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# Leniency Programs in Latin America: “New” Tools for Cartel Enforcement

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The fight against cartels has become a central feature for many competition agencies. In Latin America, this fight is long overdue as the prevalence of cartels has historically harmed competition in both large and small markets. The introduction of immunity and leniency programs to fight hard-core cartels is an important challenge for many authorities in the region. They have to garner the necessary expertise to administer these programs, increasingly join and even cooperate with their international counterparts, and learn the nuances in their legal systems when implementing them and enforcing their competition legislation. Nonetheless, these programs have proven to be extremely effective, low-cost tools that have uncovered a number of cartels in a relatively short period of time.

We present some information on the differences among these programs in eight Latin American countries and discuss some of the advantages and challenges that each have faced in using this tool to investigate cartels. While we note that increases to monetary fines and sanctions would improve the effectiveness of these programs, we also believe that, on their own, there is room for leniency programs to grow and become more effective for antitrust agencies in Latin America.

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## I. Introduction

Competition enforcement poses a particular challenge for many developing countries. In designing and drafting their competition laws, many new authorities have benefited from the experience of more mature authorities; however, enforcement is set back in many developing countries due to a lack of material and human capital resources as well as limits in their legal powers, which remain a very real challenge in curtailing anticompetitive conduct. The fight against cartels in Latin America is no exception. In fact, the prevalence of cartels is a distinctly Latin American characteristic where economies have been historically plagued with concerted, naked agreements to fix prices and quantities, allocate markets, and rig bids, both in large and small markets. This has made immunity and leniency<sup>1</sup> programs a particularly effective tool for agencies in the region.

Although leniency programs have been in place in the United States since 1978 (substantially revised in 1993), and in Europe since 1996 (and also substantially revised in 2002 followed by further, less important revisions), Latin American competition agencies have only recently put in place similar programs. The first leniency program enacted in the region was in 2000, in Brazil, and was not followed by another until 2006 when Mexico amended its law to allow for this type of program. Today, as competition regulation and institutions appear rapidly in the region, many competition agencies have put in place leniency programs, while others are in the process of designing and incorporating such programs.

The fight against cartels has become a central feature for many competition agencies, thanks in part to recommendations from international bodies such as the OECD, characterizing cartels as “the most egregious violation of competition law.”<sup>2</sup> In addition, success stories based on the use of leniency programs in other developed countries, and the recent increase in international cooperation, led by more mature agencies and international bodies such as the International Competition Network (“ICN”), have made these tools and application know-how available to legislators and agencies in Latin America.<sup>3</sup>

In Latin America, investigations based on information provided by leniency applicants have led to stark increases in the number of cartels uncovered in the region, and significant headway has been made in the fight against cartels. Based on these heartening results, competition agencies are now acting in a more congruous fashion; not only citing cartel investigations as priorities in their enforcement decisions, but also aligning their efforts and resources in uncovering and prosecuting cartels.<sup>4</sup>

IN FACT, THE PREVALENCE OF CARTELS IS A DISTINCTLY LATIN AMERICAN CHARACTERISTIC WHERE ECONOMIES HAVE BEEN HISTORICALLY PLAGUED WITH CONCERTED, NAKED AGREEMENTS TO FIX PRICES AND QUANTITIES, ALLOCATE MARKETS, AND RIG BIDS, BOTH IN LARGE AND SMALL MARKETS.

In addition, there appear to be a number of indirect benefits that are arising from the application of these programs. Chief among them is increased transparency about the workings of the competition agency; a necessary ingredient for a program that relies on honoring clear and predictable rules that provide incentives for agents to agree to participate. Another is increased cooperation among agencies regarding exchange of experiences and best practices, which has benefited both sender and receiving agencies. This cooperation has come about within international bodies (ICN, OECD, Latin American, and Iberoamerican Competition Fora) and through both bilateral technical assistance and informal case experience and exchanges between agencies—vital ingredients in building a professional and specialized team of cartel investigators in the region. Finally, another of the indirect positive effects, we would argue, is a better understanding within the region of the harm of hard-core cartels and the role played by regulators—and the regulated—in fighting them.

