

THE GEORGE WASHINGTON UNIVERSITY

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GW Competition & Innovation Lab

Key Considerations for Effective Leniency Programs in the Andean Experience

Frederic Jenny



The GW Competition & Innovation Lab

805 21st Street NW

Suite 621. 6th Floor

Washington, DC 20052

gwucil@gwu.edu



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The George Washington University
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Frederic Jenny¹

Good morning,

Leniency programs are critical but complex instrument to be used in the fight against anti-competitive practices. These programs, rooted in game theory, offer a powerful incentive for firms involved in cartels to spontaneously report their illegal activities in exchange for immunity or reduced fines, particularly when the fear of discovery looms large. However, the implementation and success of leniency programs have not been universally consistent. We've observed a degree of disappointment from two key perspectives.

Firstly, some nations, especially developing economies, which have adopted leniency frameworks, have not witnessed a corresponding influx of applications. Secondly, even in countries where leniency programs initially thrived, their effectiveness has, in some instances, waned over time. This divergence in outcomes underscores the necessity for a meticulous analysis of the conditions that underpin the success of such programs. These conditions are multifaceted, and concern:

1. The fundamental design of the leniency program itself.
2. The relationship between the leniency program and the broader legal environment in which it operates.
3. The strength and track record of the enforcement authority.
4. The overarching general business environment of the country.

Let me turn to each of these issues.

¹ Co-Director GW Competition and Innovation Lab at the George Washington University.



I. The Bedrock: A Well-Conceived Leniency Program

A robust leniency program must be carefully structured, and this encompasses various dimensions:

- First with respect to the Scope of Application: Leniency programs can extend to both corporations – encompassing single legal entities or groups – and natural persons involved in anti-competitive conduct. Furthermore, their applicability can span civil, administrative, or even criminal competition law regimes.
- Second with respect to the Types of Infringements Covered: The primary focus of most leniency programs is cartels. These are clandestine horizontal agreements or concerted practices that stifle competition through mechanisms like price fixing, market sharing, bid rigging, or output restrictions.
- Third, the core incentive: Immunity and/or Reduction of Fines: A fundamental decision for any agency is whether to grant only full immunity or also offer reductions in fines. Immunity entails protection from any financial penalty or sanction that would otherwise have been imposed for cartel participation. For immunity to be effective, a leniency program should clearly define the evidentiary threshold. This can manifest in two key scenarios: i) For example, the threshold can be a submission that empowers the agency to initiate targeted inspections when it lacks sufficient prior information. This requires the provision of detailed evidence such as the names and addresses of involved entities and individuals, the product scope, known duration, type of conduct, means employed, foreseeable meetings or contacts (for ongoing cartels), and information on filings with other agencies; ii) Or it can be a submission that enables the agency to fully establish the extent of an infringement based on the evidence provided, particularly when the agency has already conducted inspections or when no other applicant has qualified for immunity under the first threshold. This requires the level of detail mentioned above, coupled with the ability to describe and prove the infringement against all participants.
- Fourth, leniency programs must define the reduction of the potential fine, with the percentage varying based on the applicant's ranking and the timing of their application (e.g., before or after inspections). It is highly advisable to establish a dynamic where early and comprehensive cooperation is rewarded. The evidentiary threshold for a fine reduction is the provision of evidence that offers significant added value compared to the information already in the agency's possession at the time of submission. Agencies may also define the potential number of rewarded applicants and the corresponding levels of reduction, for instance, offering up to 50 percent reduction to the second and subsequent successful applicants.
- Fifth, Behavioral Conditions: Obtaining leniency is typically contingent upon applicants adhering to specific behavioral conditions, such as full and continuous cooperation with the agency's investigation. The details of the expected cooperation must be spelled out
- Sixth, procedural Aspects: The smooth functioning of a leniency program is also dependent on well-defined procedural elements, which may include:

- The availability of anonymous approaches or hypothetical applications.
- The provision of a marker, which secures an applicant's place in the queue for immunity or a fine reduction.
- Clearly defined procedures for revoking leniency if necessary.
- The option for summary applications.
- Flexible forms of application, allowing for written or even oral submissions (proffers).
- Protection for private plaintiffs from the disclosure of self-incriminating statements provided under leniency.
- Established procedures for handling information related to closely connected leniency applications and in cases of withdrawal or refusal.

II. Ensuring the effectiveness of the leniency program given the wider legal environment

Beyond a well-designed program, it is crucial to ensure that interactions with other legal interventions do not inadvertently diminish the incentives for potential leniency applicants. Several key areas warrant careful consideration. In jurisdictions with corporate and individual leniency schemes, or parallel civil, administrative, and criminal regimes, it is paramount to provide maximum certainty and predictability across the entire system and to protect both corporations and individuals (e.g., through criminal immunity for individuals) which are granted leniency. This requires that legal sanctions of different natures applying to the same conduct should be carefully calibrated to avoid neutralizing each other. In addition, the risk of disclosing self-incriminating statements that could expose cooperating entities or their management to damages actions, or to retaliation by competitors must be eliminated.

