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Session I: Strengthening incentives for leniency agreements – Background Note by the Administrative Council for Economic Defense (CADE) Brazil

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Latin American and Caribbean Competition Forum

Session I: Strengthening incentives for leniency agreements

– Background Note by CADE (Brazil)[1] –

Abstract

For more than 40 years, competition authorities have used leniency programs to detect cartels. Through this powerful tool, companies and individuals disclose infringements that, otherwise, would probably not be revealed, given the secret nature of cartels. In exchange, they are granted discounts or immunity from fines and other sanctions. On its side, the State benefits from greater evidence quality and a higher probability of punishment for the other cartelists.

The current antitrust leniency programs were built upon three pillars, crucial for their success: the threat of severe punishment, the fear of detection, and transparency of the benefits from the program. However, after decades of improvements and as new challenges emerge – which is supposedly leading to a decline in the number of leniency applications - has the time come to update the structure of incentives of leniency programs? What has recent experiences in Latin America, the Caribbean and worldwide shown?

[1] This background paper was written by Priscilla Craveiro, advisor at the General-Coordination for Antitrust Analysis 1 and former Coordinator at the Leniency Unit of the Brazilian Administrative Council for Economic Defense (CADE), with a minor collaboration of Felipe Leitão Valadares Roquete, Head of the Leniency Unit (CADE). Cristiano do Amaral Filho, trainee at the same General-Coordination, collaborated with the bibliographical research. For a complementary approach on Latin American and Caribbean leniency programs, the reader may refer to the Background Paper of the Leniency Session at the OECD Latin American and Caribbean Competition Forum of 2016: https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)5&docLanguage=En.

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1. Introduction

1. Antitrust leniency was first adopted more than 40 years ago[2]. There is a consensus over its role in making cartel detection and prosecution more effective, by complementing the *ex-officio* investigation efforts. For instance, according to an empirical study (PARK; LEE; AHN, 2018), the implementation of the leniency program by the United States was responsible for raising the probability of cartel penalization by about 65%. No wonder why leniency programs have been adopted by more than 60 countries (OECD, 2022), among which 12 are in Latin America and the Caribbean[3].

2. The *rationale* behind leniency programs is to improve the State's ability to detect and punish infringements by granting benefits for those companies and individuals who provide involved in a cartel, information and evidence that lead to the prosecution of the infringement. The State waives its prerogative of fully punishing one company and employees involved as an attempt to ensure punishment for all the other companies and individuals engaged in the misconduct.

3. This tool is especially important when it comes to cartel infringement, which is a secretive and difficult to detect conduct. Besides confessing their engagement in the wrongdoing, applicants are required to effectively co-operate with the authority during the entire proceeding and, in most cases, immediately cease their participation in the cartel activity.

4. Leniency programs provide competition authorities with inside information and evidence, raising the quality of proof as well as the probability of conviction. Moreover, applicants usually provide valuable inputs for the authorities to plan more effective down raids. Finally, leniency has a significant deterrence effect, as it destabilizes cartel agreements by increasing the incentives to defection.

5. In the next section, we present the classic structure of incentives that has been guiding authorities when designing and amending their leniency programs.

2. Leniency's classic structure of incentives

6. If we want companies and individuals that have engaged in cartel activities to self-report, we need to guarantee a balanced structure of incentives. Current leniency programs seem to have been designed based on the three cornerstones identified by Hammond (2004): the threat of severe punishment, fear of detection, and transparency of the benefits from the program. With one or another particularity, for many years those three pillars have guaranteed effectiveness of antitrust leniency programs of many jurisdictions[4].

[2] The US DOJ Antitrust Division first implemented its leniency program in 1978 and reformed it in 1994.

[3] Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Nicaragua, Panama, Peru and Uruguay (WBG, 2021).

[4] It is important to highlight that the process was dynamic, involving (i) organizational learning, (ii) building capacities initiatives and, sometimes, (iii) institutional isomorphism by agencies.

7. The first pillar on which leniency programs are based is the threat of severe punishment[5], which has a direct impact on the willingness to self-report. In countries where cartels are prosecuted administratively only, calibrating the level of fines is crucial for deterrence, but also for the leniency program attractiveness. In addition to fines, many countries have established non-monetary sanctions, such as the prohibition to participate in public bids[6] or to take loans from public institutions for a limited period.

8. Criminal prosecution also seems to be an important factor to be considered when deciding whether to apply or not for leniency. The possibility of serving jail time weighs heavily for individuals that have engaged in misconduct. In such cases, criminal immunity should be granted to the leniency applicants; otherwise, individuals may be discouraged from coming forward.

