DOMINICAN REPUBLIC'S RESOLUTION ON CARTEL LENIENCY
COMMENT OF THE GLOBAL ANTITRUST INSTITUTE
ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY

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The Global Antitrust Institute is encouraged to observe that the Dominican Republic is initiating a leniency program, as leniency is an effective means of encouraging the self-reporting of cartel behavior. Procompetencia has correctly recognized that cartels pose the greatest threat to the competitive process, with the potential to reduce the value of output, raise prices without any corresponding economic benefit, and harm consumers, among other adverse economic effects. And since cartels pose such a great threat to the competitive process, it is important for all competition authorities to take measures to deter them adequately. This comment explores a few areas in which the proposed leniency procedures might be adjusted to become even more effective in deterring cartels. We appreciate the opportunity to comment and commend Procompetencia for its transparency. We submit this comment based upon our extensive experience and expertise in antitrust law and economics.[1]

Structure of Sanctions and Reductions

In all issues of cartel behavior, the level of deterrence is determined by a combination of the severity of the penalty and the likelihood of being caught.[2] For

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[2] *See* Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POLITICAL ECONOMY 169-217 (1968); Douglas H. Ginsburg & Joshua D. Wright, *Antitrust Sanctions*, 6 COMP. POL'Y INT'L 3 (2010); William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652 (1983).

example, even if a competition agency initiated an extreme sanction for cartels, it still might not deter them if no resources were dedicated to investigating possible cartel conduct and no program existed to encourage self-reporting. The inverse is also true: Assuming (as seems strongly supported in light of historical evidence) that many cartels earn significant profits for the members, even if there were a 100 percent probability that a cartel would be detected, cartel participants would not be deterred if the sanctions were minimal. Therefore, if a competition agency seeks to effectively deter cartels, it must establish meaningful sanctions and undertake investigation and enforcement efforts that ensure a credible threat of detection sufficient to achieve adequate deterrence.

One of the most effective ways to increase the threat of detection is through a leniency program that offers lighter penalties to cartel members that self-report to the agency before an investigation has begun.[3] In the program proposed by Procompetencia, the maximum reduction in sanctions is 70 percent for the first applicant, while the reduction for subsequent applicants is 50 percent. Based on an extensive academic literature on the design and performance of optimal leniency programs, we offer the following observations regarding some aspects of this discount structure.[4]

First, the possibility of 100 percent relief from sanctions is a much more attractive reward for the first applicant and may be especially important to encourage self-reporting of cartels that are otherwise unlikely to be disclosed. The difference between

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[3] *See generally* Zhijun Chen & Patrick Rey, *On the Design of Leniency Programs*, (2013) 56 J. L. & ECON. 917-957 (2013).

[4] For theoretical analyses of the effect of leniency programs on cartel behavior, *see, e.g.*, Joe Chen & Joseph E. Harrington, Jr., *The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path*, *in* THE POLITICAL ECONOMY OF ANTITRUST 59 (2005); Cécile Aubert, Patrick Rey & William Kovacic, *The Impact of Leniency Programs On Cartels*, 24 INT'L J. INDUS. ORG. 1241 (2006); Joan-Ramón Borrell, Juan Luis Jiménez & Carmen García, *Evaluating Antitrust Leniency Programs*, 10 J. COMP. L. & ECON. 107 (2004); Jay Pil Choi & Heiko Gerlach, *Global Cartels, Leniency Programs and International Antitrust Cooperation*, 30 INT'L J. INDUS. ORG. 528 (2012); Sandra Marco Colino, *The Perks of Being a Whistleblower: Designing Efficient Leniency Programs in New Antitrust Jurisdictions*, 50 VAND. J. TRANSNAT'L L. 535 (2017); Bruce H. Kobayashi, *Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 743 (2001); Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453 (2006); Evgenia Motchenkova & Rob van der Laan, *Strictness of Leniency Programs and Asymmetric Punishment Effect*, 58 INT'L REV. ECON. 401 (2011); Massimo Motta & Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 INT'L J. INDUS. ORG. 347 (2003). For empirical evaluations of the effect of leniency programs, see Steffen Brenner, *An Empirical Study of the European Corporate Leniency Program*, 27 INT'L J. INDUS. ORG. 639 (2009); Nathan H. Miller, *Strategic Leniency and Cartel Enforcement*, 99 AMER. ECON. REV. 750 (2009); Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success?*, 28 EURO. COMP. L. REV. 148 (2007).

full relief and 70 percent relief could end up being very important. At the point of initial discovery of a cartel (when potential leniency applicants are assessing their legal options) cartel members face substantial uncertainty in predicting the amount of the ultimate sanction likely to be imposed. At that point, an offer of a 100 percent fine reduction becomes very attractive compared to continuing silence, as the receipt of leniency relieves the enterprise of a significant sanctions threat, while remaining silent will subject the cartel members to continuing uncertainty about eventual discovery (for example, if another cartel participant self-reports) and about the ultimate sanction level.

