Sección **Diálogos**

Rewards in Competition Law: Complementary Tool or Rival to Compliance and Leniency?

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April 2025

Rewards in Competition Law: Complementary Tool or Rival to Compliance and Leniency?[2]

Abstract: The introduction of monetary rewards as a mechanism to encourage informants to provide competition authorities with relevant information about anticompetitive practices presents certain design challenges. These are addressed in this paper, which engages with the existing academic literature and the comparative review of existing rewards programs in the few countries that have already adopted one, such as the United Kingdom, South Korea, Taiwan, Pakistan, Slovakia, Hungary, and Peru. In particular, we analyze the relationship of complementarity and reinforcement that reward programs have with respect to leniency programs, according to the definition of the objective and subjective scopes of application. Likewise, we study the relationship of complementarity and competition that may arise between applying to a competition authority's rewards program and the internal reporting of illegal practices that is implemented as part of a company's competition law compliance program.

Keywords: *Cartels, Compliance, Leniency, Rewards, Whistleblowers.*

2 This document consists of a translation of Calderón's work that was originally published in Spanish. The original work's title was "Recompensas en libre competencia: ¿Herramienta complementaria o rival del compliance y del leniency?", and it can be found on the following link: https://centrocompetencia.com/recompensas-en-libre-competencia-herramienta-complementaria-o-rival-del-compliance-y-del-leniency/. The work was translated by Fernanda Ruiz and Ignacio Peralta.

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INTRODUCTION

The development of new technological tools in economic and commercial activities generates opportunities both for their use in the commission of anticompetitive practices and for their use by competition agencies in detecting such practices.

Data mining, big data processing, the development of algorithmic software, and the introduction of artificial intelligence tools, to name a few recent developments in the tech industry, cannot only refine decisions regarding production volumes and selling prices in multiple markets at the same time, but can also make more complex and less evident a collusive scheme.

The payment of a reward to those who help unravel the collusive scheme appears, in this context, as an interesting mechanism. It aims to create more incentives for individuals who possess relevant information about the execution of an anticompetitive practice to come forward and collaborate with investigative authorities. In exchange, they receive an economic benefit that would motivate them to denounce a potentially illicit practice in which they may not have necessarily participated but nonetheless are aware of.

Returning to the previously mentioned examples, think about a systems engineer who developed an algorithm, or a data scientist who tested a database to be used in AI; or also, in the non-digital world, think of the executive assistant or secretary who manages the agenda of the commercial manager or general manager and who is aware of meetings their bosses secretly agreed upon with peers from competing companies. These are individuals who, being aware of the illegality they have detected, might be willing to collaborate with competition agencies but face considerable occupational, commercial, or reputational risks. Rewards thus constitute incentives that can mitigate or outweigh the insecurities of collaborating with authorities.

Few countries have implemented a system of payments to whistleblowers of anticompetitive practices.[3] Among the most notable are relatively large agencies such as the Competition Markets Authority (CMA) of the United Kingdom and the Korean Fair Trade Commission (KFTC), while the United States (US) has a general rewards regime managed by the Department of Justice (DoJ). In Latin America, only Peru stands out, whose competition agency, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI) implemented its rewards program towards the end of 2019.

In all these countries, the provision of rewards is a complementary instrument that is added to (and does not replace) the existing leniency programs,[4] which are the main proof of the success of reward-based instruments in the fight against cartels.

The coexistence of these instruments, however, creates some challenges in regards to increasing the capabilities to detect and sanction anticompetitive practices while avoiding any reduction in their effectiveness. Questions about the objective and subjective scopes of application of both tools, and their possible exclusions or disqualifications, must be resolved when introducing a reward system.

3 See CeCo's Glossary on *whistleblowing*.
4 See CeCo's Glossary on *compensated disclosure*.

A similar situation occurs in regards to the compatibility of reward programs with compliance programs that many companies implement—and some competition authorities encourage—[5] Since compliance programs help detect and report potential breaches internally, these can conflict with reward systems that incentivize direct (and external) communication between whistleblowers and competition authorities.

This work aims to study the relationships of complementarity and conflict that the introduction of reward programs might have with compliance and leniency programs.

In the first chapter, we study the relationship between the most widespread and currently existing instruments in most competition jurisdictions: leniency programs and compliance programs. Following the temporal line typically followed by legislators and competition agencies, in the second chapter, we examine reward programs in general. In this section, we analyze the rationale behind these programs, the incentives they generate, review the countries that have already introduced this tool, and the first empirical or laboratory studies dedicated to evaluating their efficacy and efficiency. The third and most extensive chapter addresses the problematic relationships of complementarity or conflict that may arise with the introduction of reward programs; first with leniency and then with compliance instruments. Finally, we conclude with some reflections and recommendations to be considered by jurisdictions that may contemplate introducing this novel tool.

I. PURPOSE OF A COMPLIANCE PROGRAM AND ITS RELATIONSHIP WITH LENIENCY

1.1. On Compliance Programs

Now that it's common practice to hold legal entities accountable, and that there has been a diversification of the negative consequences they face (administrative fines, criminal sanctions, disqualification orders, dissolution of the legal entity, among others), there is a greater need to adopt more and more substantive preventive measures. The interest in implementing internal control mechanisms that allow for the timely prevention and detection of illicit practices carried out by individuals working within the legal entity has fostered the rise of compliance instruments or compliance programs, to the point of motivating the creation of specialized areas within companies and law firms and consulting firms, and the nascent development of literature on the subject.

In general terms, a compliance program can be understood as an internal control mechanism based on the notion of due diligence, aimed at preventing or timely detecting illicit conduct.

In particular, antitrust compliance programs have a similar foundation: they are established as a preventive measure to ensure that companies do not engage in anticompetitive conduct or lessen the risks of such conduct occurring. Furthermore, when this preventive objective cannot be fulfilled, these programs also allow for the detection of illicit practices and the adoption of corrective measures to ensure their eradication.

5 See CeCo's Glossary on *Compliance Programs in Competition Law*.

In the realm of preventive measures, economic agents can establish specific guidelines such as identifying risky situations, eliminating certain practices, training officials, conducting periodic audits, providing consultation spaces and channels, among others practices.

At this point, it should be noted that there is the possibility that, as a result of the use of these mechanisms, "false positives" may be detected (conduct that, in principle, would appear ilegal but which, after a more detailed analysis, is determined not to be). However, this is also healthy for the compliance program, as it provides it with more information that can be used to improve existing mechanisms.

In regards to corrective measures implemented in a compliance program, internal reporting channels are usually established to gather information and pursue the termination of such conduct through internal investigation procedures, corrective measures, and, possibly, sanctions. The report of infringements to competition authorities is also a part of ex post actions.

In this regard, Poltarykhin and others summarize the components of a compliance program in the context of the United Kingdom, using the recommendations of the CMA, as a guide in regards to the structure and purpose of a compliance program. These components are:[6]

1. Risk identificacion.
2. Risk assessment.
3. Risk minimization.

Evaluation of the effectiveness of the previous steps.

Additionally, the aforementioned authors have identified the following essential components of an effective compliance program:[7]

1. Training (pedagogical component).
2. Auditing (monitoring component).
3. Support to management (consultive component).

The promotion of antitrust compliance programs has increased in recent years. According to the OECD, between 2011 and 2021, 26 competition agencies have implemented or updated their guidelines on compliance programs, with 20 of them doing so in the last five years.[8]

In Latin America, as of 2021, compliance programs in competition law are officially recognized in Brazil, Chile, and Peru. A particular case is Mexico, which, according to the OECD, has opted not to recognize such programs due to political change.[9]

6 Originally listed in Poltarykhin, A., Dibrova, Zh., Kovaleva, I., Vasyutkina, L., Potekhina, E., Zinisha, O. (2020). World experience in the application of antitrust regulation and compliance system. Entrepreneurship and Sustainability Issues, 7(3), 2313-2325.
7 *Id*.
8 OECD (2021), Competition Compliance Programmes, OECD Competition Committee Discussion Paper, http://oe.cd/ccp, p.10.
9 *Id*. p.13.

