

COFECE's Leniency and Immunity Program: Frequently Asked Questions.

Absolute Monopolistic Practices

1. What is an absolute monopolistic practice?

Absolute monopolistic practice is the term used in the Federal Economic Competition Law (FECL) for hard-core cartels, collusions, anticompetitive conspiracies or collusive agreements. As a result, absolute monopolistic practices are agreements among competitors that have as their purpose or effect any of the following: to fix the prices of goods or services; to restrict the output of goods or services; to allocate a market for goods or services; to rig bids; or to exchange information with the intent of achieving any of these purposes or effects. Given the seriousness of these practices, absolute monopolistic practices are illegal *per se*.

2. Which entity is in charge of investigating and sanctioning absolute monopolistic practices?

The Federal Economic Competition Commission (COFECE, for its acronym in Spanish)¹ is the agency in charge of investigating and sanctioning economic cartels or absolute monopolistic practices in all industries other than telecommunications and broadcasting². Specifically, the General Directorate for Investigations Regarding Absolute Monopolistic Practices within the Investigative Authority of COFECE is in charge of conducting these investigations.

The Investigative Authority of COFECE is the internal unit in charge of investigating, among other potential violations of the FECL, absolute monopolistic practices and eventually prosecuting the potential offenders before the Commissioners of COFECE. In such investigative tasks the Investigative Authority shall act with independence of the rest of COFECE's units.

3. What are the applicable sanctions for engaging in an absolute monopolistic practice?

Both individuals and companies can be held liable for incurring in an absolute monopolistic practice. They are subject to the following administrative and criminal sanctions:

A. Administrative sanctions:

¹ COFECE is not an agency of the Executive Branch; COFECE is a constitutional agency of the Mexican State with full autonomy.

² The Federal Telecommunications Institute (IFT, for its acronym in Spanish) is the agency in charge of investigating and sanctioning economic cartels or absolute monopolistic practices in telecommunications and broadcasting.

Companies that	Engage or participate in an Absolute Monopolistic Practice	<u>Fine</u> of up to 10% (ten percent) of their income.
Individuals who	Engage, participate or instigate an Absolute Monopolistic Practice	<u>Fine</u> of up to 200,000 (two hundred thousand) times the “Unit for Measurement and Actualization”. ³ Prohibition to perform managerial roles or act as a legal representative of economic agents for a maximum period of 5 (five) years.
Individuals or companies who	Do not engage or participate directly but help, facilitate, contribute, foster or induce companies or individuals to engage in an absolute monopolistic practice⁴	<u>Fine</u> of up to 180,000 (one hundred eighty thousand) times the UMA ⁵ .

B. Criminal sanctions / penalties:

Individuals who	Engage, order or execute an absolute monopolistic practice	<u>Imprisonment</u> of 5 (five) to 10 (ten) years ⁶ .
------------------------	---	--

³ The “Unit of Measurement and Actualization” (UMA, for its acronym in Spanish) is a unit of reference used to set the monetary penalties applicable in a variety of federal laws, among others the FECL. The UMA is currently equivalent to \$73.04 pesos per day. This means that the maximum fine for individuals, who participated in an absolute monopolistic practice during 2016, is of approximately \$14,680,000.00 Mexican Pesos.

⁴ Article 127, Section XI states that COFECE may impose the fine referred to in the chart above for individuals or companies which have contributed, facilitated or instigated the execution of monopolistic practices.

⁵ The maximum fine for individuals or companies who contribute, foster, or instigate an absolute monopolistic practice in 2016, is approximately \$13,147,000.00 Mexican Pesos, based on the current daily value of the UMA at the time of publication.

⁶ Pursuant to the Mexican Federal Criminal Code, the day of salary shall be calculated pursuant to the daily net income of the individual at the time of the infringement.

COFECE’s Leniency and Immunity Program

4. What is COFECE’s Leniency and Immunity Program?

Individuals or companies who are or have been engaged, participated, contributed, facilitated or instigated an absolute monopolistic practice and report the cartel, hand over evidence, and fully and permanently cooperate, initially with the Investigative Authority of COFECE during the investigation and subsequently during the trial like procedure may receive a total⁷ or partial reduction of the applicable fines and criminal immunity.

