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LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Strengthening incentives for leniency agreements

- Contribution from Colombia -

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The attached document from Colombia 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 of Colombia -*

1. This contribution seeks to provide a brief overview of the history and main characteristics of the leniency programme in Colombia (hereinafter the “Cooperation Benefits Programme”, or “CBP”) and, in particular, to highlight the most recent changes that have occurred in this field in the country. As has been recognised by various competition bodies, leniency programmes are one of the main tools for detecting and suppressing business cartels in the markets.¹ In the case of Colombia, the CBP was implemented through article 14 of Act No. 1340 of 2009 and regulated initially by Decree No. 2896 of 2010, which established the conditions for accessing the leniency programme and the sentence reductions available to whistleblowers.²

2. However, in view of the growing need to increase the suppression of anticompetitive behaviour, a number of reforms were implemented by means of Decree No. 1523 of 2015. One of the changes made related to the time frame for whistleblowers to submit their applications to enter the programme, which was shortened to match the time frame granted to persons under investigation to present their depositions and evidence in response to the body’s accusations. The aim was to detect cartels more efficiently during the early stages of an investigation.

3. Additionally, Decree No. 1523 of 2015 provided for new sentence reductions for whistleblowers. Consequently, the first whistleblower could be excused from paying the fine in its totality, while the second to apply to the competition authority could receive a reduction of between 30% and 50%, and the third and subsequent applicants could receive reductions of up to 25% of the sanction imposed.

4. Other reforms included adopting the presumption that any person requesting access to the CBP was not the promoter or instigator of the behaviour, and the introduction of additional benefits or “*amnesty plus*”, for persons who, without being the first whistleblower in order of priority, were the first to disclose the existence of additional agreements in another market.

5. The reforms adopted by means of Decree No.1523 of 2015 created new incentives for market agents to request access to the CBP of the Superintendence of Industry and Commerce. In fact, 2015 saw the highest numbers of applications for cooperation benefits and agreements signed by the body. Many of these resulted in the detection and dismantling

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¹ Donald I. Baker, “The use of criminal law remedies to deter and punish cartels and bid-rigging”, *Geo. Wash. L. Rev.* 69 (2001), p. 693.

² At that time, the first whistleblower to come forward was able to obtain a reduction in their fine of between 70% and 100%, the second a reduction of up to 50%, and the third and subsequent whistleblowers reductions of up to 30%.

of some of the largest cartels to have been sanctioned by the Colombian competition authority, for example in the security,³ nappies,⁴ tissue paper⁵ and notebooks⁶ markets.

6. However, in recent years the Superintendence has identified several situations linked to the application of the CBP that have prompted reforms thereof. In recent cases, behaviour during investigations by some market agents in the CBP has excluded them from the Programme. This situation, although addressed in law, undoubtedly has a negative impact on the application of this type of programme and should be studied by the authority.

7. An example is the “Chlorine-Soda” case, which resulted in sanctions in 2019.⁷ On that occasion, the competition authority imposed sanctions in relation to an anticompetitive agreement in the chlorine and its derivatives market. That customer-sharing agreement involved a whistleblower who later confessed to their participation. However, after exhaustive analysis, the Superintendence of Industry and Commerce concluded that the whistleblower had failed to comply with their obligations under the CBP, specifically by disputing facts that they had initially acknowledged when applying for cooperation benefits, likely with the aim of exceeding the time frame in which the Superintendence could impose sanctions. That contradiction resulted in the initial exclusion of the whistleblower from the benefits they could have been entitled to. However, once the applicant had retracted their objection to the facts that they had initially acknowledged, they were granted the relevant benefits.

8. Another case worth highlighting is the case relating to the mining industry,⁸ in which the Superintendence of Industry and Commerce imposed sanctions on different companies in that sector for having formed a cartel in the market for stone construction materials extracted from the riverbed. Their clients were various companies contracted by **ECOPETROL**, the Colombian state-owned oil company. Several of the investigated companies acted as whistleblowers in the CBP,⁹ thus allowing the sanctioned anticompetitive cartel to be dismantled. In accordance with the provisions of Decree No. 1523 of 2015, the market agents confessed to participating in agreements intended to restrict free economic competition, acknowledging their responsibility and providing relevant evidence that demonstrated the existence and execution of agreements relating to supply quota allocation and price fixing.

9. However, once the administrative proceedings had concluded, the Superintendence decided not to grant the benefits to a group of whistleblowers who had failed to comply with their obligations under the respective agreements signed with the Superintendence, mainly because it was noted that they had not ceased their participation in the sanctioned anticompetitive behaviour.

³ Superintendence of Industry and Commerce, Resolution No. 19890 of 2017.

