

OECD Competition Trends 2022

Please cite this publication as:

OECD (2022), *OECD Competition Trends 2022*
<http://www.oecd.org/competition/oecd-competition-trends.htm>

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SPOTLIGHT ON LENIENCY PROGRAMMES

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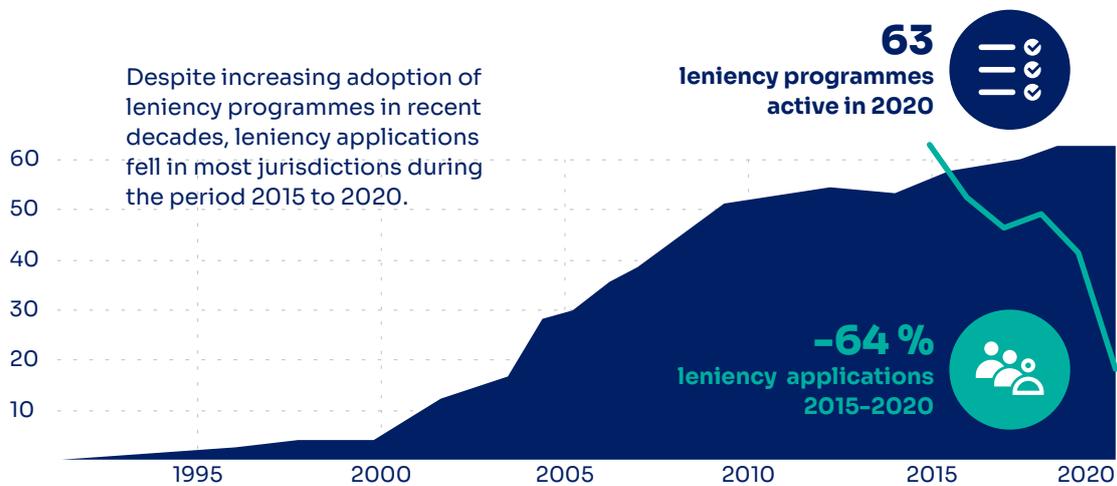
5. Spotlight on Leniency Programmes

Investigating cartels can be challenging since they are usually entered secretly with the aim of avoiding detection. Competition authorities use various tools to detect cartels. One of these tools is leniency programmes (sometimes also referred to as immunity or amnesty programmes; hereinafter jointly referred to as leniency programmes).

Leniency programmes offer cartel members the opportunity to report their conduct, provide information and evidence, and co-operate with an investigation, in exchange for immunity from, or a reduction in, sanctions (OECD, 2019^[20]). Cartel members therefore need to consider the trade-off between continuing the infringement – making additional profit but risking an often substantial sanction – and coming forward by filing a leniency application, which can avoid or limit a potential sanction. Incentives to apply for leniency can be characterised using the so-called ‘prisoner’s dilemma’, because there is a constant threat that a participant may report the cartel to a competition authority (Beaton-Wells, 2015^[21]).

Leniency programmes pursue objectives that can be divided into two broad groups. First, leniency programmes uncover conspiracies that would otherwise go undetected (OECD, 2014^[22]). Second, leniency programmes act as a form of deterrence. Companies may have less of an incentive to form a cartel due to the increased risk of detection resulting from the constant threat of one of the participants reporting the cartel. Leniency programmes may only be effective in reducing cartels, due to the increased threat of detection, if these programmes continue to be accompanied by other detection tools, such as ex-officio investigations (Chang, 2009^[23]).

Importantly, a leniency programme needs to be well-balanced to be effective. It requires both the threat of high fines for cartel members and some risk of detection and prosecution of cartels (OECD, 2019^[22]). Furthermore, it is important that the leniency programme is clear and transparent; such that potential applicants understand the procedure and possible consequences (see (UNCTAD, 2016^[24]) and (Volpin, Forthcoming^[25])). In particular, clarity regarding the scope of immunity or reduction of fines may be crucial (OECD, 2019^[19]).



