Peruvian Antitrust Law sharpens its teeth against cartels: too little… not too late

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ABSTRACT

Peruvian Antitrust Law has fairly well designed leniency mechanisms. But in order to foster the incentives to apply to them – and, thus, increase the detection of cartels – it is necessary to provide more predictability; and to increase the potential cost of cartelization practices by reinstating criminal sanctions and enhancing enforcement and investigative tools.

Keywords: Antitrust, Peru, Leniency, Cartels, Enforcement, Criminal Sanctions

1. Introduction

When the first Peruvian Antitrust Act, Legislative Decree No. 701, was enacted in 1991, it was, at least on paper, a law with "sharp teeth". It provided, besides administrative fines for corporations **and individuals**, the possibility of criminal sanctions for the gravest forms of abuse of dominant position and cartel cases[1]. At the same time, it gave the Free Competition Commission (hereinafter, the "FCC") of the Peruvian Agency for the Defense of Competition and Protection of Intellectual Property (INDECOPI, after its Spanish acronym, hereinafter, "INDECOPI") the power to approve —without major requirements— leniency requests[2] filed by any corporation or individual under investigation[3].

Subsequently, however, two things have happened: on one hand, several laws —particularly the new Free Competition Act enacted in 2008[4] (hereinafter, the "FCA")— have diminished the FCC's power to promote a criminal case, and ultimately repealed criminal sanctions against cartelization practices altogether. This means that cartel participants do not have a credible threat of a strong sanction (imprisonment) undercutting the incentives to cartelize with other competitors.

On the other hand, the Competition Tribunal[5] and the FCC itself —largely out of the fear of giving appearance of "impunity"— have diminished the range of cases on which leniency programs can be used. Criteria for the admission of leniency requests include for instance, the "absence of malice", and the fact that the cartel in question "should not

[1] Independently of the fact that no criminal case was ever brought under these provisions, they posed a credible threat.
[2] We use the term "leniency" and "Leniency Programs" to include the two procedures contemplated by the Peruvian Antitrust Law, namely the "Immunity" (*"Exoneración de Sanción"*) and the "Cessation Settlement" (*"Compromiso de Cese"*).
[3] Legislative Decree No. 701, Article 20.
[4] Approved by Legislative Decree No. 1034, *Act for the Repression of Anticompetitive Conducts*, published on the Official Gazette, *El Peruano,* on June 25, 2008.
[5] Second administrative instance, also within INDECOPI.

have caused a severe harm to the general economic interest"[6]. Some of these criteria have been included in the FCA. Moreover, said act provides that in one of the types of leniency provided, the "cessation settlement", *"(t)he Commission decides on the approval or the rejection of the proposal. Its decision is unappealable, due to its highly discretionary nature".*

Recent improvements, however, could make leniency procedures somehow more predictable. Indeed, Legislative Decree No. 1205[7] (hereinafter, "LD 1205") reduces the discretionary powers of the FCC to deny leniency applications and the requirements to apply. In the case of the "cessation settlement" (*"compromiso de cese"*), these amendments eliminate the requirement that the conduct under investigation should not have caused a severe harm to the general economic interest. Still, the decision of the FCC remains "unappealable". In the case of the immunity ("exoneración de sanción"), for instance, the amendments introduced by LD 1205 eliminate the requirement that the evidence offered by the applicants should be "determining".

With these recent changes, one may say that leniency procedures have a reasonable level of predictability. The problem of the lack incentives to apply to them remains, however. There is still no credible threat.

In the present article we posit that it is necessary to: i) provide to potential applicants to leniency programs —notwithstanding the improvements made by LD 1205— more predictability about the outcome of such procedures; and, ii) increase the potential cost of cartelization practices by **reinstating criminal sanctions** and enhancing enforcement. This combination of factors is critical in the cost-benefit analysis made by potential leniency applicants[8] and should increase the FCC's ability to detect and destabilize cartels and, therefore, to deter collusion.

2. Optimal Enforcement Against Cartels: The Carrot and the Stick

There is no much to discuss: cartels are bad. There is almost complete unanimity among scholars, policymakers and antitrust practitioners around the fact that cartels harm consumers and reduce economic efficiency[9].

