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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM

Session I: Strengthening incentives for leniency agreements – Call for contributions

27-28 September 2022

This document is circulated in preparation of the discussion under Session I of the Latin American and Caribbean Competition Forum (LACCF) that will take place during 27-28 September 2022 in Rio de Janeiro, Brazil. Delegates are requested to submit their written contributions to the Secretariat by Friday 1 July 2022 at the latest. Advance notice of your intention to submit contributions before or by Monday 25 April 2022 would be useful.

In case you need additional information related to this session, please contact:

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Session I: Strengthening incentives for leniency agreements – Call for Contributions –

Introduction

1. This request for contributions is circulated in preparation for the discussions to be held at the 2022 Latin American and Caribbean Competition Forum (LACCF) on the topic of “Strengthening incentives for leniency agreements” during Session I.
2. You are invited to prepare and submit a brief and concise written contribution for this session. In this call for contributions, we aim to identify some topics that you may wish to address in your written and oral contributions. Please note that this list is neither prescriptive nor exhaustive. You can present other relevant issues that reflect your experiences.
3. To assist the OECD Secretariat in planning the session, please inform us by **Monday 25 April 2022** if you intend to submit a contribution. The contributions should be sent by email (as a Word document in electronic format, 5 pages maximum in Spanish or English) to Angélique Servin [Angelique.Servin@oecd.org] and copied to Lynn Robertson [Lynn.Robertson@oecd.org] and Alden Caribé de Sousa [alden.sousa@cade.gov.br and international@cade.gov.br] by **Friday 1 July 2022**, at the latest. Please address all substantive queries relating to this discussion to Alden Caribé de Sousa [alden.sousa@cade.gov.br and international@cade.gov.br], always copying both email addresses.
4. Contributions will be circulated to participants on O.N.E and through the LACCF website (www.oecd.org/competition/latinamerica). Unless explicitly requested not to do so, the Secretariat will reproduce all written contributions on the site. If you would like to circulate other relevant material, such as your leniency program or related documents, please submit a copy to the Secretariat before **Friday 1 July 2022**.

Background

5. Leniency programs have been playing a major role in cartel enforcement in the Latin America and the Caribbean region, complementing the *ex officio* investigations efforts. By 2020, at least 12 countries in the region had adopted a leniency program¹. Although there seems to be a consensus about the usefulness of this enforcement tool, we can observe different stages of development in the region. Some jurisdictions have adopted a leniency program for over two decades and now seek ways to improve it; others are designing or beginning to implement it, largely based on the experiences of older programs.
6. A previous paper elaborated by the OECD² showed that leniency programs across the region essentially consist of granting immunity or fine reduction to companies and/or

¹ Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Mexico, Nicaragua, Panama, Peru and Uruguay. The World Bank. Fixing Markets, Not Prices. Policy options to tackle economic cartels in Latin America and the Caribbean. 2021. Available at: <https://openknowledge.worldbank.org/handle/10986/35985>. Access on 27 January 2022.

² LACCF 2016 Background paper on “Leniency programmes in Latin America and the Caribbean: Recent experiences and lessons learned”. Available at: [https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2016\)5&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)5&docLanguage=En). Access on 19 January 2022.

individuals that confess their participation in a cartel, present evidence about it, and report other participants involved in the anticompetitive conduct. However, programs may vary in relation to some features, such as (1) the existence of benefits to subsequent applicants, (2) the quality of information or evidence required, (3) the obligation of a written application, (4) the granting of benefits for criminal liability, (5) the possibility of benefits to the ringleader, (6) the legal provisions related to the disclosure of information, (7) the requirement that applicants terminate their participation in the conduct, and (8) the existence of a leniency/amnesty plus which relates to other cartels.

7. More recently, some experts and authorities highlight a trend, around the world and over the last years, of a decrease in the number of leniency applications. This could be due to a number of reasons, but the applicants' fear of being subject to private enforcement is commonly pointed out. This LACCF session aims to explore the reasons for this purported trend and to build on good practices to strengthen incentives for applying for leniency.

New challenges and initiatives to face them

8. The 2022 OECD Competition Trends Report³ indicates a trend 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 Americas Region, going from around 53 leniency applications in 2015 to around 18 in 2020. This happened despite an increase in the number of jurisdictions with leniency programs worldwide and in Latin America.

