

Does a Drop in Cartel Decisions Highlight Shifting Patterns of Engagement Between Competition Agencies and Companies?

By Wouter Meester and Daniel Westrik | OECD



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The withdrawal of a cartel case brought against Citigroup and Deutsche Bank in last February came as a surprise to many, marking the termination of a long-running high-profile Australian Competition & Consumer Commission cartel case that would have been the country's largest-ever white-collar criminal trial.² The Citi-Deutsche case, which could have seen lengthy jail sentences imposed on executives in connection with a US\$1.8 billion share placement, was abandoned after federal prosecutors concluded that the competition authority's evidence against the banks was unlikely to lead to convictions.

Although the case and its circumstances are unique, difficulties detecting and finding evidence of cartels could be one of the reasons for a broader pattern of declining cartel decisions around the world in recent years, a trend identified in the [OECD Competition Trends 2022](#) report. This latest edition of the OECD's annual flagship publication on trends in competition enforcement was launched on 23 February during the 2022 Competition [Open Day](#) and includes data from 73 jurisdictions over a six-year period from 2015 to 2020 ("the period").

The reduction in cartel decisions in most regions during the period may underline the increasing complexity of cases³ in an era in which fewer companies come forward to self-report their conduct in exchange for immunity from, or a reduction in, sanctions. The average number of leniency applications per jurisdiction dropped

64% during the period, from 12 in 2015 to 4.4 in 2020.⁴ Only six jurisdictions among 40 with active leniency programmes and adequate data saw increases in leniency filings.⁵ As leniency applications have traditionally been one of the most important tools for detecting cartels in many jurisdictions, the decline in cartel decisions does not signal anything so simple as a reduction in enforcement activity, but rather a changing pattern of engagement between competition authorities and companies.

Amid the broadly increased complexity of cartel cases, existing literature⁶ suggests a number of specific explanations for the declining use of leniency programmes, including the lengthy duration of cartel investigations, the damage to relationships between businesses and their competitors and clients, and negative consequences for employees. The rise of private enforcement, in which companies typically face follow-on damages claims regardless of the extent to which they cooperate with competition authorities, has been cited as another potential reason for the drop in leniency filings.⁷

OECD Competition Trends 2022 shows that the drop in leniency applications has certainly accelerated in several jurisdictions where private enforcement was recently introduced. However, their similarly stark (continuous) decline even in jurisdictions that were early to adopt private enforcement mechanisms – such

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² <https://www.accc.gov.au/media-release/cdpp-withdraws-charges-in-bank-criminal-cartel-case>.

³ The decline in cartel decisions may be partly explained by "the rise of atypical and sophisticated cartels"

<https://globalcompetitionreview.com/follow-claims/eu-reviewing-leniency-policy-amidst-drop-in-first-in-applications-enforcer-says>.

⁴ The average number of leniency applications was already declining prior to the onset of COVID-19; they were 42% lower in 2019 than 2015.

⁵ There are 40 jurisdictions that have an active leniency programme (i.e., with at least one leniency application between 2015 and 2020) and have sufficient data (i.e., provided data for the entire period 2015 to 2020). 29 jurisdictions (73%) had less leniency applications in 2020 as in 2015. Five jurisdictions (13%) had the same number of leniency applications in 2020 as in 2015.

⁶ See Ysewyn, J. (2018), *The Decline and Fall of the Leniency Programme in Europe*, pp. 44-59, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126172.

⁷ See Jaspers, J.D., (2020) *Leniency in exchange for cartel confessions*. *European Journal of Criminology*, 17(1), pp.106-124, <https://journals.sagepub.com/doi/pdf/10.1177/1477370819874432>.

as the US^{8,9} – complicates the picture, making straightforward conclusions difficult to draw.¹⁰ According to the OECD's data, the worldwide reduction in leniency applications over the period was accompanied by a decline in the number of ex-officio investigations conducted, with the average number of investigations falling 38% across the jurisdictions included in the data – a smaller drop than that seen in relation to leniency, but a marked reduction, nonetheless.

Against this backdrop, a strong decline in the number of cartel decisions globally might have also been expected, yet the OECD's data showed a relatively lesser reduction – of 18% – between 2015 and 2020. Given the fact that the proportional declines in leniency filings and ex-officio investigations were significantly larger than the corresponding drop in the number of cartel decisions, it may be tempting to interpret the discrepancy as evidence of increasingly effective enforcement amid an overall reduction in detection and investigation activity. After all, leniency programmes and ex-officio investigations are the main means by which competition authorities uncover and prosecute cartels, so a smaller drop in decisions may appear to suggest greater efficiency and enhanced effectiveness in competition authorities' enforcement efforts (i.e. a higher proportion of cases leading to a sanction).

