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Review of application and implementation of the Set

**The use of leniency programmes as a tool for the
enforcement of competition law against hardcore
cartels in developing countries**

Note by the UNCTAD secretariat

Executive summary

Hardcore cartels are considered by many to be the most egregious competition law offence. Leniency programmes are the most effective tool today for detecting cartels and obtaining evidence to prove their existence and effects. But they are effective only if cartelists not seeking leniency perceive significant punishment to be sufficiently likely. These programmes involve a commitment to a pattern of penalties designed to increase incentives of cartelists to self-report to the competition law enforcer. Leniency programmes in different countries may mutually reinforce these incentives on members of international cartels. A handful of developing countries have anti-cartel leniency programmes. If other developing countries were to adopt leniency programmes, a political commitment to fight cartels is necessary for such a programme to be effective.

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Introduction

1. Hardcore cartels¹ are considered by many to be the most egregious offence against competition laws. Cartelists benefit at the expense of their counterparties, who are deceived and cheated. Further effects—transactions not made, investments and innovations foregone, possible corruption to maintain good cartel working conditions—add to the cost. Consequently, many countries aim to deter cartel formation and promote their dissolution. Prosecuting and punishing or otherwise proceeding against cartels form part of their anti-cartel policies. But cartels are usually secret, so detecting them is not always easy. They may be discovered by competition authorities in the course of other investigations, acting on tips, or sometimes from market research. But the most effective tool today for detecting cartels and obtaining the relevant evidence is leniency programmes. These programmes give incentives to members of cartels to self-report to the competition law enforcement agency.

2. A leniency programme is a system, publicly announced, of, “partial or total exoneration from the penalties that would otherwise be applicable to a cartel member which reports its cartel membership to a competition [law] enforcement agency”. The cartel member must self-report and fulfil certain other requirements. Typically, cartelists must confess, cease cartel activity, and fully cooperate in providing significant evidence to aid in the proceedings against the other cartel members. On its side, the competition law enforcer transparently and credibly commits to a predictable pattern of penalties designed to give cartelists incentives to apply for leniency. Crucially, the offer of full or very significant leniency is available only for the first applicant; if any penalty reduction is available for the second and third, it is not nearly as attractive.

3. Necessary conditions for an effective leniency programme include:

(a) Anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do *not* apply for leniency;

(b) Penalties imposed on cartelists who do not apply for leniency are significant, and predictable to a degree. The penalty imposed on the first applicant is much less than that imposed on later applicants;

(c) The leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated;

(d) To attract international cartelists, the leniency programme protects information sufficiently for the applicant to be no more exposed than non-applicants to proceedings elsewhere.

4. About 50 jurisdictions self-identified as having a cartel leniency programme. Among medium- and low-income countries, Brazil, Mexico, the Russian Federation and South Africa have active leniency programmes. Chile recently joined the group. Their programmes are similar to and work in parallel with those of the United States and European Union (EU), *inter alia*, jurisdictions that probably receive the largest number of

¹ “Hardcore” cartel conduct has been defined by the Organization for Economic Cooperation and Development (OECD) as: “an anti-competitive agreement, anti-competitive concerted practice, or anti-competitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.” (OECD, 1998) Throughout this paper, the term “cartel” should be read as “hardcore cartel.”

leniency applications. However, most medium- and low-income countries have no leniency programme. About 100 international cartels, in addition to uncounted domestic cartels, have been detected as a result of leniency applications in the past two decades.

5. This paper examines the conditions and characteristics that make a leniency programme effective. It reviews the programmes of the handful of medium- or low-income countries with experience. And it briefly discusses possible characteristics of developing countries which would influence the effectiveness of leniency programmes. Finally, it poses policy options for developing countries.

I. Theory of effective leniency programmes

6. Entry, external shocks, and change within the industry are the most common causes of cartel breakdown. According to their review of the empirical cartel literature, bargaining problems were a more frequent cause of breakdown than cheating. The most successful cartels develop mechanisms to accommodate external changes, reducing the need to renegotiate. Cheating may, however, prevent some cartels from coalescing.

7. Competition law enforcement also figures in the list of causes of cartel breakdown. However, despite tougher sanctions in the past decade, their continued discovery indicates that cartels remain under-deterred.² In part, this is due to discovered cartels not being sanctioned in all jurisdictions where they caused harm, and sanctions that are imposed not taking into account harm in foreign markets.³

8. Leniency programmes are designed to give incentives to cartel members to come in, confess and aid the competition law enforcers. They aim to drive a wedge through the trust and mutual benefit at the heart of a cartel. They reward one, or a very few, whistleblowers with a large reduction in penalties (as compared to that calculated absent leniency), but not the other cartel members. In other words, they increase the attractiveness of whistleblowing, especially of being the first whistle-blower, as compared with continuing the cartel.

