



RCC

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Foreword

Lima/Paris, December 2020

Dear readers,

It has been a great first year for the Regional Center for Competition (RCC) in Latin America!

The “RCC-Lima” completed its first year on 20 November 2020, when a symbolic happy birthday was sang during the closing session of the last RCC workshop of the year. During this period, the RCC has organized five workshops on the topics of Merger Control, Advocacy, Health Sector, Cartel Detection, and Market Definition. They have put together more than 300 competition officials from the region to build capacity, exchange experiences and develop mutual trust – which is key to promote regional cooperation. It has been an excellent start!

This Newsletter (Nº 2 from December 2020) follows the last one (Nº 1 from June 2020) with the objective of highlighting the main activities of the RCC during the second semester of 2020, as well as promoting further exchanges through interviews with heads of agencies and expert contributions. It keeps the same structure of the first edition: I – RCC activities and updates; II – Interview with head of agencies; and III – Contributions from experts.

Concerning the activities and updates, it shares information about the workshops on Health Sector (22-26 June), Cartel Detection (2-4 September) and Market Definition (18-20 November). It also presents the planned workshops for 2021, which may require adjustments in dates and format due to the current Covid-19 crisis.

In Section II, this Newsletter provides an exclusive interview with Mr. Alexandre Barreto de Souza, head of the Brazilian Competition Authority (CADE). He has agreed to meet remotely with the OECD to share his views about the recent ascension of Brazil to the status of Associate Member of the OECD Competition Committee, the next Latin American and Caribbean Competition Forum (LACCF) which will be held in Brazil, ongoing projects with OECD, as well as the challenges related to the Covid-19 crisis.

Last, this Newsletter presents contributions from competition experts as an effort to promote experience sharing and policy guidance to RCC’s beneficiary countries. The contributions focus on the topic of cartel detection in line with the recent discussions held within the RCC. We are delighted to have contributions from Brazil, Costa Rica, El Salvador, Mexico, the Caribbean, in addition to a special contribution from Professor Rosa Abrantes-Metz on screening techniques to detect cartels.

Please feel free to contact us for any suggestion or assistance concerning the RCC activities. Enjoy your reading!

With our very best regards,

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Section I: RCC activities and updates

Workshop on Health Sector

Virtual event, 22-26 June 2020

The Workshop gathered 189 participants registered from 19 jurisdictions¹. Amongst the 29 speakers, the workshop had a keynote speech given by Professor Frédéric Jenny and the presence of heads and former heads of agency from Brazil, Chile, Colombia, Peru, Portugal, Uruguay, and the US. The Workshop was composed of 10 sessions, with a total duration of 15 hours of training, held twice a day for 1h30 each. The topics ranged from various issues related to competition in the health sector including advocacy, regulation and its specificities in Latin America, anti-cartel enforcement, mergers, abuse of dominance, and a hypothetical case exercise on health care merger. The last two sessions focused on Covid-19 issues and it was held in Spanish.

Workshop on Cartel Detection

Virtual event, 2-4 September 2020

The Workshop had 93 participants registered from 23 jurisdictions². It was composed of 4 sessions, with a total duration of 8 hours of training. The event was opened by Ms. Hania Pérez de Cuéllar, new chairwoman of Indecopi, together with Antonio Capobianco, acting head of the Competition Division. The topics of the sessions focused on reactive and proactive tools to detect cartels, in addition to a case exercise based on a hypothetical public procurement with unusual price patterns. A last session with heads of agency discussed cartel detection in times of Covid-19 crisis (in Spanish). In total, 16 speakers intervened during the workshop, being 13 of them from Latin America and the Caribbean.

Workshop on Market Definition

Virtual event, 18-20 November 2020

The Workshop had 93 participants registered from 21 jurisdictions³. It was composed of 3 session, with a total duration of 8 hours of training. The topics of the sessions covered the basics of market definition, country case studies from Brazil, Chile and Mexico, in addition to a hypothetical case exercise and an exclusive session on market definition in times of Covid-19 (in Spanish). In total, 9 speakers intervened during the workshop, being 8 of them from Latin America. On the last day, a virtual happy birthday was sang to celebrate the 1st year anniversary of the RCC, officially launched on 20 November 2019.

¹ Brazil, Chile, Colombia, Costa Rica, Curacao, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panamá, Paraguay, Peru, Trinidad y Tobago, Uruguay, and the Andean Community.

² Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Curacao, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Montserrat, Panamá, Paraguay, Peru, Saint Lucia, Suriname, Trinidad y Tobago, and the Andean Community.

³ Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Curacao, Ecuador, El Salvador, Guatemala, Guyana, Honduras, Mexico, Nicaragua, Panamá, Paraguay, Peru, Suriname, Trinidad y Tobago, Uruguay, and the Andean Community.

Future workshops

Planning for 2021

The next workshops will focus on the following topics: Introduction to Competition for Young Staff, Merger Control in Times of Crisis, Competition in the Financial Sector and Fighting Bid-Rigging. The dates and format will consider the current Covid-19 crisis and its travel restrictions around the world. Below is the preliminary planning for 2021:

	Date	Topic	Comments
1.	8-12 March	Introduction to Competition for Young Staff: it will provide a short introductory course of competition law enforcement with practical tips. It will target junior case handlers (i.e. with less than two years of experience).	To be held virtually or in Lima depending on how the Covid-19 situation evolves.
2.	5-7 May	Competition in the Financial Sector: it will cover competition issues in the financial sector including enforcement and advocacy, in addition to cooperation with regulators. The audience will include competition enforcers and civil servants from central banks, mainly from senior level.	To be held virtually or in Lima depending on how the Covid-19 situation evolves.
3.	15-17 September	Merger Control in Times of Crisis: it will address the main enforcement challenges to competition authorities including remedies and failing firm defence. It will target senior case handlers (i.e. heads and deputy heads of merger units).	To be held virtually or in Lima depending on how the Covid-19 situation evolves.
4.	17-19 November	Fighting Bid-Rigging: it will promote an update and exchanges of experience on recent developments in the region including enforcement and advocacy issues. It will target less mature competition authorities from the region.	To be held virtually or in Lima depending on how the Covid-19 situation evolves.

Obs: the dates are subject to changes.

OECD regional updates

Country Projects on Public Procurement

The OECD is committed to support governments to design public procurement procedures that promote competition and reduce the risk of rigging bids. This is why the OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the OECD Recommendations and Guidelines. Against this background, **Argentina, Colombia and Mexico** have sought the OECD's support in the past years to improve their procurement practices and step up their fight against bid rigging. **Brazil and Peru** are currently working with the OECD in similar projects.

In **Brazil**, CADE has invited the OECD to assess the Brazilian public procurement framework in light of the [OECD Recommendation](#) and [Guidelines for Fighting Bid Rigging in Public Procurement](#). During the process, the OECD will assess the main rules governing public procurement in Brazil at the federal level as well as procurement practices of major federal procurers. The OECD's assessment will be presented

in a report including recommendations to improve competition in public procurement, in addition to capacity building activities in preventing and detecting bid rigging. A webpage describing the project is available in English and Portuguese: <http://oe.cd/fbr-bra>.

In **Peru**, the Social Health Insurance agency of Peru (EsSalud) has invited the OECD to assess the public procurement framework applicable to EsSalud's purchases in light of the [OECD Recommendation](#) and [Guidelines for Fighting Bid Rigging in Public Procurement](#). The OECD will prepare a report with its assessment and specific recommendations to reinforce competition in tenders run by EsSalud, along with an action plan to implement these recommendations. Together with Indecopi, the OECD will train EsSalud's procurement officials on competition in tenders and how to fight collusion. The project's webpage is available in English and Spanish [here](#).

Country Projects on Competition Assessment

Brazil

Country Peer Reviews

El Salvador underwent an examination of its competition law and policy during the 17th OECD-IDB Latin American and Caribbean Competition Forum (LACCF) held in San Pedro Sula, Honduras, on 25 September 2019. The final report was launched virtually on 5 November 2020, with the participation of Miguel Kattán, El Salvador's Secretary of Trade and Investment and Gerardo Henríquez, Superintendent, Superintendency of Competition. Frédéric Jenny, Chair of the OECD Competition Committee, and Antonio Capobianco, Acting Head of OECD Competition Division, provided remarks during the session. For further information: www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-law-and-policy-el-salvador-2020.htm.

Ecuador has also volunteered to be peer reviewed by the OECD. The examination phase was held during the last LACCF meeting in September, and a final report with recommendations is currently being prepared.

Latin American and Caribbean Competition Forum (LACCF)

The 18th OECD-IDB Latin American and Caribbean Competition Forum (LACCF) took place virtually over two days on 28-29 September 2020. Two sessions were held on "Digital Evidence Gathering in Cartel Investigations" and "Peer examination of Ecuador's competition law and policy". Around 215 delegates representing 26 different delegations and 5 international/regional organisations attended the LACCF. The next LACCF will be held in Rio de Janeiro, Brazil. For further information: <http://www.oecd.org/competition/latinamerica/2020forum>.

Section II: Interview with heads of agencies

Interview with Mr. Alexandre Barreto de Souza, president of CADE in Brazil



ALEXANDRE BARRETO DE SOUZA is President of the Administrative Council for Economic Defence (CADE) in Brazil. He holds a Master in Public Administration from the University of Brasilia and he has more than 20 years of experience as a civil servant in Brasilia. He has agreed to meet virtually with Paulo Burnier da Silveira (OECD) to exchange his views about his term, projects with the OECD and perspectives for competition authorities in times of Covid-19.

Paulo: You have been president of CADE in Brazil for nearly three and a half years now. Sincere congratulations for the excellent work so far. If would have to select the main accomplishments, which would you pick and why? In other words, which ones do you feel most proud of?

Alexandre Barreto: First, I appreciate the congratulations. I am very proud of the work CADE has been doing. It is now widely recognised for its work excellence and became a model for the Brazilian Government. I am also proud of my journey during these three and a half years as its president. We have achieved several significant accomplishments at CADE over the past years; I believe it is worth mentioning the following:

(i) CADE's acceptance as an associate member of the OECD Competition Committee, which consolidates years of cooperation between the Brazilian agency and the OECD on competition issues, in addition to reinforcing CADE's alignment with international best practices and its commitment to the defence of competition in Brazil. This achievement is surely remarkable for us and worth mentioning, since it is an international acknowledgement of CADE's good performance, and it sets CADE on a path to participate more actively in the works carried out by the OECD and to increase its cooperation efforts with other antitrust authorities which are also members of the organisation.

(ii) The success of our cooperation efforts with other Brazilian agencies and institutions, which is being achieved through several cooperation agreements that were signed with the Brazilian Federal Prosecution Services, every State Prosecution Services in the country, the Brazilian Central Bank, regulatory agencies, the Federal Court of Accounts and the Office of the Comptroller General of Brazil. These technical cooperation agreements that are being signed between CADE and other bodies, mostly government bodies, are extremely important to expand the channels of communication between institutions and enable cases to be dealt with in a more timely and effective manner. Such efforts resulted in the creation of different working groups, conferences, courses, workshops to

provide training for civil servants, and mechanisms for data sharing. Furthermore, these agreements are important for CADE's competition advocacy operations, particularly those related to regulated sectors, and have many other benefits to the Brazilian society and economy.

(iii) The increase in CADE's budget and personnel was also a notable achievement for my administration. Throughout the past 3 years, CADE's budget has increased by more than 80%, which results from the increasing role the agency has been playing and from the acknowledgement of how important it is the work that we do. As a consequence of this increased budget, we were able to successfully invest in electronic support, computing devices and staff training, for instance. Besides, it allowed us to increase CADE's workforce by more than 70% in recent years, which was essential to improve our performance.

(iv) Finally, with regard to an achievement related to CADE's operational activities, I think it is worth mentioning the agreement signed with Petrobrás during the course of the investigations we carried out into possible abuse of dominance by the company. The company agreed to sign a Cease and Desist Agreement, which effectively ended the monopoly the state-owned company held in the refining and natural gas markets in Brazil. Through the agreement, Petrobrás committed to selling assets in the market of natural gas, which should encourage new players to enter the market, attract new investments in the product chain and increase competition in the segment, hitherto exploited almost solely by the state-owned company. The Agreement was designed to address the main structural issues of the natural gas market. CADE is currently closely monitoring its fulfilment which should result in significant benefits for the market.

