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ICN Cartel Working Group Subgroup 1 Webinar Series

Implementing Effective Leniency Programs: Lessons Learnt and Challenges Ahead”

Moderator: Mr Pedro Callol

Speakers:

- Mr Juan David Gutiérrez
- Mr David Fernández
- Ms Armine Hakobyan
- Mr Nick Wilkins
- Mr David Anderson



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ICN Tools and Guidance on Leniency

ICN Practical Guidance on Leniency


- 2020 Guidance on Enhancing Cross-Border Leniency Cooperation ([link](#))
- ✓ 2019 Report: Good practices for incentivising leniency applications ([link](#))
- ✓ 2017 Checklist for efficient and effective leniency programmes ([link](#))
- ✓ 2014 Anti-Cartel Enforcement Manual Chapter 2: Drafting and Implementing an Effective Leniency Program ([link](#))
- 2014 Leniency waiver templates and explanatory note ([link](#))

Future Work

- In 2022, in order to promote greater transparency and understanding of each other regimes, the CWG will ask its members to revise or update Country templates on anti-cartel enforcement regimes, including leniency policies ([here](#))
- These Templates:
 - are designed to highlight important features of members' anti-cartel systems
 - provide links to related materials on their websites, including relevant legislation, implementing rules and regulations, guidelines and information about cases
 - can be used for internal benchmarking exercise
- Each member is responsible for maintaining accurate and up-to-date information.



ICN Resources

- Webpage of the ICN Cartel Working Group - CWG:
<https://www.internationalcompetitionnetwork.org/working-groups/cartel/>
- CWG Webpage on Leniency:
<https://www.internationalcompetitionnetwork.org/working-groups/cartel/leniency/>
- ICN Training Video: Series II on Horizontal Restraints ([link](#))
 - ✓ Module II – 2: Leniency
 - ✓ Module II – 6: Encouraging Cartel Reporting 



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A dark red silhouette of a world map is centered on the slide, serving as a background for the main text.

Thank You



Leniency in Latin America

Juan David Gutiérrez, PhD
Prof. Universidad del Rosario

January 26, 2021

Antitrust law in Latin America and the Caribbean

- 23 national jurisdictions.
- 29 national competition authorities.
- 2 regional jurisdictions.



Source: Gutiérrez (2021)

First competition laws in Latin America

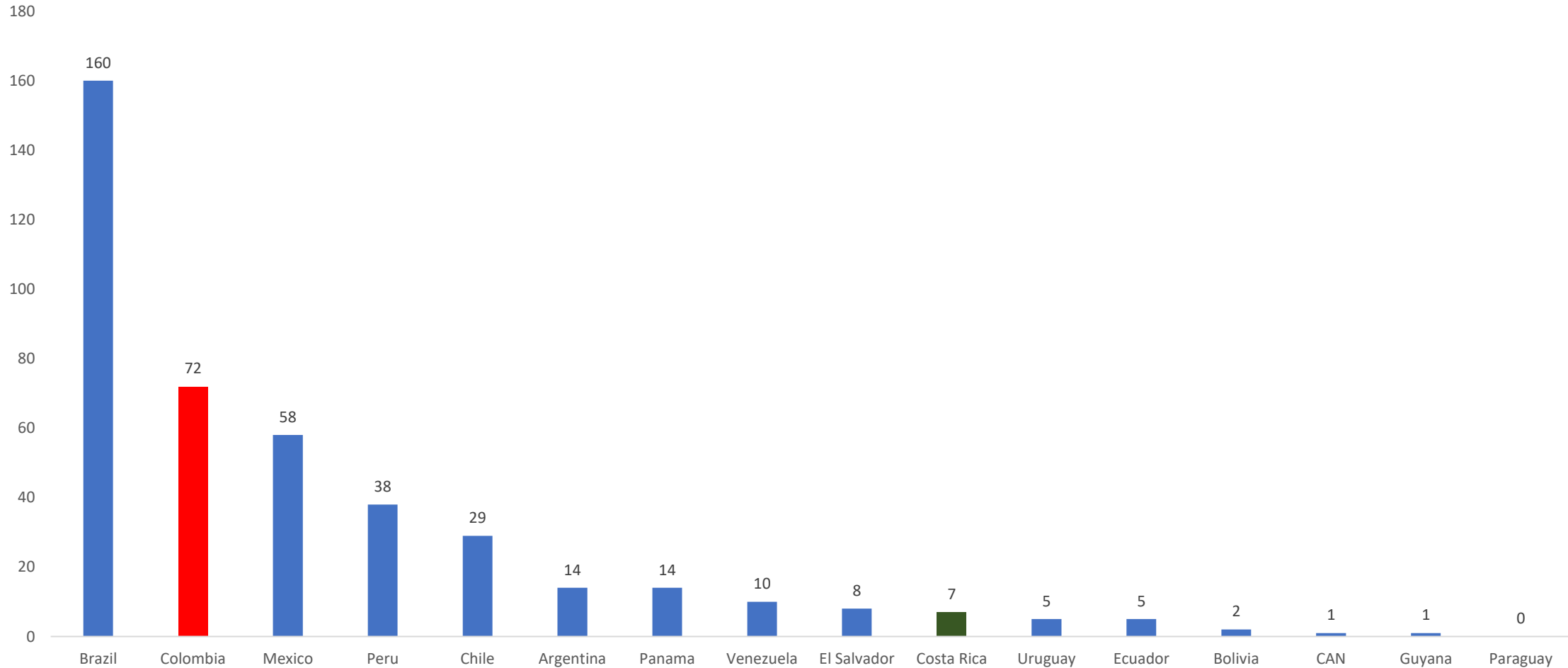
1. 1923 – Argentina
2. 1927 – Mexico
3. 1959 – Colombia
4. 1959 – Chile
5. 1962 – Brazil