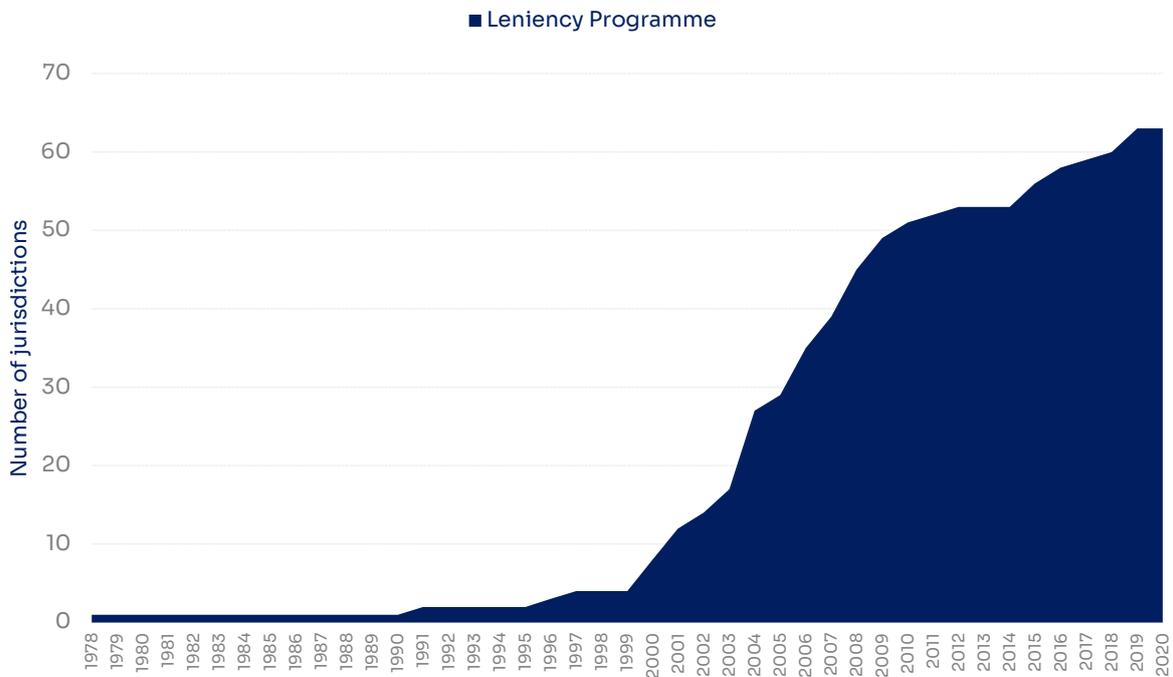
NOTE: Data based on the 63 jurisdictions in the OECD CompStats database that have a leniency programme.
SOURCE: OECD CompStats database.

5.1 Leniency programmes around the World

The first leniency programme from the jurisdictions included in the OECD CompStats database was introduced in 1978. However, most jurisdictions in the OECD CompStats database adopted a leniency programme in the last 20 years.

Most leniency programmes were adopted between 2000 and 2010.

Figure 5.1. Number of jurisdictions with a leniency programme by year of adoption

