

Unclassified

English - Or. English

25 August 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

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

– Contribution from El Salvador –

27-28 September 2022

The attached document from El Salvador 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.

Mr. Alden Caribé de Sousa, CADE, alden.sousa@cade.gov.br and international@cade.gov.br.
Ms. Lynn Robertson, Competition Expert, OECD Competition Division - Lynn.Robertson@oecd.org.

JT03501356

Session I: Strengthening incentives for leniency agreements

Challenges facing leniency programmes

- Contribution from El Salvador -

1. Background

1. El Salvador's Competition Law came into force in January 2006. It was first reformed in 2007 to strengthen the capacity of the Superintendency of Competition to tackle cartels, introducing advances such as the power to perform searches pursuant to a warrant and the leniency programme. The latter allows an economic agent participating in a cartel to acknowledge such practice in front of the Superintendent of Competition and benefit from a reduced fine, as long as it satisfies the requirements of the law.

2. In 2008, the Organisation for Economic Co-operation and Development (OECD) and Inter-American Development Bank (IDB) Peer Reviews of Competition Law and Policy noted that the leniency regime presented a challenge for the Superintendency of Competition. Given the lack of leniency applications, the most recent OECD-IDB Peer Reviews of Competition Law and Policy: El Salvador (2020) recommends reforming the leniency regime to bring it into line with international standards and best practices, so that anyone granted leniency benefits is guaranteed immunity or a reduced sanction. It also recommends greater clarity regarding how to apply for leniency.

3. In November 2021, the Legislative Assembly of El Salvador approved a set of reforms to the Competition Law, mainly motivated by the need to make it compatible with the Administrative Procedure Law. This cross-cutting law, which has been in force since 2019, included a significant development on leniency: fully exempting the first applicant from the fine and reducing the fine amount for the second and third applicants.

2. Leniency regime in El Salvador

4. The amended Competition Law details the criteria under which the Superintendency of Competition will accept an applicant to the leniency regime. It also sets out the process following acceptance, the possible granting of leniency, how confidentiality of agents under the leniency regime is handled and the verification of compliance with the applicants' duty of collaboration. The latter is an indispensable requirement for granting the benefits provided by the leniency regime. It should be emphasised that an economic agent who has participated or is participating in an agreement among competitors must acknowledge this agreement in writing before the Superintendent of Competition prior to the initiation of any penalty procedures and the evidentiary period. The maximum benefit is fine exemption for the first applicant, and the possibility for a second and third applicant to benefit from fine reductions of up to 50% and 30% respectively.

5. Although the Superintendency of Competition continues to focus on detecting and deterring cartels through efficient investigation and awareness-raising efforts, the institution is still facing challenges in the area of leniency, including: a) lack of incentives for cartel members to apply for leniency, as penalties are not sufficiently severe and cartels

are not subject to criminal prosecution; b) lack of awareness about the new leniency programme, which grants full fine exemption for the first applicant and reduced fines for the second and third applicants, protects applicants' identity and the evidence they provide to prove the illegal conduct, and has the Superintendent of Competition grant or deny leniency benefits, rather than the Superintendency of Competition's board of directors, as long as the legal requirements are fulfilled; and c) the lack of clarity regarding the type of evidence that leniency applicants must provide because second and third applicants must provide evidence with significant added value compared with the evidence already in the possession of the Superintendency of Competition at the time the previous applications were filed.

6. Recently, leniency has lost its appeal among cartelists in most competition agencies. This is, in part, due to the high costs involved in their application, including the costs associated with the need to seek leniency in an ever-increasing number of jurisdictions when a cross-border cartel is involved. It is also because some regulatory frameworks allow for private enforcement of the Competition Law, which means that anyone who feels directly affected by an anti-competitive practice can file civil claims for damages before the judicial authorities. Therefore, self-incrimination for the sole purpose of co-operating with the competition agencies could trigger a respective claim in the courts and therefore enable a more expeditious compensation for the damages caused by the anti-competitive conduct in question.