6. 1991 – Peru
7. 1992 – Venezuela
8. 1993 – Jamaica
9. 1994 – Costa Rica
10. 1996 – Panamá

11. 2000 – Barbados
12. 2004 – El Salvador
13. 2005 – Honduras
14. 2006 – Nicaragua
15. 2006 – Guyana
16. 2006 – Trinidad & Tobago
17. 2007 – Uruguay
18. 2008 – Dominican Republic
19. 2008 – Bolivia

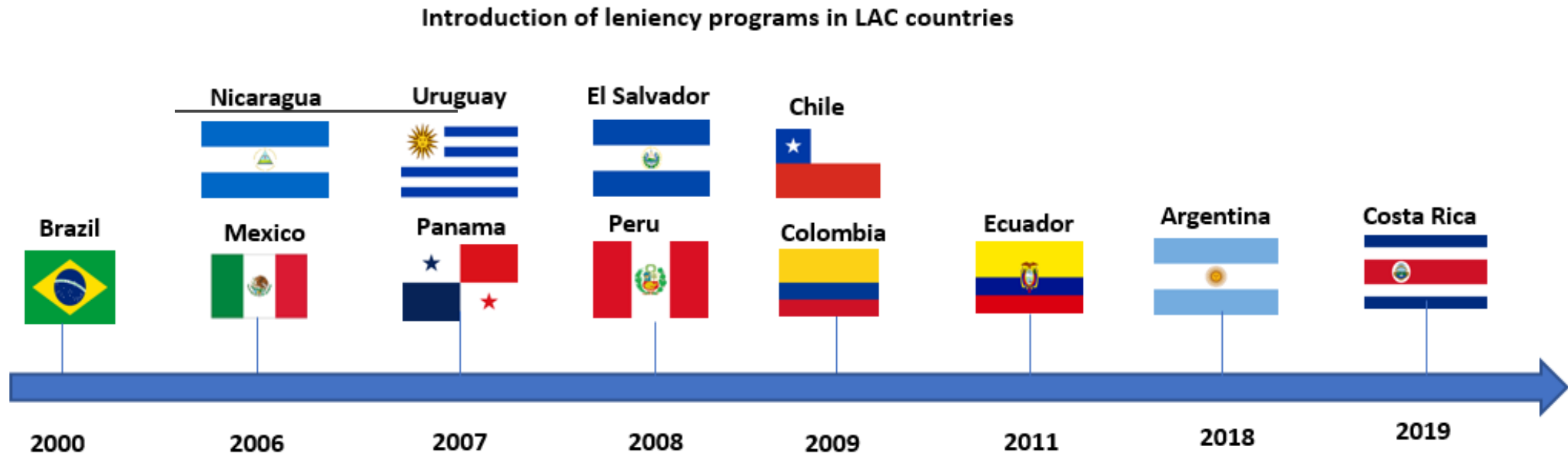
20. 2009 - The Bahamas (telecom.)
21. 2011 – Ecuador
22. 2013 – Paraguay
23. 2016 – Curazao

