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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

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

-- Contribution from United States --

12-13 April 2016, Mexico City, Mexico

The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.

Contact: Ms. Lynn Robertson, Global Relations Co-ordinator, 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

-- CONTRIBUTION FROM THE UNITED STATES --

1. Overview of U.S. Leniency Policy

1. The U.S. Department of Justice, Antitrust Division's Leniency Policy ("Leniency Policy") is its most important investigative tool for detecting and deterring cartel activity. Corporations and individuals who report cartel activity and cooperate with the Division's investigation of the cartel conduct reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program.

2. In 1978, the Antitrust Division instituted the first version of the Leniency Policy. The original policy relied on the core concept of the United States providing non-prosecution protection to a corporation for self-reporting cartel conduct and cooperating against other cartel members. For the first 15 years of the Leniency Policy, it was rarely utilized and largely ineffective at detecting large-scale cartels.

3. In 1993, the Antitrust Division revised its Corporate Leniency Policy to increase the incentives for corporations to self-report cartel conduct. The Division made three important revisions to the original policy: (1) leniency became automatic for qualifying companies if the Division has not yet received any information about the cartel; (2) leniency may still be available even if cooperation begins after the Division has received information about the cartel; and (3) the Division provides leniency to all cooperating current officers, directors, and employees of the corporation who meet the requirements of the program. These revisions made the Leniency Policy more predictable and transparent, in an effort to incentivize companies to self-report criminal activity.

4. The revised Leniency Policy was wildly successful. It has become the most successful investigative tool in the Division's arsenal, producing billions of dollars in corporate fines from co-conspirators and destabilizing hundreds of cartels. Since 1993, the Leniency Policy has remained largely unchanged, with the Division making minor modifications and clarifications to the Leniency Policy as necessary.

2. Purpose of the Leniency Policy

5. The purpose of the Leniency Policy is to detect cartel conduct and to deter and destabilize cartels. The Division specifically designed the Leniency Policy to incentivize the self-reporting corporation to fully cooperate with the Division's investigation. The Leniency Policy is significant because it allows U.S. prosecutors to: (1) gain access to information from cartel insiders; (2) conduct covert investigations into the cartel; (3) access documents and witnesses regardless of location; (3) reduce the resources necessary to effectively prosecute the cartel; (4) end the cartel; and (5) recover losses for the victims of the crime.

6. The Leniency Policy states that the Division will grant leniency—meaning not charging a firm criminally for the anticompetitive activity reported—to corporations that report illegal antitrust activity under certain enumerated conditions. The Antitrust Division devotes a webpage to the program, which provides public access to the policy, frequently asked questions, model leniency letters, contact information, and links to policy speeches by Division personnel discussing the policies, practices, and procedures of the Antitrust Division surrounding the Leniency Policy.

3. Leniency for Corporations that Cooperate Subsequent to the Leniency Applicant

7. The United States does not grant leniency to subsequent applicants under its Leniency Policy. To be clear, under the Leniency Policy, the Antitrust Division will not prosecute the first qualifying corporation to report a cartel, fully admit to its role in the conspiracy, identify its co-conspirators and the events of the conspiracy, and provide complete and timely cooperation. In the United States, only one company in each cartel can therefore qualify for leniency.

8. In some other jurisdictions, however, leniency policies offer full immunity from fines for the first company that self-reports anticompetitive behavior, while subsequent companies that do not qualify for full immunity can earn a reduction in fines.

9. In the United States, a company that comes forward after the leniency applicant and offers to cooperate may enter into a plea agreement to mitigate the consequences of its wrongdoing, but this process falls outside of the Leniency Policy. The Antitrust Division encourages prompt acceptance of responsibility and meaningful cooperation, and considers those when recommending to the court the appropriate consequences for offending corporations and their executives.

10. The Leniency Policy does not include predetermined reductions in fines for subsequent applicants because the Antitrust Division values the timeliness and extent of cooperation. The Antitrust Division believes that merely expressing the intent to cooperate is insufficient to receive a substantial reduction in a corporate fine, even if the company expresses its intent to cooperate early in the investigation. The Antitrust Division will recommend significant reductions in criminal sentences for companies that significantly advance our investigation by helping the Antitrust Division investigate and prosecute antitrust crimes. Companies that do not provide valuable cooperation do not receive that consideration and the Antitrust Division will seek higher fines, as determined by Chapter 8 of the United States Sentencing Guidelines.

11. The Antitrust Division bases its sentencing recommendations on the value of the cooperation received, not simply on the order in which companies begin to cooperate with the investigation. Naturally, companies that promptly accept responsibility and begin cooperating quickly will have a greater opportunity to provide substantial assistance to the investigation. Conversely, companies that delay acceptance of responsibility and cooperation are less likely to provide cooperation that will have value to the Antitrust Division. Companies that begin cooperating later in the process still have a chance to mitigate the consequences of their wrongdoing, however, and they can and often do provide substantial assistance by expanding the scope of our investigation or reporting an entirely new conspiracy. If a company that begins cooperating later provides substantial assistance, the Antitrust Division will consider that cooperation when making our sentencing recommendation.

4. Availability of Leniency

12. Leniency is available for corporations either before or after the Division began an investigation. The Corporate Leniency Policy includes two types of leniency, Type A Leniency and Type B Leniency. Type A Leniency is available only before the Division has received any information about the activity being reported from any source, while Type B is available even after the Division has received information about the activity. Detailed below are the criteria for each type of leniency.

