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COMPETITION COMMITTEE**

LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

Call for Country Contributions

3-4 September 2013, Lima, Peru

The attached document is circulated in preparation for the discussion under Session III of the Latin American Competition Forum at its forthcoming meeting to be held on 3-4 September 2013 in Peru. Delegates are requested to send written contributions for that session to the Secretariat by 15 July 2013 at the latest. Advance notice of contributions by 24 June 2013 would be useful.

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LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

Session III: Unannounced Inspections in Antitrust Investigations

CALL FOR COUNTRY CONTRIBUTIONS

Introduction

1. This request for contributions is circulated in preparation for the discussion to be held in Session III of the 2013 Latin American Competition Forum. Session III is entitled “Unannounced Inspections in Antitrust Investigations”. You are invited to make a written contribution to the discussion.
2. In this call for contributions, we identify some issues that you may wish to address in your written contributions and during the oral discussion. This list of issues is not prescriptive or exhaustive, though; you are free to bring up other relevant issues that reflect your experiences. Speakers will be selected on the basis of the written contributions submitted to the OECD Secretariat in response to this call. To assist the OECD Secretariat in planning the session, please provide notice **by 24 June 2013** if you intend to submit a contribution. The contributions should be sent by email (as a Word document in electronic form, 5 pages maximum in Spanish or English) to Marianne Aalto [Marianne.Aalto@oecd.org] and copied to: António Gomes [Antonio.Gomes@oecd.org] **by 15 July 2013 at the latest**. Country contributions will be circulated to participants through the LACF website (www.oecd.org/competition/latinamerica) as well as that of Peru (URL to be circulated shortly).
3. An issues paper on unannounced inspections in antitrust investigations, to be prepared by the OECD Secretariat, will also circulate in advance of the meeting on the LACF website.
4. Unannounced inspections, surprise searches or raids are one of the most powerful and effective investigatory tools available to competition authorities to gather evidence on suspected antitrust infringements. Surprise inspections are sometimes the only means of obtaining the necessary evidence for sanctioning a cartel, as cartel members go to great lengths to hide their behaviour and to remain secret.

5. Some competition authorities still lack the necessary authority to conduct unannounced inspections. Other competition authorities have only recently acquired those powers¹. Even in those countries where competition laws provide adequate powers to conduct unannounced inspections, there may be difficulties in making use of those powers. This may result from a lack of awareness of the harm of antitrust infringements, in particular cartels, or the perceptions of executive bodies, the judiciary or the business community regarding the use of these investigative powers by the competition authority. Where a judicial warrant is necessary to conduct an inspection, the competition authorities may face the reluctance of judges to provide it.

6. The power to conduct unannounced inspections enhances the ability to detect cartel behaviour. When coupled with the threat of severe sanctions, it also reinforces the success of leniency or amnesty programmes, contributing to the instability of cartels and serving as a deterrence mechanism on anticompetitive conduct. Conversely, a leniency programme may not be successful if there is no threat of inspections to find evidence.

7. When considering whether to conduct an unannounced inspection, given the available investigatory tools at the competition agency's disposal, the risk of evidence being hidden, altered, removed or destroyed must be taken into account. Unannounced inspections usually serve as a first means of investigation, particularly when the investigation is still at the covert stage. To secure the evidence, the element of surprise proves extremely relevant.

8. Many competition agencies have the power to search business premises and, in some cases, non-business or private premises and to copy or seize paper or digital documents as evidence. While in some jurisdictions the competition agency has the power to issue a search authorization, in most cases a warrant issued by a judge or a court is necessary to enable the authority to conduct a surprise search. The substantive requirements to conduct unannounced inspections may vary across jurisdiction, but most commonly a sufficient degree of suspicion is required to conduct a search. The possibility of launching such an investigatory tool without a prior reasonable suspicion in the hope of finding evidence of cartel activity is normally ruled out.

9. Compared to other investigatory tools, such as information and document requests and the taking of voluntary statements, inspections are considerably more invasive, disruptive and costly for firms, but may increase the likelihood of uncovering valuable evidence. The legal powers to conduct unannounced inspections are normally accompanied by measures to guarantee parties' rights. Procedural fairness and due process are important in the context of conducting surprise inspections.

10. Several limitations on the powers to carry-out inspections may apply in different jurisdictions regarding the powers to copy or seize paper or digital documents, the time available to conduct the search and to collect or process evidence, the powers to seal premises, the ability to ask questions during the inspections, the seizure or copying of documents subject to legal privilege, protection of privacy, of data, of correspondence or of banking secrecy, amongst other limitations.

11. Organizing unannounced inspections involves meticulous planning and preparation. Whilst carrying-out an inspection, competition agencies are often assisted by police forces or other public bodies, particularly when resistance or refusal to cooperate is anticipated. International cooperation in preparing

¹ The ability to conduct unannounced inspections was introduced, for instance, in the recent amendment of the competition laws of Chile and Mexico (in 2009 and 2010 respectively) to improve their investigatory powers. See OECD Roundtable on Improving International Co-operation in Cartel Investigations (2012), available at <http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf>.

and conducting an inspection may also prove important in some cases. Coordinated inspections increase the likelihood of success by maintaining the element of surprise.