Number of cartels detected in Latin America, 2000 - 2020



Source: Gutiérrez (*forthcoming*)

12 leniency programmes in Latin America



Source: Martínez, M., Goodwin, T., Sanchez, D., & Carreras, N. (2021). *Fixing Markets, Not Prices: Policy Options to Tackle Economic Cartels in Latin America and the Caribbean* (N° 161436). The World Bank.

Colombia's leniency programme



- Main characteristics.
- Development.
- Results.
- Recent reform.

Costa Rica's leniency programmes



- Main characteristics.
- Preparation.
- Challenges

Thank you!

Queries and comments:

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Recent challenges to the Peruvian Leniency Program

David Fernandez – INDECOPI (Peru)

ICN CWG Webinar on “Implementing Effective Leniency
Programs: Lessons Learnt and Challenges Ahead”
January - 2022



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Disclaimer

Unless otherwise stated, the views here presented are my own and aren't necessarily shared by the Commission for the Defense of Free Competition, the Directorate of Investigation and Promotion of Free Competition or other departments within Indecopi.



David Fernández

Advisor – Leader of the
Anticompetitive Conducts Division

Directorate of Investigation and
Promotion of Free Competition



INSTITUTO NACIONAL DE DEFENSA DE LA COMPETENCIA
Y DE LA PROTECCIÓN DE LA PROPIEDAD INTELECTUAL

01

TIMELINE OF THE PERUVIAN
LENIENCY PROGRAM



02

THE ACT 31040 OF THE CONGRESS



03

CHALLENGES AND WORK AHEAD





