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– Contribution from Ecuador –

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The attached document from Ecuador is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 27 28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session I: Strengthening incentives for leniency agreements

Fine exemption (leniency) programme in Ecuador

- Contribution from Ecuador[1] -

Introduction

1. The program for the exemption or reduction of the amount of fines or, simplifying, leniency as it is called on the Ecuadorian competition regime, is one of the main tools in the fight against collusive agreements[2], specially, cartels and it grants the possibility to undertakings (firms) that infringe the Organic Law for Regulation and Control of Market Power (LORCPM), of giving information and relevant proofs to the competition authority about the infractions, in exchange of total immunity or a gradual reduction of the fines that, depending on the case, would be applied on them.[3]

2. Despite this figure being completely recognized from a legal standpoint, in practice, within the Ecuadorian competition regime it is not often applied by undertakings that have taken part in a collusive agreement; deciding not to share information or proofs with the Superintendence for Market Power Control (SCPM), national competition authority.[4]

3. As a precedent of the application of a leniency program, we can mention the case of undertaking Kimberly Clark (Kimberly) on which the SCPM, during the 2016 period, without authorization from the operator, declassified and used confidential information, in order to open new investigations; furthermore, it sent such documentation to the Andean Community (CAN), for its acknowledgment and, if pertinent, sanction of a regional cartel.

4. Lastly, it is important to make emphasis that the goal in itself of leniency is to generate a deterrent to avoid the formation of new collusive agreements and to disassemble the existing collusive schemes. In this light, this article tackles, in its first part, the Ecuadorian experience in the application of the leniency program; in its second part, it explains the nature and reach of the program in Ecuador, its judicial dispositions and the parameters for evaluation; and, on its third part it explains how the SCPM has worked on recent years in the fight against collusive agreements with the goal of creating a more favourable environment for operators to use the leniency program.

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[1] This contribution was prepared by Camilo Sánchez Maila, Nicole Leines Artieda, María Alejandra Eguez and Patricio Pozo Vintimilla. The opinions contained in the present article are of exclusive responsibility of the authors and do not represent the vision or a statement of the Superintendency for Market Power Control.

[2] Beneyto José and Maillo Jerónimo. *Tratado de Derecho de la Competencia. Unión Europea y España*. 2017. p. 245. *"Within the term "agreements" we group all kinds of consensus of willingness among enterprises and economic operators, in whatever manner in which it manifest and produced."*

[3] Wils, Wouter. "Leniency in Antitrust Enforcement: Theory and Practice". *Conference on New Political Economy Frontiers of EC Antitrust Enforcement: The More Economic Approach.* 2006. p. 3.

[4] OECD-IDB Peer Review on Competition Law and Policy of Ecuador. 2021. P.89.

1. The Ecuadorian leniency program in Ecuador, rebuilding its pillars

5. A leniency program can weigh on the behaviour of firms regarding the formation of a cartel, during its operation and even after its termination[5], through two effects that mutually reinforce themselves: accusation and preference. On the one hand, the *accusation effect* captures the incentive to ask for leniency due to the wariness of the competition authority detecting the cartel and imposing full-scale sanctions. On the other hand, the *preference effect* captures the incentive to present an application for leniency before other members of the cartel does[6].

6. For such effects to enable and for a leniency program to be effective within a jurisdiction, the authority in charge of the investigations, must count with a large history of cartel detection[7], establish strong fines[8], and guarantee and protect the proofs, information and identity of the "collaborators"[9].

7. In this respect, it is pertinent to contextualize the experience of the Ecuadorian competition authority regarding the applications to the leniency program. According to the OECD[10], the protection of confidentiality is a cornerstone for the program to work properly in a country. Such element has been put into question before in Ecuador.

8. Until early July 2022, there have been two leniency cases[11], presented on 2016 by companies Kimberly Clark and Martec[12]. For the effects of this paper, we will only refer to the Kimberly Clark case, in which the authority, harmed the confidentiality of identity and information handed by the operator, which provoked the reduction of the chances for the program to consolidate in the country. Here, we recount a summary of the events.

9. Kimberly, on 2014, without the existence of an investigative file, presented an application for leniency before the SCPM, handing evidence of the existence of a cartel with the goal of acquiring an exemption from the application of the fine.

10. The breach of confidentiality, happened when the SCPM, on October 14 of 2016, declassified without authorization or notification from the informer, the evidence was handed to use it in two ways: i) used the information to open three new investigations[13];

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[5] Harrington, Joseph. *"The theory of collusion and competition policy".* MIT Press. 2017. p. 82.

