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Session II: Leniency programmes in Latin America and the Caribbean: Recent experiences and lessons learned

-- Background paper by the OECD Secretariat --

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The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

14th Latin American and Caribbean Competition Forum
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Session II: Leniency programmes in Latin America and the Caribbean: Rules, reforms and challenges

BACKGROUND PAPER BY THE SECRETARIAT*

Abstract

Under a leniency programme cartel participants may obtain full or partial exoneration of the sanction that would otherwise be imposed (either monetary or criminal), in exchange for providing information and evidence that allows the agency stop the cartel conduct and effectively prosecute other participants. With the inherent difficulties in identifying and exposing anti-competitive agreements, leniency programmes can play a major role in effective enforcement of anti-cartel laws.

Since 2000, at least nine Latin American and Caribbean countries have introduced and applied leniency policies some of them following specific recommendations from the Organisation of Economic Co-operation and Development (OECD). This first generation of leniency programmes has provided lessons used not only to improve the original programmes; but also, to guide the establishment of more programmes across the region.

The purpose of this paper is to present the key features of leniency programmes in Latin American and Caribbean jurisdictions, and explore the reasons why some of these programmes have been amended recently. This paper will first outline the benefits and prerequisites that have generally been attributed to leniency regimes both in Latin America and the Caribbean, as well as in other jurisdictions. Second, the paper will identify, describe and analyse the recent reforms of leniency programmes in the region. Third, the paper will present some of the most successful leniency cases in Latin America. Finally, the paper will conclude with an attempt to identify the common key lessons for the region when designing, implementing and reforming leniency programmes.

* This paper was written by Felipe Serrano, Former Head Advisor and Deputy Superintendent at Superintendencia de Industria y Comercio (SIC), Colombia. This paper does not necessarily represent the views of the Competition Committee or those of individual Members of the Organisation. For a complementary theoretical approach on leniency programmes the reader may refer to the Background Paper of the Session on Leniency programmes at the OECD Latin American Competition Forum of 2009 in Santiago, Chile (*i.e.* Kloub, Jindrinch, *Leniency as the Most Effective Tool in Combating Cartels*).

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1. Introduction

1. Hard core cartels, i.e. agreements between competitors to fix prices, rig bids, restrict output, or allocate markets, have been identified as "the most egregious violation of competition laws"[1]. Such conduct not only harms consumers by raising prices, reducing output and lowering the quality of goods and services; it also deprives the economy of the dynamism and innovation that follows when competitive pressure is present.

2. Jurisdictions with competition laws have different tools to tackle cartels and other anticompetitive conduct, including leniency programmes. Leniency programmes are systems under which cartel participants may obtain full or partial exoneration of the sanction that would otherwise be imposed (either monetary or criminal), in exchange for providing information and evidence that allows the agency stop the conduct and effectively prosecute other participants.

3. The secret nature of anticompetitive agreements makes their detection and punishment particularly challenging for competition authorities. Cartel participants increasingly avoid leaving trace of their conduct, reason why the co-operation from one of the members (an insider) is particularly useful to detect an unknown cartel. Today there is broad consensus between competition authorities that leniency plays a major role in effective enforcement of anti-cartel laws.[2]

4. The successful implementation of these programmes has incentivized Latin American and Caribbean jurisdictions to adopt them. From 2000 on, at least nine countries in the region introduced and started to apply leniency policies,[3] some of them following specific recommendations from the Organisation of Economic Co-operation and Development (OECD).

5. Although little time has passed, some Latin American and Caribbean countries have been able to test the effectiveness of their programmes and identify opportunities for reform. In the past five years the region has seen a wave of new leniency programmes and amendments already in place before 2010. The investigations so far undertaken by agencies in the region have allowed the competition community to learn lessons and propose actions to increase the effectiveness of this cartel enforcement tool.

6. The purpose of this paper is to present the key features of leniency programmes in Latin American and Caribbean jurisdictions, and explore the reasons why some of these programmes have been amended recently. This paper will first outline the benefits and prerequisites that have generally been attributed to leniency regimes both in Latin America and the Caribbean, as well as in other jurisdictions. Second, the paper will identify, describe and analyse the key features of leniency programmes in the region that have been reformed recently as a result of the lessons learned by jurisdictions. Third, the paper will present some of the most successful leniency cases in Latin America. Finally, the paper will conclude with an attempt to identify the common key lessons for the region when designing, implementing and reforming leniency programmes.

7. The ideas included in this paper may provide useful guidance to countries in Latin America and the Caribbean that have identified opportunities for reforming their leniency programmes, as well as for introducing one.

2. Benefits of leniency Programmes

8. Leniency programmes are beneficial both for cartel members and competition agencies. The infringer who applies for leniency benefits because he either obtains the total exoneration from the sanction that would otherwise be imposed, or at least obtains a reduction of the sanction. As more jurisdictions increase their capacity to impose monetary fines and introduce criminal penalties for cartel conduct, the incentives to collaborate in exchange for benefits grow.[4]

9. Competition authorities benefit from leniency programmes because: i) they increase deterrence by making cartel membership less attractive;[5] ii) they make cartel detection easier and more cost effective; iii) they allow the agency to collect important pieces of evidence (smoking guns in several cases) that lead to the effective prosecution of other cartel participants; and iv) they increase the agency's experience in detecting cartels, as they provide information to public officials on how cartels work.

10. Deterrence increases because cartel members know that at any moment one of the participants may provide the agency with information on the existence of the cartel, its members, nature, scope and duration. And they know that this information will usually be accompanied with insider evidence, which cartel members are aware is likely to incriminate them in the conduct.

11. Leniency also makes cartel detection easier, because a conduct that is secret in nature is difficult to uncover. These programmes have therefore proven extremely effective to detect and prosecute cartels, reason why they have been adopted in several jurisdictions.[6] This is especially true in those places where cartels are criminally punished.

12. Even if agencies have broad investigative powers, including the ability to perform inspection (or dawn raids) on company premises, access electronic documents and interrogate witnesses, some cases would probably go undetected in the absence of a leniency application. Moreover, leniency programmes allow the Authority to enforce competition laws in a much more cost-effective way, as it may prosecute a conduct without having to deploy investigative resources.

13. Leniency applications provide agencies with evidence that they would otherwise not have access to, or would not be able to make sense of. Sometimes cartel members use secret codes, false names (to refer to people, places, etc.), and other "cartel" jargon that the authority must decode. The insider perspective will usually provide a more cohesive narrative of the conduct. Moreover, the insider will –on several occasions- either provide the agency with smoking gun evidence, or assist in obtaining it.

