

# 10 years since the implementation of the Federal Economic Competition Commission's Leniency Program: what has been its impact?

## I. Introduction

The main objective of competition policy is to maintain a healthy interaction between economic agents within the markets. This has been the main task of the Federal Economic Competition Commission (COFECE, for its acronym in Spanish, or Commission) in Mexico since its formation and up to this date.

Among the most frequent challenges that competition agencies face are the detection and sanction of agreements among competitors that hinder or eliminate competition. In Mexico, these agreements are known as absolute monopolistic practices and are prohibited by the Federal Economic Competition Law (LFCE, for its acronym in Spanish). Such agreements are internationally known as economic **cartels** or collusions and are considered the most harmful to economic competition, due to the fact that, by means of them, competition and free access to the markets are artificially diminished, or even eliminated, in a determined industry and/or target market.

The mechanisms to limit or eliminate competition may be implemented through price fixing, output restriction, allocating the market, bid rigging or exchanging information with the object or effect of achieving the same results of these mechanisms.

The Organization for Economic Co-operation and Development (OECD) has calculated that when an industry is subjected to a cartel, prices are between 10% and 20% higher than they would be if such cartel did not exist. In this regard, such conducts cannot be economically justified because it has been demonstrated that they do not offer any social benefits that could compensate the generated losses<sup>1</sup>.

Because of their importance, in Mexico, cartels are considered illegal under any circumstance<sup>2</sup>; meaning that they are sanctioned *per se*<sup>3</sup> due to the fact that they inevitably damage the competition process and free access to the markets in which they are executed<sup>4</sup>. Moreover, they generate grave consequences to consumer welfare. On one hand, they generate higher prices to those that would prevail under a competitive scenario, similar to those of a monopoly, and, on the other, they diminish the quantity of goods or services

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<sup>1</sup> Carlos Mena Labarthe and Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Coord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, pg. 502.

<sup>2</sup> "The main objective of a cartel is to prevent competition, in order to have a greater income. Opposition to these cartels is not because of this greater margin, but because such margins were unduly obtained from the society." *Derecho de la Competencia Económica*, Amílcar Peredo Rivera, 2014, p. 97

<sup>3</sup> The experience in Mexico and other countries has demonstrated that these agreements do not bring any benefits; moreover, potential efficiency gains that could derive from such agreements are also achieved under competition conditions. Economic Competition Commission Annual Report, Federal Competition Commission (Mexican Antitrust Authority), 1997.

<sup>4</sup> Guidelines on the Leniency and Immunity Program, COFECE, Mexico, 2015, pg. 8.

produced, affecting economic growth<sup>5</sup>. In Mexico, cartels are subject to the highest administrative sanctions and are also criminally sanctioned.

Due to their nature, it is complicated to detect, prove and sanction them. Thus, competition authorities around the world have implemented alternative tools in order to detect and sanction members of cartels. As a result, special programs have been implemented intended to incentivize cartel members to report their conspiring associates in exchange of immunity or a total or partial reduction of the applicable sanctions.

In our country, this instrument is materialized in the Leniency Program, which is nurtured by the experience of the best international practices and consists of a tool that helps COFECE detect and sanction economic cartels. This Program was implemented in 2006 through an amendment to the LFCE and in 2016 it celebrates its 10<sup>th</sup> anniversary.

## II. What is the Leniency Program?

**The Leniency Program may be defined as the tool implemented by competition agencies in order to facilitate the detection of cartels and the gathering of the evidence required to prove their existence, in exchange of a total or partial reduction of the applicable sanctions.**

The International Competition Network (ICN) has established that the benefits<sup>6</sup> of implementing Leniency Programs can be grouped together as:

1. **Deterrence:** making cartel membership less attractive as there is an increased risk that one of the cartel participants will report the existence of the cartel;
2. **Detection:** enabling the discovery of cartels, as there is an increased likelihood of the cartel being reported;
3. **Sanctioning:** making the punishment of co-conspirators more likely as it provides competition agencies with first-hand, direct "insider" information or evidence that might otherwise be difficult to obtain;
4. **Cessation:** causing cartels to cease operation because one or more of the participants terminate their participation, either because they have applied for leniency or because they are concerned that one or more of their co-conspirators has or will apply for leniency; and
5. **Cooperation:** facilitates international cooperation in cartel investigations since many leniency programs establish that the applicant must inform if it has sought leniency in other jurisdictions and provide a waiver<sup>7</sup> allowing communication between those competition agencies.

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<sup>5</sup> Absolute Monopolistic Practices, COFECE's webpage, <https://www.cofece.mx/cofece/index.php/cofece/que-hacemos/practicas-monopolicas-absolutas>  
Date: 20 September 2016.

<sup>6</sup> *Anti-cartel Enforcement Manual*, International Competition Network (ICN), 2014, pg. 4.

<sup>7</sup> In Mexico it is understood as a mean by which the applicant authorizes COFECE to make exceptions to its confidentiality obligation regarding the identity of the applicant, procedural information and/or documents, in order for the general Directorate of investigations to be able to approach other competition authorities in connection with the application.

### III. Why create a Leniency Program in Mexico? International benchmarks

**The fight against cartels is a priority across the world and is one of the main motivations to strengthen international cooperation among agencies. In Mexico, the implementation of best international practices for prevention, detection and sanction of cartels has been intended, thus the Leniency Program was implemented in 2006.**

The first Leniency Program in the world was created in the United States in 1978; however, it did not have the success that was expected. In order to foster applications to the program, the Antitrust Division of the Department of Justice expanded its Leniency Program in 1993 with the Corporate Leniency Policy. The generosity and transparency of the program were dramatically increased: the amnesty (100% fine reduction) was automatically granted to the first cartel member (Section A leniency, before an investigation has begun). Moreover, the treatment was extended to two other areas: (1) full amnesty to applications presented once the investigation stage had initiated (Section B leniency, which could also grant a 100% reduction of the fine) and (2) amnesty against criminal prosecution of all officers, directors and employees if the confession was presented as a truly corporate act<sup>8</sup>.