Leniency programs are set in place for the regulator to obtain help from any economic agent participating in a cartel, but it is not enough to have a program in place if there are no safeguards that will convince agents to collaborate. In Latin America, many countries grapple with confidentiality issues between the regulators and the regulated. The effectiveness of these programs, therefore, rests largely on overcoming the doubts of economic agents about regulators’ discretion in the use of the information provided by applicants (including their identity) and convincing the applicants of the agency’s ability to successfully administer the process of a cartel investigation under leniency based on the confidential information provided. Thus, leniency applicants and information derived from these programs for successful cartel investigations should steadily rise as competition agencies become more adept at handling leniency applications, and economic agents or undertakings become more comfortable reporting their participation in cartels as well as dealing with the risks, such as civil actions, that may arise from applications.

The paper is structured as follows. In section II we present some general features about leniency programs in several Latin American jurisdictions and also compare some of the differences and similarities among them. Section III focuses on the design and operation of these programs in eight countries in the region: Argentina, Brazil, Chile, Colombia, El Salvador, Mexico, Panama, and Peru. The last section presents some thoughts about the future of leniency in cartel enforcement from a Latin American perspective.

## II. A Comparison of Latin America’s Leniency Programs

Although initially categorized as a snowball effect in the American continent, coming from the north to the south, the southern region has demonstrated its enormous capacity to generate some of the best institutions and aggressive enforce-

ment in this field. The advances on this front of anti-cartel activity may be explained in many ways, but a strikingly common ground has been the increase of effective enforcement tools for competition authorities. These tools have two main cornerstones: surprise searches, or so called “dawn raids,” and leniency programs.

According to the OECD, leniency programs have played a central role in the fight against cartel activity in every country with successful competition regulation. It is a relatively cheap investigative tool that provides incentives to increase the likelihood that a firm approaches the authority to confess their participation in a cartel, and provides sufficient information to open an investigation in exchange for a “best deal.”<sup>5</sup> The information is particularly relevant given the difficulty and expense involved in attaining it; in Latin American jurisdictions this difficulty increases with the lack of legal powers and resources available to competition agencies.

Given the simplicity of the program and the effectiveness of its incentive structure, it seems that its adoption is a natural step to take for cartel-fighting authorities. As competition regulation appears rapidly in countries all over the continent, including Bolivia and Venezuela, many countries have adopted leniency programs resembling other similar programs that have succeeded and evolved in other civil law countries. The years 2009 to 2010 have been fairly significant in this area, as there have been two new leniency programs in Latin America and several projects of implementation have been proposed for their respective legislative processes.

As Table 1 illustrates, with the growth of Latin American competition regulation, leniency programs have started spreading, with 6 countries in the region having begun to implement these programs over the last three years, leaving only Brazil and Mexico with a leniency regulation enacted prior to 2007.

Country	Entry into force	Responsible authority	Relevant Act or regulation
Argentina	Not yet in force	National Court of Competition Defense	Art. 49 Bis of the Competition Defense Law N° 25.156
Brazil	2000	Secretariat of Economic Law (primarily) with support from the Brazilian Competition Commission	Law 8,884/2000
Chile	2009	National Economic Attorney	Art. 39 Bis of Legislative Decree N° 211
Colombia	2009	Superintendent's Office of Industry and Commerce	Art. 14 of Law 1340 (2009)

*Continued*

**Table 1**

**Legislation Underlying Leniency Programs in Latin America**

**Table 1,  
continued**

Country	Entry into force	Responsible authority	Relevant Act or regulation
El Salvador	2008	Superintendent's Competition Office	Art. 39 of the Competition Law
México	2006	Federal Competition Commission	Art. 33 Bis 3 of the Federal Law of Economic Competition
Panama	2007	Consumer Protection and Competition Defense Authority	Art. 104 of Law 45 (2007)
Peru	2008	National Institute of Competition Defense and Intellectual Property Protection	Art. 26 of Legislative Decree N° 1034

Source: our own compilation

This wave of leniency introduction has resulted in a series of programs that are very similar to each other, with standardized procedures and level features. As we will discuss, Latin American programs are very much alike but, at the same time, due to differences in the economic makeup of different jurisdictions as well as institutional arrangements and government postures, there is still a significant gap and variability in their quality and the agency's experience in implementing some of the programs.