14. One benefit that is usually omitted is the knowledge and experience that each leniency process provides for the Agency. When a cartel member assumes a candid attitude and provides a complete and detailed history of the cartel, its elements, the particulars of how members communicate, where they meet, how they monitor the agreement, what safety measures have they taken not to be caught, among other things; the agency obtains valuable information not only for the particular case but also for future cases. Investigations with leniency applicants lead to the adjustment of the investigative techniques applied by the Authority.

3. Prerequisites of effective leniency programmes

15. Three elements are generally mentioned as prerequisites for an effective leniency programme: i) a high risk of detection; i) significant sanctions; and iii) legal certainty and transparency.[7] All of these elements should exist for a leniency programme to be effective.

16. First, cartel members must feel that there is a high risk of detection in order to be incentivised to make a leniency application before the agency. If market agents perceive that the competition Authority does not have sufficient investigative powers (both legal and practical), they will not have the incentive to apply for leniency, even if cartels are sanctioned with significant penalties. The ability to make dawn raids, question witnesses, analyse data and evidence, and other investigative techniques, coupled with the appropriate economic and legal staff to advance cases, is necessary to provide incentives to market agents to come before the Authority.

17. Most agencies in Latin America and the Caribbean deploy resources in communicating the opening of investigations, the imposition of sanctions or the challenges of conduct before courts in order to increase the perception of high risks of detection. This should be balanced, however, with the necessary measures to protect confidentiality in cases with a leniency application.

18. Second, substantial sanctions for anticompetitive conduct must exist for a leniency policy to be effective. Companies do not have the incentive to collaborate if the sanction they are exonerated from is not significant. They prefer to assume the risk of being caught, fight the existence of the anticompetitive conduct and, if required, pay the monetary fines imposed, instead of disclosing information and evidence to the Authority.

19. It is worth noting that in the last few years, some Latin American and Caribbean countries have taken initiatives to increase the sanctions that may be imposed for cartel conduct. For example,[8] in 2015 the Chilean government proposed a legislative amendment of the country's competition laws.

20. The project would increase the maximum sanction from 22.5 million dollars approx. (30.000 tax units) to 30% of the sales of the cartelized product during the period that the conduct lasted, or double the profits perceived from the conduct, when available. Also, the project includes a proposal to criminalize cartel conduct with a penalty of 5 to 10 years of prison. The objective is to establish sanctions that are sufficiently high to deter anticompetitive conduct and, in turn, make the application for leniency more attractive for companies and individuals.

21. Colombia also filed before its Congress a proposal for amending its competition law.[9] The text under consideration proposes to increase sanctions, which today are up to 30 million dollars. The new text would allow, among other things, to impose sanctions of up to 30% of the sales made on the cartelized product during the period of the cartel, or three times the profit made by the infringer with the anticompetitive conduct. Both projects are still under discussion.

22. Third, leniency programmes should be transparent and predictable. Companies must be able to foresee with a high degree of certainty the benefits available and the obligations they will assume in exchange for total or partial exoneration. Companies should know in advance, among other things: i) the requirements for entering the programme and whether or not there is a marker system available; ii) whether benefits, total or partial exoneration, are automatic or subject to some kind of judgment from the agency; iii) the amount of information or evidence that the agency requires for granting benefits; iv) what confidentiality provisions do leniency applicants have.

23. To increase transparency, agencies have developed guidelines that explain the programme in detail and address the main concerns that applicants may have when deciding whether to co-operate with the authority or not. In the case of Latin America and the Caribbean, Chile, Brazil, Mexico and Panama have issued guidelines explaining their leniency programmes. The Chilean guidelines are currently under revision, as the agency proposed an amendment to make the programme more effective.[10] Also, the Panamanian Competition Authority (*Autoridad de Protección al Consumidor y Defensa de la Competencia*, ACODECO) published in July 2015 its leniency guidelines setting out the rules on how the programme is administered,[11] as well as the procedures that private parties must follow through a leniency process.

24. Other agencies in the region are also drafting guidelines on the subject. For example, one of the items on the 2016 agenda of the Peruvian Competition Agency (*Instituto Nacional de Defensa de la Competencia y de la Proteccion de la Propiedad Intelectual*, INDECOPI) is the issuance of leniency guidelines with the objective of providing security and predictability to the market. According to INDECOPI and its Technical Secretariat, the guidelines are expected to increase applications by 200% over the next two years as a result of the legal certainty and incentives they will provide.[12] Colombia is

also drafting guidelines after modifying several aspects of its leniency programme. The document is expected to be issued at the end of 2016.

4. Features of Leniency Programmes in Latin America: trade-offs and reforms

25. This section will identify, analyse and address the main features of leniency programmes in Latin America and the Caribbean that have been subject to reform in the past 5 years, as well as the rationale for such modifications. The section will address, in particular, the rules and reforms in the region in connection with the following issues: i) eligibility and benefits of the programme (systems where only the first applicant receives benefits versus systems where subsequent applicants can also be considered); ii) the quality of information required to obtain immunity or the reduction of the sanction; iii) whether jurisdictions require applicants to produce a written statement to enter the programme or receive benefits; iv) availability of benefits in connection with criminal liability for cartel conduct; v) protections for the applicant against civil lawsuits; vi) availability of benefits for ringleaders; vii) availability of markers; viii) mandatory termination of the participation in the cartel; and, ix) confidentiality rules in the context of leniency programmes.

4.1 Eligibility and benefits of the programme: first applicant versus subsequent applicants

26. Leniency programmes in Latin America and the Caribbean are divided regarding the eligibility of subsequent applicants. Chile, Colombia,[13] Ecuador, Mexico and Peru[14] allow subsequent applicants. Brazil, Panama,[15] El Salvador and Uruguay only grant benefits to the first that approaches the Agency. However, Brazil and Uruguay permit subsequent applicants to benefit from reductions of the sanctions to be imposed for the first cartel if they recognise their participation in a second cartel and provide information and evidence of it (so-called "amnesty plus").

27. General agreement exists that the benefits of allowing subsequent applicants in leniency programmes outweigh the costs. Both the OECD[16] and the International Competition Network (ICN)[17] have recognised leniency for subsequent applicants as good practice. Subsequent applicants may provide the Authority with additional evidence that is necessary or useful to prosecute the cartel, and which is not in the hands of the first agent to join the programme.

28. Nonetheless, it has also been acknowledged that allowing subsequent applicants to receive benefits will weaken the incentives to come in first. If the second to come may still receive a substantial reduction, cartel members may prefer, if allowed, to come in later in the investigation. Agencies have learned from this and tackled the problem by establishing a significant difference between the benefits for the first applicant and the second applicant. Others have advocated for agency discretion when establishing level of reduction that subsequent applicants will receive.

29. In line with this analysis, countries in the region tend to provide full immunity to the first applicant, and up to 50% reduction to the second, provided he files evidence that adds value to the investigation.

