

DRAFTING AND IMPLEMENTING AN EFFECTIVE PERUVIAN LENIENCY POLICY

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Abstract

To fight cartels, antitrust authorities have realized that the imposition of fines is not enough. Indeed, the adoption of leniency programmes in several jurisdictions has led to significant increases in cartel enforcement. Therefore, this paper highlights the importance of leniency programmes for effective cartel prosecution because, if carefully designed, they can be an appropriate mechanism of enforcement against anticompetitive behavior. Yet Peru has not been successful at all in the implementation of leniency as an integral part of an active Cartel Policy. For that reason, this paper focuses on the problems of the Peruvian Leniency Programme by analyzing Article 26 of the Peruvian Competition Act and attempts to make some key recommendations.

Keywords: Competition Law, leniency, cartels, confidentiality

I. INTRODUCTION

It is well known that cartels are incompatible with competitive markets and cause serious harm to consumers. They injure customers by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive to others. Besides, nowadays, undertakings have implemented sophisticated mechanisms in order to keep their agreements secret, thereby making cartels increasingly difficult to detect and prove.

Competition authorities from several jurisdictions have begun to look for other solutions to discover and punish cartel members. Therefore, they have implemented programmes which encourage cartel members to betray other cartel members in exchange for full or partial immunity from penalties. This is the case of the amnesty or immunity programmes alternatively known as leniency programmes.

Nonetheless, despite great success in implementing it in various countries, some jurisdictions have not done so well. This is the case of the Peruvian Leniency Programme, which was launched in 1996 yet no leniency agreement has been executed in 17 years by the Defense of Free Competition Commission within INDECOPI (hereafter, the

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“Competition Commission”). For that reason, this paper focuses on the problems of the Peruvian Leniency Programme and attempts to solve them by making some key recommendations.

This paper is divided into four sections. Section I provides a review of how leniency is an important tool for detecting and deterring cartel activity and how antitrust enforcers have found it an important instrument to detect cartels. In addition, we try to identify the main characteristics that a leniency programme should have in order to create incentives for cartel members to reveal infringements and break up cartels.

Section II presents an overview of the U.S. Antitrust Division of the Department of Justice (DoJ) Leniency Programme and the European Union (EU) Leniency Programme. Regarding Latin American experiences, we analyze Brazil where the cartel enforcement landscape has changed remarkably since 2000 as a consequence of the implementation of a leniency programme.

Section III provides a description of the legal framework of the Peruvian Leniency Programme stated in Article 26 of Legislative Decree 1034, the Competition Act, in order to highlight the main issues it raises. We attempt to identify the reasons which have discouraged undertakings to apply to the programme, such as the lack of fear of detection and the threat of strong fines. Taking into account these issues, in Section IV we make a number of recommendations for implementing a successful leniency programme in Peru. We highlight the need to issue guidelines in order to increase the transparency and predictability of the programme. In particular, guidelines would be useful for undertakings to predict with a higher degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not. Section V, the concluding section of the paper, gives the final overview of the main problems detected and key recommendations to address them.

II. HOW LENIENCY PROGRAMMES ARE A KEY TOOL FOR DETECTING AND DETERRING CARTEL ACTIVITY?

Competition authorities need to determine the best way to address and combat cartels. In the design of cartel policy, we find richer and more complex mechanisms than those simply based on increasing fines².

Accordingly, most of the jurisdictions have not only adopted an alternative mechanism to uncover cartel members, but also to punish them. This is the case with the leniency

² Motta, Massimo and Polo, Michele (2003) *Leniency Programs and Cartel Prosecution*, pp.347-379.32 International Journal of Industrial Organization (Amsterdam)

programmes which provide an alternative method for revealing increasingly sophisticated and geographically dispersed cartels which would otherwise remain undetected. For instance, Giancarlo Spagnolo calls this “the leniency revolution”. New leniency policies have been introduced following the DoJ’s lead. In 1993 and 1994 the Corporate and Individual Leniency Policies emerged. Their impacts were clearly observed. Antitrust authorities’ “normal way” to detect, prosecute and hopefully deter cartels changed, from audits and dawn raids to well-designed leniency policies and self-reporting cartel participants.³

A leniency programme, in general, rewards undertakings that provide evidence to the competition authority regarding the existence of anticompetitive conduct (the pernicious cartels) and cooperate fully, permanently, actively and diligently during the investigations. It is based on two principles: first, that the earlier the undertakings contact the competition authority, the higher the reward received; second, that the value of the reward will depend on the usefulness of the evidence provided.