5. What are the benefits of joining COFECE’s Leniency and Immunity Program?

All individuals or companies who join COFECE’s Leniency and Immunity Program receive criminal immunity and will not be held criminally liable for engaging in cartel conduct, regardless the order in which they appear before the Investigative Authority of COFECE applying for leniency. However, only the first individual or company who applies to the Program and fulfils certain conditions, will receive the maximum reduction of the applicable fine.

6. May more than one applicant receive the benefits granted by COFECE’s Leniency and Immunity Program?

Subsequent companies or individuals who are not the first to apply may also receive significant reductions of the applicable fines and criminal immunity, if they provide additional evidence in their possession to COFECE.⁸ To determine the fine reduction, COFECE will take into account the chronological order in which applications were received and the supporting evidence provided by each applicant.

First Applicant	May receive a fine reduction to practically zero.
Subsequent Applicants	May receive a fine reduction of up to 50, 30 or 20 percent, based on the order of the application.

In all cases, no criminal liability.

⁷ According to article 103 of the FECL, COFECE shall impose the minimum fine to the individual or company who: is the first among those involved in the conduct to provide sufficient evidence which allows for an investigation procedure to initiate or to presume the existence of an absolute monopolistic practice and thereafter; fully and permanently cooperates throughout the investigation with the Investigative Authority and the trial-like procedure before COFECE’s Board of Commissioners; and undertakes all necessary actions so as to no longer engage in the unlawful practice.

⁸ Article 103 of the FECL also provides that companies or individuals who do not apply first to the Program to apply may receive a fine reduction of as much as 50, 30 or 20 per cent of the maximum applicable 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.

7. What are the specific conducts within the scope of the Program? Is it applicable to cartel conduct committed outside of Mexico?

An individual or companies may apply to the Program for cartel offenses or absolute monopolistic practices under article 53 of the FECL. Absolute monopolistic practices consist of contracts, agreements, arrangements, or combinations among competing economic agents⁹, which have as their purpose or effect any of the following:

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

COFECE investigates and sanctions absolute monopolistic practices carried out in Mexico, and those carried out in other countries, as long as these practices affected Mexican markets¹⁰. Therefore, the Program is applicable to absolute monopolistic practices committed anywhere in the world, if Mexican markets are affected by the conduct.

⁹ Article 3, Section I of the FECL defines an economic agent as any natural or legal person, either for profit or non-profit, Federal, State or Municipal public administration agencies and entities, associations, business chambers and professional associations, trusts, or any other form of participation in economic activity.

¹⁰ This should not be confused with the object or effect of absolute monopolistic practices. It only means that COFECE may investigate and sanction absolute monopolistic practices that have as purpose or effect to affect Mexican markets.

8. Who¹¹ may apply to COFECE's Leniency and Immunity Program?

Companies who: Have engaged or are engaging in an absolute monopolistic practice.

Individuals who: Have participated directly in an absolute monopolistic practice on behalf or by account and order of a company.

Companies or Individuals who: Contribute, facilitate or instigate an absolute monopolistic practice.

9. Can individuals or companies that belong to the same economic interest group¹² receive the Program's benefits?

The Program's benefits may be extended to other individuals and companies provided that they belong to the same economic interest group as a company that applied to the Program. As a result, executives, employees, former employees, subsidiary companies, etc. may receive the same benefits as the applicant. However, these individuals and companies are subject to the same obligations as the applicant.

Applying to COFECE's Leniency and Immunity Program

10. What is a marker?

A marker is the acknowledgement given to an applicant of the date and time that the application was received, establishing the chronological order of the application. A marker guarantees the order of preference amongst the applicants regarding a specific product or service. An applicant will hold its marker and its order of preference while the Investigative Authority assesses the sufficiency and appropriateness of the information provided. The Investigative Authority has to make such analysis in order to establish whether the information will enable it to either initiate an investigation concerning the facts provided or presume the existence of an absolute monopolistic practice.

