



# The end of leniency programs in the Andean Region?



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April 23, 2018 may mark the end of an era for leniency programs in the Andean region. Even more, the date may herald an insurmountable harm to the leniency programs of the whole of Latin America and the world. Media reports indicate that the Andean Council for Competition, together with the General Secretariat of the Andean Community (SGCAN) are considering a recommendation by SGCAN staff to fine companies allegedly involved in a cartel the statutory maximum for conduct that was first detected and self-reported to the Colombian and the Ecuadorian competition authorities by the same companies which had cooperated voluntarily with the investigation and applied for the leniency program.

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The tissue paper cases in Colombia and Peru have been highlighted as landmark cases that have put the authorities in those jurisdictions in the national — as well as the international — spotlight, sending the strong message that these authorities are fighting cartels and that their leniency programs are functioning effectively.

Kimberly Clark (“KC”) was the first company to ever earn full immunity in Colombia as well as in Peru, helping 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”) secure historic fines against soft paper producers. Kimberly Clark also cooperated fully with the Superintendencia de Control del Poder de Mercado in Ecuador (“SCPM”) and, in return, received a written assurance from the authority that it was eligible for full immunity. However, although the SCPM closed its lengthy investigation into soft paper without finding a violation, it then reopened and closed its soft paper investigation a second time, before finally referring the matter to the SGCAN along with information in Kimberly Clark’s leniency file. The SCPM did not seek a waiver or previous consent from KC before sharing the self-incriminating information with the SGCAN, disregarding a standard practice broadly recognized by countries in these investigatory proceedings and fostered by specific recommendations of the Organization for Economic Cooperation and Development (“OECD”). The SGCN Technical Staff’s recommendation to fine KC now rests, incredibly, on the documents and sworn testimony produced by KC in its leniency application to the SCPM.

As authorities and international organizations such as the OECD often refer,<sup>2</sup> effective leniency programs in Chile, Brazil, Mexico, Colombia and Peru have made Latin America the “hot spot” for prosecution of multinational companies engaged in cartel activity. Effective leniency programs that are transparent and predictable are key to enforcement, and the authorities in the region have been making enormous efforts to protect the cornerstones of the program until now.

That is why the stakes in the pending decision could hardly be higher. If the SGCAN decides to adopt the recommendation, then the SIC’s and INDECOPI’s leniency programs will be ruined as no company doing business in more than one Andean Member State would follow in Kimberly Clark’s footsteps.

But not only that: the adoption of the recommendation also carries risk to the leniency programs of other authorities in the region. Brazil, Chile and Mexico have been leading the fight against cartels in large part thanks to their leniency programs. Argentina is in the process of adopting a leniency program with a new law that follows other countries’ experiences. If this decision is adopted, imagine the negative incentive that potential whistle-

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<sup>2</sup> *Leniency Programs in Latin America: “New” Tools for Cartel Enforcement*, Elisa V. Mariscal and Carlos Mena-Labarthe, Competition Policy International, Autumn 2010, Vol. 6. No 2. Y *Programas de Clemencia en America Latina y el Caribe: Experiencias recientes y lecciones aprendidas*. Documento de base elaborado por la Secretaría de la Organización para la Cooperación y Desarrollo Económicos (“OCDE”). Ciudad de México, México, 2016.





blowers before the Mexican, Chilean and Brazilian authorities will feel when considering whether to voluntarily disclose cartel activity that potentially has effects throughout Latin America with the knowledge that heavy sanctions can be imposed in Colombia and Ecuador undermining other countries' leniency programs' reliability.

Leniency programs have proven to be the most effective investigative means for cracking cartels and a necessary tool in the modern cartel enforcer's toolkit. There is an international consensus shared by competition authorities as well as the public, the media and the business community that leniency tools are necessary to detect cartels, both on domestic as on international levels.

The success of leniency programs is intrinsically linked to their reliability. Whatever the rules, a party will never come forward to confess to an infraction that is unknown to the authorities and present evidence against others and itself, if there is the slightest chance that the authority will betray its own rules and not only fail to grant the promised benefits, but also use the evidence brought by the leniency beneficiary against it. A negative message of unreliability such as this will crush any leniency program. Killing leniency, in turn, means letting go of the most important and effective public tool in discovering and fighting cartels; it means threatening the welfare of millions of consumers affected by dozens of present and future cartels.

Fortunately for this matter, the very same competition authorities from countries that were successful in the soft paper investigations and are enjoying the effectiveness of the leniency policies are the ones that can determine its fate. The heads of the competition authorities of the Andean region have a responsibility to protect their own programs in their vote in the Competition Council of CAN.

However, if they accept the recent and surprising recommendation of the SGCAN Technical Staff to punish the leniency beneficiary in CAN's own Member States, Peru, Colombia and Ecuador's leniency programs could be, simply put, ruined, along with its hereto growing anti-cartel policy efforts.