[6] Ibídem. p. 104.

[7] OECD. *Challenges and Co-Ordination of Leniency Programmes. Background Note*. 2018. p. 7.

[8] Ibídem. p. 6.

[9] ICN. *Development of Private Enforcement of Competition Law in ICN Jurisdictions*. 2019. p. 4.

[10] OECD. Roundtable on possible challenges and coordination for leniency programs. 2019. p. 2.

[11] Kimberly Clark presented a leniency program on March 29 2016, it was rejected due to the facts and proofs that happened before the enactment of the LORCPM.

[12] Martec Cia. Ltda., on April 2016, presented a request for exemption and reduction of the fine, which was approved by the authority. For this, the operator had to pay only half of the original fine imposed by the SCPM for falling under the conducts established on Article 11 numeral 6 of the LORCPM.

[13] Judicial Process No. 09802-2017-00197. Sentence of the Tribunal for Contentious and Administrative matters N° 2 of Guayaquil on September 19, 2018. All investigations opened after the declassification of the confidential information presented by Kimberly, where archived by the SCPM.

and, ii) on October 20, 2016 sent the information to CAN[14], for the initiation of an investigation into alleged existence of a multinational cartel.

11. In front of the actions of SCPM, the informer presented the legal recourse in front of the competition authority, which denied them, and then to the judicial power, alleging harm to its rights.

12. The District Tribunal for Contentious and Administrative cases No.2 in Guayaquil, got notice of the demand of full jurisdiction, presented by Kimberly against the SCPM due to declassifying information handed under the leniency program, through the resolution No. SCPM-IG-DES-01-2016 of October 14, 2016.

13. The Tribunal passed sentence on September 19th, 2018[15], deciding to declare the illegality and nullity of Resolution No. SCPM-DES-001-2016 of October 14, 2016, as it was not dully sustained, did not comply with due process, right to defence, and legal certainty, and it infringed the legal framework of the time.

14. The SCPM committed mistakes in 2016, regarding the treatment of information and the protection of the informer, meaning that, it harmed one of the fundamental pillars for a leniency program to thrive: confidentiality[16].

15. In summary, Kimberly case showed that mistakes could not happen within competition authorities, if they seek to foster participation from undertakings in informing about collusive agreements and their participants, and increasing the effectiveness of the investigation of these activities.

2. Nature and reach of the Ecuadorian leniency program

16. Then, it is necessary to explain the way in which the leniency program works in Ecuador according to the LORCPM and the current Instructive, and the difficulties that have arisen for it to be completely effective.

17. The leniency program is contained in articles 83 and 84 of the LORCPM, which establishes the rules for an undertaking to be able to benefit from the exemption or reduction of a fine imposed for the infringement of article 11 of the LORCPM[17]. Regardless of the collusive agreement being vertical or horizontal[18].

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[14] Id.

[15] The sentence of the Tribunal for Contentious Administrative matters N°2 of Guayaquil, did not influence the investigation carried out by the CAN and its subsequent sanction to the involved parties, for which it only had effects on the national territory.

[16] OECD-IDB Peer Review on Competition Law and Policy of Ecuador. 2021. Pp 109,110.

[17] *"Art. 11.- Forbidden practices and agreements.- the norms established in this law forbids and sanctions every agreement, decision or collective recommendation, or concerted practice or consciously parallel; and in general, each act or conduct done by two or more undertakings, manifested in any way, related to the production and exchange of goods and services, with the intention or effect being impeding, restricting, faking or distorting competition or negatively affecting economic efficiency or general wellbeing."* LORCPM, Official Registry 555 of October 13, 2011, reformed on February 25, 2022.

[18] Regarding the judicial treatment of collusive agreements in Ecuador. See: SCPM. Guidelines for the investigation of restrictive practices and agreements. 2021. Pp 9-21.

18. Within the requisites (cumulative) established on the LORCPM, in order to enter the leniency program there are: i) Completely cooperating with the authority; ii) ending the participation in the infringement; ii) not having destroyed elements of proof related to the application; iv) not having forced other operators to take part on the agreement; and v) handing over elements of proof that show the existence of the collusive agreement[19].

19. In 2019, the SCPM, looking to bring legal certainty to the leniency program, issued the new "Guidebook for granting benefits of exemption and reduction of the amount of fines" (Instructive), which establishes the procedure for accepting and denying an application for leniency, and which prohibits that documentation or evidence handed under this program can be used in an investigation process or sent to an international institution, without prior authorization from the informer[20].

