CORNERSTONES OF EFFECTIVE LENIENCY PROGRAMMES: THE LATIN AMERICAN EXPERIENCE1

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1. Introduction

At the very dawn of antitrust history, the main issue was whether cartels[2] were pernicious for society[3]. Unlike today, at that time cartels were formalised by means of written agreements[4] and their parties had no intention to conceal their economic objectives, but focused instead on arguing that such agreements were either socially neutral or even desirable.[5] In other cases,

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[2] In this essay, the term "cartel" shall have the standardized meaning assigned to it by the OECD, which is as follows: "an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce". See OECD, "Recommendation of the Council concerning effective action against hard core cartels" (1998) 2.

[3] "In the late 19th century, the central issue in Section 1 litigation was not the fact of concerted action but rather the legality of admittedly collective behaviour" and "until the late 1930s, most Section 1 litigation focused on the legality of admittedly concerted action". See Gellhorn, Kovacic and Calkins, *Antitrust Law and Economics in a nutshell* (5th edition, Thomson West 2004) 267-268.

[4] For instance, in United States v. Trans-Missouri Freight Ass'n 166 U.S. 290 (1897) several railroad companies created an association with the aim of setting rates. Defendants acknowledged the existence of the agreement, but argued that the fixed rates were reasonable. See ibid 205.

[5] See for instance the United States Supreme Court decision in Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) whereby the Court upheld a coal sales cartel and considered "that the mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it". The discussion about the lawfulness of cartels was primarily a matter of US antitrust law since by the time

agreements between competitors were fostered by the intervention of the government in the economy.

The pernicious nature of cartels for society was conclusively established long time ago and today there is a broad consensus that cartels are "the cancers of the open economy"[6], "the most egregious violation of competition law"[7], "the supreme antitrust evil"[8], and "the public enemy No. 1 to the market economy".[9]

Consequently, firms modified their *modus operandi* of overtly entering into cartels and devised more subtle mechanisms to avoid being discovered by increasingly aware competition agencies. These novel ways to cartelise include oral or gentleman's agreements, tacit offers and acceptances, signalling between competitors, exchanges of confidential information directly between competitors or through third parties (such as trade associations, common suppliers or retailers, consultancy firms, etc.) and, most recently, even employing pricing algorithms.[10]

Since the 1990s until today, arguably one of the main tasks for competition agencies has been devising tools to discover secret cartels,[11] whereas, on the other hand, for firms it has been crafting novel ways to conceal cartels from the authorities.[12]

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other jurisdictions adopted their own competition laws, the detrimental effects of cartels were apparent to most legal and economic observers.

[6] See Mario Monti's speech "Fighting cartels why and how? Why should be concerned with cartels and collusive behaviour", September 11, 2000.

[7] OECD (n 2) 2.

[8] Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP, 540 U.S. 398 (2004) 407-408.

[9] Korea's contribution to OECD, "Leniency for subsequent applicants" (2012) 85.

[10] On the matter, see seminal work from Ezrachi and Stucke, "Artificial Intelligence & Collusion: When Computers Inhibit Competition" (Oxford Legal Studies Research Paper No. 18/2015).

[11] "By their very nature, secret cartels are often difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them", EU Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ C298/17, para. 3.

[12] Whish and Bailey, *Competition Law* (8th edition, Oxford 2015) 546-547, exemplify how firms "often go to great lengths to supress evidence of their illegal activity: for example, the Commission's decision in *Gas Insulated Switchgear*, says that participants in the cartel used codes to conceal their companies' names and encryption software to protect the secrecy of emails and telephone conversations (…) and made

In the fight against clandestine cartels, competition agencies have developed a broad array of tools to detect and tackle cartels, *inter alia*: (i) *ex officio* investigations; (ii) complaints by affected parties such as customers or competitors; (iii) market investigations or sector inquiries; (iv) tip-offs by anonymous informants (generally, disgruntled former employees); and (v) most recently, leniency programmes.[13]

Of all these tools, leniency has proven to be "the most effective and least costly mechanism for detecting and prosecuting activity that is systematic, deliberate and covert".[14]

The first ever leniency programme was devised by the Department of Justice of the United States in 1978, which was later reformed and improved in 1993. As from that time and at an astonishing pace, several jurisdictions have followed suit and adopted their own leniency programmes, which largely resemble that of the United States.

Today, out of more than 130 countries with competition laws, roughly 50 of them foresee a leniency programme[15]; the vast majority of them being adopted in the past 25 years in what can undoubtedly be considered a "leniency revolution".[16]

Latin America provides a good example of this leniency revolution. In the past 17 years, beginning with Brazil in 2000,[17] most of the Latin

use of mobile telephones provided by a member of the cartel that contained encryption options".

[13] In some jurisdictions the terms "leniency", "amnesty" and "immunity" are used in an interchangeable manner. In this paper, the term "leniency" shall be used generically to refer to leniency programmes, irrespective of whether such programmes grant full or partial immunity from sanctions.

[14] Beaton-Wells, "Leniency Policies: Revolution or Religion", in Beaton-Wells and Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion* (Hart 2015) 3. Praising leniency in a similar fashion, Werden, Hammond, and Barnett, "Deterrence and Detection of Cartels: Using all the Tools and Sanctions", Speech at the 26th Annual National Institute on White Collar Crime (1 March 2012) 14: "For all the power of this formidable array of investigative tools, the Antitrust Division's leniency program is now the most important tool either for detecting cartels or for developing the evidence necessary to prosecute them".

[15] Beaton-Wells (n 14) 3.

[16] Spagnolo, "Leniency and Whistleblowers in Antitrust" (CEPR Discussion Paper No. 5794, 2006) 3.

[17] Peru enacted its original leniency programme in 1996 but it never received any application until it was reformed in 2008. See OECD/IDB, "Follow-up to the nine peer reviews of competition law and policy of Latin American countries" (2012) 20.

American countries have adopted a leniency programme. Furthermore, starting with Brazil's 2011 amendment of its leniency programme, several Latin American jurisdictions have already undergone the first wave of leniency reforms and improvements (e.g. Mexico in 2011, Colombia in 2015, and Chile in 2016). Opposing to this trend, the only major Latin American countries lacking a leniency system are Venezuela and Argentina[18].

The goal of this paper is to identify the common cornerstones enjoyed by effective leniency programmes and to analyse whether Latin America's most developed jurisdictions in terms of competition law (i.e. Brazil, Mexico, Chile, and Colombia[19]) possess such cornerstones. The analysis shall also encompass the legal steps and modifications that each jurisdiction has taken in connection with these cornerstones to buttress the development of their respective leniency programmes.

This paper will not deal with the elements of leniency programmes, for which there is a growing global trend towards convergence[20] primarily advocated by the Organisation for Economic Co-operation and Development (OECD) and the International Competition Network (ICN), and which hinges around the United States' leniency programme. Rather, the focus of this paper will be the factors underpinning effective leniency programmes, which relate to more elemental issues of anti-cartel policy and without which even a leniency programme designed following the best international practices is doomed to fail.

By way of introduction to leniency, chapter 2 describes the dynamics of cartels and the role that leniency plays in such dynamics whilst chapter 3 considers the benefits of leniency. In turn, chapter 4 identifies the cornerstones of effective leniency programmes. Subsequently, chapter 5 analyses how the reviewed jurisdictions have fared with achieving such cornerstones. Finally, chapter 6 draws some conclusions on Latin America's

[18] However, Argentina's Congress is currently debating a bill to amend its competition law in many aspects, *inter alia*, introducing a leniency programme for the first time. Other Latin American countries with no formal leniency programme are Paraguay, Costa Rica, and Bolivia.

[19] Other Latin American countries that formally possess a leniency programme, not be covered by this paper, are: Ecuador, Peru, Panama, El Salvador, and Uruguay.

[20] See Witterick and Gudofsky, "Leniency programmes and cross-border co-operation in cartel enforcement: challenges and steps towards convergence" (Thomson Reuters Practical Law 2006), explaining the global trend towards convergence in leniency.

leniency experience to date as well as identifies some obstacles lying ahead for the successful leniency implementation in the region.

2. Cartels' Dynamics and Leniency Programmes

Cartels are inherently unstable. Cartels replace firms' independent decision-making for coordination in the market and that is not a simple task but one which faces many challenges, the extent of which depends on the parameters on which competition between the firms takes place in the market (i.e. number of players, products' characteristics, firms' symmetry, macro-economic environment, etc).

Firstly, firms need to reach a common understanding as to how to coordinate their behaviour in the market either by artificially increasing prices, reducing output, allocating territories or customers or big-rigging. Secondly, since firms will be tempted to deviate from the agreed patterns of competition, cartel members need to monitor and punish any deviation to the make the agreement viable. Thirdly, firms need to accord how to deal with external factors that could affect the cartel's stability such as new comers in the market or customers with countervailing buyer power not willing to accept the artificial costs created by the cartel.

Therefore, cartels are complex to implement and inherently unstable, and that is where leniency programmes come into play by helping to break down cartels from the inside by providing one or more of its members incentives to report its existence to the competition authority. Leniency is a tool developed to exploit cartels' inherent weaknesses to the advantage of competition authorities, however, such type of programmes are not exclusive to competition law but are also present in other areas of the law.[21]

In broad terms, leniency can be described as "a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel participant in return for reporting its cartel membership and supplying information or evidence related to the cartel to the competition agency providing leniency".[22]

[21] Leniency programmes are also a frequent investigative and deterrence tools in criminal cases relating to corruption, drug trafficking and money laundering.
[22] ICN, *Anti-cartel Enforcement Manual*, Chapter 2, "Drafting and implementing an effective leniency policy" (April 2014) 4.

To illustrate the dynamics of a leniency programme commentators usually refer to the "carrot and stick" approach, the carrot being the rewards offered by leniency and the stick being the sanctions to be imposed on cartelists that fail to come forward and cooperate. The bigger the stick (i.e. the sanctions and the prospect of being detected) the more firms are induced to wanting the carrot (i.e. the benefits of leniency).