There is also a broad political consensus that cartels are bad and that enforcement against them is good[10]. In that vein, there is consensus that this kind of behavior should be prosecuted and punished to deter its occurrence. The question, then, is what is the optimal level of sanctions that antitrust authorities should employ to deter them, and what set of tools. Deterrence depends mainly on the combination of two factors: the

[6] See for instance, Resolution No. 0791-2001/TDC-INDECOPI, November 30th, 2001, issued by the Competition Tribunal, and resolutions No. 012-2001-INDECOPI/CLC and 055-2004-INDECOPI/CLC, issued on May 2nd, 2001 and September 29th, 2004, respectively, by the FCC.
[7] Published on the Official Gazette, *El Peruano,* on September 23, 2015.
[8] Gregory J. Werden, Scott D. Hammond & Belinda A. Barnett, *Deterrence and Detection of Cartels: Using All the Tools and Sanctions*, Paper presented at the 26th Annual of the National Institute of White Collar Crime, March 1, 2012, at 22. Available at: http://www.justice.gov/atr/public/speeches/283738.pdf (Last visited, March 3rd, 2015).
[9] See: Cécile Aubert, Patrick Rey & William E. Kovacic, *The Impact of Leniency Programs and Whistle-Blowing in Programs in Cartels* (2006), at 1. Available at: https://www.ftc.gov/system/files/documents/public_statements/418011/2006leniency.pdf (Last visited, April 30th, 2015).
[10] Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 Geo. Wash. L. Rev. 693 (2001), at 694.

magnitude of the sanction applied and the probability that said sanction will be in fact applied when the infraction is committed[11].

Although that combination may depend on several factors[12], in the present article we emphasize two of them: the imposition of criminal sanctions and the enhancement of leniency programs. We may call this the "stick and carrot" strategy[13]. On one hand, antitrust authorities should create a credible threat of harsh sanctions to cartel members. On the other hand, they should provide incentives for cartel members to collaborate with such agencies to break the cartel down. We emphasize these two factors because this is a strategy that has been tried with relatively great success in other jurisdictions, and because it is also likely to have the kind of short-term impact necessary to boost the legitimacy of the antitrust authorities, which in turn would allow them to gain resources and respect among firms and practitioners. Moreover, we think that this is a strategy that could be very important for an agency with scarce resources, as is the case of the Peruvian FCC.

The following sections describe each part of this two-fold strategy. First, the "stick" (or, the need for criminal sanctions, since the application of administrative fines is not under debate); and, second, the "carrot" (or, the need for attractive and predictable leniency programs).

2.1. First, "the stick": the need for criminal sanctions

The enforcement of antitrust laws around the world is comprised by a whole set of rules and institutions: one can differentiate, to start, between public and private enforcement of laws. Within public enforcement, there is administrative prosecution and criminal prosecution. Most of antitrust systems have private enforcement (meaning that firms a consumers harmed by anticompetitive practices can obtain damages in courts) and public enforcement trough administrative agencies that apply fines to corporations and (sometimes) to individuals. The application of criminal sanctions (i.e. imprisonment) is the exception, and only the United States of America and a few other jurisdictions apply them.

Some commentators posit that criminal sanctions are not necessary in the case of antitrust violations, because monetary sanctions are enough to deter cartel formation[14]. Empirical analysis demonstrates, however, that criminal sanctions are a necessary tool (in addition to administrative fines) to deter cartel formation. As explained by Shavell for white-collar crimes in general, the level of private benefits obtained from these conducts is sometimes so great, that the monetary sanctions needed to create the levels of expected costs of sanctions required to create deterrence is too great: "the larger are these benefits, the greater is the sanction needed to deter, and again the

[11] See, in general: Steven Shavell, *Foundations of Economic Analysis of Law*. (2004), at 573. See also: William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652, at 653.

[12] The probability to detect and effectively punish anticompetitive behavior may depend in several institutional and political factors that we cannot analyze here.