Paulo: CADE has recently joined the OECD Competition Committee as an Associate Member, which is a major accomplishment. Could you please share with our readers what motivated Brazil to request this “upgrade”? And what does it change in practice?

Alexandre Barreto: CADE has been playing an active role in the OECD Competition Committee since 1997. The longstanding cooperation with the OECD has greatly contributed to the remarkable progress CADE has achieved with respect to antitrust issues in recent years. The Brazilian Competition Law (12529/2011), for instance, was widely influenced by the recommendations, studies and peer reviews carried out by the OECD, which resulted in many benefits to the Brazilian System of Competition Defence.

Therefore, after over two decades of close cooperation with the OECD in competition matters, CADE requested to join the OECD Competition Committee as an associate member and underwent a peer review process in 2018. This initiative was in accordance with the strategy of strengthening CADE's participation in international affairs, and with the strategy of the Brazilian government to strengthen our cooperation ties with the OECD and take advantage of the Organisation's broad experience with public policies.

The acceptance of Brazil as an associate member of the OECD Competition Committee in 2019 has allowed CADE to take on a more active role in the development of global competition policies and to increase its influence with respect to the international antitrust agenda. This contributes to strengthen the partnership with the OECD, foster cooperation with other competition authorities, and disseminate Brazil's opinion on competition issues.

In addition, Brazil's acceptance as an associate member is a recognition of the notable advances the agency has made in antitrust matters in recent years, and shows the international antitrust community that Brazil has an effective competition policy, in accordance with the international best practices, which consolidates CADE's position amongst the main competition authorities around the world.

Besides consolidating the implementation of best practices into Brazil's competition policy, the new status reinforces CADE's long-term commitment to adopt rational, efficient and transparent public policies, in accordance with the international best practices.

Moreover, this new status represents an important achievement not only with respect to competition. In general, the initiative shows Brazil has been an engaged key-partner of the OECD and has great potential to effectively collaborate with the OECD.

Paulo: This new status in the Competition Committee has also enabled an increased level of cooperation between CADE and the OECD. Could you share with us these recent initiatives?

Alexandre Barreto: In 2019, in accordance with the strategy adopted by the Brazilian government to foster our cooperation with the OECD, and taking into account Brazil's status as an associate member of the OECD Competition Committee, CADE decided to carry out the project of performing a competition review of the government procurement regime in force in Brazil, in partnership with the OECD. This project is aimed at reviewing the Brazilian regulatory framework related to government procurements and offer recommendations to improve Brazilian laws and practices according to the OECD Recommendation on Fighting Bid Rigging in Public Procurement, which Brazil adopted in 2017. Moreover, the project will provide capacity-building workshops to civil servants on how to effectively design government procurements and detect bid rigging, and on actions for damages resulting from anticompetitive practices.

This year, CADE has decided to carry out another project in partnership with the OECD. The project on competition assessment is intended to review the regulatory frameworks currently enforced for the ports and airlines markets in Brazil, with the purpose of identifying unnecessary competition restraints and develop broader policies that still achieve government objectives. The project is supposed to start at the end of the year and is expected to last for 18 months.

Moreover, Brazil was chosen to host the Latin American and Caribbean Competition Forum in 2021. We consider LACCF will be a great opportunity to share expertise and experience with peers across the region and promote debates on topics of common interest. Brazil has taken an active role in LACCF since the beginning, and hosting the next LACCF is in accordance with CADE's policy of strengthening international cooperation with regional partners.

Paulo: One last question: considering the challenges related to the current times of Covid-19, what advice(s) would you give to competition authorities of the region in terms of competition policy?

Alexandre Barreto: Considering CADE's experience with the competition challenges caused by the Covid-19 pandemic in Brazil, my main advice to competition authorities of the region is reinforcing we need parsimony and self-restraint, now more than ever, to fulfil our activities and perform our duties in this context of severe and extended crisis. Taking the Brazilian case as an example, I should emphasise that, the same way Brazilian companies have suffered, CADE's works have been affected by the crisis, which required us to change our ways to minimize its effects, but always having in mind the premise of promoting a healthy competitive environment promptly, and also throughout the Brazilian economic recovery. Therefore, even considering the concerns aforementioned, in my opinion, authorities that intervene on competition policies in Brazil or in other countries must evaluate their interference considering the economic sphere. Measures taken without conducting a proper analysis or adopting excessively weakened nationally and internationally acclaimed standards might, under certain circumstances, be even more harmful and worsen the situation instead of solving it. An evident example in Brazil is the collaboration between competing firms which decided to create a business coalition named Movimento Nós as a way to deal with problems faced by small and medium-

sized retailers, due to the Covid-19 pandemic. The retail market was highly affected by the crisis, and in Brazil, it represents a significant amount of the distribution channels for consumer goods such as beverages, food, and personal and domestic care products.

Thus, the decision to approve the request for collaboration on 28 May, 2020, highlighted that it is not a matter of carrying out a more flexible analysis, but rather a different analysis of the case. Therefore, CADE clarified that it will continue to address potential competition issues in its analyses in times of crisis or when reviewing collaboration agreements between competitors, and will do it considering other parameters and procedures. Consequently, given the nature of such cases, reviewing them means dealing with specificities and different procedure analyses whilst properly making available, during and after the crisis, fast, efficient and safe tools and mechanisms to give answers to firms facing difficulties. Thus, I emphasise that antitrust authorities within our region must be aware of the current scenario; however, they cannot loosen their criteria or the level of their work by any means, that is in order to avoid that, in a post-pandemic scenario, bigger issues than those caused by the Covid-19 pandemic arise. We must also work aiming to mitigate or solve issues related to the current competition context. Thus, the antitrust authorities of the region cannot allow market structures which can be harmful to competition to proliferate as a way to address deadlocks caused by the pandemic in Brazil. We cannot allow potential opportunistic firms to take advantage of a moment of crisis to get undue benefits in detriment of competition.

At last, I would like to mention that from my point of view and, once again, considering Brazil's experience, it is time to strengthen advocacy in order for us to be able to collaborate as antitrust authorities to enforce public policies and partake in legal and regulatory discussions on matters related to competition policy in the region. The authorities of our countries must understand that the best way to face the pandemic and its detrimental effects is increasing competition.

That will only be possible if we build bridges between our agencies and other public and private bodies. Even though they may temporarily settle problems and weaknesses, any other measures or understandings that impair our performance in the medium and long terms will certainly reveal itself as harmful to competition, to profitability and to economic diversity, as it has been observed in past opportunities.

In conclusion, as in the example of collaboration between competitors, I believe that both CADE (safeguarding its traditional methodologies and review parameters) and any other competition authorities in our region, who intend to properly face the crisis caused by the Covid-19 pandemic, must be open and creative in this scenario, in addition to acting with parsimony and self-restraint. Thus, we will find solutions that are feasible, proportionate, easy to monitor and quick to implement and, especially, that address the competitive concerns we intend to solve. Our role is to contribute within our jurisdiction and to the best of our abilities to the forthcoming circumstances, as we will only know the actual long-lasting effects in our countries throughout the next years.

Section III: Contributions from experts

A Note on Screens' Worldwide Adoption and Successes

by Rosa Abrantes-Metz



Rosa M. Abrantes-Metz⁴

1. Motivation

Last September, I had the pleasure of participating in the Organisation for Economic Co-operation and Development (OECD) panel, “Proactive Tools for Cartel Detection,” moderated by the OECD’s Paulo Burnier and joined by competition authorities’ representatives from Argentina, Brazil, Mexico, and Peru.⁵ It was energizing to learn additional details of all the work that these competition authorities have been conducting in the area of screens, the lessons they have learned, and the successes they have achieved.

Much development has occurred in this area over the last 20 years. I remember starting as a staff economist at the US Federal Trade Commission (FTC) in 2002, straight out of graduate school. The FTC was launching a monitoring program for retail and terminal gasoline prices across the US, which caught my interest. I was curious about what else we could do to monitor prices across multiple industries and assist in flagging potential collusion or other anti-competitive conduct.

The Director for the Bureau of Economics at the FTC, Professor Luke Froeb, encouraged these efforts and stimulated further ideas in this topic, culminating in 2004 with our first paper authored jointly with Dr. Christopher Taylor and Professor John Geweke, “A Variance Screen of Collusion.”⁶ I still remember our discussions asking, “How should we refer to these techniques?” We were evenly split between the two terms: “screens” and “filters.” Of course, now we know who won! Little did I know

⁴ Rosa M. Abrantes-Metz is a Principal at The Brattle Group in the Competition and Securities Practices, and a former Adjunct Associate Professor of Economics at the New York University Stern School of Business; Rosa.Abrantes-Metz@Brattle.com. The views expressed in this note are my own independent views and do not represent those of the organizations with which I am affiliated or their clients.

⁵ In addition to myself, the panelists were Esteban Greco, Consultant and former President of CNDC Argentina; Alexandre Cordeiro, General Superintendent at CADE Brazil; Sergio Lopez Rodriguez, head of Investigative Authority at COFECE, Mexico; and Diego Reyna, Head of Legal Unit at Indecopi, Peru.

⁶ See the first work presented in 2004, available at <https://www.ftc.gov/public-statements/2004/04/variance-and-smoothness-screens-collusion>; the 2004 FTC Working Paper is available at <https://www.ftc.gov/reports/variance-screen-collusion>. Published paper: Rosa Abrantes-Metz, Luke Froeb, John Geweke, and Chris Taylor, “A Variance Screen for Collusion,” *International Journal of Industrial Organization*, 24, 467-486, 2006, (“Abrantes-Metz, Froeb, Geweke & Taylor (2006)”).

that, from then on, I would be spending a significant amount of my time over the following decades (and counting) developing and implementing screens across a variety of contexts.

An integral part of my initial work on screens included discussing their adoption by competition authorities around the world. I had to convince the authorities that screens were worth the investment. Early on, I commonly received the question, “How can you tell me that screens work if you have never detected any illegal conduct using them?” It was a fair question, and I took it seriously. I spent much of the following years applying screens of different types to different markets and encouraging colleagues to do the same. As successes started to come, screens began to be adopted around the world.

A very early adopter in the mid-2000s was Brazil’s Carlos Ragazzo, then head of the cartel group at CADE, the Administrative Council for Economic Defense. As I recall, he was the first member of a competition authority to reach out to me early on to discuss the potential use of screens for investigations that CADE was considering on gasoline prices. His team ended up using a variety of both simple and more elaborate screens for hundreds of potential cases to select a manageable number of matters worth pursuing. They selected 10 in total. CADE went to court with these screens, received permission for dawn raids, and found direct evidence of collusion in 6 of the 10.⁷

Almost simultaneously with the Brazilian efforts, Mexico’s Carlos Mena-Labarthe, head of cartel enforcement at the Federal Economic Competition Commission (COFECE), started using screens to assist in the flagging of bid-rigging and price-fixing in a now-famous pharmaceutical matter in Mexico.⁸ It culminated with the Mexican Supreme Court accepting the empirical and economic evidence provided by the screens as part of the overall evidence supporting collusion, ultimately delivering a win for the government.

More than a decade has passed since these first screening successes in Central and South America, and they have since been adopted globally. While screens are not a panacea, as I will review in this note, they are proven to work when properly developed and implemented. I sometimes wonder why there are still skeptics.⁹

In this short note, I will review the basis of screening, their successes and adoption around the world, and their expanding role in cartel detection and deterrence into the future.

2. Screening Basics and Worldwide Adoption

The ability to flag unlawful behavior through economic and statistical analyses is commonly known as “screening.” A screen is an empirical analysis based on a statistical model or hypothesis and a theory of the alleged illegal behavior. It is designed to:

1. Identify whether collusion, manipulation, or any other type of cheating may exist in a particular market;
2. Determine who may be involved; and
3. Detect how long the illegal behavior may have lasted

⁷ Carlos Ragazzo, “Screens in the Gas Retail Market: The Brazilian Experience,” *Competition Policy International, Antitrust Chronicle*, March 2012(1), (“Ragazzo (2012)”).

⁸ Carlos Mena-Labarthe, “Mexican Experience in Screens for Bid Rigging,” *Competition Policy International, Antitrust Chronicle*, March 2012(1) (“Mena-Labarthe (2012)”).

⁹ Rosa M. Abrantes-Metz, “Recent Successes of Screens for Conspiracies and Manipulations: Why Are There Still Skeptics?” *Competition Policy International, Antitrust Chronicle*, October 2014 (2).