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In the Chilean case, the Compliance Program Guide (from 2012)[10] states that the foundation of these programs must be training. Indeed, emphasis is placed on drafting an internal manual that must contain the compliance's program information and must be distributed to all company personnel. It also reinforces the pedagogical component by including training programs, which preferably should be conducted by individuals external to the economic agent, with a frequency that depends on each company's characteristics.

Furthermore, the Chilean guide refers to audits that can be conducted by internal supervisors or by an external agent. This guide recommends conducting a specific audit if a risk of an anticompetitive practice is detected (due to, for example, an internal report) and conducting general, periodic preventive audits.

In the Brazilian case, the Compliance Program Guide (from 2016)[11] makes references to training and education in competition law, which can be conducted in person or virtually but must be delivered by individuals with expertise in the subject. In identical fashion to the Chilean case, it mentions the usefulness of having a written manual that will be adapted based on the characteristics of the economic agent.

On the other hand, the Brazilian guide describes the convenience of conducting internal audits to verify compliance with competition law regulations. Unlike the Chilean guide, no specific periodicity is recommended, but suggestions are made for conducting an efficient audit (such as guidelines on subjects to be investigated). Finally, the Brazilian guide does refer to the composition of so-called "Compliance Committees" and their interaction with the company's top management, specifying that they must be aligned but composed of independent legal and economic experts.

In the Peruvian case, the Competition Compliance Programs' Guide (from 2020)[12] refers to recommendations on how to conduct training in the field, highlighting those aspects related to the scope of competition law and the content of the legal obligations it consists of. Additionally, the guide itself incorporates a model manual for companies.

In the same line, in regard to the monitoring component, emphasis is placed on audits (without mentioning a specific periodicity but differentiating between previously called "general audits" and "specific audits") and on reporting channels, which must ensure, among other things, the informant's confidentiality.

Finally, concerning the company's "Top Management,"[13] the Peruvian guide mentions the recommended actions so they can engage in the compliance program, primarily ensuring the independence of the Compliance Officer, but also promoting mechanisms such as rewards for those who comply with the program or sending communications promoting its implementation.

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10 At the time of writing this article, an update of the referenced guide is underway. In this regard, the current version of the document, approved in 2012, has been made available and can be accessed through the following link: https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf.

11 See: Administrative Council for Economic Defense, CADE, *Guidance for Competition Compliance Programs,* January 2016. Available at: https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf.

12 See: National Institute for the Defense of Competition and Protection of Intellectual Property, *Guide for Compliance Programs in Free Competition,* March 2020. Available at: https://cdn.www.gob.pe/uploads/document/file/2131129/Gu%C3%ADa%20de%20Programas%20de%20Cumplimiento%20de%20las%20Normas%20de%20Libre%20Competencia.pdf?v=1629901602.

13 According to the Peruvian guide, the "Senior Management" is the "person or group of people who lead and control an organization at the highest level," including the General Management and the Board of Directors of the company. National Institute for the Defense of Competition and Protection of Intellectual Property, *Guide for Compliance Programs in Free Competition,* March 2020, p. 5.

Naturally, a shared premise among all the aforementioned guides is that compliance programs primarily aim to be an ex ante control mechanism to prevent companies from engaging in illegal activities. However, internal detection also helps companies mitigate damages in situations where an anticompetitive practice has already been committed. This is especially relevant considering that many jurisdictions establish reward instruments for reporting and collaborating with competition authorities after the infringing conduct has occurred.

Once an anticompetitive conduct is detected within a company, a dichotomy arises: report and collaborate with the competition authority or conceal the infringing conduct.[14] Thus, a compliance program would lose its effectiveness if it is used to cover up illegal conduct detected within an organization.

Indeed, it could happen, for example, that compliance officers do not have sufficient incentives to initiate the corresponding internal procedures to end the observed illegal practice or to report such conduct to the authority. This is where antitrust leniency programs can balance the equation.

1.2. Leniency and Its Complementarity with Compliance

Competition authorities have limited resources to monitor all markets and, hence, to detect all anticompetitive practices that may occur within them. This is clearer in complex markets with heterogeneous characteristics and multiple actors.

Under this premise, many jurisdictions complement the investigative powers of competition authorities with complementary tools for detecting and potentially sanctioning anticompetitive practices.[15]

This is how leniency programs come to the fore. These are programs in which economic agents who have participated in an anticompetitive practice can approach the authority to provide information about it and, in return, obtain full exemption from the sanction that would otherwise apply or, alternatively, a reduction based on fulfilling certain requirements.

The first leniency program in antitrust dates back to the late 70´s in the United States (1978).[16] However, it was in the 90's that this program was updated, and a trend towards its international expansion began. In the United States (1993)[17] and the European Union (EU) (1996),[18] they were implemented as collaboration mechanisms between an infringing agent and the authority in exchange for a benefit that translated into the exemption from punishment (in the case of the US) or a reduction in the fine (in the case of the EU).[19]

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14 Andreas Stephan, 2009. "Hear No Evil, See No Evil: Why Antitrust Compliance Programmes May Be Ineffective at Preventing Cartels," *Working Paper Series,* University of East Anglia, Centre for Competition Policy (CCP) 2009-09, Centre for Competition Policy, University of East Anglia, Norwich, UK.

15 Frederik Silbye, A Note on Antitrust Damages and Leniency Programs, European Journal of Law and Economics (2012), 691-699.

16 Although there is no official version of this document, the United States Department of Justice (DoJ) references its existence and identifies it as the first leniency program in the following document presented to the OECD: *OECD, Roundtable on Challenges and Coordination of Leniency Programmes - Note by the United States,* 2018. Available at: https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/leniency_united_states.pdf.

17 *Corporate Leniency Policy,* available at: https://www.justice.gov/atr/file/810281/dl.

18 *Although there is no official version of this document, the European Commission references its existence and identifies the date of implementation of the first leniency program in that jurisdiction. See: European Commission, Leniency, https://competition-policy.ec.europa.eu/cartels/leniency_en#:~:text=The%20Commission%20has%20operated%20a,heavy%20fine%20for%20competition%20infringements.*

19 Regarding the compliance program in the United States, review Joseph E. Harrington, Jr., *Optimal Corporate Leniency Programs, The Journal of Industrial Economics,* Vol. 56, No. 2 (June 2008), pp. 215-246.

A joint analysis of a company's internal compliance program and the authority's leniency program reveals that the dilemma regarding the former's effectiveness can be addressed with the implementation of the latter.

Indeed, a competition authority's leniency program should be reinforced by the existence of an internal compliance program, as the latter would allow a business organization to timely detect the conduct of anticompetitive behavior, obtain all pertinent information regarding such action, and finally approach the competition authority early to seek an exemption or reduction of the fine to be imposed. Thus, a leniency application will be more robust and have a higher probability of success if an effective compliance program has operated within the requesting company.

An example of the positive interaction between a compliance program and a leniency program can be seen in a case that resulted in the exemption of Amauta Impresiones Comerciales (a printing company belonging to the El Comercio group) in Peru. In 2017, its compliance system detected that former employees of the company had participated in a collusive agreement to allocate clients. According to the group's newspaper, once this finding was known, they immediately approached the Peruvian competition authority (Indecopi) to submit a leniency application.[20] As a result, in 2021, Indecopi's second instance administrative tribunal confirmed the sanction against the remaining companies involved in the cartel, imposing a fine of approximately 11 million soles (equivalent to 3 million dollars at the exchange rate of the time).[21]

In various jurisdictions, leniency programs have gained standing as one of the main tools for detecting cartels. In this regard, a study by Alexandre Picón shows that this tool is among the most important ones in Chile, Peru, and the European Union,[22] despite the current decline in the number of applications.