This was a response to the secrecy with which undertakings usually operate as part of a cartel. Leniency programmes uncover conspiracies that might otherwise go undetected and make the ensuing investigations more efficient and effective⁴. Also, leniency exists because circumstantial evidence is often not enough to prove a cartel infringement. Hence, there is nothing more useful than evidence obtained directly from a cartel member.

Thus, this tool seeks to create incentives for undertakings to demonstrate infringements in exchange for favorable treatment by the competition authority. As a consequence, leniency has become one of the most effective instruments for detecting and deterring cartel activity that otherwise would not be discovered. In addition, it is crucial for deterring cartel activity because it prevents cartel formation by reducing trust among potential cartel members given that it increases the likelihood that one of them may prefer to obtain immunity instead of maintaining the cartel and later being sanctioned.

The impact that leniency has had can be seen in the recent increase of successfully prosecuted cartels. For example, since the U.S. programme was revised in 1993 to make the scope of amnesty clearer and somewhat broader, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and fines of well over \$1 billion. For instance, in the US investigation of the vitamins cartel, the amnesty applicant’s co-operation led directly to guilty pleas and fines of \$500 million and \$225 million against two other firms⁵.

³ Spagnolo, Giancarlo (2005). *Leniency and Whistleblowers in Antitrust*, prepared for P. Buccirossi (Ed.), pp. 3. Handbook of Antitrust Economics. (Rome)

⁴ OECD (2001), *Using Leniency to fight hard-core cartels*. Available online at <http://www.oecd.org/daf/ca/1890449.pdf>

⁵ *Op.Cit.* OECD (2001) *Using Leniency to fight hard-core cartels*

As it can be seen, there is no doubt that leniency works. But what are the main features of a successful leniency programme?

First of all, for any leniency programme to be successful there must be strong sanctions (**penalties, fines**) backed by strong enforcement programmes. Also, there should be fear of detection. Unless there is fear in cartel members of being detected or prosecuted, there will be no incentive to betray their co-conspirators, although there might be a well-drafted leniency programme offering rewards as immunity. Finally, there must be transparency and clarity regarding the procedure and the reward(s) an applicant will obtain. These aspects should be considered as prerequisites and are considered by the U.S. Antitrust Division of the DoJ as three critical features. These three major cornerstones - stiff potential penalties, heightened fear of detection, and transparency in enforcement policies - are at the heart of both our Amnesty Programme and our deterrence efforts⁶.

After guaranteeing these three pre-requisites, there are other key features that a leniency programme should consider and cover. The following list summarizes some of them:

Confidentiality: one of the most important elements is the confidentiality of the information provided and the identity of the cartel member applying for leniency. Confidentiality is essential to remove any fear that the information provided might later be used against the applicant before other courts (national or foreign).

Marker system: In order to create incentives a marker should be established for the purpose of reserving a place for undertakings applying for leniency. An undertaking can claim a marker without providing all the information that would be necessary to complete the application.

Oral statements: Undertakings should be capable of making a leniency application orally, not just written. Certainly, the competition authority should keep a record of the meeting held with the applicant.

Possibility of knowing in advance if a leniency application has been filed in a certain market: Undertakings should be capable of contacting the competition authority to figure out if in a certain market an undertaking has already filed a leniency application. This can create incentives to start the “race” for the authority and make the cartel confess. Also, it gives predictability regarding the type of information that will be required (e.g. information that should meet the “significant added value” test) and the rewards that could be granted (full or partial immunity).

