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– Contribution from the United States –

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The attached document from the United States is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 27-28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session I: Strengthening incentives for leniency agreements

– Contribution from the United States –

1. First devised and implemented by prosecutors at the United States Department of Justice Antitrust Division ("the Division") in the 1970s, leniency programs have been the heart of cartel enforcement for decades. As noted in the 2022 OECD Competition Trends Report, there continues to be growing concern about the decline in leniency applications worldwide and reduced incentives for applicants. This submission will address: the recent amendments to the Division's leniency program and policy documents aimed at increasing the transparency and predictability of our program; international initiatives led by the Division to improve predictability and increase incentives for leniency applicants; the need for effective sanctions to incentivize leniency; and the importance of giving competition agencies the tools needed to detect cartels outside of the leniency context.

1. Brief History of Leniency in the U.S.

2. The original version of the United States' Corporate Leniency Policy ("policy") dates back to 1978. The original policy relied on the core concept of providing a pass from prosecution in exchange for self-reporting and cooperation against other cartel members in an effort to detect secretive cartels, but it failed to provide the incentives necessary to encourage self-reporting of largescale hard-core cartel conduct. For this reason, the original policy was rarely utilized. The Division, on average, received only about one leniency application per year under the original policy, and it did not result in the detection of even one international or large domestic cartel. In August 1993, the Division revised its Corporate Leniency Policy to make the program more transparent and increase incentives for corporate cartel participants to come forward and cooperate.[1]

3. The Division's policy provides complete immunity for the first applicant to self-report conduct to the Division, and it covers both companies and individuals. The policy includes Type A leniency, which is available to applicants who self-report before the Division is aware of the conduct. The Division also offers Type B leniency for applicants who come forward after the conduct has already been uncovered but before the Division has evidence likely to result in a sustainable conviction against the applicant.

2. Leniency Program for the Modern Era

4. The Division's leniency policy remained unchanged for nearly 30 years and it worked well at disrupting domestic and international cartels. But nothing is so good that it cannot be improved. In April 2022, the Division announced new changes to the leniency policy, as well as changes to the key policy document, "Frequently Asked Questions about the Division's Leniency Program." These changes are just one of the many ways in which

[1] For further discussion of the early history of the DOJ's Leniency Program, please see U.S. Submission for 2018 OECD Roundtable on leniency programs; "Roundtable on challenges and co-ordination of leniency programmes - Note by the United States", 5 June 2018, https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)33/en/pdf.

the Division is looking forward and making sure the tools being used by the Division are best equipped to confront modern problems. The Division's updates to its leniency program further encourage corporations to do the right thing and enhance corporate accountability—a priority for the Division.

2.1. Increasing accountability

5. While the core incentives of the policy remain unchanged, the updates to the leniency policy further promote accountability. First, under the revised leniency policy, to qualify for leniency, a company must promptly self-report after discovering its wrongful conduct. For nearly 30 years, the Division has emphasized the need for speed: a company is in a race against its coconspirators to qualify for leniency. However, prior to the 2022 revisions, the Division did not require an applicant to promptly report its wrongdoing upon discovery of the illicit conduct—instead, it required an applicant to promptly terminate its participation in the conspiracy. Requiring prompt reporting is good public policy. If a company discovers it committed a crime, but then sits on its hands hoping its conduct goes unnoticed, it does not deserve leniency. This change is also good for enforcement, both because it reinforces the prisoner's dilemma set up by leniency and because it maximizes opportunities for the Division and its law enforcement partners to conduct a covert investigation.

6. Another key change the Division made to the leniency policy will further the Division's goal of deterring antitrust crimes—and swiftly detecting and prosecuting them when they do occur—by encouraging companies to invest in compliance programs. Under the updated leniency policy, before qualifying for leniency a company must improve its compliance program. Requiring improvements to compliance programs for leniency applicants will reduce the risk of recidivism—a goal the Division and potential leniency applicants should share. From a company's perspective, compliance is in its best interests as well. Improving compliance programs will help companies avoid reoffending or, at a minimum, give them the best opportunity to quickly detect and report criminal conduct to obtain leniency.