In particular, Picón's study shows that between 2006 and 2012, 148 leniency applications were submitted, averaging 21 applications per year. Likewise, between 2014 and 2017, this average decreased to 6 applications per year. According to the author, this reduction can be explained by the enforcement of Directive 2014/104/EU concerning the payment of damages for anticompetitive practices. Economic agents approaching the leniency program in this jurisdiction currently have immunity from paying fines but do not enjoy a similar privilege in regards to paying compensations. Thus, the high probability of having to bear the obligation to pay substantial amounts of money in compensation can deter potential whistleblowers.[23] From an economic perspective, to confirm the advisability of such an application, a potential leniency applicant would evaluate not only the amount of fines but also the compensations they would have to pay.

In the Chilean case, Picón references a study by José Luis Corvalán Pérez and Francisco Bórquez Electorat that specifically addresses this country,[24] highlighting that between 2009 and 2021, 19 leniency applications

20 See: "Indecopi concludes sanctioning process for printing companies" at: https://elcomercio.pe/economia/indecopi-culmina-proceso-sancionador-a-empresas-de-impresion noticia/?ref=ecr, May 13, 2021. Date accessed: October 23, 2023.

21 See Resolutions 015-2021/CLC-INDECOPI of May 5, 2021 (issued by the Commission for the Defense of Free Competition of Indecopi) and 0183-2021/SDC-INDECOPI of December 21, 2021 (issued by the Specialized Chamber for Competition Defense of Indecopi).

22 Picón, A., "Exploring the Causes of the Decline in Leniency Applications in the European Union, Spain, and Latin America: Different Reasons, Different Solutions," *Investigaciones CeCo* (December 2022), https://centrocompetencia.com/causas-caida-solicitudes-clemencia-ue-espana-latam/.

23 For an analysis of the effect that the damages compensation regime has on the use of the leniency tool (in the European and Chilean context), see Garetto, M., "Leniency and Compensation for Damages Caused by Cartels: We Can Do Better (and It Is Urgent)," *Investigaciones CeCo* (April 2023). Available at: https://centrocompetencia.com/delacion-compensada-indemnizacion-perjuicios-producidos-podemos-hacerlo-mejor/.

24 Corvalán Pérez, J. and Bórquez Electorat, F., "Use and Effectiveness of Leniency in Chile: Figures Before the FNE," *Investigaciones*

were submitted. According to Picón,[25] the recent decline in the number of applications would be explained by, among other things, the Supreme Court of Chile's ruling that revoked the granting of leniency in the *Papel Tissue* case.[26] In this case, the Court interpreted the rule that granted leniency in a more stringent manner, contradicting the criterion upheld by the administrative body responsible for prosecuting collusion (the National Economic Prosecutor's Office) and the specialized judicial body (the Competition Defense Tribunal).

Regarding Peru, Picón shows that between 2012 and 2022, a total of 26 leniency applications have been submitted, noting a substantial increase between 2017 and 2018, when 9 applications were filed.[27] The author highlights the possible cause of this decline as the reinstatement of the criminalization of cartels in 2021,[28] among other factors.

On the other hand, some authors have conducted experiments to analyze the effectiveness of leniency programs in contributing to the detection and eradication of anticompetitive practices.

In 2008, for example, Joseph Harrington Jr. proposed an incentive model to evaluate the effectiveness of leniency programs, aiming to determine the optimal leniency program to reduce cartels.[29] To do this, the author posed a scenario in which a certain number of economic agents face the prisoner's dilemma, being able to compete, collude, or even collude and then deviate from the agreement (resume competition).[30] In this scenario, an authority is introduced to investigate and sanction collusion cases and has a leniency program.

Thus, the incentives that economic agents would have based on the probability of detection of the cartel and the benefits offered by the leniency program were evaluated under varying probabilities of detection. The author verified whether there were greater incentives for agents to continue colluding if the authority did not conduct any investigation, noting that this assumption is similar to a detection probability of 0, whereby agents would prefer to continue with the cartel. On the other hand, if the authority conducts investigations, he noted that there are greater incentives for agents to decide to approach the authority to apply for the leniency program.

In summary, Harrington Jr. noted that if the probability of detection is close to 0, agents collude, while if the probability of detection approaches 1 (the maximum probability of detection), agents prefer to make use of the leniency program.

Within this framework, the author concluded that the best alternative was to limit the benefits of the leniency program. Thus, according to Harrington's model, granting total exemption or amnesty for committing the infringement would only be justified when the probability of detection is low (at most 0.5). If, conversely, the probability of detection is close to 1, the evidence that the leniency applicant could provide would not be very useful for the competition authority.

CeCo (July 2022), https://centrocompetencia.com/borquez-corvalan-uso-y-efectividad-delacion-compensada-cifras-fne/. Cited by: Picón, A., *Op. Cit.*, p. 11.

25 See Picón, A., *Op. Cit.*, p. 11.

26 The referenced judgment can be found at the following link: https://centrocompetencia.com/wp-content/uploads/2022/03/Sentencia-CS-Sent_TDLC_160-1.pdf. Specifically, the difference between the criterion upheld by the Competition Defense Tribunal and the Supreme Court lies in the standard required to understand that the collusion organizer "coerced" the other cartel members.

27 Picón, A., *Op. Cit.*, p. 14.

28 Picón, A., *Op. Cit.*, p. 15.

29 Harrington, Id.

30 For a brief explanation of the prisoner's dilemma in the context of collusion, see CeCo's glossary on *game theory*.

In another experiment led by Jeroen Hinloopen and Adriaan R. Soetevent,[31] participants had the chance to collude and eventually deactivate the cartel through a leniency program (which was an element to consider when deciding whether to form a cartel). The result of the experiment was positive, as it was verified that in 50% of cases, participants did not wish to form a cartel for fear that one of the parties would approach the *leniency* tool.

The two previously described experiments demonstrate that the leniency program is useful for detecting and deactivating cartels. However, in line with Harrington Jr.'s indication,[32] it is possible to note that, on their own, leniency programs would not be sufficient. This could occur when the gains derived from anticompetitive conduct are very high and the chance of detection is very low, resulting in cartel stability and the non-deviation of the collusive agreement (despite the existence of the leniency instrument).

In a *paper* published by the OECD, Snyder precisely analyzes the challenges of leniency programs and proposes two suggestions: generating a greater incentive for cartelized companies by exempting them from civil liability payments and creating a reward program to attract individuals not involved in a cartel but who possess relevant information to detect and deactivate one.[33]

Next, we focus on the feasibility of an additional institutional tool to detect collusion: the reward program. Additionally, its compatibility with the previously studied instruments (leniency and compliance programs) will be examined.

II. PURPOSE OF A REWARD PROGRAM: INCREASING DETECTION POSSIBILITIES AND DETERRING CARTELS

When it comes to prosecuting an infringement or a crime, the best way to obtain convincing proof that leads to initiate a case is through the collaboration of a person who possesses relevant information.[34] It is at this point that the concept of bounty hunter or whistleblower comes into play.

Possibly, reading these terms evokes memories of "*wanted*" posters typical of American Western movies and current police advertisements. The truth is that this evocation is not far from reality.[35]

The idea of granting rewards is based on the premise that authorities lack sufficient resources (human and technical) to investigate or even capture accused or convicted individuals, so the acquisition of necessary information to perform these tasks is enhanced through the use of this tool. Thus, it can be advantageous to employ informants, who are granted money in exchange for a specific task, rather than consuming—inefficiently, perhaps—other resources to increase detection capacity.[36]

31 Jeroen Hinloopen and Adriaan R. Soetevent, *Laboratory Evidence on the Effectiveness of Corporate Leniency Programs, The RAND Journal of Economics,* Vol. 39, No. 2 (Summer, 2008), pp. 607-616.
32 Joseph Harrington, Op. Cit.
33 Brent Snyder, *Challenges and Coordination of Leniency Programmes – Note by Brent Snyder,* OECD, 2018.
34 Yehonatan Givati, *A Theory of Whistleblower Rewards, The University of Chicago Journal of Legal Studies,* Vol. 43, 2016, pp. 1-20.
35 For a description of the history of bounty hunters, see: Rebecca B. Fisher, *The History of American Bounty Hunting as a Study in Stunted Legal Growth, 33 N.Y.U. Rev. L. & Soc. Change* 199 (2009), p. 199.
36 See, for example: Yehonatan Givati, *Op. Cit.*, p. 2.

