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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM
Session I: Cartels: Estimation of Harm in Public Enforcement Actions**

-- Call for Country Contributions --

4-5 April 2017, Managua, Nicaragua

The attached document is circulated in preparation for the discussion under Session I of the Latin American and Caribbean Competition Forum at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua. Delegates are requested to send written contributions for that session to the Secretariat by 10 March 2017 at the latest. Advance notice of contributions before or by Friday 17 February 2017 would be useful.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum
4-5 APRIL 2017, Managua, Nicaragua

Session I **Cartels: Estimation of Harm in Public Enforcement Actions**

CALL FOR COUNTRY CONTRIBUTIONS

Introduction

1. This request for contributions is circulated in preparation for the discussions to be held at the 2017 Latin American and Caribbean Competition Forum (LACCF) on the topic of “**Cartels: Estimation of Harm in Public Enforcement Actions**”.
2. This session has the potential to shed light on a key topic for competition authorities and the judiciary. You are invited to prepare and submit a concise written contribution for this session. Contributions will serve as a foundation for the discussion. The purpose of this session will be to explore whether fines are or might be in some sense linked to damages, so to the extent that you have competition authority activity to gather fines, a contribution would be useful. Even if your authority does not typically assess damages from cartels, a contribution will still be appropriate. In this call for contributions we aim to identify some topics that you may wish to address in your written and oral contributions. Please note that this list is neither prescriptive nor exhaustive. You are free to raise other relevant issues that reflect your experiences or ignore certain questions in the interest of keeping your contribution concise.
3. To assist the OECD Secretariat in planning the session, please inform us by **17 February 2017** if you intend to submit a contribution. The contributions themselves should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin [angelique.Servin@oecd.org] and copied to Sean Ennis [sean.ennis@oecd.org] by **10 March 2017** at the latest. Country contributions will be circulated to participants through the LACCF website: www.oecd.org/competition/latinamerica/programmeanddocuments.htm and www.lacsf2017nicaragua.com/index.php. Furthermore, if you would like to circulate other relevant material, such as, any guidelines relevant to estimating harm for public enforcement, please submit a copy to the Secretariat before **10 March 2017**.

4. You may wish to consult previous work by the OECD on this topic, such as:
- Competition and Sanctions in antitrust cases, 2016 Global Forum on Competition Roundtable (www.oecd.org/competition/globalforum/competition-and-sanctions-in-antitrust-cases.htm)
 - Quantification of Harm to Competition by National Courts and Competition Agencies, 2011 Competition Committee Roundtable (www.oecd.org/daf/competition/QuantificationofHarmtoCompetition2011.pdf)
 - Third report on the Implementation of the 1998 Council Recommendation, 2005 (www.oecd.org/competition/cartels/35863307.pdf)
 - Recommendation of the Council concerning Effective Action against Hard Core Cartels, 1998 (<http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193>)

The Secretariat will circulate a background note in advance of the LACCF meeting.

Background

5. The appropriate approach for competition authorities with regard to estimating harms from cartels depends on their individual legal situation. But as fines have grown larger, the debate has increased about the value of evaluating harm prior to determining an exact fine amount. Different jurisdictions hold diverging views on the relationship between quantifying harm to competition and quantifying the appropriate level of fines. Many jurisdictions do not consider harm when setting fines. To the extent harm is considered, the role that the quantum of actual damage plays in the calculation of cartel fines largely depends on the extent to which fines are geared at deterring future cartel behaviour, apart from punishing offenders and achieving restitution. If punishment and restitution were the only objectives of fines, the amount of harm or illegal profit would be the main factor to consider for the purposes of calculating fines. However, if deterrence is a primary objective, the correlation between the actual harm caused and the level of fines becomes weaker. As a result, to promote deterrence, firms may be subject to large fines even when a particular conduct has little effect on the economy.

6. However, this does not mean that the actual harm caused by a cartel should not be a relevant consideration for the purposes of setting fines. Some jurisdictions provide for sanctions for cartel behaviour while accounting in some way for the effects of the infringement when calculating the fine, for example by considering the extent of cartel implementation or considering extent of harm as either an aggravating or mitigating circumstance.