The success of the program was quickly noted by competition authorities elsewhere. The European Union adopted its first Leniency Program in 1996. In fact, by 2013 all 28 members of the European Union, except for Malta, had a Leniency Program<sup>9</sup> <sup>10</sup>. On the other hand, South Korea was the first Asian country to adopt a Leniency Program, established in 1997<sup>11</sup>. Subsequently, the rest of the world adopted Leniency Programs<sup>12</sup>: Canada, Brazil and New Zealand in 2000; Norway, Switzerland and Singapore in 2004; Mexico and Japan in 2006; Russia in 2007; Turkey in 2009; Colombia in 2010 and China in 2011.

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<sup>8</sup> "Truly corporate act". Reference:

<http://www.usdoj.gov/atr/public/guidelines/0091.htm>. <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

<sup>9</sup> *Authorities in EU Member States which operate a Leniency Programme*, 2007, [http://ec.europa.eu/competition/antitrust/legislation/authorities\\_with\\_leniency\\_programme.pdf](http://ec.europa.eu/competition/antitrust/legislation/authorities_with_leniency_programme.pdf), Consulting on 13th September 2015.

<sup>10</sup> *Evaluating Antitrust Leniency Programs*, Borrell Joan-Ramon, Jiménez Juan Luis y Garcia Carmen, 2013, p. 108.

<sup>11</sup> *How does a corporate leniency program affect cartel stability? Empirical evidence from Korea*, Jeong Choi Yun and Soo Hahn Kyong, 2011, p. 2.

<sup>12</sup> *Evaluating Antitrust Leniency Programs*, Borrell Joan-Ramon, Jiménez Juan Luis y Garcia Carmen, 2013, p. 108.

Broadly<sup>13</sup>, Leniency Programs adopted by competition agencies across the world, differ in two aspects<sup>14</sup>: i) the criteria to be accepted, either before an investigation has begun, once it has begun or before it is concluded, and ii) how much can the fines be reduced.

In Mexico, the Leniency Program was consolidated during 2009, the year in which the former Federal Competition Commission (COFECO, for its acronym in Spanish) successfully concluded the first investigation in which an economic agent applied to the fine reduction benefit<sup>15</sup>. In order to increase its efficiency and to obtain better results, it was considered that such program required clear, transparent and well defined rules in order to give more certainty to the economic agents that wished to apply to it; therefore, the first Guidelines of the Leniency Program were published on December 2010<sup>16</sup>.

#### IV. In order to create a successful leniency program, what elements should be considered?

<b>Clarity in the amount and nature of the sanctions</b>	<p>For a Leniency Program to be successful, even without the threat of criminal sanctions, it is necessary that fines are severely punitive in order to attract amnesty applicants<sup>17</sup>.</p> <p>It is important to note that cartel activity will not be reported if the potential penalties are perceived by economic agents as outweighed by the potential rewards. Fines must be sufficiently severe so that they will not be viewed simply as a cost of doing business.</p> <p>On the other hand, a jurisdiction that does not impose liability and criminal sanctions to individuals will not be as successful at inducing amnesty applications as one that does because, ultimately, individuals have the most to lose<sup>18</sup>.</p>
<b>Real possibility of detection</b>	<p>The second prerequisite for building an effective leniency program is instilling a genuine fear of detection on behalf of the competition</p>

<sup>13</sup> "The differences between the leniency programmes relate mainly to the "marker" system, as well as the availability and scope of leniency for individuals. As there is no single leniency programme in the EU, leniency programmes operated by the NCAs on the one hand and by the EC on the other are autonomous and independent of one another. This means that in cases of international or EU/EEA-wide cartels separate applications for leniency must be made in all jurisdictions concerned." Marcin Trepka & Martyna Wurm, *Leniency Programs – The Devil Is In The Details*. Fuente: [https://www.competitionpolicyinternational.com/leniency-programs-the-devil-is-in-the-details/?utm\\_source=CPI+Lista+Combinada&utm\\_campaign=cc95e276b6-September+21+2016+20+2016&utm\\_medium=email&utm\\_term=0\\_ee26de8909-cc95e276b6-236762853](https://www.competitionpolicyinternational.com/leniency-programs-the-devil-is-in-the-details/?utm_source=CPI+Lista+Combinada&utm_campaign=cc95e276b6-September+21+2016+20+2016&utm_medium=email&utm_term=0_ee26de8909-cc95e276b6-236762853)

<sup>14</sup> *Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion*, Harrington Joseph E., 2006, p. 5.

<sup>15</sup> The first case solved in which an economic agent applied to the benefits of the leniency Program was in the provision of professional services within the real estate market in the Chapala Lake; it was reported in 2007.

<sup>16</sup> Federal Competition Commission Annual Report, 2010.

<sup>17</sup> *Cornerstones of an Effective Cartel Leniency Programme*, Hammond Scott D, 2008, p. 5.

<sup>18</sup> *Cornerstones of an Effective Cartel Leniency Programme*, Hammond Scott D, 2008, p. 6.

