

Leniency: Good Practices and Lessons Learnt

Enhancing coordination on leniency matters

ICN – Cartel Working Group – SG1

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Assigned issues to discuss

" 1. *How cooperation of competition agencies contributed to overcome/failed to resolve the concerns of leniency applicants stemming from:*

(...)

c. differences in leniency requirements (e.g. the relevance of written evidence vs oral testimony/witnesses, requiring stopping the violation vs obliging the leniency applicant to pretend continuation of the violation, etc...);

d. differences in sanctioning systems (corporate sanctions, applicability of different forms of individual sanctions, applicability of private enforcement, etc...);

e. differences in sanctions imposed by other domestic regulators (consequences of the cartel violation in the field of public procurement, withdrawal of licences, etc...), exchange of views of competition agencies on how they cooperate with their own national regulators;"

Brazilian experience with transnational leniency

□ Good source of lessons

- Major jurisdiction when it comes to cartel enforcement
- Major leniency “destination”
- Until a few years ago, young regime in comparison to mature ones
- Brazilian leniency program went through rough tests
- Leniency program had to go through important adaptations over the past years, in order to fulfill international standards
- Still facing most of the domestic and international issues in leniency programs today

Recent provisions in order to adapt to international standards

- ❑ Introduction of objective rules for **plea-agreements**, in order to contemplate and encourage **2nd-in, 3rd-in applicants**. (2013)
- ❑ **Leniency Guidelines** introducing and reinforcing (2016):
 - ✓ Predictability
 - ✓ Possibility of oral proceedings
 - ✓ “History of Conduct” (written description of leniency report and evidence) produced and signed exclusively by the authority
 - ✓ Leniency applicant forbiddance to share documents with other domestic or international authorities
 - ✓ Possibility for individuals to adhere to company leniency
 - ✓ Coordination of leniency publication with other jurisdictions
 - ✓ Reinforcement of confidentiality procedures
- ❑ Introduction of leniency (non) **discovery rules** (2018)

Adaptations due to other domestic regulators

- ❑ Adaptations in order to guarantee not only administrative immunity, but also **criminal immunity** (applied to all transnational leniencies):
 - ❑ Criminal immunity conferred by law.
 - ❑ Leniency agreements co-signed with criminal prosecutors.
 - ❑ Plea-agreements (criminal immunity not conferred by law): MoU with criminal prosecutors in order to facilitate parallel agreements.

Adaptations due to other domestic regulators

❑ The Siemens case (2013)

- ❑ Confidentiality breaches
- ❑ Civil damages law suit by state prosecutors against leniency applicant before advance of investigations
- ❑ Adaptations: (i) further cooperation with domestic prosecutors, (ii) reinforcement of confidentiality procedures, (iii) redesign of interactions with the Judiciary.

The Andean Community situation (2018)

- ❖ Successful leniency application in Colombia, Peru and Ecuador (the latter decided not to carry on with the investigation).
- ❖ Ecuador sent leniency documents to the Andean Community without consent.
- ❖ Andean Community fined the leniency applicant.
- ❖ Ongoing matter.

Adaptations due to other domestic regulators

- ❑ The issue of multiple investigators and leniency programs
 - ❑ Bid-rigging: cartel, corruption, fraud, money laundering...
 - ❑ Antitrust Law, Anticorruption Law, Criminal Code, Public Procurement Law, Banking Laws...
 - ❑ 6 or more authorities involved, in administrative and judicial spheres, in federal, state and municipal levels
 - ❑ Multiple leniency programs
 - ❑ Plus: other jurisdictions
- ❑ The Car Wash cases
 - ❑ Leniency agreements co-signed with criminal prosecutors
 - ❑ Coordination between authorities: evidence and expertise exchange
 - ❑ Mindfull of leniency programs
 - ❑ Multiple cooperation with international authorities: for leniency, evidence exchange and sanctions
- ❑ However: still a problem



Thank you!

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