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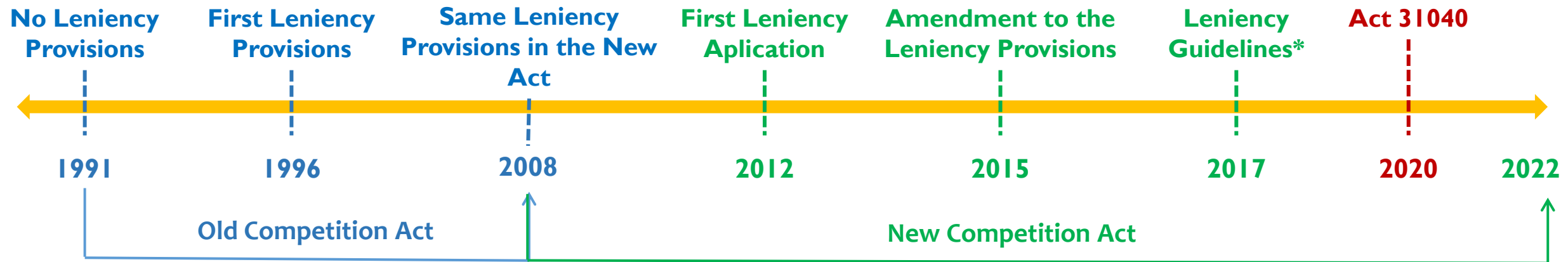
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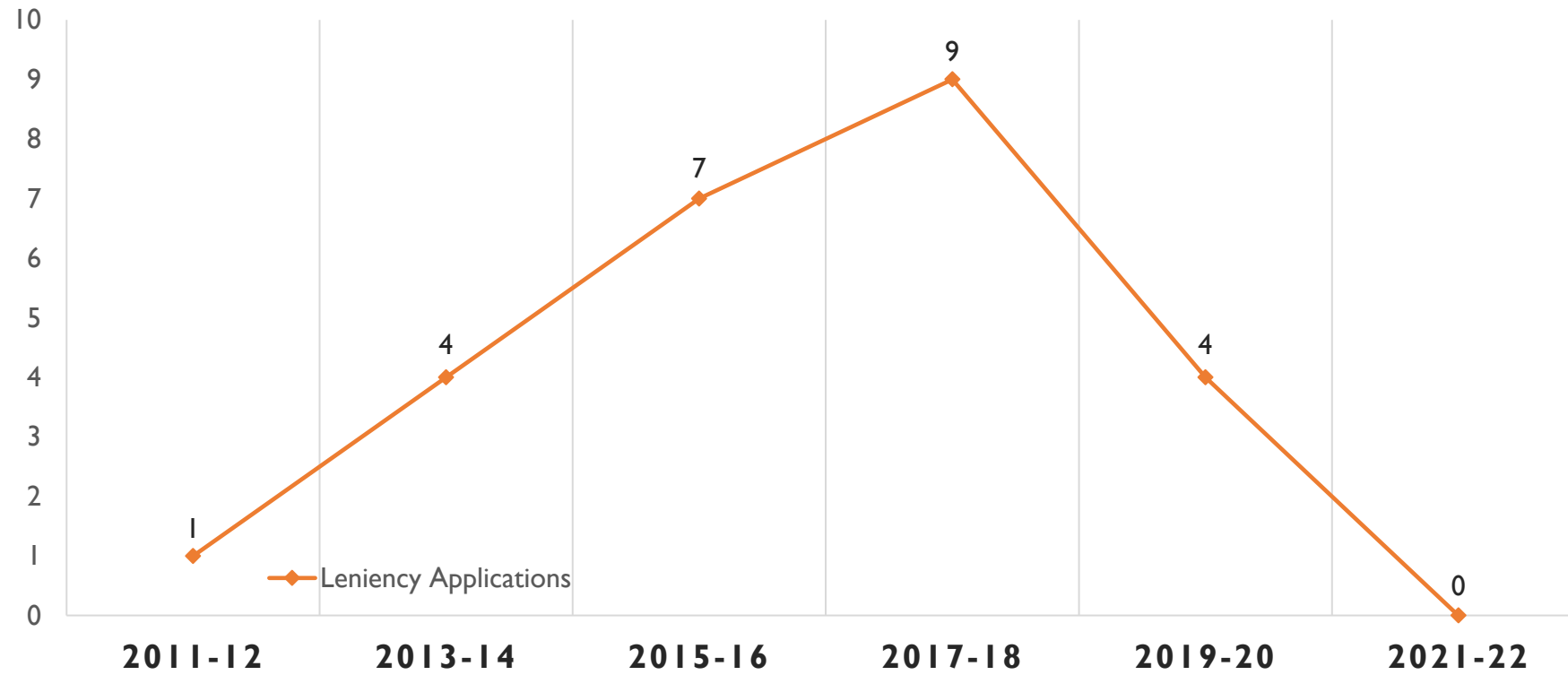
TIMELINE OF THE PERUVIAN LENIENCY PROGRAM

TIMELINE OF THE PERUVIAN LENIENCY PROGRAM



* Awarded Best Soft Law in the Concurrences Antitrust Awards 2018

LENIENCY APPLICATIONS 2011-2021





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02

THE ACT 31040 OF
THE CONGRESS



ENACTMENT OF ACT 31040

On August 29th 2020, the Congress published **Act 31040**, «**Act that modifies the Criminal Code and the Consumer Protection and Defense Code, regarding Hoarding, Speculation and Adulteration.**»

The Act introduced the **Section 232 to the Criminal Code**, establishing the crime of «**Abuse of economic power**», whose content corresponds to the prosecution of anticompetitive conducts by Indecopi, at the administrative level, as provided by the Competition Act (Legislative Decree 1034).



THE «ABUSE OF ECONOMIC POWER» FELONY

«**Criminal Code Section 232.** – Whoever abuses its dominant position in the market, or participates in restrictive practices and agreements in the productive, mercantile, or service activities with the purpose of preventing, restricting, or distorting free competition, shall be punished by **imprisonment of no less than two and not more than six years**, with a **fine** of one hundred and eighty to three hundred and sixty-five days and **disqualification** as provided by Article 36, paragraphs 2 and 4 [prohibition to hold public office or private business].»



