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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM
Session II: Leniency Programmes in Latin America and the Caribbean –
Recent Experiences and Lessons Learned**

-- Calls for Country Contributions --

12-13 April 2016, Mexico City, Mexico

The attached document is circulated in preparation for the discussion under Session II of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 12-13 April 2016 in Mexico. Delegates are requested to send written contributions for that session to the Secretariat by 11 March 2016 at the latest. Advance notice of contributions by Monday 15 February 2016 would be useful.

Contact: Ms. Lynn Robertson, Policy Analyst, Competition Division [Tel: +33 1 45 24 18 77 -- E-mail address: Lynn.ROBERTSON@oecd.org]

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



**14th Latin American and Caribbean Competition Forum
12-13 APRIL 2016, Mexico City, Mexico**

Session II Leniency Programmes in Latin America and the Caribbean – Recent Experiences and Lessons Learned

CALL FOR COUNTRY CONTRIBUTIONS

Introduction

1. This request for contributions is circulated in preparation for the discussions to be held at the 2016 Latin American and Caribbean Competition Forum (LACCF) on the topic of “**Leniency Programmes in Latin America and the Caribbean – Recent Experiences and Lessons Learned**”.

2. You are invited to prepare and submit a concise and synthetic written contribution for this session. In this call for contributions we aim to identify some topics that you may wish to address in your written and oral contributions. Please note that this list is neither prescriptive nor exhaustive. You are free to raise other relevant issues that reflect your experiences.

3. To assist the OECD Secretariat in planning the session, please inform us by **15 February 2016** if you intend to submit a contribution. The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin [Angelique.Servin@oecd.org] and copied to: Lynn Robertson [Lynn.Robertson@oecd.org] by **11 March 2016 at the latest**. Country contributions will be circulated to participants through the LACCF website (www.oecd.org/competition/latinamerica and <http://laccf2016mexico.com/en/home-2/>). Furthermore, if you would like to circulate other relevant material, such as your Leniency Programme or related documentation, please submit a copy to the Secretariat before **11 March 2016**.

Background

4. Hard core cartels are unanimously recognised, using the words of the 1998 OECD Council Recommendation concerning Effective Action against Hard Core Cartels, as “*the most egregious violation*” of competition law and hence a principal focus of competition policy and enforcement. Because cartel behaviour is illegal, and even criminal in some jurisdictions, the participants take pains to conceal it.

That secrecy makes discovering and proving violations much more difficult for enforcement agencies. It is for this reason that Governments face serious challenges when designing and implementing effective enforcement procedures to detect cartels.

5. Most jurisdictions today have developed programmes that offer leniency in order to encourage violators to come forward and confess the participation to the cartel and to implicate their co-conspirators with first-hand, direct “insider” evidence that provides convincing proof of the illegal conduct. By offering amnesty to the first conspirator who fully co-operates with a competition agency, or a more lenient treatment to subsequent applicants, these programmes are intended to induce cartel members to come forward and disclose the existence of a cartel, and to provide evidence of the conspiracy.

6. The main objective of these programmes is to uncover conspiracies that would otherwise go undetected. They elicit confessions, direct evidence about other participants, and leads that investigators can follow for other evidence too. The evidence is obtained more quickly, and at lower direct cost, compared to other methods of investigation, leading to prompt and efficient resolution of cases. To get this information, the parties who provide it are promised lower fines, shorter sentences, less restrictive orders, or even complete amnesty. Amnesty/leniency programmes have increased significantly the number of detected cartels in many jurisdictions. They seem to have also facilitated the successful prosecution of cartel cases by providing competition agencies with hard evidence of the competition law infringement.

7. The term “leniency” is used here to describe all programmes that provide for any reduction in sanction in exchange for information and co-operation. The more precise term “amnesty” will be used to describe a programme that promises no penalty to the first party to come forward to the enforcement agency and comply with the agency’s requirements. Logically, amnesty is included within the more general concept of leniency. This distinction is adopted here for clarity. Public announcements of these programmes do not always make this distinction clearly, and some use the terms “leniency” and “amnesty” almost interchangeably.