11. May a party meet with COFECE before applying to the Program?

A party seeking to join the Leniency and Immunity Program may request a meeting with the Head of the Investigative Authority prior to applying to the Program. During the meeting, the interested party may present its case in an informal manner -without any risk of liability- ask questions to learn about the Program and how it works. As this is an informal meeting, no minute will be issued.

¹¹ According to the articles 3 and 4 of the FECL, all economic agents are subject to this law. Economic agents are individuals or companies, for-profit, non-profit, governmental agencies, trade associations, groups of professionals, trusts or any kind of participation in economic activity.

¹² An economic interest is a group of companies and individuals with interrelated commercial and financial interests who coordinate their activities in order to achieve a common economic or commercial objective.

12. Whom should a party contact when applying to the Program?

All communications regarding an application to the Program shall be conducted through the Head of the Investigative Authority or the Director General for Investigations Regarding Absolute Monopolistic Practices (Head of Cartels Division).

13. How can a party apply to the Leniency and Immunity Program?

Interested parties may apply by voice mail or email by calling or sending an email to the following phone number or email address:

Voice mail:

Telephone (01 55) 27896500, Ext. 6632 or (01 55) 27896632,

24 hours a day

Email:

inmunidad@cofece.mx

14. When should a party apply?

A party may apply to the Program at any time. In order to obtain greater benefits, parties are encouraged to apply as soon as they gain knowledge of their engagement in an absolute monopolistic practice. However, in the case of an ongoing investigation leniency, applications may be filed anytime the Investigative Authority formally concludes the investigation procedure..

15. What information must be included when applying to the Program?

In order to obtain a marker, an application to the Program must include the following information:

- The identity of the applicant.
- A statement regarding the applicant's intent to join the Program.
- The applicant or its legal representative contact information; and,
- The industry or the market and the goods or services in which the absolute monopolistic practice was committed.

Furthermore, applicants may also mention which individuals or subsidiaries they wish to include within the scope of the application, although it is not strictly necessary to do so at this moment.

16. What happens after an application is received?

If the application satisfies the requirements to apply to the Program, the Investigative Authority will assign an alphanumeric code to identify the application. This code provides certainty regarding the chronological order in which the Investigative Authority received an application, since it is constructed based on the date and time that the voice mail or email was received. The code also helps keep the applicant's identity as confidential.

With the code, the Investigative Authority will grant a marker. The marker guarantees the applicant's position relative to other companies or individuals who make seek leniency, provided

that the applicant provides sufficient evidence to initiate an investigation or to support the presumption of the existence of an absolute monopolistic practice.

Within the five days following the receipt of an application, the Investigative Authority will inform the applicant of the code that was assigned to its application and the date, time, and place where the applicant should meet thereafter with the Investigative Authority.

17. Why is the marker important?

The marker guarantees the order of arrival of the applicants seeking leniency in the same industry or market or regarding the same products or services. Having a marker allows an applicant to hold its place for a finite period of time. This period of time frequently is used by the applicant to gather information that will be provided to the Investigative Authority. COFECE urges to interested companies and/ or individuals to apply to the Program as soon as they are aware of the existence of a possible absolute monopolistic practice, even in the absence of complete or definite information.

Applications are processed and analyzed in chronological order. Therefore, the Investigative Authority will not examine an application until it has determined if previous applications have fulfilled the necessary requirements for receiving conditional leniency. If an applicant does not meet the information requirements to initiate an investigation or to presume the existence of an absolute monopolistic practice, at the Investigative Authority's discretion, the next applicant would take its place in line.

Meeting with COFECE

18. When will the applicant meet with COFECE?

The date and time of the meeting will be determined case by case. However, in most cases it will be within sixty days after the Investigative Authority assigns the code and grants the marker. The applicant may suggest the date and time of the meeting when submitting its application.

