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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**

– Contribution from Argentina –

27-28 September 2022

The attached document from Argentina 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 Argentina -

Leniency. The first stages of a draft. A note from Argentina

1. In 1999, Act No. 25.156 was passed in Argentina, which became the first comprehensive regulation for the defense of competition. Articles 1 and 2 of this law established which agreements and practices were prohibited and could be sanctioned, since they were anti-competitive conducts that limited, restricted, distorted or disrupted competition or access to the market, or constituted an abuse of a dominant position in a market and, consequently, could be detrimental to the general economic interest.
2. Among these conducts were concerted practices, which involve agreements to fix prices, divide the market, limit production and/or arrange the procedure prior to a tender.
3. This legislation did not envisage the creation of a leniency programme, which, with the exception of the US Department of Justice – which implemented it early in 1978 – and the European Union – which implemented it in 1996 – was still in the early stages of its expansionary phase.
4. Use of the programme spread among OECD member countries, as well as among many Latin American countries – Brazil introduced it in 2000, Mexico in 2006, Colombia and Chile in 2009 and Peru in 2015 – during the 2000s, becoming the most effective instrument for the prosecution of cartels, in particular, due to its ability to provide the necessary evidence to enable a sanction against cartel members.
5. In Argentina, although there were numerous draft amendments to Act No. 25.156 that proposed its introduction, the leniency programme was only incorporated into the antitrust legislation in 2018, with the implementation of Act No. 27.442 (competition law).

1. The leniency programme in the new competition law

6. The competition law introduced significant changes and innovations in the Argentine antitrust regime; as far as anti-competitive conduct is concerned, it now distinguishes between practices that are *absolutely* restrictive of competition and practices that restrict competition.
7. Indeed, in its article 2, the act considers the *concerted* practices described therein as *absolutely* restrictive, which are none other than those already mentioned, i.e., agreeing to fix prices, dividing the market, limiting production and/or arranging the procedure prior to a tender.¹ The application for leniency is limited to these practices.

¹ Article 3 of the competition law, which categorises *restrictive* conduct, also refers to certain practices that require concerted action which the Law, nevertheless, does not consider *absolutely restrictive*. For example, the conduct provided for in article 3(c) of the competition law, which stipulates that limiting or controlling any technical development or investment in the production or marketing of goods and services may constitute a restrictive practice of competition.

8. Among the sanctions stipulated by the competition law for those who incur in any of these practices is a fine that can reach up to 30% of the turnover of the offending company in Argentina, as well as fines for the human persons who have exercised any position of authority in the company in question and who have contributed to, encouraged or allowed the practice to take place.

9. In turn, a major alteration of the new regulation was the incorporation of a leniency programme, which provides for full and partial amnesties to the corresponding sanctions for cartel members who voluntarily provide the competition authority with evidence that allows for the detection and prosecution of the practice in question.

10. Any human or legal person that has incurred or is incurring in concerted conduct may apply to this programme, and must disclose to the competition authority the practice in question in order to benefit from the exemption or reduction of the sanctions stipulated by the regulations.

11. The competition law stipulates that, in order to be eligible for the benefit, the applicant must appear before the competition authority – currently, the National Commission of Competition Defense (CNDC) in conjunction with the Domestic Trade Secretariat – prior to being charged, i.e. to be notified as allegedly responsible for the conduct under investigation in order to present their defence and provide the evidence they deem relevant.

12. The scope of the benefit and the requirements for it to be applicable vary according to the status of the investigation and the applicant's order of arrival, as detailed below.

13. An exemption from the sanction may be applied for in the event that the CNDC does not have information or has not previously initiated an investigation or, having initiated the investigation, does not have sufficient evidence, and the applicant is the first among those involved in the conduct to provide evidence to determine the existence of the practice.

14. In such a case, the applicant must: immediately cease their participation in the infringing practice, unless the authority deems it necessary for them to continue their actions to avoid hindering the investigation; cooperate fully, continuously and diligently with the authority; not destroy, falsify or conceal evidence of the anticompetitive conduct; and not have disclosed or divulged their intention to avail themselves of the benefit in question.

15. If the requirements for exemption are not met, the applicant may apply for a reduction of between 50% and 20% of the maximum penalty that would have been imposed, if they are able to provide additional evidence to those already in the authority's possession and satisfy the other requirements mentioned above. The amount of the reduction shall be established according to the chronological order in which the application is submitted.