[13] Hammond uses this common metaphor while explaining that "the Antitrust Division has spent the last two decades building and implementing a 'carrot and stick' enforcement strategy by coupling rewards for voluntary disclosure and timely cooperation pursuant to the Antitrust Division's Corporate Leniency Program with severe sanctions". See: Scott D. Hammond, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*. Paper presented at the 24th Annual of the National Institute of White Collar Crime, February 25, 2010, at 1. Available at: http://www.justice.gov/atr/public/speeches/255515.pdf (Last visited, April 30, 2015).

[14] See, for instance, *See, e.g.*, Kenneth G. Elzinga & William Breit, *Antitrust Penalties and Attitudes Toward Risk: An Economic Analysis*, 86 Harv. L. Rev. 693 (1973); cited by Werden et al. *supra* note 7, at 3.

more likely it is that the necessary sanction will exceed a person's assets"[15]. Talking specifically about cartel deterrence, Werden et al. explain why monetary sanctions are not enough. Some corporations simply would not be able to pay the optimal level of fines:

> A simple calculation grounded in data on real world cartels suggests that a sufficient level of fines (aggregated across all cartel participants) is about twice the annual volume of commerce affected by the cartel activity, and the annual volume of commerce done by U.S. corporations filling tax returns is roughly the same as their net worth. Hence, fines at a level sufficient to deter can exceed the ability of cartel participants to pay[16]. (…).

Without criminal sanctions, then individuals behind firms would be able to reduce the risk of sanctions protected by limited liability, reducing deterrence to a great extent.

Moreover, criminal sanctions create **more deterrence to individuals**. Collusive agreements are reached by individuals working for firms; so it is also necessary to deter them to enter into such agreements. Monetary sanctions are not the best tool for that, because firms (which obtain most of the benefits of cartelization), can always assume the cost of such sanctions, shielding their executives. As explained by Werden et al.: "Theoretical analyses concluding that it is best to rely on monetary sanctions (…) assume that imposing a fine on an individual can achieve the same level of deterrence as a prison sentence. (…) They (…) ignore the fact that the brunt of a prison sentence must be borne by the convicted individual, whereas a fine could be paid (if only indirectly) by others"[17].

Criminal sanctions (to individuals) also increase the likelihood of detecting cartels, because they introduce more instability to already instable cartels. Werden et al. explain that:

> "the sanction of imprisonment for individuals enhances deterrence by facilitating the detection and prosecution of cartels. The threat of a prison sentence provides individuals involved in cartel activity with the single greatest incentive to self-report through a leniency application and thereby escape sanctions. Even when full immunity is no longer available, the threat of a prison sentence provides an individual involved in cartel activity with a powerful incentive to cooperate with the prosecutor in exchange for a reduction in sentence. Thus, an absence of individual sanctions significantly undercuts the incentives of cartel participants to self-report, cooperate, and accept responsibility, handicapping both deterrence and detection"[18].

The level of sanctions explained in this section, of course, is not useful if is not complemented with an efficient enforcement. Antitrust agencies need to increase the quantity and quality of their markets monitoring and the prosecution of cases.

2.2. Second, "the carrot": attractive and predictable leniency programs

[15] Shavell, *supra* note 11, at 510
[16] Werden et al. *supra* note 8, at 4.
[17] *Id*, at 5-6.
[18] Werden et al. *supra* note 8, at 7.

Once the members of a given cartel are under investigation, if the laws provide optimal sanctions, they are under a credible threat of a harsh sanction. That does not mean, however, that the indicted firms and individuals are going to be convicted. The antitrust agency may have "soft-evidence" of a cartel, obtained through price monitoring (for instance, detecting "strange" correlations of prices over time) or other indirect evidence. To make a solid case, and to increase their chances of standing against judicial review, antitrust agencies need "hard evidence" which is normally very difficult to obtain: "confidential" documents that are normally very well concealed, and even testimony of private meetings or conversations[19]. That evidence could be procured through the use of powerful investigative tools, like the ones that criminal law enforcement agencies have at their disposition: wiretapping, dawn raids, surveillance, etc. And there are of course, leniency programs, which, as we have said, are supposed to encourage cartel members to provide evidence against their co-conspirators in return for immunity or at least a reduction in fines.