⁶ Hammond, Scott D (2000) *Detecting and deterring cartel activity through an effective leniency program*. U.S. Department of Justice. Available at <http://www.justice.gov/atr/public/speeches/9928.htm>

What type of information should I provide?: Undertakings should know in advance what type of information they should provide in order to be eligible for the reward. Some jurisdictions simply require that undertakings submit information and evidence that will enable the competition authority to: (a) carry out a targeted inspection in connection with the alleged cartel; or (b) find an infringement in connection with the alleged cartel (this is the case of the European Commission and its Notice on Immunity from fines and reduction of fines in cartel cases of 2006). But other jurisdictions are not sufficiently clear. For example, Mexico's Leniency Programme requires the presentation of "evidence that causes sufficient conviction"⁷; Chile's Leniency Programme requires the presentation of "accurate, truthful and verifiable background that constitutes an effective contribution to the clarification of the collusion and determination of the others responsible"⁸; and Colombia's Leniency Programme requires the presentation of "relevant and sufficient information that serves the investigation"⁹. So it seems that some programmes may not be clear at all and can grant a certain degree of discretion to the competition authority to determine if the information provided actually complies with requirements stated in the programme. Indeed, what constitutes "relevant" or "sufficient" information? In these cases, competition authorities should be careful and consider providing guidance with the purpose of clarifying those terms.

What conditions should I meet?: Likewise, leniency programmes should determine which conditions the applicants must meet in order to obtain the reward. Most programmes require full, ongoing cooperation.

Possibility of filing an application even if the competition authority is aware of the cartel: Leniency should be available under these circumstances: (i) where the agency is unaware of the cartel, and (ii) where the authority is aware of the cartel but does not have sufficient evidence to proceed or prosecute.

Cease participation in the cartel conduct: Most programmes require that the applicant ceases participation in the cartel unless instructed otherwise by the authority in order to protect the efficiency of inspections.

Leniency should not be applicable to ringleaders: Finally, most of the programmes state that ringleaders are not eligible for leniency as this could unduly reward those who have coerced others.

⁷ Comisión Federal de Competencia de México (2014). *Programa de Inmunidad*. Available at <http://www.cfc.gob.mx/cofece/index.php/cofece/que-hacemos/practicas-monopolicas-absolutas/programa-de-inmunidad>

⁸ Fiscalía Nacional Económica de Chile (2009). *Guía sobre Beneficios de Exención y Reducción de Multas en casos de Colusión*. Available at <http://www.fne.gob.cl/marco-normativo/guias/>

⁹ Superintendencia de Industria y Comercio (2013). *Programa de Beneficios por Colaboración*. Available at <http://www.sic.gov.co/es/delacion>

III. INTERNATIONAL EXPERIENCE. AN OVERVIEW OF THE U.S., EU AND BRAZILIAN EXPERIENCE IN THE APPLICATION OF LENIENCY

3.1. The U.S. Leniency Programme

Since 1978, the U.S. Antitrust Division of the DoJ has allowed the possibility for guilty parties to avoid criminal sanctions if they meet specific conditions. In 1993, the policy was redesigned and issued as the Corporate Leniency Policy, and a Leniency Policy for Individuals was issued in 1994.

3.1.1. Corporate leniency criteria

Leniency is available for corporations either before or after a Division investigation has begun. 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 information about the activity being reported from any source, while Type B is available after the Division has received information about the activity¹⁰. The requirements for qualification under Type A or Type B are similar, with a few essential differences¹¹.

3.1.2. Leniency Policy for Individuals

An individual who approaches the Division on his or her own behalf to report illegal antitrust activity may qualify for leniency under the Leniency Policy for Individuals. As with a corporate applicant, an individual leniency applicant is required to admit to his or her participation in a criminal antitrust violation. The individual must not have

¹⁰ U.S. Department of Justice. Hammond, Scott D (2008) *Frequently Asked Questions regarding the Antitrust Division's Leniency Program and model leniency letters*, Available online at <http://www.justice.gov/atr/public/criminal/239583.htm>

¹¹ Type A leniency applicants must meet the following six conditions: (1) at the time the corporation comes forward to confess criminal behavior, the Division has not yet 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 the injured parties; and (6) the corporation did not coerce another party to participate in the activity and clearly was not the leader in, nor the originator of, the activity.

Type B Leniency is available to the first company to come forward and qualify for leniency after an investigation has already been initiated and requires many of the same conditions as Type A Leniency, with the additional requirements that: (1) at the time the Corporation confesses its behavior, the Division does not yet have evidence against the company that is likely to result in a sustainable conviction; and (2) 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 the time at which the corporation comes forward.

approached the Division previously as part of a corporate approach seeking leniency for the same conduct.