30. Chile,[18] for example, grants total immunity to the first person who comes before the Agency and complies with the requirements to be accepted in the programme. Subsequent applicants may obtain a reduction up to 50%.

31. In the case of Colombia, the government undertook a reform which involved both legislative proposals before Congress and the issuance of a Presidential Decree reforming the leniency regime (Decree 1523 of 2015). This reform, which was part of the initiatives taken as a result of the country's current accession process to the OECD, reduced the benefits available for subsequent applicants.

32. Before the amendment, the second applicant could receive a reduction of up to 70% of the sanction to be imposed, the third up to 50%, and subsequent applicants up to 30%. Since the second applicant could obtain an extremely generous reduction, there was no incentive to come first before the Superintendencia de Industria y Comercio (SIC); especially when the maximum sanction is still fairly low by international standards: up to approximately 30 million dollars. Accordingly, the country reduced the benefits available to subsequent applicants. As per the new rules, second applicants may obtain a reduction from 30% to 50%, and subsequent applicants up to 25%.

33. Ecuador also amended its competition law in 2011, establishing a leniency programme that provides full immunity for the first applicant. The programme allows for reductions to subsequent applicants as follows: the second applicant may obtain a reduction from 30% to 50% of the sanction to be imposed; the third a reduction between 20% and 30%; and subsequent applicants a reduction of up to 20%.[19]

34. Mexico, which issued leniency guidelines in June 2015, grants full immunity to the first applicant (although it still charges a daily minimum salary equivalent up to approximately 5 dollars to the first cartelist to come before the agency), and reductions of up to 50% to the second, 30% to the third, and 20% to subsequent applicants.[20]

35. In Peru[21], the law provides that the first applicant to comply with the requirements of the programme will receive full immunity, if the Authority has not initiated an investigation. Subsequent applicants may receive reductions provided they present evidence that is not already in the hands of the Agency. Before the issuance of Decree 1205 of 2015, the Law did not specify the exact percentage of reduction that subsequent applicants may obtain. The distance between the first applicant and subsequent applicants was at the discretion of the agency. Decree 2105 provides that the second applicant may obtain a reduction from 30% to 50%, the third applicant from 20% to 30%, and subsequent applicants may receive up to 20%.

36. Some countries in the region which do not allow subsequent applicants in the programme may also grant immunity or reduction from the fine depending on when the first applicant comes before the agency, or on the quality of its information.

37. Brazil,[22] for example, provides full immunity if the applicant comes before the Administrative Council for Economic Defense (CADE) has initiated an investigation, and from one to two thirds of the sanction to be imposed if the application takes place after the investigation has started. In Panama,[23] the new 2015 Guidelines state that if the applicant files evidence that is sufficient by itself to prosecute the other cartel members, full immunity will be provided. If the evidence is not sufficient and the Authority has to collect further documents or proof, the applicant will only obtain up to a 50% reduction.

38. Other countries which have recently discussed the introduction of leniency programmes have also debated whether to allow subsequent applicants to receive benefits and by how much. For example, in December 2010, the Argentinian[24] government was presented with a legislative proposal to introduce leniency, which provided for full immunity from the penalty, or up to 50% reduction at the discretion of the judge, depending on whether the application was made when the investigation had already began. A similar proposal was discussed in Costa Rica after an OECD Peer Review recommended introducing leniency in the country.

4.2 Quality of the information or evidence required to sign an agreement

39. One of the main reasons why it makes sense to allow subsequent applicants to enter the programme is because the threshold for immunity for the first applicant, at least in some jurisdictions, tends to be low in order to provide an incentive for market agents to approach the agency quickly.[25] In this scenario, it makes sense to allow for a second applicant to come in with additional useful evidence on the cartel for a successful prosecution.

40. Nonetheless, it should be noted the threshold to grant immunity to the first applicant either in law or in practice is not low in every Latin American or Caribbean country. Several laws in the region require the applicant to provide information *and* evidence that demonstrates the agreement in order to sign an agreement. In practice, when negotiating with applicants, some authorities demand documents to prove the conduct, and not just information about meetings or locations were dawn raids can be made.

41. Brazil's regime, which does not grant immunity to subsequent applicants, states that "[i]n order to take advantage of the Leniency Programme, applicants must provide the SDE with all evidence and information in their possession or available to them relating to the anticompetitive conduct" (highlight is mine).[26]

42. The Draft Leniency Guidelines which are currently being discussed, state that applicants should file all documents and evidence in their power which are suitable to prove the conduct.[27] They must also provide information about the way the cartel functions, its duration, members and scope. According to the information provided by CADE, although each case varies, applicants usually submit emails, letters and other electronic messages like SMS and WhatsApp, Excel Spreadsheets, among others. In other words, a tip about a future cartel meeting where information may be collected might not be sufficient for the first applicant to obtain the benefits from the programme.[28]

43. The Chilean system[29] requires the first applicant to provide the Fiscalía Nacional Económica (FNE) with evidence that demonstrates the existence of the cartel, *or* information which allows the Authority to request the Tribunal the powers granted in Article 39 "n" of its competition law, which include the ability to perform dawn raids, wiretapping, or any other activity to establish the existence of an anticompetitive conduct. However, since the standard of evidence to obtain judicial authorisation to exercise any of these activities is high, the applicant will still have to provide important pieces of evidence. As such, a tip about the cartel would not be enough to obtain the benefits. In practice, moreover, companies usually provide the agency with several documents evidencing the conduct.

44. Colombia[30] also requires the applicant to provide not only complete information about the conduct (participants, duration, scope), but *also* evidence to demonstrate its existence. In practice the agency requires companies to submit evidence of the agreement, which includes emails, minutes, chats, phone calls, among other documents.

45. The Mexican regime[31], for its part, requires the applicant to deliver information to demonstrate the existence of the practice or to open an investigation, which could include documents and any other pieces of evidence in the applicant's power. Panama[32] requires the filing of enough evidence which can, by itself, prove the cartel. If this is not the case the applicant will not obtain full immunity, even if he is the first to approach the Authority. Peru[33] follows the same requirement by asking the applicant to provide elements of proof that help the agency to detect and punish cartel activity.

46. The Ecuadorian regime seems to provide for a lower threshold for the first applicant whenever the Authority is not conducting an investigation. Article 83 of the recently introduced Ecuadorian competition law (October 2011) provides that full immunity may be granted when the applicant either: i) files evidence that allows the Superintendencia de Control del Poder de Mercado to conduct a dawn raid,

provided the Authority does not have such evidence; or ii) files evidence that demonstrates the existence of the conduct. Accordingly, the standard of the evidence required for the first applicant, at least in the first case, tends to be low. This may motivate more companies to approach the agency with an application, in line with international practice.

4.3 The obligation to make a written application (corporate statements)

47. Some jurisdictions in the region, either by law or in practice, require the applicant to start the procedure by signing a written document accepting its participation in the cartel and providing basic information about the conduct. This is the case in Chile, Panama and Uruguay.

