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LATIN AMERICAN COMPETITION FORUM

-- Session I: Using Leniency to Fight Hard Core Cartels --

Contribution from Spain

9-10 September 2009, Santiago, Chile

The attached document from Spain is circulated to the Latin American Competition Forum FOR DISCUSSION under session I of its forthcoming meeting to be held in Chile on 9-10 September 2009.

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**LATIN AMERICAN COMPETITION FORUM
- 9-10 September 2009, Santiago, Chile -**

Session I: Using Leniency to Fight Hard Core Cartels

**SPANISH LENIENCY PROGRAMME
Clara Guzmán Zapater, Director of Investigation**

1. Introduction

1. Since entering into force on 28 February 2008, the leniency programme in the Spanish system for the protection of competition has displayed positive results in terms of the number of leniency applications filed, and also in the results obtained from the investigation and valuation of the first few leniency requests submitted.

2. No statistics are available on the implementation of this programme in Spain, owing to the confidentiality requirements that necessarily prevail when handling such cases. Nonetheless, 16% of cases initiated in 2008 in the National Competition Commission (CNC) stemmed from a leniency request. Thus, this tool, together with the new investigatory powers, a larger number of sanctions and a policy based on transparency, have provided a major boost to the detection of cartels by the Spanish competition authority, in line with one of the key objectives of the new Law No. 15/2007 of 3 July, on the Protection of Competition (hereinafter referred to as the LDC), in terms of fighting the most harmful practices, particularly cartels.

3. The leniency programme established by Articles 65 and 66 of the LDC is inspired in the EC immunity and/or reduction model implemented by the European Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, and in the leniency programme model of the Competition Authorities Network.

2. The leniency programme in Spain

4. As cartels are among the **very serious offences** specified in the LDC, offending economic agents, firms, associations, unions, or groupings are liable for a fine of up to 10% of their total sales in the fiscal year immediately preceding that in which the fine is imposed.

5. Under the leniency programme, however, the CNC can exempt a firm or a natural person immunity from payment of the fine, if the firm or person in question is the first to provide evidence that, in the opinion of the CNC, enables it to:

order an inspection in relation to a cartel, provided, at the time of providing such evidence, there is not already sufficient evidence to order such an inspection, or to verify a violation of Article 1 of the LDC in relation to a cartel, provided at the time of providing such elements, the CNC does not already have sufficient evidence to establish the existence of the offence, and has not already granted immunity under the previous point.

6. The LDC also specifies certain requirements that must be satisfied by the entity or person in question:

- (a) co-operate fully, continuously and diligently with the CNC throughout the administrative investigation procedure.
- (b) terminate its participation in the offence when it provides the evidence.¹
- (c) refrain from destroying evidence relating to immunity request and from disclosing, either directly or indirectly, to third parties other than the European Commission or other competition authorities, its intention to submit such a request, or its content.
- (d) not to have taken steps to oblige other enterprises to participate in the offence in its place.

7. Once the information and evidence submitted in the immunity application has been examined, the Director of Investigation will decide whether or not to grant conditional immunity. Requests for a reduction the amount of a fine are not considered before a ruling has been issued on conditional immunity relating to previous requests involving the same cartel.

8. The granting of conditional immunity does not in itself exempt the applicant from the fine, but merely notifies the fact that the Director of Investigation considers that the application fulfils the requirements of the LDC. In all cases the CNC Board will decide, pursuant to the proposal of the Director of Investigation, to exempt the applicant from payment of the fine if, upon completion of the penal procedure, the immunity applicant has fulfilled the duties of cooperation specified in the LDC.

2.1. *Guarantees of the leniency programme: transparency and confidentiality*

9. Pursuant to the CNC policy on transparency, Royal Decree 261/2008 of 22 February, which approves the **Regulation on the Defence of Competition** (hereinafter referred to as RDC), sets out the procedure to be followed when processing leniency requests, in terms of the conditions and requirements for filing such requests, and their valuation and analysis. This firstly guarantees security, confidentiality

¹ Except in cases where the CNC considers its participation needs to continue for the purpose of maintaining the effectiveness of an inspection.

and predictability of the outcome to the leniency applicant and, secondly, upholds the rights of other stakeholders, as necessary in a penal procedure.