9. Instilling the fear of detection in cartel participants is the second pillar of effective leniency programs. Hence, competition authorities should always seek to improve their detection tools, so that companies and individuals have incentives to self-report. Every day, as anticompetitive agreements become more innovative and less evident, authorities need to be prepared to tackle these conducts with equally innovative tools and investigative powers. Data mining, screening methods, and other computational tools (like artificial intelligence) can play a substantial role in detecting collusive behavior, especially in public bids.

10. The third pillar is transparency of the benefits from the leniency program, which encompasses legal certainty and procedural predictability. Companies and individuals considering to self-report wish to be certain about their obligations and the benefits deriving from these obligations before applying for leniency. They need to know under which conditions they will be granted a marker to negotiate, what kind of information and documents they are expected to present to the authority, and the exact procedures required to obtain the conditional leniency. In this sense, the issuance of guidelines is an important initiative to detail the programs' legislative provisions and generate awareness and reliability. Another significant concern, is legal certainty. It is important to assure that different companies/individuals facing the same situation are treated equally, except when duly justified.

11. In terms of procedural predictability, applicants are often worried about the capacity of authorities to guarantee the confidentiality of negotiations. A leak or misuse of the applicant's identity, statements or evidence presented during the negotiation process, whether by national/multijurisdictional authorities or by co-operating partners, can expose the applicant to private damages actions and harm the leniency program's reputation. To avoid this scenario, authorities can resort to risk assessment routines and measures to improve confidentiality procedures. It is also desirable that antitrust authorities establish clear rules for disclosing leniency documents, as well as to establish organizational compartmentalization of the leniency unity. Applicants must know what documents can be disclosed and in which procedural phase the disclosure can happen.

12. Almost eighteen years since Hammond identified those three cornerstones, how are leniency programs performing? In the next section, we present the purported trend of a drop in the number of leniency applications and its possible causes, and discuss if the classic structure of incentives of leniency programs needs to be somehow updated in response to these new challenges.

[5] An experimental study shows the relevance of higher fines to the effectiveness of leniency programs (see Jeong Yeol, K., Noussair, C., 2021).

[6] But incentives must be designed to avoid conflicting policy objectives (see Giosa, P.A., 2021).

3. Possible causes for the drop in the number of leniency applications

13. The 2022 OECD Competition Trends Report indicates a tendency of decline in the number of leniency applications: while there were 577 leniency applications worldwide in 2015, there were less than half of it (210) in 2020. The decreasing slope was similar in the Americas, where leniency applications varied from 53 in 2015 to around 18 in 2020[7], despite an increase in the number of jurisdictions with leniency programs worldwide and in Latin America[8].

14. A possible explanation of the decline in leniency applications is the rise in the number of private damages actions, especially in Europe. When deciding whether to self-report or not, cartelists take into account the costs and duration of civil damage proceedings. The disclosure policy regarding leniency documents also matters as, depending on the rules, statements, and evidence provided by applicants can be used to file private actions against them.

15. At the same time private actions represent a threat to leniency programs, as they largely depend on cartel decisions deriving from leniency. Consequently, a drop in leniency applications could also affect the possibility of victims obtaining proper compensation, creating a vicious circle. According to Archimbaud (2020, p. 2), "private action then runs the risk of annihilating public action without being able to survive it". Countries should consider those elements when trying to achieve the right balance between public and private enforcement. Sometimes, policy amendments can affect leniency applications when they reduce legal certainty regarding its consequences. Some experts stress that the European Union Damages Directive boosted the development of private actions, but was not successful at protecting leniency applications to the same extent. According to Archimbaud (2020), two factors contribute to discourage leniency applications: the European refusal to grant the applicant civil immunity and the fact that the applicant is the first cartel participant exposed to follow-on civil actions. Petkosky (2019, p. 49) stresses that the protection to leniency documents provided by the Directive "mainly applies to self-incriminating documents, which leaves other leniency material at risk of being disclosed in civil actions".

16. Some experts argue that leniency has been a victim of its own success. By trusting this tool so much to uncover cartels, authorities have been giving insufficient attention to proactive methods of detection, which weakens the incentives for applying for leniency. In Europe, for instance, around 60% of detected cartels are discovered through leniency (CARMELIET, 2012). In Canada, 80% of the investigations derive from immunity applications (OECD, 2013). In the Latin America and Caribbean region, on average 47% of the cartel investigations began with a leniency application until 2020 (WBG, 2021, p. 42).

[7] An alternative explanation for the decreasing slope is that every institutional innovation, after its adoption phase - when a spike in leniency agreements was expected - will face a natural reduction in the number of agreements, followed by a consolidation phase, which will constitute a plateau regarding the number of leniency signed by agencies.