According to Hammond, "cartels by their nature are secretive and, therefore, hard to detect. Leniency programs provide enforcers with an investigative tool to uncover cartels that may have otherwise gone undetected and continued to harm consumers"[20]. Cartels, however, are also inherently instable. Once cartelists have an agreement to not to cut prices or increase output, if one of them does precisely that, he could gain substantial profits in a short amount if time[21]. If we add to that instability the possibility to get away with no sanction, the prize for betraying the cartel gets bigger.

Empirical evidence also supports the effectiveness of Leniency Programs. According to Miller, who conducted an empirical study on the impact of the US Leniency Program, the program increased the discovery of cartels. Subsequently, the number of cartels diminished, arguably thanks to deterrence effect that such programs also have: "the number of cartel discoveries increases around the date of leniency introduction and then falls below pre-leniency levels, and argue that the pattern is consistent with enhanced cartel detection and deterrence capabilities"[22].

Leniency programs also reduce the administrative cost of enforcement. Leniency programs can facilitate the early termination of procedures, which entails less resources being invested in investigations and litigation[23].

Any successful leniency program should have at least the following features: i) the threat of severe sanctions ii) a high risk of detection; and, iii) a transparent and predictable cartel enforcement system "so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not"[24]. Since we have analyzed the threat for severe sanctions (and somehow, a better enforcement) in section 2.1, above; in this section

[19] Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution*. EUI Working Paper No. 99/23 (1999), at 4. "The existence of a collusive outcome in the industry is perfectly observed by the antitrust agency, but this is not enough for collusion to be proved in courts. To be able to build a case against the firms (which would be otherwise win the appeal in a Court), the AA needs to find some 'hard' information about collusion. Such information might consist of any document proving that firms have agreed on prices or have met to coordinate on the prices to be charged".
[20] Hammond, *supra* note 13 at 2.
[21] William E. Kovacic, Andrew I. Gavil, & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy*. (2nd ed 2002), at 230-232. Richard A. Posner, *Antitrust Law* (2nd, 2001), at 67-69.
[22] Nathan Miller, *Strategic Leniency and Cartel Enforcement*, 99 Am. Econ. Rev., 750, 765 (2009).
[23] Shavell, *supra* note 11.
[24] Scott D. Hammond, *Cornerstones of an Effective Leniency Program*, Speech at the International Competition Network Workshop on Leniency (November 2004), 2. Available at: http://www.justice.gov/atr/public/speeches/206611.pdf (last visited, May 1st, 2015).

we will describe the basic features that a leniency program must have in order to be successful.

a. The prize: a significant reduction of fines

There should be a clear benefit in self-reporting the participation on a cartel or delivering evidence to prove one. Otherwise, the dominant strategy of the parties would be to remain "under the radar" of antitrust authorities or, even if an investigation is already in process, to challenge every piece of evidence and every alleged behavior until the last instances. That does not benefit neither antitrust agencies nor consumers. It means more administrative costs and probably more harm to the competitive process.

b. The benefit is applicable before and after the initiation of an investigation

Even when after the initiation of an investigation the antitrust authorities have a greater chance of obtaining the evidence they need, leniency programs could be useful to break a coordinated defense. Motta and Polo make the case relying in an economic model:

> Our analysis reveals that if Leniency Programs are to be effective in breaking down cartels, they should be extended to benefit firms which reveal after the industry is put under monitoring. Since proving firms guilty of collusion is a very lengthy and complex issue, which does not always end up with the firms being condemned, a great amount of resources can be saved and a final positive outcome guaranteed by ensuring that firms have the proper incentives to collaborate with the AA even after an investigation has been started"[25].

The experience in the United States is consistent with this approach. The Leniency Program there was applicable only to firms that spontaneously approach the antitrust authorities to confess their participation in a cartel *before* the initiation of an investigation by the DOJ of the FTC. This regime was largely ineffective. In 1993, however, the new Corporate Leniency Program approved by the DOJ allowed the reduction of fines, and even total immunity even *after* the inquiry was open. According to the 1994 Annual Report of the Antitrust Division, in the first year of the new regime: "an average of one corporation per month come forward with information on unilateral conspiracies, compared to an average of one per year under the previous policy. The policy thus allowed the Division to extend the reach of its criminal enforcement activities with relatively little expenditure of resources"[26].

c. Predictability

Only with a predictable outcome parties will be willful to collaborate with antitrust authorities. Hammond explains why this requirement is so important relying on the experience of the Antitrust Division:

> Our Leniency Program is inherently transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application. Obviously, this is a very difficult thing to do, and we have had to swallow hard on a number of amnesty applicants that we would have preferred to prosecute. However, recall that we had roughly 15 years of

[25] Motta & Polo, *supra* note 19, at 12
[26] Antitrust Division, Annual Report for Fiscal Year 1994, at 6-7. Cited by Motta & Polo, *supra* note 38, at 13.