7. The updates to the Division's leniency program also properly protect victims of collusion. To qualify for leniency a company has always had to pay restitution to its victims. That has not changed, but now, an applicant will also be required to remediate the harm caused by its conduct, to the extent not covered by restitution. Even before these changes the Division endeavored to require remedial measures when restitution alone did not rectify the harm caused by anticompetitive conduct. While some anticompetitive conduct can be righted through restitution to victims, sometimes additional measures are necessary to ensure that the harm caused by the anticompetitive conduct is properly remedied. For example, the Division entered into a Deferred Prosecution Agreement (DPA) with Florida Cancer Specialists (FCS) for its participation in a long-running market allocation scheme for cancer treatment services. In addition to a $100 million penalty, the DPA included a term requiring FCS not to enforce its non-competes for four years, which was designed to help remedy the harm caused by the market allocation agreement at issue. What remedial measures may be appropriate in a given case will depend on the nature of the illegal activity and the harm it caused.

2.2. Ensuring Access to Justice

8. Just as important as the changes to the policy is the Division's commitment to making that policy transparent, predictable, and accessible to the public. Following the announcement of the revised policy in April 2022, the Division's leniency policy is now accessible in the antitrust chapter of the Department of Justice's Justice Manual, which is the definitive go-to source for the public, and the Department's attorneys, about internal policy and guidance across the entire Department of Justice.

9. Along with the newly revised policy, in April 2022, the Division issued an updated version of the Frequently Asked Questions ("FAQs") about our leniency policy. In revising the FAQs, the Division aimed to simplify and demystify Division practices. The FAQs are written in plain language. The revised document contains nearly 50 new FAQs to ensure that all recurring questions that the Division has received over the years are fully addressed. This document will make it even easier for the public to learn about leniency and understand what benefits it provides and what the division requires in return. The Division is focused on making our policies intelligible to all: outside counsel, in-house counsel, and businesspeople in all sectors of the economy and at all levels of sophistication. There are no unwritten rules of enforcement at the Antitrust Division. Enforcement decisions are based on transparent and predictable criteria.

3. Examining Leniency Incentives

10. As the Division moves the leniency program forward into a new era of enforcement, it is important to remain grounded in the core principles that have made the Division's Leniency Program so successful for so many years. The cornerstones of an effective leniency program remain unchanged: transparency and predictability, severe and significant sanctions, and credible threat of detection.

3.1. Promoting transparency and predictability

11. Some of the recent changes to the leniency policy were made to increase transparency and predictability for leniency applicants. First, with respect to Type B leniency for individual employees of leniency applicants, the Division did not change the policy concerning Type B coverage, but revised the FAQs to provide insight into how the Division exercises its discretion as to whether to immunize individuals. The Division is cognizant that there has been some confusion about this issue going back a number of years, especially with regard to the certainty of non-prosecution protection for current employees of individual applicants.

12. The updated FAQs make clear that that employees of Type B applicants will be assessed on a case-by-case basis using the principles of federal prosecution followed by all prosecutors when deciding whether to provide immunity. Employees not involved in the misconduct do not need protection. For those employees who are involved and cooperate in the Division's investigation, we will consider each individual separately and our teams will work with the leniency applicant to determine that individual's status.

3.2. Private Damages

13. Competition law in the United States authorizes the award of treble damages, plus attorneys' fees, to private litigants.[2] As more jurisdictions have adopted private rights of action in antitrust cases, this has added a new element to the cost/benefit analysis that corporate counsel engage in when deciding to seek leniency. The amount of exposure a company faces in private damages actions, often in multiple jurisdictions, can be a significant disincentive to seeking leniency. In the United States, a legislative fix was introduced to reduce the effect of this disincentive. The Antitrust Criminal Penalty Enhancement and Reform Act of 2004, also referred to as ACPERA, limits the liability for civil damages claims in private state or federal antitrust actions for a qualifying leniency applicant.[3]

14. For claims against a corporation that (1) enters into a leniency agreement with the Antitrust Division or a cooperating individual covered by such an agreement, and (2) provides satisfactory cooperation to the claimant in the private action, a claimant cannot recover damages exceeding the "portion of the actual damages sustained by such claimant which is attributable to the commerce done by the [leniency] applicant in the goods or services affected by the violation." Thus, by satisfying the cooperation requirements of ACPERA, a leniency applicant can avoid joint and several treble damages liability under the Clayton Act. Originally set to expire in 2020, ACPERA was reauthorized by the U.S. Congress in October 2020 and the sunset provision was repealed, making it permanent law.