Yet such a conclusion is hard to sustain. Measuring competition enforcement in terms of the numbers of decisions¹¹ can be useful, but it is not without its limitations, as numbers alone

do not provide any indication of the size, nature, quality or context of the decisions made. In the same way, a straightforward decline in decision numbers, regardless of the numbers of leniency filings and investigations, does not necessarily imply that there has been a decline in enforcement. The dynamics of cartel decisions are complicated, and it is difficult to reach definitive conclusions.

Nonetheless, we may continue to witness a decline in the number of cartel decisions in the coming years. After all, there is often a lag between changes in the use of detection tools and changes to the number of cartel decisions as it typically takes several years after opening a cartel investigation before an authority makes a final decision.

It is also entirely possible that the number of cartels has fallen, perhaps due to greater awareness of illegal conduct, thanks to increased advocacy efforts by competition authorities and increased adoption of internal compliance programmes.¹² Or, as we posited at the beginning of this article, the decline in cartel decisions may be attributed in part to the increased complexity of cases¹³, manifested, for instance, in the internationalisation of cases and infringements¹⁴, the changing nature of cartels such as fewer meetings in “smoke filled rooms”, and more advanced communications that leave

⁸ Snelders, R. (2021), Cartel settlements: An overview of EU and national case law, <https://www.concurrences.com/en/bulletin/special-issues/cartel-settlements/anticompetitive-practices-3712/cartel-settlements-an-overview-of-eu-and-national-case-law>.

⁹ A leniency application in the US does not typically hinder bringing a follow-on damages claim, although in some cases, it may allow the leniency applicant to partially or entirely avoid liability for treble damages and joint and several liability. [https://uk.practicallaw.thomsonreuters.com/w-006-7098?transitionType=Default&contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/w-006-7098?transitionType=Default&contextData=(sc.Default)).

¹⁰ Recent experimental evidence suggests that private enforcement reduces leniency applications, but that leniency applications increase when the whistleblower is protected from follow-on damages claims. See Bodnar, O., Fremerey, M., Normann, H. T., & Schad, J. L. (2021). The effects of private damage claims on cartel activity: Experimental evidence (No. 315). DICE Discussion Paper.

Moreover, the European Commission is currently considering giving first-in leniency applicants immunity from private enforcement (<https://globalcompetitionreview.com/follow-claims/eu-reviewing-leniency-policy-amidst-drop-in-first-in-applications-enforcer-says>).

¹¹ In the OECD Competition Trends 2022 report, decisions are not necessarily established infringements as some regimes use formal decisions to confirm the absence of an infringement. Moreover, in some cases, final decisions may still be subject to appeal. The total number of decisions excludes these appeals. For the purposes of the report, multiple decisions for the same cartel case (e.g., a separate decision for each defendant) are treated as a single decision.

¹² OECD (2021), Competition Compliance Programmes, OECD Competition Committee Discussion Paper, <http://oe.cd/ccp>, page 22.

¹³ This has been suggested as a potential explanation for the decline in cartel decisions in the US, but may equally apply more broadly. See for instance Ghosal, V., & Sokol, D. D. (2020). The Rise and (Potential) Fall of US Cartel Enforcement. U. Ill. L. Rev., 471, <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=2019&context=facultypub>.

¹⁴ OECD (2020), OECD Competition Trends 2020 <http://www.oecd.org/competition/oecd-competition-trends.htm>.

a smaller paper trail.¹⁵ Companies are also often better prepared, spending more on competition lawyers¹⁶ and economists.¹⁷

While digitalisation provides new means and opportunities for companies to collude, it has also improved the way in which competition authorities can detect and investigate cartel infringements. For example, using advanced screening methodologies, specialist digital units and improved IT-forensic tools.¹⁸

The dynamics of declining leniency, ex-officio investigations and cartel decisions are complex and will benefit from further research. The

annual *OECD Competition Trends* reports will continue to track them. The importance of leniency programmes for many competition authorities to detect and prosecute cartels warrants increased efforts to invigorate such programmes. This includes ensuring they are accompanied by sufficiently high sanctions to increase deterrence as well as adequate powers and tools for a consistently high risk of detection, investigation and prosecution. The OECD will continue to facilitate debate to share lessons learnt and possible solutions for the future.

¹⁵ See Abrantes-Metz, R. M., & Metz, A. (2019). The Future of Cartel Deterrence and Detection. *CPI Antitrust Chronicle*, January. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360615.

¹⁶ Gartner (2020), Gartner Predicts Legal Technology Budgets Will Increase Threefold by 2025 <https://www.gartner.com/en/newsroom/press-releases/2020-02-10-gartner-predicts-legal-technology-budgets-will-increase-threefold-by-2025>.

¹⁷ OECD (2021), OECD Asia-Pacific Competition Law Enforcement Trends, <https://www.oecd.org/daf/competition/oecd-asia-pacific-competition-law-enforcement-trends.htm>.

¹⁸ OECD (2017), Algorithms and Collusion: Competition Policy in the Digital Age www.oecd.org/competition/algorithms-collusion-competition-policy-in-the-digital-age.htm.