

Antitrust Leniency in Colombia: Achievements, Challenges and Recommendations

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Background



Focus on cartels

Since the late 1990s OECD members have focused on prosecuting cartels



Trends

OECD (2022) established that since 2015 leniency filings have been declining consistently across the globe.



Leniency in Colombia

Leniency was adopted in Colombia in 2009, and since then the bylaws detailing procedures have been amended 3 times.

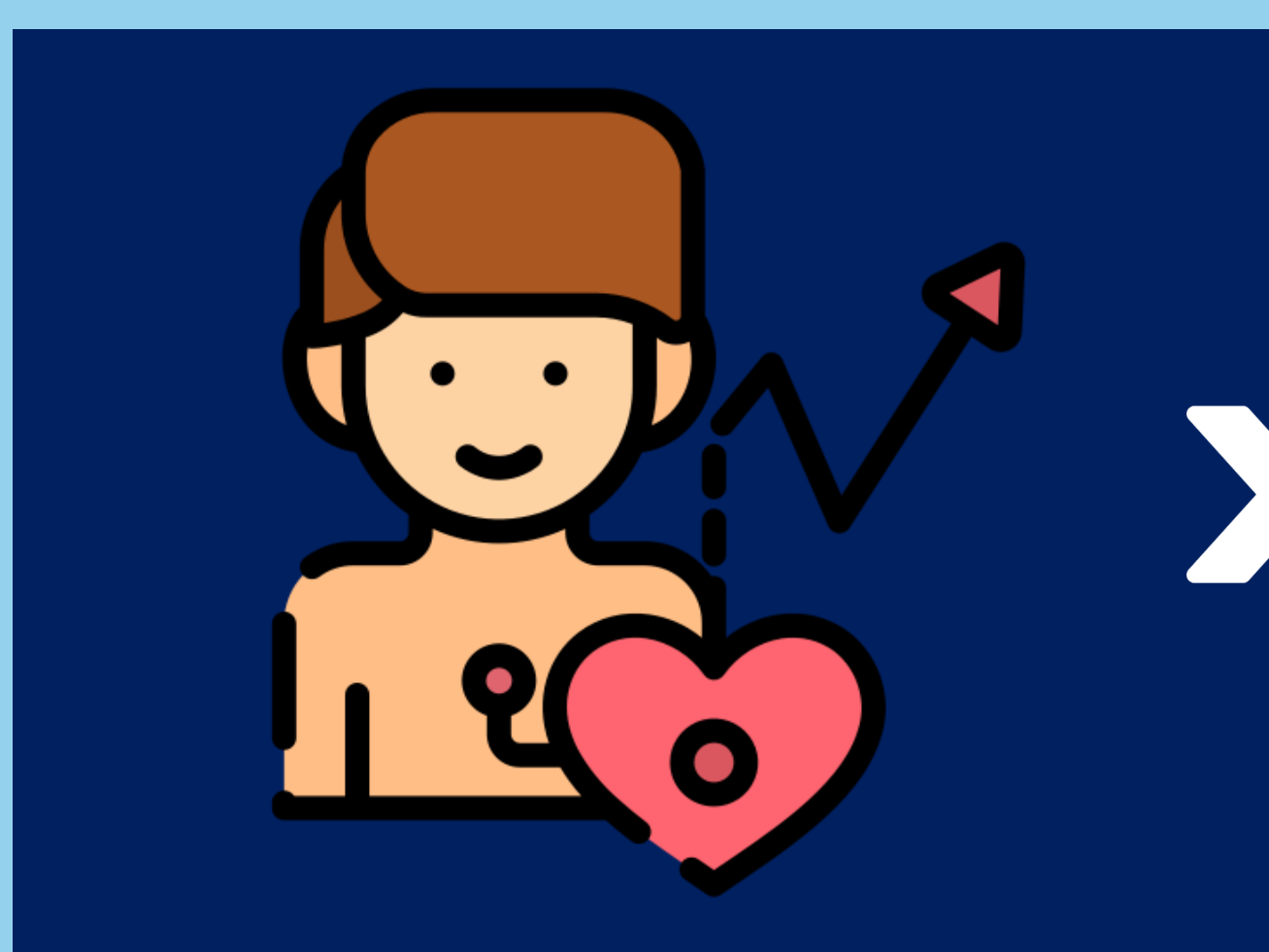


Analysis and Findings



Local manifestation of a global phenomenon