19. What happens if an applicant does not attend the meeting with COFECE?

If the applicant does not attend the meeting, the Investigative Authority will cancel the application and the code assigned to the application. Thus, the applicant will lose its marker and its position of arrival will become available for subsequent applicants. However, the applicant may submit a new application.

20. Where will the meeting with COFECE take place?

The meeting may be held outside COFECE's offices, if necessary, as long as the Head of Cartels Division attends with at least one other COFECE official.

21. Who must attend the meeting with COFECE?

The applicant or its legal representative must attend the meeting.

22. What information is a party expected to bring to the meeting with COFECE?

During the meeting, COFECE expects the applicant to deliver enough documents and information to allow the Investigative Authority to initiate an investigation or to presume the existence of an absolute monopolistic practice. This means that the applicant must provide information sufficient to establish its participation in an absolute monopolistic practice. The information and documents that the applicant may bring to the meeting are exemplified below:

- a. A detailed description of the goods or services, including their use, features and price.
- b. A description of the absolute monopolistic practice and an acknowledgement of the applicant's participation in the practice.
The applicant must support these statements with evidence such as agreements, memoranda, meeting minutes, activity reports, correspondence (hard copy or e-mails), telephone records, personal reports and signed declarations by the participants in the agreement.
- c. The names of the other individuals or corporations involved in the absolute monopolistic practice with the applicant.
- d. The duration, geographical scope and timeframe of the practice.
- e. Details of meetings, communications and agreements among participants, including, for example, dates, places, participants, objectives and results.
- f. An explanation of the monitoring mechanisms implemented to verify the participants' compliance of the agreements.
- g. A glossary of specialized terms.
- h. A summary or description of other relevant information likely to support a finding of the absolute monopolistic practice, even if it is not in the possession of the applicant.
- i. The individuals or companies to whom the applicant wishes to extend the benefits.

23. When an application is related to an international cartel, is there any additional information that the applicant should present?

When an application relates to an absolute monopolistic practice committed outside of Mexico, but which might have affected any Mexican market either by its purpose or effect, the applicant is advised to:

- a. Identify how it believes the absolute monopolistic practice affected Mexico.
- b. Submit an authorization or a waiver authorizing COFECE to make exceptions regarding its confidentiality obligation. Depending on the scope of the waiver, COFECE may disclose to competition authorities of other jurisdictions information related to the applicant. A procedural waiver is limited to COFECE disclosing the identity of the applicant. A full waiver has a broader scope and allows COFECE to share procedural information and substantive information related to the application.
Although a waiver is considered as a highly useful document, an applicant is not compelled to provide one for its application to be accepted. Suggestions of waiver templates are available at <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/waiver.aspx>
- c. Indicate if the applicant has applied to similar leniency and immunity programs in other jurisdictions.

Reviewing and examining the Application

24. What elements does COFECE take into consideration when evaluating an application?

After the meeting with the applicant, the Investigative Authority will examine whether the information submitted is sufficient to initiate an investigation procedure or to presume the existence of absolute monopolistic practices. Some of the elements that are taken into consideration to evaluate the application are the ones referred to in question 22 above.

Also, the Investigative Authority will consider: the existence of previous applications related to the same product or service; the existence and stage of ongoing investigations related to the practices reported by the applicant; and if the Investigative Authority already had already received information about the conduct from any other source.

In case of subsequent applicants, to determine the percentage of the fine reduction, the Investigative Authority will take into account the value that the information submitted by the subsequent applicant adds to the information previously acquired by the Investigative Authority in its investigation. The added value is determined by the usefulness of the information (which may be either direct or indirect evidence) in proving the conduct or expanding the scope of the Investigative Authority's investigation, as determined at the sole discretion of the Investigative Authority. The most valuable information will provide insight about additional individuals or corporations involved in, or events that occurred as part of, the absolute monopolistic practice, which are not already known to the Investigative Authority. Applicants should provide sufficient details in order for the Investigative Authority to validate the information.

25. How long will it take for COFECE to examine the application?

After the meeting with the Investigative Authority, the Investigative Authority has a period of forty working days to examine the application. The analysis of the application includes an assessment of the sufficiency and adequacy of the information provided by the applicant to initiate an investigation procedure or to presume the existence of absolute monopolistic practices. However, if needed, this period may be extended on up to four occasions.

