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The Future of Effective Leniency Programmes – Note by Mexico

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More documents related to this discussion can be found at
<https://www.oecd.org/competition/the-future-of-effective-lenency-programmes-advancing-detection-and-deterrence-of-cartels.htm>

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1. Introduction

1. Mexico's Immunity and Reduction of Sanctions Programme (or Leniency Programme) has gone through a long process to become the solid tool for the detection and investigation of absolute monopolistic practices (cartel or collusive agreements) that it is today.

2. This contribution intends to provide an overview of the evolution of this program in Mexico since its implementation in 2006 by the former Federal Competition Commission (CFC for its initials in Spanish), its adaptation as a result of a major constitutional reform on competition matters, and the introduction of harsher sanctions for cartel agreements, as well as the Programme's current state as an effective tool to detect and deter cartel conducts in the Mexican markets. Furthermore, this contribution also presents the current challenges of the Programme and how it interacts with other detection tools.

2. The Immunity and Reduction of Sanctions Programme in Mexico.

3. The first Leniency Programme in Mexico was introduced in 2006 by a reform of the Federal Economic Competition Law (LFCE for its initials in Spanish) with the objective of providing the former CFC with a useful tool to detect cartels and gather information for effective competition law enforcement. This reform allowed the CFC to grant reductions of fines to economic agents involved in collusive agreements in exchange for full and continuous cooperation. In 2010, the CFC, published the first Guidelines of the Leniency Programme to raise awareness and understanding of the benefits of the programme among the potential applicants. In 2010, the CFC, published the first Guidelines of the Leniency Programme to raise awareness and understanding of the benefits of the programme among the potential applicants.

4. In 2013, an amendment to article 28 of the Mexican Constitution resulted in the creation of a new autonomous COFECE and in 2014, in the drafting of a new LFCE. The 2013 constitutional reform introduced major changes into the Mexican competition law system, including new sanctions into the legal framework, such as disqualification of directors and an increase in the minimum prison sentence for participating in this crime, to raise the expected costs of breaching the LFCE. This led to the issuance in 2015 of new Guidelines of the Leniency Programme to make them compatible with the new legal framework and COFECE's powers.

5. In 2020, COFECE issued the Regulatory Provisions of the Immunity and Reduction of Sanctions Programme, currently in force. The Regulatory Provisions are a type of regulation issued by the Board of Commissioners in the exercise of its attributions, and have greater weight than a soft law document. As the 2015 Guidelines, the Regulatory Provisions provide greater legal and procedural certainty to economic agents with an interest in the Leniency Programme.¹

¹ COFECE (2020): AGREEMENT No. CFCE-049-2020 by which the Board of the Federal Economic Competition Commission issues the Regulatory Provisions of the Immunity and Sanction Reduction Programme provided for in Article 103 of the Federal Economic Competition Law - Available in Spanish at:

6. Accordingly, the Regulatory Provisions lay down: i) who may apply to the Programme; ii) the procedure for applying to the benefit; iii) the conditions for obtaining a single marker for each file; iv) what is meant by full and continuous cooperation by the leniency applicants throughout the entire procedure (including both the investigation and the trial-like procedure);² v) the applicant's ability to make oral statements; vi) the exclusive power of the Board to revoke the conditional benefit; vii) the possibility for COFECE's Investigative Authority, once the investigation is concluded, to issue a recommendation to the Board to revoke the Conditional Immunity Agreement; viii) the Technical Secretariat's ability to notify the applicant during the trial-like procedure of a failure to comply with its obligations under the Programme; and ix) that the benefits which are granted as long as all of the above is fulfilled. That is, the Provisions clearly establish the "rules of the game" regarding the processing and application to the Immunity Programme.

7. In 2021, the issuance of new Provisions resulted in new Guidelines to the Immunity Programme,³ aiming at ensuring that the enforcement of competition policy in the country is clear, comprehensive, coherent, and consistent. Some of the relevant substantive changes that were added in the Guidelines published in 2021, are the following:

- Among the benefits of the Programme for natural persons, aligned with article 5 of the Regulatory Provisions, the Guidelines provide for the exemption from sanctions of disqualification from holding managerial/representative positions in legal persons, which was not provided for in the previous Guidelines.
- With respect to the applicant's obligations of full and continuous cooperation and aligned with article 103 of the LFCE and article 6 of the Regulatory Provisions, the Guidelines specify three relevant obligations:
 1. The applicant must acknowledge participation in the cartel agreement.
 2. The Investigative Authority may require the applicant not to immediately terminate the participation in the cartel to obtain additional information.