Screens use commonly available data such as prices, bids, quotes, spreads, market shares, volumes, and other data to identify patterns that are anomalous or highly improbable under a theory of competition.¹⁰ There are essentially two different types of economic analyses used to flag the possibility of a conspiracy or other types of market abuse.¹¹

The first can be classified as a “structural approach,” which looks at the structure of the industry at hand and scores the likelihood of collusion based on factors including the homogeneity of the product, number of competitors, stability of demand, and other commonly used collusive markers.¹²

The second is empirical and uses what have become commonly known as “screens,” or sometimes called “empirical screens.” These analyses use data on variables that measure market outcomes – including prices, volumes, and market shares – to detect potential anticompetitive behavior. This is called a “behavioral” or “outcomes” approach, in which economists look at market and participant behavior as translated into observable data and apply screens to address whether the observed behavior is more or less likely to have been produced under an explicit agreement. A proposed market-monitoring program combining both structural and empirical components is outlined in Friederiszick & Maier-Rigaud (2008).¹³

As an example of an empirical screen, Abrantes-Metz, Froeb, Geweke, and Taylor (2006) argue that typical price-fixing cartels are not only likely to increase average prices, but also to make them less responsive to cost changes, resulting in lower price variance (or more stable prices). We first propose using low price variance as a screen for traditional price fixing and apply it to retail gasoline stations in Louisville, KY. In 2006, the FTC also applied this screen to observed gasoline price increases when investigating possible price manipulation post-Katrina.¹⁴

For more than a decade, lawyers, reporters, and economists (including myself), have advocated for the use of screens by all sides involved in litigation and pre-litigation.¹⁵

¹⁰ Rosa Abrantes-Metz & Patrick Bajari, “Screens for Conspiracies and their Multiple Applications,” *The Antitrust Magazine*, 24(1), Fall 2009, (“Abrantes-Metz & Bajari (2009)”).

¹¹ Joseph Harrington, “Detecting Cartels,” in *Handbook of Antitrust Economics*, (P. Buccirossi, ed. 2008), (“Harrington (2008)”); Michael Doane, Luke Froeb, Brijesh Pinto, and David Sibley, “Screening for Collusion as a Problem of Inference,” in *Oxford Handbook of International Antitrust Economics*, edited by Roger Blair and D. Daniel Sokol, Oxford University Press: Kettering, U.K., 2015, (“Doane, Froeb, Pinto & Sibley (2015)”).

¹² A non-exhaustive “check list” of characteristics that influence the susceptibility of a market to tacit or explicit collusion includes: number of firms and market concentration, differences among competitors, product heterogeneity, demand volatility, barriers to entry, benefits of cheating, transparency, and multi-market contact. See Rosa M. Abrantes-Metz (Guidelines 2013) “Antitrust Guidelines for Horizontal Collaborations among Competitors for Central and South American Countries,” Regional Center for Competition in Latin America, First Conference, Santo Domingo, Dominican Republic, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3291659; see also Proof of Conspiracy under Antitrust Federal Law, American Bar Association Editions, Ch. VIII (April 2010, Chapter VIII); and Harrington (2008), among others.

¹³ Hans Friederiszick & Frank Maier-Rigaud, “Triggering Inspections *Ex Officio*: Moving Beyond a Passive EU Cartel Policy,” *Journal of Competition Law and Economics*, 4(1), 89-113, 2007.

¹⁴ US Federal Trade Commission, “Investigation of Gasoline Price Manipulation and Post-Katrina Gasoline Price Increases,” Spring 2006, available at <https://www.ftc.gov/sites/default/files/documents/reports/federal-trade-commission-investigation-gasoline-price-manipulation-and-post-katrina-gasoline-price/060518publicgasolinepricesinvestigationreportfinal.pdf>.

¹⁵ See, for example, Donald Klawiter, “Conspiracy Screens: Practical Defense Perspectives,” *CPI Antitrust Chronicle*, March 2012(1); Ragazzo (2012); Mena-Labarthe (2012); Submissions by Invited Panelists Rosa Abrantes-Metz, Bill Kovacic, and M. Peter Schinkel, are contained in OECD’s “Ex officio cartel investigations and the use of screens to detect cartels,” 2013 available at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>; Rosa Abrantes-Metz and Luke Froeb, “Competition Authorities are Screening for Conspiracies: What are they Likely to Find?” *The American Bar Association Section of Antitrust Law Economics*

As a consequence, economic analyses in general and empirical screens in particular, have become increasingly crucial in uncovering some of the largest collusion and conspiracy cases of modern times, as we will briefly discuss in the next section.¹⁶ Competition authorities and other agencies worldwide are using screens to detect possible market conspiracies and manipulations. This was already true by 2013, as detailed in member countries' submissions to the 2013 OECD's, "Ex officio cartel investigations and the use of screens to detect cartels" where I spoke alongside Professors Bill Kovacic and Martin P. Schinkel.¹⁷ It is even more so now.

3. Examples of Screening Successes

A veritable "who's who" of high-profile financial benchmarks have been under investigation. The first was USD LIBOR. In 2008, two *Wall Street Journal* articles used an empirical screen to report possible manipulation intended to artificially depress the LIBOR rate.¹⁸ These reports were quickly followed by research that I completed with coauthors, which presented evidence of possible collusion among many of the participating banks well before the financial crisis,¹⁹ as explained in my February 2013 *Bloomberg Opinion* article.²⁰ Investigations then extended to other IBORs, including Euribor, Yen LIBOR, and TIBOR, and banks have been fined several billion dollars, with several civil cases still ongoing.²¹

Committee Newsletter, 8(1), 10-16, Spring 2008 ("Abrantes-Metz & Froeb (2008)"); Rosa Abrantes-Metz, "Time to rethink deficient market structures," Opinion article, *Financial Times*, April 11, 2016, ("Abrantes-Metz (FT 2016)"), available at <https://www.ft.com/content/f95648f8-d499-11e5-829b-8564e7528e54>.

¹⁶ See generally Testimony of Rosa Abrantes-Metz on behalf of the Office of Enforcement Staff, Fed. Energy Reg. Commission (Sept. 22, 2014), available at http://elibrary.ferc.gov/idmws/doc_info.asp?document_id=14274590; Testimony of Margaret Levenstein, University of Michigan, to Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights on "Cartel Prosecution: Stopping Price Fixers and Protecting Consumers" (November 14, 2013), available at <https://www.judiciary.senate.gov/imo/media/doc/11-14-13LevensteinTestimony.pdf>; Rosa Abrantes-Metz & Luke Froeb, "Competition Authorities are Screening for Conspiracies: What are they Likely to Find?" *The American Bar Association Section of Antitrust Law Economics Committee Newsletter*, 8(1), 10-16, Spring 2008; Abrantes-Metz & Bajari (2009); Kai Hüscherlath, "Economist's Note: How are Cartels Detected? The Increasing Use of Proactive Methods to Establish Antitrust Infringements," *Journal of European Competition Law and Practice*, 2010, 1-7; Doane, Froeb, Pinto and Sibley (2015).

¹⁷ OECD Roundtable on Screens available at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

¹⁸ C. Mollenkamp & L. Norman, "British bankers group steps up review of widely used Libor," *Wall St. J.* C7, April 17, 2008; C. Mollenkamp & M. Whitehouse, *Study casts doubt on key rate; WSJ analysis suggests banks may have reported flawed interest data for Libor*, *Wall St. J.* A1, May 29, 2008.

¹⁹ Rosa Abrantes-Metz, Michael Kraten, Albert Metz and Gim Seow, "LIBOR Manipulation?" *Journal of Banking and Finance*, 36, 136-150, 2012, first draft dated August 4, 2008 and available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1201389, ("Abrantes-Metz, Kraten, Metz & Seow (2008-12)"); Rosa Abrantes-Metz, George Judge Sofia Villas-Boas "Tracking the Libor Rate," *Applied Economics Letters*, 18, 893-899, 2011; Rosa Abrantes-Metz & Albert Metz, "How Far Can Screens Go in Detecting Explicit Collusion? New Evidence From the Libor Setting," *CPI Antitrust Chronicle*, March 1, 2012, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021515; and Rosa Abrantes-Metz and D. Daniel Sokol, "Lessons from Libor for Detection and Deterrence of Cartel Wrongdoing," *Harvard Business Law Review Online*, vol 3, pp 10-16, available at <http://www.hblr.org/2012/10/the-lessons-from-libor-for-detection-and-deterrence-of-cartel-wrongdoing/>.

²⁰ Rosa Abrantes-Metz, "How to Use Statistics to Seek Out Criminals," *Bloomberg*, February 26, 2013, available at <http://www.bloomberg.com/news/2013-02-26/how-to-use-statistics-to-seek-out-criminals.html>.

²¹ See also C. Snider and T. Youle, "Diagnosing the Libor: Strategic Manipulation Member Portfolio Positions," Working Paper, 2009; C. Snider and T. Youle, "Does the Libor Reflect Banks' Borrowing Costs?" Working Paper, 2010.

After LIBOR came foreign exchange (FX), when, in mid-2013, *Bloomberg* presented evidence of a possible manipulation based on screening of price movements.²² Banks have subsequently been fined many billions of dollars in the US and abroad related to this market.

The London Gold and Silver Fixings were next. In my December 2013 *Bloomberg Opinion* article, I first argued that the large price declines observed around the time of the London PM and Silver fixings — when the “price of gold and silver” for the day are determined for the purposes of many derivative contracts — were consistent with collusion to manipulate benchmarks.²³ Another *Bloomberg* article by Liam Vaughan followed on February 28, 2014, outlining additional results from my research with Metz on gold,²⁴ which was promptly followed by approximately 30 lawsuits in the US alone.²⁵ Additional complaints were filed abroad and investigations ensued by competition authorities around the world on these metals, including the US Department of Justice. Investigations continue today and have extended beyond the London fixings to the metals futures markets, namely conduct involving alleged spoofing in metals markets.²⁶

Economic analysis and empirical screening also assisted in the flagging of an Italian cartel in baby milk and a Dutch cartel in the shrimp industry. Screens have for almost two decades been used to identify potential anticompetitive behavior in gasoline markets by the U.S. Federal Trade Commission. Also, as discussed earlier in this article, both Brazil and Mexico used screens very early on, with great success, and both countries continue investing in these efforts.²⁷ In India, screens were applied to detect a cement cartel. Market monitoring and screening programs have been adopted by several other competition authorities, as reported by OECD members during the 2013 OECD Roundtable on Screens,²⁸ in addition to others, including the South African Competition Authority,²⁹ with continued and expanded efforts by many Central and South American countries.

Other regulatory agencies worldwide routinely use screens to help detect illegal conduct such as various types of manipulations and fraud, including the US Securities and Exchange Commission (SEC)

²² Liam Vaughan and Gavin Finch, “Currency Spikes at 4 P.M. in London Provide Rigging Clues,” *Bloomberg*, August 27, 2013, available at <http://www.bloomberg.com/news/2013-08-27/currency-spikes-at-4-p-m-in-london-provide-rigging-clues.html>. Abrantes-Metz’s work on FX was contained in a December 2013 complaint filed in New York, which extended Bloomberg’s analysis and showed further evidence of highly anomalous price spikes at key times of the day when certain benchmarks are set. See the CPI Cartel column on the Uncovering of the FX Rigging, 2014, available at <https://www.competitionpolicyinternational.com/from-collusion-to-competition-15th-issue/>.

²³ Rosa Abrantes-Metz, “How to Keep Banks from Rigging Gold Prices,” *Bloomberg*, December 19, 2013, available at <http://www.bloomberg.com/news/2013-12-19/how-to-keep-banks-from-rigging-gold-prices.html>.

²⁴ Liam Vaughan, “Gold Fix Study Shows Signs of Decade of Bank Manipulation,” *Bloomberg*, February 28, 2014, available at <http://www.bloomberg.com/news/2014-02-28/gold-fix-study-shows-signs-of-decade-of-bank-manipulation.html>.

²⁵ Nicholas Larkin, “London Gold Broker Says Swings in Prices No Sign of Manipulation,” *Bloomberg*, March 5, 2014, available at <http://www.bloomberg.com/news/2014-03-05/london-gold-broker-says-swings-in-prices-no-sign-of-manipulation.html>; See also “Gold lawsuit sparks concerns of market manipulation, collusion,” *Fortune*, March 8, 2014, available at <https://fortune.com/2014/03/07/gold-lawsuit-sparks-concerns-of-market-manipulation-collusion/>; among other similar news.