ISSUES WITH THE ACT 31040

- It was **enacted without appropriate debate** and disregarding the expressly established legislative procedure.
- It does not limit its application to **cartels** (per se prohibited), allowing the criminal prosecution of **rule of reason** infringements (e.g. abuse of dominance and vertical restraints).
- It does not expressly recognize the need for a **previous and firm decision** by Indecopi.
- **It does not provide for benefits to leniency applicants or beneficiaries, even if they are cooperating with Indecopi.**



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03

**CHALLENGES AND
WORK AHEAD**



CHALLENGES AND WORK AHEAD

- Indecopi has prepared a **Draft Bill** for the amendment of the Section 232 of the Criminal Code. It is still **pending approval** by the Executive before being introduced to the Congress.
 - The Draft Bill, among others, **expressly extends the leniency benefits** granted by Indecopi in the administrative sphere to any potential criminal prosecution.
- Indecopi has proposed to **challenge the Act 31040 before the Constitutional Court**. The filing of the lawsuit is still pending decision by the Executive.
 - Among others, Indecopi argues that the Act violated the legislative process as mandated by the Constitution and the Congress Statutes.
- Indecopi has approached the National Prosecutor's Office to address mutual concerns.
- These initiatives largely depend on the willingness of the Government Branches.



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**Thank you for your
attention**

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Challenges in Developing Effective Leniency Program in Multijurisdictional Competition Authority

Armine Hakobyan

Deputy Director

**Department for Competition
and Public Procurement Policy**

Eurasian Economic Commission



Origins of EEC Leniency Program: EAEU Treaty Provisions Leniency Conditions

- **Only the first person who fully fulfilled all the leniency conditions is eligible for immunity**
- **The Commission did not have evidence and documents of the violation at the time it receives application**
- **The applicant refrained from further participation in the agreement going in breach with Article 76 of the Treaty**
- **The evidence and documents provided are sufficient for establishing of the violation**
- **No immunity is granted to the second and third applicants, although they have a chance for fine reduction for “collaborating with the investigation”**

Issues to be addressed

Inputs and sources for consideration: UNCTAD, OECD, member-states, EEC

Leniency aspects considered:

- **use of markers,**
- **notification on the commencement of investigation,**
- **granting immunity,**
- **development of common position on the number of applicants who may be granted benefits for cartel disclosure,**
- **nature of information to be provided for receiving eligibility for immunity,**
- **reduction of fine etc.**

Challenges to Development of the Leniency Program

- **Delineation of competence between the EEC and NCAs**
 - **Insufficient coordination between the EEC leniency program and those of the EAEU**
 - **Intransferrability of immunity**
 - **Leniency rules do not formally provide for the benefits to the second and third leniency applicants**
 - **Not all the EAEU member-states have sufficiently developed leniency provisions and experience of receiving leniency applications**
 - **Insufficiency of EEC anti-cartel enforcement competency.**
-
- **Unpredictability of EEC reaction to leniency application**
 - **Reluctance of potential applicants**

Harmonization of EEC and Member-States Leniency Rules

- **Term of submission of the leniency application;**
- **Who is eligible to apply;**
- **Who can be granted a leniency;**
- **Confidentiality of leniency application;**
- **Requirements to sufficiency of evidence for granting the leniency;**
- **Control over observation of leniency conditions and other.**

www.eurasiancommission.org
<https://eec.eaeunion.org/>



ICN CWG Webinar on
Implementing Effective Leniency Programs: Lessons learnt and Challenges Ahead
Nick Wilkins
Principal Adviser Criminalization, Cartel Investigations Team
New Zealand Commerce Commission

Leniency has been a very effective tool worldwide for detecting and enforcing against cartels. However, whereas 10-15 years ago, it was probably the main source of substantive cartel allegations, leniency is now part of a wider toolkit in detecting cartels. Additionally, there has been a fall in the number of worldwide leniency applications which leads agencies to review what is working well and to identify any deterrents to making an application. As such, the New Zealand Commerce Commission regularly reviews its leniency policy and we have had 3 iterations since 2010 including the latest version issued in 2021. It is our view our policy needs to be revisited so that it remains relevant and fit for purpose.