48. One of the reasons why some countries require written applications may be found in the region's legal tradition. Most countries in Latin America have written legal traditions, and tend to assign a higher value to any written evidence, especially because it avoids retraction and, if well crafted, leaves little room for interpretation.

49. However, requiring companies to produce written corporate statements may be a disincentive for cartel participants to come before the agency, especially in an international cartel where a company from the United States (US) may be involved. Indeed, written applications recognising cartel conduct and providing evidence may place a US company in a sensitive position, as US discovery rules in the context of an antitrust private action allow Courts to order the disclosure of written documents produced by the defendant, including leniency corporate statements.

50. Although the company may obtain immunity from the sanction that would have been imposed by the authority, it will be exposed to civil actions in which plaintiffs will have access to the corporate statement in which the company accepts responsibility. This may apply not only for documents that have been produced in the US but also that have been produced in other jurisdictions. A system that requires a written corporate statement may therefore lower the incentives to apply for leniency, at least for US companies.

51. As stated in the background paper for the session on Leniency to Fight Hard Core Cartels at the OECD Latin American Competition Forum in 2009:[34]

> *"[T]he threat of private damage claims can be a disincentive for a company considering applying under leniency if that would increase its exposure to liability in civil suits. If by applying for leniency cartel members would be placed in a worse position in relation to civil damage suits as compared with members that did not apply, their willingness to come forward would be significantly reduced. In the US, a company's exposure in damage claim suits is generally perceived as merely another negative payoff that must be included in the cost benefit analysis of whether to come forward."*

52. To solve this issue, some jurisdictions, like the EU, started to accept oral applications to replace written applications. The Commission records and transcribes the statement of the applicants, something that will become an internal document of the Commission that may not be discoverable by US Courts, as it was not produced by the will-be defendant in a civil antitrust action.

53. Taking this into account, the Chilean Authority is currently considering ways to mitigate the possible disincentive that may arise for US companies as a result of the requirement that the leniency application be made in writing. Also, in response to this challenge the government of Colombia included a rule in its new Leniency Decree 1523 of 2015, which allows the applicant to enter the programme with an oral statement and without having to produce a written application.

4.4 Leniency benefits for criminal liability in the region

54. Antitrust regimes in Latin America and the Caribbean are also divided regarding criminal sanctions for cartel conduct. Brazil, and recently Mexico, has criminalised anticompetitive agreements. Chile is about to introduce criminal sanctions for cartel behaviour, as the proposed bill amending its competition law is undertaking its last debate in Congress at the time this paper is drafted. Other countries only account for administrative (monetary) sanctions.

55. Criminal liability for cartel behaviour increases the cost of the conduct, providing an additional deterrent effect. This is an argument in favour of imposing prison penalties for cartelists. However, there are certain particularities of Latin American and Caribbean competition regimes that argue against introducing criminal sanctions, at least for the moment.

56. First, in some countries the administrative investigation leading to a monetary fine and the criminal investigation would have to be handled by two different agencies. The former by the Competition Authority and the latter by the Office of the Prosecutor General, which has no experience on antitrust matters. In practice, this may generate inconsistencies in the application of antitrust law and compromise the technical expertise so far achieved by the Agencies in the field. Conflicting decisions could damage clear precedent, especially when the regime is still building up. Different standards and procedures for handling confidential information could add complexity to investigations and would require special safeguards for parties.

57. Chile, a country in which the administrative investigation and judgment would be handled by the FNE but the criminal case by a General Prosecutor, has recognised this challenge and is discussing ways to mitigate inconsistencies.

58. Moreover, the handling of the administrative and criminal investigations by different agencies could involve delays, thereby compromising legal certainty for the investigated parties. This is because in some countries in the region the criminal system takes a considerable amount of time to resolve cases, in comparison with the time a Competition Authority usually invests.

59. Most jurisdictions in Latin America, moreover, had protectionist economic regimes until the beginning of the 90s. Some regimes protected local producers from international competition, accepted the establishment (by law) of minimum prices in basic products, and even promoted anticompetitive agreements between competitors. This did not favour a culture for competition; especially in local areas where knowledge of competition laws is sometimes incipient.

60. Some jurisdictions have, therefore, considered that it may be too soon to establish criminal sanctions for cartels considering the history of competition policy in the region. When discussing the legislative proposal to amend Colombia's competition law (presented before Congress in 2015), the SIC weighed the pros and cons of introducing criminal sanctions for all cartel conduct (bid rigging already may be punished with prison), and, for the reasons mentioned previously, decided not to include such proposal.

61. What is relevant for the purpose of leniency policy is that regimes provide benefits to applicants both for monetary and prison sanctions. Brazil and Mexico, which have criminal penalties for hard core cartel activity, follow this pattern. Chile, which is about to approve a new competition law that punishes cartel activity with prison sentences, also provides immunity from criminal prosecution to applicants.

62. In the case of Brazil, one of the changes introduced by Law 12.529 of 2011 in connection to leniency provides that applicants who sign a leniency agreement and comply with its terms may not be prosecuted for any antitrust crime in the law or any other crime directly related to the anticompetitive conduct.[35] Once the agreement is signed the possibility of criminal sanctions is automatically extinguished.

63. In its recent competition reform of 2014, Mexico criminalised cartel conduct between 5 and 10 years of prison, but it also allowed leniency applicants to obtain immunity from criminal liability when they comply with the requirements set for by the law. This is in accordance with international practice.

64. Colombia, for its part, only punishes one anticompetitive conduct with criminal sanctions: bid rigging. The law currently states that if SIC signs a leniency agreement providing full immunity to an applicant that confesses a bid rigging, just one third reduction of the criminal sanction (6 to 12 years) would be available, and not full criminal immunity. In this case, the applicant will also have to negotiate immunity with the Office of the Prosecutor General (Fiscalía), which can also provide full immunity if the applicant co-operates also with such Office.

65. In practice, there is close co-ordination between SIC and Fiscalía in order to grant benefits both from monetary sanctions and criminal sanctions if a leniency agreement is signed. Nonetheless, to provide further legal certainty and encourage leniency in bid rigging cases, the amendment currently being debated in Congress states that if immunity is granted to the applicant by the SIC, Fiscalía will also have to grant such immunity.

4.5 Leniency benefits for civil damages in Latin America and the Caribbean

66. No leniency programme in Latin America exonerates applicants (or provides reductions) from civil damages requested by consumers affected by the anticompetitive conduct. Private antitrust enforcement has been almost non-existent in the region, even though laws tend to allow for civil compensation of damages caused by anticompetitive conduct, including class actions. Nonetheless, the first lawsuits are being lodged against investigated parties as a result of increased enforcement of antitrust laws in each country.