**Table 2**  
**Cross Comparison  
of Certain Features  
in Leniency  
Programs in  
Latin America**

Country	Marker System	Number of participants	Regulations for the cartel leader	Type of fine reduction	Percentage of fine reduced
Argentina	Yes	Exemption: 1  Reduction: 3	Cannot be exempted  Can participate in fine reduction	Administrative fine reduction only	Exemption: 100%  Reduction: 50%, 30% or 20%
Brazil	Yes	One	Cannot participate in the program	Administrative and criminal fine reduction, not civil	1/3 or 2/3 if the investigation already began, up to 100% if it has not

*Continued on next page*

Table 2,  
continued

Country	Marker System	Number of participants	Regulations for the cartel leader	Type of fine reduction	Percentage of fine reduced
Chile	Yes	Exemption: 1	Can participate, but may not be granted the exemption/reduction	Administrative fine reduction only	Exemption: up to 100%
		Reduction: no limit			Reduction: up to 50%
Colombia	No	No limit	None	Administrative fine reduction only	Up to 100%
El Salvador	Yes	One	None		Not legally defined
Mexico	Yes	No limit	None	Administrative fine reduction only	Immunity: up to 100%
					Reduction: up to 50%, 30% or 20%
Panama	Yes	Only the first one	Cannot participate in the program	Any fine or sanction may be reduced	Up to 100%
Peru	Yes	No limit	None	Administrative and criminal fine reduction, not civil	Up to 100%

Source: our own compilation

While most countries share the use of a marker system to hold an applicant's position in line for leniency, Colombia is the exception. Also, there is no clear consensus as to the treatment of the ringleader; in some countries, such as Brazil and Panama, the ringleader cannot participate in the leniency program.

There is no consensus either as to the number of applicants that can receive leniency. In some countries there are no limits (see Colombia, Mexico, and Peru); others limit this protection to only the first one (Brazil, El Salvador, and Peru); still others place differential limits on exemptions to the law and reduction of fines (Argentina and Chile). For firms that have participated in interna-

tional cartels and for the lawyers advising them on where and when to apply for leniency, these differences can pose a significant problem.

Additionally, agency investigative powers differ markedly among Latin American countries, regardless of possible similarities in their legal systems. Criminal sanctions for participation in a cartel are not widespread (only Brazil, Panama, and Peru foresee reductions in criminal sanctions and there is no evidence of Panama or Peru ever imposing criminal sanctions for cartel conduct in any case), and fine reductions in many cases only include administrative fines. As to civil fine reductions, this issue is not yet a problem in some countries where the possibility of recovery of civil damages by private parties and classes of individuals is not possible or the norm. Nonetheless, as agencies and competition enforcement evolve, these will be issues to consider when deciding to come forward, especially where new forms of class actions or collective actions are becoming a reality, as is the case in many of these countries.

As is the case in the United States and Europe, Latin American countries have adopted different types of fine reductions for those agents that are not first to report a cartel. In some countries only the first can apply and receive benefits from a leniency program (Brazil, El Salvador, and Panama). In other cases, although full leniency is not available, fine reductions can be granted to those who provide useful information after an initial applicant has contacted an agency with information. Those agencies with no protection or fine reduction for subsequent whistleblowers (others in line) have begun to explore the possibility of settlements. This has been the case, for example, of Brazil, where the CADE recently settled without following a full investigation with a "second in line" and reduced its fine significantly.

Finally, one of the elements missing from these tables and the discussion above is the difficulty in actually implementing leniency programs; that is, effectively administering a leniency program. One of the goals in the Latin American region should be the gaining of experience and the fostering of cooperation between and among countries that share a similar type of legal system and the same underlying social and, in many cases, market structures.

Issues that will surely arise will be dealing with the requirements of protection for parties in cartel cases that have affected the United States markets. In these cases the issue of discovery in civil actions may pose a potential cost that is more important to the firms than the actual threat of an administrative action in some Latin American countries. Agencies will have to be flexible enough to accommodate the needs for an oral application and delays in translation of documents. They will need to handle international cooperation well in all stages, including the application phase and investigation phases (involving the coordination of searches and the public actions needed), as well as case closing and settlements.



### III. Country Experiences with Leniency Implementation

#### A. ARGENTINA

Argentina's leniency program is still developing, even though it appears ready to be incorporated into the country's competition regulatory framework. The bill introducing a leniency program already includes what could very possibly be the final text that will appear in the Argentine Competition Defense Law. The bill shows a broad field of prior study into this subject, and demonstrates an important degree of international cooperation, making it a world-class program in light of international standards.

