

**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 Peru****5 June 2018**

This document reproduces a written contribution from Peru 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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## Peru

1. Although Peru's antitrust enforcement formally began in the early years of the 1990's, it wasn't until 2008, with the entry into force of a new Competition Law (hereinafter, Legislative Decree 1034), that the application of competition rules gained a refreshed boost amongst Peru's main public policies. The issue of Legislative Decree 1034 helped to clarify several issues which were the subject of heavy debate in past years. In this sense, concepts such as the difference of horizontal and vertical restraints or the delimitation of the *per se* rule and the rule and reason were adequately explained in the new legislation.

2. Another of these revised topics was the design of the law's Leniency Program. Even though article 20 of Legislative Decree 701<sup>1</sup> (Peru's first Competition Law) allowed anyone who was charged of an anticompetitive conduct (either an abuse of dominance or a collusion) could be exempted from the sanction that could be imposed in exchange of information about the investigated conduct, no leniency applications were submitted during the time such legislation was enforced. One of many reasons for this to happen was the uncertainty of the leniency procedure: there were no clear rules on the necessary steps that could lead to obtain a leniency or a reduction of fine, nor were there enough guidance on the authority's opinion on related subjects, such as the confidentiality of the information provided by the leniency applicant.

3. Legislative Decree 1034, in force since July 2008, made slight but insufficient amendments to the Leniency Program. The newly issued legislation envisaged the possibility for subsequent applicants to obtain a reduction from the fines that could be imposed to them. Furthermore, it expressly stated that the authority was obliged to keep the confidentiality of the evidence provided by a leniency applicant. Nevertheless, there were still unclarified issues that deterred undertakings from applying to the program, such as the confidentiality of the applicant's identity, the leniency procedure itself, the implementation of a marker system, the threshold needed to be met in order to obtain a leniency or a reduction of fine or the range of benefits available to subsequent applicants.

4. All these questions became more relevant after the submission of the first leniency application in 2012. From this moment onwards, it became clear that the Leniency Program required a thorough modification and clear-cut rules, especially when additional applications were submitted in 2014.

5. Thus, since the first months of 2015, an intense revision of the application of leniency programs by other competition agencies around the world was undertaken by the Technical Secretariat of the Commission for Defense of Free Competition<sup>2</sup> to select the best practices that could be included in an amendment to Legislative Decree 1034. A

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1 As amended by Legislative Decree 807, issued in April 1996.

2 Peru's competition authorities are the Commission for the Defense of Free Competition (hereinafter, the Commission) and its Technical Secretariat. Whereas the Commission has been entrusted to decide on the existence of anticompetitive conducts and impose sanctions and corrective measures accordingly, its Technical Secretariat is an autonomous body empowered to carry out investigations in order to detect anticompetitive conducts. Both are part of a larger entity: the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI, in Spanish).

careful consideration on the recommendations from international organizations (the World Bank, the International Competition Network, the OECD and UNCTAD) on this matter was also taken. Finally, Legislative Decree 1205, which amended several topics of Legislative Decree 1034 including its Leniency Program, came into force in September 2015.

6. The legislative amendment focused on four main points:

- The implementation of a marker system, which allows applicants to ‘secure a place’ while providing information to the authority.
- A clarification on the competences of the Commission and its Technical Secretariat, regarding the acceptance of a leniency application. According to this modification, after the applicant provides information about a cartel that could be used in an administrative proceeding, a conditional commitment is signed between the Technical Secretariat and the aforementioned applicant. In this conditional commitment, several obligations are stipulated that must be fulfilled by the applicant in order to secure a final decision from the Commission, the most important being its duty to cooperate with the Technical Secretariat and the Commission throughout the administrative proceeding. The Commission can only deny the leniency (or the reduction of fine, in case of subsequent applicants) if it is informed by the Technical Secretariat that the applicant failed to comply with its duty to cooperate.
- A further development of the benefits available for subsequent applicants. Hence, a benefit of reduction of fine from 30% to 50% is now available to a second applicant, whereas a third applicant could be granted a reduction from 20% to 30%. From there onwards, the only benefit available is a reduction of fine of 20%.
- Finally, it was specified that an applicant who exerted coercion on other members of a cartel could only be granted a reduction of fine and not full leniency, so that strategic behaviors from undertakings seeking leniency despite being the ones promoting the existence of a cartel could not be encouraged.