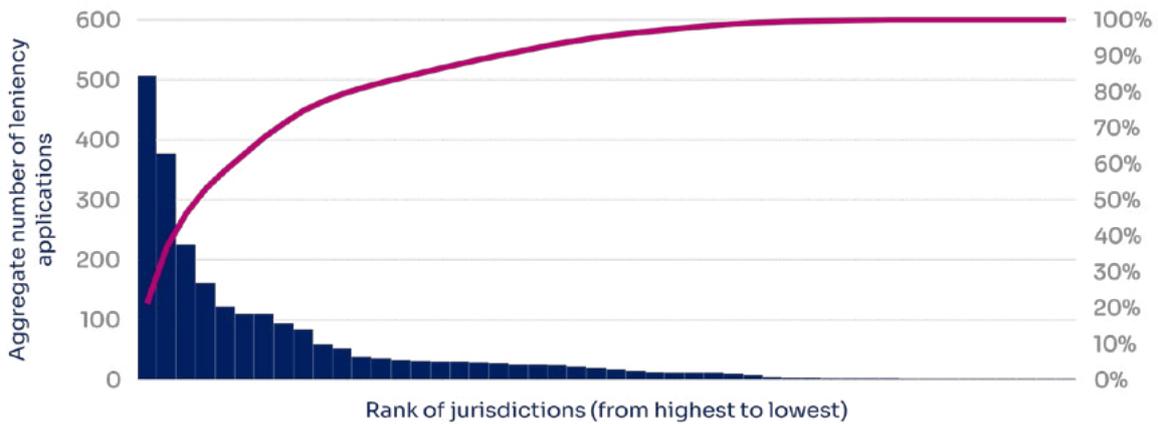


NOTE: Data based on the 63 jurisdictions in the OECD CompStats database that have a leniency programme.
SOURCE: OECD CompStats database.

In many jurisdictions, leniency remains the key (and sometimes only) tool to detect cartels. Most cartel decisions in 2019 included an immunity/leniency applicant (Allen & Overy, 2020^[26]). However, this is not the case for all jurisdictions with a leniency programme. A few jurisdictions represented most

leniency applications during the period 2015 to 2020. The top 4 jurisdictions represented 53.1% of all leniency applications, while the 20 most active leniency programmes (top-20) attracted 91.2% of the applications made.

Figure 5.2. Aggregate number of leniency applications for the period 2015–2020, by jurisdiction



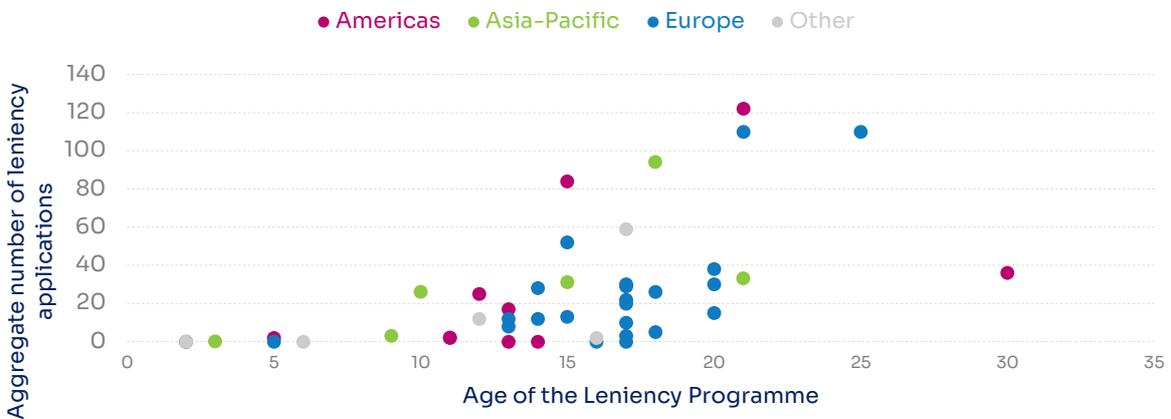
NOTE: Data based on the 48 jurisdictions in the OECD CompStats database that provided comparable data for all six years and have a leniency programme in force. These jurisdictions provided complete leniency applications data for all six years. There are 25 jurisdictions that are excluded, 19 of these because they provided incomplete leniency applications data for all six years and 6 of these because they do not have a leniency programme. There are also 9 jurisdictions that had zero leniency applications over the period 2015–2020. The blue bars indicate the aggregate number of leniency applications for each jurisdiction. The number of leniency applications can be determined using the left y-axis. The pink line represents the cumulative percentage of leniency applications, starting with the jurisdiction with the highest number of aggregate leniency applications, on the left-hand side of the distribution, and adds the percentage for each jurisdiction as the line goes from left to right. The cumulative percentage can be determined using the right y-axis.

SOURCE: OECD CompStats database.

Leniency programmes may take some time to become effective and established. Young leniency programmes often have no, or low, leniency

applications. There is a positive correlation between the number of leniency applications and the age of the leniency programme.

Figure 5.3. Total Leniency applications for the period 2015–2020 against the age of the leniency programme, by region



NOTE: Data based on the 48 jurisdictions in the OECD CompStats database that provided comparable data for all six years and have a leniency programme in force, however 4 of these jurisdictions are outside of the range presented in this figure.

