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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 Peru --

12-13 April 2016, Mexico City, Mexico

The attached document from Peru 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.

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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 PERU --

1. Introduction

1. Leniency programmes around the world establish the criteria under which a competition authority may grant immunity from or a reduction in the penalties that would be applicable to economic agents and their employees for participating in a cartel, in exchange for their active cooperation in the process of investigation and determination, by providing information intended to prove those offences.

2. In this way, leniency programmes constitute an instrument that will help to destabilise anticompetitive agreements and create incentives for economic agents to report their existence to the competition authority. Consequently, in many jurisdictions leniency programmes are regarded as a decisive tool in the prosecution of cartels.

3. Since 1996 Peru has had in place a legal provision that allows immunity from penalties for violation of the rules of free competition to be granted to those who collaborate with the competition authority. However, it was only in 2012, i.e. 16 years after the provision was adopted, that the first application for immunity was submitted.

4. With a view to strengthening the leniency programme, significant changes have been made in recent years to the laws and regulations governing free competition¹, and the number of inspection visits

¹ Legislative Decree 1034, which approved the Law on Repression of Anticompetitive Conduct (hereinafter the Free Competition Law), went some way to improving the rules established in the former Free Competition Law. However, it was Legislative Decree 1205 that introduced new provisions designed to establish a leniency programme with transparent rules, predictable outcomes and effective procedures.

has been stepped up significantly.² In this context, over the past four years five applications for leniency have been received, relating to six distinct markets.

2. The Peruvian leniency programme

2.1. Background

5. In 1996³ the existing Free Competition Law⁴, was amended to include, among other things, a provision that made it possible for an economic agent to obtain immunity from punishment for violations of that law, in return for providing evidence that could be used to identify and prove the existence of an illegal practice. This mechanism was intended to step up the fight against cartels.

6. In 2008, the old Free Competition Law was repealed. The new Free Competition Law maintained the provision on immunity from punishment, without any substantive changes: it introduced only a few modifications with respect to the available benefits. Specifically, it allowed more than one economic agent to apply for the benefit of immunity (first applicant) or reduction (subsequent applicants) of the penalty.

7. In 2015, following an assessment of the rules in force until then, Legislative Decree 1205 was enacted, amending the Free Competition Law in part. The principal aims of the law were: (i) to establish clearer rules on the processing of applications for immunity or reduction of penalty; (ii) to maximise incentives for economic agents who have participated in cartels to apply for acceptance under the leniency system; and (iii) to reformulate the provisions whereby benefits could be earned by collaboration.

8. The main changes with respect to leniency introduced by Legislative Decree 1205 were:

- Introduction of a "markers" system, which guarantees the applicant's order of precedence with a view to encouraging the applicant to compile and present full information relating to the violation revealed.
- Greater precision as to the powers of the Commission for the Defence of Free Competition (hereinafter "the Commission") and the Technical Secretariat in responding to applications for immunity or reduction of penalty, as well as the rules applicable to those applications, in order to make the procedure predictable and to encourage the use of this mechanism.
- Greater clarity as to the rules applicable to the participation of second and subsequent applicants for benefits.
- The specification that the agent who exercised coercion on others to constitute or maintain a cartel may only apply for a reduction in the applicable penalty, and not for total immunity, in order to discourage strategic behaviour and to destabilise the formation of cartels.

9. The amendments mentioned above, together with other provisions, were intended primarily to establish a sufficiently solid normative framework for implementing an efficient leniency programme that

² Thus, during the years 2012-2013 33 inspection visits were conducted, while in 2014-2015 this figure rose to 173.

³ In 1996 Legislative Decree 807, the Law on the Powers, Rules and Organisation of INDECOPI, was issued.

⁴ Legislative Decree 701, the Law against practices involving monopoly, control and restraint of free competition.

would complement and reinforce the efforts of INDECOPI (National Institute for the Defence of Competition and the Protection of Intellectual Property) to combat cartels.

2.2. Purpose

10. Consistent with the provisions of article 26 of the Free Competition Law, the main objective of the leniency programme now being developed is to offer sufficient incentives to members of a cartel that they will reveal the existence of the illicit activity and cooperate with the authority in its detection and prosecution, thereby reinforcing the fight against such illegal conduct.

2.3. Markers or indicators

11. Pursuant to the Free Competition Law, a system of markers has been established that guarantees to applicants the order of precedence in which their application will be assessed. Once a marker is granted, the applicant will be given a reasonable period of time, in principle 30 working days⁵, within which to submit in writing all the information on the cartel and thereby obtain the status of Collaborator. These markers are granted to the first applicant as well as to successive applicants.