Once a corporation attempts to qualify for leniency under the Corporate Leniency Policy, individuals who come forward and admit their involvement in the criminal antitrust violation as part of the corporate confession will be considered for leniency solely under the provisions of the Corporate Leniency Policy. They may not be considered for leniency under the Leniency Policy for Individuals¹².

3.2. EU Leniency Programme

The EU Leniency Policy was first introduced in 1996 and revised twice, in February 2002 and more recently in December 2006¹³ (2006 Leniency Notice). In brief, the leniency policy grants undertakings involved in a cartel either full immunity from fines or a reduction of fines which the European Commission (hereafter, the Commission or EC) would have otherwise imposed on them.

According to the 2006 Notice, the Commission will grant immunity from any fine which would otherwise have been imposed on an undertaking disclosing its participation in an alleged cartel affecting the European Community if that undertaking is the first to submit information and evidence which in the Commission's view will enable it to: (a) carry out a targeted inspection in connection with the alleged cartel; or (b) find an infringement of Article 81 EC (now, Article 101 of the EU Treaty) in connection with the alleged cartel. In addition, the undertaking must also fully cooperate with the Commission throughout the process, provide it with all evidence in its possession, and put an end to the infringement immediately. Furthermore, immunity will not be granted if, at the time of the submission, the Commission already had sufficient evidence to adopt a decision to carry out an inspection in connection with the alleged cartel or had already carried out such an inspection. Finally, an undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. Yet it may still qualify for a reduction of fines if it fulfills the relevant requirements and meets all the conditions.

Undertakings which do not qualify for immunity may benefit from a reduction of fines if they provide evidence that represents "significant added value" to that already in the Commission's possession and have ended their participation in the cartel. According to the Notice, the concept of "added value" refers to the extent to which the evidence provided strengthens, by its very nature and/or its level of detail, the Commission's ability to prove the alleged cartel. Also, full cooperation should be provided as in the

¹² *Op.Cit.* (2000) *Detecting and deterring cartel activity through an effective leniency program*

¹³ Available at

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208\(04\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006XC1208(04):EN:NOT)

first scenario. The first undertaking to meet these conditions is granted a 30 to 50% reduction, the second 20 to 30% and subsequent companies up to 20%¹⁴.

3.3. Brazilian Leniency Programme

The Brazilian Leniency Programme, launched in 2000, allowed the Secretariat of Economic Law (SDE) to develop leniency agreements under which individuals and corporations are excused from some or all of the administrative penalties related to illegal conduct (in return for their cooperation in prosecuting a case).

Pursuant to Brazilian Competition Law¹⁵, in order to benefit from the Leniency Agreement, the following requirements have to be fulfilled:

- The applicant (a company or an individual) is the first to come forward and confesses its participation in the unlawful practice;
- The applicant ceases its involvement in the anticompetitive practice;
- The applicant was not the ringleader of the activity being reported;
- The applicant agrees to fully cooperate with the investigation;
- The cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that demonstrate the anticompetitive practice;
- At the time the applicant comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant¹⁶.

IV. WHY HAS THE PERUVIAN LENIENCY PROGRAMME NOT BEEN SUCCESSFUL IN UNCOVERING CARTELS?

The Peruvian Leniency Programme was launched for the first time in 1996 by Legislative Decree 807, which amended Legislative Decree 701 and was the Peruvian Competition Act in force at that time. The main characteristics of the Leniency Programme were:

- Like the U.S. Leniency Programme, only the first undertaking coming forward to the Technical Secretariat of the Competition Commission could obtain full immunity in

¹⁴ European Commission (2013) *About the Leniency Policy*. Available at <http://ec.europa.eu/competition/cartels/leniency/leniency.html>

¹⁵ The Competition law and policy in Brazil is governed primarily by Law 8,884, of 1994, known as the “Brazilian Competition Law”

¹⁶ Secretariat of Economic Law, Antitrust Division, Council for Economic Defense and Ministry of Justice, Brazil (2009), *Fighting Cartels: Brazil's Leniency Program, 3rd. edition*. Available at http://www.cade.gov.br/upload/Brazil_Leniencia_Program_Brochure.pdf

exchange for evidence that could help the Technical Secretariat identify and establish the existence of illegal conduct.