67. The legislative proposal filed by the Colombian Government before Congress last year[36] contains a proposal which states that the cartel participant that obtains full immunity from the SIC will only be liable for civil damages according to its market share. The rule, which is currently being discussed, would eliminate joint and several liability for the first applicant, although would not eliminate its responsibility for civil reparations. As of today, every cartel participant may be individually sued for 100% of the damage, even if he can later claim from other cartelists the return of their share.

4.6 Availability of benefits for the ringleader

68. Several countries in Latin America and the Caribbean prohibit the ring leader or motivator of the cartel to apply for leniency. This is the case in Chile, Colombia, El Salvador, Panama, Peru and Uruguay. Panama also prohibits the market leader to obtain leniency benefits. Jurisdictions, like Ecuador, bar the entry to the programme only if the leader has coerced other cartel members to enter into the agreement.

69. In light of recent experiences, some countries in the region have either eliminated this prohibition or taken steps to limit its application. Jurisdictions prohibit ringleaders from applying for leniency, among other things, because: i) they wish to deter companies from cartelising in the first place by withdrawing the possibility of obtaining immunity; and ii) some consider unfair or immoral that after having organized a cartel and taking the lead a company obtains immunity and turns other cartel members before the authorities.

70. Some have encountered that this prohibition reduces the effectiveness of the programme, may unnecessarily lower the incentives to apply for leniency, and also creates administrative complexities.

71. First, very often it is difficult to establish the leader of the cartel. This can be the reason why companies that are unsure about who initiated the cartel may be reluctant to come before the Authority and take the risk of losing potential benefits. Second, cartels may last several years, even decades, and it is likely that leadership within the cartel will have changed depending on the time period, making it difficult to establish the leader and preventing companies from applying. Third, new management may come to the company, find out about the conduct, but be reluctant to apply for leniency if they are the ringleader. Fourth, allowing the leader to apply for leniency may actually provide further deterrence, as other cartel members may be reluctant to accept the invitation to fix prices, allocate customers, etc., if they know that the leader may turn them before the agency. Fifth, ringleaders may have the best evidence available to present before the Authorities: the reason why their participation in the programme may shed more light about the conduct. Finally, both the leader and the followers have committed the same illegal conduct, and therefore, why the same moral judgment should apply for both.

72. Three jurisdictions have decided to change their laws in this regard. First, one of the main legislative changes introduced by Brazil in 2011 (Law 12.529/2011) in connection with leniency programmes repealed the rule prohibiting the ringleader to obtain the benefits. According to the new Law, the cartel leader will be able to obtain benefits in the same way as other participants. Moreover, Peru introduced a prohibition through Decree 1205 of 2015 for the ringleader to benefit from total immunity, but it allows the ringleader to obtain fine reductions.

73. Colombia also narrowed the definition of cartel leader through the recent 2015 Decree that regulates leniency. According to the new rule, a cartel leader is defined as the economic agent that coerced other cartel participants into the agreement, provided that such coercion was present through the whole duration of the cartel. By narrowing down the definition of ringleader the country made it very difficult for a person to actually hold such a status, reason why, in practice, all members of the cartel may apply for leniency. Moreover, in the proposed bill that is being discussed in Congress every current limitation on leaders to apply for leniency –even in the case of coercion- will be eliminated.

4.7 Availability of markers

74. The OECD has defined a marker as a "mechanism that allows prospective leniency applicants to approach the competition authority with initial limited information about a cartel, in exchange for a commitment by the Authority to hold their place in the leniency line for a finite period", which will allow the applicant to complete his application.[37]

75. Markers allow the applicant to secure a place while it obtains all the necessary information and evidence to prove the anticompetitive conduct. It is often the case that companies involved in cartels decide to apply for leniency but do not have all the information about the conduct (such as evidence of the precise duration of the practice, scope, individuals in the company involved, etc.), that may be necessary to perfect the leniency agreement. In such situation, as time is of the essence to obtain full immunity or reduction, it is useful to have a marker system that allows the company to confess its participation and undertake an obligation to present information and evidence about the conduct in the near future.

76. Countries in the region with a marker system include Brazil, Chile, Colombia, Mexico and Peru. These jurisdictions allow the applicant to obtain a marker providing basic information about the conduct, participants and scope, while assuming the obligation to file information and evidence within a period of time to perfect the application.

77. Colombia did not have a marker system until recently, and saw the necessity of introducing one after it dealt with its first leniency applications. The absence of a marker system created an unregulated situation revealing administrative complexities and legal uncertainty when companies approached the agency recognizing the cartel, and asked the Authority to grant some time to gather all the evidence about the practice. The SIC could have either rejected the application for lack of evidence of the conduct or decided *ex officio* to grant preference in line to the first company to approach it (i.e. a de facto marker). In view of this situation, through Decree 1523 of 2015, Colombia introduced the marker system to its competition law. The new rule allows the applicant to mark its entry into the programme by recognizing its participation in the conduct and giving at least succinct information about its nature, participants and scope. The SIC will then confirm the position of the applicant and instruct him to present the required evidence in the period the Authority deems sufficient, depending on the nature of the case. The new rules provide more legal certainty to future applicants and give the authority clearer rules for administering the programme.

78. At the end of 2015, Peru also introduced a marker system to its competition regime through Decree 1205 of 2015. These markers guarantee the position of the applicant in the leniency process, while allowing the company to obtain the information backing the application.

79. Chile[38] also moved to reform its marker system through a proposal of new leniency guidelines that are being discussed at the moment. As per the current rules, the marker is granted automatically once the FNE verifies the identity of the applicant that requests it. The FNE does not have the discretion to accept or reject a marker. This has posed some challenges as certain applicants started applying for markers without recognizing their participation in the conduct, and while they verified whether they had been involved in cartel behavior. This is aggravated by the fact that Chilean competition law allows cartel members to apply even after a dawn raid has occurred, as all dawn raided companies could then move for a marker once the visit occurred.

80. For such reason, the FNE is discussing a modification of its Guidelines. The Authority is proposing to refuse the request for a marker in certain scenarios, including when the applicant does not acknowledge its participation in the cartel conduct.

4.8 Mandatory termination of the participation in the cartel

81. Most of the jurisdictions in the region require the applicant to immediately terminate its participation in the cartel agreement. This includes Brazil, Chile, Colombia, Ecuador, El Salvador, Mexico, and Panama. Requiring the applicant to end its participation in the cartel when applying for leniency is thought as an obvious consequence of the collaboration offered to the authorities. Ending the harmful effect caused by anticompetitive agreements is a top priority for every antitrust Agency.

82. However, immediately ending the participation of the applicant may jeopardize the effectiveness of the investigation or raise suspicion among other cartel participants that one of the members decided to co-operate with the authorities. Continuous participation of the applicant may also be necessary for obtaining further evidence or protecting the pieces of evidence that are being collected immediately after the applicant is accepted in the programme.

