

**SECCIÓN II**  
**AUTORES NACIONALES**



# THE LENIENCY PROGRAM IN COLOMBIA

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## RESUMEN

Los programas de clemencia son considerados como la herramienta más eficaz en la lucha contra los carteles empresariales. Estos programas consisten en otorgar inmunidad total o parcial a aquellos agentes económicos que deciden confesar su participación en un cartel proporcionando a la autoridad de competencia la información y evidencia que permita identificar los participantes y como opera el cartel. El objetivo de este documento de investigación es hacer un resumen del funcionamiento del programa de clemencia en Colombia. En primer lugar, se desarrolla un análisis de los principios que debe tener un programa de clemencia efectivo. Posteriormente, se explica cuales son los beneficios del programa de clemencia. Luego, se hace referencia a los requisitos que debe cumplir el primer solicitante del programa y los solicitantes que llegan después del primero. Enseguida, se examina el acuerdo de delación, donde se explican los principales contenidos de este, incluyendo, las obligaciones que existen para el solicitante. Finalmente, se explica el último paso del programa de clemencia y las opciones de decisión que la Superintendencia de Industria y Comercio tiene con respecto a la aceptación del acuerdo de delación.

**Palabras Clave:** *Programa de Clemencia, acuerdo de clemencia, Cartel, Autoridad de competencia, solicitante de clemencia.*

## ABSTRACT

The leniency programs is considered as the most effective tool in the fight against cartels. These programs consist in granting full or partial

immunity to those economic agents that decide to confess their illegal conducts and provide the competition authority with information and evidence that help to identify the participants and the functioning of a cartel. The purpose of this paper is to summarize the operation of the leniency program in Colombia. In order to achieve this, in the first place we present an analysis of the main principles that an effective leniency program must have. Then we explain the benefits that the leniency program can offer to the applicants. Then, we describe the requisites that the first and subsequent applicants to the program in Colombia must comply with. In addition, we analyze the contents and obligations that the applicants must comply with pursuant to the leniency agreement. Finally, the last step of the leniency program is explained as well as the options of the Superintendence of Industry and Commerce for the decision regarding the acceptance of the leniency agreement.

**Keywords:** *Leniency program, leniency, agreement, Cartel, Competition authority, leniency applicant.*

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## INTRODUCTION

In brief, the so called “*Leniency Programs*” can be described as procedural tools that allow the competition authorities to grant full or partial immunity to those participants in a horizontal anti-competitive agreement—“*Cartel*”, who decide to confess to their illegal conduct and provide the authority with relevant information and evidence about the identity of the participants and the functioning of the cartel, thus helping the authority to quickly put a stop to the conduct and create an important deterrence for its occurrence.

In the course of the past twenty (20) years, the *Leniency Programs* have been included in the competition laws of most jurisdictions, because they are considered as the most effective tool in the fight against cartels.

Aware of the important damages that cartels inflict in the competition environment of the markets as well as in the living conditions of the population, and of the difficulty to detect and stop them, modern competition authorities around the world have implemented the *Leniency Programs*, which create an economic incentive to obtain full immunity or a reduction in the penalties imposed for the breach of the competition laws, which benefit those applicants who decide to self-report their conduct and fully cooperate with the authorities in the dismantlement of the cartels.

As a result of this incentive and pursuant to the dynamics of game theory, the *Leniency Programs* represent an important deterrence for the formation and functioning of cartels, because in the presence of an effective *Leniency Program*, businessmen are in constant fear that one of the members of the cartel will take the initiative to report it to the authority in order to obtain immunity with the consequence that the rest of the participants will have to bear stiff sanctions.

On top of the already mentioned benefits of the *Leniency Programs*, they are also important because they help the competition authorities save time, effort and resources in their permanent war against cartels. In fact, pursuant to the *Leniency Programs*, the applicants will not only help in discovering the cartel, but they will also help in the gathering of the evidence, allowing the authorities to conduct more robust investi-

gations and to reach quicker and firmer decisions, that will enhance the reputation of the authority and the public policy as a whole.