- Confidentiality was not granted immediately the application was filed. It was subject to analysis by the Competition Commission which could determine whether to grant confidentiality or not depending on the nature of the information provided. Also, if confidentiality was granted, it could only protect the identity of the applicant as the source of the information provided.
- There was no possibility of obtaining any sort of reduction for the second or subsequent applicants.

This programme was in force until June 2008 when a new Competition Act was passed by Legislative Decree 1034 (hereafter, the “Competition Act”), introducing some changes to the Peruvian Leniency Programme. Article 26 of the Competition Act regulates the Peruvian Leniency Programme in the following terms:

“Article 26. - Exoneration from sanction¹⁷.-

26.1. Without prejudice to what is set forth in the preceding article, any person may make a request to the Technical Secretariat to be exonerated from sanction in return for providing evidence that helps to identify and establish the existence of illegal conduct. Assuming that the evidence provided is determining to punish the participants of the illegal conduct, the Technical Secretariat may propose, and the Commission accepts, the approval of the offer made. For this purpose, the Technical Secretariat has all the powers of negotiation that may be necessary to establish the terms of the offer”.

“26.2. The agreement of exoneration from sanction shall be signed by the interested individual and the Technical Secretariat; it shall include the obligation to keep confidential the source of the evidence provided. The failure to comply with this obligation shall produce in the officer the administrative and criminal accountability established for the cases of non-compliance of confidentiality policy. The signature of the agreement and its compliance by the interested party, exonerates it from sanction regarding the illegal conduct, the Commission, or any other administrative or judicial authority cannot follow or initiate an administrative or judicial procedure on the same charges”.

“26.3. If there are several undertakings requesting exoneration from sanction, only the first undertaking that has provided evidence of the existence of an anticompetitive conduct and the identity of the participants involved in the alleged conduct will benefit

¹⁷ This is my translation of Article 26 of the Competition Act. The original version is in Spanish.

from exoneration. Other undertakings that provide relevant information may benefit from the reduction of the fine, if that information is different from what the competition authority already has, either through its own research or the application filed previously. The Technical Secretariat will examine in each case the appropriateness of reducing the fine”.

“26.4. The approval of exoneration from sanction does not remove nor limit civil liability of the undertakings involved in the illegal conduct if damages have been caused by them (the emphasis is ours)”.

As it can be seen, some changes were introduced by the new Competition Act:

- Undertakings can obtain full or partial immunity if they are the first or second (or subsequent) applicants approaching the Technical Secretariat.
- Confidentiality is no longer subject to approval by the Competition Commission. The Technical Secretariat and the Competition Commission are required to keep the source of the information confidential. If there is non-compliance, officers will be subject to administrative and criminal accountability.
- It is stated that the approval of exoneration from sanction does not remove nor limit civil liability if damages have been caused.

Despite the fact that these changes improve Peru's previous policy, serious problems still remain:

- If a full reading is given to Article 26, certain discrepancies are revealed regarding the threshold imposed on the first applicant about the sort of evidence to be provided to gain the benefit of full immunity. If we read the first sentences of Articles 26.1 and 26.3, it can be validly interpreted that the first undertaking applying for leniency has to provide evidence that could help the Technical Secretariat to identify and establish the existence of illegal conduct. Yet the second sentence of article 26.1 seems to raise the bar by stating that the first undertaking should provide “determining” evidence to benefit from full immunity. So what is the threshold imposed in Article 26? Should the first undertaking provide evidence that helps the authority to identify and establish the existence of illegal conduct? Or should this evidence be determining for punishing the participants of the illegal conduct? Should any of these interpretations prevail? Which interpretation will be chosen by the Technical Secretariat? Will the Competition Commission follow the same criteria?
- Similarly, with regard to the subsequent applicants, Article 26.3 states that evidence should be relevant and different from what the Technical Secretariat already has. What should be understood by “relevant and different”?

- It is not clear what additional requirements an applicant must fulfill for obtaining full or partial immunity. On reading Article 26.1 it seems that the Technical Secretariat has all the powers of negotiation that may be necessary to establish the terms of the agreement. This lack of predictability may have discouraged some applicants because they do not know how the Technical Secretariat will execute its powers of negotiation.
- Other questions raised by Article 26 are: What is the level of reduction of the fines? 50%? 90%? 20%? How can an applicant know if a leniency application has been filed previously? Can an undertaking contact the competition authority to obtain some minimum information before filing its leniency application? Also, can an undertaking submit its application orally? Can an undertaking submit an application even if the competition authority is already aware of the anticompetitive conduct?
- Also, certain problems may exist for the competition authority in the application of Article 26 regarding confidentiality such as: Should the authority allow access to the evidence provided by the applicant to those undertakings denounced as cartel members? Can the competition authority exchange information with other competition authorities?
- Finally, the Peruvian regime does not establish the possibility of obtaining a marker that could reserve the position in the queue while the applicant gathers more evidence. It seems that from the very beginning it must be indispensable to have all the information required.