	<p>authorities<sup>19</sup>. Competition authorities must cultivate an environment in which a significant risk of detection is perceived.</p> <p>If cartel members perceive a genuine risk of detection, then a leniency program can build on that fear and create distrust inside the cartel, therefore, cartel members can no longer afford to trust one another. The rewards for self-reporting and applying to the leniency program are too great. The dynamic creates a race to be the first to the enforcer's office<sup>20</sup>.</p>
<p><b>Predictability and transparency in the enforcement policies</b></p>	<p>Predictability and transparency are basic elements which allow economic agents to calculate the costs and benefits of applying to the Leniency Program. In addition, it allows them to predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not<sup>21</sup>. Furthermore, some authors note that it is important that firms believe it is within their control to receive leniency<sup>22</sup>.</p> <p>The competition authority must advertise the scope, requirements and policies of the leniency program so that possible applicants understand what requirements they will need to fulfil in order to receive the benefits of leniency and what they must do to maintain it.</p> <p>This has the objective to guarantee transparency and predictability of the program, determine the rules for participating in it and to give certainty of its functioning. By doing so, economic agents will be given security and, ultimately, be motivated to apply.</p>
<p><b>Confidentiality</b></p>	<p>Along with predictability and transparency, confidentiality of the information given to the competition agency must be guaranteed. Generally, leniency programs are implemented for companies to avoid being in a situation worse than if they had not applied to the program<sup>23</sup>. Therefore, competition authorities must have the ideal mechanisms to guarantee the protection of confidential information.</p>
<p><b>Advertising</b></p>	<p>An economic agent will be more inclined to apply to the leniency program if he thinks that detection and conviction are more probable. Also, if it thinks that another cartel member can apply. What can competition authorities do to strengthen these beliefs? <sup>24</sup> They can advertise the program and remind economic agents that they are watching, that their fellow cartel members may apply to the leniency program and that they have imposed sanctions for engaging in a cartel.</p>

<sup>19</sup> Op. Cit. p. 6.

<sup>20</sup> Op. Cit. p. 6.

<sup>21</sup> *Cornerstones of an Effective Cartel Leniency Program*, Hammond Scott D, 2008, p. 6.

<sup>22</sup> *Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion*, Harrington Joseph E., 2006, p. 19.

<sup>23</sup> Carlos Mena Labarthe y Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Cord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, p. 514.

<sup>24</sup> *Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion*, Harrington Joseph E., 2006, p. 23.

It is important that a competition agency promotes and advertises its enforcement policies to the private sector; reminding them continuously of the consequences of anticompetitive conducts.

## V. Analysis of Mexico's Leniency Program development

The first and most important moment in the history of economic competition in Mexico is, undoubtedly, Congress' approval in December 1992 of the LFCE as a direct consequence of signing into the North America Free Trade Agreement (Nafta) and, along with this, the formation of COFECO. The LFCE enacted in 1992 was amended several times, although the most relevant amendments were in 2006 and 2011. Finally, in 2014, the new LFCE was enacted, by means of which the constitutional amendment of 2013 was implemented.

Since 1998, the former Federal Competition Commission was clear on its position regarding absolute monopolistic practices, considering them the most harmful to competition and free market access. Likewise, they have been considered as the most difficult to detect and prove due to the secrecy of how cartel member's act<sup>25</sup>. Therefore, the necessity of incorporating tools such as the Leniency Program in our legal framework was made evident in the Commission's annual reports<sup>26</sup>. Such tool was materialized in an administrative program adopted on January 26, 2006 as an internal policy to grant leniency<sup>27</sup>.

Historical records show that the first program did not have the success expected; this was a result of to the fact that individuals, companies and lawyers did not trust the tool due to its lack of transparency and certainty regarding the competition authority's behaviour. Additionally, the fines for participating in a cartel or, in other words, in absolute monopolistic practices, were too low so economic agents were not motivated to apply.

Considering the abovementioned situation, a substantial amendment to the LFCE was made in June 28, 2006. Such amendment intended to incorporate some of the best international practices to the Mexican legal framework; thus consolidating the Leniency Program. In this regard, such program was materialized in the LFCE, empowering COFECO to grant fine reductions to the economic agents that applied to the program.

Likewise, the 2006 amendment increased the amount of the applicable fines to those economic agents who incurred, participated, contributed, facilitated or instigated the execution of absolute monopolistic practices, as well as in the cases of recidivism. The increases in fines to cartel members helped strengthen the incentives created by the

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<sup>25</sup> Carlos Mena Labarthe and Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Coord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, pg. 514.

<sup>26</sup> Comisión Federal de Competencia, Informe Anual 1998, México, p. 63.

<sup>27</sup> Carlos Mena Labarthe and Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Coord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, pg. 515

program<sup>28</sup>. Internally, the formation of the General Directorate for Investigations Regarding Absolute Monopolistic Practices strengthened the program too in 2007; as such body would be in charge of its management and follow-up.

In this regard, to foster and develop the program, and looking to generate greater transparency, certainty and security regarding the competition authority's behaviour, the first Guidelines on the Leniency and Immunity Program were published in 2010. Only in 2011, 20 applications were received, both from national and international economic agents.

In response to the increasing importance and transcendence of competition in the economic sphere of the country, a new amendment to our legal framework was contemplated in 2011. With this amendment, COFECO was empowered with the capacity to carry out surprise on-site inspections and reproduce electronic information in such inspections; moreover, the maximum amount of the applicable fines was increased, passing from a fixed cap to a percentage of the economic agent's income, and engaging on absolute monopolistic practices was made a criminal offense. These modifications resulted in the strengthening of the Leniency Program by increasing the risk of detection and the seriousness of the sanctions, even considering criminal liability for individuals that incurred in collusive conducts<sup>29</sup>.

With the constitutional reform of 2013, published in the Federation's Official Gazette (DOF, for its acronym in Spanish) on June 11th, today's COFECE was formed as an autonomous constitutional body. The powers of this new agency were increased, preserving COFECO's duties. In this regard, the reform aimed to create a new agency in charge of defending and promoting economic competition in the country, with full autonomy, independence and new powers. Such powers are limited by an institutional system of checks and balances that, among other things, demands greater transparency and accountability from the Commission. Therefore, there was a separation of the authority that carried out the investigation from the one that resolved the trial like procedure.