9. Although being an important factor for the possible decline trend, private enforcement can't explain it all by itself, according to OECD's Report. Experts stress other potential reasons to the overall trend: (i) exposure to large antitrust penalties in multiple jurisdictions, some of them not covered by the protection of immunity agreements; (ii) overt collusion being displaced by tacit collusion, facilitated by technological advances; (iii) effectiveness of antitrust enforcement to discourage new cartels (deterrence effect); (iv) the impact leniency has in applicants' commercial relations; and (v) existence of more effective corporate compliance programs, what has the potential to reduce misconducts⁴. It is important to acknowledge that specific adjustments in national/regional programs can also contribute to a local drop in applications⁵.

10. An effective leniency program largely depends on an adequate balance between obligations and incentives. One frequent applicants' concern seems to be their premature and unbalanced exposure to civil action. In this sense, to have a successful leniency program, countries should observe the golden rule, by which the applicant cannot be in a worse position than the co-cartelists. Hence, some jurisdictions believe limiting liability in civil actions and establishing clear criteria for disclosing leniency documents as potential solutions.⁶

³ Available at <https://www.oecd.org/competition/oecd-competition-trends.htm>.

⁴ For further details, see Snelders and Conor (2021), Ginsburg and Cheng (2020), Archimbaud (2020), Petkoski (2019) and Ysewyn and Kahmann (2018).

⁵ Petkoski (2019) and Archimbaud (2020), for example, argue that the EU Damages Directive has been impacting the number of leniency applications in Europe. Because the Directive does not protect all leniency documents from disclosure, it can make companies more vulnerable to civil actions following a European Commission or national authority decision.

⁶ Brazil is now discussing a bill that, besides exempting the leniency applicant from joint liability, establishes reparation in double for damages caused by cartel conduct, except for the applicant. Besides, in 2018, CADE issued a Resolution that established clear criteria for disclosing leniency

11. Applicants which took part in international cartel cases are usually worried about whether and where to apply for leniency, as they cannot be sure 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 of the cases, criminal charges - in one or more jurisdictions. Not to mention the amount of money spent and the long period of time 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.

12. The detection of misconducts are becoming more challenging. In one hand standard cartels are adopting new ways of communication and concealing of illegal agreements, making it more demanding for private and public enforcers to uncover. On the other hand newer forms of cooperative behaviour with anticompetitive effects are arising. Here we talk about some anticompetitive conducts in the labour market⁷, buying alliances, standalone infringement of exchange of sensitive information and agreements to limit innovation⁸. For the systems where these second group of conducts are subject to leniency agreement, generating legal certainty regarding these conducts – seen by some companies as borderline - is a necessary measure to avoid disincentives for new leniency applications.

13. As confidentiality of negotiations – together with predictability and transparency - is the backbone of a leniency policy, it should be one of the main worries of authorities. 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 put the applicant in a vulnerable position as to private damages actions and harm the leniency program’s reputation. To avoid this scenario, risk assessment routines and measures to improve confidentiality procedures are recommended. Besides that, it is paramount that the co-operating partners observe limits on sharing documents and information, as well as each other’s confidentiality rules.

documents. Colombia also just passed a new law with a framework to introduce changes that affect the leniency program, including the elimination of joint liability for damages caused to third parties.

⁷ The Portuguese Competition Authority recently launched “Good Practices for Preventing Anti-Competitive Agreements in the Labor Market”. Available at: <https://www.concorrenca.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/>. Access date: Access on 18 January 2022. 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>. Access on 18 January 2022.

⁸ https://ec.europa.eu/commission/presscorner/detail/sv/ip_21_3581. Access on 10 March 2022.

Suggested Discussion Topics

14. The maturity of leniency programs varies in the Latin American and Caribbean regions. While some jurisdictions are designing their programs, others are making efforts to improve their long-standing ones based on the challenges they have already faced. At this stage of the leniency program history, some data point toward a decline in leniency applications over the last years. This LACCF session will debate if it is happening the same way in the region, recent developments and ways to deal with the trend by strengthening the incentives for leniency agreements.

15. A Paper will be circulated prior to the meeting and can be used as a starting point for discussions in this session. The Annex below lists a number of relevant topics for discussion and recommends further reading material. The list can be useful in the preparation of contributions but should not limit the debate or the contributions to the leniency session.