As noted, the current legal framework does not answer in full any of the questions mentioned above. This scenario is made worse by the fact that there is no further guidance or regulation. Transparency and predictability are needed, as stated in Section II.

Yet our current legal framework is not the only problem that may have deterred businesses from applying to the leniency programme over the last 17 years. In Section II we identified as prerequisites of a successful leniency programme two additional key cornerstones: the fear of detection and the threat of strong sanctions. Unfortunately, we have to admit that there is not a strong fear of detection in the Peruvian market that could encourage businesses to balance the costs and benefits of blowing the whistle before the competition authority. Dawn raids are rarely done – not because INDECOPI does not have the power to do so but largely due to the fact that it – particularly the Technical Secretariat of the Competition Commission – does not have enough resources.

According to the most recent census by the National Institute of Statistics and Informatics - INEI¹⁸ up to June, 2012, Peru's population is over 30 million, and the Technical Secretariat of the Competition Commission has currently 20 full-time officers

¹⁸ Diario El Comercio, *Peru's population increases by 335,000 people each year*, July 10th, 2012. Article available at <http://elcomercio.pe/actualidad/1439789/noticia-poblacion-peru-se-incrementa-335-mil-habitantes-cada-ano>

on its staff. It is evident that for such a big market more resources should be allocated, and that INDECOPI should be more proactive, not just reactive. It is necessary to adopt a strong enforcement programme to detect cartels. INDECOPI has to commit to vigorously investigate cartels by using robust investigatory powers. Judicial Power should also participate by granting warrants when it is requested by INDECOPI. Indeed, extensive work and training have to be done with the judges because Peru does not have judges specialized in competition matters and most of them are not conscious of the serious harm that anticompetitive conduct causes. Those participating in cartels must understand that there is a real risk of detection and that, in the absence of a leniency application, subsequent enforcement action will follow. This will encourage them to come forward before they are caught.

Finally, and in connection with the prior idea, there is no serious threat of strong sanctions. Recently, in the last five years, the Technical Secretariat of the Competition Commission has imposed the highest fines since the creation of INDECOPI, around S/. 38 million Nuevos Soles¹⁹, which is eight times the total amount of the penalties previously imposed. The principal markets investigated and fined were the vehicles insurance market, the medical oxygen market, the land transport market and the cement market. But, as mentioned, this practice has only occurred recently.

Having identified the main problems with Peruvian Leniency Policy, the next section attempts to make some key recommendation in order to enforce this programme as an integral part of an active cartel policy.

V. PERU: LENIENCY PROGRAMME RECOMMENDATIONS

5.1. The need to provide guidance for improving transparency and predictability

After analyzing the legal framework, it is crucial to issue some guidance in order to clarify certain ambiguities. Certainly, the only manner for the Peruvian leniency regime to meet its stated objective of improved detection of, and enforcement against, cartels is by providing the strongest possible incentive for cartel participants to apply. Every uncertainty and ambiguity detracts from this incentive, as businesses are unlikely to take such a significant step without a clear understanding of the risks involved.

This guidance should address the following issues:

Possibility of making an oral application: The possibility of submitting a leniency application orally should be considered. Undertakings should be able to contact the

¹⁹ Approximately, US\$15 million.

Technical Secretariat of the Competition Commission and tell them their interest in participating in the leniency programme. The Technical Secretariat staff should accept this invitation and have a meeting with the applicants. This meeting could be recorded and access to this record will be only given to the applicant and if necessary to the cartel members denounced in order to protect their defense rights. They could take notes in INDECOPI's offices but not a copy of the record itself.