9. Applying different penalties for the same illegal conduct seems unfair or discriminatory. But leniency programmes are available to any cartel member (if they are first to apply or, in some programmes, second or third) on identical terms.

² In the United States, fines calculated under the Sentencing Guidelines, “are likely to be far too low to deter most cartels” (Connor and Lande, 2008: 2216). Cartel detection is not fading away: In September 2009, the Antitrust Division had 144 pending grand jury investigations, which are very likely to be investigating possible cartels, the highest number since 1992. (United States, 2010)

³ “Scholars of modern international cartels generally believe that current competition policies cannot significantly deter recidivism because they are ‘...oriented towards addressing harm done in domestic markets... [or] merely prohibit cartels without [sufficiently strong sanctions].’ For international cartels discovered 1990–2005, median total monetary penalty was 3.5 per cent of sales. Of the 14 global cartels in the sample that were sanctioned four times (in Canada, the European Union (EU) and twice in the United States), average total monetary penalty was 16.3 per cent of sales. Global cartels, despite affecting markets globally, are rarely sanctioned outside North America and Europe. While the optimal level of fines to deter cartels is subject to debate, the current ratios are clearly too low. (Connor, 2006: 198).

The marine hose cartel prosecutions illustrate penalties not taking into account harm elsewhere. The plea agreement reached in the United States explicitly ensures that United States charges are limited to United States commerce and United Kingdom charges are limited to United Kingdom supplies. (ICN, 2009b: 4–8) Brazil settled separately (OECD, 2009: para. 17).

10. Leniency programmes target secret cartels. Because they are illegal and actively prosecuted in many economically important jurisdictions, members of cartels wish to keep them secret. Members limit, destroy, or camouflage evidence of the cartels' existence, operations or effects. A cartel member seeking leniency describes how the cartel operates, brings in and explains evidence to law enforcers, and perhaps testifies against the other members.

11. An effective leniency policy increases the expected penalty from cartelization. Although some cartelists receive a lower penalty, the resulting increase in the number of investigations means that more cartelists are punished. This more than compensates for the reduced fines imposed on those granted leniency. A higher expected penalty discourages cartels.

12. Leniency is distinguished from settlement. Leniency is relevant at an earlier stage, before the competition agency is aware of the cartel or, under some programmes, before it has sufficient evidence to proceed, e.g., to court. By contrast, settlement is an agreement between the parties after the agency has concluded its investigation but before the adjudicating body has reached a decision. Settlement is aimed at reducing the costs and delays of adjudication.

13. The following paragraphs describe how leniency programmes change cartelists' incentives, first for a single jurisdiction and then for two jurisdictions. The latter is relevant for international cartels.

A. Cartel in a single jurisdiction

14. When deciding whether to report to the authorities or, instead, to continue with the cartel, a cartelist compares the costs and benefits of the three potential courses of action: continue the cartel, quietly dissolve the cartel, or seek leniency. The focus here is on the first and last potential courses of action. The middle course, to quietly dissolve the cartel, is sensible if the risk of punishment has risen but the leniency programme is unattractive.

15. The costs and benefits depend on the markets and on the actions of the competition authorities. The authorities, by their anti-cartel actions and leniency programmes, change the incentives on cartelists in order to induce cartel dissolution or leniency applications.

16. Seeking leniency, which ends a cartel, entails sacrificing future cartel profits and, if leniency is not granted in full, possibly suffering penalties. If a cartel is unlikely to be punished, or penalties are small, then the certain losses from seeking leniency outweigh the small risk of detection and punishment: Cartel members will tend not to seek leniency and the anti-cartel law tend to be ignored.

17. Even if incentives are sufficiently large to induce some leniency applications, cartels and cartelists differ: Highly profitable cartels may continue even as less profitable ones do not. More risk-averse companies may seek leniency if they are uncertain as to whether they have violated the law, or if they wish not to run even a small risk of detection and punishment.

18. To induce leniency applications, both the penalty absent leniency and the reduction in penalty if one self-reports must be large and predictable. If the penalty for cartelization is too low, then there is little to gain from seeking leniency. "Penalty" here means not the maximum in the statute books, but what is expected to be imposed. This takes into account *inter alia* actual penalties imposed in past cases, actual settlement policies, and expected delays in the payment of penalties. Some degree of predictability of penalties with and without leniency is necessary to enable potential applicants to roughly calculate the costs and benefits of seeking leniency. Predictability may be further increased by eliminating

prosecutorial discretion: If an applicant meets certain clearly stated conditions, then leniency is automatically granted. This would also increase the perception of fairness and non-favouritism. Public guidelines, combined with training such as the ICN Cartel Workshop to align implementation with policy, aid predictability.

19. The first applicant must be treated much better than the second. If the second applicant is treated similarly to the first, then there is less incentive to rush; each cartel member can wait until he suspects that a first application has been made. Cartel members may thus avoid getting tipped into a race to apply. Many programmes provide for full leniency (no penalties) for the first applicant; others may limit the reduction to, e.g., half or two-thirds.