3. Benefits of Leniency

Nowadays there is a large consensus among competition enforcers, international organisations fostering the expansion and converge of competition law (e.g. Organisation for Economic Co-operation and Development, International Competition Network, Inter-American Development Bank) and scholars that leniency programmes are the most cost-effective tool to detect cartels and prevent their formation.[23]

The following are the main benefits arising from leniency programmes:[24]

▪ Deterrence: first and foremost, leniency deters the formation of cartels as well as fosters the dissolution of already existent cartels by means of reducing the incentives of firms to cartelise. Firm's incentives to collude are diminished since any cartel member could decide[25] to apply for leniency and hefty sanctions are likely to follow;[26]

[23] There are nonetheless some economic studies that report mixed results as to the effectiveness of leniency programmes to deter cartel formation, particularly, by means of buttressing cartel stability, see for instance Marvão and Spagnolo, "What do we know about the Effectiveness of Leniency Policies? A survey of the Empirical and Experimental Evidence", in Beaton-Wells and Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion* (Hart 2015).

[24] ICN (n 22) 4-5.

[25] In addition to avoiding a sanction for cartel behaviour, the motives that could trigger a firm's decision to apply for leniency could be multiple, e.g. a cartel member which is unhappy with the results of the collusion; the sale of a company and the need to avoid future contingencies for the purchaser; a company's new management that detects an existing collusion and desires to clean the company; a desire to harm competitors by reporting them to the competition authority, etc.

[26] There is no (and there cannot be) accurate data to quantify the effectiveness of leniency programmes in deterring cartels (as opposed to detecting cartels) because it

▪ Detection: perhaps as its most apparent benefit, leniency allows competition agencies to detect cartels which would otherwise remain covert and slip under the competition agency's radar. It is worth remarking that even though leniency is generally the most efficient cartel detection tool within a competition agency's toolkit, over-reliance to the detriment of other cartel detection tools could reduce the fear of detection, which -as explained below- is one the cornerstones of an effective leniency programme;

▪ Sanctioning: as a direct result of enhanced cartel detection, leniency also enables competition authorities to sanction a larger number of cartels than they would otherwise be able to sanction. An applicant seeking leniency will be generally required to provide meaningful and direct evidence of the cartel's existence, which will allow the competition agency to more easily (i.e. cost-effectively) prosecute and incriminate fellow cartelists. Such cost-savings in cartel prosecution will also free additional human and financial resources that would enable the authority to investigate further cartels. Moreover, sanctioning cartels will in turn generate further deterrence, not only in connection the firms engaged in the collusion being punished (i.e. special deterrence) but also for firms unrelated to the collusion at hand but nonetheless considering entering into one of their own (i.e. general deterrence);

▪ Cessation: in addition to cartel deterrence and detection, successful leniency programmes inevitably lead to cartel cessation because either one or more of its members applied for leniency or, even absent any leniency application, its members decide that there is an enhanced risk of continuing with the cartel while a leniency programme is in force;

▪ Cooperation: in cases where a leniency applicant grants a waiver, the competition authority recipient of the application could cooperate with its counterparts in other jurisdictions, which could result in, for instance, the launch of simultaneous dawn raids in different jurisdictions; and

▪ Knowledge and Expertise: an usually neglected advantage of leniency programmes is that they provide competition agencies and its staff with knowledge and expertise on how (and why) cartels are formed, concealed

is impossible to determine the number of firms that have refrained from cartelising due to the existence of leniency.

and operated.[27] The acquired know-how definitively reinforces the agency's capabilities to tackle cartels in the future.

The benefits of leniency extend beyond the detection and sanctioning of the cartel at hand. According to Hammond, leniency programmes have a "rollover pattern"[28] since one investigation often leads to another as firms involved in the cartel reported through leniency are likely to be involved in further discrete cartels.[29]

Competition agencies will normally follow the *iter criminis*, i.e. the trails of cartelists to neighbouring product markets where they are also active. In this regard, certain leniency programmes (e.g. United States and the United Kingdom) include a policy mechanism commonly referred to as "Leniency Plus" whereby a firm that fails to qualify for immunity as to the first cartel, is nonetheless granted a reduction if it discloses a distinct cartel in which it is involved (for which it shall obtain immunity).

Additionally, firms unrelated to the cartel reported via leniency but members to a discrete cartel together with one or more of parties to the reported cartel, will have enhanced incentives to self-report their cartel as they would perceive the competition agency closing in on the second cartel to which they are parties.

[27] OECD, Secretariat Background paper, "Leniency programmes in Latin America and the Caribbean: Rules, reforms and challenges" (14th Latin American and Caribbean Competition Forum, Mexico City, 12-13 April 2016) 5.

[28] Hammond, "Cornerstones of an effective Cartel Leniency Programme", ICN Workshop on Leniency Programs (Sydney, November 22-23, 2004) 13.

[29] Two main reasons explain why cartelists are prone to be involved in more than one cartel: (a) if a cartelist broke the moral imperative of not infringing the law by engaging in a cartel once, it would thereafter have less incentives not to infringe the law at least once more and engage in a different cartel; and (b) by being part to a cartel, its members acquire the know-how and experience as to how to successfully manage a cartel, which in turn can be used to run other cartels; see Wils, "Leniency in Antitrust Enforcement: Theory and Practice" (World Competition 30 (1), 2007) 42-43.

4. Cornerstones of an Effective Leniency Programme

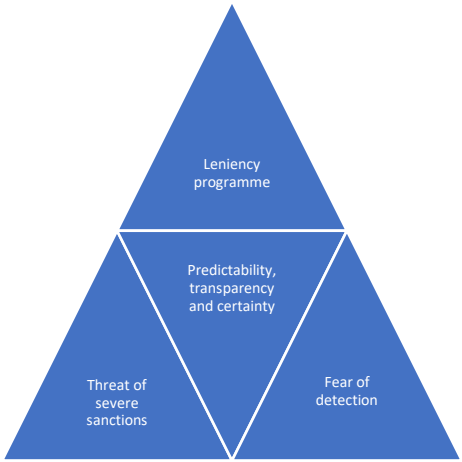
The following have traditionally been identified as the three cornerstones that must be present before[30] a jurisdiction can successfully implement a leniency programme:[31]

a. Threat of severe sanctions;

b. Fear of detection; and

c. Transparency, predictability and certainty in enforcement policies.

These cornerstones refer to the more fundamental features that the competition law edifice of any jurisdiction must possess to host a successful leniency programme. The graphic below helps to understand how a successful leniency programme can solely be achieved if grounded on the three referred cornerstones, all of which are equally important:



[30] Ideally these cornerstones should be achieved before implementing a leniency programme. Nonetheless, as it will be seen below, many jurisdictions simultaneously adopt leniency and amend their competition laws to buttress the newly introduced leniency by, for instance, increasing civil fines, criminalising cartels, granting dawn raid powers to the competition agency, etc. This confirms that a leniency programme is- to a large extent- useless to a competition agency which has not first achieved these three cornerstones.

[31] Hammond (n 28) 4-5. Similarly, see O'Brien, "Leadership of Leniency", in Beaton-Wells and Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion* (Hart 2015) 21.

Marco Colino rightly draws a distinction and refers to these cornerstones as the external factors affecting the success of leniency "which although not part of the leniency programme itself, act as buttress that provide vital support to the leniency edifice",[32] as opposed to the internal factors relating to the intrinsic features of the leniency, which are rewards granted by a leniency programme (e.g. level of reward, conditions for applicability, availability of marker, availability of amnesty plus).

By analogy to the construction of a building, the foundations, pillars, beams, and roof would be tantamount to the cornerstones (or external factors) of a leniency programme, whereas windows, doors, and coatings would be equivalent to the elements (or internal factors) of a leniency programme. The former are necessary and essential to hold the latter, and must therefore be laid down firstly. Only once the foundations are sturdy enough, then can an engineer (by analogy, a competition policy designer) decide which type of windows and doors it will use. No matter how good the windows and doors are, the building will inevitably collapse if the foundations are weak.

Each of the three cornerstones is addressed in further detail below.

4.1 Threat of severe sanctions

The first cornerstone of an effective leniency policy is the threat of significant and severe sanctions on cartel members. Immaterial or weak sanctions would otherwise neither create incentives for firms to blow the whistle on an existing cartel nor deterrence from first entering into one, as they would be part of the costs that cartelists would be willing to assume to reap the gains of collusion.

It is almost needless to add that the threat of significant sanctions must not be merely a theoretical one, but a real, tangible, and concrete risk of being severely punished by the competition authority.[33] In this regard, harsh sanctions imposed on previous cartels will provide firms with real-life

[32] Marco Colino, "The perks of being a whistleblower: designing efficient leniency programs in new antitrust jurisdictions" (The Chinese University of Hong Kong, Research Paper No. 2016-32) 14.

[33] Repeated annulment or reduction by the Judiciary of the sanctions imposed by competition agencies would certainly undermine the effectiveness of a leniency programme, as cartelists could perceive that the threat of severe sanctions is merely theoretical. The same effect could be caused by the undue delay of the Judiciary in reviewing appeals to cartel sanctions.

examples of the risks they take on by colluding. Certainly, competition agencies with an abundant track-record in penalising cartels are more likely to generate more incentives on cartelists to self-report and thus receive more applications than authorities with poor cartel track-records.[34]

Although there is no exact formula to determine how severe a sanction ought to be, "cartel activity will not be adequately deterred nor reported if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards".[35] It is common ground to state that sanctions cannot merely be a tax on cartels or the cost of doing business, on the contrary, sanctions must be substantial enough to achieve a deterrent effect on economic agents.

Imprisonment certainly fulfils the requirement of severe sanctions and creates sufficient incentives for firms' executives to avoid engaging in collusive behaviour. Indeed, there is evidence showing that certain cartels explicitly agreed not to cover the United States' market in light of the active criminal enforcement pursued by the United States Department of Justice and the prospect of the firms' executives being imprisoned.[36] Additionally, those jurisdictions that criminalised cartels witnessed a substantial increase in leniency applications.