83. Four authorities in the region have recently modified their laws or practices after recognizing these risks. First, Colombian Leniency Decree 1523 of 2013 established that the applicant must terminate its participation in the cartel, but only as instructed by the Agency, which gives room to adopt the appropriate measures to collect the necessary evidence or avoid raising suspicion about the existence of an applicant. Ecuador, which amended its laws in 2011, also included a rule according to which the applicant must cease its participation in the cartel unless otherwise instructed by the Superintendencia. Mexico introduced similar rules in its 2015 Leniency Guidelines, requiring the applicant to cease its involvement in

the conduct as established in the 2013 Guidelines, but adds a caveat to this rule which allows the Agency to instruct the applicant otherwise. By means of Decree 1205 of 2015, Peru also established that the applicant must terminate its participation in the agreement unless otherwise instructed by the Authority.

4.9 Confidentiality rules governing the identity of the applicant and the evidence submitted

84. Confidentiality is a core feature of every successful leniency programme. Applicants are more willing to make applications in jurisdictions where the Authority keeps confidentiality over: i) trade secrets and other strategic business information; and ii) statements, evidence, and any other document filed together with the application.

85. As stated in the background paper for the discussion on Leniency Programmes at the Latin American Competition Forum in 2009:

> *"If a leniency applicant knows that anything it voluntarily provides to the enforcement authority may end up in the hands of its customers or other third parties, it may be discouraged to come forward. Therefore, leniency programmes are generally set up so as not to place leniency applicants in a worse position than they would be had they not come forward. The exact way to achieve that obviously depends on the enforcement framework of a particular jurisdiction."*

86. Competition laws in the region generally provide strict confidentiality protections to leniency applicants, both with regards to their identities and to the evidence submitted within the umbrella of the programme. For example, Brazil, Colombia, Mexico and Panama have express rules that protect the identity of the applicant. Moreover, Brazil and Panama have norms stating that the information (evidence) that the applicant submits as part of the leniency agreement will be kept confidential. Mexico's 2013 Guidelines on Leniency also state that the evidence will not be disclosed to other international agencies or third parties unless there is an authorization from the applicant.

87. Although Colombia has a confidentiality rule protecting the identity of the applicant, trade secrets and strategic business information, express confidentiality for the evidence filed by the leniency applicant is not provided in the law. The SIC has recognised that this may pose a challenge for the effectiveness of its programme, and has therefore proposed to Congress, among other things, a rule establishing confidentiality not only for the leniency applicant but also for the information it submits. The rule is intended to protect the exposure of the agents who collaborate with the agency against the use in civil actions of evidence that has been voluntarily.

5. Recent investigations with leniency applicants in Latin America and the Caribbean

88. This section presents some recent and representative cartel investigations opened in Latin America and the Caribbean with leniency applications. The cases described show that leniency programmes continue to be a major investigative tool for some countries in the region, and are gaining increasing importance in others.[39]

5.1 Brazil

5.1.1 Investigation bid rigging in train and subways

89. Beginning 2014, CADE opened an administrative investigation against 18 companies (including Siemens AG, Bombardier INC, Alstom S.A, Mitsui & Co, Hyundai Rotem Co, DaimlerChrysler Rail Systems and CAF SA, and 109 , for alleged bid rigging in 15 contracts for building and maintaining train and metro lines in Brazil, totaling 9.4 billion Reais (2.6 billion dollars approximately).[40] Absence of competition would have resulted in higher prices for the constructions and services contracted.

90. The investigation started following a leniency agreement with one of the cartel participants. After receiving information and evidence from Siemens AG, CADE conducted 13 dawn raids and obtained evidence of the alleged conduct. CADE has shared the evidence collected with the Federal Police, the Public Prosecutor's Office and the Prosecutor's Office of the State of São Paulo in charge of initiating criminal proceedings for cartel conduct.

91. The companies allegedly colluded in public contracts awarded between 1998 and 2013, using different mechanisms to distort competition. Investigated parties would have previously agreed the winners of each bid, as well as the prices to be offered. This would have included making extremely high (losing) bids, forming consortia with previously agreed participants, and subcontracting with competitors. The "losing" companies on each bid, or those excluded from consortia, would receive compensation from the winners through several mechanisms, including subcontracting.

92. CADE's administrative Tribunal may impose sanctions up to 20% of a company's turnover. As cartel conduct is a crime in Brazil, the individuals investigated may also receive criminal penalties.

5.1.2 Manipulation of exchange rates

93. On July 2015, CADE opened an administrative proceeding against Banco Standard de Investimentos, Tokyo-Mitsubishi UFJ Bank, Barclays, Citigroup, Credit Suisse, Deutsche Bank, HSBC, JP Morgan Chase, Merril Lynch, Morgan Stanley, Nomura, Royal Bank of Canada, Royal Bank of Scotland, Standard Chartered and UBS, and 30 individuals, for an alleged manipulation of foreign exchange rates, as well as for an alleged manipulation of the reference index of the Brazilian Central Bank, European Central Bank and WM/Reuters. The manipulation would have influenced the Brazilian Real and other currencies as well.

94. The proceeding was opened as a result of a leniency agreement between one of the companies, CADE's General Superintendence and the Brazilian Federal Prosecutor's Office. The conduct would have affected key economic variables in Brazil, including domestic rates of consumption, investments, exports and financial transactions that used the allegedly manipulated exchange rates.[41]

95. According to the evidence, the investigated financial institutions "would have cartelized in order to fix price levels (exchange rate spread); co-ordinate the purchase and sale of currencies and price proposals to clients; in addition to hindering or impeding the activity of other agents in the exchange market involving the Brazilian currency".[42] The cartel would have been conducted through the use of online chat rooms between competitors.

96. This, in addition to an alleged co-ordination that would have influenced reference rates used for foreign exchanges, which was achieved by sharing confidential information on client's orders, specific orders, among others. The conduct would have harmed prices assumed by clients in foreign exchange operations and increased the revenues of the alleged cartelists. The investigation may also result in sanctions up to 20% of a company's turnover and criminal penalties.

5.2 Chile

97. Since it was introduced in 2009, Chile has had five leniency applications for cartel conduct. Three of those cases are described below.

5.2.1 Whirlpool (Embraco)

98. In mid-2013, the Chilean Supreme Court ratified a judgment from the Chilean Competition Tribunal which declared the existence of a cartel between Whirlpool S.A and Tecumseh Do Brazil Ltda., to raise the price of low power hermetic compressors, which are inputs for manufacturing refrigerators sold in Chile.[43] This was the first case in which the FNE used the leniency programme to detect and prosecute a cartel, receiving collaboration and evidence from Tecumseh Do Brazil Ltda. The success in this case constitutes a milestone for Chile's competition law.