7. The amendments to the Leniency Program added more predictability to its enforcement and, therefore, were welcomed by the private sector, prominent competition lawyers and the academia. It also helped to increase the number of applications received in 2016 (four applications) in comparison with those received in 2015 (two applications).

8. However, the Leniency Program suffered a backlash from public opinion when the ‘*Toilet paper case*’ was decided, in March 2017<sup>3</sup>. In this case, the Commission found Kimberly Clark and Protisa<sup>4</sup> liable for entering into price-fixing agreements and other trading conditions from 2005 to 2014, regarding toilet paper and other products of tissue paper (paper towels, napkins, handkerchiefs and facials).

9. The evidence used in the case (mostly e-mails, electronic files, testimonies from employees involved in the cartel, physical agendas and hotel bills) revealed that there were constant interactions between employees of the two companies, including CEO’s, in

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<sup>3</sup> Up to date, this is the first case decided by the Commission involving leniency applications.

<sup>4</sup> Productos Tissue del Perú S.A., a subsidiary of CMPC Tissue, a Chilean-based paper manufacturer company.

which sensitive information regarding prices and other trading conditions were shared. All of this was discovered due to the applications for leniency submitted by both Kimberly Clark and Protisa in 2014. Coming forward to the authority allowed Kimberly Clark to receive full leniency from the fine that was imposed by the Commission after the end of the administrative proceeding. Meanwhile, Protisa was granted a reduction of 50% from the fine imposed.

10. When the Commission's judgement became public, the Leniency Program became the target of several criticism. Consumer's associations rebuked the Commission's decision of granting full leniency to Kimberly Clark, claiming that such benefits were detrimental to consumer's wellbeing. On the other hand, two legislative bills were filed in the Congress' Commission for the Defense of Consumers that posed a significant threat to the program's effectiveness. Indeed, while the first bill eliminated the possibility of granting full leniency to the first applicant, allowing only a reduction of fine up to 80%, the second bill drastically diminished the benefits available to first applicants, acknowledging only a reduction of fine up to 40%. Furthermore, the second bill expressly proscribed cartels that could have lasted more than one year since the submission of the application from receiving any benefit.

11. It then became obvious for the Commission and its Technical Secretariat that, for the Leniency Program to be accepted as a valid tool for the detection and elimination of cartels, it was essential to intensify the raise of awareness of its foundations (the detection of cartels is always problematic since cartel members put all their efforts to conceal their illegal activities) and its advantages (a Leniency Program is an efficient instrument against the secrecy of cartels). To this extent, numerous activities were carried out with one common goal: to spread the advantages of the Leniency Program in the long run. Some of the activities were the following:

- Academic events
- Several citations to Congress, in which the Head of the Technical Secretariat and the President of INDECOPI explained in detail the main aspects of the Leniency Program and how it aided to the strengthening of a national competition policy
- Forum debates with experts from international organizations and competition agencies
- Interviews in news media and broadcast news
- Brochures explaining the key features of the Leniency Program, which were handed out during dawn raids and academic events

12. In spite of these obstacles, the Leniency Program has successfully aided the Technical Secretariat in the exercise of its prosecutorial powers and opening of investigations. Also, the practice of its implementation has permitted to identify certain aspects that were still not sufficiently laid out in Legislative Decree 1205. Some of these have been clarified by the Leniency Guidelines (issued in August 2017 by the Commission<sup>5</sup>), as listed below:

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5 English version available at:<https://www.indecopi.gob.pe/documents/51771/1981946/Leniency+Program+Guidelines+%E2%80%93+Peru+Indecopi/f2f8506a-90d0-3657-56b2-b3e6799ec274>.