However, the criminalisation of cartels is not a *conditio sine qua non* to a successful leniency programme. Competition law systems which lack criminal enforcement but provide for substantial administrative fines, such as the European Union, can also operate a successful leniency programme.[37]

To create a stronger deterrent effect on cartelists, monetary sanctions ought not to have a maximum ceiling (i.e. a certain amount of currency) but rather a variable ceiling (for instance, a given percentage of the offender's turnover or sales). This approach prevents cartelists from accurately running a cost-benefit analysis for their participation in the cartel that would deter them from colluding.

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[34] This triggers the separate issue of whether a newly created competition agency with obviously no cartel track record can implement from scratch an effective leniency programme. Although answering such question is not strictly the aim of this paper, in light of the cornerstones discussed herein, it would be sensible to argue that in principle only mature -or sufficiently experienced- antitrust regimes would be in the best position to operate a successful leniency programme.

[35] Hammond (n 28) 7.

[36] ibid 7.

[37] ibid 8.

Complying with the requisite of severe sanctions is not simply a matter of passing legislation, but one that requires competition agencies to effectively and consistently apply the sanctions provided in their legislations.

4.2 Fear of detection

To lay the groundwork for an effective leniency programme, in parallel to the threat of severe sanctions, cartel members must perceive a real risk that the competition agency may discover and penalise any illegal agreement. Conversely, a cartelist would have no incentives to run to the agency's door to self-report a conduct of which the competition agency would have never gained knowledge.

To convey how the fear of detection among cartelists works, Hammond uses the example of a cartel meeting which begins with an "empty seat at the table".[38] Such absence triggers all kinds of fears and speculations on fellow cartel members, among which one certainly is that the unexpected non-attendance derives from the fact that the absent member has reported the illegal agreement to the competition agency and applied for leniency. The fear of detection and thus of losing the race to the competition agency's door to benefit from immunity, undoubtedly creates incentives on cartelists not only to self-report but to do it urgently.

To achieve such fear of detection a competition agency must be proactive in chasing and harshly sanctioning cartels, using to that end all the investigative powers at its disposal, including -but not limited- to leniency.

To that end, the power to perform unannounced inspections on business premises is nowadays an unavoidable investigative power that no competition agency can fail to possess. Without said power it is almost impossible for a competition agency to investigate and successfully prosecute cartels.[39] To further reinforce the fear of detection on cartelists, competition agencies must also be provided with other fundamental investigatory powers, such as copying or storing electronic data in the framework of a dawn raid, issuing mandatory information requests and questioning witnesses. It is needless to state that the previously mentioned investigatory powers would be useless and generate no fear of detection if a competition agency is not

[38] ibid 10.

[39] Acknowledging cartel prosecution without dawn raid powers as virtually impossible, see OECD/IDB (n 17) 19.

sufficiently funded with the financial and human resources necessary to perform its duties.[40]

It is crucial that the competition agency's detection of cartels does not exclusively rely on leniency because this would undermine the effectiveness of the programme as cartelists would perceive that the agency's only source of detection stems from self-reporting and hence diminish the fear and/or real prospect of being caught. Accordingly, it is sensible to point out that 'leniency is not a substitute but a complement to the other methods of collecting intelligence and evidence of antitrust violations'.[41] Leniency over-reliance carries the seed of the programme's own destruction and accordingly many commentators alert against such risk,[42] especially for non-mature competition regimes.

To enhance the fear of the detection, competition agencies normally advertise the fruits of their enforcement activity in the media[43], notably, through the publication in local newspapers of their infringement decisions and the sanctions imposed therein. This not only increases the perception of enforcement and deterrence on firms engaged in cartel activity, but also raises awareness of honest businessmen not engaged in cartel activity and the society at large. Likewise, dawn raids by competition agencies (a procedural step preceding most cartel sanctions) boost the perception of enforcement. Advertising by the competition authority of both the competition law framework (including the existence and availability of a leniency programme) and the results of its enforcement agenda is particularly relevant in developing jurisdictions where knowledge of competition law is scarce, since knowledge

[40] See OECD (n 27) 5.

[41] Wils (n 29) 22.

[42] For instance, Kovacic, "Leniency and Competition Authority Governance", in Beaton-Wells and Tran (eds), *Anti-Cartel Enforcement in Contemporary Age: Leniency Religion* (Hart 2015) 123-135.

[43] COFECE, "10 years since the implementation of the Federal Economic Competition Commission's Leniency Program: what has been its impact?" (2017) 5, stressing that advertisement of the leniency programme by the competition agency is crucial to its success. Similarly, it is reported that Colombia's competition agency "deliberately leverages news media to highlight for the public and the business community in particular its increasingly effective antitrust enforcement in Colombia", see Dillon and De los Rios Quiñones, "Colombian Cartel Leniency and U.S. DOJ Leniency: Different Approaches to the same Objectives", ABA Antitrust Spring 2015 Newsletter, available at https://www.dillonlawgroup.com/colombian-cartel-leniency-and-us-doj-leniency/ (accessed on August 10, 2017).

by economic agents is a precondition for deterrence as well as to attracting leniency applications.

Taking into account the first two cornerstones, it is patent that the risk of cartel detection and the threat of severe sanctions are closely intertwined as no firm would self-report its engagement in a cartel if there is no realistic probability that the competition agency may, firstly detect the cartel, and secondly, severely sanction its members.

4.3 Transparency, predictability and certainty in enforcement

As a third and last pillar, an effective leniency programme shall account for transparency, predictability, and certainty.

Accumulated experience, especially that stemming from the United States' 1978 original programme, has shown that predictability is essential to a successful leniency programme because it enables an applicant to 'predict with a high degree of certainty how it will be treated if it reports the conduct and what the consequences will be if it does not'.[44]

For the most part, a firm's decision to submit a leniency application relies on a cost-benefit analysis. Therefore, for a firm assessing whether it is convenient to apply it is crucial to gauge with certainty and predictability the conditions under which leniency will be granted by the competition authority and, if so, the extent of the benefits arising therefrom.

Under the United States' original leniency programme, immunity was not automatic but rested on the Department of Justice's prosecutorial discretion. The uncertainty as to whether immunity would be effectively granted by the Department of Justice rendered, among other reasons, the original leniency programme unsuccessful.[45]

There is a wide consensus that predictability is the most difficult cornerstone to accomplish because a competition agency "has to be willing to make the ultimate sacrifice for transparency -the abdication of prosecutorial

[44] Hammond (n 28) 18.

[45] The United States' original leniency programme received on average one application per year, however, it was revised and modified in 1993. Notably, the prosecutorial discretion was supplanted by an automatic grant of immunity, among other changes. The results were immediate as the revised programme received on average 12 applications per year up to 2003, and by 2010, the yearly average of applications increased to approximately 20. See O'Brien (n 31) 18.

discretion".[46] This is obviously something hard to do for a competition agency whose prime institutional command is generally to punish cartelists. Sanctioning cartels is deeply rooted in a competition agency's DNA. Nonetheless, as past experience has shown, the benefits for a competition agency deriving from self-restraining its prosecutorial discretion and running a predictable and transparent leniency programme certainly outweigh the costs of letting a cartelist escape the sanction in exchange for cooperation.

Likewise, the complexity of attaining this cornerstone lies in the fact that predictability "is a journey, not a destination. Transparency is an ongoing goal that cartel enforcers strive to achieve each day in every policy and enforcement decision they make".[47] Hence, it is reasonable to conclude that achieving transparency and predictability would constitute a tough hurdle for a new competition authority or one that, albeit not new, holds a bad reputation for being arbitrary or unreliable.

The ICN acknowledges the prime importance of transparency for leniency programmes and recommends competition agencies to "ensure that their leniency policies are clear, comprehensive, regularly updated, well publicised, coherently applied, and sufficiently attractive for the applicants in terms of rewards that be granted".[48] In line with the ICN recommendation, many jurisdictions have published guidelines or documents answering frequently asked questions, whereby a competition agency provides full information about the programme's features.[49]

Despite the particular importance of transparency and predictability to achieve a successful leniency programme, it is worth underscoring that such attributes must without exception characterise the entire enforcement activity of any competition agency, irrespective of whether they operate a leniency programme.

4.4 Coordination and Cooperation as a Fourth Cornerstone?

In addition to the three cornerstones traditionally identified by scholars and enforcers, a successful leniency programme also requires competition agencies to attain a great deal of coordination and cooperation both internally and externally, so that the effectiveness of the programme is

46 Hammond (n 28) 19.
47 O'Brien (n 31) 24.
48 ICN (n 22) 6.
49 ibid 20.

not hampered by other potentially conflicting policies pursued by the competition agency or by decisions adopted by the courts. Therefore, this paper argues that coordination and cooperation could be viewed either as a discrete fourth pillar for the success of leniency programme or as a sub-set of the third pillar relating to predictability and transparency.

As to the internal coordination with the remaining policies executed by the competition agency, it is necessary to keep in mind that leniency is just one of many tools, albeit likely the most efficient, to detect and sanction cartels. Therefore, "designing an effective leniency programme also requires careful consideration of the other antitrust enforcement policies" because "immunity programmes do no operate in a vacuum".[50] Consequently, leniency shall not be considered an end on itself, but just a tool to detect and punish cartels despite the obvious temptation of competition agencies to rely almost exclusively on leniency to fight cartels. In this regard, many commentators have warned against the abuse of leniency, because "over-reliance on leniency at the expense of investment in other detection tools undermines the perceived threat of detection, independent of such policies".[51]

On a different note, but one that also calls for more coordination within competition agencies, is the possibly conflicting relationship between leniency programmes and civil damages actions.

Leniency programmes are a fundamental tool in a competition agency's public enforcement toolkit as they are a major stream of new cartel investigations and they increase cartel deterrence. Not less importantly, private enforcement complements public enforcement by reinforcing public deterrence as well as provides compensation for cartel victims.