The program consists of two main benefits for applicant firms: an exemption benefit and a reduction benefit. The first is attainable only by the first economic agent to come forward and approach the National Court of Competition Defense (*Tribunal Nacional de Defensa de la Competencia*), and who is able to meet certain requirements. These requirements include not being or having been the cartel leader and a "cease and desist" condition that forces the firm to stop its conduct as a cartel member, among others. The exemption benefit completely exonerates the cartel member from any economic fine. An economic agent who cannot meet the requirements for exemption can apply for a reduction benefit. This part of the program can reduce the final amount of the fine by 50, 30, or 20 percent, with the numbers varying according to the chronological order in which the application was received and the number of active members that participated in the cartel.

The National Court of Competition Defense would be the authority in charge of implementing this program through a special division called the Leniency Directorate, which would have responsibility for investigations and administering a petitioner's registration. This registration is secured by a marker system that verifies the chronological order of all applications.

Some of the special features of the Argentine leniency program are its willingness to introduce detailed regulations for a company's managers and legal representatives, as well as a "Leniency Plus" feature. Leniency Plus is a provision that encourages cartel participants in a separate cartel (usually in another market or industry) to come forward. This program offers a reduction in the penalty that would otherwise have been imposed in relation to the first cartel—over and above the reduction it would have received for its cooperation with respect to its activities in the first.

SOME OF THE SPECIAL FEATURES OF THE ARGENTINE LENIENCY PROGRAM ARE ITS WILLINGNESS TO INTRODUCE DETAILED REGULATIONS FOR A COMPANY'S MANAGERS AND LEGAL REPRESENTATIVES, AS WELL AS A "LENIENCY PLUS" FEATURE.

The program features and the detail with which the program has been outlined already represent a promising start for the Argentinean competition regulator, and demonstrate a detailed knowledge and understanding of international developments and experience in these matters. These ingredients can be an enormous step forward in the fight against cartels in this country and a powerful weapon to strengthen their cartel investigations. However, implementation is key, which may pose some new issues based on certain features of the Argentinean legislation and institutions.

## **B. BRAZIL**

Brazil was the first Latin American country to introduce a leniency program in its competition regulation. Their Law 10.149/2000, which amended Law 8,884/1994, allowed Brazil to become the first country in the region to prosecute cartel activity by means of a leniency program. Another important feature of Brazil's program is that all types of immunity and reductions apply not only to administrative procedures, but can offer full criminal immunity to the applicant.

Administered primarily by the Secretariat of Economic Law, this program saw action for the first time in 2003. Since then, Brazilian competition authorities have given cartel investigations a top priority status, devoting 75 percent of their resources to detect and fight cartels. From our records, there are approximately 15 leniency agreements signed or under negotiation in this country.

Since Brazilian regulation does not distinguish between hard-core cartels and other type of cartels, this program is applicable for participants in any kind of cartel or collusive activity. It has a strict "first in" policy, in which only one member of the cartel can enjoy the benefits of the program, as well as a marker system that excludes anyone who isn't the first agent to come forward, subject to a 30 day wait period to enable the applicant to gather and provide information that may better support its leniency application.

The program is especially strict in eliciting cooperation from the applicant in order to grant the leniency, and also has a special feature in that there is no obligation by the authority to keep information confidential from other investigated parties. This latter characteristic is particularly worthy of mention, given the danger that the leniency applicant faces in being uncovered by other members in the cartel and the complications this can bring regarding international cooperation and investigation. The potentially negative effects have been dampened, however, by offering the possibility of an informal guidance on a confidential basis prior to submitting a formal application, thus allowing the applicant easier access to the program and fostering more openness with the authorities.

An immunity plus factor is included in the program, which grants up to a one-third reduction in the original cartel fine. It also includes a criteria based on the "initiated" status of the investigation. This means that if the agency has not

started an investigation at the time of the immunity request, the applicant can be granted up to a 100 percent reduction on the infraction. Instead, if the agency has already begun an investigation, the agent can only be granted a fine reduction between one- and two-thirds of the resulting monetary sanction. Employees can be considered part of the program provided they file according to the established procedures.

Without a doubt, the Brazilian leniency program has had the most applicants in Latin America and the Brazilian authorities are the most experienced in successfully using this enforcement tool, regardless of some recent questions that have arisen about its ability to handle confidentiality and its incompatibility with other competition programs in the country. Nonetheless, these issues arise from experience in using the program and highlight the fact that Brazil is on the right track in implementing a successful leniency program and coping with its challenges.