As a result of all of this, society is benefited, first because of the dismantlement of the cartel and second because the authority will increase its efficiency by reducing the time and cost of the investigations.

In sum, it can be said that leniency programs generate profits for society, for the authority, and also for the leniency applicants.

The leniency program was first introduced in Colombia in article 14 of Law 1340, 2009 (hereinafter Law 1340). This law was initially developed by Decree 2896, 2010, reformed by Decree 1074, 2015 (hereinafter Decree 1074), known as the Colombian Unified Decree for Commerce, Industry and Tourism (“UDCIT”), which was reformed in the Leniency Chapter (Chapter 29) by Decree 1523, 2015 (hereinafter Decree 1523).

The aim of this document is to briefly summarize the main elements of the Colombian Leniency Program.

## 1. MAIN PRINCIPLES OF THE LENIENCY PROGRAM

Most jurisdiction that have included a leniency program share the same main principles that ensure their effectiveness. According to Scott Hammond<sup>1</sup> a “*guiding principle is what makes leniency effective*”.

### 1.1. STRENGTH AND EFFECTIVENESS OF THE AUTHORITY

Economic agents must perceive the authority as strong and effective, so that those companies that break the law fear there is a high risk of detection, and also that if they apply for leniency, the authority will be able to protect them. If the authority is not strong and effective, the perpetrators will not take it seriously, will not fear detection and will not trust the leniency program<sup>2</sup>.

<sup>1</sup> HAMMOND, Scott (2014), “2° Congreso Internacional de Derecho de la Competencia”. Available on: <https://www.youtube.com/watch?v=aXhO1ObTeYw&t=274s>

<sup>2</sup> SERRANO, Felipe (2016). *Programas de clemencia en América Latina y el Caribe: experiencias recientes y lecciones aprendidas*. Available on: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF\(2016\)5&docLanguage=Es](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/LACF(2016)5&docLanguage=Es)

## 1.2. SUBSTANTIAL SANCTIONS THAT TRANSLATE INTO INCENTIVES TO APPLY TO THE PROGRAM

Sanctions should be substantial, so that they can be perceived as a deterrent for companies that may be tempted to breach the law; and also, in order to create an important economic incentive for companies that consider participating in the Leniency Program.

It is clear that one of the important features of an effective Leniency Program is that potential wrongdoers feel they have a lot to lose if they are caught and actual lawbreakers feel they are in great danger of being caught, because someone else will apply for leniency before they decide to do it, which has the potential of creating a stampede or race of the members of the cartel, in order to seize the first position as a leniency applicant.

As said before, leniency is all about benefit: in the first place for society at large, but also for the authority and for the leniency applicants. As a matter of fact, to a large extent the success of the Leniency Program depends on the fact that applicants that are accepted into the program can secure the total or partial immunity promised by the law, according to their position in the case. It is clear that in the absence of an economic incentive that is certain and achievable, the participants in the cartel will prefer to wait for the authority to investigate instead of accepting responsibility.

There has been a tendency in the last years to increase the sanctions of the anticompetitive conducts in Latin America, which increases the possibility of success of the Leniency Programs in the region<sup>3</sup>.

## 1.3. TRANSPARENCY, PREDICTABILITY AND GOOD FAITH

Companies will be more inclined to participate in the leniency program if they perceive that the authority can be trusted because it acts with transparency and good faith and there is predictability in the application of the program, so that they know in advance the chances they have to obtain the benefits promised by the law.

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<sup>3</sup> *Ibidem.*

If there is no certainty that the participants in the *Leniency Program* will receive the promised benefits, the trust in the authority will be broken and the program will fail, because companies that in the future would be in a position to file for leniency will not take the important risks that entail to participate in the program, for eventual benefits that at the end they will not receive. (Hammond, 2014)

According to Felipe Serrano<sup>4</sup>, one way to increase the transparency of the program is by issuing guidelines that will help future applicants to effectively participate in the *Leniency Program*.