20. The concept of penalty includes all types of consequences. In addition to those imposed by governmental institutions, the social environment may also impose informal penalties. The larger are social penalties for “turning in” business associates as compared with those for being labeled a cartel member, the more formal penalties must adjust so as to maintain the leniency programme’s effectiveness. Social penalties could be quite significant in developing countries where considerations of trust and personal relations tend to play an important role in business. Social penalties can include even violence and shunning. Penalties imposed under follow-on proceedings are also relevant; see below.

21. Individuals are liable for cartelization in some jurisdictions. Sanctions may include fines, imprisonment, and temporary or permanent bans from acting as a director or officer of a company. Leniency programmes in jurisdictions where individuals may be sanctioned typically grant immunity from prosecution to cooperating individuals at the relevant company simultaneous with the grant of leniency to the company. Ignoring individuals’ incentives risks undermining a corporate leniency programme. If individuals are not granted immunity from prosecution simultaneously with their company, they may influence corporate decision-making away from seeking leniency out of concern, in part, for their own circumstances. Some leniency programmes allow individuals to apply for leniency independently of the company where they are/were employed.

22. The leniency offer changes perceptions of the likelihood of detection. Each cartel member’s calculation as to whether it should seek leniency takes into account other members’ calculations. If one cartel member is on the verge of confessing, then it may think that others are also on the verge, perhaps because they are both exposed to the same “entry, external shocks, and change within the industry.” Or a cartel member may deduce that another is tempted to confess for idiosyncratic reasons. Since there are penalties for being late, the cartel member revises its own thinking about the risk of further waiting and races to confess. In some of these races, minutes separate the first and second application.

23. In other words, there can be a long period during which a cartel is stable. At some point, a change may occur that causes the cartel members to revise their expectations. If this happens, then the cartel members may race to self-report. Sources of such changes may include market shocks, changes in competition authority anti-cartel policies, and changes in corporate ownership – e.g. new owners may discover ongoing cartel conduct and apply for leniency to reduce their liability or to distance themselves from conduct considered criminal in their home culture.

24. Leniency programmes differ as to who may qualify. Many qualify applicants both when the competition agency is unaware of the cartel and when it is aware but has insufficient evidence to proceed. Many exclude all but the first applicant, or all but the first two or three. This is not as strict as it appears at first sight since latecomers might get penalty reductions under a settlement process. Some exclude those who coerced other cartel members or were ringleaders. Many programmes allow potential applicants to probe, often anonymously, as to whether they might qualify before applying.

25. Many programmes require, “full and frank disclosure and ongoing cooperation by the applicant, and if applicable, the applicant’s directors, officers and employees.” They also typically require the applicant to stop cartel activities, although some competition authorities may order applicants to continue to aid proceedings against the other cartelists.

26. Many leniency programmes have a “marker” system. The marker establishes the applicant’s place in the queue, but the threshold disclosure and cooperation requirements must be fulfilled before a deadline.

27. Leniency is granted conditionally. It may be withdrawn if an applicant does not comply, e.g., with the ongoing cooperation requirement. Although uncertainty about conditions that trigger withdrawal reduces a programme’s predictability, not withdrawing leniency from in-compliant applicants risks undermining the programme.

Further points

28. Competition law enforcers can increase a leniency programme’s effectiveness by better focusing resources for cartel detection – e.g. months after the Competition Commission of South Africa announced a focus on the infrastructure and construction sectors, it got leniency applications related to cartels in, respectively, pre-cast concrete products and polyvinylchloride and high density polyethylene pipes.⁴ This approach risks cartels flourishing outside the area of focus. Alternatively, resources may be allocated on basis that cartelization is a learned behaviour.

29. “Cartel profiling” means to focus on other markets where discovered cartelists are also active. Both common corporate members and an individual active in one cartel can lead, via earlier employment and relationships, to other cartels.

30. Penalty reductions under a settlement process can undermine the effectiveness of the leniency programme. Too large expected settlement discounts reduces the attractiveness of the leniency offer – e.g. the European Commission aimed to limit the undermining effect by capping settlement discounts at 10 per cent, in contrast with leniency discounts of up to 100 per cent.

31. In some jurisdictions, cartel cases are prosecuted not by the competition authority but by a different institution, e.g., the public prosecutor. Potential leniency applicants are understandably sceptical of whether one institution’s promises bind another. But both the Brazilian and Australian competition authorities have convinced the respective criminal prosecutors to apply the anti-cartel leniency programme.

32. The choice among applying administrative, civil or criminal law (or no law) to cartels affects company conduct. Fines imposed under administrative or civil law may be regarded as simply a cost of doing business. Criminal law may impose not only substantial fines on companies and sanctions on individuals, but also reflects societal judgement as to improper conduct. Thus, criminal law gives leniency programmes additional leverage, since penalties may be larger and applicable to individuals. However, criminal law prosecution imposes costs and constraints. The higher standard of proof demands more resources. If a different agency prosecutes crimes, coordination and priorities must be worked out. Jurisdictions that prosecute cartels criminally include Australia, Brazil, Canada, the United Kingdom and, for the past several decades, the United States.

