Colombian Cartel Leniency and U.S. DOJ Leniency: Different Approaches to the Same Objectives

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Introduction

In November 2013 the anti-cartel enforcement agency for the Republic of Colombia, the Superintendencia de Industria y Comercio (SIC), conducted dawn raids of the sales and manufacturing facilities of several diaper companies in Bogotá and Medellín, Colombia. In August 2014, the head of the SIC, Pablo Felipe Robledo, did something unheard of in the United States: he held a press conference during which he announced an investigation of five diaper manufacturers and more than forty individuals. Robledo also confirmed some of the details of the investigation and explained how two of the targeted companies had cooperated with the investigation under the SIC's newborn leniency program.[2] The Superintendent has continued to grant interviews with local media on this and several other on-going investigations.[3]

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[2] *See* Unidad Investigativa, *'Delatores recibirán jugosas rebajas': SIC*, El Tiempo (August 6, 2014, 1:00 AM) http://www.eltiempo.com/politica/justicia/delatores-recibiran-jugosas-rebajas-sic/14347261; and Unidad

This article explores the cultural, legal, and political forces shaping the way the United States and Colombia very differently investigate allegations of corporate antitrust conduct. Although both use programs of leniency, they very differently define that terminology and they apply vastly different processes during such investigations. Counsel involved in similar administrative proceedings must understand these differences to effectively serve and protect clients' interests.

"Corporations and individuals who...cooperate in the Division's investigation...can avoid criminal conviction, fines and prison sentences..."

Foundations of U.S. Antitrust Leniency

In the United States antitrust law is ensconced in a hundred years of jurisprudence. The DOJ Antitrust Division's Leniency Program has been the subject of intense debate since its 1978 debut. Fifteen years of ineffective leniency administration prompted substantial revision in 1993, producing the current process by which a leniency applicant can come forward either before or after a formal investigation has begun.[4]

In its own words, "[t]he Antitrust Division's Leniency Program is its most important investigative tool for detecting cartel activity. Corporations and individuals who report their cartel activity and cooperate in the Division's investigation of the cartel reported can avoid criminal conviction, fines, and prison sentences if they meet the requirements of the program."[5] The DOJ takes a provisional evidentiary submission from the leniency applicant, who agrees to provide any and all documents the Government requests.[6] The corporate applicant additionally agrees to make all of its employees available for interviews by the Antitrust Division, understanding that any truthful cooperator will be spared the lash of federal prosecution, should the DOJ file a criminal case.[7]

Investigativa, *Los correos electrónicos que enredan al 'cartel' de los pañales*, El Tiempo (August 6, 2014, 12:30 AM) http://www.eltiempo.com/politica/justicia/los-correos-electronicos-que-enredan-al-cartel-de-los-panales-/14346856.

[3] *See* CM & la Noticia, *Superindustria denuncia presunto "cartel" de pañales* (August 4, 2014 10:01 PM) http://www.cmi.com.co/superindustria-denuncia-presunto--cartel--de-panales/236140.

[4] Scott D. Hammond, Dir. Criminal Enforcement, U.S. Dep't Justice, Antitrust Div., *Cornerstones of an Effective Leniency Program*, Address to the ICN Workshop on Leniency Programs 1, (November 22-23, 2004), http://www.justice.gov/atr/public/speeches/206611.htm.

[5] *See* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, LENIENCY PROGRAM, http://www.justice.gov/atr/public/criminal/leniency.html.

[6] *Id.*

[7] *See* ANTITRUST DIV., U.S. DEP'T OF JUSTICE, Model Corporate Conditional Leniency Letter, http://www.justice.gov/atr/public/criminal/239524.htm.