Since its adoption in 2009, the Leniency program has faced several of the issues identified in other jurisdictions, as well as local issues. However, the trend in Colombia is consistent with the trend of other OECD members, namely, the reduction of leniency cases.



Is Leniency in Survival Mode?

Since the enactment of the leniency program in 2009, the Government has amended 3 times the bylaws regulating how it operates. The changes have not contributed to an increase in filings.

Problems of leniency in Colombia

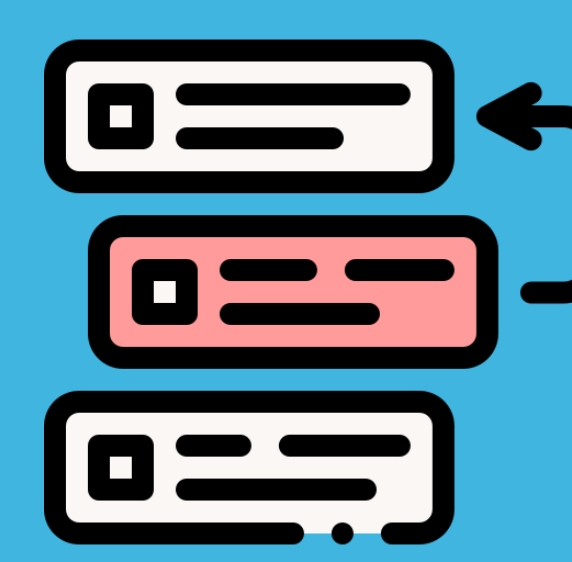
It is particularly difficult to determine the effectiveness of leniency programs because a key variable – the amount of cartels that are not established and the cartels that are abandoned without the knowledge of competition authorities – is significant.