10. Before the RDC was approved, **provisional indications** for processing leniency applications were posted on the CNC website. These were subsequently updated in March 2009, to take account of experience gained in the first year of the programme's application and to introduce improvements such as the possibility of submitting an online leniency application through the CNC Electronic Register (<https://oficinavirtual.cncompetencia.es>).

11. With regard to the bodies responsible for processing leniency applications submitted to the CNC, given that such requests give rise to a penal file, strict **separation is maintained** from the outset **between the processing body, the CNC Investigation Department, and the decision-making body, the CNC Council**.

12. The Investigation Department receives leniency applications and, following a prior justified request from the applicant, decides whether or not to set a deadline for the presentation of evidence of the cartel, whether the applicant may disclose the filing of the application before notification of the Specification of Facts Document (*Pliego de Concreción de Hechos*, hereinafter referred to as the PCH), or whether to allow the applicant to continue participating in the cartel after submitting the application, so as to ensure the effectiveness of an inspection. Lastly, once the information and evidence submitted in the immunity application has been examined, the Director of Investigation will decide whether to grant the conditional immunity, or not.

- Decision to grant conditional immunity from payment of the fine, on the grounds that the conditions established in the LDC have been fulfilled and the existence of actions representing the restrictive practices prohibited by Article 1 of the LDC and, as the case may be, Article 81 of the Treaty, is considered possible; or
- Decision to reject the immunity application if the conditions set in the LDC are not fulfilled, either stating that the information and evidence presented in the immunity application can be withdrawn, or requesting the Investigation Department to examine them as part of an application for a reduction in the amount of the fine, provided the applicant provides evidence of the presumed offence that adds significant value in relation to information and evidence already in the CNC's possession, in other words, by its nature or level of detail it improves the CNC's capacity to verify the facts in question.

13. In applications for reduction, if the evidence provides **significant value added**, the Investigation Department will notify the CNC Council of its proposal to reduce the amount of the fine, within the limits specified in the LDC, or else inform it that it does not propose to reduce the amount of the fine since the requirements for such reduction are not fulfilled.

14. Once it has received the proposal from the Investigation Department, and provided all legal requirements have been fulfilled, the CNC Council will decide whether to grant immunity from payment of the fine in the resolution concluding the procedure in question, or a reduction in the amount of the fine, in which case it will establish the percentage reduction applicable to each firm or individual requesting such a reduction in relation to the cartel in question.

15. To guarantee the **confidentiality** of the leniency application, the information and evidence provided and the anonymity of the applicant, a special unit has been created in the Investigation Department to analyse these applications — the Sub-department of Cartels and Leniency — and telephone

numbers have been set up through which the applicant can request assistance in submitting an application, either in writing or verbally.

16. When the case file is opened, the CNC website **announces the opening of the case**, and interested parties may access the file and obtain copies of the pertinent documents, except for the separate confidentiality item which will contain both the commercial secrets of other stakeholders or third parties, and the special confidentiality item relating to any leniency applications submitted.

17. **Once the PCH has been issued**, however, and to avoid violating the defence rights of other parties involved, which is one of the fundamental guarantees of the Law on Competition, **access is permitted** to data or documents relating to any leniency applications submitted, which, while forming a separate special confidentiality item, are needed to respond to the PCH.

18. None of the above prejudices the fact that, in relation to statements made by the leniency applicant, specifically for its presentation along with the corresponding application, whether written or verbal, **stakeholders may not obtain copies thereof**, although they will be accessible and they can take such notes as they deem appropriate.

19. This also does not impair the **duty of secrecy** that the LDC imposes on all persons participating in the processing of case files and those with access to them; nor their exclusive use for the purposes specified in the LDC, with respect to defence of their rights in relation to judicial or administrative proceedings to enforce the rules of competition that are the subject of the administrative sanctioning procedure in question, and in no circumstances shall they have public information status. Their use for other purposes would imply violations of the duty of secrecy, giving rise to the corresponding penal and civil liabilities.