The Antitrust Division's process is to review the evidence provided by the leniency applicant, assure itself of the fundamental truth of the provided evidence, and then conduct its own investigation. It either drafts search warrants and sends FBI agents to collect evidence from all relevant corporate facilities, or drafts grand jury subpoenas and begins the normal grand jury process of collecting evidence and the testimony of relevant witnesses. Both investigative processes are governed by the Federal Rules of Criminal Procedure and call for the grand jury to conduct an investigation and return indictments, if the violation can be proved. Cooperating witnesses meet with the FBI and the prosecutors in order to present their knowledge and admit their involvement in the matter under investigation. The key witnesses then are called to testify before the grand jury. The grand jury testimony and the summaries of FBI interviews will be disclosed only on the eve of trial and even then only to the party who is facing the jury at trial.

There is never a hint of the fact or identity of a leniency applicant by the DOJ during the investigative stage.

It is true that dawn raids by the FBI at the inception of the investigation occasionally draw inquiries from the media. Sensational stories about Antitrust Division investigations occasionally explode in the New York Times and Wall Street Journal; however, the Antitrust Division as a rule neither publicizes its investigative agenda nor comments on current investigations to media unless media outlets somehow discover and repeatedly report on a particular investigation. Even then, comments are brief.

The Antitrust Division additionally treats the granting of leniency and the identity of the leniency applicant as "confidential," as specifically defined in Leniency Program guidelines.[8] This means the DOJ uses the evidence brought by the leniency applicant to justify its search warrants (affidavits to which are typically kept under seal for some time) and its grand jury subpoenas. The alleged cartelists under investigation may realize that one of the former cartel members seems not to be embroiled in the same processes as they are and they may suspect a leniency is in the works, but there is never a hint of the fact or identity of a leniency applicant by the DOJ during the investigative stage.[9]

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[8] "The Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation." *See* Scott D. Hammond, Dep. Ass't Att'y Gen. & Belinda A. Barnett, Sr. Counsel, Antitrust Div., *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters* (November 19, 2008), http://www.justice.gov/atr/public/criminal/239583.htm.

[9] At trial, Fed. R. Crim. P. Rule 16 requires that the Antitrust Division disclose all gathered evidence to the charged parties, including the material provided by the leniency applicant. *Giglio* Policy additionally requires disclosure of the fact that "Leniency Company's" employees have been granted immunity from prosecution. This occurs many years after the investigation has begun, and the actual confirmation of the acceptance into the Leniency Program would occur only in a letter to the defendant's attorneys and, thus, never really be part of the public record. Its disclosure only would be part of the required disclosures to the defense at trial under Fed. R. Crim. P. Rule 16.

Antitrust Enforcement in the Republic of Colombia

Like the program instituted by the DOJ Antitrust Division, the Colombian SIC antitrust leniency program offers fully-compliant participants, both the corporation and its agents, the possibility of avoiding corporate and individual penalties for wrongdoing. Unlike the system in the United States, however, Colombian antitrust enforcement is an administrative process. It does not anticipate jail time and provides only for the application of civil fines for violations of Colombian antitrust law.

Since 2009, antitrust enforcement in Colombia has improved due to increasing fines, strengthening the SIC, and adopting the leniency program.

Colombia first enacted antitrust regulation in 1959 with Law 155; however, regulatory authority was spread among several agencies, including the SIC, rendering enforcement understaffed and ineffective.[10] The SIC's power was strengthened with passage of Law 1340 of 2009, the Competition Law, which vested antitrust regulatory authority solely in the SIC and introduced the leniency program.[11] Colombian antitrust enforcement thus was reborn and the diapers case fittingly was the first test of a cartel investigation proceeding with cooperation obtained using the infant leniency program.[12]

The maximum corporate penalty for cartel behavior in Colombia under Law 1340 is much less than in the United States. While Law 1340 significantly increased the maximum corporate penalty to approximately US$30 million and introduced a maximum personal exposure of about US$600,000, the penalties still are insufficient to create a strong "race to the enforcer"—to be the first to capitulate in order to avoid prosecution, as happens in the United States. Fines also don't have the power of threatened criminal penalties. The superintendent of the SIC recognizes these limitations and intends to propose before the Colombian National Congress modifications to the sanctions based on recommendations received from the OECD, which includes changing the method by which maximum fines are calculated.[13]

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[10] Not unlike the timeline of antitrust law in the U.S., which finally classified antitrust violations as a felony in 1979 and which, as previously noted, suffered from weak enforcement until significant changes to the leniency program in 1993. Colombia introduced Law 155 in 1959 and then adjusted it through Decree 1302 of 1962 and Decree 2153 of 1992 before enacting Law 1340 in 2009.