The foregoing was consolidated in the new LFCE, published in the DOF on May 23, 2014. Also, amendments to the Federal Criminal Code were made. In that regard, prohibitions to perform as director, manager, executive agent, legal representative or attorney-in-fact of companies for a maximum period of five years and fines of up to approximately USD \$ 802, 716.75<sup>30</sup> for those who, directly or indirectly, participate in monopolistic practices or illicit concentrations, in the name or on behalf of companies. Additionally, criminal penalties were increased.

Under Article 103, within the Leniency and Fines Reduction Procedures chapter, the new LFCE prescribes the Leniency Program with some modifications and retakes the general aspects of the program included in the previous LFCE. Additional details of the Leniency Program are also included in Articles 114, 115 and 116 of the Regulations of the LFCE, published in the DOF on

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<sup>28</sup> Carlos Mena Labarthe and Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Coord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, pg. 516

<sup>29</sup> Op. Cit. p. 516

<sup>30</sup> At an exchange rate of MXN\$18.19 per US dollar (average exchange rate for 2016).

November 10, 2014.<sup>31</sup> Likewise, this new law considers the exchange of information between economic agents as an absolute monopolistic practice, when such exchange has as purpose or effect those established in the other absolute monopolistic practices provided in sections I through IV of article 53 of the LFCE.

On June 25, 2015, derived from the new powers to issue guidelines that inform the public about its proceedings, COFECE published new Guidelines on the Leniency and Immunity Program. These Guidelines seek to become a tool to facilitate the understanding of the program.

In that regard, the previous amendments importantly contributed to guarantee the success of the Leniency Program, especially regarding the clarity on the amount and nature of the sanctions; the real possibility of detecting a cartel; and the predictability, transparency and confidentiality of COFECE's proceedings.

## VI. Applicable legal framework of the Leniency Program in Mexico: Where are we standing?

The LFCE prohibits monopolistic absolute practices, which consist of contracts, agreements, arrangements, or combinations among competing economic agents. Monopolistic absolute practices have, as purpose or effect, any of the following:

<b>Price fixing</b>	To fix, raise, coordinate or manipulate the sale or purchase price of goods or services supplied or demanded in the markets.
<b>Output restriction</b>	To establish an obligation not to produce, process, distribute market or acquire but only a restricted or limited amount of goods or the provision or transaction of a limited or restricted number, volume, or frequency of services.
<b>Market allocation</b>	To divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services, by a determined or determinable group of customers, suppliers, time spans or spaces.
<b>Bid rigging</b>	To establish, arrange or coordinate bids or abstentions from tenders, contests, auctions or purchase calls.
<b>Exchange of information</b>	To exchange information with the purpose or effect of fixing prices, restricting output, allocating markets, or rigging bids.

<sup>31</sup> Carlos Mena Labarthe and Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Coord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, pg. 517

Pursuant to Article 127 of the LFCE, the fine for engaging in absolute monopolistic practices may be of up to 10% of the economic agent's incomes. Moreover, those who, directly or indirectly, participate in monopolistic practices or prohibited concentrations, in the name or on behalf of economic agents, may be sanctioned with prohibition to be eligible to act as an undertaking's board member, manager, director, executive, agent, representative or legal representative for a maximum period of five years and fines of up to approximately USD \$ 802, 716.75<sup>32</sup>.

The previous modifications in the new LFCE intended to make the fines severe enough in order for economic agents that considered executing absolute monopolistic practices to assess the consequences of such conducts.

On the other hand, the Leniency Program's legal framework is provided for in Article 103 of the LFCE. The persons that may apply to the program are:

<b>Companies who:</b>	<ol style="list-style-type: none"><li><b>1. Have been engaging in absolute monopolistic practices.</b></li><li><b>2. Currently are engaging in absolute monopolistic practices.</b></li><li><b>3. Have been or currently are contributing, facilitating, fostering or participating in the execution of an absolute monopolistic practice.</b></li></ol>
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As well as:

<b>Individuals who:</b>	<ol style="list-style-type: none"><li><b>1. Have been engaging in absolute monopolistic practices in the name or on behalf of companies.</b></li><li><b>2. Currently are engaging in absolute monopolistic practices in the name or on behalf of companies.</b></li><li><b>3. Have been or currently are contributing, facilitating, fostering or participating in the execution of an absolute monopolistic practice.</b></li></ol>
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The requirements established in Article 103 of the LFCE are the following:

- I. The applicant must be the first, among the economic agents or individuals involved in the conduct, to provide sufficient supporting evidence in its possession or which may be available which, in the Commission's judgment, allows the investigation

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<sup>32</sup> Pursuant to the amendment made to Article 26 of the Political Constitution of the United Mexican States to separate the minimum wage as a unit measure, on January 28, 2016 the National Institute of Statistics and Geography (INEGI, for its acronym in Spanish) determined, by means of a publication in the DOF that for purposes of imposing fines, the minimum wage to be substituted by the daily value of the Unit of Measurement and Actualization, which value is of MXN\$73.04, the monthly value is of MXN\$2,220.42 and the annual value is of MXN\$ 26,645.04, during 2016.

procedure to be initiated or, if the case may be, allows for the presumption of the existence of an absolute monopolistic practice;

- II. The applicant must **cooperate fully and continuously** throughout the investigation and, if the case may be, within the trial-like procedure; and
- III. The applicant must undertake all necessary actions so as to no longer engage in the unlawful practice.

Subsequent applicants that are not the first ones may receive a fine reduction for as much as 50, 30 or 20 per cent of the maximum permitted fine, when additional evidentiary elements to those in possession of the Investigative Authority are submitted during the course of the investigation, and the other requirements under this article are met.

Likewise, it is established that the Commission will uphold as confidential the identity of the Economic Agent and the individuals who seek to apply for the benefits under this article.