⁴ The latter may also have been prompted by an unrelated matter, a merger investigation and prohibition.

33. A robust anti-corruption system complements a leniency programme. An official may, e.g., condition leniency on getting a bribe.⁵ In one case where a competition official attempted to extort a bribe from a potential leniency applicant, the cartel member reported the extortion to the police and the bribe-seeker was convicted.

34. The issues above arise whether a cartel is national or international in scope. The next part discusses issues that arise if cartels spanning two or more jurisdictions.

B. Cartel in two jurisdictions

35. A cartel that may be punished in two or more jurisdictions presents additional considerations both on the part of the cartel members and of the competition law enforcers. The leniency programmes may affect each other, either positively or negatively. Follow-on actions may also undermine leniency programmes. But law enforcers can attenuate the negative effects. Small economies have special considerations. These issues are discussed below.

1. Spillovers

36. Leniency programmes may be mutually reinforcing. A simultaneous application to multiple jurisdictions, along with a waiver to allow the exchange of confidential information, allows coordinated investigations against the remaining cartel members. While competition authorities are urged to encourage leniency applicants to apply simultaneously to other jurisdictions⁶, many authorities simply ask applicants if they have or intend to apply elsewhere.

37. On the other hand, a leniency programme may be weakened if another jurisdiction imposes significant penalties and lacks an effective leniency programme. This effect occurs whether the second jurisdiction entirely lacks such a programme or it is unattractive. The threat of punishment in the second jurisdiction discourages applicants to the first. Consider the situation where jurisdiction A has a well-designed leniency programme, but jurisdiction B has none, or an unattractive one. If applying for leniency to A increases the risk of punishment in B, then applying to A is less attractive. (These negative spillovers are absent if punishment in the second jurisdiction is trivial or highly unlikely.) The effect is real: “Over time, we [Antitrust Division, United States Department of Justice] learned that occasionally members of international cartels did not apply for amnesty in one jurisdiction because they had greater exposure in another jurisdiction that did not have a transparent and predictable amnesty policy”.

38. Follow-on private civil lawsuits for antitrust damage can, similarly, reduce leniency programme effectiveness worldwide. Such lawsuits commonly follow criminal convictions of cartel members in the United States and can substantially increase the financial consequences of being found guilty. At issue in the United States Supreme Court 2004 *Hoffmann-LaRoche v. Empagran* decision was who had standing to sue for civil antitrust damages in United States courts under United States antitrust law. Several governments, including that of the United States, argued in their *amicus curiae* briefs for limiting standing since they feared their leniency programmes would be less effective if leniency-granted cartel members could be sued for damages in the United States. While the Court did not determine whether

⁵ Clarke and Evenett (2003) report concerns that anti-cartel laws and enforcement create opportunities for official corruption and private sector harassment (fn. 39).

⁶ “Eight or more” is the largest number of jurisdictions in which leniency has been sought simultaneously as of early 2008 (Hammond, 2008).

leniency programmes would indeed be rendered less effective, it limited standing on the basis of the principle of comity.

39. Competition law enforcers are trying to attenuate these negative spillovers – e.g. they limit the information available for follow-on actions. Some keep confidential in perpetuity the identities of companies granted leniency. Many accept “paperless” corporate statements and keep them confidential.⁷ More generally, principles of international comity suggest that courts would not order documents to be produced if they harmed another jurisdiction’s law enforcement. To reduce the spillover effect of private civil antitrust lawsuits in the United States, the 2004 Antitrust Criminal Penalty Enhancement and Reform Act *inter alia* reduced leniency recipients’ liability from treble to the actual amount of damages.

40. Incompatible conditions discourage seeking leniency in multiple jurisdictions – e.g. one jurisdiction may require the applicant to continue the cartel to gather evidence or safeguard the investigation while another requires immediate cessation. Requirements that disadvantage applicants in a second jurisdiction also discourage applications.

41. To summarize, actions in other jurisdictions can strengthen or weaken a leniency programme. Leniency programmes can mutually reinforce incentives to seek leniency in multiple jurisdictions. Simultaneous applications combined with waivers to allow the exchange of confidential information can facilitate coordinated and more effective investigations. But a jurisdiction imposing large sanctions while lacking an attractive leniency programme undermines others’ programmes. Follow-on private lawsuits for antitrust damages also undermine incentives to seek leniency. Law enforcers can attenuate the negative spillovers by reducing the information available to follow-on actions and modifying incompatible or disadvantaging requirements imposed on leniency applicants. The next section considers the situation of a jurisdiction that may impose at most a small fine on cartelists.