Disclosure of leniency confidential information is a double-edged sword, as it can encourage private litigation by providing victims with crucial information that will allow them obtaining redress in courts, but can by the same token diminish the incentives of cartelists to self-report, which would in

[50] Call for countries contributions paper prepared by the OECD's Secretariat for the 14th Latin American and Caribbean Competition Forum, 12-13 April 2016, Mexico City, "*Session II: Leniency programmes in Latin America and the Caribbean: Rules, reforms and challenges*", 4.

[51] Beaton-Wells (n 14) 3.

turn significantly affect a competition agency's detection powers and subsequent follow-on private litigation.[52]

Such tension between public and private enforcement is not irreconcilable, and begs for a coherent and harmonious approach within the competition agency in relation to, on the one hand, fostering private damages actions and, on the other hand, protecting the confidentiality of the leniency submissions it receives. Normally the solution to this tension materialises firstly in the form of a judicial decisions, followed by the adoption of some sort of regulation.[53]

On the external front, it is of the utmost importance that competition agencies educate courts on the influence that judicial decisions can exert on the effectiveness of a leniency programme and, more broadly, on the fight against cartels. The following two examples clearly demonstrate how a successful leniency programme requires competition agencies to strive for coordination with the courts. Firstly, on several occasions the US Department of Justice had to appear before domestic courts and submit *amicus curiae* briefs opposing to the discovery of information obtained through its leniency programme.[54] Secondly, courts reviewing cartel decisions (irrespective of

[52] The referred tension is clearly framed by the European Commission which argues that leniency programmes "have proved to be useful for the effective investigation and termination of cartel infringements and they should not be discouraged by discovery orders issued in civil litigation. Potential leniency applicants might be dissuaded from cooperating with the Commission under this Notice if this could impair their position in civil proceedings, as compared to companies who not cooperate. Such undesirable effect would significantly harm the public interest in ensuring effective public enforcement of Article 81 EC in cartel cases and thus its subsequent or parallel effective private enforcement", EU Commission Notice on Immunity from fines and reduction of fines in cartel cases (2006/C298/11) para. 6.

[53] This was the case in the European Union. The adoption of a leniency programme (firstly in 1996, revamped in 2002 and 2006), triggered the decision by the European Court of Justice in *Pfleiderer* (case C-360/09 [2011] ECR 1-5161) in 2011. Thereafter, the Damages Directive (2014/104/EU of 26 November 2014) was adopted in 2014, which devotes the whole chapter IV to the disclosure of evidence in proceedings obtained through leniency and settlements.

[54] This occurred in several cases, for example, in *re Micron Technology, Inc. Securities Litigation*, No. 09-mc-00609 (Doc. No. 17) (D.D.C. Feb. 1, 2010), where the United States Department of Justice opposed to discovery and stated that "the government's disclosure of its investigative memoranda will strongly damage the integrity of the Division's leniency program, current open investigations, and the ability to pursue investigations in the future".

whether they derive from leniency) must take into consideration the relevance that severe sanctions have for the success of a leniency programme and, in turn, in the fight against cartels. Should courts systematically reverse (or significantly reduce) the fines imposed by competition agencies, such judicial approach will certainly jeopardize the deterrent effect of fines and thus endanger the whole effectiveness of the leniency programme.[55]

External coordination in leniency is especially needed in those jurisdictions where enforcement of competition law is vested in more than one body. Most commonly, in jurisdictions where the criminal prosecution of cartels is entrusted to one body (normally, an ordinary or specialized public prosecutor) whilst civil enforcement is vested on the competition agency. To operate an efficient leniency programme, the different competition enforcers must coordinate their approach towards, among other things, criminal immunity and the protection of confidentiality in leniency applications. Conflicts arising from this kind of lack of coordination are frequent and have been reported in several jurisdictions.

Additionally, a leniency programme's coordination with the public policies carried out by other areas of the administration is advisable, particularly, in relation with anti-corruption leniency programmes.[56]

Furthermore, coordination and cooperation among the competition agencies of different jurisdictions is important to perform simultaneous dawn raids in cases arising from leniency. A successful example is the Refrigerators Compressors cartel, which began with a leniency application in Brazil, and dawn raids were simultaneously executed in Brazil, United States, Germany, Denmark and Italy. Lack of coordination between agencies (for instance, a leak of information) would have simply spoiled the success of the parallel investigations.[57]

* * *

To summarize, even the most technically sound leniency programme will fail to deter and detect cartels if it is not underpinned on the cornerstones explained above, i.e. threat of detection, severe sanctions, predictability, coordination, and cooperation. In fact, most jurisdictions have

[55] For instance, this problem has been reported in Chile and Peru.

[56] For instance, lack of coordination on this matter has been reported in Brazil and Mexico.

[57] Silva Pereira Neto and Casagrande, "Recent Developments in Brazilian Competition Law and Policy", CPI Antitrust Journal, July 2010 (1) 5.

adopted leniency programmes largely based on the United States' experience, however, not all of them have delivered equally successful results, but only those which were firmly based upon the cornerstones of an effective leniency programme.[58]

In this regard, young antitrust jurisdictions desiring to adopt a leniency programme should firstly focus on achieving the referred cornerstones, and only then turn to focus on the internal features of the programme itself. This lesson is confirmed by the Latin American experience, which is addressed in section V below.

Most revolutions entail some level of wishful thinking and the 'leniency revolution' is not an exception. The false belief that leniency will provide an instant remedy to all the competition agency's shortcomings seems unavoidable. Therefore, the temptation for young antitrust jurisdictions to put the cart before the horse (i.e. adopting a leniency programme without first focusing on achieving its cornerstones) is understandable although highly inadvisable.

5. The Latin American Experience

Prior to analyzing how Brazil, Mexico, Chile and Colombia have striven to achieve the cornerstones of a successful leniency programme, it is useful to briefly set forth certain social, economic and cultural characteristics *generally* present in Latin American countries, which necessarily influence and condition the way in which competition law is designed and implemented in the region:[59]

[58] In Latin America, Panama and Ecuador stand out as examples of jurisdictions which although formally adopting a leniency programme (in 2007 and 2011, respectively) have not had yet any prosecutions deriving from leniency. As of March 2016, Ecuador received only one leniency application while Panama nil. The immaterial results yielded by leniency in these jurisdictions are highly likely explained by the absence of the above referred cornerstones. For instance, Ecuador has not decided a single cartel case since the introduction of the new competition law in 2011, thus cartelists have no fear of being detected by the competition agency, whereas cartel penalties in Panama are not deterrent (i.e. maximum fine is US$1 million), hence cartelists would most probably decide to cartelise and pay the bill, if and when they are detected.

[59] Most of these characteristics are stated by Javier Tapia in "Increasing deterrence in Latin American competition law enforcement regimes", in Richard Whish and Christopher Townley (eds), *New Competition Jurisdictions: Shaping Policies and*

(a) Large social inequality and high levels of poverty and indigence;[60]

(b) Wide-spread corruption,[61] which necessarily entails an important degree of disregard for the rule law both from the public and private sector;

(c) Most industries exhibit a high degree of concentration,[62] derived from former state intervention in the economy. Furthermore, Latin American countries have historically held "a tolerant if not supportive view of cartels".[63] On a related note, Latin American markets are normally insulated from foreign competition through the erection of high entry barriers,[64] particularly, trade and non-trade import restrictions; and

(d) Lack of competition culture,[65] which is manifested in various ways, and across most of the sectors of the society. On the one hand, businessmen in Latin America are for the most part used

Building Institutions' (2012) 142. Similarly, Tapia and Ditzel Faraco, "Latin American antitrust law and policy: An overview of three jurisdictions -Brazil, Chile and Colombia", in Duns, Duke and Sweeney (eds), *Comparative Competition Law* (Elgar 2015) 473-474.

[60] *Comisión Económica para America Latina y el Caribe* (CEPAL) reports that in 2014 average poverty in Latin American countries was 28% of the population while average indigence reached 12%. See CEPAL, *Panorama Social de América Latina* (2014) 16.

[61] According to the 2015-2016 World Economic Forum's Competitiveness Rankings, which survey and ranked 140 nations according to their levels of competitiveness, in the field of "Ethics and Corruption" Chile stands #33, Mexico #121, Colombia #126, and Brazil #138.

[62] Same report in footnote 59, in the field of "Extent of Market Dominance", which measures whether corporate activity is dominated by a few business groups or spread among many firms, out of a 140 surveyed nations Brazil ranks #45, Mexico #103, Colombia #108, and Chile #129.

[63] See IDB and OECD, 'Fighting Hard Core Cartels in Latin America and the Caribbean', 2. Available at: http://www.oecd.org/daf/competition/prosecutionandlawenforcement/38835329.pdf

[64] Same report in footnote 59, in the field of "Foreign Competition", which assesses the openness of a country to foreign competition (e.g. prevalence of tariff and non-tariff barriers, foreign ownership, business impact of rules on foreign direct investment, burden of customs procedures), out of a 140 surveyed nations Chile ranks #34, Mexico #80, Colombia #109, and Brazil #136.

[65] See IDB/OECD (n 63) 2.

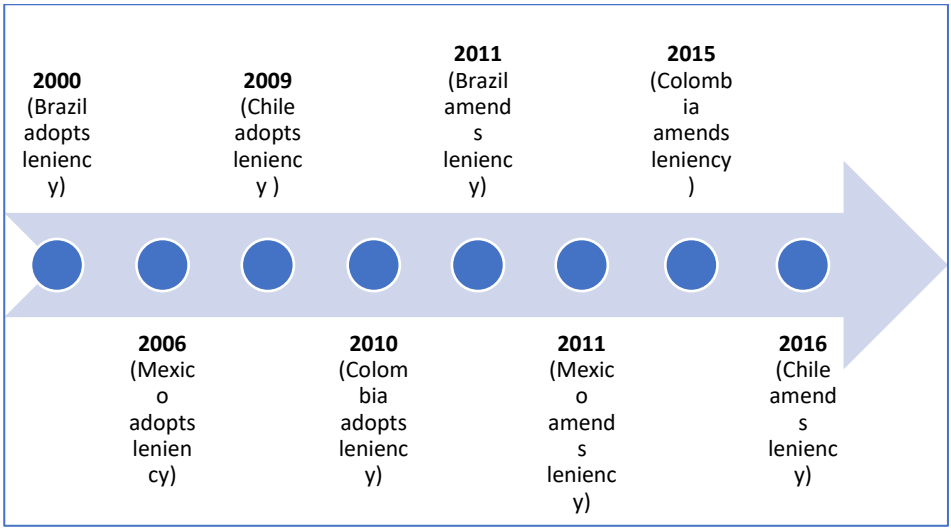
> to be favored by the government sitting at office, rather than truly competing on the merits for customers. On the other hand, governments in the region have not been consistent throughout the years to convey society with the benefits steaming from a culture of competition. As a contributing factor to the lack of competition culture, there are still large portions of the population that are ideologically biased and are under the belief that competition law is a foreign value imposed by developed countries interested in exploiting less developed ones.