It should be noted that the program provides for the opportunity to apply for its benefits to any economic agent, notwithstanding the form in which it has participated, the duration of the conduct, the location of the economic agent or its role within the cartel<sup>33</sup>.

Lastly, regarding criminal matters, Article 254 *bis* of the Federal Criminal Code establishes that those who enter into, order or execute contracts, agreements, arrangements, or combinations in order to carry out absolute monopolistic practices will be punished with imprisonment of 5 (five) to 10 (ten) years and with fines of 1,000 to 10,000 times the minimum daily wage. However, if the economic agents apply for the benefits of the Leniency Program provided for in Article 103 of the LFCE, they not be held criminally liable, as long as there is a previous decision from COFECE determining that the terms established in such provision and other applicable articles are met.

In order to analyse the information provided by the applicant, the Investigative Authority will have a term of 40 business days, extendable per four additional occasions.

## VII. Principles of Mexico's Leniency Program

COFECE considers it important that stakeholders have in mind that their conduct is guided by the following principles:

1. **Reciprocity**, meaning mutual correspondence between the parts. This principle is based on a strict adherence to the obligations established in the applicable regulations. Thus, it is expected from the economic agent to continue and direct its actions to cooperate constantly with the authority during the application process, the investigation and the trial-like procedure.

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<sup>33</sup> Carlos Mena Labarthe and Laura A. Méndez Rodríguez, *El Programa de Inmunidad en México: perspectiva internacional, Derecho de la Competencia en México*, Coord. Carlos Mena Labarthe, Laura A. Méndez Rodríguez, José Roldán Xopa, page 518.

2. **Confidentiality**, this refers to COFECE's clear obligation to keep confidential the identity of the economic agent applying to the program. On a daily basis, COFECE does various actions which range from handling confidential records, to which only authorized officials have access, to the omission of mentioning the economic agent as a beneficiary of the program in its resolution.

If deemed appropriate by COFECE, the economic agent may have the correlative obligation of confidentiality regarding the information given to the Commission, as well as the application.

- **Does Mexico's Leniency Program adopt international best practices?**

COFECE's Leniency Program complies with ICN's suggested good practices. The following are some of them:

ICN <sup>34</sup>	MEXICO
To <b>make lenient treatment</b> available when the leniency applicant facilitates the competition agency's ability to prove a cartel.	✓
To <b>make lenient treatment</b> available when the competition agency is unaware of the cartel and when the competition agency is aware of the cartel but it does not have sufficient evidence to prosecute the cartel.	✓
To use <b>markers</b> <sup>35</sup> in the leniency application process and grant extensions to the applicant while allowing it to preserve its marker periods where a leniency applicant is making a good faith effort to complete its application in a timely manner.	✓
To ensure that <b>markers and extensions to marker periods</b> maintain the incentives for cartel participants to self-report their involvement in a cartel.	✓
For the requirements for leniency to include full and frank disclosure of relevant information or evidence and ongoing cooperation by the leniency applicant, and if applicable, the leniency applicant's employees.	✓
To provide <b>lenient treatment</b> (less than full leniency) for <b>second and subsequent</b> cooperating cartel participants.	✓
Where applicable, to encourage leniency applicants to <b>apply for leniency in other jurisdictions</b> where cartel conduct also occurred.	✓
To encourage a leniency applicant to provide a <b>waiver</b> that allows a competition agency to discuss the application with relevant counterpart agencies.	✓
To keep the <b>identity</b> of the leniency applicant and <b>any information</b> or provided by the leniency applicant <b>confidential</b> .	✓

<sup>34</sup> *Anti-cartel Enforcement Manual, International Competition Network (ICN), 2014, p. 22-23*

<sup>35</sup> In Mexico, we have a marker system that chronologically orders the applications presented. At the moment of the presentation of the application, an alphanumeric code is assigned as well as a marker. The marker indicates the moment when the application was made.

To have maximum <b>transparency and certainty</b> with respect to the requirements for leniency and the application of policies, procedures, the conditions for granting leniency and responsibilities and contact information for competition agency officials.	✓
In a parallel system, it is important that the application of the leniency policy for <b>civil and criminal</b> cartel conduct is clearly articulated.	✓
To ask leniency applicants <b>if they have applied for leniency in other jurisdictions</b> , and if so, what conditions, if any, have been imposed?	✓
To <b>encourage leniency</b> applications through education and awareness campaigns.	✓

## VIII. Relevant facts of Mexico's Leniency Program: figures since its implementation

### **Real efficiency of the Leniency Program**

Data in Mexico shows that until September 2016, we have received a total of 113 applications to the leniency program. From these applications 52.2% corresponds to international economic agents and 47.8% to national economic agents. The analysis of the evolution in the managing of applications to the program is divided into the following stages:

#### **i. Beginning of the Leniency Program (2006-2010)**

As mentioned before, with the amendment in 2006 the leniency program was created. It was strengthened with 2011's amendments. In the period from 2007 to 2010, 13.3% of the total applications to the program were presented.

#### **ii. Amendment of 2011**

From 2006 to 2012, 61 applications were registered, of which 45 were presented after the implementation of the amendments to the LFCE on April 2011, meaning that 42.6% of the total applications in the period from 2006 to 2012 were presented alone in 2012. This reflects a better knowledge and understanding of the program<sup>36</sup>.

One of the relevant aspects of 2011's amendment was the implementation of unannounced inspections; during this period we were able to appreciate an increase by 44.2% in the applications by international and national economic agents.