2. Small economies

42. Characteristics of small economies change the relative importance of some of the above points. The number of businesses or businesspersons may be small. Maximum sanctions may be small, and international cartelists may find it easy to avoid small economies. These characteristics may affect the design or even benefit of a leniency programme.

43. A limited population of businesses and businesspersons may increase the relative importance of informal penalties, and thus decrease the effectiveness of formal penalty reductions under a leniency programme. The empirical significance of this is debatable: Jamaican officials feel that cartel detection and investigation are more difficult in a small economy: “Relationships are tightly interwoven”; acting as an informer would result in social exclusion, perhaps even physical harm; unofficial measures may undermine competition authority investigations. By contrast, Singapore, with less than twice the population albeit 10 times the GDP (at PPP), got its first applicant in 2010 after adopting its first cartel infringement decision in 2008 and a leniency programme in 2009. Although it is still early, a small population may not preclude a successful leniency programme for domestic cartel detection.

⁷ In comments to New Zealand, the International Bar Association (IBA) warned that written records may have a detrimental effect on a leniency applicant “in other jurisdictions’ proceedings and in actions for damages” (IBA, 2009: point 2.15(a)).

44. International cartelists likely have little incentive to apply for leniency in a small jurisdiction. First, small markets imply low penalties, even if cartel surcharges may be higher. In the brief interval during which leniency is sought, a cartelist places a lower priority on jurisdictions where it has a low exposure or with time-consuming procedures: it is better to risk a small penalty than imperil leniency where a large penalty is at risk. Second, low potential profits could tip other corporate decisions: liability becomes more theoretical if one can avoid visiting, being extradited to, or holding assets in the jurisdiction.

45. Thus, a small economy likely experiences greater obstacles to the development of an effective leniency programme, though perhaps less so for domestic cartels. Many developing countries can probably be described as “small economies.”

C. Multiple cartels in one jurisdiction

46. Leniency programmes have evolved to increase incentives. They make use of the fact that companies typically supply many markets and cartel behaviour learned in one market can be applied in others. Certain provisions encourage the cartelist at hand to disclose additional cartels in which it is involved.

(a) “Amnesty Plus” encourages a company under investigation for one cartel to apply for leniency with respect to another, and earn not just a penalty reduction in respect of the newly disclosed cartel but also in respect of the cartel already under investigation;

(b) “Penalty Plus” increases penalties if a company could have taken advantage of “Amnesty Plus” but did not and the cartel is later discovered and successfully prosecuted;

(c) The “Omnibus Question” is asked of persons who are witnesses under oath in a cartel investigation. They are asked whether they know about cartel activity in any other market than the one at hand. Being subject to perjury penalties, they have a greater willingness to disclose other cartels.

47. These carrots and sticks appear to work. In 2004, the leads in over half of the then-active cartel investigations of the United States had been generated in investigations in other markets. The vitamins cartels (12 separate markets) were uncovered one after the other in a chain of investigations. Another chain of investigations led from a cartel in lysine to one in citric acid, to sodium gluconate, to sodium erythorbate, to maltol. Other jurisdictions have been inspired to adopt similar provisions.

D. Applying the theory: Experience

48. Most international cartel investigations in the United States and by the European Commission have been aided by leniency applications. Connor studied cartel leniency based on publicly available information, which is necessarily incomplete. He attributes the detection of 87—and counting—cartels affecting at least two continents during 1990-2008 to leniency applications. He estimates that 133 amnesties (full leniency) had been granted worldwide in connection with these cartels. The breakdown was as follows: 43 (European Commission), 42 (United States), 20 (Canada), 15 (nine national competition authorities in the European Union), and 13 (Republic of Korea, South Africa, Brazil, and Australia).

49. New cartel formation appears to have declined. One study found a peak in the formation of new cartels in the early 1990s for global, European and North American regions. The decline in the formation of new cartels in North America is consistent with, in the United States, more severe penalties (price-fixing made a felony in 1987 and the

statutory corporate fine increased from \$1 million pre-1990 to \$100 million post-2004), increased priority of international cartel prosecution after 1992, improvements in the effectiveness of the leniency programme, and demonstrated ability to successfully prosecute (lysine and citric acid cases in 1995-1996). In Europe, the decline is consistent with increased priority for cartel investigations. The causes of the change for global cartels were unidentifiable.

II. Leniency programmes in developing countries⁸

50. A handful of developing countries actively fight cartels, including through the use of leniency programmes. But the vast majority of developing countries appear not to. This chapter explores possible systematic differences between developed and developing countries that would influence the value of a leniency programme if a jurisdiction actively fought cartels. It begins with a description of the experience of five medium-income countries with active anti-cartel and leniency programmes and, more briefly, some of those with some elements in place.

A. Experience in five middle-income countries

51. Five middle-income countries – South Africa, Brazil, Chile, Mexico and the Russian Federation – have active leniency programmes. Their programmes do not differ significantly from those of traditionally developed countries. Their experience, reviewed below, may provide insights as to why more developing countries do not have such programmes and whether their introduction would be helpful.

