Leniency Programs in Latin America and the Caribbean

Recent experiences and lessons learned

Felipe Serrano
OECD - IDB Latin American Competition Forum
Mexico City, April 2016

Agenda

- Introduction: fundamentals of leniency programs
- Features of leniency programs in LA: trade-offs and reforms
  - Leniency benefits for criminal liability
  - Availability of benefits for the ringleader
  - Obligation to make a written application
  - Quality of the information or evidence required to sign an agreement
- Recent trends in cases
- Conclusion

Introduction…

- Fundamentals of leniency programs
  - High risk of detection
  - Significant sanctions: Projects of reform
    - Chile: from USD 22.5 mm approx. to up to 30% product sales during cartel, or double the profits
    - Colombia: from USD 20 mm approx. to 30% product sales during cartel or triple profits
    - Ecuador: sanctions up to 10% - 12% of total volume of business
  - Certainty and transparency:
    - Amending Guidelines – Chile, Brazil
    - Drafting - Colombia, IFT (Mex)
    - Introduced New – Panama and Mexico (Cofece)

…*Benefits, criminal liability*

- Brazil and Mexico criminalize cartel conduct, Colombia for bid rigging, Chile is about to criminalize cartels
- Criminal liability increases cost of the conduct
- Challenges of introducing criminal sanctions?
  - Some countries administrative and criminal investigation handled by two different Agencies (lack of experience, inconsistency in application, conflicting decisions affect advocacy, handling confidentiality?)
  - Delays in judicial resolution in some countries may generate legal uncertainty
  - Until 90s some jurisdictions in LA did not heavily prosecute cartels, sometimes promoted them
- What is relevant is to have leniency for monetary and criminal sanctions
  - Brazil 2011: applicants who sign leniency with CADE cannot not be prosecuted for criminal liability. Mexico 2011 also follows this pattern, Chile will as well. Colombia provides up to half reduction (12 to 6 years), Cooperation between SIC and Prosecutor has emerged

…Benefits for ringleader

- Several countries in Latin America prohibit the leader of the cartel to obtain benefits: Chile, Colombia, El Salvador, Panama and Uruguay
- Arguments often advanced: deter companies from cartelizing, avoid strategic behavior, moral considerations
- Possible challenges of this provision that may reduce effectiveness of leniency
  - Difficult to establish cartel leaders, uncertainty may make company reluctant to apply
  - Leadership may change with the years, cartel may stop and be born again
  - New management may want to stop conduct but be reluctant
  - Allowing leader to apply may actually increase deterrence
  - Ringleaders may have the best evidence
  - Both leaders and followers equally guilty
- Three jurisdictions changed laws: In 2011 Brazil repealed prohibition; Peru also established that ringleader may receive reductions (no immunity); Colombia narrowed definition of leader –requires stable coercion

…Obligation to make written application

- Some jurisdictions require applicants to start process by submitting a written document accepting their participation and providing information
- Region's written legal tradition? More weight to written evidence?
- Producing written corporate statements may provide disincentives to applicants, especially US companies
  - US Courts may demand disclosure of documents produced by defendant, including corporate statements recognizing conduct (may apply to documents produced in other jurisdictions) – Exposure to civil damages
- Solution? Accept oral applications – record and transcribe the statement, document now belongs to Authority
  - Chile is currently considering alternatives to mitigate its requirement to make applications in writing (draft guidelines allow applications by phone)
  - Colombia moved to allow for oral applications and has the alternative of not requiring corporate statements

Finally…*Quality of information required to sign*

- The trend: be strict and demand strong evidence of cartel conduct
  - Some require information *and* evidence, tips are not enough
  - Ex. CADE increasingly requires higher standard of evidence to sign (people usually submit emails, chats, WhatsApp…)
  - Chile requires information proving agreement or sufficient to request courts authorization to perform dawn raids, wiretapping… in practice high standard
  - Panama requires evidence that by itself is enough to prove the cartel to grant immunity

Conclusion

- In the last five years the region has seen several reforms to leniency programs
- Reforms have been motivated by lessons learned in handling cases
- Countries are moving towards higher sanctions and predictability, relying more on leniency applications everyday. High risk of detection should keep up as well
- With higher sanctions to come it is possible that applications will increase
- Current cases (first in some jurisdictions) are setting precedent (how you handle confidentiality, media, negotiations)

Thank you