[11] Law 1340 of 2009 introduced for the first time the leniency program as a means for fighting against cartels. Decree 2896 of 2010 developed the applicable regulation for leniency applications.

[12] The diapers cartel case is still under investigation and sanctions have yet to be imposed by the SIC.

[13] *See Pregunta Yamid: Pablo Felipe Robledo, Superintendente de Industria y Comercio,* (CM& la noticia broadcast January 28, 2015), *available at* http://cmi.com.co/yamid/?py=208.

This Colombian publicity campaign eschews assumptions of confidentiality so fundamental to leniency in the United States.

Despite these acknowledged limitations, the SIC has begun an impressive number of investigations regarding alleged cartel activity using the administrative process empowered by Law 1340, coupled with the ability to conduct dawn raids and to compel the production of business records and testimony. It has publicly announced investigations of the sugar, cement, and bathroom tissue industries and has launched preliminary investigations with dawn raids in the notebook paper product market and the pulp and paper industry.

The intention is to promote marketplace competition via effective enforcement of antitrust policy. In numerous interviews with prominent Colombian media and news outlets, the SIC's Robledo has said that since 2009, antitrust enforcement in Colombia has improved due to increasing fines, strengthening the SIC, and adopting the leniency program to fight against hardcore cartels. He specifically credited the leniency program with his office receiving 700 emails and two dozen witness statements that provided evidence of a conspiracy in the diaper and other related product-markets.[14]

This intense Colombian media attention for SIC activity is both cultural and tactical. Keeping up with daily news, including business news, is a part of daily life not just in Colombia, but across South America. Stories of cartel investigations, or of any corporate wrongdoing, are intensely followed and widely discussed in dining rooms and board rooms alike. Knowing this, the SIC deliberately leverages news media to highlight for the public and the business community in particular its increasingly effective antitrust enforcement in Colombia.

This Colombian publicity campaign eschews assumptions of confidentiality so fundamental to leniency in the United States. In August 2014, approximately nine months after its initial raids, the SIC publicly issued a 180-page Resolution of the SIC relating to the diaper cartel. The resolution identified by name the five companies targeted by the investigation, as well as the identities of the forty-four individuals whom it considered were involved and had knowledge of the facts under investigation. The SIC did redact the names of the cooperating witnesses who provided testimony, as well as the identity of their corporate employers, but the redacted information was made available to all of the subjects of the investigation in a disclosure a few months later. The public document also divulged the dates, places, and alleged attendees of the putative cartel meetings, as well as a great deal of evidentiary detail supporting its allegations. It even outlined the details of the alleged conduct in a fashion that tracked the language of the offense and with much greater detail than disclosed in a typical indictment in the United States. The head of the SIC additionally quoted the evidence against the five alleged cartelists during media interviews.[15] Reports by local and international news outlets then included these details.[16]

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[14] *See* El Tiempo http://www.eltiempo.com/politica/justicia/los-correos-electronicos-que-enredan-al-cartel-de-los-panales-/14346856, and *see* also https://www.youtube.com/watch?v=llSWops2sCA related to the tissue paper cartel.

[15] *See e.g.*, https://www.youtube.com/watch?v=dbdpk7tKnHE in Spanish.

[16] *See e.g.*, Rico, *Colombia's Diaper Cartel: How Dirty Can Business Get?* Today Colombia (August 24, 2013 at 1:07 AM), *available at* http://todaycolombia.com/colombias-diaper-cartel-how-dirty-can-business-get/.