7. The calculation of possible, likely or actual cartel harm may occur with different degrees of detail depending on the jurisdiction. Competition authorities very often would not use quantitative evidence due to the difficulties inherent to these calculations (such as the unavailability of relevant data), and the fact that analyses must be undertaken on a case-by-case basis. Some competition authorities use presumptions to overcome these challenges; others prefer to refrain from quantifying harm and instead leave the calculations to the courts in the context of private actions.

8. The methods that competition authorities use to make estimates or calculations of harm, would not necessarily be the same ones used for private damage claims. In private damage claims, the focus may be on the overcharge effect and the pass-on defence. In administrative proceedings, the main emphasis may be on output effects which measure the negative welfare implications of a cartel; or the price effects, if consumer welfare is the focus of the calculation.

9. This roundtable will review the estimation of harm by public authorities in cartel cases, focusing on experiences in Latin America, Caribbean and elsewhere. The roundtable promises to be interesting, relevant and topical, as the appropriate role of harm estimation is increasingly debated and of increasing economic importance as fines grow larger.

10. For the purpose of the session, several questions follow. We hope that you may be able to respond with information about your jurisdiction. Please provide an integrated response, rather than replying question by question. If a question is not relevant to your jurisdiction, feel free to ignore it. Responses will be posted publicly on the LACCF website www.oecd.org/competition/latinamerica/ and www.laccf2017nicaragua.com/index.php to ensure that all attendees have a chance to see them prior to the meeting.

QUESTIONS FOR CONSIDERATION IN COUNTRY CONTRIBUTIONS

Please note this is not a questionnaire. We would appreciate a unified, concise contribution that considers the most interesting aspects of fining policy for your jurisdiction.

1. Is existence of harm relevant to fine determination?

Background

11. Competition authorities may be critiqued for applying large fines in cartel cases where there is little or no damage. Sometimes competition authorities take account of damages when calculating a fine. Sometimes they do not, as rigorous requirements to develop a damage estimate may reduce efficacy of enforcement and reduce the deterrence effect of anti-cartel enforcement.

Question

12. In your jurisdiction, is the existence or extent of potential, likely or actual harm from a cartel taken into account when determining a fine to cartel participants? If the existence is taken into account, how would you treat an unimplemented cartel agreement? If it is not taken into account, what are the reasons for this? Please feel free to elaborate.

2. Judicial views on showing of harm

Background

In some jurisdictions, judicial standards may require a consideration or showing of damages from a cartel as a prerequisite for establishing fines, while in other jurisdictions, no such requirement exists.

Question

What are the views of your judiciary on this question, based on case law decisions (potentially from outside the cartel context)? Can you provide examples of relevant judicial decisions in this context, if any?

3. Financial deterrence of cartels

Background

Based on the theory of optimal enforcement, fines must be sufficient to outweigh the expected costs to discovered cartel members. In principle these expected costs would include both damages and fines, so from the perspective of the calculating firm, damages and fines may be somewhat substitutable, even if the legal basis for each and the parties receiving the payment are completely different.

Question

To the extent that private damage claims are feasible and actually successful, would the need for the competition authority to consider effects and potential harm be reduced? Would the need for large fines be reduced in the presence of a vigorous and successful private damage claim system that has the effect of raising costs of participating in a cartel? Does the likelihood of facing damages claims have an influence on the consideration of “inability to pay” arguments?

4. Calculations of harm by a competition authority

Background

When competition authorities enter into the process of evaluating damages, the evaluation can reach different levels of rigour, from simply requiring a serious consideration by the competition authority, to engaging in more serious quantification of economic effects. To the extent an effort is made to quantify harm, the techniques used may vary, as may the criteria for establishing what measure of harm to use.

Questions

If the extent of potential, likely or actual harm is taken into account:

- (a) In what way is it considered (for example in determining a base fine, in determining aggravating or mitigating circumstances)? Must the harm be potential or likely harm, or is actual harm needed?
- (b) What standards would be used for this consideration (e.g., consumer welfare standard, total welfare standard, simple output reduction, price increase)?
- (c) What techniques are used for assessing the extent of harm?
- (d) What types and sources of evidence are relevant for such calculations? Does the competition authority have sufficient access to this type of information?
- (e) Are there any presumptions of harm that apply to all or to some types of cartel behaviour?
- (f) Does the approach used for the calculation of damages in cartel proceedings differ from that used in private damages claims? Has one of these approaches influenced the development of the other?