As already noted, detecting anticompetitive practices is not usually an easy task, something that underpins the creation of already established leniency programs. However, this is not the only mechanism that the authority can implement.

2.1. What Are Reward Programs?

Reward programs are mechanisms that seek to generate an incentive for individuals to approach the authority and provide all relevant information they possess to detect anticompetitive practices. Through the reward program, any person (except for the exclusions that each jurisdiction contemplates, as will be seen in the following section) can approach the authority to present information about an anticompetitive practice. This increases the competition authority's detection capacity by having "more eyes" interested in reporting the occurrence of an anticompetitive practice.

From the infringer's perspective, the risk of sanction also increases, as there is not only the possibility of investigation by the competition authority or betrayal of the cartel through the leniency program but also the potential presence of an informant who denounces the anticompetitive practice in exchange for a reward.

Now, when designing a program that incentivizes informant participation, there are elements that must be specified for it to be effective. For example, the type of information that can be provided, the subjects eligible to access this program, and the protection that can be offered.

Regarding the type of information that is provided, it is important to clarify the concept of "relevant information". If the premise is that the authority lacks sufficient resources to monitor markets, having to assess every report submitted by an informant without minimum requirements would consume the same resources authorities aim to save.

Certainly, without the imposition of minimal requirements, individuals may try to earn a reward merely by reporting superfluous data such as a price increase, the existence of a business guild, or a coincidental price parallelism. That is, data that is inconclusive or does not truly give valuable information about the existence of an anticompetitive practice.

In this sense, those who design the program must choose between (i) granting the authority full discretion to evaluate each reward application based on general parameters of "relevance" and "suitability"; or (ii) establishing a series of specific minimum requirements for the authority to perform a preliminary evaluation easily.

Regarding the subjects eligible for this program, attention must be paid to which individuals can access the program and provide the relevant information that the competition authority needs.

Therefore, when designing the program, authorities must ask themselves the following questions: Should we promote the gathering of information by someone personally involved in the practice being reported? If so, it is possible that a reward program would be open to the same agents who could also apply to the leniency program, i.e., the infringers themselves.

Conversely, the authority might not want to "over-reward" those who have violated the law and, instead, exclude cartel participants from the possibility of accessing a reward. By making that decision, the authority would also be relinquishing the possibility of promoting access to highly relevant information. Naturally, whether to expand or restrict the subjective scope of a reward program will respond to the tradeoff the authority wishes to accept.

Finally, informant protection is one of the cornerstones of the reward program.

Predictably, those who have access to relevant information about an anticompetitive practice must have some significant connection to the infringing organization. Thus, for example, if the potential informant works for one of the allegedly infringing agents, there is a high risk of retaliation against them, materialized in dismissals, harassment, threats, among others acts of reprisal.[37]

The issues we have just discussed have been addressed by legislators and competition authorities in some jurisdictions that have been pioneers in implementing a competition rewards program. Among them we can count the United Kingdom, South Korea, Taiwan, Pakistan, Slovakia, Hungary, and Peru. In the Americas, only Peru has a rewards program specifically tailored for competition law, while the United States has a broader rewards program applicable to a series of offenses prosecuted by the DOJ.[38] It is necessary to note that other jurisdictions do have whistleblower programs, but they are mere reporting channels with protection, and these do not guarantee a reward to the informant. Examples of such jurisdictions include Germany and Italy.

Next, we review how the main design issues of a reward program have been addressed in jurisdictions that have already implemented such programs.

2.2. Elements of Reward Program Design

Firstly, regarding the type of information, Peru has Indecopi's guidelines, which recognize the authority's discretion and does not establish a fixed parameter on the relevance of the information. Specifically, it states that the decision to accept a reward application will take into consideration, among other things, the value that the authority itself attributes to the provided information and the possibility of corroborating such information.[39]

Regarding the subjects eligible to apply to this program, Indecopi's guidelines only admit natural persons and expressly exclude legal persons, and it also excludes individuals who have actively participated in a cartel, as the can use the leniency program. It is also specified that this does not exclude those who work for the company and have been outside the scope of execution of the illegal practice, illegal practice over which they had no decision-making power or control. These individuals can apply to Indecopi's reward program.[40]

37 An analysis of the effectiveness of a program that encouraged informants' participation but failed due to the lack of effective protection for these individuals can be found here: Luke R. Hornblower, *Outsourcing Fraud Detection: The Analyst as Dodd-Frank Whistleblower, 6 J. Bus. & Tech. L.* 287 (2011).

38 For a list of U.S. laws that include whistleblower reward programs: https://constantinecannon.com/practice/whistleblower/whistleblower-types/whistleblower-reward-laws/.

39 See page 33 of the document titled *Guidelines for the Rewards Program,* available at: https://cdn.www.gob.pe/uploads/document/file/2131176/Lineamientos%20del%20programa%20de%20recompensas.pdf?v=1629902109.

40 See page 10 of the document titled *Guidelines for the Rewards Program,* available at: https://cdn.www.gob.pe/uploads/document/file/2131176/Lineamientos%20del%20programa%20de%20recompensas.pdf?v=1629902109.

Finally, regarding the informant's protection, Indecopi's guidelines opt to adhere to the confidentiality of the informant's identity, granting them a special code for identification. According to the Peruvian authority's document, this will prevent any occupational, social, or economic reprisals. Notwithstanding this protection measure, it is highlighted that the reward amount to be granted contains a significant compensatory component. Up to 50% of the total amount of the reward available to an informant is related to the " assumed or expected costs for the applicant," which can include, of course, employment dismissal.[41]

In the case of Taiwan, Article 47.1 of its Competition Law introduced the reward program, and the program was further developed and specified by the regulation titled "*Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions*" (hereinafter, Taiwan's reward program regulations),[42] which contains only 11 articles.

Regarding the type of information, the rules of Taiwan's reward program specify that it must be relevant information that constitutes evidence of a cartel. Regarding the subjects eligible to apply to this program, these regulations include both natural and legal persons in general but exclude legal and natural persons who have been part of the cartel, as well as those who work in the Taiwanese authority or have family members there.[43] On the other hand, the only provision related to informant protection refers to the confidentiality of their identity.[44]

In Pakistan, the applicable regulation for this program is the "*Competition (Reward Payment to Informant) Regulations*,"[45] which contains seven articles. Among its provisions, it defines information (related to a company's participation in a cartel, known by the company's top management, and not public information),[46] it state who is excluded from the company (solely those working in the authority), and ensures informant security guarantees (which are limited to the confidentiality of their identity).[47]

Regarding the United Kingdom, the guideline titled "Guidance Rewards for information about cartels" covers the application of the reward program in said country.[48] Specifically, the guide recommends that informants approach the authority to understand what type of information is required to initiate an investigation or procedure, safeguarding their identity's confidentiality (again, as the sole protection measure) and excluding, in principle, natural or legal persons involved directly with the cartel unless their participation was merely peripheral.[49]

In Slovakia, the "Act of Protection of Competition and on Amendments to Certain Acts"[50] regulates the reward program in its Section 53. This norm stipulates that the information must be "decisive" for the authority to sanction the cartel, and excludes employees of companies that have submitted a leniency application

41 See pages 23-24 of the document titled *Guidelines for the Rewards Program,* available at: https://cdn.www.gob.pe/uploads/document/file/2131176/Lineamientos%20del%20programa%20de%20recompensas.pdf?v=1629902109.
42 Available at: https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1978&docid=14680.
43 See Article 4 of the document titled *Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions,* available at: https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1430&docid=14680.
44 See Article 10 of the document titled *Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions,* available at: https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1430&docid=14680.
45 Available at: https://cc.gov.pk/assets/images/regulations/reward_payment_to_informants.pdf.
46 See Article 2 of the document titled *Competition (Reward Payment to Informant) Regulations,* available at: https://cc.gov.pk/assets/images/regulations/reward_payment_to_informants.pdf.
47 See Article 7 of the document titled *Competition (Reward Payment to Informant) Regulations,* available at: https://cc.gov.pk/assets/images/regulations/reward_payment_to_informants.pdf.
48 Available at: https://www.gov.uk/government/publications/cartels-informant-rewards-policy/rewards-for-information-about-cartels.
49 See the document titled *Guidance Rewards for Information About Cartels,* available at: https://www.gov.uk/government/publications/cartels-informant-rewards-policy/rewards-for-information-about-cartels.
50 Available at: https://www.antimon.gov.sk/data/files/1765_act_187_2021_endocx.pdf?csrt=6403745015417906878.