https://www.dof.gob.mx/nota_detalle.php?codigo=5588359&fecha=04/03/2020#gsc.tab=0. A courtesy translation into English is available at: <https://www.cofece.mx/wp-content/uploads/2020/08/DRsdeInmunidadTraduccion.pdf>

² Within COFECE, the process for reaching a decision regarding a cartel involves two stages: FIRST STAGE: INVESTIGATION, carried out by the Investigative Authority. Initiation: Investigations for probable cartels can begin either ex officio (resulting from market monitoring efforts or from applications to the Immunity and Reductions of Sanctions Program), from complaints or per request from the Executive Power. In all cases, COFECE issues a notification of the initiation of an investigation. Outcomes: At the end of the investigation, the Investigative Authority brings before the Board of Commissioners an investigative opinion that either (i) proposes the initiation of a trial-like procedure (through a statement of objection) due to objective elements that indicate a probable responsibility or (ii) proposes the closing of the case file when there are no elements of wrongdoing. SECOND STAGE: TRIAL LIKE PROCEDURE AND DECISION. The notification of the statement of objection establishes the initiation of the trial-like procedure, during which the alleged offenders have the right to argue in their favour and submit evidence related to the allegations presented against them. Once the facts have been addressed, the evidence processed, and the corresponding arguments presented, the case file is completed. COFECE's Board of Commissioners may issue a resolution as per the law. (Sanctioned parties may then appeal the Board of Commissioners' decision before specialised courts pertaining to the Federal Judicial Power).

³ COFECE (2021): AGREEMENT by which the Board issues Immunity and Reduction of Sanctions Programme Guide. Spanish version available at: https://www.dof.gob.mx/nota_detalle.php?codigo=5610359&fecha=26/01/2021#gsc.tab=0

3. Report all possible cartel agreements in which it has participated or is participating in the investigated market or in the market that is the subject of the application.

- If an agreement to revoke the benefit is issued, subsequent applicants will maintain the markers they originally obtained.

8. These regulatory changes sought to reinforce the incentives of the Leniency Programme. However, having been implemented two years ago and in a changing context due to the SARS-CoV-2 pandemic, it is still difficult to measure their effectiveness. Therefore, it is necessary to carry out a new diagnosis in the next years to assess the impact of these changes on the effectiveness of the Leniency Programme as a tool for detection and investigation of cartel agreements. Nevertheless, it can be said that the modifications made have provided greater legal certainty for economic agents and that could mean that, as confidence in effective collaboration increases, leniency requests could also do so.

3. Trends of leniency applications.

9. From 2007 to 2022, 161 applications to the Leniency Programme were received, with 2012 and 2016 being the years with more applications. From 2014 to 2022, 26% of the investigations initiated by COFECE were originated by leniency applications.

10. As in several countries, Mexico has seen a downward trend in the number of leniency applications. While it is difficult to precisely identify the causes of this trend, five main factors may have led to a decrease in the number of applications received.

11. The first factor is the different interpretation between the economic agents and COFECE on the rules governing the processing of the Leniency Programme, as well as the requirements and conditions that economic agents must meet to qualify for the benefit. For example, economic agents and COFECE had a different understanding of full and continuous cooperation during the investigation procedure and the trial-like procedure. As a result, COFECE revoked the Conditional Immunity Agreement on two occasions once the investigation stage was concluded, as it considered the economic agents had failed to comply with their obligation to cooperate fully and continuously throughout the entire procedure, as well as because of statements by one applicant during the trial-like procedure denying its participation in the agreement in question.

12. As a result, one of the companies whose conditional benefits were revoked filed an *amparo* before the Specialised Courts in Economic Competition, Broadcasting and Telecommunications, alleging that COFECE had violated its right to be heard,⁴ and the Tribunal ruled in its favour. Consequently, COFECE issued the 2021 Regulatory Provisions of the Leniency Programme that provide greater certainty to economic agents as to the obligations and conditions to which they were subject, the consequences of filing an application without complying with the requirements established by the Commission, as well as the applicable procedures and sanctions.