The Repercussions of Leniency in Colombia

The ready availability of this information will have substantial impact on the case's final disposition. It has triggered quick civil lawsuits against the investigated parties. In addition, the use of media in a very early stage of the investigation has damaged the reputations of the corporations and individuals involved, who may now be considered guilty by the public without the opportunity to exercise their right to legal defense. One could argue that using media to the extent the SIC has constitutes bullying of the companies and the individuals involved in the diapers cartel case. Companies engaging in anticompetitive practices in Colombia now may ask themselves whether or not to report their own conduct under leniency in exchange for benefits like a reduction in or total exemption from the administrative fines, or to follow pre-2009 strategy and remain silent in hopes of evading either detection or conviction by headline.

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U.S. Confidentiality versus Colombian Disclosure of Leniency Applicants

This very different treatment of leniency applicants by enforcers in Washington and Bogotá can be attributed to a variety of legal and cultural factors. The DOJ Antitrust Leniency Program was crafted on a foundation of criminal law enforcement and the federal rules of criminal procedure. Leniency applicants here have become accustomed to privacy in their dealings with the DOJ, but that is a byproduct of the impact of rule of grand jury secrecy under Fed. R. Crim. P. Rule 6(e). The treatment of leniency applicants in a similar fashion to confidential informants serves the purpose of secrecy, which is necessary pre-indictment. Post indictment, all disclosures are covered by Fed. R. Crim. P. Rule 16, which relates to pre-trial discovery in criminal cases. In short, there is neither occasion nor reason for the DOJ to publicize the identity of its leniency applicants. The very assurance of confidentiality, particularly in the event that no charges are brought forward, is one of the biggest inducements that the DOJ can give a cooperative leniency applicant.

Colombia makes no such assurances. Although Colombia recently adopted regulations strengthening the SIC as the sole antitrust enforcement authority, antitrust enforcement remains in a formative stage. The SIC's move to change quickly the way it deals with corporations and individuals suspected of engaging in anticompetitive conduct is praiseworthy; however, sacrificing confidentiality in leniency proceedings in favor of prosecution via media may backfire.

To be effective, leniency processes need safeguarding from media scandals, and the SIC needs to ensure future leniency applicants that they can count on both legal and reputational protection…

Announcing details of the diaper cartel investigations in the media shocked both the general public and the business community, which were accustomed to decades of the government tacitly protecting the corporate sector with lax antitrust enforcement.[17] Publicly disclosing leniency proceedings may seem like it would deter would-be cartelists, but it ultimately may damage the trust that must exist between leniency applicants and the SIC in order for applicants to come forward. Leveraging media coverage to prove the SIC's regulatory strength also compromises fundamental legal presumptions of innocence and right to counsel, further deterring voluntary cooperation and constraining effective antitrust enforcement.

Publicly disclosing leniency proceedings... may damage the trust that must exist between leniency applicants and the SIC.

To be effective, leniency processes need safeguarding from media scandals, and the SIC needs to ensure future leniency applicants that they can count on both legal and reputational protection when seeking immunity in exchange for full cooperation during a cartel investigation. The diapers case is the first in which a leniency agreement between the applicants and the SIC was reached. It will be interesting to see how the SIC adjusts its approach, if at all, for subsequent investigations.

Conclusion

Seeking leniency in cartel investigations affords corporations and individuals very different protections and outcomes in the United States and Colombia. Counsel for corporations involved in a Colombian cartel investigation must remember the process is administrative, not criminal, and the assumptions of confidentiality and single applicant, essential for effective leniency applications in the United States, do not apply in Colombia. Care must be taken when deciding the best defense strategy to follow and clients must recognize the potential for intense, damaging media attention once a Colombian investigation opens, especially if they seek leniency.

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17 Before 2009 the applicable sanctions for anticompetitive behaviors were approximately US$600,000 for corporations and approximately US$95.000 for individuals.