1. If you reward cheaters, you will be cheated.



2. There are incentives against reporting



3. The possibility of ACN stepping in is problematic

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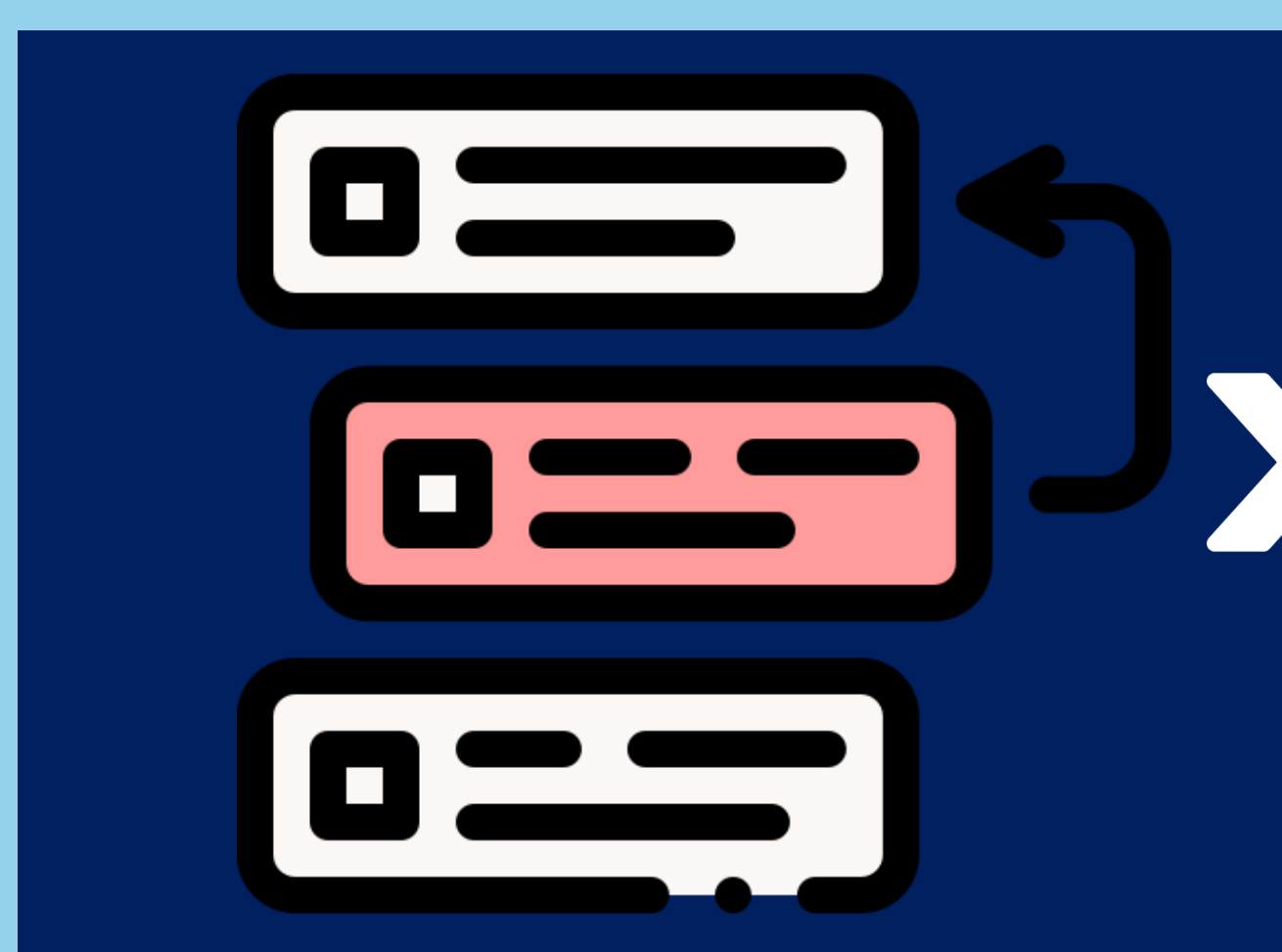
1. If you reward cheaters, you will be cheated.

Leniency is a reward system for cartelists that “blow the whistle” on each other. As such, it replaces a moral duty to obey the law with a transaction awarded on the basis of providing information. It should be no surprise that 7 out of 10 participants tried to cheat the competition authority as well.



2. There are incentives against reporting

When SIC announces that it is investigating a cartel, it is revealing all the useful information it has about a cartel. Hence, a potential leniency applicant will wait until the formal investigation is announced to determine whether it will come forward; it will most likely do so only when it is directly implicated.



3. The Possibility of ACN stepping in is problematic

The Andean Community of Nations (ACN) has competence and jurisdiction to investigate and sanction cartels between 2 or more member states. However, it does not have a leniency program. In the past, ACN has used confidential material provided to member States under leniency to investigate and punish cartels, much to the surprise of the investigated parties.

Recommendations

SIC does not need to convince any other institution to impose a fine; it therefore does not need direct evidence challenge cartels.



1. Account for Institutional Advantages

2. Make Leniency Less Generous



Only first participants that come forward before SIC's formal claim should be awarded leniency, and allow more information to parties that seek damages.

Leniency regimes can be increasingly complex. Alternatively, adopt a simple rule establishing a fixed benefit for collaborating with the authorities



3. Replace Leniency with a Simple Rule Granting Benefits for Collaboration

3. Make Leniency about Consumer Redress



Leniency should be granted only to cartel participants that adopt programs amending the harm caused to consumers.

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