[8] Also, it is important to analyze other variables when assessing the effectiveness of leniency programs. The number of agreements signed by year is a good indicator, but we could add other relevant variables, for instance, (i) if the leniency programs are being successful a identifying anticompetitive conducts in new markets (like labour market, digital markets, and so on), (ii) if the agreements are providing higher quality evidence about the conduct under investigation and (iii) if the leniency agreements are resulting in a higher level of conviction of companies and subjects involved in the conduct.

17. Another possible cause that could explain a drop in leniency applications relates to the uncertainties around the concept of cartels. The detection of misconduct is becoming more challenging. On the one hand, standard cartels are adopting new ways of communicating and concealing illegal agreements, making it more demanding for private and public enforcers to uncover them. On the other hand, newer forms of cooperative behavior with anticompetitive effects are arising. Some examples are anticompetitive activities in the labor market[9], buying alliances, standalone infringement of exchange of sensitive information[10] and agreements to limit innovation[11]. In jurisdictions where this second group of activities is subject to a leniency agreement, generating legal certainty regarding these activities– seen by some companies as borderline - is a necessary measure to avoid disincentives for new leniency applications.

18. Experts also regard the multiplicity of leniency programs, and consequently of rules and procedures, as an issue for international cartel participants to apply for leniency. They cannot be sure if they are going to qualify for immunity in every important jurisdiction affected by the specific cartel. This could mean being exposed to large antitrust penalties – and, in some cases, criminal charges - in one or more countries. Not to mention the amount of money spent and the long period during which the company will be subject to different authorities' scrutiny. Granting benefits to subsequent applicants can soften this worry, but may not be enough.

19. A reduction in the scope of protection of the leniency agreement is also mentioned as a plausible cause for cartelists not to apply. In 2017, for instance, the DOJ Antitrust Division launched new guidance establishing that it may, at its own discretion, carve out from type B leniency agreements[12] those current employees deemed highly culpable. More recently, in April 2022, the Division issued a revised set of frequently asked questions determining that companies and individuals need to promptly report illegal activity and remediate any resulting harm if they want to apply for leniency and avoid criminal prosecution, fines, and prison. Some practitioners (Day, 2022 and Cole; Amato; Arguello; Cook-Milligan, 2022; Williamson, 2021) consider that the changes introduce additional burdens and uncertainty, which could turn leniency less attractive to those who uncovered evidence of misconduct.

[9] The Portuguese Competition Authority recently launched "Good Practices for Preventing Anti-Competitive Agreements in the Labor Market". Available at: https://www.concorrencia.pt/sites/default/files/Guia%20Boas%20Pr%C3%A1ticas%20Preven%C3%A7%C3%A3o%20de%20Acordos%20Anticoncorrenciais%20nos%20Mercados%20de%20Trabalho.pdf. In 2021, US President Joseph Biden issued an "Executive Order on Promoting Competition in the American Economy", with specific mention to competition in labor market. Available at: https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.
COFECE (Mexican antitrust authority) released, in 2020, "Guidelines for exchange of information among economic agents". Available at: https://www.cofece.mx/wp-content/uploads/2020/11/GuiaFacilLecturaIntercambiodeInfoAE.pdf#pdf.

[10] COFECE (Mexican antitrust authority) released, in 2020, "Guidelines for exchange of information among economic agents". Available at: https://www.cofece.mx/wp-content/uploads/2020/11/GuiaFacilLecturaIntercambiodeInfoAE.pdf#pdf.

[11] Last year, the European Commission fined car manufacturers for restricting competition in emission cleaning for new diesel passenger cars: https://ec.europa.eu/commission/presscorner/detail/sv/ip_21_3581.

[12] Type B leniency agreements are the ones where the applicant applies for leniency only after the Division has begun its cartel investigation.

20. Gärtner (2021), for instance, states that granting more incentives to first-comers (relative to latecomers) might be more crucial for a leniency program's effectiveness, a finding that has policy implications for agencies that are able to enter into other types of agreements (such as cease and desist).

21. More recently, some authorities and experts have been worried about the possibility of collusion being facilitated by technological advances. By resorting to algorithmic collusion, for instance, companies make it much more difficult for authorities to uncover the infringement. Without fearing detection, they have no incentive to apply for leniency. This could be another factor to explain the purported reduction in the number of leniency applications.

22. Another optimistic perspective to explain the declining trend in leniency applications points toward the successful development of a culture of corporate compliance and the capacity of these programs to prevent infringements. According to a GCR Survey Report (2021, p. 18), "as more countries have developed competent agencies and enforceable laws, the need for compliance has grown".