SOURCE: OECD CompStats database.

5.2 Overall decline in leniency applications

The number of leniency applications declined during the period 2015 to 2020. The decline in leniency applications in Europe is well documented (Ysewyn, 2018^[27]). However, the decline in leniency applications is prevalent around the world as all regions in the OECD CompStats database show this trend. Leniency applications declined in most jurisdictions in the OECD CompStats database. The number of leniency applications was lower in 2020 than 2015 in 28 jurisdictions (71.8% of the 39 jurisdictions that had at least one leniency application during the period 2015-2020 and provided complete data for all six years).

In Europe, the number of leniency applications steadily declined for the period 2015 to 2020. Leniency applications were 70.5% lower in 2020 than 2015.

In the Americas, the number of leniency applications declined, although not as steadily as in Europe. Nonetheless, leniency applications were 68.6% lower in 2020 than 2015.

-37%

2019-2020, All

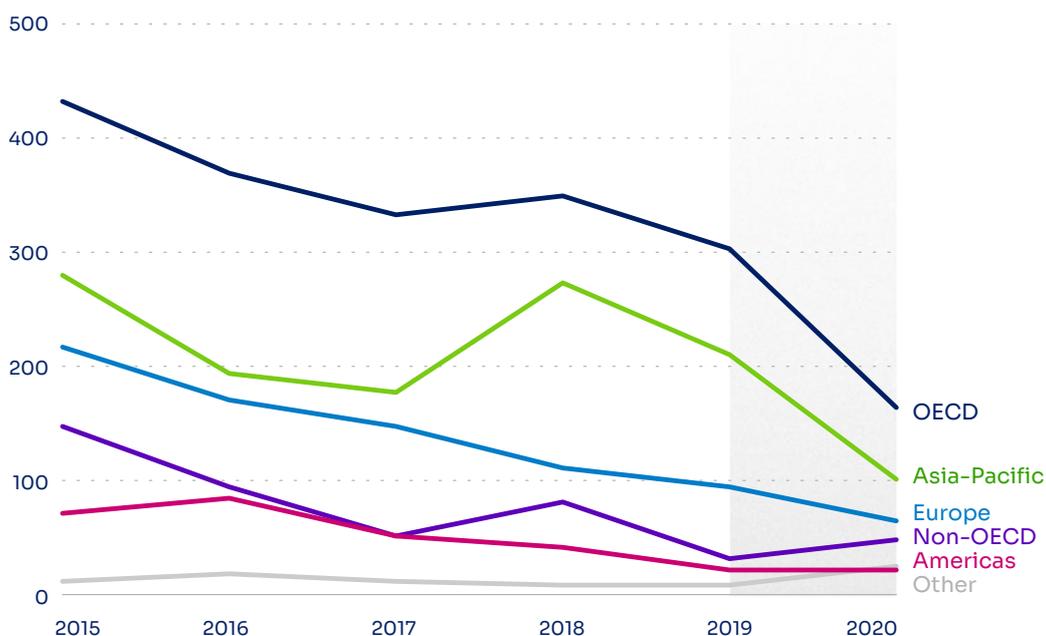
-46%

2019-2020, OECD

In Asia-Pacific, the number of leniency applications also declined over the period 2015 to 2020, however this was not a smooth decline. There were spike increases in 2018 and 2019 followed by a significant drop in 2020, although these changes were predominantly caused by a single jurisdiction. Excluding this jurisdiction, the number of leniency applications declined more steadily in Asia-Pacific over the period.

In the region Other, there is an apparent increase in the number of leniency applications in 2020. However, 95.7% of this increase from 2019 to 2020 is driven by a single jurisdiction. Excluding this jurisdiction, there was a decline in the region Other from 2015 to 2020.

Figure 5.4. Total leniency applications, 2015-2020



NOTE: This figure includes 48 jurisdictions that provided complete leniency applications data for all six years and have a leniency programme in force.
SOURCE: OECD CompStats database.