7. In the case of El Salvador, the Competition Law does not foresee or prohibit private enforcement. However, Article 155(2) of the Administrative Procedure Law, which is a supplementary application regulation in public administration procedures, establishes a compensation mechanism, whereby the administrative authorities, including the Superintendency of Competition, could disclose in the respective proceedings the compensation for damages caused by the proven and sanctioned infringement. In the event that the Superintendency of Competition is unable to determine such compensation, the Administrative Procedure Law prescribes that the corresponding legal action will be available. In this sense, claimants could initiate the trial for liquidated damages before the civil courts, attaching to their claim the respective sanctioning resolution issued by the Superintendency of Competition, in which it declares it has tried and sanctioned the anti-competitive conduct investigated.

8. As regards leniency programme benefits provided for by the Competition Law, in the wording of the 2021 reform, these benefits do not include advantages beyond the total exemption or reduction of fines. Therefore, leniency programme benefits would not cover any other sanction, liability or legal consequence arising from the recognised anti-competitive practice provided for in other regulatory frameworks in force when applying to the programme, for example, administrative proceedings or lawsuits for compensation for damages to consumers. However, this does not seem to explain the absence of leniency applications made to the Superintendency of Competition; since this institution imposed the first sanction for anti-competitive practice to date, no lawsuit has been filed claiming damages for the anti-competitive conduct sanctioned.

9. In this respect, efforts to increase incentives for cartelists to apply to the leniency programme must have a focus other than the threat of possible private enforcement. Therefore, the benefit of full immunity (which did not previously exist in the Competition Law) should be the focus, regardless of whether the applicant is the instigator of the cartel or whether there is an ongoing investigation. Another aspect to consider is the confidentiality of leniency applications and the documentation provided by applicants, as this is a key element of attractive and successful leniency programmes.

10. According to the internal guidelines for the implementation of leniency benefits, which were recently approved by the Superintendent of Competition as part of the reform, leniency applications will be processed separately from investigations into anti-competitive practices (preliminary investigations or penalty procedures). These files will be protected by the respective of confidentiality and reservation, which will specify that only the Superintendent of Competition, the designated members of the leniency team and the Superintendency of Competition's board of directors will have access to these files in due course.

11. Therefore, the Superintendency of Competition will keep the identity of the applicant strictly confidential and anonymous, and will take the necessary and appropriate measures to meet this objective at all times. To do so, and to safeguard the confidentiality of the applicant's identity, final resolutions derived from the penalty procedures in which an applicant for leniency appears are expected to be drafted according to the standard structure, with the names of those sanctioned and the corresponding fines as established by the Competition Law. The leniency benefit will be formalised in a separate resolution, identifying the applicant or applicants to be granted the respective benefit. However, the applicant to the leniency programme may at any time waive their anonymity and the safeguarding of their identity. This waiver must be recorded in writing.

12. Given the significant challenges that leniency programme implementation presents for the Superintendency, training and dissemination sessions are being prepared to raise awareness among the population of the benefits of the programme and how to apply. Anonymity mechanisms have also been implemented to make the threat of cartels being detected more real. The AVISE channels are an example of this, allowing informants to report cartels without having to reveal their identity, via a form on the Superintendency of Competition website and using the 194 telephone number.

13. The Superintendency of Competition is also aiming to tackle cartels through more aggressive investigative tools, such as searches and raids. The design of the leniency programme allows applications to be submitted even after a penalty procedure has been initiated and a search has been conducted. Under the regulations of the Competition Law, the power to conduct searches or raids is only possible during investigations into a penalty procedure, not in the previous, preliminary investigation stage.

14. Regarding preliminary investigations, reforms to the Competition Law regulations will be proposed to guarantee that searches pursuant to a warrant may be used in preliminary investigations to obtain direct and robust evidence of cartel establishment and therefore to initiate the corresponding penalty procedure. This reform is also intended to promote competition to be the first applicant to a leniency programme, as long as there is a credible threat of detection and the applicant is able to provide sufficient evidence, which it has in its possession or can access, to prove the existence of the reported anti-competitive practice and the participants.

15. In short, the Superintendency of Competition hopes that this new leniency programme – which grants full immunity (with respect to the fine) to the first applicant before or even after a penalty procedure has been initiated – will incentivise cartelists to testify to the commission of the infringement. This will ensure that investigations are carried out efficiently and effectively and lead to the corresponding sanctions. Most importantly, it will deter economic agents from continuing to engage in harmful cartel practices, which nullify or seriously affect competition.