²⁶ Another example is the ISDAfix benchmark for swaps, for which Abrantes-Metz’s screens played an important role in supporting plausible evidence of manipulation and in uncovering previously unknown evidence consistent with collusion. See, for example, CPI Cartel column on the ISDAfix Decision from June 15, 2016, available at <https://www.competitionpolicyinternational.com/isdafix-decision/>.

²⁷ Mena-Labarthe (2012).

²⁸ *Ex officio* cartel investigations and the use of screens to detect cartels 2013, OECD, available at <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

²⁹ “Beyond Leniency: Empirical Methods of Cartel Detection,” *American Bar Association Brown Bag Series*, December 15, 2011. Presentations, slides, and audio available at www.americanbar.org.

and the US Commodities Futures Trading Commission (CFTC). Other examples of the power of these screens to flag anticompetitive behavior in financial markets include the stock options backdating and spring loading cases from the mid 2000s, and the 1994 break of an alleged conspiracy by NASDAQ dealers in which odd-eighths quotes were avoided.³⁰ Both of these were triggered by academics and consultants applying screens to financial data and generating large-scale public investigations, as well as private litigation.

These are only some examples of the successful applications of screens to assist in the initial detection of rigging of financial benchmarks, and they are certainly not the only ones. It is a growing universe. There should be little doubt that monitoring the data through appropriately developed and implemented screens is powerful and effective in identifying potential illegal conduct.

4. Leniency and Screening

For decades now, leniency programs have recorded a successful history of identifying and dismantling cartels. The essential idea is simple: authorities will reward a cartel member who self-reports. It is instructive to consider why authorities have relied so heavily on leniency in the past. First, it is not particularly resource-intensive to implement. It does not require collecting large amounts of data and employing economists and data analysts to sift through the haystack in hopes of finding the occasional needle.

Second, almost by definition, leniency is likely to have a high success rate of prosecution among those applications selected to be fully investigated. It is noteworthy, though, that authorities are reluctant to produce statistics on the overall efficacy of their leniency programs. We should have a better idea of how many leniency applications are reviewed and investigated (among all those filed), and how many of those lead nowhere. However, we are not privy to such valuable information. Should authorities continue to almost exclusively depend on leniency programs going forward?³¹

Before authorities investigate a crime, someone must identify the crime. The police will investigate every missing person report, but they do not knock on every door every day to make sure everyone is accounted for. Instead, they wait (“passively”) until someone *informs* them that a person is missing.

In general, most crime is reported by the victim. The challenge with many cartels is that the victims of the cartel are diffuse, and the victims may not *know* they are victims. As a practical matter, who else but a member of the conspiracy is likely to report the crime, if even the victims do not know? It is eminently sensible for competition authorities to put an emphasis on leniency.

But while leniency is effective – and likely necessary – many competition authorities no longer believe it should be their almost exclusive approach to cartel detection. For example, in its 2006 Committee of Public Accounts Report, the Office of Fair Trading’s competition enforcement explained that:

The OFT has been too reliant on complaints as a source for its competition enforcement work. The OFT should start a greater proportion of investigations on its own initiative, rather than waiting for a relevant complaint.³²

³⁰ A summary of these studies is presented in Rosa Abrantes-Metz, “The Power of Screens to Trigger Investigations,” *Securities Litigation Report*, 10(10).

³¹ Rosa M. Abrantes-Metz and Albert D. Metz, “The Future of Cartel Deterrence and Detection,” *Competition Policy International, Antitrust Chronicle*, January 2019.

³² House of Commons, Committee of Public Accounts, “Enforcing competition in markets,” Forty-second Report of Session 2005-06, page 5.

After all, leniency is not without its drawbacks. It requires a cartel member to calculate that reporting the cartel is more beneficial than participating in it. But if the cartel is very successful – which means that its social harm is that much greater – then it becomes *less* likely that it will be self-reported to authorities. On the other hand, the more effective the cartel is in affecting market outcomes, the easier it will be to find through empirical screening techniques. Put simply, the likelihood of detection through leniency is *decreasing* in the cartel’s effectiveness, while the opportunity of detection through screening is *increasing*.

While properly structured leniency programs are desirable and should remain in use, there is no reason they can’t be supplemented by other methods, namely active market screening, and other programs. I have made this argument years ago, over the years (see, for example, Abrantes-Metz (2013)).³³ This is especially true given the large success that screens have had over at least the last decade. And this is exactly the trend we are observing, complementarity in tools increase success. Let’s keep it going!

³³ “Roundtable on *Ex Officio* Cartel Investigations and the Use of Screens to Detect Cartels, A Paper by Rosa M. Abrantes-Metz,” prepared for the Directorate for Financial and Enterprise Affairs, Competition Committee, Organization for Economic Cooperation and Development, for discussion at its meeting held on October 31, 2013, OECD, Paris.

Brazil: New Investigation Techniques to Fighting Cartels – the “Brain Project”

by Alexandre Cordeiro Macedo and Raquel Mazzuco Sant'Ana



*Alexandre Cordeiro Macedo*³⁴



*Raquel Mazzuco Sant'Ana*³⁵

Introduction – The importance of different investigative techniques to fight cartels

The policy on fighting cartels is still a part of the wide range of concerns and goals of CADE, the Brazilian antitrust authority. The fight against cartels gained momentum and became a priority for the Brazilian Competition Defense System at the turn of the century, when Law 10149 was passed in 2000. This new Law introduced significant changes into Law 8884/94, such as investigative mechanisms which allowed for more sophisticated evidence to be obtained, such as searches and seizures, and leniency agreements.

After CADE found several companies guilty of cartel conduct for the first time (the case of the Steel Cartel in 1999), the agency's priority gradually came to be investigating anticompetitive activities, which are usually dealt with by imposing severe fines to offenders. As from 2012, when the current Competition Law in force in Brazil, Law 12529/2011, was enacted, the country started implementing an effective institutionalization policy to fight cartels, a more structured policy which grants more autonomy for investigations, focusing on national cartels, strategic sectors and government procurements.

Using different investigative techniques to fight anticompetitive behaviour contributes to a more effective strategy for cartel detection. At the beginning of any investigation it should be considered the need for adopting different strategies, being creative and proactive, making use of knowledge gained in previous cases, and—more than ever—relying on an intelligence system, one which transform information into knowledge.

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³⁵ Raquel Mazzuco Sant'Ana is the currently CADE's General Superintendent counseling. Doctoral candidate in Law and Economics at the Federal University of Santa Catarina (UFSC). She enrolled in the 38th Pincade - Cade's exchange program (2018). Raquel is the author of several articles and coauthor of a book called “The turn state's evidence being a legal business”.

On this basis, Cade instituted a unit intended to analyse information with an emphasis on developing such investigative techniques, both collaboratively and proactively. The first appear as agreements signed with offenders (leniency agreements, and cease and desist agreements). While proactive investigation involves crafting techniques, that is, it is based on complaints and might or not be combined with other detection tools (such as searches and seizures, market studies, power to request information, interface with criminal investigations, cooperation with the international community, and intelligence systems).

It is worth remembering that the combination of these methods provides for a favourable environment for the development of more effective detection instruments. Proactive research brings benefits, including boosting collaborative research, as it also increases the probability of detecting collusion, by creating distrust within the criminal organization, effectively jump-starting the race amongst offenders to cooperate with the agency. It is a cycle in which the two types of research stimulate each other. Thus, the incentives established in the policy to fight cartels must take into account the probability of detecting these conducts, and not just the severity of punishment—the sums of the fines—, in order to have the expected deterrent effect and improve the quality of investigative instruments.

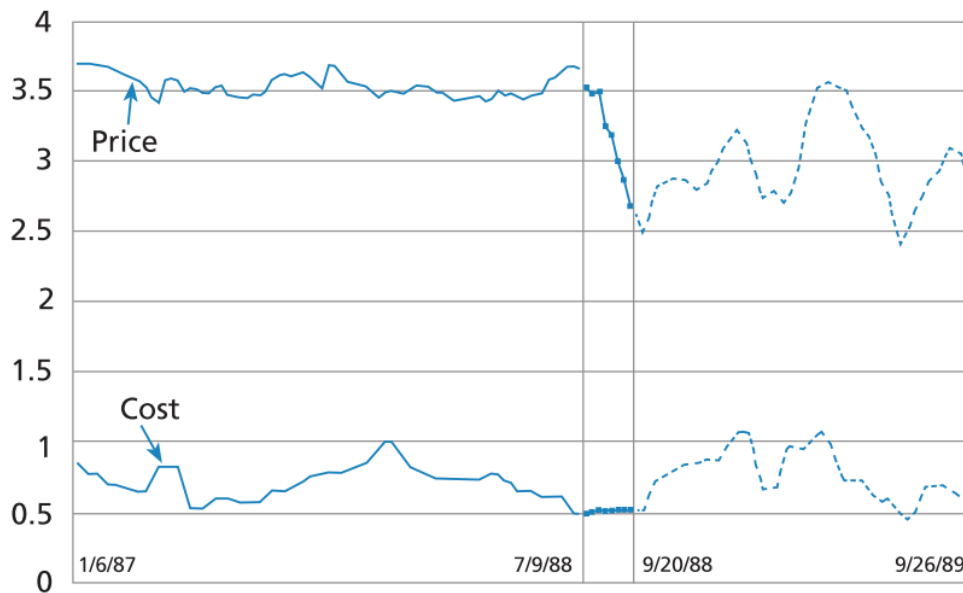
New research techniques and the priority given to the investigations into bid-rigging cartels

As time went by and the expertise of cartelists increased regarding means to break competition rules, the Brazilian antitrust authority noted the traditional protocol for investigating bid-rigging cartels was inefficient, as it carried out superficial analyses of bids, accessing data and risking compromising the confidentiality of the investigation, besides only using limited tools.

The strategy of the Brazilian antitrust authority of making use of economic filters to analyse large amounts of data on bidding procedures and the strategy of analysing concerted practices by economic agents, is based on the definition of Rosa Abrantes-Metz, who, with respect to economic filters, stated they are mechanisms to identify collusive behaviour by using an economic analysis and statistics. Abrantes-Metz also speaks on the importance of applying variance filters, considering that the variation in prices is related to coordination amongst economic agents, and in case of collusion, a smaller price variance is expected.

Abrantes-Metz, Froeb, Geweke and Taylor (2005) adopted a reverse engineering technique, starting from a cartel that had already been detected and found guilty, and observing the chosen variables according to the availability of data, the behaviour of participants before and after the detection of the cartel were mapped. The research was based in a case of a cartel which had been found guilty by the DOJ and was related to companies that sold frozen fish to the American army in Pennsylvania. It involved analysing data from all the bids conducted, such as the prices charged and their relation with costs. By comparison with the expected behaviour in a competitive market, it was observed there were costs that did not match price variance. After the detection of the cartel by the authority, the price of the product fell sharply, as it can be seen in the table below:

FIGURE 1 Frozen Perch Prices and Costs: 1/6/87 - 9/26/89



At the time, the Secretariat for Economic Monitoring of the Ministry of Finance (SEAE), in partnership with the Secretariat of Economic Law of the Ministry of Justice (SDE), developed an economic filter aimed at detecting evidence of cartel activities in the retail fuel sector, in order to map the locations where price behaviour was atypical, in other words, it did not match what happens in competitive markets. This was the first initiative in which the SBDC used margin data and prices charged in an attempt to prioritize and have more robust evidence linked to local investigations into concerted practices between companies.

These investigations started to focus on bid-rigging cartels, considering some circumstances such as: how easy it is to have access to public data (in comparison with private markets), the expertise and experience of CADE's staff, and the existence of institutional partnerships for sharing information related to criminal investigations. Furthermore, the typology of bid-rigging cartels has fixed strategies in all parts of the world, in other words, regardless of the institutional reality of each country, the companies apply the same strategy to eventually get into an illegal agreement to fraud public bids: cover bidding, bid suppression, bid rotation, subcontracting, and collusion.

Therefore, the tendency to conduct research on bid rigging cartels arise from favourable conditions found in these markets for cartel formation: predictability of hiring, advertising, frequent interaction, number of competitors, barriers to entry and how difficult it is for governments that are acquiring goods and services in the market to act against it. As a result, as from the enactment of Law 12529 of 2011, up to 2019 bid rigging cartel cases investigated by CADE represented approximately 50% of the ongoing investigations at the General Superintendence, 30% of the convictions by the Tribunal (as from 2012), 50% of the leniency agreements signed, and 75% of the total financial contributions linked to Cease and Desist Agreements (which represents more than 1,5 billion Brazilian reais).