1. South Africa

52. The Competition Commission instituted a leniency programme in 2004, revised in 2008. The Competition Act provides for penalties for cartels of up to 10 per cent of the cartelists' corporate annual turnover. The 2009 Competition Amendment Act would, upon entering into force, criminalize cartel conduct and impose individual liability; questions have been raised as to whether this change would increase effectiveness. The leniency policy allows for full leniency (immunity) only for the first qualifying applicant; subsequent applicants may receive a penalty reduction via a settlement agreement. The leniency policy was revised to *inter alia* increase predictability as to what would qualify applicants for leniency. Other changes allowed for oral or "paperless" applications and introduced a marker system. Fifty-four leniency applications had been received as of September 2009; more than two-thirds of these were received in the 12 months ending 30 June 2009. Many are in the construction, energy and transport sectors.

53. Cartel prosecution was not the highest priority in the early years of the modern institutions, established in 1999. Resources were focused on merger review, increasing public awareness of the new competition rules, and testing and establishing practices and procedures. In 2003, the Commissioner announced that more attention and resources would be devoted to cartels. Significant penalties were agreed in settlements in a few cartel cases, notably R20 million (International Health Distributors) and R223,000 (Pretoria Association of Attorneys) during the course of 2003-2004. These high profile cartel settlements signaled that henceforth cartels would attract serious penalties. The leniency programme, offering

⁸ The term "developing country" is used here to mean a low- or medium-income country as defined by the World Bank.

cartelists an alternative, was adopted in February 2004. The first application was received in the same year.

2. Brazil

54. Cartels in Brazil are subject to both administrative and criminal law. Administrative fines for cartels are 1 per cent to 30 per cent of total turnover, and fines on individuals are 10 per cent to 50 per cent of the fine imposed on the respective company. Other penalties can include exclusion from public procurement or access to official bank credit for five years. Criminal penalties include criminal fines and prison terms of two to five years.

55. Leniency for cartels was introduced in 2000 by way of a change in the law. The first leniency agreement was executed in 2003. As of mid-2009, about 15 leniency agreements had been signed and at least 29 executives had been found guilty of cartel involvement by criminal courts. The number of search warrants served to obtain evidence about cartels, an indicator of anti-cartel activity, is accelerating: from 30 in 2003–2006 to 84 in 2007 and 93 in 2008.

56. The leniency programme allows applicants to receive a one- to two-thirds reduction in financial penalties, depending on the effectiveness of the cooperation and good faith of the applicant. If the authority was unaware of the cartel when the application was received, full immunity may be granted. Individuals can get immunity from administrative and criminal prosecution. The applicant must be the first to approach the authorities, not have been the leader, confess, cease the cartel activity, and effectively cooperate with the investigation. The applicant must apply before the SDE (Secretariat of Economic Law of the Ministry of Justice) has sufficient information to ensure the condemnation of the applicant. To benefit from the company's leniency application, individuals must sign the agreement to cooperate in the same manner as the company. Individuals may apply separately if the company does not apply. A marker system reserves a place in the queue for up to 30 days. There is a "Leniency Plus" provision.

57. The current competition act was adopted in 1994. In 2000, the OECD recommended reallocating resources away from innocuous mergers towards *inter alia* cartels. SDE gained the power to make dawn raids and grant leniency in 2000, but only in 2002 were the federal police authorized to assist in interstate and international cartel investigations. In 2003, SDE internally reorganized to focus on cartels and entered agreements with the federal police and public prosecutors for joint criminal and civil cartel investigations. In the same year, CADE (Administrative Council for Economic Defence) began imposing large fines and SDE made two dawn raids. In October 2003, the first leniency application arrived. This resulted in a total of more than R\$40 million in fines, of which the leniency applicant paid nothing. The number of leniency agreements totalled 15 by the end of that year. Over time, penalties have increased, e.g., from 1 per cent of total turnover in CADE's first cartel decision in 1999 to 22.5 per cent in a 2008 decision.

3. Chile

58. Cartels have become the top enforcement priority of the FNE (Fiscalía Nacional Económica), the competition authority. The largest cartel fine imposed as of 2009 is about \$8 million, although the legal maximum for companies and individuals is about \$22.5 million.

59. Leniency (partial or full) was made possible by amendments to the competition law effective in 2009. To qualify for leniency, the applicant must be the first to apply, not have been the ringleader, provide "precise, true and verifiable information" that effectively contributes to support the claim to the Tribunal, cease cartel activity, and keep secret its request for leniency until FNE files charges or the records are filed. The FNE may not

request of the Competition Tribunal a reduction in fine greater than 50 per cent of the highest fine requested for cartelists not benefiting from leniency. The amendments also expanded investigative tools to include dawn raids and wiretapping, subject to judicial warrant.