⁴ Superintendence of Industry and Commerce, Resolution No. 43218 of 2016.

⁵ Superintendence of Industry and Commerce, Resolution No. 31739 of 2016.

⁶ Superintendence of Industry and Commerce, Resolution No. 54403 of 2016.

⁷ Superintendence of Industry and Commerce, Resolution No. 57600 of 2019.

⁸ Superintendence of Industry and Commerce, Resolution No. 10220 of 2021.

⁹ Under the regulations in force at the time, there was no limit to the number of applications to the CPB, and seven (7) applications were therefore submitted in this case.

10. Furthermore, the Superintendence has identified a significant decline in requests for entry into the CBP by market agents since 2015. Indeed, while six (6) applications were received in 2015, there was just one application in 2017 and none in 2020. The Superintendence advised that this trend was not exclusive to Colombia but rather a phenomenon that was occurring in most jurisdictions and that, moreover, it was likely due to a lack of incentives for market agents to apply to the programme and to an increase in disincentives such as developments in civil proceedings for damages caused by anticompetitive conduct.

11. In view of the above, the Superintendence designed, promoted and implemented a series of programme adjustments that seek to increase the incentives for offenders to join it, mainly through reforms aimed at granting greater benefits to persons who enter the programme before the Superintendence launches a formal administrative investigation and at guaranteeing the confidentiality of the information provided, among other things.

12. In this sense, and following an economic analysis, it was determined that the leniency programme, as defined in Decree No. 1523 of 2015, increased the probability of one of two possible responses by participants in anticompetitive behaviour: either that none of the participants would report it, or that all of them would. Thus, using a game theory model, a series of reforms were considered and found to significantly increase the probability of reaching a single non-cooperative equilibrium. In other words, the reforms to the CBP considered by the Superintendence reduced the dilemma facing cartel participants and encouraged them to adopt a non-cooperative response with regard to their fellow participants.

13. Based on Aguado and De La Heras (2012), Goehring and Kahan (1976)¹⁰ and Tullock (1985),¹¹ the model proposed by the Superintendence related to four market agents involved in business collusion or cartelisation, all with the same degree of responsibility according to articles 25 and 26 of Act No. 1340 of 2009. Similarly, varying benefit levels were introduced depending on the order of entry into the CBP. The scenario in which fewer benefits are granted to whistleblowers who request admission after the investigation has been opened was therefore considered. It should also be noted that the outcome variable used in the model reflected cartel participants' perceived likelihood of being detected or discovered by the authority. As this likelihood increases, so therefore does the incentive for cartel members to apply to the CBP.

14. After simulating two scenarios, which included 491 simulations, the Superintendence concluded from an economic perspective that the changes to the CBP that had been considered increased the probability that an offender would act as a whistleblower to 68% under the new circumstances, as opposed to 10% in the counterfactual scenario.

15. Although the analyses presented are not exhaustive, the Superintendence recognises that this model allowed for the simulation of how changes to the CBP would bring about a change in the expected benefits for potential whistleblowers, in the form of reduced benefits and, specifically, the removal of 100% exemptions from fines for persons requesting admission to the CBP after an investigation has been opened and accusations laid by the authority. In this regard it was found that, all other things being equal, the changes to the CBP increased the probability of applications to it.

¹⁰ Goehring, D. & Kahan, J. (1976). The Uniform N-Person Prisoner's Dilemma Game. *Journal of Conflict Resolution*, 20(1), pp. 111-128.

¹¹ Tullock, G. (1985). Adam Smith and the Prisoners' Dilemma. *The Quarterly Journal of Economics*, 100, pp. 1073-1081.

16. In other words, by increasing the incentives to come forward before an investigation is opened, offenders are pushed towards a non-cooperative scenario. The above illustrates the model's conclusion clearly: i.e., that implementing the changes to the CBP allows for the Nash equilibrium, which could lead to an increase in the number of applications to the CBP, increased dismantling of cartels and resource-saving by the competition authority.

17. On the basis of the aforementioned economic analysis, the CBP was reformed with the aim of promoting its use by market agents who may be engaging in anticompetitive practices. These changes, described below, were implemented by means of Act No. 2195 of 2022 and Decree No. 253 of 2022.

18. Firstly, the programme's benefits were extended. Rather than being limited to cases of anticompetitive agreements, they now apply to any conduct that runs counter to free competition and that is undertaken in a coordinated manner by two (2) or more market agents.¹² This change reflects the fact that, in addition to an exhaustive list of agreements that restrict competition, Colombian legislation includes provisions allowing the competition authority to sanction all types of practice, procedure or system that limit free economic competition, and which occasionally take the form of coordinated behaviour that may be subject to leniency.