> experience with a Leniency Program that was designed to maintain a greater degree of prosecutorial discretion, and it simply did not work. Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of its corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program[27].

3. The poor performance of leniency programs in Peru explained: "no carrot and no stick"

Leniency programs in Peru have not been successful. In more than 20 years of Antitrust Laws in the country, only two immunity requirements have been filed. In that time, only ten cessation settlements have been signed[28], and mostly on low-profile cases[29]. Why is that these programs have not been successful? In the following sections, after offering a brief description of the substantive rules applicable to horizontal agreements in Peru, we will explore the reasons of such failure.

Peer reviews made by international experts, for instance, have considered that although the FCC is known for taking a strict approach to cartels; it has not been much active in cartel enforcement[30].

The FCA contemplates two types of leniency procedures. One is the "Cessation Settlement" ("*compromiso de cese*")[31] in which economic agents (either corporations or individuals) under a cartel investigation may voluntarily confess their participation in this kind of practices and request the benefit of a full exoneration from any administrative liability (any liability for civil damages are not to be waived). This settlement may be requested until 45 working days from the beginning of the procedure.

In order to request such benefit, the FCA originally required applicants to: (i) full acknowledge of the charges; (ii) the cartel in question should have not caused "grave harm" to consumer welfare; and (iii) to carry out all the necessary actions to stop its participation in the illegal conduct. After the amendments introduced by LD 1205, the full acknowledge of charges and the absence of "grave harm" to consumer welfare are not required anymore[32].

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[27] Hammond, supra note 24, at 19.

[28] Official statistics about the total of requests filed are not available, because, if not approved, the requests remain confidential.

[29] Cartels involving small and unsophisticated economic agents, who had not been very good at concealing their collusive practices in the first place: gas stations (Resolution No. 021-94-INDECOPI/CLC, September 22, 1994), bakers (Resolution No. 033-94-INDECOPI/CLC, August 23, 1994), cart-bike (motorcycle taxi) drivers (Resolution No. 003-2000-INDECOPI/CLC, June 16, 2000), and maritime pilots (Resolution No. 012-2001-INDECOPI/CLC, May 2, 2001).

[30] Terry Winslow, *Competition Law And Policy In Peru. A Peer Review*. OECD Country Studies (October 2004), 14.

[31] Legislative Decree No. 1034, article 25.

[32] Demanding the absence of harm made no sense. As explained by Werden et al., "while the notion of letting **hard core cartel** participants escape punishment was initially unsettling to many prosecutors, the Antitrust Division recognized that the grant of full immunity was necessary to induce cartel participants to turn each other and self-report, resulting in the discovery and termination for the conduct, the successful prosecution of the remaining cartel participants, and damage recovery for victims"[32]. (Emphasis added). Werden et al. *supra* note 7, at 2.

The FCC, however, is still not bound to grant the cessation of the procedure. The FCC decision on this regard is, as the FCA states, "eminently discretionary".

The other leniency procedure contemplated in the Peruvian antitrust framework is the immunity ("*Exoneración de sanción*")[33]. Economic agents participating in cartels (either corporations or individuals), may request to the FCC immunity of any sanction, in exchange, as the FCA originally provided, of the delivery of evidence useful to identify and proof an anticompetitive practice. Immunity may be requested at any time, if the FCC has not already initiated formal procedures.

In order to obtain total immunity, a company that participated in a cartel must be the first one to inform the FCC of the cartel. Companies that do not qualify for full immunity, however, may benefit from a reduction of fines if they provide "relevant information".

Although the Act does not specify if the decisions of the FCC about immunity requirements are also "eminently discretional", the language of the rule (the Technical Secretariat "may" propose, and the Commission "may" accept[34]) indicates a high degree if discretion.