16. In the event that the applicant does not meet the requirements for exemption of the anticompetitive conduct under investigation, but in the course of the investigation discloses and acknowledges a second and dissimilar anticompetitive concerted conduct and also meets the requirements for exemption in respect of the latter conduct, they shall be granted this benefit in respect of the second conduct and a reduction of one-third of the sanction or fine that would otherwise have been imposed for their participation in the first conduct.

17. As regards the confidentiality of the process, the competition authority must keep the identity of the person seeking to benefit from the leniency programme confidential. The corresponding judges responsible for the judicial proceedings that may be initiated under the provisions of the competition law may in no case order the disclosure of statements, acknowledgments, information and/or other means of evidence that may have been provided to the CNDC by those who have received any of the benefits stipulated in the framework of the leniency programme. In the event that the authority rejects the application

for the benefit, such application shall not be considered as an acknowledgment or confession by the applicant of the unlawfulness of the reported conduct, or of the factual matters reported. At the same time, the information and evidence obtained in the framework of a rejected application may not be used by the CNDC, nor may rejected applications be disclosed.

18. Furthermore, the competition law stipulates that the benefit of exemption or reduction of sanctions or fines, as applicable, may not be jointly exercised by two or more participants in the anticompetitive concerted conduct. However, the legal person and all human persons who have held any position of authority, legal representative or similar position, may be jointly eligible. Those persons who avail themselves of the benefit of the leniency programme will also be exempted from the penalties provided for in the Argentine Penal Code, and from any prison sentences that may apply to them in any way for having engaged in concerted anticompetitive conduct.

19. Finally, the filing of an application for the leniency programme interrupts the statutory time limit of the action.

2. The regulation of the leniency programme

20. Regulatory Decree No. 480/2018 outlines the implementation of the programme, with some issues still to be defined in its regulation, on which the CNDC is currently working.

21. The aforementioned regulatory decree of the competition law stipulates the creation of the *Registro Nacional de Marcadores* national register, in order to register all applications for markers (from leniency applicants), indicating the order of priority of each application according to its date and order of presentation, and which is in charge of the Registry Directorate of the CNDC, the area that receives and issues all notifications from the authority.

22. The decree also provides for a procedure to be followed for the application, processing, granting or rejection of the request for leniency application, and granting or rejection of the benefit, which consists of four stages.

23. The first is the request for a marker, in which the applicant communicates their interest in applying for leniency and can consult about the programme and the information to be submitted, among other data. A second stage, in which the applicant formally submits the application for the benefit and provides the authority with all the information, documentation and evidence that it may require in order to determine the existence of the anticompetitive practices. A third, in which the background information submitted by the applicant is evaluated and a *conditional* benefit is granted – subject to full cooperation throughout the procedure – of exemption or reduction of the sanction, as appropriate, with the possibility of requesting the submission of additional background information, as well as any clarifications deemed relevant to determine the existence of the practices under investigation. A fourth stage, which includes the definitive granting of the benefit by the authority, after evaluation of the information and evidence provided by the applicant and compliance with their duty to collaborate and cooperate.

24. For its part, the CNDC is working on a draft provision aimed at regulating those aspects that have been omitted by the aforementioned regulatory decree. The draft details, among other procedural issues, that the file initiated on the basis of an application for the leniency programme must be processed by the Dirección Nacional de Conductas Anticompetitivas (National Directorate of Anticompetitive Conduct), with access to the information contained in the register of markers being granted only to the authorities of the CNDC, the directors of the relevant National Directorate and any designated investigating

officers. It also stipulates the procedure to be followed for each of the four stages of the process, indicating how, in the first instance, the application for the marker must be made and what information must be included in the application and, in a second instance, the formal application for the benefit and the information and data to be submitted in order to be eligible for the amnesty, the deadlines for each stage, what type of clarifying or additional information the CNDC may request from applicants and, once all the information has been provided, the deadlines for granting the conditional benefit of exoneration or reduction of the sanction, as appropriate, and, later, the definitive granting of the benefit.

3. The challenges ahead

25. In Argentina, the regulatory framework for the implementation of the leniency programme has already been developed. The CNDC is working on establishing a regulation that covers the entire procedure for applying for amnesty, and regulates compliance with the requirements of each of the stages established in Regulatory Decree No. 480/2018. However, the CNDC understands that the most important thing is to publicise the existence of the leniency programme and, at the same time, create incentives for applicants to apply for the benefit. In this respect, there is no better publicity than to continue working to detect, investigate and sanction concerted anticompetitive behavior.