In view of the above characteristics, it sounds sensible to assert that "Latin American markets are *prima facie* prone to cartelization".[66] Therefore, if markets in Latin American countries are particularly inclined to cartel formation, it is reasonable to argue that leniency programmes have a larger potential to detect cartels in this region than in other more law-abiding jurisdictions. However, it is also the case the absence of a credible threat of severe sanctions for cartelists in most Latin American jurisdictions "may limit the potential benefits of leniency programmes" in the region.[67]

As shown in the timeline below, the "leniency revolution" reached Latin America in the early 2000s and expanded to most jurisdictions in the region. Brazil was a regional pioneer and introduced leniency in 2000, whilst Mexico followed suit in 2006, Chile in 2009 and Colombia in 2010. Since 2011 this revolution has consolidated as countries learnt from experience and introduced the first set of leniency reforms.

66 Tapia (n 59) 142.

67 See IDB/OECD (n 63) 16.



In hindsight, the leniency experience in Brazil, Mexico, Chile, and Colombia can generally be branded as a success, despite the varying outcomes and timings to deliver positive results. A brief comparative analysis of the leniency experience in these four jurisdictions follows next.

5.1 Brazil

Brazil implemented its leniency programme in 2000, being the first Latin American country to effectively implement such tool.[68] The positive results were almost immediate as the country's first leniency agreement was executed in 2003.[69] Since then, the Brazilian competition authority[70] has

[68] In line with the global trend towards convergence of leniency programmes, Brazil's leniency programme is similar in many respects to that of the United States. See Barnett, "Perspectives on Cartel Enforcement in the United States and Brazil" (28 April 2008), available at: https://www.justice.gov/atr/speech/perspectives-cartel-enforcement-united-states-and-brazil.

[69] Particularly on 8 October 2003. In 2008 that date was officially established as the Anti-Cartel Enforcement Day in commemoration of the first ever leniency agreement to be executed in Brazil. See OECD/IDB, Latin American Forum, "Session I: Using Leniency to Fight Hard Core Cartels" (9-10 September 2009, Santiago, Chile) 3.

[70] The Administrative Council for Economic Defense (CADE) is Brazil's competition law enforcer, which is entrusted with administering the leniency programme.

executed more than 72 leniency agreements with companies and individuals that had allegedly participated in cartel conduct.[71]

This is remarkable considering that CADE's first cartel decision was issued only in 1999. It also indicates that Brazil stands out as an excellent example of how a young antitrust jurisdiction can implement a successful leniency programme in roughly 15 years. Special regard to the Brazilian experience should be paid by the rest of the Latin American countries given that they all share, albeit to varying degrees, the social, economic and cultural traits stated at the beginning of chapter 5.

As explained in more detail below, the key to the success of Brazil's leniency programme is its firm reliance on severe sanctions (in particular, CADE's commitment to increasing fines over time and criminally prosecuting individuals engaged in collusion), fear of detection (e.g. CADE's increasing use of dawn raids), and the adoption of clear, fair, and predictable rules to improve the attractiveness of the programme.[72]

The Brazilian competition regime provides serious sanctions for cartel behaviour. Companies can be sanctioned with fines ranging from 0.1% to 20% of their gross revenue whilst individuals involved in the conduct can receive fines varying between 1% and 20% of the fine imposed on their respective companies.

Brazil's increased efforts against cartels can be shown as CADE's fines based on the percentage of the sanctioned companies' revenue picked up over time, even though the latest modification to its competition law actually reduced the maximum applicable fines.[73] As an illustration of this trend, in its first cartel decision in the flat steel market in 1999 CADE set the fine at the

[71] Brazil's leniency statistics are condensed by CADE and are available at: http://en.cade.gov.br/topics/leniency-program (accessed on 9 November 2017).

[72] Similarly, Ana Paula Martinez argues that the effectiveness of Brazil's leniency programme "is built mainly on three pillars: fear of detection (with increasing numbers of dawn raids and wiretaps, as a result of the cooperation with criminal authorities), threat of severe sanctions (with record fines and jail sentences), and efforts to promote transparency". See Martinez, "Challenges Ahead of Leniency Programmes: The Brazilian Experience", Journal of European Competition Law & Practice (Vol. 6, No. 4, 2015) 260.

[73] The previous competition law no. 8,884/94 provided the possibility of levying higher fines on companies (i.e. up to 30% of the company's revenue) than the current competition law no. 12,529/11 (i.e. up to 20% of the company's revenue), however, despite the legislative lowering of the ceiling on fines, in practice the relative weight of CADE's cartel fines has increased over time.

statutory minimum percentage of 1% of the firms' turnover whereas in the sand extraction cartel decision of 2008 fines amounted to 22.5% of the firms' turnover.[74]

Cartels are not only subject to administrative fines in Brazil, but also to criminal sanctions. Pursuant to law no. 8,137 of 1990, individuals involved in cartel behaviour can be imprisoned from 2 to 5 years. In this regard, the OECD has regarded Brazil as one of the most active nations when it comes to criminal prosecution of cartels.[75]

Jointly with the adoption of a leniency programme in 2000, CADE was granted the power to carry out dawn raids and inspections. Ever since the first dawn raid in 2003, CADE use of this investigative tool has steadily grown throughout the years. It is not striking that the first leniency application was made in 2003, immediately after the first two dawn raids ever carried out by CADE, which reveals the close link between the fear of detection and cartelists blowing the whistle.

Since the adoption of its original leniency programme in 2000, Brazil has been taking incremental steps to achieve further predictability and transparency, which as explained above, is crucial to the successful outcome of any leniency programme. On this regard, Brazil's leniency programme was modified and consolidated with the enactment of Brazil's new competition law no. 12,529 in 2011.

Arguably the most relevant change in such respect is that Brazil has amended its competition law (as recommended by the OECD)[76] to eliminate the uncertainty as to whether a successful leniency applicant is entitled to full criminal immunity. Under the previous competition law no. 8884/94 it was unclear whether a leniency recipient would obtain full criminal immunity or exclusively in relation to the crimes listed in the Economic Crimes Law no. 8,137/90. To dispel the uncertainty as to the rewards derived from the programme and thus increase cartelists' incentives to come forward, the legal wording was amended and the current competition law no. 12,529/11 clarifies that a leniency recipient is entitled to full criminal immunity.[77]

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[74] OECD/IDB, Latin American Forum, "Session I: Using Leniency to Fight Hard Core Cartels" (9-10 September 2009, Santiago, Chile), 4.

[75] OECD, *Competition Law and Policy in Brazil, A Peer Review* (2010) 18.

[76] OECD, *Competition Law and Policy in Brazil, A Peer Review* (2005) 111.

[77] Like in Brazil, uncertainty in connection with criminal liability was also a shortcoming of the original US leniency programme. As advanced above, the US

A further example of Brazil's attempts towards increased predictability is CADE's publication of its first Leniency Guidelines[78] in June 2016, which explain in detail how the leniency programme works.

Countering Brazil's efforts to increase the predictability of its leniency programme, there are certain factors that undermine the incentives of cartel members to self-report in Brazil, and which are addressed below.

Firstly, the fact that leniency recipients are potentially subject to full damages compensation affects the predictability of the programme. Insofar as private damages litigation remains low in Brazil this is not a pressing issue. Nevertheless, should the number and economic significance of the actions brought by private parties soar, Brazil's leniency programme will certainly loose attractiveness with a consequent decrease in leniency applications, which in turn will lead to less cartels being tackled by CADE.

Secondly, the infamous leakage to the media of confidential information contained in a leniency agreement occurred in Brazil in 2013 has severely affected the programme's credibility, especially in the eyes of foreign companies.[79] Aggravating the uncertainty regarding the disclosure of confidential leniency information, the Brazilian Superior Court of Justice recently ruled that, if the leniency materials are deemed essential for private enforcement, third parties should have access to leniency materials before a final decision is reached by CADE.[80] Such a decision negates CADE's position not to disclose leniency agreements and related documents until a final decision on the case.

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revamped its leniency programme in 1993 clarifying that successful leniency applicants are entitled to full criminal immunity, and therefore the individuals involved would not be subject to imprisonment. The experiences in both the US and Brazil demonstrate that predictability -especially when related to whether an executive could spend jail time- is of paramount importance to a successful leniency programme.

[78] Available at: http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf (accessed on 20 June 2017).

[79] Martorano, "The Leniency Avalanche in the first 5 years of the Brazilian Antitrust Law: Improvements achieved and challenges ahead", in *Brazilian Antitrust Law (Law No. 12,529/11): 5 years* (IBRAC 2016) 243.

[80] Celidonio Neto, "Five years of anti-cartel enforcement under the new Brazilian Antitrust Law: how changes in the competition regulatory framework balanced the decision matrix in favour of cooperative solutions", in *Brazilian Antitrust Law (Law No. 12,529/11): 5 years* (IBRAC 2016).

To remediate the negative effects of the two factors mentioned above, CADE published in December 2016 a draft resolution which intends to "foster antitrust damages actions in the country in a complementary and harmonious way with the antitrust authority's investigations" as well as to "align the rules related to the access of the documents in CADE with the best international practices".[81]

Thirdly, some commentators have expressed concerns that the lack of coordination between the antitrust leniency programme administered by CADE and other existing leniency programmes in Brazil[82] (i.e. those established by the anti-corruption and criminal organization laws) are denting the predictability of the regime.