#### **iii. COFECE's Autonomy (2013- to date)**

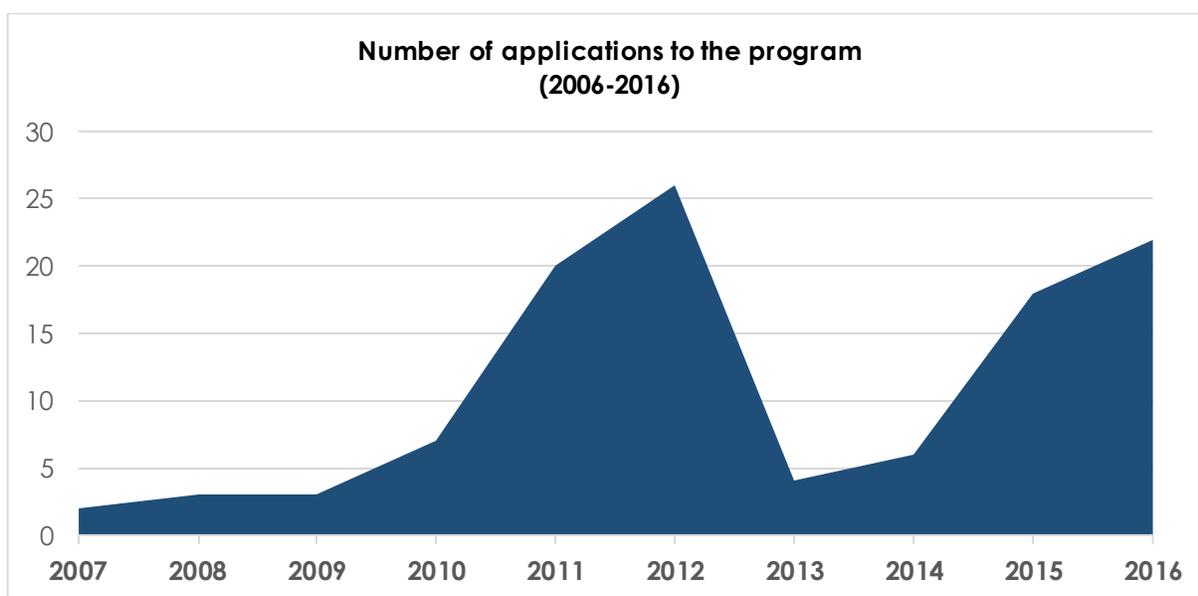
<sup>36</sup> Annual Report of the Federal Competition Commission (Mexican Antitrust Authority), 2012.

Lastly, since the creation of COFECE as an autonomous body, 42.5% of all the applications presented to date correspond to the period from January 2014 to September 2016. In that period, national economic agents represent up to a 78.8% of the total applications.

Additionally, of the 113 applications presented, 54 correspond to applications presented by national economic agents. It should be noted that from 2014 to 2016, once COFECE was consolidated as an autonomous constitutional body, the number of applications from national economic agents was increased; reaching a 79.6% of the total applications.

Coupled with the above figures, 50.44% of the applications presented were *first in*, meaning economic agents that applied to the program before the other cartel members.

The following figure shows the evolution of the applications to the program:



Until September 2016, the total amount of applications (113) were related to the following sectors:

Sector	Percentage
Agriculture, forestry, livestock, fishing and hunting	2.70%
Retail trade	3.60%
Manufacturing industries <sup>37</sup>	64.86%
Mass media information	0.90%
Health and social services	10.81%
Financial services and insurance	4.50%
Real estate and rental of personal property and intangible services	1.80%
Transportation and storage	10.81%
Total	100%

<sup>37</sup> The automotive industry has presented most of the applications.

Statistics show that of the 113 applications:

Indicative	Percentage
How many of the applications presented, since 2006 to date, have helped detect a cartel?	8.11%
The number of investigations initiated ex officio, as a result of an application	16.22 %
How many applications were presented once the investigation had started?	10.81%
How many of the applications presented ended up in penalties?	6.31%

### a. Analysis of sanctioned cases

In this regard, seven (7) investigations where leniency applications have been presented have been sanctioned, with a total amount of the fines of MXN \$512, 331, 943.40 (five hundred and twelve million three hundred and thirty one thousand nine hundred and forty three Mexican Pesos, with 40 cents of Mexican peso), approximately USD \$28, 152, 891.13. Some of the most relevant cases, along with the investigated market are:

Investigated market	Date of Resolution
Hermetic Compressors	02/25/2014
Cargo transportation services in Baja California	09/08/2011
Ballasts <sup>38</sup>	06/03/2011
Passenger maritime transportation services in Quintana Roo	06/14/2011
Passenger transportation services in Chiapas	06/25/2015
Air conditioning compressors	06/30/2016

It should be noted that the cases sanctioned by the Commission involve absolute monopolistic practices with national as well as with international scope. In this regard, a description of some of the most relevant cases sanctioned by the Commission in which applicants to the Leniency Program participated are described:

#### 1. IO-002-2009: Hermetic Compressors

As a result of the information provided by an economic agent through the Leniency Program, COFECO had sufficient evidence to initiate an *ex officio* investigation on June 10, 2009, identified under docket number IO-002-2009. The investigation was related to absolute monopolistic practices committed during the production, distribution and commercialization of hermetic compressors. Because of the nature of the agreement and its worldwide impact, in Brazil, United States, Canada and the European Union similar investigations were carried out simultaneously, such investigations also began with leniency applications.

<sup>38</sup> Devices used for the transformation and/or control of electric currents for illumination purposes.

During the investigation, it was determined that the investigated economic agents carried out arrangements to fix prices of hermetic compressors, mainly used for residential and commercial global sectors and it was determined that executives and employees of the involved economic agents exchanged information. Even though such exchange of information was personally made through phone calls, e-mails and meetings held in Brazil and Europe, the Mexican economy suffered its repercussions.