60. A bill introduced into parliament in 2009 would allow criminal prosecution of individuals involved in cartels and imprisonment up to five years. It would extend the protections of the leniency programme to criminal sanctions.

4. Mexico

61. Cartels in Mexico are subject to administrative law imposed by the Federal Competition Commission, and criminal law. Both companies and individuals are liable. The criminal law provisions, however, are not applied in practice.

62. Mexico introduced a cartel leniency programme in 2006 via amendment to the competition law and its rulings. The first applicant may get full leniency from administrative penalties; subsequent applicants may receive reductions of 20 per cent to 50 per cent on their fines. Applications must be made before an investigation ends. The applicant must provide sufficient evidence to prove the existence of the cartel, fully and continuously cooperate with the competition agency, and comply with all requests the agency makes. The competition agency will make best efforts to keep confidential the identity of the applicant during the entire process, including after the investigation has ended.

63. While upon introduction the leniency programme suffered from the absence of formal procedures for decision making and calculating reductions in fines, this has since been rectified. Further guidelines will address possible “leniency plus” provisions, individuals’ liability, international cooperation, and oral applications. During 2008, five applications for leniency were received, and by mid-2009 two more.

5. Russian Federation

64. Cartels are subject to administrative law penalties in the Russian Federation. Criminal law provisions are inactive. In 2007, a leniency programme was introduced via legal amendment and eight companies self-reported under the programme. The competition authority increased its level of activity in 2008 as compared with 2007, initiating 355 investigations of restrictive agreements or concerted practices—a broader category than “cartels”—in 2008, an increase of 54 per cent over 2007. Cartel fines totalled 1.5 billion rubles in 2008, more than 359 times as much as in the previous year. However, the programme allowed simultaneous leniency applications. Consequently, for example, 37 insurance companies applied simultaneously for leniency in the Rosbank case. Their application was accepted, and no fine was imposed. Amendment in 2009 of *inter alia* the Code on Administrative Violations limited the penalty reduction to the first applicant and disallowed simultaneous applications.

B. Experience in developing countries with less active programmes

65. In **India**, the Competition Act grants the Competition Commission the power to impose a lesser penalty on a cartel member who provides full, true and vital information regarding the cartel. Per Regulation No. 4 of 2009, the first applicant may get a penalty reduction of up to 100 per cent if the Commission or Director General had insufficient evidence to establish the violation at the time the disclosure was made. Second and third applicants may get reductions of 50 per cent and 30 per cent, respectively. There is a marker system; the application must be perfected within 15 days. Leniency may be

withdrawn if the applicant is not fully cooperative. The applicant's identity and the information submitted remain confidential.

66. In **Tunisia**, the Competition Law in Article 19 provides for full leniency for cartel members who are the first applicant if the enforcement agency had no prior knowledge of the cartel.

67. In **Egypt**, the Competition Act in Article 26 provides for a reduction in penalty for cartel members who contribute to "disclosing and establishing the elements of the crime at any stage of inquiry, search, inspection, investigation or trial." The maximum fine is around € 40 million.

68. In **El Salvador**, 2007 amendments to the Competition Act strengthened the competition authority's investigative powers—permitting dawn raids pursuant to search warrants—and level of fines. Cartels have been prosecuted. El Salvador is preparing a leniency programme.

69. In **Pakistan**, the 2009 Competition Ordinance, Art. 39, would allow the Competition Commission to impose on undertakings that have made a "full and true disclosure" in respect of collusion a lesser penalty as it may deem fit. The Commission may also conduct searches and seizures.

70. The vast majority of developing countries have no leniency programmes aimed at inducing self-reporting of cartels. **Zambia** provides an example. The Competition and Fair Trading Act outright prohibits cartels; participating individuals as well as companies are liable. The maximum fine is about \$2,000 and maximum jail term five years, but the Director of Public Prosecutions may spare a person from prosecution who fully cooperates by providing vital evidence to the prosecution. Anti-cartel enforcement is weak since evidence is often located abroad, the competition agency has limited financial and human resources, Government is often involved (the Competition Act does not apply to transactions to which Government is a party), and other Government institutions are disinclined to cooperate on cartel enforcement. "Where key institutions do not and are perhaps not even obliged to cooperate...it would render anti-cartel enforcement ineffective. In view of the above, it would appear a competition-specific leniency programme may not necessarily be the panacea to effective cartel investigation and prosecution in the Zambian setting and perhaps, other countries at this level of development".