It is important to say at this point, that in Colombia, the benefits of the *Leniency Program* are confirmed by the Superintendent only at the end of the investigation. So, the applicants can only be sure that they have secured the benefits at the very end of the procedure.

#### 1.4. *IN DUBIO* PRO APPLICANT

As a result of the principle related to *transparency, predictability and good faith*, in case of doubt, the *Leniency Program* should favor the applicants, who have taken the risk of abandoning their presumption of innocence and good faith in order to cooperate with the authority and seek the benefits that the law offers. Otherwise, perpetrators will not apply because they will not trust the authority or the program. It is important to convince the companies to apply to the program and to stay in the program. The program is meant to be seen by the companies as a solution and not as another problem<sup>5</sup>.

#### 1.5. GOLDEN RULE

The *Golden Rule* is perhaps the most important principle of the *Leniency Program*. According to the *Golden Rule* the leniency applicants cannot be left in an inferior or worse situation than those who did not cooperate with the authority<sup>6</sup>.

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<sup>4</sup> *Ibidem*.

<sup>5</sup> Scott Hammond (2014), “2° Congreso Internacional de Derecho de la Competencia”. Available on: <https://www.youtube.com/watch?v=aXhO1ObTcYw&t=274s>

<sup>6</sup> *Ibidem*.



## 1.6. CONFIDENTIALITY

Confidentiality is a very important factor for the success of the *Leniency Program*, because the leniency applicants renounce to their presumption of innocence and confess to the authority their participation in the cartel, which implicates damages to the consumers and to the economy in general; and also because by nature of the program they have to present evidence and information regarding the participation of third parties in the illegal conduct. All these situations present inherent dangers to the reputation of the leniency applicant and create the potential for litigation against him from the side of the consumers and the other participants in the cartel.

Confidentiality of the identity of the leniency applicants is consistent with the application of the *Golden Rule*. In fact, Hammond<sup>7</sup> argues that lack of confidentiality will affect the leniency applicant in two ways: first because his reputation will suffer even more than the one of those who deny the charges; and second, because he will not have the same opportunities to defend himself in case of private damages actions, since in the absence of confidentiality the plaintiffs may have better information and access to evidence against him than in regard to other participants in the cartel, which will lead to a disadvantage in the defense.

In the US, for example, the information gathered within the leniency application will only be disclosed in case of litigation, but not before<sup>8</sup>.

## 2. BENEFITS

### 2.1. BENEFITS FOR THE FIRST APPLICANT TO QUALIFY

The benefit for the first applicant to qualify to the *Leniency Program* is full exoneration of the fines that the Colombian competition authority, the Superintendence of Industry and Commerce (hereinafter the “SIC”), can impose pursuant to Law 1340.

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<sup>7</sup> *Ibidem*.

<sup>8</sup> *Ibidem*.

Full exoneration refers only to the administrative sanctions: It does not protect the leniency applicant from criminal or private judicial actions aiming to recover the damages caused by the anticompetitive conduct, including class actions.

## 2.2. BENEFITS FOR THE REST OF APPLICANTS

Pursuant to the UDCIT, whenever an applicant seeking total immunity does not meet the requirements to obtain that benefit, or when an applicant directly requests a reduction in the fine in exchange for cooperation, the fine may be reduced by the SIC. This is the situation where second and further applicants stand. In that case the process is exactly the same as the one who has to follow the applicant seeking full immunity.

In accordance with the UDCIT, the second applicant can obtain a reduction of up to fifty percent (50%) of the applicable fine; and the third and following applicants can receive a reduction up twenty five percent (25%) per cent of the applicable fine. In case of *Amnesty Plus* situations, the reduction in the fines can be even bigger as will be explained ahead.

The SIC will evaluate the extension of the reduction in fines that should be granted to the applicants depending on their position within the program. The result of this evaluation will be known at the end of the investigation.

