/wp-content/uploads/ClientAlert_170920_Surcharge-to-Antitrust-Violation_E.pdf.

36. We understand that the report does not contain specific details regarding the amendments to the Antimonopoly Act, and that its contents may not reflect the final form of the amendments.

VI. Use of Markers in Leniency Programs

37. In addition to the issues that may arise due to the costs of multijurisdictional applications, as well as inconsistencies between leniency programs in different jurisdictions, significant problems also arise absent an integrated international system for obtaining markers in leniency programs.²⁹

38. Marker systems allow a prospective leniency applicant to approach an antitrust authority with initial information about their participation in a cartel in exchange for a commitment by the authority to hold the applicant's place in line for leniency, for a finite period of time, while the applicant gathers additional information to complete its application.³⁰

39. An effective marker system is an important element of a leniency program and over 40 jurisdictions have adopted a marker approach. However, at present there is no integrated international marker system; instead, there are varying rules and requirements for obtaining markers in different jurisdictions.

40. Some of the problems that can arise from the absence of an integrated international marker system are (i) the existence of different "first in" leniency applicants in different jurisdictions; and (ii) the risk of premature disclosure of the cartel investigation.³¹

41. A one-stop shop marker system would permit one or more designated agencies to become the "clearinghouse agency" for markers involving international cartel matters. A potential applicant would contact one of the clearinghouse agencies requesting a marker, clearly indicating the jurisdictions in which the applicant is seeking leniency. The clearinghouse agency would ensure that the requisite information was gathered and then promptly send an alert to all indicated agencies with an official date and time of the one-stop shop application. Any indicated agency that had received a prior marker request from another applicant with respect to the same conduct could reject the one-stop shop application in its own jurisdiction but could not void the one-stop marker application in any other jurisdiction. The applicant would then hold the marker for the prescribed period. Before that period expired, the marker would have to be perfected according to the separate laws or regulations of the various individual jurisdictions.³²

²⁹ OECD, *Use of Markers in Leniency Programs—Note by the Secretariat* (Mar. 24, 2015), available at [www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP3\(2014\)9&doclanguage=en](http://www.oecd.org/officialdocuments/displaydocument/?cote=DAF/COMP/WP3(2014)9&doclanguage=en) [hereinafter *OECD Leniency Markers Paper*].

³⁰ *Competition and the use of markers in leniency programmes*, OECD, available at www.oecd.org/competition/markers-in-leniency-programmes.htm

³¹ *OECD Leniency Markers Paper*, *supra* note 29, ¶¶ 5-6.

³² John M. Taladay, *Time for a Global "One-Stop Shop" For Leniency Markers*, *ANTITRUST*, Fall 2012, at 47.

42. The one-stop shop mechanism would be an “opt-in” mechanism both for agencies and applicants.³³ No agency would be required to participate in a one-stop shop marker system. The system could be established with a baseline group of jurisdictions,³⁴ and individual jurisdictions could elect to participate or not. An applicant would also have the option of selecting the jurisdictions in which it was seeking a marker in order to avoid potential proceedings in jurisdictions where it does not operate or has only a minimal presence.

43. Providing first-in leniency applicants with a one-stop shop option to report suspected cartel behavior and obtain a marker would benefit agencies and leniency applicants alike.

44. First, leniency applicants would have an efficient mechanism to report cartels in all relevant jurisdictions at once, eliminating the potential for different leniency applicants in different jurisdictions and encouraging prompt and comprehensive reporting. Second, all jurisdictions would learn of potential cartel violations at an early stage and be able to maximize their potential to pursue antitrust wrongdoers. Third, such a system would limit the amount of information required to be shared about the investigation, and the number of people exposed to that information prior to dawn raids. Fourth, it would facilitate coordination among the agencies themselves, for instance, in conducting synchronized dawn raids.³⁵

45. The uncertainty engendered by the current absence of a one-stop shop system imposes additional burdens on applicants considering applying for leniency markers in multiple jurisdictions. These burdens deter potential applicants from applying for leniency, undermining effective cartel detection. A one-stop shop marker system would eliminate many of those burdens by providing a uniform framework pursuant to which a marker can be acquired. Ultimately, it would provide a more efficient and effective approach when applying for leniency in multiple jurisdictions.

VII. Conclusion

46. In BIAC’s view, an effective leniency program will encourage applicants to self-report. The significant costs of multi-jurisdictional applications, internationally inconsistent policies, and challenges created by the absence of an internationally integrated system for establishing a consistent priority date for leniency markers, will deter—rather than incentivize—such behavior.

47. Accordingly, best practice should aim for coordination between antitrust authorities to best mitigate the costs of applying for leniency in multiple jurisdictions, as well as clear and consistent policies between antitrust authorities to assist companies with the difficulties of navigating multiple regulatory regimes. Best practice would also ideally incorporate a one-stop shop to obtain a priority date for the initial notification of leniency applications. This approach

³³ *Id.*

³⁴ As a practical matter, a one-stop shop marker system could not function without the participation of the U.S. and EC authorities, as well as at least several other jurisdictions.

³⁵ *OECD Leniency Markers Paper, supra* note 29.

would mitigate the system frictions that presently exist between different leniency programs and facilitate more effective international cartel enforcement.