Leniency Programmes – Common Features

8. Leniency programmes vary across jurisdictions due to various factors, for example antitrust enforcement may be of administrative or adjudicative character. There are, however, basic features that are common to all of them.

9. The basic principle of leniency is that a cartel member who first discloses the existence of an illegal cartel to the authorities is rewarded through full immunity from any pecuniary and criminal sanctions. An amnesty policy, a representative example of which is the US programme, provides for rewards (usually full immunity) only to the first-in applicant. Most leniency programmes take into consideration also co-operation from other cartelists (also called subsequent applicants) and reward them with a reduction in the level of the fine corresponding to the value of the cooperation provided. This is the case, for example, in most European countries.

10. There are generally no restrictions as to who is eligible for leniency except with respect to full immunity for those companies that initiated the cartel (instigators), significantly lead others in the course of its operation (leaders) or coerced others to participate therein (coercers). Some jurisdictions preclude granting full immunity to instigators, leaders and coercers while others exclude only coercers or leaders. Leniency policies generally impose three types of requirements on leniency applicants: (i) to terminate its involvement in the cartel, (ii) to maintain secrecy as to the fact that an immunity application was made, and (iii) to co-operate fully with the enforcement authority throughout the proceedings.

11. The first-in applicant is generally required to supply sufficient evidence pointing at the existence of the cartel and its members, in addition to information of a logistical nature so as to enable the agency to effectively target its investigation. The demands on subsequent applicants are generally more fluid. However, as any reduction in sanctions that would otherwise be imposed is derived from the quality of co-operation and added-value of the information supplied, there is pressure for leniency applicants to provide as complete and comprehensive account of the facts as possible, supported by all available evidence, in a timely manner.

12. Information and evidence can usually be provided both in oral and written form, depending on the evidentiary rules in different jurisdictions. With respect to information provided by leniency applicants most systems provide for a maximum protection against disclosure. This is to ensure that leniency applicants are not in a worse position than they would be had they not come forward.

Designing Effective Leniency Programmes

13. Leniency programmes have proven very successful for many competition authorities in detecting, investigating and prosecuting hard-core cartels and, as a result, have been adopted in a large number of jurisdictions around the world. Despite their general success, in certain cases leniency programmes have not been as effective as expected. Various reasons can explain these uneven experiences: the legal and cultural context in different jurisdictions, the enforcement record and the reputation of the agency, the size of the economy, and the features and design of the leniency programme itself.

14. Designing an effective leniency programme also requires careful consideration of other antitrust enforcement policies. Immunity programmes do not operate in a vacuum. They interact with and affect other related anti-cartel enforcement policies including: (i) sanctioning (fining) policy, (ii) early case termination policies (e.g. settlements and plea bargaining), and (iii) private damage claims policy. A leniency programme offers the right incentives only if there is a clear and established approach to sanctions. Transparency and predictability of fines therefore play an important role when companies decide to break ranks and file for amnesty/leniency. Similarly, the incentives to enter an immunity programme will be diluted if agencies offer too attractive settlements or plea bargaining agreements. Companies will have little incentive to defect if they can obtain comparable rewards through an early case termination arrangement.

15. In the same way, the success of an immunity programme depends on the likely exposure of amnesty/immunity applicants to future private claims. While private damage actions can serve as an additional deterrent to cartel activity, as they ensure that victims of cartel violations are compensated for the damage they suffered, they can equally discourage companies considering applying under a leniency programme if such an application would increase their exposure to significant liability in civil suits.

Suggested Discussion Topics

16. In the Latin American and Caribbean region a number of jurisdictions have adopted leniency programmes in the recent year, and some of them have already amended their programme to reflect their experience and to introduce features which have advanced the effectiveness of the programme itself. At the same time, some jurisdictions in the region have not yet adopted such programmes and would significantly benefit from an exchange of experiences on effective design of leniency programmes. This session will discuss the key features of existing leniency programmes in the Latin American and Caribbean region, highlight differences in amnesty/leniency programmes across the region, as well as explore the reasons why some of these programmes have been recently amended and the impact that these changes have had on cartel detection and prosecution in these jurisdictions.

