

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Roundtable on challenges and co-ordination of leniency programmes - Note by  
Colombia****5 June 2018**

This document reproduces a written contribution from Colombia submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

[www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm](http://www.oecd.org/daf/competition/challenges-and-coordination-of-lenieny-programmes.htm)

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## Colombia

### 1. Legal framework

1. The leniency program in Colombia was established by Article 14 of Law 1340 of 2009. This law was regulated by Decree 2896 of 2010, which was updated by Decree 2153 of 2015. The program contemplates both complete and partial amnesty for undertakings and individuals who participate in cartels and provide timely and effective assistance to the Superintendence of Industry and Commerce (SIC) in exposing and prosecuting anticompetitive behaviours.

2. According to the program's regulation, complete amnesty is reserved for the first party who applies before the Deputy Superintendent for Competition Protection, and meets the following conditions: (i) is not the instigator or promoter<sup>1</sup>, (ii) recognizes and terminates the participation in the conduct, and (iii) provides evidence and complete information relating to the identities of other participants; the nature, duration, objectives, and operation of the agreement; and the markets affected. If the Deputy Superintendent determines that the evidence provided by the applicant is not sufficient to warrant total amnesty from the fine, the applicant may withdraw the application and the evidence submitted, or may request the Deputy to consider the application as a petition for a fine reduction.

3. Subsequent applicants apply in the same manner, must meet the same conditions for qualification, and are assigned roster positions in order of application. The Deputy Superintendent may suggest fine reductions for subsequent applicants by evaluating the quality of their cooperation, considering the following maximum reduction schedule: 30% to 50% reduction for the second applicant, and up to 25% reduction for the third and subsequent applicants. The benefits earned by an undertaking will extend to its officers and employees ("facilitators"), but not vice versa, although individuals may still qualify for more benefits by cooperating with the investigation.

4. Applicants must submit their applications within the 20-days term given to parties to provide evidence against the Statement of Objections. The Superintendent's final decision resolving the case will award the benefits negotiated with the Deputy Superintendent, depending on the collaboration provided throughout the proceeding.

5. Finally, it should be noted that the purpose of the amendments made by Decree 2153 of 2015 was to update the leniency program taking into account OECD recommendations. Some of the most important changes made by such decree are the following: (i) automatic amnesty for the first applicant; (ii) recognition of "amnesty plus", to enable leniency applicants who are not the "first in" applying for leniency benefits to earn an additional 15% reduction in their fine by disclosing the existence of a different cartel; (iii) extension of the gap between the benefits granted to the first and second applicant for the leniency program, in order to increase the incentive to be the "first in" applying; and (iv) opportunities for employees of an infringer undertaking to apply to the

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<sup>1</sup> Instigator or promoter is the person who, by coercion or serious threat, induces another to initiate an anticompetitive agreement, provided that such coercion or serious threat remains during the execution of the cartel and is determinant in the conduct of the undertakings involved.

leniency program regarding all anticompetitive practices (i.e. unilateral conducts, abuse of dominance and cartels) - legal entities are only enabled to apply in cartel cases.

## 2. Leniency cases

6. Although Colombia has a leniency program since 2009, the first leniency applications were received only in 2013. Since then, an overall balance can be summarized in: (i) 31 leniency applications have been filed in several market sectors; (ii) 15 leniency agreements have been signed; (iii) 5 investigations with statement of objections have been issued; and (iv) 4 cases have finished with sanctions and/or recognition of benefits.

7. The four cases that have successfully ended are the following:

### 2.1. Baby diapers cartel

8. In June, 2016, the Superintendent of Industry and Commerce imposed a total fine of approximately USD \$72 million, to TECNOQUÍMICAS, FAMILIA, KIMBERLY (diapers producers) and 16 individuals (high-level employees), for incurring in more than a decade (20001-2012) in a price fixing cartel that involved baby diapers in Colombia. This cartel affected, specially, households with children under 2 years of age, mainly belonging to lower social strata. The decision was confirmed in December, 2016.