WITHOUT A DOUBT, THE BRAZILIAN LENIENCY PROGRAM HAS HAD THE MOST APPLICANTS IN LATIN AMERICA AND THE BRAZILIAN AUTHORITIES ARE THE MOST EXPERIENCED IN SUCCESSFULLY USING THIS ENFORCEMENT TOOL, REGARDLESS OF SOME RECENT QUESTIONS THAT HAVE ARISEN ABOUT ITS ABILITY TO HANDLE CONFIDENTIALITY AND ITS INCOMPATIBILITY WITH OTHER COMPETITION PROGRAMS IN THE COUNTRY.

### C. CHILE

The Chilean Leniency Program is very similar to Argentina's current bill for a leniency program in its exemption/reduction aspect, with some slight deviations that offer new and interesting features. Those who worked in the project made sure to consult all advanced competition jurisdictions for design suggestions. For example, it is interesting to observe a special measure that concentrates on false cooperation, which makes explicit that any economic agent that states, offers, or displays false information when participating in the program is subject to criminal sanctions. Contrary to Brazil's program, Chile's leniency program is very careful when dealing with the confidentiality of the applicant, which is considered a big plus of this program. The program states that confidentiality is required not only of the authority but also of the petitioner.

Aside from otherwise common features of a leniency program, Chile's program puts in doubt the situation with the cartel ringleader. Although the cartel leader is not literally prohibited from participating in the program, it is at the National Economic Attorney's discretion to offer the resulting exemption or reduction if, in fact, the applicant was the cartel ringleader. This will most probably discourage cartel leaders from applying to the program because of the uncertainty and lack of protection surrounding the rules for leniency.

An important discussion in Chile has been the requirement to stop the cartel activity in order to secure the benefits of the program. It is a controversial subject because of the suspicion it raises, and is an element that all jurisdictions should consider when agreeing to include such a condition in a leniency program. Mexico’s experience has also proved this.

Chile’s program is very recent in its implementation; therefore, it lacks an actual reference point to assess success. Chile will have to learn from its experience with the program, while evaluating the resulting information.

#### D. COLOMBIA

Colombian regulation experience in immunity matters is scarce. In fact, Colombia’s leniency program is the most recent in the region so, as is the case with Chile, it is very hard to evaluate its relative success. The general view that this program offers, however, leads one to conclude that it is very loosely regulated and leaves much to the agency’s discretion. Through one fairly brief article in Law 1340, the Superintendent’s Office of Industry and Commerce is empowered to administer a not easily enforceable program with very little secondary regulation. Therefore, it has yet to be seen if this practice turns out to be effective.

THERE ARE SIGNS THAT COLOMBIA  
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There are signs that Colombia considers its regulation a work in progress, and there appear to be plans to establish a more specific ruling.

The open-endedness of the regulation allows many agents to apply for the program, and offers almost complete discretion to the authority in undertaking any decisions. In practice, however, the results can be good or bad, and largely depend on the agency’s competence and its willingness to use the information derived from leniency applicants and from their investigations to learn from experience.

#### E. EL SALVADOR

The Superintendent’s Competition Office of El Salvador has established a well-defined leniency program with clear guidelines in a very user-friendly web page. One of the elements worthy of mention about this program is its requirement that the petitioner demonstrate its own participation in the anticompetitive practice. The program also features a first-in policy for leniency applicants, with the requirement that the firm be a “one time only” applicant, meaning that they cannot apply twice for the program and can only receive its benefits once. This obviously eliminates the possibility of the contrary “leniency plus” policy.

One last thing to mention is the fact that the core of this program is based on conduct characterized as a hard-core cartel, a distinction that is rarely important in the leniency programs of this part of the world.

## F. MEXICO

Mexico announced its leniency program as part of a package of reforms to its law in 2006. The program included some of the best practices that other successful programs had in place, including a marker system and a promise to cooperate during the investigation process. Leniency is offered for the first applicant with a reduction of fines equivalent to one daily minimum wage (less than U.S. 5 dollars – this amount is the minimum the authority can possibly charge as it is legally impeded from charging nothing) and fine reductions can also be obtained for subsequent applicants (50, 30, or 20 percent) provided they offer new elements of conviction and comply with the same conditions as an applicant who obtains full leniency.

The program was highly influenced by its European and American counterparts, and has only a very narrow difference between full leniency and reduction in benefits; nevertheless, the agency has made sure that the incentive to come forward first remains important. This program also offers the possibility of an informal guidance on a confidential basis to economic agents, prior to submitting information. Using international precedent, the program took a step forward with the introduction of internal guidelines regarding the law's applications; a type of soft law that aims to unify interpretative criteria inside the Commission and clarify the program's implementation to those interested in applying.