17. A Secretariat Paper will be distributed in advance of the meeting and can be used as a starting point for discussions in this session. The Annex identifies a number of relevant topics for discussion and suggested reading material. The list can inform the preparation of contributions but should not limit the debate nor the contributions of the issues discussed above.

ANNEX.

SUGGESTED ISSUES FOR CONSIDERATION IN COUNTRY CONTRIBUTIONS

1. Please provide a brief description of your leniency programme, its background and its development over time. Please focus your submission particularly on recent developments and/or changes.
2. Please discuss what is/are the policy purpose(s) of your leniency programme. Is the purpose of the programme formally stated in guidelines or notices?
3. If your agency grants some form of leniency to subsequent applicants, what is the policy rationale for doing so? Please describe the treatment reserved to subsequent applicants under your leniency programme.
4. Describe the requirements placed on applicants who wish to benefit from the leniency programme. Are these requirements different for the first-in and the subsequent applicants, and among subsequent applicants?
5. Discuss how your agency assessed the degree of co-operation from applicants under your leniency programme, e.g. in terms of the amount of evidence made available to the agency and the timeliness of co-operation. Is there a different standard (e.g. on the amount and quality of information demanded) for first-in and subsequent applicants, and among subsequent applicants?
6. Describe the criteria that you apply to determine the appropriate level of discount in fines/sanctions to encourage cartellists to enter into the leniency programme. If you reward co-operation from subsequent applicants, how did you differentiate the level of discounts for the various applicants?
7. If your leniency programme includes the possibility to apply for a “marker”, please discuss how the marker system affects the race to be “first in the door” of potential applicants. Are markers available also to subsequent applicants?
8. Please explain if your leniency programme is always available during the proceeding, or if there is a cut-off point in time after which your agency does not accept leniency applications anymore.
9. Please explain if amnesty or leniency can be revoked after it has been granted and if yes, for what reasons.
10. Please describe the relationship between your leniency programme and the other enforcement policies (settlement and plea bargaining, private enforcement, criminal sanctions and debarment). When designing your leniency programme, have you considered its implications on other enforcement tools? If yes, please explain how and what solutions you have adopted.

SUGGESTED READING LIST

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- Borrell J., Jimenez J., and Garcia C., “Evaluating Antitrust Leniency Programs”, XREAP (2012).
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- International Competition Network (ICN), Anti-cartel Enforcement Manual, Chapter 2 Drafting and Implementing an effective Leniency Policy, 2009, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf>.
- Kloub J., “Using Leniency to Fight Hard Core Cartels – Leniency as the Most Effective Tool in Combating Cartels”, paper presented at the OECD LACF 2009, available at <http://www.oecd.org/dataoecd/40/2/43420031.pdf>.
- Mariscal, E.V. and Mena-Labarthe, C., Leniency Programs in Latin America: 'New' Tools for Cartel, 2010, available at <https://www.competitionpolicyinternational.com/assets/0d358061e11f2708ad9d62634c6c40ad/MariscalMeanLabarthe.pdf>
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- OECD Report, Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programs, 2002, available at <http://www.oecd.org/competition/cartelsandanticompetitiveagreements/1841891.pdf>.
- OECD, Ex-officio cartel investigations and the use of screens to detect cartels, 2013, available at <http://www.oecd.org/daf/competition/exofficio-cartel-investigations.htm>.
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- OECD, The Use of Markers in Leniency Programmes, 2015, available at <http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>.
- Wils W., Leniency in Antitrust Enforcement: Theory and Practice, (2007) 30 World Competition 25-64.
- Zingales N., European and American Leniency Programs: Two Models Towards Convergence?, (2008) 5(1) ComLRev.