9. Three out of five companies investigated and 16 out of 44 individuals were sanctioned, since their participation in the price fixing cartel was proved.

10. Thanks to the leniency program, KIMBERLY, in its condition of first applicant, received total exoneration (100%) of the fine imposed, and FAMILIA, in its condition of second applicant, received a reduction of 50% of the fine imposed.

### 2.2. Soft papers cartel (toilet paper and others)

11. In May, 2016, the Superintendent of Industry and Commerce imposed fines on 4 companies (KIMBERLY, FAMILIA, C. Y P. DEL R. and PAPELES NACIONALES) and 21 individuals (high-level managers, including former employees) for incurring in agreements to artificially set the price of “soft papers” in Colombia. This market is composed of four products: toilet paper (which is the most representative), napkins, kitchen towels and handkerchiefs for hands and face. The Superintendent sanctioned the individuals for collaborating, facilitating, authorizing, executing or tolerating the conducts that violated free economic competition. The decision was confirmed in October, 2016.

12. This cartel operated during more than a decade (2000-2013), using a secret and covered structure, in which the participating companies identified themselves with nicknames or pseudonyms, and used fake e-mail accounts to plan and implement the price fixing agreement. Prices were set directly and indirectly.

13. The fines that were imposed by the Superintendent represented a lump sum of, approximately, USD \$64 million. Such amount did not exceed the 15% of the annual operational income of the sanctioned companies.

14. It should be noted that, under the leniency program, the SIC granted KIMBERLY, in its condition of first applicant, the exoneration of 100% of the fine imposed. The Authority also gave to C. Y P. DEL R., in its condition of third applicant, a reduction of 30% of the fine imposed. However, it was determined that FAMILIA, who had the condition of second applicant, breached its obligations under the leniency program and, consequently, was excluded from the benefits that were provisionally agreed.

### 2.3. Scholar Notebooks cartel

15. In August, 2016, the Superintendent imposed total fines that exceeded USD\$ 15 million to KIMBERLY, CARVAJAL and SCRIBE –scholar notebook producers–, for incurring in price fixing agreements by imposing minimum prices and sale quotas (direct price fixing), and by determining discount percentages among the different distribution channels (indirect price fixing). Other anticompetitive conducts detected involved agreements on marketing policies and strategies, financial policies and limitations to supply sources. The investigation also included 27 individuals who, in their condition of directors, collaborated, authorized, tolerated and/or executed the anticompetitive conducts. The decision was confirmed in December, 2016.

16. The conduct produced negative effects on purchasers within the commercialization chain, and on final consumers, mainly primary school, high school and college students. According to SIC’s calculations, based on information provided by the National Statistics Department (DANE), more than 3,7 millions of families in 2013 spent an important part of their salaries on school supplies, segment in which scholar notebooks are included.

17. Two of the three investigated companies applied for a leniency program within the investigation, confessed their participation in the cartel and provided relevant evidence, such as e-mails, documents and statements, demonstrating the cartel’s existence and its means of operation. Thanks to this, KIMBERLY and SCRIBE, and 12 investigated directives were exonerated from the payment of fines.

### 2.4. Private security services cartel

18. In April, 2017, the Superintendent Ad-Hoc sanctioned 7 companies in the private security sector and 17 senior executives linked to them, with approximate fines of USD\$9 million, for bid rigging in public procurement. This case was part of the National Government's frontal fight against corruption, which in this occasion had a private nature, since the investigated conduct did not involve public officials. The decision was confirmed in April, 2018.

19. The SIC found that the 7 sanctioned companies formed a “de facto” business group (named SMG) which was controlled by a single person, and by means of which numerous contracts with different public entities were manipulated. The sanctioned companies showed themselves as independent competitors in public tenders worth USD\$24 million, between 2009 and 2012, when in fact they acted in a coordinated and concerted way and under the direction of a hidden controller.