23. The issues presented above are the main factors highlighted by experts and enforcers that could cause this drop trend, however, this list is surely not exhaustive. We need to consider that this possible tendency could be due not to one single factor, but to a combination of factors, in different degrees and according to each country's reality. This myriad of challenges requests the authorities' attention to assess and eventually amend particular features of their antitrust policies. However, in a broader view, it can reveal a great opportunity for reassessing and, if necessary, updating the classic structure of incentives to apply for leniency.

24. In the next section, we present different ideas and initiatives that could inspire changes to leniency policies aimed at raising incentives for new applications. These possibilities are being discussed by the academia, and in international fora that gather enforcers from various jurisdictions. There are also initiatives already being implemented by enforcers, which could serve as inspiration to different authorities.

4. Recent amendments and initiatives to strengthen incentives for leniency applications

25. Updating the classic structure of incentives to apply for leniency could be the key to reversing the observed drop trend. Therefore, it is useful to identify and detail possibilities and concrete initiatives toward raising incentives for leniency applications around the world.

4.1. Initiatives to strengthen cartel deterrence

26. As mentioned before, the threat of severe sanctioning weighs a lot when cartelists assess the risks and benefits of applying for leniency. That is why some countries are administering more vigorous punishment for executives. The United Kingdom, for instance, recently applied a long-standing rule on director disqualification (the Company Directors Disqualification Act), according to which an individual can be disqualified from acting as a company director for up to 15 years for breaching competition rules[13]. Mexico also has legal provisions to sanction individuals engaging in absolute monopolistic practices with the prohibition to be eligible to act as a company's board member, manager,

[13] More information on the concrete case available at: https://www.gov.uk/cma-cases/suppliers-of-antidepressants-director-disqualification.

director, executive, agent, representative or legal representative for a maximum period of five years (COFECE, 2016).

27. Another possibility to increase the risk of perception regarding sanctions, and consequently giving more incentives for leniency, is to establish double or treble damages in private actions, exempting the leniency applicant, of course. This is done in the United States where companies involved in anticompetitive practices can be required to pay three times as much for the harm they caused to consumers. The Brazilian Congress is currently discussing a bill that aims at introducing double damages liability for cartel participants, with the exception of leniency applicants.

28. As already mentioned, criminalizing the cartel activity is also a possibility that shifts the balance towards applying for leniency, but only when it is accompanied by the provision of criminal immunity for the first leniency applicant.

29. Strengthening the authorities' market intelligence seems a key initiative to increase the fear of detection among cartelists. In this sense, some authorities believe that digital markets should receive a closer look. Digital services are continuously gaining importance for society and the economy and, hence for competition authorities' work. Pursuing to keep pace with these markets' development, some competition authorities are allocating structure and human resources to study and specialize in this area. The United Kingdom Competition and Markets Authority (CMA), for instance, recently created its Digital Markets Unit, which aims at proactively monitoring the wider digital market and "understanding the operation and effects of key algorithms and automated decision systems of significant firms" (CMA, 2021, p. 6). In 2015, the Mexican antitrust authority (COFECE) created a market-intelligence unit fully dedicated to monitoring markets and screening market data. Between 2016 and 2019, "approximately 20% of investigations were initiated through findings of the market-intelligence unit" (OECD, 2020, p. 21).

30. Investing in computational tools is also an option to increase the authorities' detection capacity. Since 2014, Brazil maintains the "Brain Project", a digital system based on data mining and economic filters that gives support to the investigation of collusive practices, especially in public bids. Its main findings have been used to initiate proceedings and to convince judges to grant search and seizure warrants. The Danish authority, in collaboration with several agencies, developed a tool, called "Bid Viewer", based on statistical and machine learning models, to detect collusion in public bids.[14]

31. This kind of proactive initiatives improves the authority's capacity to detect infringements and strengths the incentives to apply for leniency.

4.2. Initiatives to strengthen transparency, legal certainty and procedural predictability

32. As mentioned before, a simpler ancillary measure that countries can implement is defining and publicizing the rules for document disclosure. In 2018, the Brazilian competition authority issued a Resolution[15] setting clear criteria for the disclosure of leniency documents, which also influences the balance between public and private enforcement.

[14] https://www.kfst.dk/media/cnldn11q/bid-viewer_56_seneste.pdf. Besides the robustness of the models, it is an excellent example of interinstitucional cooperation among different jurisdictions.

[15] Resolution nº 21, of 11 September 2018 (https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/normas-e-legislacao/resolucoes/Resolução%20nº%2021%20de%2012%20de%20setembro%20de%202018.pdf).