- The Guidelines expressly circumscribe the application of the Leniency Program to horizontal agreements, excluding vertical restrictions from its scope.
  - The Guidelines have established three types of leniency, with different benefits from each other, depending on the moment in which a leniency application is filed (whether before or after the beginning of an administrative proceeding carried out by the Technical Secretariat). In this regard:
    - If the leniency application is filed before the Technical Secretariat has any evidence of the existence of the cartel, the first applicant will be eligible for full leniency and will not be obliged to provide restitution measures, aimed at reversing the harmful effects arising from the cartel (Leniency Type A).
    - If an application is filed when the Technical Secretariat already has preliminary evidence of the existence of the cartel or has carried out dawn raids or other investigation actions for the purpose of obtaining evidence, but has not initiated an administrative proceeding, the benefits available for the applicant could be a reduction of fine up to 100%, as long as the applicant is able to provide additional information that adds value to the investigation and contributes significantly to the initiation of an administrative proceeding (Leniency Type B).
    - Finally, if the application is submitted after the initiation of an administrative proceeding or if there is already a first applicant, the benefit available will be the reduction of fine, which will not be higher than 50% (Leniency Type C).
  - The Guidelines include a definition of the ‘duty to cooperate’, understood as the set of obligations that materialize the best effort of the applicant to offer the fullest and most active collaboration with the prosecutorial activities of the authority, with the objective of allowing it to prove the revealed infringement.
13. Naturally, there are still issues that are subject of debate between the authority and law practitioners. From a practical point of view, some of these issues are the following:
- Many applicants have conducted internal investigations before coming forward to the authority, so that they could provide all the information related to the revealed cartel. However, there is always the need to verify if such internal investigations have been conducted satisfactorily. In these occasions, the use of forensic technology becomes relevant, so that the authority can confirm if the evidence provided is indeed all the evidence that the applicant could have obtained through its best efforts.
  - Most of leniency applicants are undertakings that have been involved in cartels. Yet, undertakings develop their activities through natural persons, whom might be reluctant to participate in a leniency application out of several concerns (for example, some might fear to be considered as ‘snitches’, others might fear to lose their jobs, their prestige or simply reject the idea of being associated with an illegal conduct). For this reason, it is not always easy for the applicants, and neither for the authority, to secure the participation of natural persons, even though they could be the best source of evidence.
  - When international companies who don’t have subsidiaries in Peru come forward for a leniency application, the issue of collecting evidence from them turns out to be a major hurdle for the exercise of the prosecutorial powers of the Technical Secretariat. Moreover, in this scenario there are greater difficulties to replicate the

evidence provided by the applicant without compromising the confidentiality of its identity.

14. From a legal point of view, there are still doubts on the relation that there should be between the Leniency Program and similar schemes related to criminal offenses. For example, bid rigging is considered by Legislative Decree 1034 as a hardcore horizontal agreement, subject to the *per se* rule. Since bid rigging could be originated in corruption practices, the members of a cartel involving this kind of horizontal agreements could also be subject to criminal penalties. Therefore, a leniency applicant might be deterred to confess his involvement in a cartel if it isn't clear that the information provided could be later used by a criminal court against him. This is a real possibility, since according to article 407 of the Peruvian Criminal Code, whoever comes in touch with information regarding a crime due to their professional tasks is obliged to communicate them to the correspondent authorities, which means that the Technical Secretariat could be compelled to reveal information related to a crime even though it was obtained through a leniency application.

15. An additional legal uncertainty comes from the application of article 49 of Legislative Decree 1034, as amended by Legislative Decree 1205. This article states that INDECOPI's Board of Directors<sup>6</sup> can promote a damages claim (class action) before the Judiciary against a member of a cartel and on behalf of the consumers that might have been affected by the anticompetitive conduct. Neither the law nor the Leniency Guidelines expressly shield an applicant from being later sued for damages by a class action promoted by INDECOPI itself, a possibility that could also discourage potential leniency applicants.

16. Finally, a third legal incertitude stems from the application of the supranational legal framework related to the Andean Community. This international organization, in which Peru participates along with Bolivia, Colombia and Ecuador, issued in 2005 the Decision 608, which sets forth a competition protection system in the Andean region. Unfortunately, Decision 608 doesn't acknowledge a leniency program or anything similar, unlike the legislations of Colombia, Ecuador and Peru. Consequently, an undertaking applying for leniency in those three countries and later receiving it might find itself defenseless if the Andean Community decides to initiate a case against him. As a result, the member of an Andean cartel might prefer not to reveal its participation to the national competition authorities if it knows that, despite obtaining leniency from them, the Andean competition authority will still impose sanctions without the chance of granting benefits of any kind.

17. Notwithstanding the aforementioned, and though Peru's Leniency Program is still very recent, it has proven to be an effective enforcement tool that has aided the Technical Secretariat to obtain relevant evidence regarding cartels that might have been difficult to detect through other means.

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<sup>6</sup> As previously mentioned, the Commission and its Technical Secretariat are part of a larger entity called INDECOPI. It is governed by a President (chosen by the President of the Republic) and a Board of Directors (chosen by the Prime Minister).