Some of its distinct features include the fact that more than one petitioner is allowed and there is no ringleader regulation. It is a hard-core cartel based program with a special disposition underscoring the absolute discretion of the Commission in matters relating to the evaluation of information and cooperation. This disposition is aimed at invalidating any judicial or administrative resolution that could attack a Commission resolution based on these arguments.

Even though there are discussions of reform projects and possible changes that could improve it, especially if criminal sanctions were to be introduced for cartel conduct as is currently being discussed in Congress, the program as a whole has led to fairly positive results with only some details still needing attunement to better serve the interests of competition and cartel investigations.

Its few years of experience with the program have allowed the Federal Competition Commission (“CFC”) time to learn about its implementation, and enjoy some of its results. Over its lifespan, 7 investigations have been opened through leniency applications, allowing the CFC to obtain information that

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would otherwise have been inaccessible or only accessible at a very high cost. Although much is yet to be done to harness the investigative powers of the CFC and increase fines, this leniency program has already proven itself worthy of investment as an invaluable tool inside the Commission for cartel investigation purposes.

### G. PANAMA

A clear, one paragraph disposition is all that Panama’s legislation needed to introduce their leniency program, where only the first agent who applies can receive the benefits, which can be up to a 100 percent exoneration of sanctions. Panama’s hard-core cartel based program also denies the benefit of exemption and reduction to the cartel leader or instigator.

A salient feature of this legislation is a disposition that includes a reward of 25 percent of imposed fines granted to the person who comes forward. This figure can be interpreted as a reward program just for denouncing a cartel. This apparently roughly sketched benefit should encourage us to follow the development of Panama’s leniency program to evaluate its results.

### H. PERU

Peru’s leniency regulation is fairly simple: The informer needs to provide the agency with determinant information leading to a sanction against cartel members in order to be granted exoneration. It includes criminal and administrative sanctions against the officials who do not honor the exoneration agreement.

It is also noteworthy that there is a sentence expressly stating that the National Institute of Competition Defense and Intellectual Property Protection, along with other administrative or judicial authorities, are obliged to refrain from instituting any procedure against the agent who cooperates in accordance with an agreement previously established by the authority and the agent.

PERU’S LENIENCY REGULATION  
IS FAIRLY SIMPLE

If the information received from the agents who seek reductions is new and relevant, they can have the benefit.

Again, there are some important innovations in these program, especially in the field of authority boundaries; a feature of extreme importance in our legal traditions and scarcely regulated in other jurisdictions in the region.

## IV. Concluding Remarks

Latin American leniency programs have been inspired to a large degree by the U.S., U.K., and European experiences in using these tools to more effectively prosecute mostly hard-core cartels. It is good news to see that the first big steps

have been taken towards successful cartel prosecutions in many countries in the region; that is, in the program implementation. It is now important to ensure that these programs do not become simple words on paper, and that information derived becomes useful evidence and leads to successful cartel investigations. Success in Latin America will also strengthen resolve in other developing countries to enact leniency programs and more effectively enforce their own competition regulations using these tools.

Egregious sanctions are needed for the most egregious violations to competition laws and principles. Leniency will not work correctly where there are no hard sanctions that correspond with both the damage such a conduct causes and also the benefits the firms derive from them. Hard sanctions should also reflect the difficulty of detection. In this regard, criminal sanctions are among the most important topics that competition authorities have to consider within these programs and, with them, the possibility of criminal leniency. Having criminal sanctions and criminal investigations can become quite a challenge for authorities in civil law countries. Moreover, this combination implies that a dual track is necessary in a certain legal context. If criminal sanctions are to be adopted, the most important attention should be given to harmonizing leniency programs in the criminal context. The worst outcome for competition enforcement is having criminal sanctions and a leniency program that does not cover them.

Also important are effective civil claims, which in many parts of Latin America are still not important enough to deter anticompetitive behavior—nevertheless society in the region is moving towards them. In this case, the competition regulator will have to evaluate whether these claims can weaken their programs if leniency does not include them, or if there are other means by which some level of leniency can be attained while allowing affected parties compensation for conduct that clearly harms competition and consumers. An interesting example is the possible reduction in the United States of treble damages to single damages, which can work very well in favor of leniency. In any case, the participation of private parties in competition enforcement is needed.