What are the main risks:

1. **Interaction between Leniency programs and Civil Enforcement:** The potential disclosure of information provided by a leniency applicant can trigger significant damages claims through private lawsuits. For instance, in the EU, cartelists face joint and several liability which means that the leniency applicant may be sued for the entire damage due to the cartel. The fear of increased exposure to civil damages can create a disincentive for firms to come forward, even with compelling evidence of their cartel involvement.
2. **Interaction Between Leniency Programs and Personal Sanctions:** In many jurisdictions, both undertakings and individuals involved in cartels face potential sanctions, which can be administrative, criminal, or a combination. A clear conflict can arise in administrative antitrust regimes where cartel conduct, such as bid rigging, is also prosecuted as a criminal offense outside the administrative framework. If competition agencies can only offer leniency for administrative or civil sanctions, the risk of criminal prosecution can significantly deter leniency applications. Therefore, providing some form of lenient treatment for individuals is often necessary. This can be achieved by extending corporate leniency benefits to cooperating current and former directors, managers, and employees, or by allowing individuals to apply for leniency independently.



3. **Interaction Between Competition Enforcement and Other Regulatory Intervention:** When a potential leniency applicant is also subject to oversight by other regulators (for example, in the banking or public procurement sectors), the interaction between competition enforcement and these other regulatory regimes becomes relevant.
4. **Interaction between leniency programs and Foreign Enforcement:** The commencement of investigations in other jurisdictions where a cartel member did not apply for leniency can expose the applicant to greater liability risks. Cross-border effects can also arise when victims obtain leniency statements in one jurisdiction and pursue damages claims in another, potentially a jurisdiction where the defendant did not seek leniency. Differences in leniency policies across jurisdictions, such as the timing of cartel termination, information requirements for a marker, the format of the application, and completion deadlines, can create uncertainty and disincentives for both applicants and agencies. Open dialogue and coordination between cooperating competition agencies, and between agencies and leniency applicants, are crucial to address these challenges.

III. The Cornerstone: Guaranteeing Confidentiality

To effectively address these potential disincentives, guaranteeing the confidentiality of the leniency applicant's declaration is paramount. Many jurisdictions have adopted policies that protect an applicant's identity. Protecting statements made in support of a leniency application, whether by the undertaking or natural persons, is also a critical factor in safeguarding the incentive to apply. Despite variations in legal systems governing disclosure, establishing rules that limit the disclosure of such statements has become good practice. For example, in a number of countries, the information provided by the leniency applicant is protected from disclosure to third parties, including other competition agencies, without a waiver. In short, clear guidance from competition agencies on the rules governing leniency confidentiality, including the terms under which information will be shared with other agencies, is essential.

This transparency can alleviate the concerns of current and potential applicants and facilitate smoother coordination between different competition authorities. The confidentiality of leniency applicant declarations is a critical issue in both national and international competition law enforcement. This requires that the exchange of leniency information between authorities be possible through waivers of confidentiality and that equal protection for exchanged information be granted in other jurisdictions. Agencies should also strive for maximum certainty and predictability in their leniency systems compared to global partners, ensuring that their rules are clear, comprehensive, regularly updated, coherent, and sufficiently attractive. Once an applicant meets the program's conditions, the agency should have no discretion to deny leniency on other grounds.

IV. The Engine: Strength of Enforcement

The effectiveness of a leniency program is intrinsically linked to the strength of enforcement by the competition authority which can grant this leniency. Firstly, a competition authority that adopts a leniency program should ideally have a demonstrated track record of successfully sanctioning anti-competitive cartels and the competition law must provide for sanctions to be

sufficiently high to have a deterrent effect. The program's efficacy hinges on firms fearing the potential consequences if a competitor reports the cartel. Consequently, a leniency program may not be well-suited for a newly established or inexperienced competition authority and this may explain why there have occasionally been disappointment with the effectiveness of the leniency programs adopted in countries where the young competition authority did not have a proved strong enforcement track record.

Secondly, firms will be incentivized to seek leniency only if they perceive a genuine risk that the cartel they belong to may be uncovered by the competition authority. Therefore, a leniency program is not a substitute for robust investigation but rather a valuable complement to it. The intensity of enforcement by the competition authority directly influences the program's success.