20. The investigation began thanks to complaints received by a contracting party and several dawn raids performed afterwards. Subsequently, a former executive of one in the investigated parties came to the Authority as a whistleblower and brought information about the bid rigging conduct. This whistleblower, for being the first to apply in the

leniency program, had 100% of immunity in the administrative field, but was still exposed to criminal sanctions. The applicant finally dismissed his application to the leniency program. The lesson learned from this experience is that incentives are essential for the correct functioning of the leniency program, since criminal sanctions may deter individuals from applying and acting as whistleblowers.

21. Some of the public entities affected by the conduct were the General Attorney's Office, the Colombian Family Welfare Institute (DANE), the Colombian Air Force, the National Apprenticeship Service (SENA), the Administrative Department of Sports (COLDEPORTES), among others, as well as the District of Bogota and several municipalities of the country.

### 3. Ongoing concerns and challenges

22. The Andean Community<sup>2</sup> has a competition regime that has been inactive for many years (Decision 608 of 2005). The lack of application of the Andean competition regime has resulted in a lack of knowledge and awareness about its existence and functioning. No cases have been successfully conducted under the Andean competition rules<sup>3</sup>, and because of that, undertakings, individuals and authorities do not have any practical source to understand how or when such community regime must be activated.

23. Unlike the case of Europe, where there are clear rules defining the powers that the national authorities and the European Commission have –and the way they should interact–, in the case of the Andean Community there is no regulation or guide on how to deal with possible concurrent competences of the community authority and the national authorities. This creates a problem of legal security, both for the competition authorities and for the undertakings and individuals as market players.

24. With this in mind it should be noted that, in November of 2016, the General Secretariat of the Andean Community (SGCAN) issued a statement of objections against the companies of the KIMBERLY business group (KIMBERLY CLARK CORPORATION, COLOMBIANA KIMBERLY COLPAPEL S.A. and KIMBERLY CLARK DEL ECUADOR S.A.) and the companies of the FAMILIA business group (PRODUCTOS FAMILIA S.A. and PRODUCTOS FAMILIA SANCELA DEL ECUADOR S.A.), for allegedly incurring in price fixing and market allocation in the Andean region. By the time that such investigation was opened, the Colombian competition authority (SIC) had recently decided and confirmed the soft papers cartel case in Colombia (October, 2016).

25. The origin of the community investigation was a complaint filed by the Ecuadorian Competition Authority (SCPM), in which such entity “declassified” information provided by leniency applicants in that country. Based on an alleged regional

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<sup>2</sup> The Andean Community is formed by Bolivia, Colombia, Ecuador and Perú.

<sup>3</sup> In June, 2017, the SGCAN deemed as “unfounded” an investigation request filed by INTERNEXA S.A. and INTERNEXA PERÚ S.A. against CORPORACIÓN NACIONAL DE TELECOMUNICACIONES CNT EP –which is the public telecommunications company of Ecuador– for allegedly incurring in an abuse of dominance. This is the only precedent that exists on the application of the Andean competition regime.

effect, the SCPM forwarded the information it had collected from the applicants to the SGCAN, in order to let such entity conduct a community investigation.

26. The community investigation is still ongoing, but the SGCAN already issued a report<sup>4</sup> recommending the General Secretariat to impose fines on the investigated parties for incurring in price fixing in the Andean soft paper market –the market allocation accusation was dismissed. According to the SGCAN, there was a cartel that was created in Colombia and had effects in Ecuador, and because of those transnational effects a sanction in the community level should proceed. That conclusion goes against the findings of the Colombian authority, since the SIC, in the national investigation that conducted in the same market, established that there was no regional cartel but two national and different cartels –one in Colombia and another in Ecuador–, which is totally different.

27. Thus, for the SIC the activation of the Andean competition regime represents a major concern, since it can lead to conflicting decisions that affect the transparency of the leniency programs, the credibility on leniency, and the legal certainty of investigated parties in competition proceedings, especially if those parties have Andean presence.

28. From this situation, a new challenge has been formulated for the Colombian Competition Authority, which is to establish the limits and scope of the community regulations on local competition cases in the future. The SIC has made great progresses in the application of its leniency program, and because of that, it will continue working hard to ensure that this program continues contributing effectively to the detection of cartels in the country.

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4 The SGCAN report was issued in March, 2018.