(provided that said application was submitted before the reward program application), as well as any legal person in general. Furthermore, the norm does not make any reference to informant protection.

Finally, in Hungary, the applicable regulation is the "Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices,"[51] which, in its Article 79/A, regulates the reward program. This norm states that the information to be provided must be "indispensable" to punish cartelized agents, but also admits data that may help the authority in conducting a dawn raid. Additionally, it excludes individuals who have been or are executive officers, members of the supervisory board, employees, or agents of a company that has previously submitted an application to the leniency program. Finally, Article 79/B of the same norm guarantees the confidentiality of the informant's identity, but also states that the authority must inform the reward program applicant that the confidentiality of their identity may impact the analysis of the investigated anticompetitive practice.

2.3. Efficacy of Leniency Programs

To date, in general terms, it is not possible to analyze the efficacy of reward programs based on existing cases since these are always confidential, as authorities seek to protect the informants' identities, and as national authorities have not yet disclosed public information about their experience in this matter (later we will mention an exception: the information we have of Peru's reward program). However, comparative literature provides evidence of the importance of this program and its impact on competition law.

Specifically, regarding the subjective scope of application, Kovacic argues that the scope of the reward program should be extended to those employees of companies that violate competition regulations. He contends that the existence of high sanctions and an active agency can motivate companies to conceal their coordination with competitors more sophisticatedly, so internal monitoring by employees should be incentivized through the reward program.[52]

More recently, and in line with Kovacic's statements, Aleksandra Lamontanaro suggests that the reward program would be a useful tool to detect algorithmic cartels. The author indicates that it is no novelty that new technologies are currently giving way to new forms of cartelization and the concealment of such practices, so this program could compensate for any technological gap that the authority might have.[53] Specifically, the main benefit Lamontanaro highlights is linked to the technological update the authority could have: by strengthening the reward program, individuals with technical expertise and knowledge of these technologies could provide evidence and explanations of how algorithms operate and thus address cases of algorithmic cartels, while if a supervisory strategy were chosen, the authority would not know where to start due to its lack of knowledge and the technological gap between the public and private sectors.[54]

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51 Available at: https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true.

52 William Kovacic, *Bounties as Inducements to Identify Cartels,* in *European Competition Law Annual 2006: Enforcement of Prohibition of Cartels,* p. 571.

53 Aleksandra Lamontanaro, *Bounty Hunters for Algorithmic Cartels: An Old Solution for a New Problem, 30 Fordham Intell. Prop. Media & Ent. L.J.* 1259 (2020).

54 *Id.*

On the other hand, Jonathan Wright is of the opinion that establishing a reward program could offer greater advantages than a leniency program since the latter consists of "rewarding an infringer," while the reward program rewards the diligent informant who conducted an investigation and monitoring task within the company.[55]

Additionally, he emphasizes two arguments: the first related to resource savings, as through the reward program, authorities can allocate existing resources to analyze other markets; and the second related to the fact that existing reward programs in the United States are designed in such a way that they allow the informant to have the incentive to collaborate with the authority in exchange for a prize, but also the assurance that the DoJ can provide protection.[56]

As seen in the reviewed literature, there is consensus that a reward program would complement a leniency program and, to that extent, reinforce the objectives of a competition agency in preventing and detecting cartels. In the following chapter, we analyze whether this occurs in all cases and expand the question to the compatibility between the antitrust reward instrument and the rules of an internal compliance program.

Regarding the lack of empirical data, an exception should be noted: we have some information of Peru's program. Recently, Annie Saravia, the public official in charge of Peru's reward system has shed some light on how it works in practice[57]. She has disclosed that the first reward application was submitted in February 2020, and that since then, 250 preliminary inquiries[58], and 51 requests have been received. Of these, nine requests are currently being processed, and one commitment has been signed and fully paid. The main markets addressed by these requests are related to basic food products and health services.

III. REWARDS AND LENIENCY, REWARDS AND COMPLIANCE: COMPLEMENTARY TOOLS OR CONFLICTING INSTRUMENTS?

3.1. Leniency and Rewards: Between Reinforcement and Redundancy

As observed in the previous sections, leniency and reward programs share common elements that allow for interaction between both figures. Thus, in this section, we will identify these elements, as well as aspects in which they could differ.

To do this, we will study the universe of jurisdictions that have both a leniency program and a reward program. These are those indicated in section 2 of this research: Taiwan, Pakistan, South Korea, the United Kingdom, Slovakia, Hungary, and Peru.

55 Jonathan Wright, Blow the Whistle: How Bringing Whistleblower Rewards to Antitrust Would Help Cartel Enforcement, 69 ADMIN. L. REV. 695 (2017).

56 *Id*

57 See Saravia's contribution, discussing an earlier version of this work, in her short piece titled "Una mirada a los programas de recompensas desde la experiencia peruana", at Centro Competencia. This was the information available as of the 27th of November 2024.

58 As Annie Saravia explains, since, at first, a potential applicant might have been hesitant to reveal their identity for fear of retaliation or may have needed more information about the program to decide their course of action, the Guidelines provide that, as an exception, preliminary inquiries may be submitted, which will have an advisory function. This will allow the potential applicant or their representative to be informed about the scope and application of the Rewards Program, as well as the likelihood that the information available to the potential applicant will be sufficient to qualify for a financial reward.

The previous sections show that, as a first common element, there is the objective scope of application: only cartel conduct can be the subject of leniency and reward programs. That is, both reward instruments (whether it is the exemption or reduction of punishment or the grant of a reward) are available only when the applicant reports the existence of an naked collusive agreement.[59]

Table 1

Objective Scope of Application for Leniency and Reward Programs by Country

Country	Leniency Program	Reward Program
Pakistan	Applies to cartels [60]	Applies to cartels [61]
Taiwan	Applies to cartels [62]	Applies to cartels [63]
United Kingdom	Applies to cartels [64]	Applies to cartels [65]
Slovakia	Applies to cartels [66]	Applies to cartels [67]
Hungary	Applies to cartels [68]	Applies to cartels [69]
South Korea	Applies to cartels [70]	Applies to cartels [71]
Peru	Applies to cartels [72]	Applies to cartels [73]

The reason for this is that competition authorities must focus their efforts on eradicating the most harmful

59 These are agreements between competitors whose sole purpose is to restrict competition (i.e., they are not ancillary or complementary to another potentially legitimate objective).

60 See Article 1 of the document called *Competition (Leniency) Regulations*, available at: https://cc.gov.pk/assets/images/regulations/leniency_regualtion_sept_21_2019.pdf.

61 See Article 1 of the document called *Competition (Reward Payment to Informant) Regulations*, available at: https://cc.gov.pk/assets/images/regulations/reward_payment_to_informants.pdf.

62 See Article 2 of the document titled *Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases*, available at: https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1608&docid=12223.

63 See Article 2 of the document titled *Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions*, available at: https://www.ftc.gov.tw/internet/english/doc/docList.aspx?uid=1990.

