

The Andean Community and Leniency in Latin America

By Eduardo Frade & Pedro Anitelle | Mattos Filho



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It has been over 5 years since, in previous columns at CPI,² we called attention to a unique case then under review by the General Secretariat of the Andean Community (“SGCAN”), a regional organization comprising Bolivia, Colombia, Ecuador and Peru as member-states, whose main goal is to promote free trade in the Andean states’ region, and that was until then unfamiliar to most antitrust practitioners. This case, involving an alleged international “tissue paper” cartel originating in Colombia, is especially important as its ripple effects could effectively cripple leniency programs in Andean countries, and undermine the effectiveness of cartel enforcement throughout Latin America.

As a brief recap: In 2013, Kimberly-Clark (“KC”) signed leniency agreements with the Superintendencia de Industria y Comercio (“SIC”) and the Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (“INDECOPI”), the antitrust authorities in Colombia and Peru, respectively. These agreements assisted the authorities in imposing fines against tissue paper producers engaged in a price-fixing scheme. In the same context, KC also applied to leniency with the Superintendencia de Control del Poder de Mercado in Ecuador (SCPM, now Superintendencia de Competencia Económica - SCE) – the Ecuadorian antitrust authority – and in exchange received assurance of its eligibility for full immunity. Surprisingly, the SCPM decided not to pursue an investigation into the tissue paper cartel but referred the matter to the SGCAN – including the confidential self-incriminatory information in KC’s leniency file.

Notably, the Ecuadorian authority did not have the leniency applicant’s consent to share such information with another authority. According to KC, SCPM declassified it under its own authority,

contravening the confidentiality rules of its own agreement with KC as well as standard procedure in leniency agreements, which evidently depend on confidentiality and legal assurance between the authority and the applicant to maintain effectiveness.

Based on said documents, the Andean Community’s SG – which lacks a leniency program and has not updated its rules to introduce one, although its member states have – conducted an investigation into the tissue paper cartel and, on November 2021, issued a resolution fining Colombian companies Kimberly Colpapel S.A and Kimberly Clark del Ecuador S.A the amount of USD 17.5 million, as well fines for Ecuadorian companies Productos Familia S.A and Productos Familia Sancela del Ecuador S.A. (from Grupo Familia, another cartel member) for a total of USD 16.9 million.

The decision to fine a leniency applicant using their own self-incriminating evidence, which had been surrendered to a different authority in exchange for expedited immunity, came as a shock. Understandably, Colombian and Peruvian authorities, who had honored their leniency commitments, actively opposed CAN’s decision by presenting reconsideration pleas founded on numerous grounds, including the Andean Community’s lack of jurisdiction over the case and, notably, the disregard for member-countries’ leniency programs, as in wiping out the promised benefits in exchange for the applicant’s collaboration the decision may threaten the viability of leniency programs in these countries.

Each one of the sanctioned companies filed a nullity action before the Andean Tribunal of Justice, in which they request the annulment of the sanctioning resolutions. These proceedings have moved forward, and now the Andean Tribunal of Justice is set to issue a final decision

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² Carlos Mena-Labarthe, Jaime Barahona, Vinicius Marques de Carvalho and Eduardo Frade, *The end of leniency programs in the Andean Region?*, CPI LATIN AMERICAN COLUMN (April 18, 2018), <https://www.competitionpolicyinternational.com/the-end-of-lenieny-programs-in-the-andean-region/>. Carlos Mena-Labarthe, Jaime Barahona, Vinicius Marques de Carvalho and Eduardo Frade, *A Call to Arms to Protect Latin American Leniency Programs* CPI LATIN AMERICAN COLUMN (July 23, 2018), <https://www.pymnts.com/cpi-posts/a-call-to-arms-to-protect-latin-american-lenieny-programs/>.

on the case. It can either overturn the SGCAN's decision and restore private companies' trust into Andean countries' leniency programs or reaffirm the SG's decision and hold a significant shadow of doubt over companies that consider applying for leniency in Andean jurisdictions.

The SGCAN's decision has effects which far surpass the boundaries of the relevant conduct in Colombia, Peru, and Ecuador. It has incited a dispute between nation states and a regional organization, raised unanswered questions on the confidentiality guarantees for leniency applicants in Andean countries, and has cast doubt on the trustworthiness of such countries' leniency programs.

Leniency programs are one of antitrust authorities' main tools for cartel deterrence and detection, as well as an effective way to break said cartels' internal trust and stability. According to the OCDE,³ procedural clarity, trust between the authority and leniency applicant, and confidentiality, are factors universally recognized as key to the success of leniency programs.

This is particularly essential in jurisdictions where leniency programs are being consolidated and where authorities are making efforts to garner the confidence of private companies' by establishing predictable and transparent programs – as is the

case with most Latin American jurisdictions. Note, for instance, that KC was the first company to ever earn full immunity in a leniency agreement in Colombia as well as Peru. These concerns are even more pressing given the current context, where there is a global decline in the number of leniency applications. In its latest report on this subject, the OECD⁴ found a worldwide decline of 65 percent between 2015 and 2021, and a 66 percent decline in the Latin America and Caribbean region. Even in Brazil, a leading jurisdiction for cartel enforcement in the LatAm area, there was a sharp drop of 82 percent in the number of signed leniency agreements between 2019 and 2023.⁵

Granted, this decline is caused by several factors, and it represents a global distress in anti-cartel enforcement which concerns the antitrust community worldwide. However, given this context, a decision by a regional authority to directly undermine the very foundations of leniency programs can deepen the mistrust of potential leniency applicants in the region to an irreparable degree. The effects of this could spill over beyond the Andean Community to other Latin American countries, which are already painstakingly attempting to restore the vigor of their declining leniency programs.

³ OECD, *The Future of Effective Leniency Programmes: Advancing Detection and Deterrence of Cartels*, OECD Competition Policy Roundtable Background Note (2023), www.oecd.org/daf/competition/the-future-of-effective-leniency-programmes-2023.pdf.

⁴ *Ibid.*

⁵ *Estatísticas do Programa de Leniência do Cade*, <https://www.gov.br/cade/pt-br/assuntos/programa-de-leniencia/estatisticas/estatisticas-do-programa-de-leniencia-do-cade>.