The Brain Project

In this context, as from 2013, CADE went on to improve its new techniques and tools to gather evidence of cartel activity, especially bid rigging cartels, by creating an economic filter, based on the

experiences of partner agencies and other antitrust authorities who use machine learning techniques, data mining and screening techniques (economic filters). The development of Brain Project was also inspired by the hypothesis that in some markets there are indicators that are affected by the existence of a cartel, in other words, that there are measurable effects of collusive behaviour unlikely to occur in a competitive market.

The first initiatives counted on studies of international practices involving information technology to detect anticompetitive conduct, such as the contributions made by the countries that participated in the *OECD Roundtable on ex officio cartel investigations and the use of screens from detect cartels*, held in October 2013, enabling the learning of Brazilian autarchy with the experience provided by the use of innovative techniques in other jurisdictions, as well as the challenges faced in similar projects.

Brazilian federal authorities with experience with big data, such as the Brazilian Court of Accounts (TCU), the former Ministry of Transparency, Supervision and Control (MTFC), and the Council for Financial Activity Control (COAF), also guided and supported CADE in its endeavour to focus on government procurements and in starting the project, considering the much larger database available. The initial design was important for the agency to experiment with different techniques and improve them over time.

In 2014, the Brain Project entered its second phase, in which specialists on data mining were hired as consultants to develop analytical tools, which relied on the work performed by the technical team responsible for fighting cartels, as well as by specialists from the Department of Economic Studies of CADE (DEE). An interface called “Cérebro” with data mining tools and economic filters was delivered by these consultants to CADE’s technical team.

The mechanism is intended to detect evidence of bid rigging cartels, that is, behaviour patterns of a simulated event, such as government procurements with similar sums. To that end, it makes use of data related to price, bids, manufacturing costs, profit margin, barriers to entry, market share and spatial econometrics.

In summary, the Brain Project is an artificial intelligence system which develops programmed algorithms to detect suspicious behaviours, by using a wide database to cross information and produce results indicating whether there are signs of collusion between competitors in certain procurement processes.

Then screening tests are carried out to compare proposals in bids, in an attempt to check whether there are similarities with suspicious patterns based in econometric tests, modelling what is expected of a competitive market and making a comparison with the analysis of the actual market behaviour.

The first aspect that ensures the functioning of the project is having access to a database of available state or local government procurements and being able to access electronic invoices. The data collected needs to be reliable. This is the whole reason to focus on government procurements, as government purchases have specificities which favour agreements between suppliers and the data is available in government procurement e-system. In addition to the data, it is necessary that the project follow a methodology and that computer resources are available.

Thus, we can summarize the project as follows: international benchmarking, obtaining a database, external consultancy (data mining techniques and statistical methods), validation and application.

In the validation and application phases, the system searches for bid suppression, cover bidding, prevalence of disqualified bids, market division, price patterns and similarities between proposals.

While examining the data, the system accesses and detects information such as: metadata related to proposals; bids with identical sums (different from the reference value); the success rate on items and auctions; non-competitive bids; whether the distribution of digits is in agreement with Bedford's Law; comparison between the description of items offered; identification of the place of establishment of the legal entity.

Such results can be obtained by identifying the partners of these companies, where the bids come from, the metadata related to proposals and the computer from which the bid originated and the sums of the bids. In the end, should the conclusion arrived at be that there is no other explanation other than collusion between competitors to account for the data found, it is a sign to start searching for other evidence.

The artificial intelligence of the Brain has been used in many public investigations, including operations carried out by the Brazilian Federal Police, to identify the companies involved in alleged cartels. An example is Operation Meeting Point, which was conducted in partnership with the Federal Police, and was started following a single complaint to CADE involving evidence of cartel activity and of use of shell companies. With the Brain Project system, it was possible to identify 4,779 procurements in which the companies involved in the alleged cartel participated. The system also allowed for the identification of signs of bid rotation and cover bidding (through statistical tests). Thus, 16 companies were selected, due to the greater risk of their involvement in the collusion, and were subject to search and seizures authorised through warrants (which were carried out 31 October, 2018).

Final Considerations

Despite undergoing continuous improvements, just like every other innovative project, the Brain also has certain challenges to overcome. Today, the main challenge concerns expanding the use of data analysis to detect cartels in other scenarios and markets, and accessing and manipulating such data. Furthermore, there are also other challenges involving human resources (mainly the difficulty involved in training and recruiting specialists), institutionalization of the project (incorporating the project within the institutional framework), and the focus on end users (developing the parameters requires the technical employee to have specific knowledge and experience with cartel behaviour, which are indispensable for detecting evidence of collusion). That is in addition to the need for ongoing reviews and improvements.

With regard to the statistical evidence gathered from the data, perhaps the biggest challenge today is considering whether or not the Tribunal and antitrust authorities around the world will use the evidence gathered to convict the parties involved in the anticompetitive conduct.

Finally, it is essential to remember the importance of inter-institutional cooperation for the project to continue, given the difficulty involved in data mining and the multiplicity of databases, and considering that cooperation between authorities is what allows for the sharing of information and data aimed at intensifying and coordinating the actions intended to fight cartels, thus ensuring more efficient and timely investigations. The idea is expanding its usage and the number of users, through open government initiatives and, possibly, by integrating databases (such as ComprasNet) for real-time application.

Costa Rica: Update and perspectives of the new leniency programme in Costa Rica

by Mariana Castro Sotela



by Mariana Castro Sotela³⁶

Introduction

This paper addresses the new leniency programme established in Costa Rica by means of the integral reform to its competition regime. First, it will briefly describe the Costa Rican previous experience regarding hardcore cartels. Then, it will provide a detailed description of the new leniency programme established, what it entails and how it works, analyzing several particularities this new programme introduced in order to align Costa Rica with best international practices and OECD standards in the competition field. Finally, the paper considers some challenges the programme may have, and sets out the outlook for the programme for the upcoming years, as well as possible positive externalities to other Central American economies.

Costa Rican previous experience on hardcore cartels

Since its inception, the Costa Rican Commission to Promote Competition (COPROCOM) has sought the effective implementation of antitrust law through the investigation and prohibition of anti-competitive practices.

In Costa Rica, a number of anticompetitive horizontal agreements, which could be broadly described as 'hardcore cartels', are called 'absolute monopolistic practices', and are defined as any act, contract, agreement, arrangement or combinations thereof, between undertakings who are current or potential competitors, and which are intended to set prices, restrict output, allocate markets, rig bids (collusive tendering) in public procurement, refuse to buy or sell goods or services (collusive boycotts), as well as any exchange of information whose object or effect is any of the abovementioned purposes. Also, Costa Rican law provides for the application of the "per se rule" to hardcore cartels, which means these types of agreements are legally void (i.e. not legally enforceable) and cannot be justified by efficiency claims, as the law presumes their inefficiency conclusively- all of which has been confirmed by national jurisprudence.

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In its early stages the national competition authority was very effective in its action against hardcore cartels, investigating altogether 16 cartels in its first 10 years of existence. For the most part, those decisions were ratified by the judicial courts. This success obeyed to two main factors; first, COPROCOM did not have the ex-ante merger notification obligation, which meant it could devote most of its resources (already scarce) to investigating such practices; and, secondly, the undertakings were not well aware of the competition laws, and thus, proudly published in newspapers and general press the anticompetitive agreements adopted by them and their competitors, or, briefings between the parties agreeing to the cartel were brought to the attention of COPROCOM, which made the detection process particularly simple for the authority.

In 2012, after COPROCOM was granted the obligation of reviewing ex-ante merger notifications, the number of investigations on alleged cartel cases significantly declined, due to the fact that the merger analysis obligation took up a great part of COPROCOM's resources, and also because, over the years, undertakings had become more aware of the applicable antitrust legislation and the possible consequences of their actions. This did not necessarily mean that they no longer cartelized, but that they, at least, no longer published their intentions in the general press.

Furthermore, in 2012, the power to carry out dawn raids was incorporated into the Costa Rican competition law. However, the authority was not granted any human or financial resources to carry out this new obligation. Needless to say, without the proper resources or tools for a successful dawn raids programme, not a single dawn raid was performed by the authority.

On April 9th, 2015, the OECD Council decided to open accession discussions with Costa Rica. The Roadmap for the Accession of Costa Rica to the OECD Convention was subsequently adopted, and established three Core Principles of the OECD legal instruments on competition policy:

- Ensuring effective enforcement of competition laws through the establishment and operation of appropriate legal provisions, sanctions, procedures, policies and institutions;
- Facilitating international cooperation in investigations and proceedings that involve application of competition laws; and,
- Actively identifying, assessing and revising existing and proposed public policies whose objectives could be accomplished with less anti-competitive effect, and ensuring that individuals or government bodies with competition expertise are involved in the process of such competition assessment.

After the 2016 Accession Review, the Competition Committee informed Costa Rica its priority recommendations, and thus, in order to address such recommendations, Costa Rica created an interdisciplinary and inter-institutional commission in charge of reforming Costa Rica's competition law framework by means of Law 9736 (the 'Competition Reform Act').

The new leniency programme

As per the above, in order to implement the Competition Committee's recommendations and thereby further align Costa Rica with OECD standards and best international practices, COPROCOM betted on introducing a leniency programme into the comprehensive Competition Reform Act, sanctioned on November 2019.

Leniency programmes are one of the most effective tools for detecting cartels and obtaining evidence to prove their existence and effects. In most countries where leniency programmes have been

implemented, they have had a successful outcome in deterring the creation and weakening the maintenance of cartels³⁷. Moreover, the most significant penalties imposed against cartels in other countries were based on information obtained from whistleblowers by means of a leniency programme. It is safe to say that leniency programmes are one of the tools that have led to the increase in the investigating capacity of competition authorities around the world, in recent years.

The Costa Rican leniency programme takes into consideration best international practices. Horizontal agreements are subject to administrative law imposed by COPROCOM. Any undertaking or individual who incurred, assisted, promoted, encouraged, induced, participated or currently participates in an absolute monopolistic practice has the opportunity to 'blow the whistle' or disclose to the corresponding competition authority³⁸ the execution of said practices. In exchange, they may benefit from the exoneration in the application or reduction of the corresponding fine.

The programme provides for a 100% exemption (a fine of zero) to the first undertaking or individual to blow the whistle, insofar they provide truthful evidence, the disclosed practice was unknown to the authority at the time, and the evidence provided is useful to either substantiate the formal request for a dawn raid or to prove an anticompetitive absolute monopolistic practice. This exemption is extensive to the legal representatives of the undertakings, or to the individuals who are members of the governing bodies that have intervened in the unlawful agreement, as long as they cooperate with the corresponding competition authority until the issuance of the final resolution of the special procedure.

Furthermore, the Competition Reform Act provides for a 50% reduction of applicable fines for the second party to blow the whistle, 30% for the third, and 20% for the fourth whistleblower, as long as the evidence they provide is new and useful for the competition authority. This reduction is extensive in the same percentage to the legal representatives of the undertakings, or to the individuals who are members of the governing bodies that have intervened in the unlawful agreement, as long as they have cooperated with the corresponding competition authority until the issuance of the final resolution of the special procedure.

All of the above exemptions and reductions apply, provided that the applicants meet 3 basic requirements:

- a) They must cooperate, fully and continuously, with the relevant competition authority during the investigation process and throughout the proceedings (as may be established in detail, in the pending regulation to the Competition Reform Act).
- b) They must terminate their participation in the horizontal agreement in the time and manner indicated by the relevant competition authority.
- c) They must not have taken steps to compel other undertakings to participate in the infringement.

Also, the competition authority must maintain confidential the identity of the undertakings seeking to benefit from the leniency program, as well as the information provided by them, to the greatest extent possible. Additionally, to promote and assure the success of the leniency program, as mentioned,

³⁷ UNCTAD (2010), The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, https://unctad.org/system/files/official-document/tdrbpconf7d4_en.pdf

³⁸ Costa Rica has two competition authorities. COPROCOM as the national competition authority, and SUTEL as the sectoral regulator for telecommunication matters.

competition authorities also have the power to carry out dawn raids, and the new law establishes deterrent fines which could amount to 10% of the infringing undertaking's turnover for the previous fiscal period.