33. Improving internal co-operation among different government agencies is also relevant, especially for jurisdictions with authorities that have complementary and potentially conflicting mandates. In these cases, leniency applicants can be subject to various procedures and rules that can overlap and cause legal uncertainty, discouraging new applications. That is why, "in a parallel system, it is important that the application of the leniency policy to civil and criminal cartel conduct is clearly articulated to provide maximum certainty to potential leniency applicants" (ICN, 2014, p. 18). Signing technical co-operation agreements, organizing joint training and working groups, and creating more opportunities for working closely can be solutions to generate more synergy among the involved agencies. In light of this, it is paramount that the co-operating bodies observe limits on sharing documents and information, as well as each other's confidentiality rules, which include signing confidentiality and liability agreements.

4.3. Other initiatives to strengthen leniency incentives

34. As we have seen, private actions are believed to be the main cause of the purported drop trend in the number of leniency applications. To face this new challenge, some countries are seeking to limit civil liability for applicants. One possibility is to exempt them from joint liability, which means that they would only be held liable for the damages they directly caused. That is what happens in the United States and the European Union. Another possibility would be establishing that leniency applicants would be only subsidiarily liable, meaning that they would only be liable if the other cartel members were unable to pay for damages. That approach used to be adopted by Hungary[16] before the European Union Damages Directive was implemented.

35. Hornkohl (2022) goes further and proposes to combine the limitation or exclusion of civil liability with the creation of a "Fair Fund" to compensate victims from damages caused by cartels. Fines resulting from administrative proceeding in cartel cases would nourish this public-administered fund, which would function in parallel to the follow-on damages actions.

36. In this context, Colombia recently passed a new law[17] reforming its leniency program, including the elimination of joint liability for damages caused to third parties. Brazil is now discussing a bill that exempts the leniency applicant from joint liability.

37. Despite having the potential of boosting leniency applications again, these alternatives involving the applicants' protection from civil liability are not simple nor quick to implement as they require legislative changes. Nevertheless, they are necessary to reach an optimal equilibrium between public and private enforcement.

38. Good co-operation among enforcers is also key to improve leniency programs, especially when it comes to cross-border conducts. Enforcers should seek to exchange perceptions in concrete cases through waivers given by the applicants. Besides, authorities can always look for coordination regarding policy implementation and amendments. Regional and international entities have an important role in facilitating these collaboration opportunities. They can also develop policy guidance and offer practical tools for improving enforcement co-operation and help face some of its intrinsic challenges[18].

[16] Art. 88D of the Hungarian Competition Act (1996), revised in 2009.

[17] Law nº 2195, of 18 January 2022.

[18] To see the challenges to enforcers' cooperation in detail, please refer to the "OECD/ICN Report on International Co-operation in Competition Enforcement". Available at:

39. Stalder (2021) suggests extending the scope of leniency for other types of infringements. The author argues that since authorities grant immunity to those who engage in horizontal cartels, the most harmful anticompetitive conduct, there is no reason why they should not negotiate leniency with those who participated in less pernicious practices, like unilateral conducts.

40. Democratizing access to public services, including leniency applications, is always a good measure. Hereupon, Brazil recently launched "Click Leniency"[19], an online tool where those willing to report their engagement in cartels can do it quickly, easily, and safely. It follows the international trend of facilitating access to this important tool, as the European Commission's leniency[20] and the Spanish online tool for requesting leniency[21].

5. Conclusions

41. Leniency programs have been so successful that different jurisdictions now rely heavily on them to detect cartel activity. The success of leniency programs can be attributed to the adoption of a classic structure of incentives to apply for leniency, based on three pillars: the threat of severe sanctioning, fear of detection, and transparency.

42. However, a recent trend in the decline in the number of leniency applications has been highlighted by experts and observed to different degrees by some authorities. This trend can be explained by a number of reasons, from changes in the provisions of a specific program to more general causes that affect the overall system of incentives to apply for leniency.

43. In any case, there seems to be a good opportunity for enforcers to discuss these challenges and co-operate in order to find paths to overcome them. Inspiration can come from academic studies, regional and international entities analysis, and successful experiences worldwide. Finally, it is important that the particular features and contexts of each jurisdiction are taken into account when designing initiatives to tackle the decline trend and boost leniency programs once again.

https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf.

[19] https://leniencia.cade.gov.br/.

[20] https://ec.europa.eu/competition-policy/cartels/leniency/eleniency_en.

[21] https://sede.cnmc.gob.es/en/tramites/competencia/solicitud-de-clemencia.

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