Marker system: A marker system should be granted to the applicant just by submitting its application with certain minimum information such as a detailed description of the alleged cartel arrangement, the product or service concerned, the geographic scope, the duration of the cartel, specific dates regarding the alleged cartel, and any further information that the applicant possesses. Hence, by granting this marker, the applicant could be sure that its position in the queue will be reserved and protected while he or she gathers additional evidence. Furthermore, the Technical Secretariat could have a meeting with the applicant to discuss what sort of evidence will be provided and, according to that the authority will define the term for providing this further evidence.

Defining what sort of evidence the applicants shall provide: The guidance should establish how the Technical Secretariat will understand “determining” evidence. Content should be given to that term in order to avoid doubts. In fact, the guidance could state that for the Technical Secretariat determining evidence means evidence that helps the authority to identify and establish the existence of anticompetitive conduct. Similarly, the guidance should establish how the Technical Secretariat defines “relevant and different” evidence for the purposes of subsequent applicants. Hence, the guidance could state that for the Technical Secretariat relevant and different evidence means evidence that provides further certainty to the authority regarding the anticompetitive conduct already acknowledged and increases its capability of proving such conduct.

Determining the conditions that an applicant should fulfill in order to obtain immunity: The guidance should establish that in order to be eligible for obtaining immunity the applicant should meet certain conditions beyond its obligation of providing evidence. These conditions must be clearly determined. In accordance with other jurisdictions, applicants should provide full and permanent cooperation from the time they submit their applications throughout the Competition Commission's administrative sanctioning procedure. Like the EU Leniency Notice, this duty to cooperate could include (a) providing the competition authority promptly with all relevant information and evidence relating to the alleged cartel that comes into its possession or is available to it; (b) remaining at the competition authority's disposal to answer promptly any request that may contribute to the establishment of the facts; (c) not destroying, falsifying or concealing evidence or information relating to the alleged cartel, (d) not disclosing the fact or any of the content of its application until the competition authority determines it. Also, the undertaking should cease its involvement in the alleged cartel immediately following its application, except for what would, in the competition authority's view,

be reasonably necessary to preserve the integrity of the inspections. Finally, it could be established that full immunity will not be granted if the applicant coerces other undertakings to join the cartel or to remain in it.

Finally, applicants should know that if they fail to cooperate as stated above, they will not benefit from the reward.

Possibility of filing a leniency application even if the Technical Secretariat of the Competition Commission is aware of the cartel: The possibility that undertakings could file a leniency application even if the competition authority is aware of the cartel should be permitted because it could allow the authority to gather and obtain major evidence in less time.

Confidentiality: Without doubt, confidentiality is vital for a leniency applicant. INDECOPI should keep leniency applications confidential. Hence, the source of the information provided - as stated in Article 26 of the Competition Act - will be kept confidential (applicant's name), and the information resulting from the application will be confidential as well, to the maximum extent possible.

Therefore, INDECOPI could only share information obtained from an applicant with another competition authority after obtaining the applicant's permission. Otherwise, it would create a significant disincentive to enter the leniency program that would lead to fewer leniency applications.

Similarly, the guidance should explain that limited access to the information (non-confidential version) will be provided solely to the cartel members for the purpose of respecting their defense rights.

In all scenarios, the competition authority shall take the necessary and adequate measures to keep its commitment to confidentiality. Finally, if a third party requests access to the information provided through the programme for initiating civil action for damages, INDECOPI shall only provide access to the final decision issued and not the information obtained through the programme.

Possibility of knowing in advance if a leniency application has been filed in a certain market: Applicants should be given the possibility to contact the Technical Secretariat of the Competition Commission to figure out if a leniency application has been previously filed in a certain market. This will enhance certainty as potential applicants could know what type of information shall be provided and what benefit could be obtained.

Fine reduction levels: Since Article 26 of the Competition Act does not establish what percentage reduction could be obtained, the guidance could establish the level of reduction obtained by second and subsequent applicants.

5.2. The need of fear of detection

The only form of creating fear of detection consists in carrying out dawn raids continuously in different markets in order to send the signal to businesses that they are permanently supervised by the competition authority. For this purpose, more resources should be allocated to the Technical Secretariat of the Competition Commission within INDECOPI. Public funding should be allocated and increased because it is an investment that can pay for itself. The number of people working at the Technical Secretariat should be increased as well. They should receive ongoing training in how to carry out dawn raids, given that certain degrees of specialization and technique are required. The Judicial Power should promptly grant warrants when INDECOPI requests them. It is important to train judges and explain the importance in many cases of conducting dawn raids - even without prior notice. All these aspects will help INDECOPI to be more proactive in enforcing the Competition Act.