19. Furthermore, and taking into account the game theory analysis undertaken by the Superintendence, the benefits granted to persons submitting to the leniency programme were modified.¹³ It was established that up to three (3) whistleblowers will be eligible for the CBP for the same incident and will obtain the following benefits depending on the point at which they qualify for the programme:

Table 1.

Time of application	First applicant	Second applicant	Third applicant
Up to the day before the date on which the administrative act that opens the investigation is issued and the charges are laid.	Total exoneration.	Reduction of between 30% and 50% of the fine to be imposed.	Reduction of up to 25% of the fine to be imposed.
On or after the date on which the administrative act that opens the investigation is issued and the charges are laid.	Reduction of up to 30% of the fine to be imposed.	Reduction of up to 20% of the fine to be imposed.	Reduction of up to 15% of the fine to be imposed.

Source: Superintendence of Industry and Commerce

¹² Article 2.2.2.29.1.1. of Decree No. 253 of 2022 which replaces Book 2, Part 2, Title 2, Chapter 29 of Decree No. 1074 of 2015.

¹³ Article 2.2.2.29.2.2. Ibid.

20. Moreover, the regulation's wording was amended to eliminate any uncertainty regarding the obligations of benefit applicants and the grounds for exclusion. It was expressly established that applicants for cooperation benefits must provide useful evidence of the conduct.¹⁴ Alongside this, and in order to address criticism related to the recent expulsion of applicants for not complying with the requirements of the CBP, a whistleblower's failure to immediately cease their participation in anticompetitive conduct was explicitly added to the grounds for losing benefits.¹⁵ This reform was also intended to ensure that whistleblowers cannot continue to benefit from conduct that has been reported while an investigation is underway and later be exonerated from a fine, a situation that, as discussed previously, occurred in a recent case sanctioned by the Superintendence.¹⁶

21. Another relevant change made to the CBP consisted of advocating for reforms through Congress that would ensure the confidentiality of the benefits negotiation process, guaranteeing the confidentiality of an applicant's identity and of the information provided until the cooperation benefits agreement is signed. Additionally, once the agreement has been signed, the identity of the beneficiary and any evidence that they have provided to the Superintendence of Industry and Commerce and which becomes part of the investigation file will remain confidential until any final administrative act is issued and firm.¹⁷

22. Furthermore, legal reforms were undertaken with a view to reducing possible disincentives created by any civil proceedings against cartel participants.¹⁸ It was established that any person who, under the CBP, obtains a total or partial exoneration of a fine to be imposed by the Superintendence of Industry and Commerce will not be among the parties jointly and severally liable for the damages caused by virtue of the anticompetitive conduct, and their liability will consequently be proportional to their participation in causing damage to third parties.¹⁹

23. Lastly, and bearing in mind that the reduction in sanctions through leniency programmes is only noteworthy if it involves sanctions that are sufficiently harsh as to make participation in anticompetitive conduct more costly, Act No. 2195 of 2022 substantially increased the sanctioning powers of the Superintendence of Industry and Commerce, which may impose the highest of the following sanctions: **(i)** a maximum of 20% of the offender's operating income in the tax year immediately preceding the year in which the sanction is imposed; **(ii)** a maximum of 20% of the value of the offender's assets in the tax year immediately preceding the year in which the sanction is imposed; **(iii)** a

¹⁴ Article 2.2.2.29.2.6. Ibid.

¹⁵ Article 2.2.2.29.3.1. Ibid.

¹⁶ Superintendence of Industry and Commerce, Resolution No. 10220 of 2021.

¹⁷ Article 66 of Act No. 2195 of 2022.

¹⁸ It should be noted that this reform is in line with proposals at the international level on how disincentives to participation in leniency programmes may be eliminated. "It is therefore prudent for competition agencies to think about ways to safeguard leniency incentives. The right balance must be struck between public and private enforcement so that the exposure of private enforcement does not unduly disincentives self-reporting to public enforcement officials. Of course, the idea behind a special liability regime is not to absolve the leniency recipient from civil liability for damages completely, but to provide the right set of incentives to encourage cooperation, including assurance that the leniency applicant does not suffer worse consequences from damages actions than its co-cartelists." ICN. Cartel Working Group 2019. Development of Private Enforcement of Competition Law in ICN Jurisdictions.

¹⁹ Article 66 of Act No. 2195 of 2022.

maximum of 100,000 times the legal monthly minimum wage in force payable by the offender; or (iv) a maximum of 30% of the value of the state contract in cases of restrictive business practices that affect or may affect public procurement processes.²⁰

24. In this context, as a result of the reforms adopted, and as the national authority for the protection of free competition in Colombia, the Superintendence of Industry and Commerce expects to increase the participation of market agents in the CBP.

²⁰ Article 67 of Act No. 2195 of 2022