Due to the international nature of the resources and scope of the agreements, this was considered as an international cartel. In that regard, on February 25, 2015, the Board of the Commissioners determined that Whirlpool, ACC, Panasonic and Tecumseh Brazil engaged in absolute monopolistic practices, provided for in section I of Article 9 of the LFCE. Embraco Mexico, Embraco North America and Tecumseh Products Company were also held liable for facilitating or contributing, pursuant to section XI of Article 35 of the LFCE, the commission of absolute monopolistic practices provided for in Section I of Article 9 of the LFCE.

Seven companies were sanctioned, according to their economic capacity and role within the market, with a total amount of MXN\$223, 273,399.11, approximately USD\$16, 537,055.35<sup>39</sup>, fines imposed.

## **2. IO-002-2011: Ballasts**

On April 4, 2011, COFECO began an ex officio investigation regarding the possible commission of absolute monopolistic practices within the production, distribution and commercialization of devices used for the transformation and/or control of electric currents for illumination purposes, commonly known as ballasts.

During the investigation, two applications to the Leniency Program were received. These applications helped prove the existence of the absolute monopolistic practices provided for in sections I and IV of Article 9 of the LFCE, consisting in price fixing and bid rigging.

During its investigation, the Commission uncovered that the investigated economic agents met during the investigated period, from April 4, 2011 to October 18, 2012, with the purpose of fixing and raising prices, as well as coordinating their bids or abstentions in public tenders.

During the trial like procedure, the involved economic agents were not able to challenge the conducts proved by the Commission and such procedure resulted in the imposition of fines. The Commission sanctioned those who participated as facilitators and those who acted in the name and on behalf of companies, as well as the companies themselves with a total amount of MXN\$119, 947,476.60, approximately USD \$9, 654, 730.60<sup>40</sup>.

After the Commission's decision, the sanctioned economic agents filed several appeals. However, in October 25, 2011, once all the procedures had been substantiated, the Commission's decision was confirmed by the Judicial Branch.

## **3. IO-004-2012: Passenger transportation services in Chiapas**

<sup>39</sup> At an exchange rate of MXN\$13.50 per US dollar (average exchange rate for 2009).

<sup>40</sup> At an exchange rate of MXN\$12.42 per US dollar (average exchange rate for 2011).

On December 14, 2012, COFECO began an investigation regarding the possible commission of absolute monopolistic practices in the passenger transportation services market in Chiapas. The investigation concentrated in the analysis of eight collusive agreements that had as an object or effect to manipulate the sale price of transportation services in the State of Chiapas and to establish an obligation to not provide more than limited amount of transportation services in diverse sections of the Tuxtla-Comitán and Tuxtla-Tapachula routes.

In that regard, based on the information provided by the applicants to the Leniency Program and other elements gathered during the investigation, a statement of objections was issued. During the trial-like procedure the participants of the cartel could not challenge the evidence presented by the Commission. Thus, the existence of absolute monopolistic practices was proved. The Board of Commissioners considered that the, damages to the market were of approximately 43.8 million Mexican pesos and that prices of the Tuxtla-Tapachula route were artificially increased. In that regard, Commission imposed a total amount sanctions of MXN\$26,636,196.00<sup>41</sup>, approximately US\$2,022,060.31<sup>42</sup>.

#### **IV. 10 years after the implementation of the Leniency Program: What are our challenges?**

##### **1. First challenge: damages suits (and consumers' compensation)**

In Mexico, the LFCE provides for the possibility of asserting a claim against economic agents demanding them to compensate the damages<sup>43</sup> suffered from a monopolistic practices or illicit concentration, regardless if the economic agent had applied to the Leniency Program. Up to this date, there have only been a few cases and only one has been successful<sup>44</sup>; so it has not been possible to assess the effects that such claims could have on the Leniency Program.

International experience shows that if an applicant to the Leniency Program contemplates the exemption not only of the fines and sanctions imposed by the competition authority, but also grants immunity from possible damage claims, the Leniency Program could become more

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<sup>41</sup> It is noteworthy that the amount of the penalties corresponds to the economic capacity of the poster artists.

<sup>42</sup> At an exchange rate of MXN\$13.17 per US dollar (average exchange rate for 2012).

<sup>43</sup> Article 134 LFCE.

<sup>44</sup> In Mexico, during 2006, COFECO initiated an ex officio investigation regarding the possible bid rigging between pharmaceutical companies in bids conducted by Mexican Institute of Social Security (IMSS, for its acronym in Spanish). The investigation revealed that the patterns of postures and tender outcomes during 2003 and 2006, were a result of the cartel agreement. On April 8th, 2015, the Supreme Court of Justice of the Nation (SCJN, for its acronym in Spanish) confirmed the legality of COFECO's 2010 resolution, which demonstrated the responsibility of the defendants.

To calculate the damage this agreement caused to IMSS, COFECO performed an ex post evaluation during 2015, based on international best practices. The results of this evaluation show that, on average, IMSS paid an overprice of 22.9% in saline solution and 57.6% in human insulin during the time of the agreement, equivalent to an approximate of 622.7 million pesos, approximately 46 million dollars, (calculated with 2014's prices). As a result of SCJN's determination, IMSS filed a damages complaint for 800 million pesos. On October 2016, it was determined that IMSS will be remunerated in 2017.

effective<sup>45</sup>, due to the fact that more economic agents would be attracted by a greater benefit.

In the United States, for example, the affected parties can file a suit against the companies involved in an anticompetitive practice, and these shall pay up to treble damages (three times as much as the damages caused to consumers). However, the companies that apply to the leniency program and cooperate with the competition authority, particularly those who were granted immunity, may qualify to only be held liable for simple instead of treble damages<sup>46</sup>.