Much is left to be done and much more is left to be seen, but the Latin American race towards cartel prosecution is well underway. As we see some simple regulations in most of these legislations, we have to stop and think that simplicity may be the way of gradually improving the program. On the other hand, we must remember that the battle we fight with this program is not only a battle against cartel members, it is also a battle against our own legal systems, which are still unfamiliar with these procedures and present many bumps in the process. Because of these reasons, lack of regulation can have two strong counterproductive problems. The first is the under protection of the citizen who, after all, is the object and purpose of the competition regulation. The second is that an under-regulated economic agent can easily escape from the fines imposed by the competition authority and avoid its sanctions through legal formalities.

A clear leniency program with well-established authoritative attributions can lead to a non-defendable position for the guilty agents. This is where Latin American legal systems can become harmonized through competition regulation and cooperation in implementation; these kinds of problems need to be foreseen from the moment that legislation is designed. Consequently, it is of the utmost importance that agencies in the region maintain and ensure close relations so that sharing experiences can lead to an improvement in joint cartel investigations, something that is becoming more common. Participation in international

groups and organizations, such as the International Competition Network, is now a must for competition agencies as well.

IN ANY CASE, WE BELIEVE  
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In any case, we believe the principles of leniency programs apply equally to all legislations; they are necessary to break up the silence that surrounds cartel activity. They produce more results when the leniency offer is clear and simple, the process is predictable and stable, officers are credible, and risks of hard sanctions

are also clear. With these principles, cooperation of the applicant is ensured. Agencies should encourage and promote applicants to apply in other jurisdictions and cooperate significantly in all stages of the process. If these conditions are met, agencies in the region will have transparent, secure, credible, and confidential programs that will surely produce results.

In addition, agencies and legislators in the region should also consider including some specific characteristics that are not seen regularly in their programs, such as looking at the personal responsibility of employees engaging in cartel conduct, and then offering these employees an opportunity to come forward as whistleblowers themselves, allowing for oral applications and leniency plus programs. Agencies also should not lower their guard regarding the need to better align incentives for both individuals and companies to participate in these types of programs, be it through increased fines or through monetary compensation for those willing to come forward with useful information, as is the case in Korea.

Finally, we are well aware that many professionals in the area of competition are moving the discussion away from the benefits of leniency programs to the effects that such programs have had on dissuading the formation of cartels, and the type of cartels that are more likely to be caught by these programs—that is, whether cartel members seeking leniency are indeed the more harmful. In some sense the discussion is questioning whether agencies should better expend their resources on detection of cartels rather than “whistle blowing.”<sup>6</sup> It may be the case that more mature agencies, with greater access to resources and greater powers, are in a position to consider these options. From our point of view, Latin America is still benefiting from an increased detection rate of cartels through



leniency programs, which have proven to be effective and low cost tools. Furthermore, we should focus our efforts to increasing our effectiveness in fighting cartels, a historic and generalized anticompetitive behavior that has plagued our economies. ▼

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- 1 Legislations and legal practice differentiate among the terms “immunity program,” “leniency program,” and other related terms. In general, commentators have identified as “immunity” a program that totally excludes prosecution or sanctions, and as “leniency” a program that represents a reduction of fines. In reality most jurisdictions that have such programs have a combination of both. For the purpose of this paper we will refer to leniency programs in general, which may include an immunity program or a leniency program alone or an immunity program plus a leniency program, depending on the jurisdiction.
  - 2 OECD, Recommendation of the Council concerning effective action against Hard Core Cartels (1998) <http://www.oecd.org/dataoecd/39/4/2350130.pdf>.
  - 3 ICN Cartel Working Group.
  - 4 See, for example, the number of cartel investigations (or *prácticas monopólicas absolutas*) resulting in a finding of responsibility by the Mexican competition agency from 2008 to the present, compared to conduct investigations (or *prácticas monopólicas relativas*). Available at <http://www.cfc.gob.mx> (Informe Annual 2010).
  - 5 See, for example, OECD Policy Brief: *Using Leniency to Fight Hard Core Cartels* (2001), available at <http://www.oecd.org/dataoecd/60/8/21554908.pdf>.
  - 6 Giancarlo Spagnolo, *Leniency and Whistleblowers in Antitrust*, HANDBOOK OF ANTITRUST ECONOMICS (Paolo Buccirossi ed.) (2008).