64 See page 6 of the document titled *Applications for Leniency and No-Action in Cartel Cases*, published in July 2013. Available at: https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf.

65 See the document titled *CMA Guidance of Rewards for Information About Cartels*, published in March 2014. Available at: https://www.gov.uk/government/publications/cartels-informant-rewards-policy/rewards-for-information-about-cartels.

66 See Section 51 of the document titled *Act on Protection of Competition and on Amendments to Certain Acts*, published in May 2021. Available at: https://www.antimon.gov.sk/data/files/1765_act_187_2021_endocx.pdf?csrt=6403745015417906878.

67 See Section 53 of the document titled *Act on Protection of Competition and on Amendments to Certain Acts*, published in May 2021. Available at: https://www.antimon.gov.sk/data/files/1765_act_187_2021_endocx.pdf?csrt=6403745015417906878.

68 See Article 78/A of the *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices*, published in June 1996. Available at: https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true.

69 See Article 79/A of the *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices*, published in June 1996. Available at: https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true.

70 See Article 22.2 of the "Monopoly Regulation and Fair Trade Act," published in January 1990. Available at: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=41658&type=part&key=19.

71 See page 1 of the information contained on the KFTC website. Available at: https://www.ftc.go.kr/www/contents.do?key=4955.

72 See Article 26.1 of the "Consolidated Text of Legislative Decree 1034." Available at: https://cdn.www.gob.pe/uploads/document/file/2131899/Texto%20%C3%9Anico%20Ordenado%20del%20Decreto%20Legislativo%20N%C2%B01034%20%28Ley%20de%20Represi%C3%B3n%20de%20Conductas%20Anticompetitivas%29.pdf?v=1629904661..

73 See Article 26B.1 of the "Consolidated Text of Legislative Decree 1034." Available at: https://cdn.www.gob.pe/uploads/document/file/2131899/Texto%20%C3%9Anico%20Ordenado%20del%20Decreto%20Legislativo%20N%C2%B01034%20%28Ley%20de%20Represi%C3%B3n%20de%20Conductas%20Anticompetitivas%29.pdf?v=1629904661.

practices to the competitive process, such as cartels. This has been reinforced by OECD reports, which suggest establishing tools for the detection and deactivation of cartels. [74]

This does not mean that authorities should only concern themselves with these anticompetitive practices. In fact, in the document titled "Peer Review of Competition Laws and Policy" prepared by the OECD and the Inter-American Development Bank (IDB) for Peru, the point was made that the competition authority should also pay attention to practices of abuse of dominance.[75]

However, it is necessary to bear in mind that leniency and reward programs imply some kind of concession by the competition authority. This involves the relinquishment of punishment (in the case of leniency programs) or the grant of economic resources (in the case of reward programs). This sacrifice by competition authorities must be compensated, and to that extent, it is understood that there is greater "gain" to be obtained when what is sought to be detected and sanctioned are the most harmful offenses to the market, as is the case with cartels.

The purpose of reward and leniency programs is to identify and deactivate behaviors that are difficult to detect. Considering this, abuse of dominance or unilateral practices are easier to detect than collusive practices, as, regarding the former, the agency can monitor markets where there is an agent with market power and verify their conduct. Additionally, affected competitors and consumers help monitor their occurrence and provide relevant information to the competition authority.

In contrast, horizontal collusive practices are often difficult to uncover, as their optimal operation relies on remaining unnoticed by consumers or other economic agents. Thus, cartel participants usually employ concealment strategies that become more sophisticated over time. Therefore, it is common to observe that compliance and reward programs share collusive practices as their objective scope of application.

Regarding the subjects covered by the programs, as previously explained, it is important to define which individuals can participate in one program or the other.

If those actively responsible for the cartel are included, a first more evaluative or political cost will be assumed, consisting of "rewarding" those who have violated the law. Additionally, it should be considered that reward instruments have an inherent moral hazard, consisting of the perverse incentive that potential applicants might have to create circumstances that favor them. Specifically, this refers to the scenario where an economic agent promotes a cartel and participates in it with the purpose of then betraying their competitors to exempt themselves from the sanction. In this sense, it might be "beneficial" for the cartel promoter to participate because they would not bear any costs (assuming they obtain leniency) while their competitors would, as they would face sanctions from the authority as well as reputational negative effects. This moral hazard is amplified when a reward program applies, as the cartel promoter would not only not bear the costs of the infringement but could also obtain an economic reward.

On the other hand, if cartel participants are excluded, the moral hazard risk is minimized, but the chance of obtaining valuable information about the anticompetitive practice could be lost. It is foreseeable that

74 For example, see OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels,* C(98)35/FINAL (1998).
75 OECD and Inter-American Development Bank (2018), *Peer Review of Competition Laws and Policy: Peru,* available at: https://www.oecd.org/en/publications/2018/01/oecd-idb-peer-reviews-of-competition-law-and-policy-peru-2018_6d056b82.html.

those who can best inform about the existence of a cartel and provide evidence to the competition authority are precisely those who have participated in some part of the design, execution, or implementation of the collusive agreement. Thus, if a reward program only applied to non-infringing agents, the number of individuals who could become informants (leniency would remain available to infringers, and the reward to non-infringers) would certainly be expanded, but its effectiveness could be inferior as there would be few non-infringing agents capable of providing useful evidence to the competition agency.

This tradeoff is illustrated in the following table, which refers in detail to the people included excluded or included in the program in the studied jurisdictions:

Table 2

Subjective Scope of Application for Leniency and Reward Programs by Country

Jurisdiction	Leniency Program Exclusions	Reward Program Exclusions
Taiwan	Agents who committed coercive acts to execute the anticompetitive practice. Agents who, after submitting their application, destroy or alter cartel evidence or disclose their participation in the leniency program.[76]	Agents who were part of the cartel. Agents who submitted an application to the leniency program, as well as their executives, representatives, or any authorized persons. Individuals who committed coercive acts to execute the anticompetitive practice. Individuals who work for the relevant authority or have family members there.[77]
Pakistan	Agents who committed coercive acts to execute the anticompetitive practice. Agents who, after submitting their application, destroy or alter cartel evidence or disclose their participation in the leniency program.[78]	Individuals who work for the country's competition authority and its dependencies.[79]

76 See Article 2 of the document titled *Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases,* available at: https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1608&docid=12223.

77 See Article 4 of the document titled *Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions,* available at: https://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1430&docid=14680.

78 See Article 3 of the document titled *Competition (Leniency) Regulations,* available at: https://cc.gov.pk/assets/images/regulations/leniency_regualtion_sept_21_2019.pdf.

79 See Articles 1 and 2 of the document titled *Competition (Reward Payment to Informant) Regulations,* available at: https://cc.gov.pk/assets/images/regulations/reward_payment_to_informants.pdf.

South Korea	Agents who committed coercive acts to execute the anticompetitive practice.[80]	Agents who were part of the anticompetitive practice. Public officials or employees of the agency.[81]
United Kingdom	Agents who committed coercive acts to execute the anticompetitive practice.[82]	Natural or legal persons directly involved with the cartel, unless their role was peripheral.[83]
Slovakia	Agents who committed coercive acts to execute the anticompetitive practice. Agents who disclose their participation in the leniency program.[84]	Any company as stipulated by the Competition Act. All company employees requesting the leniency program, provided the informant acts after the company's application.[85]
Hungary	Agents who committed coercive acts to execute the anticompetitive practice.[86]	Individuals who have been or are executive officers, members of the supervisory board, employees, or agents of a company that has previously submitted a leniency program application.[87]

80 See Article 22.2 of the *Monopoly Regulation and Fair Trade Act,* published in January 1990. Available at: https://elaw.klri.re.kr/eng_mobile/viewer.do?hseq=41658&type=part&key=19.

81 See page 1 of the information contained on the KFTC website. Available at: https://www.ftc.go.kr/www/contents.do?key=4955.