During this period, the Investigative Authority may ask the applicant to clarify aspects of the information it provided as part of its application.

26. What is a conditional leniency letter?

When the documents and information submitted by the applicant are sufficient to initiate an investigation or presume the existence of an absolute monopolistic practice, the Investigative Authority will issue a conditional leniency letter or decision. If the applicant was not the first to apply and receive conditional leniency related to a certain good or service, the applicant must deliver additional evidentiary elements to those in possession of the Investigative Authority in order for the Investigative Authority to issue a conditional leniency decision.

With the decision, the applicant will receive a letter from the Investigative Authority that conditionally confers the benefits of the Program. The letter includes the chronological order of the application, the maximum percentage to which the fine may be reduced, and the applicant's obligation to fully and permanently cooperate with COFECE which covenant to cooperate conditions finally and definitely receiving the leniency benefit.

27. What is a decision to cancel a leniency application?

When the information and documents provided by the applicant are not enough to initiate an investigation or to presume the existence of an absolute monopolistic practice, the Investigative Authority will issue a decision to cancel the leniency application. In the event this occurs, the information and documents submitted by the applicant shall be returned and will not be used against the withdrawing applicant.

Notwithstanding the foregoing, when such applicant has sufficient information and evidence for the Investigative Authority to initiate an investigation or presume the existence of an absolute monopolistic practice, it may submit a new application. However, the applicant will receive a new marker, thus it may have a different order of arrival.

Full and continuous cooperation after conditional leniency decision

28. What are an applicant's obligations after a conditional leniency decision has been issued?

a) Full and continuous cooperation during the investigation procedure

During the investigation, the Investigative Authority carries out the actions it deems necessary to gain knowledge of the investigated market, the agents who participate in it, and the probable existence of an absolute monopolistic practice. Some of the actions and proceedings the Investigative Authority may carry out are unannounced inspections, compulsory interviews, and compulsory requests for documents and information. Applicants must fully and permanently cooperate with the Investigative Authority throughout the investigation procedure. The following list includes some examples how the applicant may be required cooperate:

- i. Terminate its participation in the absolute monopolistic practice, except as directed otherwise by the Investigative Authority.
- ii. Maintain the confidentiality of the information provided to COFECE.
- iii. Expediently furnish all information and documents requested by COFECE during the investigation.
- iv. Cooperate in the proceedings conducted by the Investigative Authority during the investigation. For instance, allowing the conduction of unannounced inspections in their premises, as well as providing documents or information requested and attending compulsory interviews.

- v. Carry out the necessary actions to assure that the individuals who participated in the reported absolute monopolistic practice cooperate during the investigation.
- vi. Ensure that no information regarding the absolute monopolistic practice or individuals or companies involved in the alleged conduct is destroyed, falsified or concealed from the Investigative Authority.

b) Full and continuous cooperation during the trial-like procedure

Upon conclusion of the investigation procedure, if the Investigative Authority concludes that there is sufficient evidence indicating the probable responsibility of economic agents for their roles in an absolute monopolistic practice, it will issue a statement of probable responsibility. The trial-like procedure begins with the notification to the alleged offenders of the statement of probable responsibility and ends with a final resolution issued by the Board of Commissioners of COFECE. The Technical Secretariat is the entity within COFECE in charge of conducting this procedure.

During the trial-like procedure, the applicant must continue to cooperate with COFECE to obtain the benefits of leniency. The following list includes some examples of how the applicant may be required to cooperate:

- i. Admit its participation in the reported absolute monopolistic practice.
- ii. Submit additional evidence considered useful by the Investigative Authority or the Technical Secretariat during the trial-like procedure.
- iii. Cooperate during all the proceedings conducted by COFECE during the trial-like procedure.
- iv. Ensure that no information regarding the absolute monopolistic practice or individuals or companies involved in the alleged conduct is destroyed, falsified or concealed from the Investigative Authority.
- v. Do not contradict the previously admitted conducts or submit evidence that intends to prove its innocence or challenge the evidence presented by the Investigative Authority.