An important particularity included in the Competition Reform Act is the partial protection for the first whistleblower from civil damages caused by the infringement. This new law establishes that the first whistleblower would only be liable for civil damages subsidiarily to the other infringers. This means that the first whistleblower will only be liable in case other whistleblowers or infringers are not able to pay up the complete amount granted in damages by the courts.

In addition, the new law introduces a leniency plus programme. This programme allows a cartelist who did not manage to secure complete immunity or a reduction of the fine by means of the general leniency programme, to secure immunity and an additional reduction of the applicable fine, in exchange for cooperation with the competition authority with respect to the operation of other prohibited horizontal agreements unknown to the authority. This way, a cartelist may be granted a 50% reduction of the fine of the original cartel and could also receive full 100% immunity from the applicable fine of the 'additional cartel' reported.

The executive regulation to the Competition Reform Act (which is currently under public consultation) establishes in detail the procedure under which the application of the leniency benefit must be requested and resolved, as well as the functioning of the marker system.

Challenges ahead

Notwithstanding all of the above, it is clear that leniency programmes are effective only if:

- a) the penalties imposed on cartelists who do not apply for leniency are significant and predictable to a certain degree;
- b) the anti-cartel enforcement is sufficiently active for cartel members to believe that there is a significant risk of being detected and punished if they do not apply for leniency;
- c) the leniency programme is rigorous and manages to protect the confidentiality of the applicants; and,
- d) the leniency programme is sufficiently transparent and predictable to enable potential applicants to predict how they would be treated by the competition authority.³⁹

For this reason, COPROCOM, as the national competition authority, has several important challenges ahead:

1. First, the perception of COPROCOM as an active and rigorous enforcer must be strengthened, which would lead to undertakings to worry about the likelihood of detection. The authority must have a strong cartel detection record independently of its leniency programme.
2. Similarly, conspirators that do not apply or qualify for leniency should receive severe sanctions, so that leniency applicants are better off than non-applicants (no less advantageous

³⁹ UNCTAD (2010), The use of leniency programmes as a tool for the enforcement of competition law against hardcore cartels in developing countries, https://unctad.org/system/files/official-document/t drbpconf7d4_en.pdf

position). This way the imposition of deterrent fines serves as a relevant element for the cost-benefit analysis performed by the possible whistleblowers.

3. Furthermore, by means of the advocacy powers of the authority, COPROCOM must ensure that the leniency programme as well as its options and procedures are well known to the public, in order to provide transparency and legal certainty for undertakings to abide to the programme. Important measures must be taken in order to preserve the confidentiality of the whistleblowers. The public should trust the way in which COPROCOM administers the leniency programme.
4. Moreover, COPROCOM must warrant, by means of the regulation to the Competition Reform Act, that the programme is not to be used to avoid or reduce sanctions without providing adequate and sufficiently valuable information in the authority's view.
5. Constant revision and self-criticism by COPROCOM is essential to continually optimize and refine the design and organization of its leniency programme to ensure its success over time. COPROCOM would also benefit from extensive public consultation to be undertaken when proposing changes to its leniency program and to consider the feedback it will receive from applicants.
6. Strengthening cooperation with other competition agencies particularly for cross border cartel cases and parallel leniency applications to several jurisdictions, where enforcement coordination can be crucial.

All the above aspects have been considered in the regulation to the Competition Reform Act or will be detailed in the guidelines that for this purpose the competition authorities are currently drafting.

Outlook and possible eventual positive externalities

We are certain that this leniency programme will be a particularly valuable tool for the detection of cartels in Costa Rica.

Notwithstanding the above, we are aware there is some reluctance on the effectiveness of leniency programmes for developing and small economies like ours, presuming their eventual failure or disuse both because of the size of the economy, as well as because of the size of the country's population. However, the possible benefits that a leniency programme could eventually provide to a competition authority, render it somehow speculative to be simply overlooked, just because one doubts its future effectiveness.

Not having such an important tool closes on the possibility of improving in terms of more and more efficient cartel investigations, in the effectiveness of dawn raids and in the preparation of infringement decisions based on irrefutable (usually documentary) evidence on the existence of a cartel, which will provide a greater chance of being validated by the judicial courts. All this will enable the rapid achievement of the ultimate goal of our work as competition agencies: to reinstate the proper competition conditions in the markets concerned, for the ultimate benefit of consumers.

If, through this leniency programme, Costa Rica's competition authorities manage to discover and disarm at least one cartel, the program will have absolutely been worth it, in favor of all Costa Rican citizens.

Moreover, we not only expect the new programme to cause a significant positive impact in cartel enforcement in Costa Rica, but also at the regional level, as the future investigations may highlight to neighboring countries the importance of leniency programmes to detect cartels, or even, Costa Rican cases may provide and surface further facts or allegations on related anticompetitive agreements in the region. If more countries in Central America adopt a leniency programme, this could eventually lead to the convergence of our leniency programmes at the regional level, which can reduce the costs and burden of leniency applications and could help maintain incentives to apply.

In conclusion, COPROCOM is eager to implement its new leniency programme for the benefit of Costa Rican consumers, and possibly for Central American consumers as well. We expect this programme to have a significant positive impact over the years on cartel enforcement in the country. The full impact and dimension of the programme is yet to be seen but we are certain this is a huge step in the right direction for Costa Rica.

El Salvador: Leniency and compliance: the interdisciplinary nexus

by Evelyn Olmedo Amaya



by Evelyn Olmedo Amaya⁴⁰

Introduction

In El Salvador, the design of a competition advocacy strategy aimed at encouraging the use of competition law compliance programs and the efforts to promote the leniency policy evinced the suitability of an interdisciplinary outlook. One that considers historical factors influence over contemporary businesses culture and benefits from behavioral and social sciences insights. This realization -addressed herein at a glance- may be beneficial for other developing countries with similar background.

The origins

El Salvador's Competition Law (CL) came into effect on January 1st, 2006 and it has been amended twice. Its sole comprehensive amendment occurred in October 2007, introducing, among others, the power to conduct dawn raids and the possibility for economic agents to seek leniency for anticompetitive practices among competitors. Those improvements strengthened the Competition Superintendence (SC) anti-cartel efforts. In 2008, the SC used for the first -and only- time its power to conduct a dawn raid in the wheat flour investigation, finding key evidence of a cartel. That case concluded with the two highest fines imposed to date by the SC to economic agents.

In contrast, leniency has never been invoked by an economic agent. The SC has persistently raised awareness about its leniency policy and handed out its informative publication about the leniency figure in competition law in advocacy activities for economic agents. Pursuant article 39 of the CL, the benefit for the first applicant -provided it complies with all legal requirements to be granted leniency- would be the non-application of the particularly severe offense criteria when setting the fine. This will result in a lower sum.

The challenges

Regarding the lack of leniency applications, El Salvador's latest OECD Peer Review of Competition Law and Policy (2019) suggests the CL is not offering sufficiently attractive incentives, a modest deterrent effect of fines and the absence of a detailed procedure for leniency applications building upon the

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legal framework. It concludes the leniency regime should be reformed in consonance with international practice.

The SC has promoted CL reforms -although with modest progress- since 2013. Suggested amendments -up to the SC's analysis in early 2020- have persistently pursued improvements on leniency. Nevertheless, from a competition advocacy standpoint, an equally relevant but frequently overlooked factor to prompt leniency applications is the impact of historical competition conditions over contemporary business culture (for instance, clarity about what does a pro-competitive business culture entails or the apprehension of a leniency alternative for cartelists).

El Salvador's contemporary business culture is rooted in the historical attitude towards competition and cartels inexhaustibly exemplified herein. Colonial *estancos* prevailed over industries as salt, gunpower, tobacco, spirits, cards and stamped paper. By 1886 the Constitution of the Republic recognized fewer *estancos* and prohibited monopolies. The next century, the 1950 Constitution prohibited the authorization of monopolies if not in favor of the State or municipalities -when essential for social interest- and in 1983 a prohibition of monopolistic practices was introduced in the Constitution.

Regarding agreements among competitors, provisions -later derogated by the CL- in two legal codes rendered an ambivalent treatment to what is now considered anticompetitive. The 1970 Code of Commerce allowed certain restrictive agreements among economic agents (on quantity, quality and limiting the activity to a certain market) for a maximum duration of ten years provided those were not in contravention of the Constitution. Additionally, it considered unfair competition causing injury to a competitor by failing to comply with an agreement to restrict competition. Thus, those competition restrictive conducts were assumed as a valid behavior for several decades.

In contrast, by 1998 Monopoly was a felony under the Criminal Code. That figure -different from its usual denotation in competition policy- covered what it deemed abuses of dominance and agreements among individuals or businesses to impede, difficult or distort competition (among those tying, bundling, market allocation and abandoning crops or cattle).

The interdisciplinary nexus

Trust matters for cartels and reputation matters to businesses. Behavioral and social sciences have analyzed those convictions -as well as rationalizations, incentives and effective ethical encouragement-. Therefore, the design of advocacy interventions to encourage a behavioral change towards "competition friendly" attitudes that also happen to be ethical (i.e. the voluntary use of compliance programs to prevent CL infringements or defecting from a cartel to request leniency) benefits from interdisciplinary insights.

From a behavioral -and simplistic- stance, competition compliance programs success is determined by their ability to effectively address risks (including actual or potential rationalizations of anticompetitive conduct) by using customized controls and mechanisms to deter, identify and manage deviations and to encourage compliance with businesses pro-competitive culture (including the report of anomalies or wrongdoing).

Regarding leniency, behavioral ethics insights suggest deviating from an agreement -even if to pursue leniency- confronts the economic agent with a dilemma and prompting an ethical conduct -reporting its offense- requires an important stimulus (as a credible fear for detection and a great fine). Once the economic agent considers defecting, leniency shall offer enough incentives to prompt its ethical

behavior (recognizing wrongdoing and cooperating in full throughout an investigation that could otherwise end with a worse outcome).

The SC twofold strategy

I) Competition advocacy

The 2019 Peer Review suggests promoting competition compliance programs can complement stronger enforcement and other advocacy efforts. The SC recently drafted its informative guidance on competition compliance -not yet published- which includes a non-exhaustive explanation of its leniency policy.

Considering compliance programs and leniency ultimately appeal to ethics, the SC is encouraging behaviorally cognizant voluntary competition compliance programs aimed at demystifying underlying -and historically inspired- business rationalizations of anticompetitive conducts. Additionally, the SC is evaluating the suitability of framing incentives for this kind of programs.

Nevertheless, even if clear messages are conveyed, communications research stresses there is a risk its receptor may filter those through its frame of reference and adapt a self-serving rationalization (behavioral scientists suggest rationalizations are the crux of wrongdoing). Thus, the SC is using its interdisciplinary approach to efficiently combine its competition advocacy efforts towards compliance and leniency.

The SC is considering historical factors influence over contemporary businesses culture and benefitting from behavioral sciences, ethics, behavioral economics, bounded awareness, management -and other disciplines- insights for promoting the voluntary adoption of competition law compliance programs and -within those- increasing awareness and information about its leniency policy. Concurrently, cartel detection and deterrence keep being pursued through its effective enforcement action.

II) Reinforced legal framework

One of the 2019 Peer Review recommendations regarding leniency points to increasing its attractiveness. It suggests -among others- raising economic agents' motivation to defect from a cartel and introducing greater incentives to prompt leniency applications.

In the project of amendments to the CL -currently under analysis and reasonably broader than the leniency aspect-, the SC proposes to strengthen its leniency policy, for instance, by increasing the benefits for the first applicant -potentially up to a non-application of the fine - and introducing a staggered benefit for a fixed number of subsequent applicants provided certain criteria is met. This comprehensive CL reform proposal may be refined as its discussion develops.

Mexico: COFECE's view of ex-officio investigations in strategic markets

by Sergio López Rodríguez



*Sergio López Rodríguez*⁴¹

Introduction

For some time now, it has been an international consensus that ex-officio investigations hold an important role in the procurement of antitrust enforcement policy giving it pro-active and deterrent effects. Ex-officio investigations contribute to the virtuous cycle of antitrust policy, increasing the possibility of leniency applications, the detection of various anti-competitive practices ranging from collusion to abuse of dominance, and the discouragement of the perpetration of such conducts. A roundtable held in 2013 by the Competition Committee of the Organization of Economic Co-operation and Development (OECD), whose summary was published under the title “*Ex-officio cartel investigations and the use of screens to detect cartels*”, stated that “(...) if competition agencies are able to strike fear of detection into cartelists’ hearts, that may be another reason for conspirators to desist from their activities”⁴².