Annex A. List of issues to be considered in the country contributions

Session I on Strengthening incentives for leniency agreements

- In case your country has a leniency program, please briefly describe its history, main features and recent or planned amendments. In case it does not have one, please comment on the main challenges to designing or implementing it. Are there plans to adopt a leniency program? Can you explain the reasons why you do not have one? How do you interpret issues related to incentives?
- Have you experienced a decrease in leniency applications in the last years? If positive, please comment on the possible causes.
- What have you been doing to keep the balance between public and private enforcement in a way the latter does not offset the attractiveness of the leniency program?
- Please comment on your experience in generating incentives for leniency applications related to new anticompetitive agreement schemes. Have you prepared guidelines, official documents or other kind of campaign stating their anticompetitive potential and establishing limits to companies' actions? How are these conducts sanctioned (if they are) in your country?
- How do you handle confidentiality in leniency negotiations and documentation? Are there risk assessment programs? What are the main identified risks?
- Have your experience shown some positive or negative impact of your ex-officio initiatives on the attractiveness of your leniency program in the last years?
- What other initiatives are you preparing or executing in order to strengthen the incentives for leniency applications?
- Please indicate and comment any successful or unsuccessful experiences related to the use of leniency applications at the regional level.
- Please indicate and briefly comment on remarkable cartel decisions (2 maximum) deriving from leniency agreements, if any.

Suggested reading list

- Archimbaud, A. European leniency programmes and private enforcement: Dangerous liaisons, September 2020, *Concurrences* N° 3-2020, Art. N° 95707.
<https://www.concurrences.com/en/review/issues/no-3-2020/articles/european-lenieny-programmes-and-private-enforcement-dangerous-liaisons>.
- Ginsburg, D.; Cheng, C. The Decline in US Criminal Antitrust Cases: ACPERA and Leniency in an International Context. In: Foer, Albert A.. *A Consumer Voice in the Antitrust Arena*. Liber Amicorum, hrsg. v. Charbit, Nicolas, Ahmad, Sonia.
<https://www.readcube.com/articles/10.2139%2Fssrn.3460091>.
- Hovenkamp, H. Competition Policy for Labour Markets (May 17, 2019). U of Penn, Inst for Law & Econ Research Paper No. 19-29. [https://one.oecd.org/document/DAF/COMP/WD\(2019\)67/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2019)67/en/pdf).
- ICN. Development of Private Enforcement of Competition Law in ICN Jurisdictions. 2019.
https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/07/CWG_Privateenforcement-2019.pdf.
- ICN. Guidance on Enhancing Cross-Border Leniency Cooperation. 2020.
<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/CWG-Leniency-Coordination-Guidance.pdf>.
- OECD. Leniency programmes in Latin America and the Caribbean: Recent experiences and lessons learned. LACCF 2016 Background paper.
[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2016\)5&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)5&docLanguage=En).
- OECD. Challenges and Co-Ordination of Leniency Programmes. Background Note. 2018.
[https://one.oecd.org/document/DAF/COMP/WP3\(2018\)1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2018)1/en/pdf).
- OECD. OECD Competition Trends 2022. <http://www.oecd.org/competition/oecd-competition-trends.htm>
- OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement.
<https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf>.
- Petkoski, D. Reduction in Leniency; Drop in Enforcement? Shearman & Sterling, 2019.
<https://www.shearman.com/Perspectives/2019/07/2019-Antitrust-Report-chapters/Reduction-in-Leniency-Drop-in-Enforcement>.
- Snelders, R.; Opdebeek-Wilson, C. Cartel settlements: An overview of EU and national case law, 17 June 2021, *e-Competitions Cartel settlements*, Art. N° 99701.
<https://www.concurrences.com/en/bulletin/special-issues/cartel-settlements/cartel-settlements-an-overview-of-eu-and-national-case-law-en>.
- World Bank. 2021. Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean. <https://openknowledge.worldbank.org/handle/10986/35985>.
- Ysewyn, J.; Kahmann, S. The decline and fall of the leniency programme in Europe, February 2018, *Concurrences* N° 1-2018, Art. N° 86060, pp. 44-59.
<https://www.concurrences.com/en/review/issues/no-1-2018/articles/the-decline-and-fall-of-the-lenieny-programme-in-europe-86060-en>.