Unquestionably, Brazil is at the forefront when it comes to the fight against cartels and leniency in Latin America. According to the OECD, "Brazil has an active leniency programme, which is generating applications and cases",[83] and has proven "to be quite successful".[84] Provided that Brazilian competition authorities overcome the challenges discussed herein, primarily in furtherance of predictability and transparency, the leniency programme should constitute an even more effective tool to enforce competition law in Brazil.

5.2 Mexico

Mexico adopted its first leniency programme in June 2006. Despite the excitement caused by the adoption of leniency and what such new tool could entail in terms of cartel busting for Mexico, "historical records show that the first program did not have the success expected".[85]

The unsuccessful start was unrelated to the features of the leniency programme itself, which following the leniency global convergence trend

[81] Available at: http://en.cade.gov.br/press-releases/cade-submits-for-public-consultation-resolution-on-procedures-related-to-the-access-to-documents-from-the-antitrust-investigations (accessed on 10 August 2017).

[82] Alves Guimaraes, "Interface between the Brazilian Antitrust, Anti-corruption, and Criminal Organization Laws: the Leniency Agreements", in *Brazilian Antitrust Law (Law No. 12,529/11): 5 years* (IBRAC 2016).

[83] OECD, *Competition Law and Policy in Brazil, A Peer Review* (2010) 15.

[84] Ibid 77.

[85] COFECE (n 43) 6.

identified above, resembled those adopted in other jurisdictions.[86] On the contrary, the deficiencies were more fundamentally enshrined in the lack of the cornerstones for effective leniency in the Mexican competition regime. Notably, cartel fines were low and thus not deterrent, and predictability and certainty were absent in the enforcement activity[87] performed by the Mexican competition agency.[88]

Mexico's competition regime needed important modifications for its leniency programme to deliver the expected results. Accordingly, Mexico carried out a sizeable modification of its competition law regime in 2011 with the purpose of increasing cartel deterrence and thus the attractiveness of its leniency programme.

Firstly, Mexico abandoned the fixed-amount cap on cartel fines and replaced it with a variable ceiling, and nowadays cartelists can be fined with up to 10% of their annual turnover.[89]

Secondly, Mexico criminalised cartel conduct with imprisonment from 5 to 10 years. Despite the huge step of criminalising cartel conduct in 2011, the Mexican regime still had a procedural hurdle that prevented the effective criminal prosecution of cartels, i.e. COFECE could press criminal charges only after reaching a final decision with *res iudicata* effects. Said obstacle was cleared with a new competition law reform in 2014, which now

[86] See Mexico chapter by Guerrero Rodriguez and Michaus Fernandez, in *The Cartels and Leniency Review*, Varney and Terzaken (eds.) (5th Edition, Law Business Research 2017) 189. Similarly arguing that the Mexican leniency programme is influenced by its European and American counterparts, see Mariscal and Mena-Labarthe, 'Leniency Programs in Latin America: "New" Tools for Cartel Enforcement' (Competition Policy International, Autumn 2010, Volume 6, No. 2) 174.

[87] Reporting on the flaws of the Mexican competition regime affecting leniency, Guerrero Rodriguez and Michaus Fernandez (n 86) 183 and COFECE (n 43) 6.

[88] Today the administration of the leniency programme is entrusted to the Federal Economic Competition Commission's (COFECE, for its acronym in Spanish), which is the Mexican competition agency. It is worth mentioning that the Federal Institute for Telecommunications is entrusted with competition matters in the sectors of telecoms, radio and broadcasting.

[89] This change brought Mexico's fining policy in line with most antitrust jurisdictions, which determine cartelists' fines by reference to a percentage of the offender's turnover rather than a fixed cap. The new approach does not only boost deterrence, but also relies on information which is "relatively easy to obtain, normally collected and audited and kept on records by the companies". See ICN, "Setting of Fines for Cartels in ICN Jurisdictions (2017)", Report to the 15th ICN Annual Conference (Porto, May 2017) 55.

allows COFECE to press charges with the Criminal Public Prosecutor before reaching a final administrative decision.[90] Despite the modifications of the regime to introduce criminal sanctions for cartel conduct, as of today, there has only been one single case in which COFECE sought the criminal indictment of the individuals involved in a cartel.[91] Although an increased level of deterrence has been attained by criminalising cartels, further deterrence (and in turn, more leniency submissions) are likely to follow after individuals responsible for cartel behaviour serve time in prison.

On the other hand, to increase the threat of detection, the 2011 amendments granted COFECE the much-needed power to carry out unannounced inspections.[92] As explained above, surprise inspections on business premises is fundamental to convey a real fear on cartelists of being detected.

In terms of the third pillar of predictability and transparency, stakeholders do not report serious flaws in the Mexican leniency programme. Arguably this is related to the fact that criminal enforcement of cartels has been recently introduced and that private litigation is yet in a nascent stage in Mexico.[93]

The recent criminalisation of cartels (once indictments become more frequent and individuals effectively serve time in prison) should increase the number of leniency applications in Mexico. Close cooperation between COFECE and the Federal Criminal Prosecutor is expected to avoid conflicting positions (for instance, in relation to safeguarding confidential leniency materials),[94] which would negatively impact on cartelist's incentives to come

[90] Valdes-Abascal and Santiago-Abrego, *Cartel Regulation* (Getting the Deal Through 2016) 200.

[91] In early 2017, for the first time, COFECE pressed criminal charges against three individuals involved in a bid-rigging cartel in the health market. COFECE's press release is available at: https://cofece.mx/solicita-cofece-accion-penal-contra-3-personas-que-de-acuerdo-a-sus-investigaciones-se-coludieron-en-la-venta-de-bienes-en-el-sector-salud (accessed on 18 December 2017).

[92] COFECE (n 43) 7. Prior to the 2011 reform COFECE had to request a judge's authorization to perform a dawn raid.

[93] Mexico's legislation does not allow stand-alone actions for cartel infringements, but only follow-on actions where an infringement decision from the competition authority predates the private action.

[94] Mariscal and Mena-Labarthe warn about how leniency programmes could be impaired by the lack of coordination between the competition authority and criminal prosecutors, see Mariscal and Mena-Labarthe, (n 86) 176.

forward. Cooperation is likewise advisable if and when private enforcement attains relevance in Mexico.

Also potentially affecting the predictability of Mexico's leniency programme, some stakeholders have reported that the existence of a parallel anti-corruption leniency programme for big rigging cases could be hampering the effectiveness of antitrust leniency in Mexico.[95]

On the other hand, COFECE has also taken measures to ensure that its leniency programme conveys certainty and transparency for all stakeholders. For instance, in 2016 COFECE had to adopt the unprecedented decision of revoking leniency to a non-cooperating applicant. Although such measures are very exceptional in the leniency world, they are not completely unheard of in other jurisdictions, since there are times in which competition agencies must adopt a tough stance and recall applicants that the benefits of leniency are reserved only for those parties that fully cooperate throughout the whole investigation. Some may argue that the revocation of a leniency application would always be prejudicial for the system's predictability, however, if the decision is fair and duly justified it can only reinforce the transparency of the programme.

Moreover, as part of the journey to enhance predictability and transparency, in 2010 COFECE issued its first guidelines explaining the functioning of its leniency programme, which were revised and amended with the same goal in June 2015.

To sum up, the leniency experience in Mexico has been one of gradual progress. By the time its first leniency programme was implemented in 2009, all of the pillars for effective leniency were absent as cartel sanctions were not dissuasive and the level of cartel detection was low. Nonetheless, as time elapsed, Mexico introduced several reforms to buttress its leniency programme, notably, increasing civil fines (through the deletion of its fixed-amount cap) and buttressing cartel detection by means of granting COFECE with vital dawn raid powers. Furthermore, the criminalisation of cartels (and the first criminal indictment in February 2017) has definitely increased the number of leniency applications in Mexico.

[95] In COFECE (n 41) 17-18, the Mexican competition agency highlights as one of the challenges ahead the need to coordinate and cooperate with the anticorruption authorities as certain offenses can fall under both the anticorruption and competition law frameworks.

5.3 Chile

Following the regional examples of Brazil and Mexico, Chile adopted its first leniency programme in July 2009.[96]

At the moment of introducing its first leniency programme, the Chilean competition regime lacked the cornerstones of effective leniency since cartel enforcement was limited, sanctions were weak, and the Chilean Competition Authority[97] was devoid of the necessary tools to effectively fight cartels.[98]

Against this background, the adoption of a leniency programme in 2009 was not isolated but part of a substantial overhaul of Chile's Competition Law DL 211/1973, which sought to equip the Chilean Competition Authority with the necessary tools to tackle cartels as well as to increase the level of fines to deter collusions.

Prior to the 2009 amendment of Chile's Competition Law, monetary penalties failed to be deterrent, thus the maximum fine was increased by 50% (from approximately US$15 million to US$22 million). Similarly to the Mexican experience addressed above, Chile's 2009 increase of its maximum fines despite representing an improvement, proved to be inadequate to both *ex ante* deter cartel formation and to *ex post* sanction cartelists. As a consequence, Chile's Competition Law was amended once again in 2016, whereby the fixed ceiling was abandoned and a variable maximum fine determined in relation to the offender's turnover was adopted.[99]

[96] The features of the Chilean leniency programme are based on the EU system. See Barahona, "Confidentiality of Leniency Material vis-à-vis Criminal Prosecution (Chile)", Journal of European Competition Law & Practice (Vol. 8, No. 4, 2017) 253.

[97] The Chilean Competition Authority is comprised of the *Fiscalía Nacional Económica* (FNE), a prosecuting body that investigates and presses charges; and the *Tribunal de Defensa de la Libre Competencia* (TDLC), a specialized court which adjudicates and decides the cases prosecuted by FNE.

[98] See OECD, *Competition Law and Policy in Chile: Accession review 2010* (2011) 50.