There are a number of reasons:

- As I have mentioned, leniency is only part of our investigative toolkit. Our new policy signposts other ways in which those who are involved in cartel conduct can also gain cooperation benefits during the life of investigations. In addition to leniency, we also provide benefits for cooperation with the investigation, we have an anonymous whistle-blower system, we can handle confidential informants in addition to more traditional reporting methods.
- In New Zealand, we have actually seen a rise in leniency applications over the last few years. However, we have observed that leniency applications have moved from being international in nature to largely domestic.
- We believe that the international cartels are still occurring and are still likely to have an impact on the New Zealand economy. In reinventing our leniency policy we plan to play our part in addressing the falling number of leniency applications on the global stage.
- Cartel conduct can now be dealt with criminally as well as civilly in New Zealand. Our latest policy provides details to potential applicants on how both civil leniency and criminal immunity can be obtained. The stronger deterrence of criminal sanctions for individuals means that the benefits that a leniency policy can bring may be more tangible to those individuals involved.
- In New Zealand, criminal immunity can only be granted by the Solicitor-General. During the redraft of the latest policy, we engaged with the Solicitor-General's office to ensure that our policy remains as transparent and effective as possible.

The key reason for reinventing our leniency policies is to identify and address any factors which might deter potential applicants from coming in. With this in mind, we have found it key to engage with legal practitioners to understand:

- Firstly, why they are not advising their clients to apply for leniency and/or immunity; and
- Secondly, to identify any other reasons that clients are raising as to why they do not wish to apply.

It is also important to engage with other competition authorities around the world to understand what reasons they are seeing for the falling number of leniency applications. The biggest factors still appear to be the following:

- The risk of third party damages. This is probably the most important factor in why potential applicants are coming forward and I will later come onto some of the steps that can be taken to ensure leniency remains attractive to those who are concerned about third party damages.
- The cost of applications and, in particular, assisting during the investigations can be very high especially where applications are required in a number of jurisdictions. There is the cost of engagement of forensic IT to complete a comprehensive search for relevant documents. There is the cost of staff time to take part in the internal investigation, engaging with legal advisers, document reviews, proffer preparation and then being involved in interviews and answering requests for further information or clarification. There is also the cost of legal advisers which, if several jurisdictions are involved can become large. The decision for potential applicants is also made knowing that they are committing to a process which will likely run for several years through the investigation and any prosecution phases.
- We are also aware that applicants are also looking for a consistency of approach from competition authorities around the globe and transparency in the way in which policies will be applied.

Applying for leniency is a risk/reward decision for cartelists so in redesigning our policies, competition authorities need to strike a balance between offering enough incentives and not enough.

In assessing how much to offer, we should not lose sight of why we offer leniency. It is still an extremely beneficial tool for us as agencies to detect and prove cartels. However, there is a balance to be struck between what we, as agencies, can offer and what we should offer recognising that applicants have broken the law. Some of the suggestions that I put forward may be acceptable in some jurisdictions but not others.

1. Have a transparent leniency process.

Transparency is achieved through having a clear published policy, consistent application of it and engagement with interested stakeholders.

We have found, as many of you will have, that consulting on a draft revised policy with legal advisers is particularly helpful. We also engage with legal advisers outside of formal consultation processes especially through the consistent way in which we apply our policy. It helps:

- identifying what has and hasn't been working well with our leniency policy;
- identify where there is a perception that the policy hasn't been applied consistently;
- and
- whether proposed changes will likely remove barriers to applications.

In our latest policy, we were keen to be clear on:

- what benefits are on offer for both individuals and corporate entities under the criminal and civil regimes;
- having a clear process for applying for leniency. In particular, even though the decision on criminal immunity rests with the Solicitor-General, we were keen to ensure that the application process was as simple as possible. With that in mind, we have a single point of contact for civil leniency and criminal immunity applications.
- There is clarity on what is expected of applicants, whether they be individual or corporate. We also set out what is expected of individuals and corporate entities who would benefit from derived leniency and/or immunity.
- We set out how the civil leniency and criminal immunity decisions would be taken and how they would interact.
- While we have a first in system only, we point in the policy to what benefits may be available to those who miss out but still wish to cooperate with the Commission's investigation and prosecution processes including, in certain circumstances immunity from criminal prosecution.

To address the issue of the risk of third party damages, our policy refers to:

- A paperless process to minimise disclosure risk for applicants;
- The policy also provides clarity on the way in which we will handle information provided by the leniency applicant. We set out that, if we receive a request for documents, we will give the applicant the opportunity to make representations before disclosing.
- Our policy requires an admission that the applicant has engaged in cartel conduct which **may** breach the legislation rather than confessing to a breach of the legislation. A subtle distinction but one which may prove to be less of a barrier for potential applicants.