These programs, although inspired in their American and European peers, have not been very successful. There are two main reasons. The first one is endogenous to the Leniency Programs. Although at first glance similar to other programs, they have features that make them **unpredictable**. The second one, lies outside of the specific regulation of leniency programs, and has to do with the poor enforcement of cartels.

3.1. Lack of a predictable outcome

The lack of predictability is particularly serious in the case of the cessation settlement, where the FCA states: "the Commission decides on the approval or rejection of the proposal. Its decision is unappealable, due to its highly discretionary nature". Does this mean that even if a given firm complies with all the conditions stated in Article 26 of the FCA the FCC might decide anyway to deny the cessation settlement? With the current language of the FCA, the cessation settlement can look like a lottery to subjects under investigation, and even to their lawyers.

Two Peruvian commentators consider that this requirement is appropriate, since "the granting of cessation settlement is not a right of the investigated party, but is grounded on a public policy, which is to culminate promptly with procedures that have not seriously violated social welfare"[35]. Their defense, however, is flawed. The purpose of Leniency Programs is not "to culminate promptly with procedures that have not seriously violated social welfare". It is to minimize the occurrence of cartels in the market. And for that, you need to detect them. And for that, in turn, you need predictable leniency programs.

This problem may arise regarding the immunity procedure too. Although the Act does not specify if the decisions of the FCC about immunity requirements are also

[33] Legislative Decree No. 1034, Article 26.
[34] Id.
[35] César Higa & Francisco Sigueñas, *Incentivos para el Cumplimiento de la Ley de Represión de Conductas Anticompetitivas. Compromiso de Cese, Exoneración de Responsabilidad y Sanción en los Procedimientos de Libre Competencia*, 14 Revista de la Competencia y la Propiedad Intelectual, 5. Fall 2012, at 16. Available at: http://servicios.indecopi.gob.pe/revistaCompetencia/castellano/articulos/otono2012/CesarHiga.pdf (Last visited, April 30th, 2015).

"eminently discretional", the language of the rule may be used to interpret that it has a high degree if discretion. That should not be the case.

3.2. The absence of strong sanctions

In addition to the endogenous problems of leniency programs, they cannot be successful if antitrust authorities have no leverage against investigated parties. If sanctions are low, that means that the "prize" to betray the cartel is low.

Currently, in Peru, there is no serious threat of strong sanctions. Administrative fines can go even above 1000 Tax Units[36] and are calculated taking into account the benefit accrued from the anticompetitive behavior in question. However, the fine cannot surpass the 12% of the investigated firm of person's total gross income.

Moreover, even assuming that the level of fines is optimal, and as we have mentioned, there are not criminal sanctions applicable to neither corporations nor individuals. As we have mentioned, the original Peruvian Antitrust Act, Legislative Decree No. 701 gave to the FCC the authority to open a criminal indictment against the members of a cartel. That possibility however, was eliminated with the enactment of FCA. Its Second Supplementary Provision repealed Article 232 of the Criminal Code, which established criminal sanctions to both abuses of dominant position[37] and restrictive agreements[38].

4. How to enhance the impact of Leniency Programs and Cartel Enforcement in Peru. Outlines of Reform

In light of the current situation of the legal and institutional framework of Peruvian antitrust enforcement and the international experience, we propose the following outlines of reform:

4.1. Increase the threat of severe sanctions

It is crucial to reintroduce to the Peruvian legal framework criminal sanctions to firms and individuals participating in cartels. Since increasing the likelihood of detection of cartels requires legal and institutional reforms that would not have impact in the short or medium term, and resources that the FCC probably will not have, increasing sanctions for cartel violations could be an effective reform to increase deterrence. As we have seen above, the expected value of sanctions, which creates deterrence, depends on both the probability and the magnitude of the sanctions ($v = p * m$). Since in the case of Peru it is difficult to increase the likelihood of detection, a legal reform in the antitrust legal framework should emphasize an increase in the expected sanction for wrongdoers.