[99] Today, the Chilean Competition Law sets forth a maximum fine for cartelists amounting to 30% of the sales achieved while the collusion existed or twice the economic benefit achieved through the collusion. If determining the sales proves impossible, then a maximum legal fine of approximately US$53 million can be applied.

Additionally, the 2016 amendment criminalized cartels in Chile, and at present individuals involved in cartel conduct can be subject to imprisonment from 3 to 10 years, with at least 1 year of effective prison time.

It is very likely that the criminalization of cartels coupled with the increase in the level of fines will foster the number of leniency applications received by the FNE in the near future.

To strengthen the threat of cartel detection, which was low in the pre-leniency scenario, the 2009 amendment of Chile's Competition Law conveniently granted the FNE new investigatory tools to hunt cartels[100]. Most importantly, the FNE was given the power to carry out searches, inspections, wiretapping as well as ordering telecom companies to hand in communication records,[101] all of which require the authorization of the TDLC and a judge from the Court of Appeals.[102]

Shortly after the enactment of the original leniency programme and to enhance predictability for potential applicants, Chile published its first leniency guidelines in October 2009. Furthermore, as a consequence of the 2016 amendment, Chile revised and updated its leniency guidelines in March 2017.[103]

It is undoubtable that the adoption of harsher sanctions for cartelists (i.e. criminalization together with an increase in civil fines for cartels) as well as the higher prospects of cartel detection (achieved notably through the award of dawn raid powers to the FNE) will boost cartel deterrence and consequently lead to a surge in leniency applications in Chile. Nonetheless, at least three factors still distort the predictability (and thereby success) of Chile's leniency programme.

Firstly, the system is riddled with uncertainty as to whether successful leniency recipients are entitled to criminal immunity. Although a 2003 amendment to the Chilean Competition Law abrogated criminal

[100] Since the 2009 amendment of the Chile's Competition Law, all of the prosecutions brought by the FNE were originated on a leniency application and/or featured the use of dawn raids.

[101] IDB/OECD, "Recent Challenges for Cartel Combat: Chile's New Leniency Programme" (Latin American Competition Forum, 9-10 September 2009, Santiago, Chile) 5.

[102] Lizana, Piedra, Barahona, and Kubick Orrego, "Overview of Competition Law in Chile", in *Overview of Competition Law in Latin America* (IBRAC 2016) 110.

[103] Chile's leniency guidelines are available at: http://www.fne.gob.cl/wp-content/uploads/2017/04/Guidelines_Leniency_Cartel_Cases.pdf

sanctions for anti-competitive conducts, since 2008 certain criminal prosecutors casted uncertainty on the regime by bringing criminal charges based on article 285 of the Chilean Criminal Code (enacted in 1874), which punished artificially increasing prices with up to 3 years of prison. In December 2015 a Court of Appeals restored some level of certainty to the regime by blocking the criminal prosecutor's attempt to seek the imprisonment of certain individuals involved in the Retail Pharmacies cartel.[104] Despite the Court of Appeals' decision, some uncertainty remains as to whether prosecutors can seek the criminal enforcement of cartels, and this will certainly diminish the attractiveness of Chile's leniency programme.[105] The US and Brazilian experiences addressed above confirm that it is crucial for the success of a leniency programme to clearly provide whether criminal immunity will be awarded, as no businessman will self-report its involvement in a cartel if that will trigger the chance to be imprisoned.

Secondly, also generating uncertainty and closely linked to the first factor, certain criminal prosecutors began requesting the Chilean Competition Authority to disclose confidential information (including leniency applications and submissions) to criminally prosecute cartel behavior based on article 285 of the Chilean Criminal Code. This matter reached the Constitutional Tribunal of Chile,[106] which sided with the Chilean Competition Authority and denied access to the confidential materials filed in the framework of the Tissue Paper cartel investigation. At the core of the dispute, among other issues, was the public interest in running a predictable leniency programme to investigate collusions, and the devastating effect that breaching the confidentiality of applications would entail for Chile's leniency programme.[107]

Thirdly, the Chilean Supreme Court has repealed some decisions of the TDLC or substantially reduced the fines imposed therein,[108] which as

[104] Court of Appeals of Santiago (Chile), FNE v. Farmacias Ahumada (29 December 2015).

[105] It is also true that the 2016 amendment of Chile's Competition Law diminished the referred uncertainty since by creating a new and discrete cartel offence, Congress implicitly meant that article 285 of the Criminal Code is not applicable to cartels (if it ever was).

[106] Decision in Case No 2934-15-CCO (2016) Constitutional Tribunal, Chile, "*Contienda de competencia suscitada entre el Tribunal de Defensa de la Libre Competencia y la Fiscalía Regional Metropolitana Sur del Ministerio Público*".

[107] For a comment on the case, see Barahona (n 96) 253-256.

[108] Tapia (n 59) 160.

flagged in section 4.4 above decreases cartel deterrence and consequently the incentives of cartelists to self-report.

All in all, the Chilean leniency programme has been gradually consolidated[109] since its adoption in 2009, and improved with the 2016 amendment of the Chilean competition law. It is expected that the recent criminalization of cartels and the increase in the maximum civil fine will reinforce the incentives of cartelists to blow the whistle; however, these advances need to go in hand with increased efforts in the field of transparency and predictability, notably, as to the confidentiality of leniency materials and the criminal immunity of successful leniency applicants.

5.4 Colombia

Colombia's first leniency programme entered into force in August 2010.[110]

By the time of the enactment of its leniency programme, Colombia's competition system lacked the preconditions to guarantee the operation of a successful leniency programme.

In that regard, the OECD reported in 2009 that, despite SIC's efforts to tackle cartels "most cases were settled with the acceptance of undertakings from the companies without the imposition of significant penalties, the effect of which is to diminish the deterrent effect of these prosecutions".[111] At that time, maximum legal fines for cartel conduct amounted to 2,000 minimum monthly wages (at that time approximately US$427,000), which was undeniably low and far from creating any kind of deterrence on cartelists. To illustrate with an example, the whole Colombian cement industry was fined with the meagre amount of US$1.3 million for market allocation during 2005.[112] The suspicion that such fines were non-deterrent was corroborated by

[109] Opinion of the FNE's head Felipe Irarrazabal in *The Antitrust Review of the Americas 2017* (Global Competition Review, 2016) 122.

[110] Article 14 of Law 1340 of 2009 authorized the Colombian Competition Authority (i.e. the Superintendence of Industry and Commerce or SIC) to create a leniency programme, which was subsequently introduced by means of Decree 2896 of 2010.

[111] OECD, *Competition Law and Policy in Colombia, A Peer Review* (2009) 8.

[112] SIC's Resolution no. 051694 of 2008. As a further example of the non-deterrent effect of fines in the pre-leniency scenario, SIC imposed an insignificant fine worth US$2,260 to a company engaged in bid-rigging in a public tender for systematization services for district schools in Bogota. See OECD, *Competition Law and Policy in Colombia, A Peer Review* (2009) 22.

the fact that less than 5 years after (i.e. between January 2010 and December 2012) the very same companies (Cementos Argo, Cemex, and Holcim) engaged again in collusion in connection with the same product. However, this time the fines imposed by SIC under the new regime were considerably higher, and amounted to approximately US$68 million.[113]

In addition to the weak sanctions provided in the pre-leniency scenario, SIC lacked dawn raid powers, which as stated above, is an indispensable tool for any competition agency to effectively fight cartels.[114]

Against this feeble cartel enforcement scenario, the OECD rightly warned that Colombia's newly enacted leniency programme could not "be effective unless the SIC also establishes a reputation for imposing large, punitive fines on cartel operators".[115]

In this context, Colombia's Competition law underwent a substantial modification in 2009. As a buttress to the newly created leniency programme, the maximum financial penalties for cartel behavior were augmented and since then, Colombia's Competition Law foresees fines for cartelists of up to 100,000 minimum monthly wages (equivalent today to roughly US$25 million).[116] By increasing the maximum legal fine by 50 times, the Colombian competition regime moved in the right direction towards creating a real threat of severe sanctions on cartelists. This modification in the legal text was in turn

[113] SIC's Resolution no. 81391 dated 11 December 2017. See SIC's press release at: http://www.sic.gov.co/noticias/por-cartelizacion-empresarial-en-el-mercado-del-cemento-superindustria-sanciona-a-argos-cemex-y-holcim (accessed on 18 December 2017).

[114] The SIC has no formal dawn raid powers, but only the power to inspect premises provided that the investigated firm agrees to it. However, if the firm refuses to submit to the inspection without a valid justification, SIC may charge the firm with obstructing the investigation which foresees the same penalty as cartels. Certain delays in authorizing SIC's staff to access the premises as well as unexpected absences of key managers or employees, argues in favour of formally granting dawn raid powers to SIC.

[115] OECD, *Competition Law and Policy in Colombia, A Peer Review* (2009) 59.

[116] See article 25 of Law 1340 of 2009, which also provides a second and alternative parameter under which fines can amount up to 150% of the profits derived from the anticompetitive conduct. Since calculating the latter figure is complex, SIC generally calculates fines using the maximum fixed amount. In this regard, the OECD recognizes that "the option permitting fines of up to 150% of the illicit profits is unavailable as a practical matter, because the profits cannot effectively be calculated". See OECD, *Colombia: Assessment of Competition Law and Policy* (2016) 21.

accompanied by SIC's strong commitment to increase the level of fines for hard-core cartels.[117]

Despite the heightened deterrence brought about by the substantial increase in the maximum legal fines, it is nonetheless worth noting that the Colombia's Competition law still provides a fixed ceiling for fines.[118] As explained above whilst addressing the experiences of Chile and Mexico, maximum fines that refer to a specific amount of a certain currency achieve less deterrence vis-à-vis those that refer to variable ceiling (e.g. a certain percentage of a company's sales or turnover), as the former can be more easily factored into a cartelist's cost-benefit analysis. Moreover, a fixed-amount fine can have uneven results as small firms will be more deterred whereas larger and more resourceful firms will tend to be less deterred by the same fine.[119]

To further increase deterrence and incentivize whistle-blowing by cartelists, in 2011 Colombia criminalized big-rigging in public procurement with imprisonment from 6 to 12 years, fines up to 1,000 minimum monthly wages (approx. US$ 250,000) and debarment from public procurement of up to 8 years.