V. The Context: Country-Specific Characteristics

Finally, the success of a leniency program can also be influenced by the specific characteristics of the country. In smaller economies with close-knit business communities where personal relationships are strong, there might be a reduced incentive to apply for leniency due to the fear of potential reprisals. If I now turn to how these principles apply in the Andean Community, I would be tempted to say that this region offers valuable insights into both the potential and the challenges of implementing such crucial instruments. As I have said, well-conceived leniency program is paramount.

In the Andean region, Colombia stands out as an early adopter, establishing its leniency program in 2009. The Superintendencia de Industria y Comercio (SIC), the Colombian competition authority, has actively utilized this tool, and we've seen successful applications, for instance, in the investigation of cartels in the diaper and tissue paper markets. In the latter case, Kimberly, as the first applicant, received full immunity, demonstrating the power of a well-functioning program in uncovering illicit agreements.

In Peru a formal leniency program was established in 1996. However, this initial program did not see any applications until it was significantly reformed in 2008 with the adoption of Legislative Decree 1034. From 1991 to 2008 collusion and abuse of dominance were criminalised under Article 232 of the Peruvian Penal Code. While this provision was in force, no leniency applications were made as individuals feared prosecution. Collusion and abuse of dominance were decriminalised in 2008 following the adoption of Legislative Decree 1034, which was seen as a necessary step to increase the number of leniency applications.

Nevertheless, INDECOPI's efforts were thwarted by the adoption of Law N° 31040 in 2020, which re-introduced the criminalisation of anti-competitive practices. The program has been amended several times to enhance its effectiveness. A significant change in 2023 through Law N° 31775 extended immunity to include exemption from criminal proceedings for hard-core cartels for immunity applicants. This was a key step to address concerns that the risk of criminal prosecution was deterring applications. According to Indecopi, since the 2008 reforms, there has been a notable increase in leniency applications compared to the initial period.

Ecuador has also implemented a leniency program. However, its experience highlights the critical importance of confidentiality. In a well-documented case involving Kimberly Clark, a



breach of confidentiality by the Ecuadorian competition authority reportedly undermined the applicant's trust and potentially deterred future leniency applications. This reinforces our earlier point about the non-negotiable nature of confidentiality in ensuring the success of these programs.

Bolivia, while part of the Andean Community, has a less developed history with dedicated leniency programs, highlighting the varying levels of implementation and enforcement capacity within the region.

However, the Andean experience also underscores the complexities arising from the interaction between national and regional competition frameworks. The Andean Community itself has Decision 608, which aims to protect and promote free competition within the member states. While this demonstrates a regional commitment to tackling anti-competitive practices, the interplay with national leniency programs has presented challenges.

A notable example that has generated considerable debate involves a case where the Andean Community's General Secretariat (SGCAN) investigated the same tissue paper cartel where Colombia and Peru had already granted leniency at the national level. The SGCAN, despite not having its own leniency program, used evidence provided under those national leniency agreements to impose fines on companies that had cooperated nationally. This decision sparked significant concern, as highlighted by the competition authorities in Colombia and Peru, who argued that it undermined the trust and legal certainty crucial for the effectiveness of their national leniency programs. This case serves as a stark reminder of the potential for conflict and the need for clear rules governing the interaction between regional and national leniency initiatives.

These examples from the Andean region underscore several key takeaways:

- **National Leniency Programs are Developing:** Countries like Colombia and Peru have made strides in establishing and utilizing their national leniency programs, demonstrating their commitment to fighting cartels.
- **Regional Overlap Creates Complexity:** The existence of a regional competition framework within the Andean Community, while intended to foster competition, can create complexities and potential conflicts with national leniency programs if the interaction is not clearly defined and respected.
- **Confidentiality is Paramount:** The case in Ecuador starkly illustrates the detrimental impact of a breach of confidentiality on the willingness of companies to come forward.
- **Trust and Legal Certainty are Essential:** The dispute between the Andean Community and its member states over the treatment of national leniency applicants highlights the critical need for trust and legal certainty to ensure the effectiveness of these programs.

Moving forward, for the Andean region to fully leverage the power of leniency programs, there needs to be a greater degree of clarity and coordination between national and regional competition authorities. Establishing a supranational leniency program within the Andean Community, with clearly defined rules on its interplay with national systems and robust guarantees of confidentiality, could be a significant step forward. The ongoing dialogue and efforts to reform the Andean Community's competition framework, including Decision 608, are crucial in addressing these challenges and fostering a more effective cartel detection and deterrence regime across the region.



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In conclusion, the effective implementation of leniency programs requires a holistic approach. It demands a well-designed program, careful consideration of potential disincentives arising from interactions with other legal frameworks, a steadfast commitment to confidentiality, a strong and credible enforcement authority, and an awareness of the specific context in which the program operates. By addressing these critical considerations, we can harness the full potential of leniency programs as a vital tool in our ongoing efforts to combat cartels and foster a more competitive marketplace.

Thank you for your attention.