2.4. Application for leniency and requirements for accessing benefits

12. The leniency programme allows any person or business to apply to the Technical Secretariat for the benefits of immunity or reduction of penalty. The granting of these benefits is conditional on compliance with specific requirements of collaboration, and on the timing of the application.

13. The benefit of immunity is available only to the first party to presents its application for immunity, provided that the application is filed before administrative enforcement proceedings begin. This immunity will allow the first applicant to avoid the penalty that would be incurred by the violation.

14. The benefit of reduction of penalty is granted to applicants under two possible scenarios: (i) when the application is presented, either before or after the beginning of administrative enforcement proceedings, and the Commission has granted priority for immunity to a first applicant; and (ii) when, as the first applicant, a party presents a petition for immunity after the beginning of administrative enforcement proceedings. The percentage of the reduction granted to applicants varies according to the time at which their applications are submitted: the maximum possible reduction is 50% of the penalty that the Commission imposes for the violation.

15. The requirements that economic agents must fulfil in order to access the benefits are subject to conditions, such as the status of the investigation by the Technical Secretariat and the existence of prior applications for immunity or reduction.

16. To obtain immunity from the penalty, the applicant must fulfil the following requirements:

- The applicant must be the first to present an application for immunity, with the information necessary to identify the existence of the cartel in question and to obtain the respective marker.
- The Technical Secretariat must not have begun an administrative enforcement procedure with respect to the cartel in question.
- The applicant must provide all the information available on the cartel in question.

⁵ This period can be extended on an exceptional basis for an additional 30 working days.

- It must comply strictly with its duty to collaborate during the investigation and the administrative enforcement procedure.
- It must terminate its participation in the cartel, unless the Technical Secretariat indicates otherwise.
- It must not have exerted coercion on other economic agents to participate in the cartel.

17. On the other hand, applications for reduction of penalty must fulfil the following requirements:

- The applicant must provide information that offers significant added value to the investigation or the administrative enforcement procedure.
- It must terminate its participation in the cartel in question, unless the Technical Secretariat indicates otherwise.
- It must comply strictly with its duty to collaborate during the investigation and/or the administrative enforcement procedure, in particular by supplying all of the available information on the cartel.

18. The applicable ranges for reduction of penalty, pursuant to article 26 of the Free Competition Law, are the following:

- The first beneficiary of a penalty reduction may receive a reduction of between 30 and 50% of the fine that would have been applicable.
- The second beneficiary may receive a reduction of between 20 and 30% of the fine that would have been applicable.
- Subsequent applicants may receive at most a reduction of 20% of the fine that would have been applicable.

2.5. *Collaboration by the applicant*

19. The duty of collaboration amounts to the set of obligations that constitute the best efforts of the applicant to provide full and active collaboration in the activities of investigation, adjudication and punishment by the Technical Secretariat and the Commission. The duty of collaboration includes the following actions:

- Deliver full information on the planning, formation and execution of the cartel in question.
- Make best efforts to allow its employees to be interviewed in relation to the cartel, and to take any other measure necessary for the investigative work of the Technical Secretariat.
- Make the necessary arrangements for the inspection visits conducted by the Technical Secretariat.
- Abstain from destroying, falsifying or concealing information or evidence relating to the cartel in question.

- Abstain from disclosing to any third party the presentation and the contents of the application for immunity from penalty, until the administrative enforcement procedure begins.
- Agree not to deny or question the actions and measures taken during the investigation or the charges filed at the beginning of the administrative enforcement procedure.

2.6. *Compliance with the duty of collaboration and revoking of leniency*

20. Obtaining the benefit of leniency is subject to compliance with the duty of collaboration on the part of the Collaborator, and the Technical Secretariat is the body responsible for supervising and assessing fulfilment of this duty. The Collaborator will act in continuous and permanent coordination with the Technical Secretariat and the Commission for the necessary actions during the investigation and the administrative enforcement procedure.

21. If the Technical Secretariat finds that the Collaborator is not fulfilling its duty, it will grant the Collaborator a reasonable period of time for remedying the acts or omissions that constitute noncompliance. If the noncompliance is not remedied, the Technical Secretariat, after conducting a thorough assessment of the collaboration offered during the investigation and the administrative enforcement procedure, may prepare a report to the Commission explaining this alleged failure and recommending withdrawal of the benefit conditionally granted.

22. The Commission may only deny the conditional benefit when the Technical Secretariat has advised it that the collaborator has failed to remedy its noncompliance with its duty of collaboration. The Commission will assess this noncompliance in order to determine whether the decision to deny the conditional benefit should be made definitive or revoked.