In addition to the basic reductions already explained, the UDCIT concedes up to an additional fifteen percent (15%) reduction in the applicable fine, as an “*Amnesty Plus*” benefit, to the leniency applicant that is not granted full immunity in an investigation, but is able to obtain a first-in position in the investigation of another cartel. Notice that this fifteen percent (15%) reduction may be aggregated to the originally awarded reduction (depending on the applicant’s position in the leniency program), even if that means exceeding the basic caps stated in the UDCIT). In order to obtain such benefit, the applicant must inform the SIC about the second cartel before signing the leniency agreement in the first cartel investigation.

The SIC applies the reductions in sanctions using its own discretion and within the limits established in the UDCIT, taking into account, the

quality of the information provided and the timing of the application to the program. As said before, the limits are as follows:

- a. The first-in applicant that is eligible in terms of the Decree may be awarded total immunity or a one hundred percent (100%) reduction of the possible fines.
- b. The second-in eligible applicant may be awarded a maximum of fifty percent (50%) reduction of the possible fines.
- c. All subsequent eligible applicants may be awarded a maximum of twenty five percent (25%) reduction of the possible fines.

### 2.3. THE SUBJECT OF THE BENEFITS

Pursuant to the UDCIT, the SIC only grants total immunity to the first applicant, conditioned to the compliance and fulfilment of the requirements described in this document. If the first applicant fails to fulfil those conditions, the next applicant can be granted the first position. Nevertheless, other applicants continue to be eligible for a significant reduction of the fines.

It should be noted that in the *Notebooks Cartel*<sup>9</sup> somewhat exceptionally the SIC awarded full immunity to two (2) companies, due to the fact that the SIC accepted that in reality both of them were the “*first applicant*”, because the notebooks business initially owned by Kimberly Clark was later acquired by Scribe. Given the duration of the cartel conduct both companies were involved in the illegal conduct in different periods of time. As can be seen, at an early stage in the development of its *Leniency Program*, Colombia has already applied the so called “*Predecessor – Successor Doctrine*”.

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<sup>9</sup> Superintendencia de Industria y Comercio, Resolución 90560 de 2016, “Por medio de la cual se deciden unos recursos de reposición”, Rad. 14-151036.

Superintendencia de Industria y Comercio, Resolución 86862 de 2016, “Por medio de la cual se decide un recurso de reposición”, Rad. 14-151036.

Superintendencia de Industria y Comercio, Resolución 54403 de 2016, “Por la cual se imponen unas sanciones por infracciones del régimen de protección de la competencia y se adoptan otras determinaciones”, Rad. 14-151036.

The procedure for application to the *Leniency Program* and the qualifying criteria for participation in the program is exactly the same for natural persons and for companies. Nevertheless, it is important to notice some aspects:

*2.3.1. Extension of the leniency benefits obtained by the applicant company to natural persons attached to the company*

According to UDCIT, benefits granted to the leniency applicant automatically extend to any facilitator. The UDCIT defines facilitator as “*any natural person who cooperates with, authorizes or tolerates anti-trust practices’ as established in article 26 of Law 1340*”.

Nevertheless, there are some exceptions to the application or award of the benefits, when the natural person under investigation is in any of the following circumstances:

- a. He or she denies participation in the cartel.
- b. He or she fails to provide the assistance requested by the authority to produce evidence (e.g. depositions, documents, assistance to hearings, etc.).
- c. He or she alters, destroys or hides in any way evidence relevant to prove the anticompetitive practices.
- d. The company from which his or her leniency status depends, loses its standing as leniency applicant or is expelled from the *Leniency Program* within the investigation.

Pursuant to the UDCIT, the company is forced to facilitate the SIC taking the testimony of its employees. If the company is willing to help the SIC to collect the testimonies, the fact that one or more employees refuse to cooperate with the SIC will not in itself damage the company’s application, provided that it has other means to demonstrate the conduct and comply with the requisites for a successful leniency application.

In general terms obstructive behavior of employees will take them out of the umbrella protection of the company’s leniency application and will not damage the position of the company, unless the obstructive conduct affects the compliance of the company with the requirements for a successful leniency application.