99. The Supreme Court also confirmed that regardless of whether the cartel is performed outside Chilean territory, the FNE and the Courts will have jurisdiction to prosecute it provided the anticompetitive agreement had effects over the Chilean market, as it was in this case.

5.2.2 Shipping case

100. In January 2015, the FNE filed a complaint against Chile's Compania Sud Americana de Vapores SA (CSAV) and CCNI, South Korean Eukor Car Carriers and Japan's Kawasaki Kisen Kaisha, Mitsui OSK Lines and NYK Line, all shipping companies that allegedly celebrated a cartel to fix the prices on car carriers. The leniency programme was used to detect the alleged cartel that affected trade in Europe, Asia and America. The case is currently being argued before the Chilean Judicial authorities.

5.2.3 Tissue paper

101. As a result of a leniency application, a few months ago the FNE filed a complaint against the companies CMPC and SCA for allegedly fixing the prices and allocating the markets for tissue paper products in Chile.[44] Both companies filed for leniency As a result, the FNE asked the Competition Tribunal to grant CMPC complete immunity from the sanction, and to impose a sanction of USD 15.5 million to SCA (who came in second).

102. According to the evidence collected, the parties engages in the cartel conduct from the 2000 to 2011 included, by which they raised the prices of toilet paper, paper towels, napkins and facial tissues in Chile. According to the FNE, both companies provided corporate statements from the main executives that were part of the conduct.

103. The FNE also reported that the companies had taken measures to hide the conduct, including using Hotmail and Gmail accounts with fake identities (instead of corporate accounts) to communicate, as well as prepaid mobile phones. They also destroyed laptops that contained relevant documents. This case followed an investigation opened by the Colombian Competition Authority (SIC) in the same market. The SIC found evidence of cartel behaviour in the tissue paper market in several Latin American countries.

5.3 Colombia

104. In the last three years the SIC has opened its first investigations with leniency applications, thereby starting the use of a system implemented in 2009. Two cases are worth mentioning.

5.3.1 Baby diaper cartel investigation

105. In mid-2014, the Superintendence of Industry and Commerce SIC opened an investigation against five companies (TECNOSUR S.A.S, TECNOQUMICAS S.A., COLOMBIANA KIMBERLY COLPAPEL S.A., PRODUCTOS FAMILIA S.A. and DRYPERS ANDINA S.A.), for allegedly fixing the prices of baby diapers sold in Colombia between 2000 and 2013. The SIC also charged 44 individuals that would have participated in the conduct. The cartel would have also involved agreements to affect the quality of the products and the way in which diapers were commercialised.

106. Two companies applied for leniency after the SIC performed dawn raids on their corporate headquarters. One of them obtained full immunity and the other one obtained a reduction from the sanction to be imposed.

107. This was the first leniency application in the history of Colombia's competition law. The leniency applicants provided evidence to prove the conduct, including emails, documents, testimonies and sworn declarations. They also provided the Authority with the context and full history of the conduct. The investigation is currently ongoing and should conclude in 2016.

5.3.2 Notebooks cartel investigation

108. On February 2015, the SIC opened an investigation against COLOMBIANA KIMBERLY COLPAPEL S.A., CARVAJAL EDUCACIÓN S.A.S y SCRIBE COLOMBIA S.A.S., for allegedly forming a cartel to fix the prices of notebooks in Colombia. The investigation was opened after one of the investigated parties applied for leniency. The party obtained full immunity for confessing its participation in the conduct and presenting evidence (including several emails and testimonies) that would prove the anticompetitive practice.

109. The SIC also charged 42 individuals that would have participated in the conduct, including former employees of the companies. According to the SIC, the conduct would have affected 3.7 million households that use notebooks and more than 9.5 million students that attend schools or universities in the country and use notebooks regularly. The investigation is ongoing, and it is part of the first leniency agreements that are being signed in the country.

5.4 Peru

5.4.1 Toilet paper investigation

110. On December 2015, INDECOPI launched an investigation against Kimberly Clark S.R.L. and Productos Tissue del Perú S.A. – Protisa (which had 88% of the market), for allegedly cartelizing to raise the price of toilet paper and other paper tissue products in Peru. The investigation was initiated as a result of the signing of the first leniency agreement in the history of Peru's competition law.

111. INDECOPI[45] stated that Protisa signed a leniency agreement and provided collaboration and evidence of the investigated agreement. The investigation is currently ongoing and it is part of a set of proceedings taking place in Chile and Colombia. The Peruvian competition authority hopes that leniency applications will significantly increase in the near future.

6. Conclusions

112. Although leniency programmes in Latin America and the Caribbean are fairly new, most of them started after 2007 with the exception of Brazil and Peru which started in 2000 and 1996, respectively, the region has started quickly to rely on their effectiveness for prosecuting cartels, and to adjust the rules to motivate companies to collaborate with the Authorities.

113. In the last five years in particular, the region has seen a wave of new leniency programmes and amendments to those that existed before 2010, which try to incorporate the lessons that agencies have learned while enforcing its cartel laws using leniency agreements. Moreover, the recent investigations opened as a result of leniency agreements demonstrate that several countries in the region are starting to rely on these systems to fight hard core cartels. Although there may be different approaches and perspectives to each policy alternative when designing leniency programmes, Latin American and Caribbean countries have identified some lessons from the use of leniency agreements.

114. First, countries have recognised that regardless of whether they provide leniency only to the first applicant or the subsequent applicant, the system should allow the Agency to obtain all the necessary evidence to prosecute the cartel, and entice agents to be the first to apply. This may be achieved by generating a sufficient difference in benefits between the first and the second applicant. Moreover, allowing the applicants to obtain markers while it collects the evidence may be good policy to motivate cartel members to approach the Authority quickly.

115. Second, some regimes in the region require the applicant to produce a written statement of its application. This may reduce the incentives for US companies to apply for leniency as such corporate statements may be used later in seeking redress through private litigation. This has led some Authorities in Latin America and the Caribbean to allow for oral applications or simply eliminated the need to produce a statement, notwithstanding the need by the applicant to present all documentary evidence (emails, chats, testimonies, etc.) available.

116. Third, most countries in the region provide benefits for both monetary and criminal sanctions, when such penalties exist. They have recognised that if criminal immunity is not offered, very little incentive will exist to apply for leniency, and have therefore made the necessary amendments.

117. Fourth, some countries in the region have recognised that availability of benefits for the cartel leader may be appropriate, especially when management in the company has changed or when leadership in the cartel is uncertain.

118. Finally, countries have learned that it may be good policy to grant the Authority the flexibility to order the applicant not to finish its participation in the cartel in order to protect the evidence and the investigation. They have also acknowledged that providing treating as confidential the identity of the applicant and the documents that it voluntarily presents before the Agency will likely stimulate more applications from cartel members.