4.1 Leniency Before an Investigation Has Begun (“Type A Leniency”)

13. The Antitrust Division will grant leniency to a corporation reporting illegal antitrust activity before an investigation has begun if it meets the following six conditions:

1. At the time the corporation comes forward, the Division has not received information about the activity from any other source.
2. Upon the corporation’s discovery of the activity, the corporation took prompt and effective action to terminate its participation in the activity.
3. The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation to the Division throughout the investigation.
4. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
5. Where possible, the corporation makes restitution to injured parties.
6. The corporation did not coerce another party to participate in the activity and clearly was not the leader in, or the originator of, the activity.

14. If the corporation does not meet all six of the Type A Leniency conditions, it may still qualify for leniency if it meets the conditions of Type B Leniency.

4.2 *Alternative Requirements for Leniency (“Type B Leniency”)*

15. A company will qualify for leniency even after the Division has received information about the illegal antitrust activity, whether this is before or after the Antitrust Division has formally opened an investigation if the corporation meets following conditions:

1. The corporation is the first to come forward and qualify for leniency with respect to the activity.
2. At the time the corporation comes in, the Division does not have evidence against the company that is likely to result in a sustainable conviction.
3. Upon the corporation’s discovery of the activity, the corporation took prompt and effective action to terminate its part in the activity.
4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing, and complete cooperation that advances the Division in its investigation.
5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials.
6. Where possible, the corporation makes restitution to injured parties.
7. The Division determines that granting leniency would not be unfair to others, considering the nature of the activity, the confessing corporation’s role in the activity, and when the corporation comes forward.

5. **Markers**

16. The Antitrust Division understands that when corporate counsel first obtains indications of a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to know whether the corporation has engaged in such a violation, an admission of which is required to obtain a conditional leniency letter. Time is of the essence, though, because the Antitrust Division grants only one corporate leniency per conspiracy. The company is therefore in a race for leniency with its co-conspirators and possibly even its own employees who may also be preparing to apply independently for individual leniency.¹ On a number of occasions, the applicant beat the second company to inquire about a leniency application by only a matter of hours. Thus, the Division has established a marker system to hold an applicant’s place in the line for leniency while the applicant gathers more information to support its leniency application.

17. Confirmation of a criminal antitrust violation is not required at the marker stage. However, in order to receive a marker, the corporation must report that it has uncovered information or evidence suggesting a possible criminal antitrust violation, e.g. agreements related to price fixing, bid rigging, output restriction, or allocation of markets, customers, sales or production volumes. With respect to the product or service involved in the violation, in some cases, an identification of the industry will be sufficient for the Antitrust Division to determine whether leniency is available. For example, there may be no pending investigations of any products or services in that particular industry. In other cases, an identification of the specific product or service or other identifying information, such as the geographic location of affected

¹ In 1994, the Antitrust Division instituted its Leniency Policy for Individuals, which applies to all individuals who approach the Division on their own behalf, not as part of a corporate proffer or confession, to seek leniency for reporting illegal antitrust activity of which the Division has not previously been made aware.

customers or one or more of the subject companies, may be necessary in order for the Division to determine whether leniency is available.

18. The Division frequently gives a leniency applicant a marker for a finite period to hold its place at the front of the line for leniency while counsel gathers additional information through an internal investigation to perfect the client's leniency application. While the marker is in effect, no other corporation can secure leniency at the expense of the corporation that has the marker.

19. To obtain a marker, a corporation must: (1) report that it has uncovered some information or evidence indicating that it has engaged in a criminal antitrust violation; (2) disclose the general nature of the conduct discovered; (3) identify the industry, product, or service involved in terms that are specific enough to allow the Antitrust Division to determine whether leniency is still available and to protect the marker for the applicant; and (4) identify itself.² As noted above, when the corporation first reports a possible criminal antitrust violation, authoritative personnel for the company may not have sufficient information to enable them to admit definitively to such a violation. Because the Antitrust Division urges companies to seek leniency at the first indication of wrongdoing, the evidentiary standard for obtaining a marker is relatively low, particularly in situations where the Division is not already investigating the wrongdoing. For example, if an attorney gave a compliance presentation and after the presentation, an employee reported to the attorney a conversation the employee had overheard about his employer's potential price-fixing activities, this information would be sufficient to obtain a marker. However, the burden is higher when the Division already is in possession of information about the illegal activity. For example, it is not enough for counsel to state merely that the client has received a grand jury subpoena or has been searched during a Division investigation and that counsel wants a marker to investigate whether the client has committed a criminal antitrust violation.

20. The Antitrust Division provides markers only for a finite period. The length of time the Antitrust Division gives an applicant to perfect its leniency application is based on factors such as the location and number of company employees counsel needs to interview, the amount and location of documents counsel needs to review, and whether the Division already has an ongoing investigation at the time the marker is requested. A 30-day period for an initial marker is common, particularly in situations where the Division is not yet investigating the wrongdoing. If necessary, the Antitrust Division, within its sole discretion, may extend the marker for an additional finite period, as long as the applicant demonstrates it is making a good-faith effort to complete its application in a timely manner.

² It is also possible in limited circumstances for counsel to secure a very short-term "anonymous" marker without identifying his or her client. The Division grants an anonymous marker when counsel wants to secure the client's place first in line for leniency by disclosing the other information listed above, but needs more time to verify additional information before providing the client's name.