Consequently, it has been a priority for the Federal Economic Competition Commission (COFECE for its acronym Spanish) to strengthen its proactive approach towards antitrust enforcement, in order to fit the international standards⁴³ and to fulfill its mandate to protect and guarantee free market access and economic competition, as well as to prevent, investigate and combat monopolies, unlawful concentrations, barriers to entry and to economic competition⁴⁴. This Article will address ex-officio investigations in the context of COFECE’s Investigative Authority’s efforts to pay special attention to certain strategic markets of the Mexican economy, to then analyze the importance of public procurements as one of those strategic sectors, and will end with COFECE’s *Public Procurement for Media Monitoring* case that has demonstrated the efficacy of these means.

Strategic Markets in Ex-officio investigations

COFECE’s Investigative Authority has two main criteria to determine the initiation of a formal ex-officio investigation. The first criterion is a legal one, the case in question must fulfill the legal requirement of an “*objective cause*”, which implies the identification of one or several hints or indications that legitimize the possibility to open an investigation for an infringement under the Law. The second criterion is a strategic one, it serves the dual purpose of antitrust enforcement and antitrust policy

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⁴² Directorate For Financial And Enterprise Affairs, “Ex Officio Cartel Investigations And The Use Of Screens To Detect Cartels”, *Competition Committee, OECD* (July 2014): 17. <http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf>.

⁴³ “Strategic Plan for 2018-2021”, *Comisión Federal de Competencia Económica*: 11. https://www.cofece.mx/wp-content/uploads/2018/02/pe_2018-2021.pdf.

⁴⁴ Article 1 of the Mexican Federal Economic Competition Law (FECL or Law)

and has allowed us to focus on the markets that will most likely lead to an improvement of Mexican economy and consumer welfare.

In this sense, even though the Investigative Authority has sufficient powers to investigate any market⁴⁵, the relevance of a strategic criterion comes from COFECE's necessity to maximize the use of its resources in those areas of the Mexican economy where it can have the biggest impact in improving the population's overall standard of living⁴⁶. Hence, COFECE has set upon itself the task to identify those markets where goods and services are in higher demand by the overall population, and where over-prices can be detected.

For this task it must be taken into account that Mexican households paid in industries such as agri-food, transport, medications and construction, average over-prices of 98.23% in 2014⁴⁷, due to a number of reasons, primarily market power⁴⁸. It must also be taken into account that in 2019, the total amount of public procurements represented roughly 2% of Mexico's GDP⁴⁹, this substantial amount corresponds to approximately \$340 billion Mexican pesos⁵⁰ that directly contributed to the Mexican Public Institutions' ability to perform their tasks, provide basic public services and where maximizing the available resources is crucial for the correct performance of the Government's tasks. All these elements combined play a major role in consumer welfare and affect the GDP growth of our country. In this regard, COFECE identified those markets of Mexican economy where its policies can have a greater impact, and included them in its Strategic Plan for 2018-2021⁵¹, defining the markets it will mostly focus on, which comprise the financial sector, agri-food, energy, transportation, health and public procurements.

Accordingly, the Investigative Authority released in 2017 a General Principles Plan to Conduct Investigations⁵², aiming to publicly state the principles that drive its powers to investigate antitrust violations under the FECL, with a particular emphasis on the importance of prioritizing investigations on strategic markets in accordance to COFECE's Strategic Plan⁵³. Furthermore, the Investigative Authority has developed (and made available for the general public) two additional criteria to prioritize ex-officio investigations⁵⁴; firstly, it will concentrate on those economic activities prone to competition issues, such as concentrated markets with barriers to entry; and finally, it will focus on

⁴⁵ As long as it does not belong to telecommunications or broadcasting markets, where antitrust enforcement is regulated by the Federal Institute of Telecommunications (IFT for its acronym in Spanish).

⁴⁶ Between 1985 and 2005, the rise of inequality reduced the GDP growth in over 10% in OECD countries, Federico Cingano, "Trends in Income Inequality and its Impact on Economic Growth", *OECD Social, Employment and Migration Working Papers*, no. 163 (2014): 14.

⁴⁷ Andrés Aradillas López, Alejandra Palacios Prieto and José Nery Pérez Trujillo, "Poder de Mercado y Bienestar Social", *COFECE's Booklet on Competition Promotion*, (2018): 87 and 98. <https://www.cofece.mx/wp-content/uploads/2018/10/Libro-CPC-PoderyBienestar-ver4.pdf>.

⁴⁸ Aradillas López, Palacios Prieto and Pérez Trujillo "Poder de Mercado y Bienestar Social", 87 and 98.

⁴⁹ This estimation was conducted with information published by the National Institute of Statistics, Geography and Informatics (INEGI for its acronym in Spanish), regarding Mexico's GDP.

INEGI, "PIB y Cuentas Nacionales", accessed October 16, 2020. <https://www.inegi.org.mx/temas/pib/>.

Mexico's Central Bank (BANXICO for its acronym in Spanish), "Sistema de Información Económica", accessed October 16, 2020. <https://www.banxico.org.mx/tipcamb/main.do?page=tip&idioma=sp>.

⁵⁰ INEGI, "PIB y Cuentas Nacionales". BANXICO, "Sistema de Información Económica".

⁵¹ COFECE, "Plan Estratégico 2018-2020", accessed October 19, 2020. https://www.cofece.mx/wp-content/uploads/2018/02/pe_2018-2021.pdf.

COFECE, "COFECE Submits its Strategic Plan Project 2018-2021 for Public Consultation" (2017). <https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-059-2017.pdf>

⁵² COFECE's Investigative Authority, "General Principles Plan to Conduct Investigations", accessed October 19, 2020. https://www.cofece.mx/wp-content/uploads/2017/11/Principios-generales-AI_03072017.pdf.

⁵³ COFECE's Investigative Authority's "General Principles Plan to Conduct Investigations", 12 – 15.

⁵⁴ COFECE's Investigative Authority's "General Principles Plan to Conduct Investigations", 12 – 15.

the impact or relevance that the investigation could have, such as transversal effects on other segments of economic activity or the impact it could have on Mexican families income.

This focus has led to an efficient management of its investigations⁵⁵, having approximately twenty investigations per year, of which 74% revolve around strategic markets, and that range from cartels and unilateral conducts to investigations to determine essential facilities and barriers to competition. In this sense, COFECE's pro-active tools such as detection techniques and screens have played a major role in the efficiency in which the Investigations branch of COFECE allocates its limited resources to prioritize strategic markets having each year, on average, three new investigations that emerge from public complaints and five that arise from ex-officio investigations identified through the use of pre-investigation techniques.

In addition, between 2018 and 2020⁵⁶, there has been an increase of 15% in ex-officio investigations in comparison to the period from 2015 to 2017. This is a clear demonstration of COFECE's priorities, and how the Investigative Authority relies on detection techniques to promptly identify markets that are altered with anti-competitive practices, and thus, address its resources.

Public Procurements

That said, public procurements stand out as one of COFECE's strategic sectors, depicting an important element of Mexican economy and of the general population's well-being. Public procurement not only represents an important percentage of Mexico's GDP, but it directly contributes to the Mexican Government's ability to provide basic goods and services, ensures the development of our country, and it is also responsible for the hiring of an important amount of firms (19,144 in 2019⁵⁷) and countless jobs.

As such, public procurements in Mexico can be performed through different means such as public tenders, procedures where only three participants are invited to submit quotations, or by direct awards, where a contract is assigned directly to a specific firm. Even though the latter should represent the least available option⁵⁸, in 2019 it accounted for 78% of public procurements, followed by 12% in public tenders, and 8% for procedures of invitation to at least three suppliers⁵⁹.

Therefore, an important amount of COFECE's resources are allocated in the detection and prosecution of conducts regarding public acquisitions. In fact, 30% of ex-officio investigations initiated by the Investigative Authority between 2014 and 2020⁶⁰, were focused on markets that revolve around public procurements.

This comes to show the efficiency of monitoring and detection tools that have enabled the Investigating branch of COFECE to initiate ex-officio investigations regarding public acquisitions. Hence, the Investigative Authority is vigilant to assess the sector's characteristics such as the number

⁵⁵ The numbers and percentages regarding the Investigative Authority's investigation correspond to available data of 2018, 2019, and preliminary data of 2020 (updated until October 16, 2020).

⁵⁶ Preliminary data from 2020 (until October 16, 2020).

⁵⁷ Ministry of Finance, "Compranet", accessed October 16, 2020. <https://compranet.hacienda.gob.mx/web/login.html>. Platform where public procurements are held and registered.

⁵⁸ Ministry of Governmental Inspection (SFP, for its acronym in Spanish), "1.3.3 Adjudicación directa (LOPSRM y LAASSP)", accessed October 19, 2020. <https://www.gob.mx/sfp/acciones-y-programas/1-3-3-adjudicacion-directa>.

⁵⁹ "Compranet". <https://compranet.hacienda.gob.mx/web/login.html>.

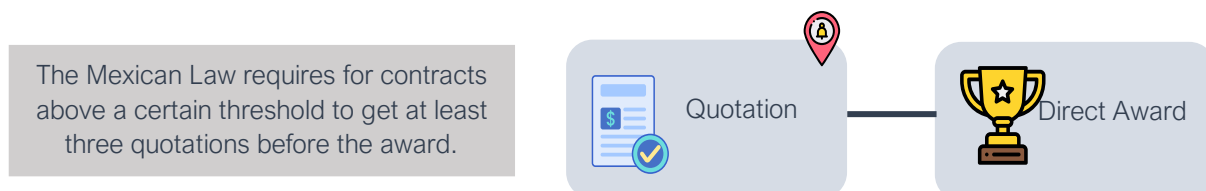
⁶⁰ Preliminary data from 2020 (updated until October 16, 2020).

of firms that take part in the different markets that englobe public acquisitions, the market share of each participant, the types of goods and services and their prices, the dates and amounts awarded and their evolution, among others. With this public data recollected, the Investigative Authority has developed abilities and tools to identify suspicious patterns to successfully initiate ex-officio investigations, meeting the legal standards established by the Law. Thus, reliance on detection techniques have proven to be helpful for the Investigative Authority to promptly identify markets with anti-competitive issues to correctly address its resources, a good example can be the work done by COFECE for the public procurements of Media Monitoring services.

Case Study

The *Public Procurement for Media Monitoring case* is an ex-officio collusion investigation, initiated due to COFECE's pre-investigation efforts, that detected patterns in dates and amounts awarded, regarding the services hired by public authorities for the gathering, systematization and follow up of information spread through various communication outlets. This media monitoring service has proven to be paramount in keeping up with updated and reliable information regarding key subjects for the performance of any tasks in the public or private sector, it is used by public authorities to keep up with the latest news or topics that are in their direct interest for the performance of their public duties.

In this case the Investigative Authority successfully established that a cartel manipulated the public acquisition of Media Monitoring services between 2012 and 2016, in twenty four public acquisition procedures⁶¹, where even though only one firm was hired to provide the service, it agreed with the rest to outsource the services to the other members of the cartel. This cartel involved four firms (A, B, C and D) and operated in two kinds of public procurement procedures to hire Media Monitoring: Direct awards and Invitations to at least three suppliers. The Direct Award's agreement came to life when a Public Authority would ask the firm A for a quotation, later that firm A agreed with either one of the remaining firms on the proposal they would send to that Public Authority, always keeping the firm A's proposal less expensive, as shown hereunder:

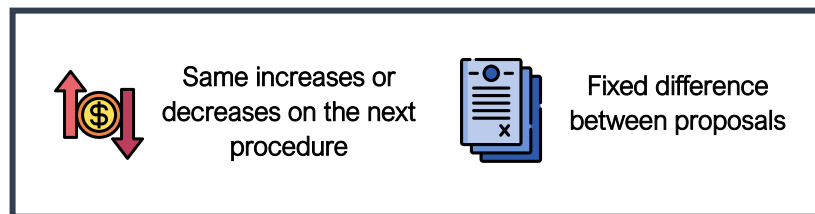


Regarding procurements structured as an invitation to at least three suppliers, a Public Authority would ask the firm A for a market investigation, and in turn, the firm A would agree with the firms B, C or D on the proposal they would send to the Public Authority, where the firm A's proposal would be less expensive than the ones offered by the other participants of the public procurement (firms B, C or D), assuring that firm A would always win. As shown hereunder:

⁶¹ In this case, the public acquisitions where not bound by a public tenders, instead, the authorities that purchased this service, directly assigned the service to a single firm, or had procedures where only three participants were invited to participate, and one of them got the contract.