15. Over the years, the Division has received feedback from the private bar about the effectiveness of ACPERA, including at a 2019 Public Roundtable hosted by the Division that featured representatives from the private bar, industry, and antitrust thinktanks with firsthand experience with ACPERA litigation. Some of the concerns expressed include lack of clarity about the definition of the terms of ACPERA, including the meaning of "satisfactory cooperation" and the impact of civil litigation on a leniency applicant's cooperation obligations.

16. In the newly revised FAQs, the Division provides clarity on its views of the obligations and benefits of ACPERA. Specifically, the FAQs provide guidance on what constitutes "satisfactory cooperation"; when satisfactory cooperation must occur; how a stay of civil discovery impacts an applicant's cooperation obligations; and when ACPERA benefits are determined. As specified in the FAQs, if requested by the applicant or a court, the Division will fully advise the court of the timeliness, nature, extent, and significance of the applicant's cooperation under the Leniency Policy and its commitment to prospective cooperation with the Division's investigation and prosecutions. The Division recognizes parallel civil litigation can be burdensome for leniency applicants and appreciates the need for transparency. By providing the Division's views on ACPERA, the Division is making leniency and its ACPERA benefits more predictable.

17. When considering both the additional transparency and accessibility as well as our increased emphasis on antitrust compliance programs, firms are better positioned to understand the immense benefits of leniency and what it will mean for them. It also means that firms will fully appreciate the importance of promptly self-reporting any potential violation. The benefits of leniency are substantial. When leniency programs are made

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[2] *See* Clayton Act, 15 U.S.C. § 15(a) and Sherman Act, 15 U.S.C. § 1.

[3] Pub. L. No. 108-237, Title II, §§ 211 to 214, 118 Stat. 661, 666-68 (2004), as amended Pub. L. No. 111-30, § 2, 123 Stat. 1775 (2009) and Pub. L. No. 111-190, §§ 1 to 4, 124 Stat. 1275, 1275-76 (2010) (set out as a note under 15 U.S.C. § 1).

accessible and understandable to in-house counsel and the business community generally, leniency becomes even more powerful as an enforcement tool.

3.3. The role of international cooperation in predictability

18. Since the inception of the Division's leniency program, economic globalization has also led to the globalization of both cartel conduct and enforcement. Cartels frequently cross borders, and culpable companies and individuals often find themselves facing enforcement actions in jurisdictions around the world that were affected by the conspiracy. As noted in the OECD's 2022 Competition Trends Report, concerns have been raised about the rising costs of cooperating in multi-jurisdictional investigations. Cooperating in an international cartel investigation now means preparing document submissions for multiple competition agencies, flying executives around the world to sit for interviews, and sometimes confronting conflicting outcomes and private claims for damages across several jurisdictions.

19. The Division has heard the concerns and is committed to reducing unnecessary burdens on leniency applicants and cooperating companies in cross-border investigations. The Division works tirelessly to ensure that we are strengthening and improving our relationships with our international counterparts to maximize the effectiveness of cartel detection, while also ensuring that leniency applicants are able to meet the competing demands in the jurisdictions where they have reported. To that end, the Division undertook an initiative in 2019 to examine its investigative practices to determine how to more efficiently work with foreign partners in cases involving the same leniency applicants. The Division surveyed case staff from across its five criminal offices to identify good practices as well as challenges with respect to international cooperation in its own cases. From there, the Division developed internal best practices for Division staff to apply when working with other competition agencies.

20. The international competition community has responded to the concerns as well. In 2017-2018, the ICN Cartel Working Group ("CWG") carried out a fact-finding survey on leniency, and in 2019 issued the report, "Good Practices for Incentivising Leniency Applications."[4] Based on the survey responses, the report identified incentives and disincentives for companies to apply for leniency in the context of multi-jurisdictional cartel cases. The report focused on three key areas – private enforcement, individual sanctions, and the interaction between competition agencies and other domestic regulators – and identified good practices, policies, and laws or regulations that competition agencies should adopt in their own jurisdictions to improve incentives for leniency applicants in each of these areas.

21. Following the 2019 report, the CWG spent the last year developing guidance on good practices for international cooperation in matters involving multi-jurisdictional leniency applicants. The "Guidance on Enhancing Cross-Border Leniency Cooperation,"[5] published in July 2020, addresses key areas of coordination between competition agencies with the two parallel aims of (1) making international enforcement efforts more effective and (2) helping to reduce disincentives for prospective leniency applicants. The guidance is intended to go beyond mere discussion of the cornerstones of successful leniency programs and provide

[4] "Good practices for incentivizing leniency applications", 30 April 2019, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/CWG-Good-practices-for-incentivising-leniency.pdf.