The combination of low fines (which ultimately resulted in a poor anti-cartel enforcement record) and the absence of formal dawn raid powers, largely explains the slow development of Colombia's leniency programme. To make its whistle-blower programme more predictable and appealing to cartelists, certain modifications were adopted in 2015 by means of Decree 1523/2015. As acknowledged by SIC, although the leniency programme was

[117] Both in 2013 and 2014, the average individual fine levied by SIC on firms engaged in cartel conducts more than doubled those imposed during the 2008-2012 period. See OECD, *Colombia: Assessment of Competition Law and Policy* (2016) 61.

[118] In September 2015 bill no. 38 of 2015 was introduced in the Colombian Senate to modify, *inter alia*, the methodology to calculate financial penalties under the Colombian Competition Law, however, it was withdrawn for political reasons in April 2016. Maintaining the current fining criteria of 100,000 minimum monthly wages, the bill sought to introduce several other fining parameters for SIC to determine fines, i.e. up to 10% of the offender's income, or up to 10% of the offender's assets, or up to 30% of sales related to the collusion, whichever is the highest. The bill's statement of purpose acknowledged that the current fix ceiling on fines of US$25 million proves inadequate to sanction and deter anticompetitive conduct by high-turnover companies and companies involved in long-lasting cartels.

[119] Also acknowledging that Colombia's fixed maximum legal fines may not act as sufficient deterrent for large firms, see OECD, *Colombia: Assessment of Competition Law and Policy* (2016) 21.

implemented in mid-2010 it only began to be fruitful in 2014, delivering important results in 2015.[120]

Despite the slow, albeit steady, progress made by Colombian leniency programme, there are still several important issues affecting its predictability and success.[121]

Firstly, Colombia's competition law system does not foresee criminal immunity for the first-in applicant in the case of public bid rigging, but only limited incentives consisting in reductions of one-third of the maximum imprisonment term (i.e. from 12 years to 8 years), 40% of the maximum fine (i.e. from 1,000 to 600 minimum monthly wages), and three years in the debarment from public procurement (i.e. from 8 to 5 years). These reductions in the extent of criminal liability would not be sufficient to lure leniency applicants, and it is certainly the prospect of serving time in jail – even if reduced- that will discourage any businessman from turning in.[122]

Secondly, a successful applicant under Colombia's leniency programme is potentially subject to full compensation of private damages, and this operates as a disincentive for cartelists to blow the whistle. Despite the fact that private damages actions in Colombia are still in a nascent stage,[123] in the future this could become an important factor affecting the attractiveness of Colombia's leniency programme.[124]

Thirdly, the Colombian regime foresees the possibility of granting confidential treatment to the identity of the leniency applicant upon request to

[120] *The Antitrust Review of the Americas 2017* (Global Competition Review, 2016) 125.

[121] Most of these negative factors were addressed in a legislative proposal, which was backed by the SIC, to amend Colombia's competition law, but as stated, unluckily such proposal has lost parliamentary status.

[122] The bill referred to above also aimed at granting criminal immunity to individuals involved in public procurement bid-rigging to make Colombia's leniency programme more attractive. However, such bill has been withdrawn from Congress.

[123] To date, there are no reported cases of successful awards of damages in Colombia. See Colombia chapter co-authored by Alberto Zuleta-Londono and Ximena Zuleta-Londono, *International Comparative Legal Guide to: Cartels & Leniency 2016* (Global Legal Group, 2016) 60.

[124] The withdrawn bill also dealt with this issue and proposed to limit the liability of a leniency successful applicant to the extent of its damages, as an exception to today's joint and several liability between cartelists. See OECD, *Colombia: Assessment of Competition Law and Policy* (2016) 62.

SIC,[125] but such treatment does not extend to the leniency application itself or to the accompanying evidence submitted to SIC. There is no express rule prohibiting SIC and/or other leniency applicants which may have obtained access to leniency materials through access to file, from disclosing such documents if required by a domestic or foreign court in the framework of a civil damages litigation. SIC has expressly recognized that this shortcoming in the current legislation can negatively impact the effectiveness of the leniency programme, and has thus advocated for the introduction of a prohibition to extend the scope of confidentiality to also cover leniency materials.[126]

Fourthly, as reported by SIC as also affecting the predictability and transparency of Colombia's leniency programme, is the statutory requirement that in order to be granted civil immunity, the first applicant must not have been the instigator or promoter of the collusion.[127] Leniency applications might be discouraged both in situations in which it is clear-cut who has been the cartel promoter, as well as those in which the converse is true (for instance, because members might have switched the leader role throughout time in a long-standing collusion).

Finally, unlike Brazil, Mexico, and Chile, Colombia has not yet issued leniency guidelines. The four factors tampering the predictability of Colombia's leniency programme identified above obviously call for greater and more urgent attention, however, the issuance of leniency guidelines would be a step forward towards reducing at least some the uncertainty surrounding its leniency programme.

6. Conclusions

In spite of the different outcomes, the leniency experiences in Brazil, Mexico, Chile and Colombia ratify that, first and foremost, a jurisdiction needs to lay the cornerstones that will enable the leniency programme's future success, i.e. (i) threat of severe sanctions; (ii) fear of detection; and (iii) predictability and transparency in enforcement.

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125 Article 15, Law 1340 of 2009.

126 OECD, Secretariat Background paper, "Leniency programmes in Latin America and the Caribbean: Rules, reforms and challenges" (14th Latin American and Caribbean Competition Forum, Mexico City, 12-13 April 2016) 15.

127 See OECD, *Colombia: Assessment of Competition Law and Policy* (2016) 62.

The relevance of achieving these three pillars in order to have a successful leniency programme is further confirmed by the fact that most leniency programmes in the world (i.e. not only those under analysis in this paper) are modelled on the United States leniency programme,[128] hence, the factors which might prevent the effectiveness of a particular leniency programme are most likely associated with the total or partial absence of the referred cornerstones in the competition law regime of a particular jurisdiction rather than with the intrinsic features of a the leniency programme itself.

Well-aware of the critical importance of these three cornerstones and that the "leniency revolution" would not magically put an end to all cartel behaviour, policy-makers in the surveyed Latin American countries while introducing leniency (or shortly thereafter through additional reforms) pledged to equip their competition agencies with the necessary investigatory powers (mainly, the power to carry out dawn raids) and stronger sanctioning powers (e.g. criminalization of cartels, elimination of fixed ceilings on fines). On their part, competition agencies actively deployed these new enhanced investigatory and sanctioning powers through a more aggressive cartel enforcement, which increased the fear of detection and the threat of severe sanctions on cartelists, generating further incentives on cartelists to blow the whistle.

The recent criminalisation of cartels and the abandonment of fixed ceilings for fines in both Chile and Mexico will undoubtedly boost their leniency programmes. On the other hand, Colombia may not take full advantage of its leniency programme as long as the fixed-amount ceiling on civil fines is not abolished and/or cartels (other than bid-rigging in public procurement) are fully criminalized. However, the experience in the European Union demonstrates that cartel criminalization is not an essential condition to have an effective leniency programme.

The experience in the reviewed jurisdictions also ratifies the predominant role that predictability and transparency play in having a successful leniency programme. To enhance the predictability of their leniency programmes, Brazil, Mexico and Chile adopted several steps, for instance, by clarifying the precise scope of the benefits granted by leniency

[128] As stated above, the leniency programmes adopted in Brazil, Mexico, Chile and Colombia are, to different extents, all modelled on the United States' leniency programme. This buttresses the finding of a global alignment or convergence trend in relation to the intrinsic features of leniency programmes.

(most importantly, whether full criminal immunity is available to successful leniency recipients) and publishing guidelines explaining the programme's functioning.

Alongside the three traditional cornerstones identified by commentators, a fourth one has been detected, namely, the need for cooperation and coordination on several fronts to have a successful leniency programme. For instance, greater internal coordination is required with the remaining policies carried out within the competition agency, especially to avoid the risk of over-relying on leniency. Also, a need for greater external cooperation with the courts reviewing cartel fines and ordering the disclosure of confidential leniency materials has been reported in the reviewed jurisdictions as diminishing the attractiveness of their leniency programmes. Additionally, the absence of coordination with parallel leniency programmes established by other domestic laws (e.g. anti-corruption laws) seems to be hampering the effectiveness of the leniency programmes in Mexico and Brazil.

Commentators in Brazil, Mexico, Chile and Colombia have identified the interface between leniency and private damages actions as one of the challenges that lie ahead once the latter increase in the region. Today, private damages actions are still underdeveloped in Latin America, however, this type of actions will most likely surge in the near future (as they did in the United States, the European Union, and almost everywhere else).

Once this occurs, cartelists will begin to factor-in the potential awards and litigation costs within their cost-benefit calculation when considering filing for leniency. In turn, competition agencies will need to assess the impact of private litigation on the incentives provided to potential applicants to come forward and report their involvement in a cartel. At that stage, we will likely witness the passing in the region of some kind of legislative cap on private actions as those imposed in the United States[129] or the European Union[130] because the prospect of hefty private damages awards

[129] See United States' Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) of 2004, which creates an exception to the ordinary treble damages to which a private plaintiff is entitled under section 4 of the Clayton Act. ACPERA limits the damages recoverable by a private plaintiff against a successful recipient of leniency to single or actual damages.

[130] See Damages Directive 2014/104/EU of the European Parliament and of the Council dated 26 November 2014, article 11, paragraph 4, which sets forth an exception to the general joint and several liability of cartelists, thus limiting the

will certainly discourage cartelists from blowing the whistle, thus endangering the capability of competition agencies to tackle collusions.

liability of immunity recipients to the damages caused to its direct or indirect purchasers as long as the other injured parties are able to recover full compensation from the other cartelists.