As a matter of general principle, the company should make reasonable efforts to ensure that all the relevant employees cooperate with the SIC and abstain from any kind of obstructive behavior.

As said before, the leniency benefits awarded to a company will be *automatically* extended to its employees if they decide to collaborate with the SIC, but as also was explained before the UDCIT lists the reasons that would cause the natural persons to lose the benefits *automatically* awarded, one of which is of course the lack of cooperation with the SIC.

### 2.3.2. *Leniency benefits granted to a natural person*

It is important to note that there is a distinction between the application presented by an employee acting on behalf of the company, and an employee presenting his own personal leniency application.

If the employee presents his own personal leniency application in the first place and before the company, he could be granted full immunity. However, the UDCIT expressly states that the benefits granted to the employee that presents his own personal leniency application will not extend to the company. Accordingly, if the company follows the application of its employee, it can obtain the second place in the *Leniency Program* and the reduction of the applicable fines. As can be seen, if a natural person applies for leniency as an individual, his position as leniency applicant (even if the applicant did not obtain the first place) will not be extended to the company.

## 2.4. REQUISITES THAT THE FIRST APPLICANT MUST COMPLY WITH

It should be noted that even if the applicant signs the Leniency Agreement, the final decision over the immunity and the benefits is taken by the Superintendent of Industry and Commerce, in the resolution that puts an end to the case. Therefore, before this occurs, the applicant only has a reasonable expectation regarding the benefits.

In this section we will explain the requisites that have to be complied with by the first applicant in order to maintain its position and its benefits.

### 2.4.1. *Opportunity of the application*

According to the UDCIT, the investigated parties may apply to the Leniency Program up until the term to respond to the Opening Resolution has expired, i.e. 20 (twenty) business days after said Resolution has been notified to the investigated parties.

However, eligibility for full or partial immunity will be assessed on a first come, first serve basis. To obtain full exoneration, the applicant must be the first to file for leniency (the proceeding wants to create a *stampede* environment). This is what the UDCIT calls a “*marker*”.

There are different ways to contact the SIC to make an effective *marker* and apply for leniency. The applicant can contact the SIC by writing or by e-mail. In this last case, the moment of access to the program will be the one stated in the minute prepared by the SIC.

The applicant must express his intention to obtain a *marker* and secure a position to apply for leniency, and the SIC will establish the period to comply with the initial conditions to secure the marker, if they are not complied with at that time.

Again, the SIC will create a minute stating the date and time of the contact with the prospective applicant in order to secure the precedence of his application in case that the conditions are met to grant a *marker*. In that case, the date and time of the initial contact will be the effective date and time of the *marker*.

The applicant must provide the SIC with a minimum of information in order to obtain the *marker*. It must be noticed that the SIC will evaluate the usefulness of the information contained in the applicant’s filing. Thus, applying before the formal investigation has been launched gives the applicant a better opportunity to get full immunity, since the standard of usefulness of the information will be lower. As the investigation advances and evidence is gathered, the likelihood that the information provided by the applicant will be considered valuable by the SIC decreases. When it comes to leniency applications, time is of the essence.

Regulations do not specify the time that the SIC should grant the applicant to secure its *marker*. That term is agreed in each case between the applicant and the SIC and should provide a reasonable time to acquire the required information. Most probably the SIC will consider

that thirty (30) days is in principle a reasonable initial time to perfect the *marker*.

It is possible to extend the deadline for perfecting the *marker*, because there is no statute or regulation concerning the deadline to perfect it. Accordingly, the SIC at its discretion can decide to grant an extension to the applicant. The SIC will be inclined to extend the time if the applicant can show progress in its internal investigation. Experience has shown that this is a very probable scenario. Usually companies coming forward have only discovered the tip of the iceberg. During the ensuing internal investigation, they can be confronted with more evidence of the anticompetitive conduct contained in the reported market as well as in other markets not included in the initial filing.