5.3 Leniency applications and private enforcement

The literature points out several possible explanations for a decline in leniency programmes.⁶ However, these explanations may vary by jurisdiction and sector and can depend on specific circumstances and factors. Thus, it is difficult to identify explanations that are generally valid.

One of these possible explanations is private enforcement. It is an example of something that has changed significantly over time in many jurisdictions and could have a potential effect on leniency programmes, particularly in Europe in the last few years. Private enforcement enables potentially harmed customers to pursue damage claims against cartel members. In jurisdictions with private enforcement, in addition to criminal and/or civil and administrative sanctions, when considering a leniency application, cartelists also need to assess potential litigation costs and damages resulting from private enforcement. Given this risk of substantial additional costs, private enforcement could have a considerable impact on a cartelist's decision to file for leniency.

To determine whether private enforcement can have a significant impact on the number of leniency applications, the analysis below focuses on jurisdictions that had a meaningful number of leniency applications during the period 2015–2020. As mentioned above, the top-20 jurisdictions represent 91.2% of all leniency applications in the OECD CompStats database in the period 2015–2020. These jurisdictions cover all regions in the OECD CompStats database, with 9 in Europe, 7 in Asia-Pacific, 3 in Americas and 1 in Other. Therefore, the analysis and figures below focus on these jurisdictions.

The EU member states strengthened private enforcement in recent years as they transposed the EU Directive on Antitrust Damages Actions⁷ into national law (Rodger, 2018^[28]).

Most of the 9 European jurisdictions included in this analysis that introduced private enforcement in the period 2005 to 2020 (see Figure 5.5)⁸, showed a decline in leniency applications following the introduction of private enforcement (and often a sharper one than the general decline before its introduction).

Of the remaining 11 jurisdictions, only one of these jurisdictions introduced private enforcement in the period 2005 to 2020 (see Figure 5.6). Most of the remaining 10 jurisdictions introduced private enforcement before 2005. Many of these jurisdictions also show an apparent decline in the number of leniency applications for a comparable period (e.g. from around 2014 onwards).

These figures suggest that there are likely other additional factors causing the decline in leniency applications. Indeed, some academic literature has commented on the US, where a decline in leniency applications has also been observed in the past few years despite no recent change in private enforcement which is already well established (Snelders, 2021^[17]).

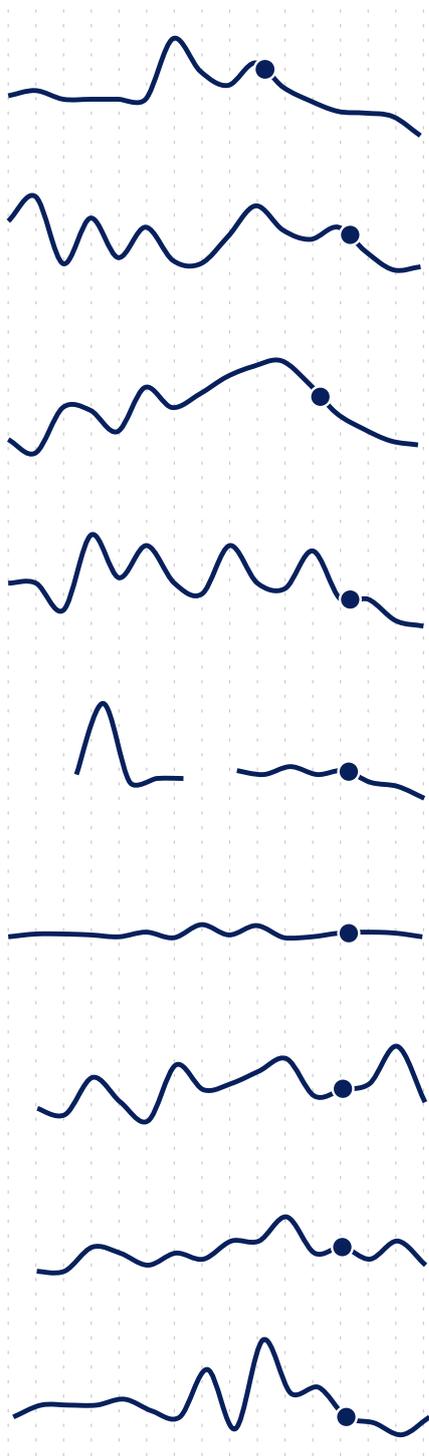
20 jurisdictions represented 91% of leniency applications during the period 2015 to 2020, while four jurisdictions accounted for 53%.