[5] "Guidance on Enhancing Cross-Border Leniency Cooperation", June 2020, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf.

practical tips for the day-to-day issues confronting competition agency case teams as they engage with both leniency applicants and colleagues in other jurisdictions.

22. The project was developed and drafted by a team of ICN members, including the Australian Competition & Consumer Commission, Canada's Competition Bureau, Chile's Fiscalía Nacional Económica, Brazil's Conselho Administrativo de Defesa Econômica (CADE), the European Commission's Directorate General for Competition, the Hong Kong Competition Commission, the New Zealand Commerce Commission, Turkey's Rekabet Kurumu, Hungary's Gazdasági Versenyhivatal (GVH), and the United States Department of Justice Antitrust Division. The diversity of the project team and interest in the project from NGAs and other ICN members demonstrate the importance of the increased focus on preserving leniency incentives, and the Division hopes that this guidance will help agencies across the globe to implement effective leniency practices.

23. The areas of focus in the guidance are: baseline principles of leniency that are necessary for collaboration, effective communication between competition agencies, exchange of information through waivers and other tools, and coordination of investigative steps throughout the life-cycle of a case. The CWG's 2017-2018 survey on leniency incentives found that one of the key disincentives affecting leniency applicants is the impact of sanctions that may be imposed by other regulators or prosecutors in a jurisdiction, outside of the competition agency. In response, the guidance also addresses how competition agencies can more effectively collaborate with other domestic regulators as they are engaging with other competition agencies.

24. During the process of developing the guidance, other CWG members and NGAs shared their experiences of international cooperation, both positive and negative. Two particular lessons learned have been first, the importance of building trust – both between leniency applicants and competition agencies, and among competition agencies engaging in cooperation – and second, the importance of communication between competition agencies throughout a case. With regard to the first lesson, the guidance highlights throughout the key elements of building trust between leniency applicants and competition agencies, including confidentiality and transparency. The guidance also stresses the significance of mutual trust as a starting point for competition agencies to engage in cooperation, and includes practical suggestions for relationship building. With respect to communication between competition agencies – a topic for which most agencies intrinsically understand the "why" – the guidance addresses in detail the "when, how, and what" of effective communication strategies that have been learned from the years of experience of the project's team members.

4. Tools Needed to Ensure an Effective Leniency Program

25. The U.S. has learned from its years of experience that leniency programs, standing alone, are not effective without the threat of detection and sanctions. First, in order to incentivize cartelists to self-report, sanctions for cartel violations need to be severe enough to motivate companies and individuals to come in for leniency. Otherwise, a cartel sanction simply becomes the "cost of doing business." Second, competition agencies need to be given the tools to proactively detect cartels absent the assistance of a leniency applicant. If a cartelist believes it will not ever get caught, there is no incentive to self-report, even for all the tangible benefits leniency provides.

4.1. Sanctions

26. Over the last two decades, the Antitrust Division has obtained steadily increasing corporate fines and longer jail sentences for individuals. Criminal violations of the Sherman Act became a felony in 1974, with a maximum of three years of imprisonment, which went unchanged for three decades. Fine levels were initially set at $ 1 million for corporations and $100,000 for individual defendants in 1974, and were increased gradually in 1984 and 1990.[6] In addition, since 1984, fines in excess of the statutory maximum may be imposed pursuant to 18 USC § 3571(d), which provides for a fine of up to twice the gain derived by, or twice the loss caused by, the cartel. In June 2004, recognizing the rising threat to US businesses and consumers posed by cartels, Congress significantly raised the maximum penalties for criminal Sherman Act violations by increasing the statutory maximum corporate fine to $100 million, the statutory maximum individual fine to $1 million, and the maximum jail term to 10 years.[7]

27. Since the late 1990s, the Antitrust Division has emphasized deterrence through individual accountability, and statistics demonstrate that individuals who violate US antitrust laws are being sent to jail with increasing frequency and for longer periods of time. Terms of imprisonment, fines, and other sanctions are determined by U.S. federal courts. Since 2000, jail time for cartel defendants in the United States has averaged well over a year of imprisonment.[8] The current average since the beginning of 2020 is 15 months imprisonment.[9] With respect to fines, during the last decade (Fiscal Year 2010 to 2019), the Division's criminal prosecutions have resulted in over $9 billion in criminal fines and penalties, along with jail terms for more than 250 individuals.[10] The Division regularly obtains criminal fines and penalties at or above the Sherman Act's $100 million statutory maximum.