20. At first instance, in order to apply to a leniency program, the undertaking interested in benefiting from an exemption or reduction in a fine, must present its request before the SCPM in a verbal or written manner. Once the request has been received, a mark number[21] will be assigned and the investigative body proceeds to open a confidential file that incorporates all the elements of proof handed by the applicant. Lastly, the resolution body must communicate its decision on whether it grants the exemption or reduction of the amount of the fine to the informer, following the report from the investigative body.

21. Therefore, the goal of the program is to generate a deterrent effect, by discouraging the formation of collusive practices and by destabilizing the equilibrium on which the members of the cartel are functioning, by breaking loyalties within its members[22]. Nevertheless, and, despite normative improvements, there is still an impending debt to increase greater benefits in favor of the informers, for example, for the first operator that seeks to take part in the leniency program without the existence of an open investigation against it, and that hands enough evidence about the existence of a collusive agreement, can be benefited in a direct manner (automatically) with the exemption of the fine. This incentive could help to increase the number of applications, but this requires a reform of Article 83 of the LORCPM[23], and to the Instructive as well[24].

3. The fight against collusive agreements

22. At this point, it is pertinent to divide the existence of the program in two moments in Ecuador, the first is from October 13, 2011, the date on which the LORCPM is issued, until September 2019; and the second goes from October 2, 2019, issue date of the new Instructive for granting benefits of exemption and reduction of the fine, containing

[19] LORCPM. Articles 83 and 84.

[20] Instructive for granting benefits of exemption or reduction of the amount of the fine of the SCPM. Official Registry No. 52 of October 2, 2019. Articles 3, 12 and 16.

[21] The "mark number" is the chronological order of the presentation of the application for the leniency program, and determines the position that an undertaking holds in order to receive the exemption or reduction of the amount of the fine.

[22] Gómez, Carolina. "Lo incierto de los programas de beneficios por colaboración". *Díkaion* 30. 2021. p. 35.

[23] According to articles 120, numeral 6, 132 and 133 of the Constitution of the Republic of Ecuador, the reform of organic laws, corresponds exclusively to the National Assembly of Ecuador.

[24] See: Motta. Massimo, Competition Policy. Theory and Practice. CFE. 2018 PP. 240-244.

substantial reforms to strengthen the program looking to increase the capacity to detect such agreements.

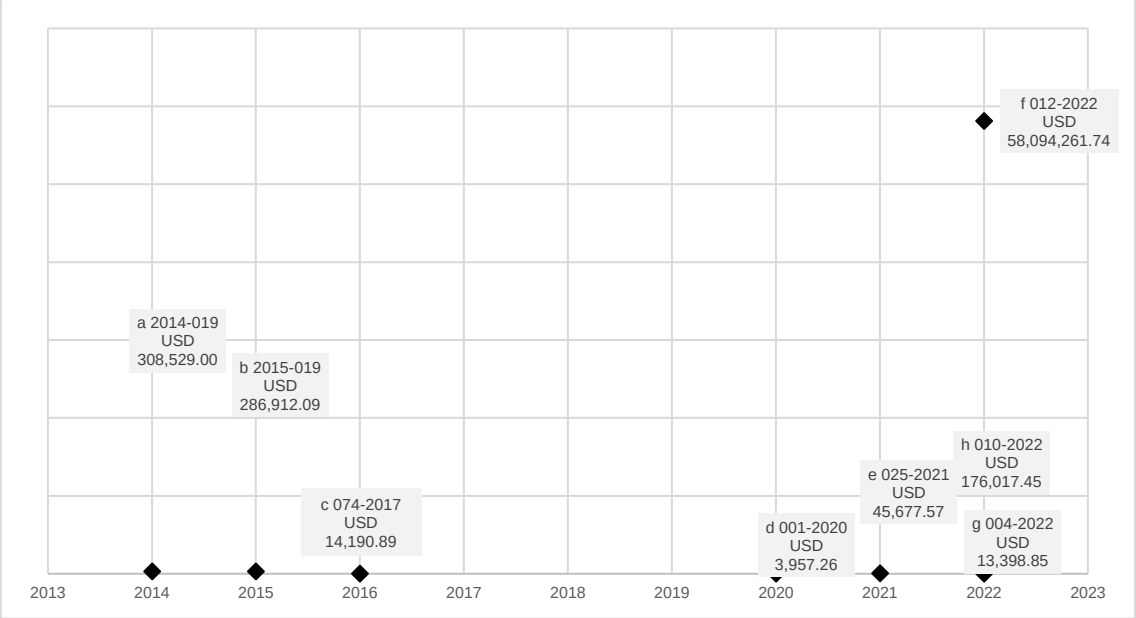
23. In these two moments, it is necessary to contextualize the number of sanctioned cases and their respective amounts, in order to unveil the number of applications submitted by undertakings in each of them.