Of course that it always would be necessary to increase enforcement with enhanced investigative tools and increased international cooperation: "Deterrence ultimately fails without effective tools for detecting cartels because the probability that the available sanctions would be applied likely would be so low that the sanctions could not do their job. And this is not merely a theoretical possibility; cartel activity is more easily

[36] Approximately 1'250,000.
[37] Which, by the way, I do not believe should be subject to criminal sanctions, due to the difficulty to assess the multiple factors and consequences of such conducts.
[38] Disqualification under article 36 of the Criminal Code included disbarment and the inability to hold public offices.

concealed than other crimes, and cartel participants have a strong interest in concealing their unlawful activity"[39].

In order to avoid problems of due process in the applications of stricter sanctions to cartelists, the Law would have to define specifically which conducts would be subject to criminal investigation and sanctions. As explained by Baker, "(o)rdinary business actors must be able to understand the difference between right and wrong, and their lawyers must be able to give unequivocal legal advice"[40].

Baker, for instance, proposes to apply criminal sanctions to the following agreements[41]:

i) Agreements to fix prices or some element of prices (i.e., credit terms);
ii) Agreements to limit output;
iii) Agreements not to poach each other's existing customers;
iv) Agreements not to compete for any customers, old or new, in each others agreed geographic markets; and,
v) Bid-rigging agreements.

There are of course, understandable concerns about the application of criminal sanctions in cartel cases, specially in Peru, where the Judiciary is, to the say the least, not well prepared to deal with antitrust cases. It is precisely for that reason that some commentators actually received well the decriminalization of Antitrust Law. Patrón, for instance, states that "it is not hard to foresee how the possibility of having these [Peruvian courts and prosecutors] handling procedures related to a legal matter as technically complex as the antitrust laws, could potentially lead to situations and outcomes less than desirable"[42].

This, however, should not be a barrier to impose criminal sanctions to the gravest anticompetitive behavior. INDECOPI and the Courts, or better, the Law itself, can develop clear lines between the kinds of anticompetitive behavior that should be criminally prosecuted and the kinds that would entail only administrative fines.

4.2. Increase the prize to potential applicants and create trust

Also, in line with our comments regarding the current requirements contemplated in the FCA, we suggest the following reforms:

First, There should be a clear statement of the (reasonable) requirements to grant leniency: if met, leniency must be granted, automatically.

Second, the Antitrust agency and their main officers need to have a strong will to enforce cartel agreements, without hesitating about conceding leniency to firm fearing a "sensation of impunity". Again, especially where and agency has scarce resources a sound leniency policy could be a very important tool. In words of Motta and Polo: "if the antitrust authority has limited resources, and is therefore unable to prevent collusion ex-ante, the use of Leniency Programs can improve the effectiveness of the policy, by sharply increasing the probability of interrupting collusive practices. Hence, in a second best perspective, fine reductions [in the context of leniency programs] may be desirable because they allow to better implement ex-post desistence from collusion"[43].

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[39] Werden et al. *supra* note 8, at 12
[40] Baker, *supra* note 10, at 697.
[41] Baker, *supra* note 10, at 697.
[42] Carlos Patrón, *Aciertos, Divergencias y Desatinos de la Nueva Ley de Represión de Conductas Anticompetitivas*, 36 Ius et Veritas L. Rev, 128 (2008).
[43] Motta & Polo, *supra* note 19, at 2.

Third, a decision to deny leniency must be able to be challenged in the superior administrative instance and, of course, to Judicial Review. While we understand that leniency mechanisms require some level of discretion, it should be subject of, at least, a revision under the “arbitrary and capricious” standard.

5. Conclusions

Antitrust enforcement in Peru is weak. Although INDECOPI is a well-respected agency, and their officers have the necessary expertise, the lack of resources to monitor more markets and to make more preliminary investigations is a problem that cannot be solved overnight.

That lack of resources, however, can be compensated with a strong political will to fight cartels. Congress and the Executive Branch have to have a strong political will to modify our laws and reinstate criminal sanctions for cartel violations. They also have to provide the agency with more resources. The Agency, in turn, should provide clear and predictable rules to economic agents.

We cannot afford to waste the tool that constitutes our main chance of having success against cartels. Cartels are still out there, so it is not too late to modify our laws and our agency attitude towards leniency programs.