28. Leniency applicants who receive immunity from the Division remain far better off than their co-conspirators. Indeed, the number of cartel cases the Division currently has in litigation highlights the commitment to aggressively prosecute the other members of the cartel. Companies convicted face the threat of a felony conviction, which could lead to significant financial penalties. In some industries, debarment is also a possibility. Individuals convicted for their role face jail time in federal prison in the U.S. The Division secures convictions both through guilty pleas and through guilty verdicts after difficult trials. Of course, not every trial results in a conviction, but one thing is for sure—the only cartelist who can control its destiny is the leniency applicant.

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[6] The maximum individual fine for criminal Sherman Act violations was increased to $250,000 in 1984 through a combination of the Comprehensive Crime Control Act, Pub L No 98-473, 98 Stat 1976 (1984) and the Criminal Fine Enforcement Act, Pub L No 98-596, 98 Stat 3134 (1984), and the maximum corporate fine remained $1 million. In 1990, the Sherman Act was amended to raise the statutory maximum fines to $10 million for corporations and $350,000 for individuals. See Antitrust Amendments Act, Pub L No 101-588, 104 Stat 2880 (1990).

[7] *See* Antitrust Criminal Penalty Enhancement and Reform Act, Pub L No 108-237, § 215, 118 Stat 661, 668 (2004).

[8] "Criminal Enforcement Trends Charts", US DOJ Official Website, https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

[9] *See id.*

[10] *See id.*

4.2. Creating a Credible Threat of Detection

29. It is crucial that competition agencies be given the investigative tools necessary to proactively detect cartels outside of the leniency context. In the last few years, several of the Division's largest cartel prosecutions came out of its own internal investigative efforts – cartels that produced hundreds of millions of dollars in fines and penalties and individual and corporate prosecutions. Some companies made the wise decision to seek leniency after learning of the Division's investigation and have reaped the benefits. The Division works proactively and aggressively to uncover cartels and will continue doing so working closely with international partners, using all tools at our disposal.

30. Many competition agencies around the world, though, have not been empowered to proactively detect cartels and lack the tools needed to effectively detect cartels. Some of the tools that the Division has at its disposal include: the use of consensually monitored phone calls, the ability to conduct surveillance, access to personal phone and email records with proper authorization from courts, the ability to conduct voluntary interviews of subjects and witnesses, and the ability to develop informants/confidential sources. Further, the Division has made and continues to make significant investments in the information technology infrastructure needed to support case teams in the collection and review of all of this evidence collected during investigations.

31. The U.S. also has a range of laws that complement the Division's ability to conduct proactive investigations, including laws prohibiting obstruction of investigations, such as destruction of documents, and laws prohibiting false statements to government investigators. The Division aggressively pursues violations of these types of conduct which impede our investigations. In 2020, the Criminal Antitrust Anti-Retaliation Act was signed into law.[11] This law prohibits employers from retaliating against certain individuals who report criminal antitrust violations and complements the various tools that already exist for prosecuting companies and individuals who seek to obstruct cartel investigations.

32. The Division also engages in significant outreach efforts to relevant stakeholders in the legal and business community and other law enforcement agencies. In 2019, the Department announced the creation of the Procurement Collusion Strike Force, an interagency partnership that is leading a national effort to protect taxpayer-funded projects from antitrust violations and related crimes at the federal, state, and local levels. Prosecutors from the Division's five criminal offices and 13 U.S. Attorneys' Offices have partnered with agents from the FBI and four federal Offices of Inspector General, including the U.S. Postal Service and Department of Defense, to conduct outreach and training for procurement officials and government contractors on antitrust risks in the procurement process. These district-focused teams of prosecutors and agents also work together to jointly investigate and prosecute procurement-related criminal cases.[12]

[11] https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act "Justice Department Applauds Passage of the Criminal Antitrust Anti-Retaliation Act", 24 December 2020, https://www.justice.gov/opa/pr/justice-department-applauds-passage-criminal-antitrust-anti-retaliation-act.

[12] For more about the PCSF, including training materials and exemplars, please visit the PCSF website at: https://www.justice.gov/procurement-collusion-strike-force.