It should be noted that an applicant cannot lose its marker if a second applicant comes forward with better information. The applicant may only lose its marker if the information provided does not comply with the requirements stated in the UDCIT, if the applicant is in primary position aiming for full immunity. If a company or person applies first and complies with the aforementioned rule, it can be granted full immunity even if the second applicant brings better information. The aim of the law is to reward the first company that comes forward.

#### 2.4.2. *The leniency applicant cannot be the promoter or instigator (i.e. Ringleader) of the cartel*

Pursuant to the UDCIT, the leniency benefits, whether they consist in total immunity or in reduction of the fines the SIC can impose, are not available for the instigator or the promoter of the conduct. The instigator or promoter of the conduct is the person that forces or induces other person or persons to participate in anticompetitive agreement as long as such coercion remains during the execution of the cartel and is deemed relevant to determine the conduct of the other companies involved in the scheme.

As can be seen, the UDCIT earnestly tries to water down this requisite that was included in article 14 of Law 1340, because it can create doubts on the potential applicants that may fear that after they have taken the step to confess to the authority, they can be debunked and lose

their preferential treatment on the account of being considered as the ringleader or instigator of the cartel. For that reason, the decree requires that anyone that accuses the leniency applicant of being the ringleader, has to prove it.

2.4.3. *The leniency applicant must acknowledge its participation in the cartel and must confess to the violation of the law*

When the applicant makes its first approach to the SIC to secure his *marker*, he has to admit to a violation of the law, this is, to acknowledge its participation in the cartel.

In addition to that, one of the essential elements of a leniency application is the confession of wrongdoing on the part of the applicant. Pursuant to the UDCIT, an application to the Leniency Program can be presented in written format at the SIC's offices or via e-mail, at the choice of the applicant.

2.4.4. *The leniency applicant must provide information regarding the existence, modus operandi, the relevant market affected and the members of the cartel*

Current regulations do not establish a clear threshold regarding the amount of information required to secure a *marker*.

However, the filing for leniency must contain solid factual and legal arguments that represent a significant contribution to the investigation. The Deputy Superintendent for Competition Protection, who is the officer that conducts the investigation, will assess the merits of the filing presented by the investigated party. The more advanced the proceedings are, the more difficult to successfully clear the evaluation on the merits made by the Deputy Superintendent.

In accordance with the UDCIT, during the five (5) business days following reception of the application, a SIC official will evaluate the document and inform the applicant whether such application complies with the legal requirements stated in the Law.

If the SIC concludes that the application does not comply with the requirements it will be considered as "*not filed*". On the contrary, if the



authority considers that the application complies with the requirements, it will proceed to issue a certification (i.e. *marker*) informing the applicant about its position within the *Leniency Program*.

If the SIC does not respond during the five (5)-day term, it will be understood that the application complies with the legal requirements.

## 2.5. REQUISITES THAT THE OTHER LENIENCY APPLICANTS MUST COMPLY WITH

The cooperation obligations related to reduction of fines are similar to those required for total immunity. Whenever an applicant who aimed to obtain total immunity does not meet the conditions named above, or when an applicant directly requests a reduction in the fine, the fine may be reduced if the applicant:

- a. Recognizes that it participated or continues to participate in the anticompetitive agreement or agreements.
- b. Provides useful information and evidence regarding the anticompetitive agreement or agreements that adds a significant value to the existing evidence.
- c. Assists its employees in testifying to the SIC.
- d. Answers any requests from the SIC to clarify the facts.
- e. Abstains from destroying, altering or concealing relevant information or evidence regarding the alleged anticompetitive agreement.
- f. Ceases to be part of the agreement.
- g. Cooperates with the SIC throughout the investigation.
- h. Assures that it is not the promoter or instigator of the anticompetitive agreements.
- i. Puts an end to its participation in the anticompetitive conducts.

## 3. LENIENCY AGREEMENT

Once the SIC has evaluated the information and evidence filed by the applicant and once compliance with the requirements for obtaining the leniency benefits are established, a *Leniency Agreement* is signed.