C. Discussion

71. A leniency programme is ineffective unless cartels are actively and significantly punished. If that precondition is not met, then it is rational to forego a leniency programme. Identification of either proximate or ultimate obstacles to anti-cartel action is beyond the scope of this paper.⁹

72. A handful of medium-income countries have had anti-cartel and attractive leniency programmes for a few years. What distinguishes these countries? None are low-income countries. At least two—Brazil and South Africa—consciously reallocated resources from merger review towards anti-cartel work after a few years. That is, they switched away from an area where parties are eager to provide information and to build staff skills to an area

⁹ A 2004 survey of developing country competition agencies found that almost every one felt the absence of a competition culture, both among other parts of government and the public at large. A slow start to cartel prosecution was a common problem: "Inexperienced staff, inadequate investigative tools, lack of understanding and cooperation from the public and insufficient sanctioning powers" were among the factors inhibiting anti-cartel efforts (OECD, 2009).

where parties are less eager. Further, the increase in anti-cartel actions just preceded or accompanied the establishment of a leniency programme, as two parts of a single strategy. But what ultimately distinguishes these countries is unclear.

73. Do any systematic differences between high-income and other countries influence the effectiveness of a cartel leniency programme? Some of the factors that have been identified elsewhere as affecting competition policy design in emerging markets – i.e. State dominance of the economy at least until the 1980s and continued State monopolies, higher variability in development among sectors, and different socio-economic and political factors – could conceivably influence the effectiveness of a leniency programme in a jurisdiction that is actively fighting cartels.

(a) Coming of age in a State-steered economy could make blowing the whistle on a cartel inconceivable if cartels are viewed as replacing the now-lost State direction;¹⁰

(b) High variability in development among sectors could imply that some cartels have members from the “informal” economy. Such entities would hesitate to apply for leniency, as it implies becoming visible to the enforcement of other laws;

(c) “Different socio-economic and political factors” could refer to concentrated or highly interwoven economic and political power. Leniency applications may be hindered, as noted under the “small economy” rubric. Or the phrase could refer to weak institutions, less able to commit to the processes necessary to an attractive leniency programme.

74. In summary, the leniency programmes in active medium-income countries form part of broader anti-cartel strategies. They resemble those of high-income countries, but that fact does not preclude differences in design if lower-income countries were also to become active against cartels.

III. Policy options

75. While leniency programmes are the most effective cartel discovery tool today, they are only effective when paired with active search for and significant punishment of cartelists. Many developed countries but only a handful of medium-income countries actively fight cartels and have a leniency programme. Would other developing countries also benefit from instituting their own leniency programmes?

76. To benefit from a leniency programme, a jurisdiction must actively fight against cartels. Absent this, effort expended in instituting a leniency programme would likely be wasted.

77. A country cannot rely on others’ anti-cartel actions or leniency programmes. Foreign countries’ actions do not help against purely domestic cartels. International cartels can operate globally except for those jurisdictions where they perceive the antitrust risk to be too great, and there is evidence suggesting that their overcharges are larger in countries not actively fighting cartels. Thus, one country cannot rely on another’s anti-cartel proceedings. With respect to leniency programmes, the trend is towards restricting information originating, ultimately, from leniency applicants. Thus one country cannot rely on another

¹⁰ This echoes a comment by the competition commission in Papua New Guinea, where market participants are accustomed to the former system of governmentally fixed prices and margins. “The Commission is convinced that...market sharing and price fixing continue to occur in PNG, but...there is little complaint or evidence of these practices coming forward to the Commission” (Papua New Guinea, 2009).

to generate information for follow-on domestic proceedings. In summary, fighting cartels may not be left to others.

78. One jurisdiction's efforts against international cartels may be harmed if others impose significant penalties on cartels but do not offer attractive leniency programmes: the risk of prosecution in non-notified jurisdictions weakens cartelists' incentives to seek leniency. By contrast, simultaneous application in multiple jurisdictions, combined with waivers to allow the exchange of confidential information, allows coordinated cartel investigations, which in turn helps each jurisdiction's proceedings. Together, these effects imply that countries benefit when others become more active against cartels and adopt effective leniency programmes. Consequently, more experienced competition authorities provide technical assistance to less experienced authorities.

79. The experience of a handful of middle-income countries shows that, once the precondition of seriously fighting cartels is met, both domestic and international cartels can be detected by such countries using leniency programmes.

80. Some characteristics of developing countries may diminish the effectiveness of cartel leniency programmes. Close relationships among businesspersons, a larger informal economy, and a weaker "competition culture" each sap the strength of a leniency programme's incentives. With respect to international cartelists, they prioritize applying for leniency in those jurisdictions where *inter alia* they are exposed to larger potential penalties, which may not include many developing countries. Developing countries may have higher opportunity costs in building institutional capabilities. Further, the legal systems may offer settlement processes that provide an adequate substitute. In these circumstances, in some jurisdictions the costs of a cartel-specific leniency programme may outweigh the benefits.

81. Competition authorities may wish to consider:

- (a) Is a leniency programme an integral part of an active cartel policy?
- (b) Do any characteristics of developing countries affect leniency programme design?
- (c) Can larger, more active jurisdictions engage in any actions or policies to reduce the harm of cartels in other countries? Is there a role for international organizations such as UNCTAD under the Set of Principles and Rules on Competition?