Other jurisdictions, such as the United States and European Union, offer successful leniency applicants full relief, and as a result, their leniency programs have been very effective. And even though the first cartel member to report receives a 100 percent fine reduction, it may still face other consequences, such as private litigation and reputational harm. It is not clear, however, that the possibility of only a 70 percent fine reduction will provide a sufficient incentive to attract applicants. Ultimately, it is an empirical question whether a 70 percent discount will achieve the same level of deterrence as 100 percent. As stated, it will depend *inter alia* on both the level of punishment, considering both public and private sources, and the ability of antitrust regulators to detect cheating without the help of self-reporting. Nonetheless, creating a very strong incentive to self-report, which a 100 percent fine reduction provides, is something to consider seriously given the successful experiences of other jurisdictions that have significant experience with leniency programs.

Second, the gap between the 70 percent discount for first applicant and 50 percent for subsequent applicants might have the unintended consequence of discouraging first applicants from reporting.[5] The risk of a 20 percent increase in the ultimate sanction simply may not be enough to outweigh the benefits associated with the possibility that the cartel might never be disclosed to Procompetencia. Under this arrangement, it may be in each cartel member's best interest to adhere to the cartel and then apply for a 50 percent reduction if one of the other members reports. Consequently, it is entirely possible that, because of the modest difference between 30% liability and 50% liability, no cartel member has an adequate incentive to be the first applicant, thinking it can come in as the second applicant if another member reports the cartel to Procompetencia. As a result, many cartels may never be uncovered.

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[5] *See, e.g.*, Chen & Rey, *supra* note 3 (showing the usefulness of restricting leniency to the first informant only); Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs*, STOCKHOLM SCHOOL ECON. (2005) (optimal leniency policy restricted to first party that reports); *but see* Jeroen Hinloopen & Adriaan R. Soetevent, *Laboratory Evidence on the Effectiveness of Corporate Leniency Programs*, 39 RAND J. ECON. 607 (2008) (showing experimental evidence of reduced cartel behavior where the leniency discount is 100% for the first to report, 50% for the second, and 0% for the remaining cartel members).

Finally, it is important to note that leniency programs become increasingly attractive to the extent that the agency successfully imposes significant sanctions on those who do not get leniency. Even if a leniency program is properly structured to provide a strong incentive to self-report, it may not begin to succeed until the competition agency builds a reputation for imposing significant sanctions—thereby making itself an increasingly credible threat.

Bookmarking Procedures

With regard to the bookmarking system, we have concerns that the information required to obtain an initial marker may set too high a standard for companies considering the possibility of a leniency application. As mentioned above, a large factor in determining the success of any leniency program is the degree of certainty that a cartel member expects to receive as a result of its leniency application. Placing such stringent requirements on the acts necessary to receive a marker will make the process more uncertain. This uncertainty arises from both the degree of internal investigation required to obtain a bookmark and the chance that the investigation may tip off other cartel members to the existence of a potential cooperator. As such, we strongly recommend that Procompetencia consider lowering the requirements necessary for a potential leniency applicant to obtain a bookmark.

The requirements to receive a bookmark, as currently proposed, necessarily entail an extensive internal investigation into a company's own practices, which will delay the initial reporting of the cartel and thereby increase uncertainty about the company's ability to obtain leniency. Asking a company to ascertain the origin, duration, and extent of the cartel's activity would require a considerable amount of research on the part of the cartel member. The danger to the cartel member comes in the lapse of time between when the member decides it would like to cooperate and when it is able to gather all the information necessary to obtain a bookmark. During this period, the cartel member is exposed to serious and mounting legal repercussions. That exposure leads to the exact type of uncertainty that may discourage cartel members from seeking leniency

In addition, the internal investigation required by the bookmark system could result in tipping off other cartel members as to a potential leniency applicant, which could lead to actions by other cartel member that prejudice or even defeat the agency's enforcement efforts. To determine the origin, scope and duration of a cartel may require extensive interviews with suspected participants, extensive searches of documents and data bases associated with the suspected participants and affected

products, and other investigative activity that is likely to be noticed by those involved in the cartel. Such individuals and other cartel members with whom they communicate may destroy evidence or attempt to jump in line ahead of the original would-be leniency applicant. If other participants would have the possibility of jumping ahead in line due to the lengthy period of investigation needed to satisfy the requirements for a bookmark, this will, in turn, create a disincentive on the part of the original cooperator to seek a bookmark.

United States Department of Justice officials have recently emphasized the importance of avoiding actions that could alert co-conspirators to any potential investigation.[6] The Department and other agencies have seen that cartel members "compete" to be the first in line for leniency.[7] If a cartel member finds out about another potential cooperator, it may accelerate the competition to be first in line by taking short cuts in its investigation, and thereby compromising the effectiveness of the agency's ability to investigate the cartel fully.[8] Even a well-intentioned cartel member seeking to cooperate risks losing its chance to be the first to report if it inadvertently tips off other cartel members. (For example, an individual involved in the cartel might notice that a conspirator at a competing firm is reluctant or unavailable to communicate for extended and unexplained periods, causing the first conspirator to infer that an investigation of the cartel has begun and to urge his own company to seek leniency without delay.) Again, this increases the potential applicant's uncertainty of receiving leniency, further discouraging potential cooperators.