ENDNOTES

[1] Organisation for Economic Co-operation and Development OECD, Recommendation of the Council concerning Effective Action against Hard Core Cartels, 25 March 1998 – C(98)35/FINAL, Reference Text: 8 February 2001 –C(2001)27.

[2] Organisation for Economic Co-operation and Development OECD, Use of Markers in Leniency Programs, Note by the Secretariat, March 2015, DAF/COMP/WP3(2014)9.

[3] Countries with leniency programs in Latin America include Brazil, Chile, Colombia, Ecuador, El Salvador, Mexico, Panama, Peru and Uruguay.

[4] Organisation for Economic Co-operation and Development, OECD. Using Leniency to Fight Hard Core Cartels, Policy Brief, September 2001.

[5] International Competition Network, Anti-Cartel Enforcement Manual, Chapter Two, Drafting and implementing and effective leniency policy, May 2009.

[6] Organisation for Economic Co-operation and Development OECD, Policy Roundtable: Leniency for subsequent applicants, 2012, DAF/COMP(2012)25.

[7] International Competition Network (ICN), Anti-Cartel Enforcement Manual, Chapter Two, Drafting and implementing and effective leniency policy, May 2009.

[8] Law project to Amend Chile's Competition Regime, Message No. 009-363/ from the President of the Republic of Chile to the Chamber of Deputies, March 19, 2015, *available at* http://www.senado.cl/appsenado/templates/tramitacion/index.php#.

[9] Congress of the Republic of Colombia, Law Project No. 38 of 2015, which introduces reforms to the Colombian competition regime.

[10] Some of the changes proposed will be discussed later in this document when appropriate.

[11] Autoridad de Protección al Consumidor y Defensa de la Competencia –ACODECO, Resolution A-064-15 of July 10, 2015, published in Gaceta Oficial Digital of Tuesday, July 21, 2015.

[12] Espinoza, Jesus Eloy, *Peru: National Institute for the Defense of Competition and the Protection of Intellectual Property*, The Antitrust Review of the Americas 2016, Global Competition Review.

[13] Republic of Colombia, Law 1340 of 2009 and Decree 1523 of 2015.

[14] Peruvian Legislative Decree 1034 of 2008 (*Decreto Legislativo que Aprueba la Represión de Conductas Anticompetitivas*), Article 26.

[15] Resolution A-064-15 of July 10, 2015.

[16] OECD, Policy Roundtable: Leniency for subsequent applicants, 2012.

[17] ICN, Anti-Cartel Enforcement Manual, Chapter Two.

[18] Chile introduced its leniency program in 2009.

[19] Ecuadorian Competition Law, *Ley Orgánica de Regulación y Control del Poder de Mercado*, October 2011, Article 83.

[20] Comisión Federal de Competencia Económica, COFECE, Guía del Programa de Inmunidad y Reducción de Sanciones, GUIA-003/2015, June 2015.

[21] *Op Cit.*, Peruvian Legislative Decree 1034 of 2008, Article 26. Amended by Peruvian Legislative Decree 1205 of 2015.

[22] Administrative Council for Economic Defense (CADE): Fighting Cartels: Brazil's Leniency Program, 2009, 3th Edition.

[23] ACODECO, Resolution A-064-15 of July 10, 2015.

[24] Mobley S. and Denton R., "Global Cartel Handbook – Leniency: Policy and Procedure", Oxford University Press (2011).

[25] OECD, Policy Roundtable: Leniency for subsequent applicants, 2012.

[26] CADE, Fighting Cartels: Brazil's Leniency Program, 2009, 3th Edition.

[27] Administrative Council for Economic Defense (CADE), Draft Guidelines, Cade's Antitrust Leniency Program, 2016.

[28] It is worth noting that according to Brazilian provisions, the applicant may secure a marker without providing evidence. However, in order to obtain the benefits it will need to file all documents available to prove the conduct.

[29] Fiscalía Nacional Económica de Chile, Guía interna sobre beneficios de exención y reducción de multas en casos de colusión, October 2009.

[30] Republic of Colombia, Law 1340 of 2009 and Decree 1523 of 2015.

[31] *Op Cit.*, COFECE, Guía del Programa de Inmunidad y Reducción de Sanciones, GUIA-003/2015, June 2015.

[32] *Op Cit.,* ACODECO, Resolution A-064-15 of July 10, 2015, Section III.1.

[33] *Op Cit.*, Peruvian Legislative Decree 1034 of 2008, Article 26.1. Amended by Peruvian Legislative Decree 1205 of 2015.

[34] Kloub, Jindrinch, *Leniency as the Most Effective Tool in Combating Cartels*, OECD Latin American Competition Forum 2009, Santiago, Chile.

[35] Federative Republic of Brazil, Article 87, Competition Law 12.529 of 2011.

[36] Congress of the Republic of Colombia, Law Project No. 38 of 2015.

[37] OECD, Use of Markers in Leniency Programs, Note by the Secretariat, March 2015.

[38] Organisation for Economic Co-operation and Development OECD, Use of Markers in Leniency Programs, Contribution from Chile, November 18, 2014, DAF/COMP/WP3/WD(2014)52.

[39] For example, Mexico has had 64 leniency applications from 2007 to 2013. Comisión Federal de Competencia Económica COFECE, Informe Anual 2013, *available at* https://www.cofece.mx/cofece/phocadownload/Normateca/Informe/informe_anual_2013_cofece.pdf.

[40] Administrative Council for Economic Defense, Brazil, *available at* http://www.cade.gov.br/Default.aspx?5cef3ecb25fa1112e452e27bc972.

[41] Administrative Council for Economic Defense, Brazil, *available at* http://www.cade.gov.br/Default.aspx?192cfa0ee73dd35fab98ab87de68.

[42] *Ibid.*

[43] Fiscalía Nacional Económica, *available at* http://www.fne.gob.cl/english/2013/09/25/hon-supreme-court-of-chile-affirmed-the-judgment-of-the-tdlc-which-had-accepted-a-complaint-of-the-fne-against-whirlpool-sa-and-tecumseh-do-brasil-ltda-4/.

[44] Fiscalía Nacional Económica, *available at* http://www.fne.gob.cl/english/2015/10/28/ne-files-complaint-against-cmpc-and-sca-before-the-competition-tribunal-for-fixing-prices-of-tissue-paper-products-and-allocating-market-quotas-among-them/#more-1887.

[45] *Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectua*l – INDECOPI, https://www.indecopi.gob.pe/inicio/-/asset_publisher/ZxXrtRdgbv1r/content/el-indecopi-abre-procedimiento-sancionador-por-presunta-concertacion-de-precios-de-papel-higienico?inheritRedirect=false.

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