5.3. The need of threat of strong sanctions

During recent years some improvements have been made regarding this final issue, as stated in Section IV. Therefore, this practice should continue and INDECOPI should coordinate promptly with the media in order to cover these cases where significant fines are imposed in order to send signals to businesses about the consequences of participating in anticompetitive conduct. Fines should be properly calculated according to the parameters stated in the Competition Act. The main idea behind it is that if penalties are inadequate, cartel participants will not come forward since the benefits from leniency are reduced or non-existent. Essentially, the value of the cartel for cartel participants should not be greater than the cost of getting caught²⁰.

Moreover, INDECOPI could express its concern to the Peruvian Congress regarding the fact that since June 2008, following the enactment of Legislative Decree 1044, the Unfair Competition Act, cartel offence was not a criminal offence any more. Imprisonment has a general deterrence effect. People who do not offend may be dissuaded from doing so by the knowledge that imprisonment could follow. Unlike financial penalties, the general deterrent effect of imprisonment is not particularly dependent on an individual's wealth. The general deterrent effect of imprisonment may be higher for white collar offenders

²⁰ International Competition Network (2009), *Anti-cartel enforcement manual. Chapter 2: Drafting and implementing an effective leniency policy*, Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf>

because of the social stigma and the greater opportunity cost (through lost income), the reduced opportunities for future employment, and the possibility of travel restrictions to some destinations²¹.

Finally, competition advocacy should continue emphasizing that anticompetitive conduct injures society at large. Businesses, consumers and Peruvian society should understand that INDECOPI is not just a means of resolving private disputes but a means to combat conduct that cause harm to society in general. Information campaigns should be launched; brochures regarding the damage that cartels cause should be distributed; brochures informing that Peru has a leniency programme should be distributed as well; and; lastly, INDECOPI should celebrate annually an official Competition Day on issues of guidance and transparency.

VI. CONCLUSIONS

There is no doubt that leniency is one of the most relevant tools for cartel detection. According to the UNCTAD, approximately 100 international cartels have been detected **thanks to leniency programmes and about 50 jurisdictions self-identified as having a leniency programme**²².

The key elements of a successful leniency programme are: (i) transparency and certainty, (ii) high probability of being uncovered (fear of detection), and (iii) strong sanctions. Otherwise, even if a jurisdiction has a well-drafted programme, there will be little incentive to apply for leniency.

The Peruvian Leniency Programme faces serious challenges as identified in Sections III and IV. INDECOPI and particularly the Technical Secretariat of the Competition Commission need to work on the above mentioned issues. First of all, guidance should be provided in order to reduce the ambiguity of Article 26 of the Competition Act. Secondly, the Technical Secretariat of the Competition Commission should regularly conduct dawn raids on businesses, and the Judicial Power should support INDECOPI by granting the required warrants. For these purposes, INDECOPI could operate a scheme dedicated to the training of national judges in competition law. Also, more resources should be allocated to the Technical Secretariat. It is clear that with an efficient allocation of resources Peruvian society could be earning significantly more. Finally, the Competition Commission must impose strong penalties. Strong penalties

²¹ Ministry of Economic Development of New Zealand (2010), Discussion Paper to consult on whether cartel conduct should be criminalized. pp. 28. Available at <http://www.med.govt.nz/business/competition-policy/pdf-docs-library/cartel-criminalisation-discussion-document.pdf>

²² Unctad Secretariat (2010). *Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*. Available at http://unctad.org/sections/wcmu/docs/tdrbpconf7_slc1_UNCTAD.pdf

against enterprises and individuals increase the effectiveness of leniency programs in uncovering cartels and provide incentives to cartel participants to co-operate with a cartel investigation²³. **Regarding the latter, criminalization could still be an additional solution for deterring cartel activity.**

INDECOPI needs to enforce urgently its Leniency Programme in order to penetrate **the cloak of secrecy in which cartels operate. It would be a shame to continue having** such an important tool and not enforce it as an integral part of an active cartel policy. Hopefully, the recommendations made in this paper could help INDECOPI to achieve such a goal.

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