As depicted, to ensure the functioning of the cartel, the firms involved previously agreed on the the prices of the quotations each one would present to the hiring authority, in order to ensure that the pre-agreed upon firm (the firm A) would be hired to provide the service, in turn, the firm A would subcontract the services of firms B, C or D to provide Media Monitoring services. The main evidence⁶² obtained for this case consisted primarily on patterns identified from public information such as:



In this regard, the estimated over-price paid by government bodies such as the Consumer Protection Agency (PROFECO for its acronym in Spanish), the Ministry of Public Education, the Ministry of Economy, and others, for this service was estimated in 14.5%. This case was sanctioned by COFECE in 2017.

The case represents an important precedent for antitrust enforcement in Mexico since it was the first time that COFECE sanctioned a cartel with a collusive behavior not only in public procurement proceeding itself, but the collusion also tampered with the market studies hired by Public Authorities; even more, it also gave hints of corruption within the hiring authorities. Therefor, COFECE gave notice to the Ministry of Internal Affairs (SFP, for its acronym in Spanish), and other Mexican authorities, of the possible corruption conducts underlying this case.

Furthermore, this case along with other public procurement cases sanctioned by COFECE helped us realize the importance of cooperation and communication with the anticorruption institutions in Mexico such as SFP. Additionally, given the similarities of legal enforcement of anticorruption and competition laws, and the particularities of the behaviors that they prohibit, last year (2019), we celebrated a collaboration agreement with the SFP. The objective of the agreement is to increase collaboration, exchange information and to create working groups that help achieve these objectives.

This is a great step to align incentives to fight corruption and collusion, as both types of infringement are in detriment of public procurement processes as well as the allocation of taxpayers' resources. An effective implementation of the agreement will surly contribute to deter and detect collusion and corruption cases, which in addition, serves as an incentive for both leniency programs, given that the fear of being detected increases.

⁶² It should be noted that through the course of the investigation, different communications through emails between the cartelists where also identified and served as main evidence in this case as well.

Conclusion

In conclusion, due to COFECE's prioritization of resources in certain strategic markets, such as those involved in public procurements, and given the detection tools it is continuously developing, COFECE is able to identify flaws in markets tainted with competition issues that have a direct impact in the execution of Government institution's tasks, and that compromise public resources that could be otherwise exploited for the benefit of Mexico's economic development and the general welfare of its population. Consequently, it is important to value and promote the importance of ex-officio investigations in COFECE's antitrust enforcement policy.

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Caribbean: The Efficacy of Leniency Programs in Small Economies – a view from the Caribbean
by Taimoon Stewart



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Introduction

Leniency programs have proven to be very effective in some competition regimes, with the US DOJ having an outstanding record of unearthing and successfully sanctioning both domestic and international hardcore cartels through whistleblowing by cartel members. Under antitrust rules whistle blowing can take place under specified conditions, with predictable benefits, and guaranteed confidentiality. Developing countries are encouraged to emulate their mature counterparts and adopt leniency programs as a way of combating cartels in their economies. I argue here that the expected results from introducing a leniency program in small economies are unlikely to occur because of very different societal and institutional conditions compared to mature jurisdictions. Firstly, the circumstances that motivate a whistleblower to come forward are not present in small, young jurisdictions. Secondly, whistleblowers have much less to gain from coming forward in young jurisdictions than they do in larger jurisdictions, particularly when cartels are subject to criminal sanctions. They also have much more to lose by whistleblowing. The security and safety expected by the whistleblower in more mature jurisdictions are likely not to be forthcoming in small economies, particularly ones with high levels of homicide. Finally, the assumption that the whistleblower will always act out of self-interest to protect himself or the firm may not apply in small economies because cultural behavior is based more on protecting the business community and less on self-interest. I elaborate on these points below.

What Motivates a Whistleblower to come forward?

A whistleblower comes forward because of fear of detection and the severity of the sanction that would follow detection. He chooses to whistle blow to save himself (or the firm and its CEOs) from fines and incarceration, where criminal sanctions apply. In the United States, the Antitrust Division of the Department of Justice is one of the most feared antitrust institutions, both domestically and internationally. Cartel members fear being caught by the DOJ because of the power of this institution, its immense success in investigating cases in collaboration with the Federal Bureau of Investigation, and its power to incarcerate CEOs of companies found guilty. Moreover, the clever design of the US Leniency program pits not only cartel members against each other in a race to the DOJ, but also pits

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the firm against its employees with knowledge of the cartel by offering Individual Leniency in return for reporting, and individual sanctions for not reporting if the firm is caught.

In the EU, cartel members fear the European Competition Commission because of the severity of the fines levied (compared to the US) and its immense investigative power. This is sufficient disincentive, despite the fact that criminal sanction is not included in their program and there is no individual leniency offered. Further, the EU also uses the carrot of reducing fines if firms cooperate in the investigation and provide useful evidence. The enabling conditions are therefore the presence of a strong competition agency that has a successful track record of enforcement against cartels, and with the law enabling significant investigative tools and punitive sanctions.

By contrast, in the small economies of the Caribbean Community (CARICOM), the realities differ substantially from those in mature jurisdictions. Competition Commissions are young and do not have the enforcement record nor the power of a DOJ or DG Competition and do not invoke the fear in the business community that is evident in the US and EU. Further, a culture of competition is still nascent in the business communities as they learn the prohibitions in the respective laws. Therefore, the fear motive for coming forward and whistleblowing is not present. Nor are the sanctions sufficient to be a deterrence: there are no criminal sanctions in the competition laws in the region, and fines in the legislation are not punitive. Therefore, there is not much to be gained by avoiding sanctions. More importantly, the risk of enforcement is small given that enforcement takes place in the courts and CARICOM courts perennially suffer from lack of resources, financial and human, which affect their ability to enforce and thus lower the risk to companies of adverse consequences for cartel behavior. Therefore, the conditions that would motivate a whistleblower to come forward are not present.

While international cartel members whistle blow and cooperate with the US and EU agencies, they do so because of the importance of those markets to international firms. Losing either market will be a fatal blow to the business, and so there is willingness to subject themselves to these foreign jurisdictions and accept sanctions. By contrast, the small markets in CARICOM are of little significance to multinational firms who would certainly see no benefit in either whistleblowing or subjecting themselves to the competition authorities in this region.

Indeed, the Commissions in this region have not investigated cartels except for one recent case in Guyana arising from a complaint by a trucking and haulage company that the Shipping Association had fixed the prices for handling services and issued a notice detailing the applicable prices. The evidence was therefore transparent and readily available. The question is, why have cartels not been investigated in the region? This question is addressed below.

Is the Whistleblower safe?

In societies where the rule of law prevails, and there is a reasonable level of assurance of personal safety and security, whistleblowers would expect due process and would generally not be afraid for their personal safety as a consequence of coming forward. In the US, they are able to whistle blow, cooperate with the DOJ in its investigation, get leniency, while their co-conspirators face fines and incarceration. Further, once the case is complete, they are able to continue operating in the business world without further recriminations from their co-conspirators. Not so in societies that have a high level of violence and homicide. Popular culture makes it clear that a whistleblower will receive a bullet (or several), as illustrated by Jamaican Dance Hall song, 'Man Fi Dead' by Buju Banton and "Informer Fi dead' by Bunny General and Top Cat. These songs reflect the deep cultural abhorrence towards whistleblowing in Jamaican society, and the consequences for whistle blowing. While this violence permeates the societies as a whole, and one could argue that the business community may be different, cultural taboos and fear generated by widespread violence can have a chilling effect on a

potential whistle blower coming forward. This fear of violence against a whistleblower permeates most Caribbean societies because of the high level of crime and homicide in these societies.⁶⁴

Besides the fear of somatic violence, there is a deep underlying distrust of authority in these countries. This may be a continuum of past distrust of the colonial authority, but there is a perception that police and governments are involved in corruption giving little confidence to the public to come forward to authorities to whistle blow. Transparency International's publication, *Citizens' Views of Experiences of Corruption 2019* reported that over 60 % of people in Trinidad and Tobago, The Bahamas, Jamaica, and Guyana (59%) think that corruption in government is a major issue. In these small societies, the closeness between the political and economic elites further the corruption and cronyism. In these conditions, there is little confidence by John Public that the name of whistle blowers would be kept confidential. This perception may be ill founded in the context of competition cases, given the mandatory legal confidentiality provisions by which staff of Commissions are guided.

Individualism or Community Loyalty?

Small societies are also characterised by a culture of loyalty to each by members of the business community. The largest businesses in these small economies date back to the commercial elite during the colonial period, with a group of white families having control of major sectors of the economy, particularly import and distribution of retail goods. The close relations of these families, their identification with each other as a separate community from the majority of the population (brown and black), their continued deepening of their relationships through intermarriage and social ties, mean that they would not whistle blow on each other. Indeed, breaking ranks with the 'community' would lead to social ostracism at the least, and elimination at the worse. Further, these very factors make it likely that they share information and fix prices, easily done in trade associations, or in social gatherings and those such cartels are very stable. Proving their existence would be even more difficult in these small societies.

The cultural ethos of western societies, derived from philosophical constructs of individualism, and the belief that seeking self-interest ultimately redounds to the society as a whole, may not be the primary force in decision-making in small societies in the context of whistleblowing. Rather, loyalty to the 'community' comes first, and one can argue that this is a rational choice for preserving individual peace of mind and social inclusion. This view is supported by analysis by Hofstede Insights that classify societies as individualistic or collectivist. They posit that in individualistic societies, people are supposed to look after themselves and their direct family only. In Collectivist societies, people belong to 'in groups' that take care of them in exchange for loyalty. Hofstede Insights classify all Caribbean societies as being collectivist, rather than individualistic, that is, having a long term commitment to the 'group', be it family, extended family, or extended relationships. Ultimately, these cultural realities may upset the careful game theory that underpins the economic logic of leniency programs which pit cartelists against each other in terms of maximizing promised benefits and avoiding threaten penalties consequent upon detection.

Is the phenomenon more widespread than found in CARICOM?

While this short note focused on CARICOM countries, similar empirical evidence and conclusions may be drawn from experiences and social constructs in the small economies of Central America. Like CARICOM, they have historically entrenched business elite who operate as a tightknit unit, and control

⁶⁴ For instance, of 133 countries surveyed (Crime Index by Country 2020, with No. 1 being the country with the highest crime rate), Trinidad and Tobago ranks at No. 6; Guyana: No. 8; Jamaica: No. 11; and The Bahamas: No. 18. According to the World Data Atlas, Jamaica ranks No. 2 in the world for homicide rate, 43.9 rate per 100,000 in 2018, down from 56.4 per 100,000 in 2017.

the majority of their respective economies, with similar group loyalty as in CARICOM, and where violence and homicide rates are high, personal security cannot be guaranteed, and there is a distrust of authority. For instance, El Salvador has a leniency program, but in the twelve years of its existence, not a single person has come forward. Could it be because of the reasons outlined above? The issue therefore goes beyond the small economies of CARICOM to other small economies in Central America. Interestingly, there was a similar finding in Kenya. The Head of the Kenyan Competition Authority deemed their leniency program to be a failure⁶⁵. He pointed to a general mistrust of government agencies, a close culture and network within the Kenyan business community that has dis-incentivized whistleblowing, and the fact that collusion was standard practice by firms before competition law was introduced and such practices are regarded as normal, not illegal. There was a further problem in that there is no guarantee that the whistle blower, having been spared prosecution by the competition authority, would not still face prosecution by the public prosecutor who is empowered to prosecute all criminals in Kenya.

Conclusion

The efficacy of leniency programs in developing countries deserves a wider enquiry because the fundamental assumptions upon which success is based may not be present, and to the contrary, conditions may exist that would ensure failure. The culture of social relations is different in developing countries, despite their integration into the global capitalist system, and the inculcation of capitalist values. It may be that there is a tension between the standard individualistic behaviour found in Western societies and a more nuanced approach, a hybrid between western and local indigenous culture, in developing countries. Community values often supersede individual gain. Do non-western values run counter to the paramountcy of self-interest? And, would this limit the efficacy of leniency programs as developed in the industrialized countries?

⁶⁵ Presentation at the Istanbul Competition Forum on November 26, 2019.