82 See page 11 of the document titled *Applications for Leniency and No-Action in Cartel Cases*, published in July 2013. Available at: https://assets.publishing.service.gov.uk/media/5a7b9fec40f0b62826a04c65/OFT1495.pdf.

83 See the document titled CMA Guidance of Rewards for Information About Cartels, published in March 2014. Available at: https://www.gov.uk/government/publications/cartels-informant-rewards-policy/rewards-for-information-about-cartels.

84 See Section 51 of the document titled *Act on Protection of Competition and on Amendments to Certain Acts*, published in May 2021. Available at: https://www.antimon.gov.sk/data/files/1765_act_187_2021_endocx.pdf?csrt=6403745015417906878.

85 See Section 53 of the document titled *Act on Protection of Competition and on Amendments to Certain Acts*, published in May 2021. Available at: https://www.antimon.gov.sk/data/files/1765_act_187_2021_endocx.pdf?csrt=6403745015417906878.

86 See Article 78/A of the *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices*, published in June 1996. Available at: https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true.

87 See Article 79/A of the *Act LVII of 1996 on the Prohibition of Unfair and Restrictive Market Practices*, published in June 1996. Available at: https://www.gvh.hu/pfile/file?path=/en/legal_background/rules_for_the_hungarian_market/competition_act/competition-act-documents/jogihatter_tpvt_hataly_20190101_a&inline=true.

Peru	Not having coerced other agents to participate in the cartel.[88]	Legal persons. Natural persons who have participated in the cartel, unless their role was peripheral. Lawyers, compliance officers, or members of the Compliance Committee of natural or legal persons, in relation to privileged information obtained in the exercise of these functions. Indecopi officials, their spouses, and relatives up to the fourth degree of consanguinity and second of affinity. Public officials or servers, in relation to information obtained in the exercise of their functions.[89]

As observed, in jurisdictions where both programs coexist, exclusions vary, the most common one being the exclusion of those who instigated in the cartel. This exclusion aims to mitigate the previously discussed moral hazard and to prevent economic agents from actively promoting a collusive practice to harm their competitors or gain economic advantages.

Besides cartel instigators, there remains the discussion of whether to include regular cartel participants in the reward program. Taiwan's reward program excludes individuals who actively participated in the cartel, while the United Kingdom and Peru exclude almost all cartel participants, except those who only executed the collusive practice without participating in the agreement's formulation or design. These latter individuals are attributed a peripheral and replaceable role in the cartel's development.

Hungary and Slovakia, on the other hand, exclude certain cartel participants, specifically those who work for the company that was part of the cartel but submitted their application after the economic agent submitted a leniency program application. This rule seeks to avoid redundancy, assuming that if a company has already submitted a request for exemption or sanction reduction, the additional information that a company's employee could provide would be of little value, thus not justifying the granting of a reward. It also seeks to prevent opportunistic behaviors such as coordination between a company and its employee for the former to obtain leniency and the latter to secure a reward, despite both handling the same information about the cartel.

None of the studied jurisdictions have explicitly contemplated the scenario where a leniency application is submitted after an employee has submitted a reward application. Logically, we should assume that the competition authority would only grant a reward if the provided information were genuinely beneficial for

88 See pages 7 and 8 of the document titled *Guide to the Leniency Program,* available at: https://cdn.www.gob.pe/uploads/document/file/2078926/Gu%C3%ADa%20del%20Programa%20de%20Clemencia.pdf.pdf.

89 See pages 31 and 32 of the document titled *Guidelines for the Rewards Program,* available at: https://cdn.www.gob.pe/uploads/document/file/2131176/Lineamientos%20del%20programa%20de%20recompensas.pdf?v=1629902109.

detecting and sanctioning a cartel. Thus, a leniency application submitted subsequently would risk being rendered useless and dismissed by the competition agency.

Nonetheless, based on the premise that a leniency applicant likely has access to more relevant information than a reward applicant, it makes more sense that a leniency request could preempt a subsequent reward request, but that does not necessarily imply the reverse.

3.2. Compliance and Rewards: From Conflict to Competition

As seen in the preceding subsection, the relationship between leniency and reward programs is one of complementarity: the latter seek to reinforce the former, which is why they act on the same type of anticompetitive conduct, cartels. Depending on each jurisdiction, the reward program may expand the scope of subjects who obtain some type of benefit from the competition authority (to non-infringers) or influence the same subjects who already have certain incentives (leniency) to denounce their participation in the anticompetitive practice (the infringers).

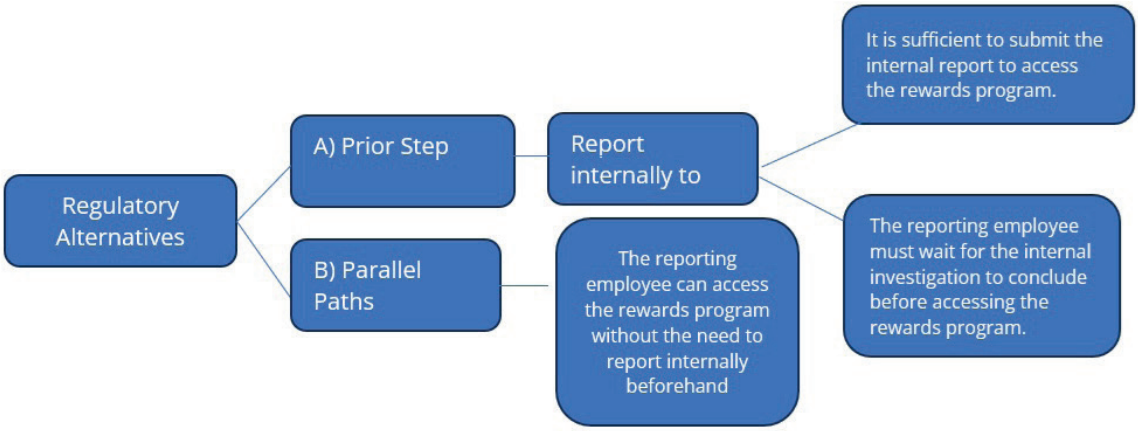
Now, it is necessary to verify how internal control programs (compliance) should interact with the reward program to understand the type of relationship that will exist between both instruments.

A first aspect to consider is the compatibility of both programs. As previously mentioned, compliance programs help detect the commission of anticompetitive practices and, to that extent, can be useful tools for an organization to submit a leniency request in jurisdictions that allow it. In this scenario, it is worth considering the possibility that an individual working in a company decides, on his own, to apply to a reward program. This could occur after having reported the existence of the anticompetitive practice through the company's internal reporting channels or without having taken this step.

In this sense, there are two legislative alternatives regarding procedural design: either require that the company employee first use the internal reporting mechanisms provided in the organizational compliance program or allow them to approach the reward program at any time.

Scheme 1

Alternatives relations between the Reward Program and Internal Reporting in a Compliance Program



Av. Presidente Errázuriz 3485, Las Condes. Santiago - Chile

The argument in favor of the first option (Prior Step) is that this way compliance programs are strengthened, enabling companies to submit a more structured and substantiated leniency application.

Indeed, for a compliance program to function adequately, it is necessary to have the collaboration of all employees and for them to promptly report illicit conduct they may have detected in their duties. This internal communication would also help a company gather sufficient information and, after conducting the corresponding investigation, determine whether an anticompetitive practice has indeed occurred. If so, the information gathered by the company (including internal reports) would serve as the basis for a potential leniency application.

If internal reporting were not a prerequisite, employees could directly approach the reward program, bypassing the internal reporting channels provided in a *compliance* program, thereby avoiding contributing to the corrective role that compliance programs also have.

From the opposite perspective (Parallel Paths), the reward program becomes a competitive alternative to (that does not necessarily exclude) internal reporting channels. Without the prerequisite step, an employee who suspects the existence of a cartel in which their company is involved could choose whether to submit only the internal report or to prefer approaching the competition authority directly in search of an individual reward.