6. This includes, for instance, (i) the uncertainties around the cartel concept; (ii) the risk of losing a fighting chance; (iii) the uncertainty concerning jurisdiction; (iv) the very high administrative hurdle; (v) the duration of cartel investigation and damage claims; (vi) the discretionary marker regime; (vii) the domino effect through the extension of the cartel into other markets and jurisdictions; (viii) the broader impact on the relationship with competitors; (ix) the implication for employees; and (x) the risk of private damages (Ysewijn, 2018^[27]), (Volpin, Forthcoming^[21]) and (OECD, 2018^[22]).

7. Directive no. 2014/104/EU.

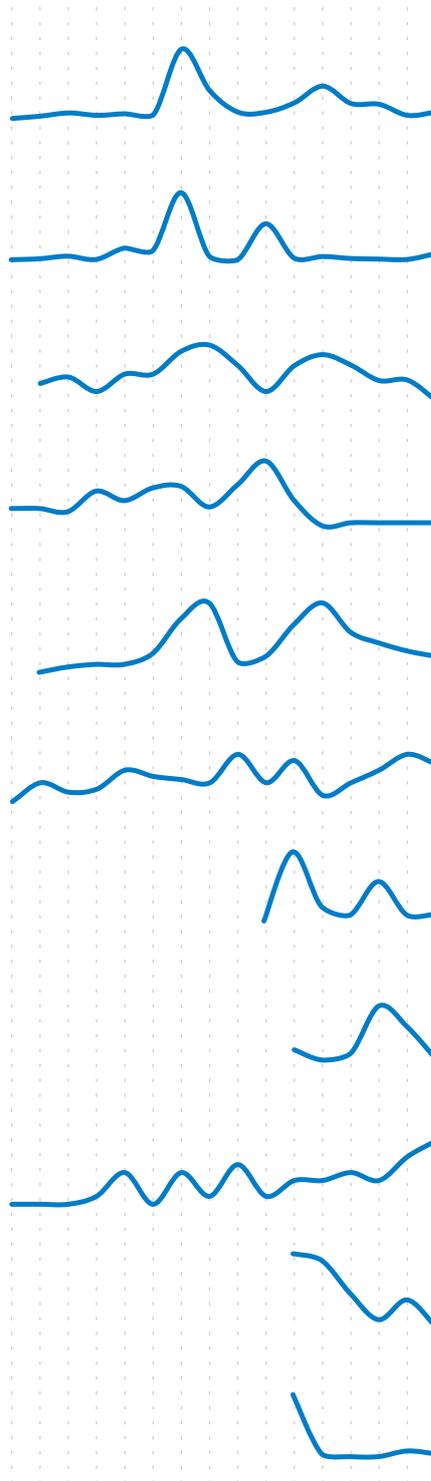
8. In order to better contextualise a potential trend after the introduction of private enforcement in a jurisdiction, the OECD has added more years to the analysis by adding data for 2005 to 2014 from Global Competition Review, GCR Rating Enforcement 2021. Consequently, the figures below present the evolution of leniency applications for the period 2005 to 2020 in the top-20 jurisdictions, separated by jurisdictions in Europe and in the rest of the world.

Figure 5.5. Evolution of leniency applications in jurisdictions in Europe that are in the ‘top 20’, 2005-2020



NOTE: A dot indicates the year that private enforcement was introduced in a given jurisdiction.
SOURCE: CompStats database for the period 2015-2020 and GCR's enforcer tracker data from 2005 to 2014.

Figure 5.6. Evolution of leniency applications in jurisdictions in Rest of World that are in the ‘top 20’, 2005-2020



NOTE: A dot indicates the year that private enforcement was introduced in a given jurisdiction.
SOURCE: CompStats database for the period 2015-2020 and GCR's enforcer tracker data from 2005 to 2014.