24. Since October 13 2011 until September 2019, there were three sanctioned cases of collusive agreements with a total amount of fines of USD 609.631,98[25].

25. During the first eight years of existence of the SCPM, there has been a low capacity for detection and sanction of collusive agreements in Ecuador, which means that one of the essential characteristics for a leniency program to work is not being met.

26. In contrast, since October 2019, date of issue of the current instructive, until July 22 there have been five sanctioned cases with a total amount of fines of USD 58 333.312,87.

Figure 1. Sanctions between 2011-2019i



Note:
a File SCPM-CRPI-2014-019; b File SCPM-CRPI-2015-019;c File SCPM-CRPI-074-2017; d File SCPM-CRPI-001-2020; e File SCPM-CRPI-025-2021, f File SCPM-CRPI-012-2022, g File SCPM-CRPI-004-2022, h File SCPM-CRPI-010-2022.
i Fines shown refer to files sanctioned by the Commission for First Instance Resolution, done after the investigation carried out by the National Direction for Investigation and Control of Restrictive Practices and Agreements

[25] Out of the 3 sanctioned cases, 2 of them still have ongoing legal recourses, for which there is no certainty regarding the final imposition of fines and therefore the amount can still vary in the future. The reported amounts are based on the Memorandum SPM-INAF-DNF-2022-296 OF May 13, 2022 and its report.

27. In the last three years, there has been an increase in the detection of collusive agreements, as for exponential growth in the imposition of economic fines to infringing operators following how grave are the agreements per object, through which, the SCPM looks for an increase in the applications for leniency programs and therefore achieve that the operators that are or have been committing a collusive agreement, can be opportunely detected and sanctioned.

4. Conclusions

28. The leniency program in Ecuador is under a strengthening process as an optimal tool for the detection of cartels. In 10 years of existence[26], the authority has accepted two applications for acceding and benefiting of this program.

29. Kimberly case, resulted in a situation where undertakings that wanted to inform about the existence of a collusive agreement, do not count with the necessary incentives to do so, for which, they do not have guarantees about the use that the proofs and information will be given.

30. For a leniency program to be successful, it must count on a large history of detecting collusive agreements, imposition of strong economic fines, and it must guarantee and protect the proofs and information shared by the applicants. These characteristics have not been met in the Ecuadorian competition regime, for which, there have only been two applications for leniency, out of which Kimberly case, resulted in a harm to the rights of the applicant, as determined by a competent judge.

31. By issuing the new Instructive, the SCPM aims to foster the following lines: i) clarity on the five phases that the program has; ii) respect for the place where the application is presented, through the use of marks; and, iii) better protection of the confidentiality of information. With which I, the SCPM looks to generate confidence for the undertakings that make up a collusive agreement, that they might benefit from the exemption of a fine, with the certainty that the information will be completely protected and the proofs will not be used against them.

32. From 2019 until early July 2022, the imposed fines to infringing undertakings, have notably increased, with which the SCPM expects to eventually increase the number of leniency applications as well, therefore easing the process of investigations and detection and disbandment of collusive agreements in the country.

33. From 2019 until early July 2022, five cases relating to collusive agreements have been detected and sanctioned, therefore, in two and a half years the SCPM has detected and sanctioned more cases than in the previous 8 years, and there is a substantial difference in the amounts of the fines imposed. These results on which the SCPM has worked in the last years, foster an environment in which undertakings can foresee an increase in SCPM effectivity for detecting agreements, as for the imposition of economic fines that can realistically affect the income obtained through a collusive agreement, which works as an incentive to the infringing parties to work with the authority and apply to the leniency program.

[26] According to the resolution No. 002-197-CPCCS-2012, of July 31, 2012, the Council for Citizens Participation and Social Control, designated the first Superintendent for Market Power Control, and the SCPM started functioning.

34. As closure, it is still necessary to reform articles 83 and 84 of the LORCPM and the leniency program[27], in order to generate stronger incentives for the application to leniency programs, especially in the case of the first undertaking to present proofs of existence of a collusive agreement that has not been previously detected. This will benefit the SCPM for sanctioning these conducts as for the applicant as it will immediately benefit with an exemption of the fine correspondent to its infringement.

[27] It is recommendable to change the denomination of the leniency program, looking for a wider and friendlier acceptance for undertakings that might want to apply to the program, v. gr. "Collaboration program".