12. Rather than giving special emphasis to the practices and procedures of the various delegations in conducting unannounced inspections², this roundtable is an opportunity to discuss how the powers to conduct searches have evolved in different jurisdictions and the process leading to such powers. It will also allow for discussing the perceptions of executive bodies, the judiciary or the business community regarding the use of these investigative powers by the competition authority. This roundtable will also consider when it may be adequate to carry-out inspections in the context of the possible investigatory tools at the disposal of each authority, and the level of suspicion or evidence needed to justify the use of such an investigatory tool. The scope of inspections powers and existing limitations on those powers will also be discussed, as well as the relationship between inspection powers and the success of leniency or amnesty programmes. This roundtable will also allow for a sharing of experiences in conducting unannounced inspections as an investigatory tool and to discuss experiences and difficulties in co-operating internationally.

² Good practices and procedures with respect to the organization, timing and conduct of the seizure of documentary evidence can be found in a particularly relevant study by the International Competition Network. The ICN Anti-cartel Enforcement Manual dedicates one of its chapters to “Searches, raids and inspections”, focusing on practices and procedures (available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf>).

QUESTIONS FOR CONSIDERATION IN COUNTRY CONTRIBUTIONS

1. Countries are invited to address the following issues by answering the questions below each of them, but please bear in mind that both the issues and the questions are intended to be illustrative rather than exhaustive. You should feel free to discuss other pertinent topics that are not mentioned here. Wherever possible, please demonstrate the points you raise by referring to specific cases.

1. Legal authority to conduct unannounced inspections

- Please describe your powers to conduct unannounced inspections in antitrust investigations, the legal basis for those powers, when they were acquired and how they have evolved. Have you engaged in advocacy before government or legislators to obtain or reinforce these powers? If so, please describe the arguments put forward to overcome any concerns or perceptions relating to granting those powers to the competition authority.
- Please describe the role played by the judiciary or any other public bodies, such as police forces, in conducting unannounced inspections. If a warrant or judicial authorization from a Court to conduct a search is required in your jurisdiction, have you faced any difficulties or reluctance from the judiciary to provide the necessary warrants? How would you describe the level of initial evidence necessary to justify carrying out an inspection and how has it affected your investigations?
- In case your competition authority does not have the powers to conduct unannounced inspections, please discuss, illustrating with some examples, whether the lack of this investigatory tool has affected your ability to investigate antitrust infringements. Please describe whether your authority has been seeking to obtain these powers and the arguments you may have put forward before government or legislators. If your authority may conduct inspections but is required to give advance notice to the targeted parties, please discuss the difficulties which may arise from such a legal framework.

2. Scope of inspection powers

- Please describe the scope of your inspection powers regarding paper documents and digital evidence. Please describe any limitation which may apply regarding the scope of your inspection powers (legal professional privilege rules relating to in-house or to external legal counsel; privacy, data protection, protection of correspondence, protection of banking secrecy, time limitations, amongst others). Please discuss how these limitations may affect your ability to investigate antitrust infringements, whilst taking into consideration the underlying rationale for such limitations.
- If evidence is found relating to an infringement of competition rules not covered by the initial inspection decision or court warrant, how does your authority proceed regarding such evidence?

3. Leniency programmes and inspection powers

- Please discuss how the powers provided by your current legal framework regarding unannounced inspections may influence the effectiveness of a leniency programme. Please describe how your leniency programme has evolved in relation to the evolution of your inspection powers.

4. Experience in conducting unannounced inspections

- Please describe how often are the powers to conduct unannounced inspections used, in which types of antitrust investigations do you consider using these powers and when would your authority opt for a different investigatory tool. Please discuss the importance of having the ability to carry-out inspections in the context of the investigatory tools at the disposal of the competition authority, illustrating with some examples of cases.
- What are the main restrictions or difficulties your authority has faced in conducting effective inspections in antitrust investigations? Please also describe any issues raised by the targeted parties regarding an unannounced inspection. Has your authority faced any litigation case following an inspection? Please describe any case law from your jurisdiction in this context.
- Please describe your experience of organizing and conducting unannounced inspections. Please describe how your authority plans and prepares for a search, the organization of the search teams, the main steps taken during the inspection, and the aftermath of the inspection. What kind of training do the staff involved in conducting inspections attend? Has your competition authority issued guidance for carrying-out unannounced inspections?

5. International cooperation

- Has your authority cooperated with another competition authority to conduct any joint unannounced inspections? In case you have agreements in place with foreign countries or authorities, do these allow your authority to conduct unannounced inspections on behalf of a competition authority from another jurisdiction?
- Please describe any difficulties you may have encountered relating to international cooperation to prepare or conduct inspections (e.g., difficulties arising from only being allowed to conduct searches during specified hours, from having to give advance notice of the inspection to targeted parties, if it is the case, amongst others).