13. The second factor that has been a challenge in the application of the Leniency Programme in Mexico is related to the criminal sanctions that economic agents may face for entering into collusive agreements. According to article 28, section VII of the LFCE, the Investigative Authority has the power to file a complaint before the Attorney General's Office for the cartel offence. In this sense, the Investigative Authority, once the investigation procedure is concluded, can file the complaint, presenting the statement of

⁴ An administrative appeal used to contest competition decisions before the Judicial Power

objections as an element of conviction.⁵ The Investigative Authority has filed several complaints in this manner. However, the Attorney General's Office is yet to conclude the prosecution of these offences.⁶ Therefore, the signal of a higher penalty for economic agents that commit collusive agreements has not been effectively sent. Furthermore, the current design of the Leniency Programme does not provide for applicants to cooperate with the Attorney General's Office, which makes it difficult for it to obtain information. In addition, according to the recommendation of the Organisation for Economic Co-operation and Development (OECD),⁷ close and proactive cooperation with the Attorney General's Office is imperative, given the lack of competition specialists in this agency. In this regard, COFECE's has the institutional goal to provide technical assistance and work closer with the officers from the Attorney General's Office respecting both authorities' independence.

14. The third factor is the SARS-CoV-2 pandemic declared by the World Health Organisation in March 2020.⁸ In the specific case of COFECE, in the first few months, the legal deadlines that apply to multiple procedures, including investigation procedures, were suspended. However, as the state of alert progressed and was maintained, these deadlines were reactivated, introducing measures that allowed COFECE to continue handling its procedures while avoiding the spread of the virus, such as filing proceedings electronically. Although at no time did the Investigative Authority suspend the receipt of applications to the Leniency Programme, this period of uncertainty may have contributed to a decrease in applications in 2020 and 2021, as the capacity to detect and investigate cartels also decreased, due to a reduction in the number of COFECE's proceedings, especially unannounced on-site inspections (or dawn raids).

15. The fourth factor is the risk that economic agents may face claims for damages, especially in other jurisdictions, which the benefit of reduced sanctions does not cover. A case was identified where the economic agent stopped cooperating under the Leniency Programme due to the threat of a lawsuit for damages in another country.

16. Finally, the downward trend in the number of applications to leniency programmes globally, particularly in international cartels, has directly affected the number of leniency applications filed in Mexico. This trend has been observed in most OECD member countries, where there has been a 46% decrease in total leniency applications between 2015 and 2020.⁹ In this regard, it should be considered that the Investigative Authority resumed dawn raids in 2022, which had been suspended due to the pandemic. The former will most likely have a positive impact on leniency applications of economic agents involved in domestic cartels.

⁵ Article 77 of the LFCE, published in the Official Gazette of the Federation (DOF, per its initials in Spanish) on November 10, 2014. Available in Spanish at: https://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_200521.pdf

⁶ Collusive agreements are criminalised under the Federal Criminal Code, Book Two, Title Fourteen, Chapter I, Article 254 bis. Available in Spanish at: https://www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf

⁷ OCDE (2020): OECD Peer Reviews of Competition Law and Policy: Mexico 2020. The recommendation was made in the framework of the Peer Reviews of Competition Law and Policy, 2020. The full document is available at: <https://www.oecd.org/daf/competition/Mexico-Peer-Reviews-of-Competition-Law-and-Policy-en.pdf>

⁸ WHO: Timeline: WHO's COVID-19 response. Available at: <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#event-19>

⁹ OECD (2022): OECD Competition Trends. Pg. 26 Available at: <https://www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf>

17. As for the quality of leniency applications, the level of evidence has been consistent and valuable information has been provided for investigations. In fact, the number of investigations opened for leniency applications has not changed significantly from 2015 to 2020; even though the number of applications has decreased. The Investigative Authority has observed that the more promotion is given to the Leniency Programme, among economic agents and law firms, there has been a greater use of the tool.

4. Proactive and other detection tools.

18. In terms of detection, COFECE is proactive in identifying cases on an ongoing basis, so that it not only complies with its constitutional mandate, but also creates incentives to apply to the Leniency Programme by increasing the risk of detecting anti-competitive agreements.

19. Within the Investigative Authority, COFECE has a General Directorate for Market Intelligence, which is responsible of this proactive approach in the detection of anticompetitive conducts. This with the objective of increasing the initiation of *ex officio* investigations, as well as the continuous monitoring of variables in important markets for the national economy.

20. To detect possible anticompetitive practices, including cartels, the General Directorate for Market Intelligence has multiple tools:

- Data and economic analysis tools: these include the use of structural-behavioural screening techniques in public procurement; the development and application of market monitoring algorithms (prices, quantities, among other supply variables), the monitoring of different information media and social networks, and others.
- Intelligence tools: intelligence capabilities have been developed to gather information of strategic value both for in-house analysis and in the field inspection.
- Mailbox for anticompetitive practices: since 2017, the General Directorate for Market Intelligence has a mailbox available for reporting anticompetitive practices. Through this mailbox any person who has information about a possible conduct can inform the Commission about them. This mailbox has been a very useful tool as it allows collecting valuable information from direct sources, such as consumers, or from those who share the information they have in a completely anonymous manner.