29. What happens if the applicant fails to provide full and continuous cooperation?

If the applicant fails to provide full and continuous cooperation during the investigation procedure, the Investigative Authority will revoke the benefits granted conditionally. However, before revoking the benefits, the applicant will have an opportunity to meet with the Investigative Authority.

If the Investigative Authority decides to revoke the conditionally granted benefits, the information and documents provided by the applicant will not be returned. Moreover, such information and documents may be used to uphold the Investigative Authority's statement of probable responsibility and the final resolution issued during the trial-like procedure against the applicant whose conditional benefits were revoked.

On the other hand, if the applicant fails to provide full and continuous cooperation during the trial-like procedure, COFECE will also revoke the benefits granted conditionally with the final resolution issued in the trial-like procedure by the Board of Commissioners.

30. If one or more individual corporate executives refuses to cooperate, will an applicant's leniency be revoked?

If one or more individuals who participated in the reported absolute monopolistic practice and to whom the program's benefits were extended fails to cooperate, these individuals will be excluded from the Program's benefits. However, the applicant, as well as the rest of individuals to whom the benefits were extended and who remain fully cooperative, will not be excluded.

On the other hand, if the applicant fails to cooperate, the individuals to whom the Program's benefits were extended may still receive such benefits, since they can be considered as independent applicants, provided they provide full and continuous cooperation.

Leniency decision

31. When does a conditional leniency decision become final?

When the Board of Commissioners issues the final resolution, it also will determine if the benefits granted conditionally will become final. This decision is based on the conditional leniency decision and the applicant's cooperation throughout the investigation procedure and the trial-like procedure. If the Board of Commissioners decides that the applicant has cooperated full and continuously, it will issue a final leniency decision and the applicant will receive the following benefits:

- i. A total or partial reduction of the applicable fines for engaging in, participating in, or contributing to an absolute monopolistic practice.
- ii. Immunity to individuals from receiving disqualification orders for participating in an absolute monopolistic practice.
- iii. Criminal immunity to individuals for engaging in an absolute monopolistic practice.

Confidentiality

32. Does COFECE maintain the applicant's identity as confidential?

Yes, COFECE will ensure that the applicant's identity is kept confidential. In order to keep the confidentiality of the identity, in all the communications regarding the application, the applicant will be referred to by an individualized alphanumeric code, and the application shall be maintained in a separate and confidential file. Only the Investigative Authority, the Head of the Cartels Division, and the staff of the Investigative Authority who are assigned to the investigation will have access to the application file.

COFECE will not share the applicant's identity or any information related to the application unless authorized by the applicant.

33. How long does COFECE maintain the applicant's identity as confidential?

COFECE will keep the applicant's identity confidential not only during its investigation procedure but also during the trial-like procedure and in the final resolution. There will be no reference to companies or individuals as applicants, either during the investigation or trial-like procedure. In the

latter, the applicants will be subject to the same rules as non-applicant companies or individuals called into the procedure.

Given that the applicant's identity will be kept as confidential even upon the issuance of COFECE's Board of Commissioners' resolution, in order to protect the identity of applicant, the resolution will include the sanction imposed to every company and individual who engaged in an absolute monopolistic practice, including those who received the leniency benefit. As a result, the final resolution will include the sanctions imposed to the leniency applicant or applicants without the applicable reduction. This strategy implemented in the Mexican regime makes it difficult to identify which is the member of the cartel that cooperated with the authority by means of the leniency program.

In press releases, COFECE may acknowledge the existence of leniency applications, but it will not identify as applicants specific companies or individuals.

34. How does COFECE use the information submitted by the applicant?

The information submitted by the applicant is maintained in a separate file from the investigation file. Since the Investigative Authority includes in the investigation file the information which supports the probable responsibility of the participants in the absolute monopolistic practice, the information provided by the applicant may be used by the Investigative Authority during the investigation procedure.