### 3.1. OBLIGATIONS FOR THE APPLICANT IN THE LENIENCY AGREEMENT

Pursuant to the UDCIT, once the ‘first-in’ applicant has handed over its information and evidence, the SIC will evaluate it and if it complies with the requirements set out above, the delegated SIC officer will sign a *Leniency Agreement* with the applicant. In this document, the applicant is required to:

- a. Accept its participation in the anticompetitive conduct.
- b. Provide complete and useful information or evidence concerning: the goals of the cartel; the circumstances of place, time and manner surrounding the conduct; the parties to the cartel and their degree of participation (e.g. as principals, accomplices or accessories before and after the fact); and the affected markets (i.e., relevant product and geographic market); the period in which the cartel was in effect.
- c. Cooperate with the SIC during the administrative investigation. This encompasses providing useful information, timely response to information requests from the SIC,
- d. Additionally, the applicant is required to refrain from destroying, altering or concealing relevant information or evidence regarding the alleged anticompetitive agreement.
- e. Cease its participation in the cartel or conspiracy: There is no precise time for this in the regulation. However, under UDCIT, in order to be eligible to receive the leniency benefits, the applicant must put an end to its participation in the unlawful conduct. This means that the company must take corrective actions before or immediately after it files its application to be able to sign a *Leniency Agreement* with the SIC and receive the benefits.
- f. The Law does not define what constitutes ‘termination of conduct’. Also, the Law does not imply that the applicant must cause the termination of the cartel. However, the applicant must guarantee that his own participation has stopped.

### 3.2. CONTENTS OF THE LENIENCY AGREEMENT

The *Leniency Agreement* must contain the following:

- a. A description of the evidence and information provided by the applicant.
- b. The recognition that the applicant was first in time with its application, or the position that the applicant has in the *Leniency Program* for that investigation, and the fact that the applicant complies with the requisites for a successful application as described before.
- c. An explanation regarding the conditional nature of the immunity, which depends on the confirmation of the Superintendent of Industry and Commerce in the resolution that puts an end to the investigation.

Normally, only the applicant and the SIC have access to the *Leniency Agreement*, which remains in the leniency file and which is a separate file from the investigation dossier (even with a different internal number).

### 4. DECISION OF THE SIC

The confirmation of the conditional immunity granted by the Deputy Superintendent in the Leniency Agreement depends on the complete compliance with the leniency requirements along the investigation. This evaluation will be made in the final decisions (Resolution) by the head of the SIC (the Superintendent of Industry and Commerce) when deciding the case. Before this confirmation is issued, there is no certainty of the application of the leniency benefits, there is only an expectation based in the evaluation contained in the *Leniency Agreement*, but not a granted right.

It could be said then that there is no possibility of revocation of the leniency benefits, because in reality they are not firm until the Superintendent issues the final decision.

It is possible that the SIC may decide not to confirm the leniency benefits for one or more of the following reasons:

- a. The applicant has failed to comply with the obligations accepted in the leniency agreement.
- b. The Superintendent is in disagreement with the evaluation regarding the usefulness of the information and evidence made by the Deputy Superintendent at the time of the signature of the *Leniency Agreement*.

- c. It is demonstrated that the applicant was the instigator or promoter (ringleader) of the cartel.
- d. The applicant fails to stop its participation in the anticompetitive conduct.
- e. The applicant fails to cooperate with the SIC or to respond to its new requests for information.
- f. The applicant obstructs the investigation by hiding, destroying or manipulating the evidence.

The final resolution by which the Superintendent decides the case is an administrative act against which the interested parties can file a reconsideration plea within ten (10) days of its notification. The Superintendent should decide the reconsideration plea within two (2) months. If the decision is unfavorable, the interested parties can file a lawsuit before the administrative jurisdiction, aimed to the annulment of the decision and the indemnification of the damages caused.

In addition, the UDCIT states that when the motive for revoking was the applicant's role as instigator of the cartel, said loss of benefits will be decided by the head of SIC, taking into account the due process and defense rights of the applicant.

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