For all of the reasons just discussed, we strongly recommend reducing the requirements for potential leniency applicants to obtain a bookmark. When a cartel member comes to the decision to cooperate, often its first action is to determine whether leniency is still available in each pertinent jurisdiction. If leniency does remain available, that cartel member wants to get its name on the list of leniency applicants as quickly as possible. At that point, however, the applicant often has limited information about the scope of the conspiracy. The extensive proposed requirements for getting a bookmark would prevent a willing cooperator from coming forward at the earliest possible moment.

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[6] Pallavi Guniganti, *US Prosecutors Stress Importance of Preservation of Evidence*, GLOBAL COMP. REV. (Feb. 15, 2018), https://globalcompetitionreview.com/article/1159060/us-prosecutors-stress-importance-of-preservation-of-evidence.

[7] *See* Kobayashi, *supra* note 4, at 739.

[8] *See* Scott D. Hammond, *Cornerstones of an Effective Cartel Leniency Programme*, COMP. L. INT'L 4, 6-7 (2008).

Successful leniency programs around the world have lower standards for obtaining a bookmark than those now proposed by Procompetencia. Most programs require only a notification that there is a material possibility a cartel is operating in a certain market sector. The United States program in particular requires only that counsel 1) report that an antitrust violation has been uncovered, 2) disclose the general nature of the conduct, 3) identify the industry, product, or service to allow the Department of Justice to determine whether leniency is still available, and 4) identify the client.[9] This bare bones report does not hinder long-term cooperation between the agency and the reporting applicant because, even if the first to report later declines to apply for leniency, the next member with a bookmark is able to apply to the fullest extent of the leniency program. In order to provide the certainty characteristic of successful leniency programs, the requirements for an initial bookmark should be much lower than those Procompetencia has proposed. We respectfully urge Procompetencia to require only notification that there is a material possibility a cartel is operating in a certain market sector, using the United States Department of Justice Antitrust Division requirements as a model.

Destruction of Evidence as a Bar to Leniency

Procompetencia proposes to disqualify potential leniency applicants that engage in any destruction or alteration of evidence related to the conspiracy. Unfortunately, in many cartels the destruction or even fabrication of evidence is commonplace. The proposal, however, treats tampering with evidence in a way that could deter compliance. As explained below, it could deter both would-be cooperators that had not actually destroyed or altered any evidence and potential leniency applicants that would otherwise be eager to cooperate. Accordingly, we recommend that any past destruction or alteration of evidence should not prevent a cartel member from applying for leniency.

The mere threat that past illicit handling of cartel-related evidence could prevent participation in a leniency program could prevent potential cooperators from coming forward, even if they had not engaged in any such improper conduct. For example, when management first discovers the company's possible participation in a cartel, they are likely to be unsure whether lower level employees destroyed any relevant evidence. Under the proposed rule, it could not be confident of its eligibility for leniency. This

[9] U.S. DEP'T OF JUSTICE, FREQUENTLY ASKED QUESTIONS ABOUT THE ANTITRUST DIVISION'S LENIENCY PROGRAM AND MODEL LENIENCY LETTERS 3 (2017), https://www.justice.gov/atr/page/file/926521/download.

might deter the potential applicant from coming forward; it would not want the agency to launch an investigation while its eligibility for leniency is in doubt.

Further, the bar to leniency could prevent a potential cooperator from aiding the investigation for other reasons. Oftentimes, documents and other evidence are altered or destroyed in the ordinary course of operating a cartel. A cartel member may do this during the initial stages of the cartel but be unwilling to do so later, when it is considering whether to seek leniency. Under the current proposal, that cartel member would be prevented from taking part in the leniency program. As such, its incentive may be skewed towards continuing to participate in the cartel – or withdrawing from the cartel but not coming forward to self-report – rather than aiding the agency's investigation.

We applaud the goal of this measure, as the preservation of evidence is an essential part of an antitrust investigation.[10] However, this proposal may be counterproductive as it could unnecessarily prevent participation in a leniency program and deter leniency applicants. Instead, we recommend an emphasis on continuing cooperation, from the moment when a cartel member first expresses an interest in obtaining leniency. The agency could then extract a promise not to alter or destroy any evidence in the future; leniency programs around the world require continuing cooperation by leniency applicants.[11] The current proposal could serve as a model for that commitment.

Cooperation with the agency following the initial discovery of the cartel and contact with the agency is far more important than any past misconduct regarding evidence. While it is understandable for an agency to take measures to prevent the destruction or alteration of evidence, requirements to that effect should be forward looking.

Conclusion

We appreciate the opportunity to comment and would be happy to respond to any questions Procompetencia may have or to assist Procompetencia in any other appropriate manner.

[10] *See* Guniganti, *supra* note 6.

[11] *See* Kobayashi, *supra* note 4, at 743.