2.2. Incentives for submitting applications

20. The effectiveness of the leniency programme depends largely on the incentives provided to potential applicants to submit applications for immunity from and/or a reduction of any fine. The Spanish leniency programme includes the following incentives among others:

- (a) The possibility for leniency application to be filed both by a **firm and by a private individual** who, as part of a cartel, seek to benefit from the leniency programme.
- (b) The possibility of submitting leniency applications **after the case has been opened and until notification of the PCH**, and even after such notification in the case of applications for reduction, when the nature or content of evidence submitted so justifies, bearing in mind the information contained in the case file. This gives incentives to provide information and evidence that make it possible to corroborate the facts almost until the end of the procedure.
- (c) The **procedural guarantees** offered in the leniency programme, which ensure the anonymity of the leniency applicant from the outset, and full transparency regarding the conditions to be fulfilled to obtain immunity from or a reduction in the amount of the fine, as the case may be.
- (d) Lastly, cartel participants are liable to a **high level of sanctions**, since this is considered a very serious offence in the LDC. A fine can be imposed of up to 10% of the total sales volume of the offending enterprise in the fiscal year immediately preceding the imposition of the fine, as reiterated in the CNC communication on the quantification of sanctions arising from violations of Articles 1, 2 and 3 of Law 15/2007 of 3 July, on the Defence of Competition, and of Articles 81 and 82 of the European Community Treaty.

3. Coordination with other competition bodies

21. With regard to coordination with other competition bodies, mechanisms have been developed in the RDC for coordination in leniency procedures with the **competition protection agencies of the autonomous communities** (*órganos autonómicos de defensa de la competencia*) of which there are currently 12, to complement the provisions of existing legislation.²

22. In the case of the **European Commission**, following the leniency programme model of the Competition Authorities Network, and assuming application of Article 81 of the TCE in respect of cartels that could affect trade between member States, it is possible to submit abbreviated immunity applications to the Investigation Department if the firm has submitted, or is going to submit, a request for immunity from payment of the fine to the European Commission, this being the most appropriate competition authority.

23. On this point, attention should be drawn to collaboration and coordination between the CNC and the services of the European Commission and other **national competition authorities (NCAs) in the European Union**, in which leniency contact points have been designated. An example of such coordination is the leniency workgroup set up by these authorities, which met most recently on 20 April 2009 in Madrid. Among other issues, this meeting analysed common problems arising from leniency applications affecting various jurisdictions, such as the European Commission and the national jurisdictions of member States, and the problems arising from jointly submitted applications (joint-venture, subsidiaries and parent companies, etc).

24. Coordination is not only necessary to ensure that leniency applications are correctly processed, but it is also essential to increase the information to be shared between competition authorities while maintaining maximum respect for confidentiality. This is the norm even within the CNC itself, and in any event should be guaranteed to maintain the credibility of the leniency programme not only among future applicants, but also with respect to lawyers specialising in competition cases, who might encourage their clients to file a leniency application. For that reason, in all forums in which the Spanish authority participates, it stresses the need to continue improving coordination and collaboration between competition authorities.

4. Conclusion

25. Now that the Spanish leniency programme has been in force for just over a year, attention needs to be drawn not only to the large number of leniency applications filed but also to the consequences of implementing this programme to fight cartels, including a significant increase in the number of inspections performed by the CNC since the programme came into force. These inspections have also led to the opening of new proceedings, other than that relating to the original leniency request, as a result of information obtained in certain cases.

26. Pursuant to the procedural deadlines established in the LDC, in the next few months the CNC Council will issue rulings on the first cases arising as a result of this programme. This will provide another chance to assess the new procedure in its decision-making phase.

27. The creation of a specialised unit for detecting cartels within the prosecuting body (Investigation Department) is considered crucial for guaranteeing maximum confidentiality of the procedure and, hence, legal certainty for those involved in the cases. This is particularly relevant considering that the cases

² Law 1/2002 of 21 February, on coordination of the jurisdictions of the State and the Autonomous Communities in the field of defence of competition.

processed under the leniency programme follow an extremely painstaking and detailed procedure, as it clearly has to be, unlike the administrative procedure applicable to other penal case files in Spain.

28. Continuous and close collaboration between the CNC and the European Community, and with other ANCs, particularly within the EU, is highly necessary, and it is particularly important to insist on this at international forums.

29. The definition and publicising of clear procedures for presenting and processing applications, together with the existence of transparent criteria for granting immunity or reduction, strengthened investigatory powers and a larger number of sanctions, has made it possible to generate a climate of credibility and effectiveness as to the system's effective implementation, and it can be said that the main objective of its implementation is being achieved.