On the other hand, the European Commission has resolved that damages claims constitute an important contribution to maintain effective competition within the European Union<sup>47</sup>. However, the European Commission is aware that in spite of its promotion of damages claims this is a complex situation. This is due to the fact that providing information regarding economic agents in order to file such claims, on one hand could be considered as an infringement of European Union rules on protecting confidentiality and business secrets; and, on the other hand, the fear of leniency applications being disclosed could undermine the Leniency Program<sup>48</sup>.

Moreover, the European Court of Justice considered these issues in the *Pleoderer AG v Bundeskartellamt*<sup>49</sup>. In that case, the plaintiff demanded access not only to the file regarding the procedure carried out by the competition agency, but also to the file containing information of the Leniency Program. The Court considered, on one hand, the importance of Leniency Programs as a mechanism to discover cartels and that disclosing such information could undermine the effectiveness of the Program<sup>50</sup>. On the other, it recognized the importance of affected parties being able to demand compensation for damages and losses. Finally, it was determined that all these considerations should be analysed in a case by case basis among with all the other relevant elements of each case<sup>51</sup>.

## **2. Second challenge: Cooperation with anticorruption authorities derived from the amendment to the national anticorruption system**

One of the biggest challenges of the competition culture consists in explaining to the public the difference between collusion and corruption. On one hand, corruption is a concept that involves illegal conducts carried out by public officers; meaning that a company or economic agent bribes a government official in order to obtain a benefit. Corrupt practices are: bribing officers; misappropriation of resources; influence peddling; abuse of office; and unlawful enrichment (among others).

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<sup>45</sup> *Leniency in Antitrust Enforcement: Theory and Practice*, Wils Wouter P.J., 2007, p. 57.

<sup>46</sup> *Frequently Asked Questions regarding the Antitrust Division's Leniency Program and Model Leniency Letters*, Department of Justice (DOJ), 2008 <https://www.justice.gov/atr/frequently-asked-questions-regarding-antitrust-divisions-leniency-program>, Date: 12 de septiembre de 2016.

<sup>47</sup> Case C-453/99 [2001] ECR I-6297, [2001] 5 CML 1058. *Courage Ltd v Crehan*.

<sup>48</sup> *Competition Law*, Whish Richard and Bailey David, 2012, p. 305.

<sup>49</sup> Case C-360/09 [2011] ECR I-000 [2011] 5 CMLR 219.

<sup>50</sup> *Competition Law*, Whish Richard and Bailey David, 2012, p. 306.

<sup>51</sup> *Op. Cit.* p. 306.

On the other, collusion involves, at least, two economic agents that reach an agreement to limit or obstruct competition with their rivals. Therefore, corruption may imply a collusive conduct, but not the other way around.

Broadly, markets susceptible of collusive behaviours are those which have characteristics that could be risky for competition, such as: (1) there is a low number of competitors in the market; (2) there is little or no market access; (3) the market conditions are stable; 4) the market has little or no substitutes at all; and/or (5) there is limited or no technological development.

Currently, we are in a cyclical time for the implementation of these two concepts, which they are usually analyzed separately. The new National Anti-Corruption System was created on May 2015, in response to the badly perception related corruption in Mexico.

The National Anticorruption System has the objective to end the fragmentation between anti-corruption institutions; however, it is important to recognize that both, collusion and corruption, generate market inefficiencies.

### **3. Third challenge: consolidating competition and reporting culture in Mexico**

International experience has determined that education and raising awareness of the Leniency program, as well as of Competition Law, play a decisive role in the establishment of a successful program<sup>52</sup>. According to the ICN, raising awareness between businessmen, consumers and the public are most important as this will eventually generate more applicants to the program. Likewise, the design and publishing of guidelines that may work as tools to foster access to the Leniency Program is strongly recommended.

In that regard, COFECE has published multiple guidelines on various subjects. Specifically, on June 26, 2015, the Guidelines on the Leniency and Immunity Program were approved by the Commission. These Guidelines comply with international standards as they invest the Leniency Program with clarity and certainty.

COFECE's institutional values are legality, impartiality, objectivity, transparency and excellence. In connection with the foregoing, COFECE is a modern agency that looks to perform its activities in a structured and organized fashion under the most rigorous efficiency, efficacy and quality standards; transmitting credibility and strengthening its prestige as a competition authority.

However, in order for a Leniency Program to work, an antitrust authority must do more than just publicize its policies and educate the public. It has to be willing to make the ultimate sacrifice for transparency and the abdication of prosecutorial discretion.

## **V. Conclusions**

Leniency programs have been praised as an important step in the fight against international cartels. Experts agree that Leniency Programs should have key elements to motivate infringers

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<sup>52</sup> *Anti-cartel Enforcement Manual*, ICN, 2014, p. 20.

to report their participation in cartels and, consequently, detect, sanction and deter the existence of such cartels in the markets. The abovementioned essential elements are quickly becoming transcendental due to the sophistication level of cartel structures around the world. The foregoing makes it a much harder task for the authority to discover the existence of such cartels without the help of its members.

Considering the aforesaid, this Commission acknowledges the importance of the Leniency Program not only for the prosperity of the Mexican economy, but also to protect consumers, and commemorates these past 10 years since it was first implemented recognizing that there are still some areas of opportunity to cover in order to obtain better results.

However, it is important to recognize that the Leniency Program in Mexico has proved its effectiveness as an investigative tool, as well as its completeness to position itself among the top Leniency Programs in the world, as it shares their main characteristics and complies with the best international practices.

COFECE estimates that the Leniency Program is, and will increasingly become, a key piece in its fight against absolute monopolistic practices in our country.

For more information regarding COFECE's Leniency Program, please refer to the Guideline on the Leniency and Immunity Program available at: [www.cofece.mx](http://www.cofece.mx). For further details, please contact the Investigative Authority or the General Directorate for Investigations Regarding Absolute Monopolistic Practices to the following number: +52 (55) 27-89-66-24.