Other steps to address the third party damages concerns could include:

- Agencies can consider providing an assurance, if their jurisdiction allows, that they will take all reasonable steps to resist requests for disclosure of information and documents provided by the applicant except where required to do so by law. This is an area where what can be offered will differ from jurisdiction to jurisdiction.
- Consideration can also be given to whether the benefits for applicants could extend to immunisation from third party damages claims or some form of cap. Again, whether this is permissible will depend on the jurisdiction. In addition to any legal thresholds that need to be crossed, consideration needs to be given to how such an approach would play out in the public arena and whether it might even have an impact on prosecutions.

Other steps which may make leniency more attractive:

- We, like many other agencies, have moved away from excluding cartel ‘instigators’. We now exclude ‘coercers’. It is often difficult to identify a true instigator and this therefore is a potential barrier that we have removed.
- Co-ordinate international cartel investigations to the extent possible. For example, organising interviews at the same time and in the same location as other jurisdictions to minimise the time that key staff need to be away from their day-to-day business.
- Having similar processes, particularly at the marker stage, can also minimise the cost and time that an applicant needs to expend;
- Recognise that there may be regional or cultural reasons why potential applicants may not want to become applicants. For example, there may even be geographic regions or particular groups who have a greater mistrust of central government.
-

In summary:

- leniency policies need to be reviewed regularly to keep them relevant;
- Consult with legal advisers and any other key stakeholders to understand what barriers exist to applications being made both in your jurisdiction and internationally;
- consider what steps can be taken to make the process more transparent and consistent;
- consider what protections are available for applicants where third party damages are a concern;
- consider what steps can be taken to make multi-jurisdictional applicants more appealing; and

recognise it is still a risk/reward decision for potential applicants. The more cases we can prove, the higher the risk that they will perceive that they will be caught.



What works in leniency – a private sector perspective

Dave Anderson - Bryan Cave Leighton Paisner LLP, Brussels

ICN Cartel Working Group Webinar - Implementing Effective Leniency
Programs: Lessons Learnt and Challenges Ahead - January 26, 2022



Leniency – the stick and the carrot

Assuming the stick (enforcement/penalties)

Focusing on the carrot (leniency)



Key aspects of leniency – how to get them coming in

- An area where procedure can truly drive outcomes
- Transparency, predictability, incentives
 - Clear benefits of the program and end result
 - Clear rules on which infringements are covered
 - Clear burdens on the applicant
 - Transparent procedure and predictable results
- Agency track record and advocacy with private sector/bar – achieving user/adviser confidence and trust in program
- Base your leniency program design/procedure on the major global regimes/best practices
 - International/regional convergence increases leniency likelihood and waivers

The honey on the carrot: key design points (I)

- Threshold for immunity – lower the better if you want companies to report as quickly as possible upon internal detection
- Use “markers” – report quick/return with evidence
- Availability of procedures to protect against disclosure of leniency statements - “oral/e-lenieny”
- On-going obligations – reasonable and clear continuing cooperation conditions
- Harmonise/converge program with major models to encourage int’l applicants (w/multiple applications) – utilizing ICN workproducts

The honey on the carrot: key design points (II)

- Protections for applicants
 - Confirmation of position in the queue
 - Protection of leniency statements from disclosure to civil damages claimants
 - Protection for cooperating individuals if corporate disqualifications or criminal sanctions exist
 - Reduce civil liability exposure for immunity applicants
 - Withdrawal of leniency should be rare and difficult to do
 - Above address challenges/incentivise applicants (“no worse off than non-cooperating parties”)
- Waivers – create “waiver friendly” environment to incentivise granting of waivers in int’l cases

Advertise the carrot, honey, stick...

- Advocacy/education – *crucial* to success
 - Bringing bar/business on board/trust in the program
 - Key to success 2002 EC leniency program launch
 - Publicise program & track record of success, be open to improvements over time/consult and adapt
- Well-designed and well-run leniency programs inspire bar/business community confidence and trust = enhancing cartel detection and enforcement
- Return on leniency program investment - cartel detection and enforcement builds public and political confidence in the agency and the benefits of competition law + provides quicker fix to economy

If you build it well...they (well-advised companies) will come!





Thanks!

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