Which procedural design is better is not straightforward, considering the different incentives at play for each option. On the one hand, the employee could obtain a direct economic benefit from the competition authority willing to pay a reward. On the other hand, the employee could "forgo" the reward and only report the infringing conduct internally but could receive some professional or reputational benefit by being rewarded for their collaboration with the company's compliance program.

Nevertheless, requiring internal reporting as a prerequisite for submitting a valid reward application to the competition authority could end up overprotecting the compliance program, even when it functions negligently or as a cover-up mechanism.

This could occur if the individuals responsible for investigating the conduct reported through the company's internal reporting channels decide to conceal evidence of the illegal practice and instead harass the reporting employee to prevent the information from leaving the company.

In summary, compliance and reward programs in the scenario where they function as parallel paths represent competitive alternatives for an informant. They are not mutually exclusive, but the informant will first approach the one that appears more attractive considering the benefits to be obtained and the risks of their ineffectiveness (due to cover-up, in the case of compliance programs; or due to not obtaining the economic payment, in the case of reward programs).

Thus, a competition authority's reward program does not have to be seen as an instrument that reduces the effectiveness of a compliance program. On the contrary, a reward system can inject effectiveness to a company's internal compliance program. If a company has correctly designed a compliance program with reliable internal reporting channels and incentives to use them, the employee who possesses information about an anticompetitive act would prefer to use this reliable internal mechanism before approaching an external and unknown instrument. Thus, the reward program should generate incentives to design more effective and employee-friendly internal compliance programs.

Furthermore, it is important to highlight that among the studied jurisdictions (those with leniency, rewards, and compliance programs), none establish an order or prior requirement for applying to these programs. That is, the Parallel Paths option is predominant.

Finally, without aiming to address all necessary design elements regarding the relationship between compliance programs and rewards programs, it is nonetheless important to address two additional elements: (i) the exclusion of certain employees from reward programs, and (ii) the definition of the type of information that an employee subject to a confidentiality obligation can provide as part of a reward application.

Regarding the exclusion of certain employees from reward programs, legislators and competition authorities must determine whether any company official can approach the reward program or if, based on their role within the organization, they could be excluded from this potential benefit. Specifically, this refers to the case of Top Management members and the Compliance Officer.

These individuals have a primary fiduciary duty concerning the company,[90] compelling them to safeguard its interests through the implementation of a robust compliance program. Indeed, top management (Board of Directors and General Management) are primarily responsible for approving and operating a compliance program, and it is natural that the initial component of these programs includes what is known as the tone at the top, meaning that the company's top management makes it a priority to implement a compliance program and leads by example.[91]

Meanwhile, the Compliance Officer's designation responds precisely to the need for an individual who verifies the proper execution of a compliance program. This will also mean that the officer has access to privileged information about possible deviations from competition law norms by the company. Possession of this knowledge is justified as it allows the Compliance officer to adopt preventive or corrective measures that steer the organization toward compliance with antitrust norms. The possession of this knowledge is not meant to be used for the Compliance Officer's personal economic gain.

In this sense, if it is demonstrated that the compliance program has failed to prevent the company from engaging in an anticompetitive act, it would be wrong for the competition authority to incentivize this situation by granting a reward to those who, due to the fiduciary duty, had a cardinal obligation to ensure the compliance program's effectiveness. Therefore, both Top Management and the Compliance Officer should be excluded from the reward program.

The second issue to address concerns the type of information that an employee can provide to apply for a reward program. Given that the relevant information that a potential informant could provide might be covered by a confidentiality clause, the issue here is whether collaborating with a reward program can exempt an employee from their legal duties of confidentiality.

We face an evident conflict of rights. On the one hand, there is the duty of confidentiality, in its professional secrecy facet, by virtue of which an employee cannot freely dispose of the information she has accessed due

90 See, Francisco Pfeffer Urquiaga (2005). *Duty of Loyalty of Directors and Managers of Corporations Within a Group of Companies, Regarding the So-Called Cascadas Case, Revista ACTUALIDAD JURÍDICA* N° 32 - July 2015. P. 210.

91 Schwartz, M. S., Dunfee, T. W., & Kline, M. J. (2005). *Tone at the Top: An Ethics Code for Directors? Journal of Business Ethics,* 58(1/3), 79–100. http://www.jstor.org/stable/25123502.

to her role within an organization. This duty typically includes an obligation to inform the company when a public authority requires certain information. In this case, it would be the employee who voluntarily—without needing a request—decides to provide the reserved information to the competition agency. On the other hand, there is the public interest in knowing the truth, particularly in accessing information that would prove the existence of an anticompetitive act.

We are of the opinion that in this clash, the public interest in protecting free competition should prevail, sacrificing the professional secret that only protects a particular company.[92] Although it could be argued that information evidencing a possible breach of competition norms should initially be reported through internal mechanisms of a compliance program, the public interest in justice administration would justify that both tools (internal compliance and the reward program) compete. In this sense, the competition authority should not be deprived of the possibility to access this information directly through an informant who decided to approach from the outset the reward rather than going through the internal reporting channel.

CONCLUSIONS

Reward programs in the field of competition law are in an early stage, with only a few jurisdictions having implemented them, such as the United Kingdom, South Korea, and the United States (in a general manner, not specifically tailored to antitrust offenses), among the most prominent, and Peru in Latin America.

Although the effectiveness of compliance programs has not yet been empirically evaluated for the most part, works on the subject highlight their potential benefits considering the virtues of other reward-based tools like leniency programs. Additionally, this literature warns of the need to reinforce competition authorities' cartel detection capabilities. This appears to be especially necessary considering the decline in leniency applications in various jurisdictions worldwide and the illegal use of technological tools in the execution of collusive practices that make their discovery harder but could increase the number of individuals aware of anticompetitive activities and, consequently, the number of potential whistleblowers for competition agencies.

Reward programs complement and reinforce leniency programs. Essentially, rewards aim to increase the number of people who collaborate with competition authorities in detecting the most harmful anticompetitive practices. For this reason, it is common for reward and leniency programs to aim to obtain information about the same type of illegal acts: overt collusive agreements or cartels. In regard to the people who apply to the programs, while leniency programs primarily target active cartel participants, reward programs do not necessarily do so. Thus, we find jurisdictions like the United Kingdom, Taiwan, and Peru that, *prima facie*, seek to exclude main actors who participated in the design, formulation, or execution of a cartel. This is not aimed at expanding the dimension of the reward (leniency + reward) but rather the universe of potential collaborators. That is, leniency or exemption from sanction would be available to infringing subjects, while the reward would be available to those who were not protagonists of the anticompetitive act but were aware of its occurrence or had a merely peripheral and replaceable role in committing the anticompetitive conduct.

92 On this topic, see Miller, S. (2017). *The Ethics of Whistleblowing, Leaking and Disclosure.* In *The Palgrave Handbook of Security, Risk and Intelligence,* pp. 479-494.

Compliance programs and internal reward programs can also be understood as complementary tools for detecting anticompetitive conduct; however, they potentially compete. Thus, an employee who becomes aware of a possible anticompetitive conduct can choose to report it internally through the company's internal reporting channel implemented as part of the compliance program or can directly approach the competition authority with the aim of obtaining a reward. In this sense, the reward program could incentivize companies to design attractive and effective compliance programs that generate confidence among their employees that they will not be harassed for reporting potentially illegal conduct and that such conduct will not be covered up. Introducing internal rewards (economic, professional, or reputational) could serve to reinforce the incentives to first use the internal reporting channel rather than submitting a reward application.

Finally, to ensure the effectiveness and predictability of both systems (internal compliance and external rewards), it is advisable for legislators and competition authorities to define from the outset certain rules regarding the exclusion of certain employees from the reward program (top management and compliance officers) and the admission of confidential information as part of a reward application.

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Cite this:
Andrés Calderón, "Recompensas en libre competencia: "Rewards in Competition Law: Complementary Tool or Rival to Compliance and Leniency?", Diálogos CeCo (april, 2025), **http://www.centrocompetencia.com/category/dialogos**

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