21. Also, and with the aim of increasing detection capabilities, the General Directorate for Market Intelligence has created the *DataLab Project*, which uses specialised infrastructure to explore the performance of specific technologies in virtual spaces and assess their potential impact on competition, as well as exploits the possibilities offered by new data analysis techniques.

22. In addition to the Leniency Program, the LFCE endows the Investigative Authority with several investigative tools to detect anticompetitive conducts. Among them are dawn raids, requirements, and requests for information, as well as hearings, inspections, and the complaints mailbox.¹⁰ The Investigative Authority has also the power to obtain additional information from public information sources, among others. The combination of the

¹⁰ COFECE (2017): Principios generales que rigen el desarrollo de las investigaciones conducidas por la Autoridad Investigadora [General principles governing investigations conducted by the Investigative Authority]. Available in Spanish at: https://www.cofece.mx/wp-content/uploads/2017/11/principios-generales-ai_03072017.pdf

different tools has allowed COFECE to achieve positive results. In some cases, leading to the initiation of high-impact investigations with indications of anticompetitive conduct.

23. Dawn raids are one of the most useful tools to effectively enforce the law and create incentives to apply to the Leniency Program, as the Investigative Authority has the power to issue a visit order without the need for judicial authorisation. In addition, investigations may be kept confidential during the first 120 days of the procedure,¹¹ allowing the Investigative Authority to conduct unannounced on-site visits without providing information about the initiation of an investigation, increasing the possibility of obtaining useful information to support a case. It is worth mentioning that after this power was granted to the Commission, the number of leniency applications more than doubled. Also, it has been observed that the use of this tool has resulted in more robust cases, which effectively translate into sanctions. For example, at least one dawn raid was conducted in 74% of the cases that COFECE has sanctioned since 2014.

24. Furthermore, in terms of investigative approaches, the Investigative Authority created a protocol for conducting dawn raids in the context of the COVID-19 pandemic, reactivating a key tool for cartel detection, which, in turn, increases the incentives of the leniency programme.

25. Also, several internal training programmes have been developed to improve tools such as the issuance of requirements and requests for information, as well as the simulation program of hearings, which seek to train personnel and improve the existing tools for the investigation of anticompetitive conducts.

26. The use of different tools by COFECE strengthens the Leniency Program by making its benefits more attractive to those who have participated in a collusive agreement and by creating incentives to apply to the program.

4.1. International enforcement cooperation

27. International cooperation with other competition authorities has become crucial for COFECE to better enforce competition policy and deal with cross-border anticompetitive practices.

28. The objectives COFECE pursues cooperating internationally mainly revolve around reciprocity among parties, which facilitate cooperation on enforcement (and advocacy) matters, on the basis of bilateral or multilateral agreements or informal channels established through cooperative relationships, which may materialize into:¹² i) notification processes, consultations and the exchange of information related to the enforcement of competition legal frameworks and policies; ii) consistent decisions within jurisdictions; iii) timing alignment in merger cases; iv) learning about anticompetitive activity affecting other jurisdictions, their approach and experience; and v) technical assistance, visits and staff exchanges for capacity building.

29. In cartel investigations, the Commission has achieved the most beneficial results through informal cooperation and the use of company waivers (used only in cases with Leniency applications). A good example of this type of cooperation is a case regarding compressors in which the Commission had an on-going exchange with various jurisdictions involved. Mainly, the informal discussions focused on exchanging ideas on the

¹¹ Pursuant to Article 75 of the LFCE.

¹²For more information on the instruments entered by COFECE see OECD (2022): Inventory of International Cooperation Agreements Between Competition Authorities. Available at: <https://www.oecd.org/daf/competition/mou-inventory-list.pdf>

investigation strategy followed by other jurisdictions. In addition, there were several formal requests to competition authorities from the United States and the European Commission. In most of these requests, however, exchange of information was subject to the national provisions related to confidentiality of information and public records produced by courts.

30. Over time COFECE's international cooperation has increased due to COFECE's institutional strengthening and successful investigation of anticompetitive practices, and greater participation, networking, and engagement in international events. The latter have increased confidence and trust which has resulted in more international cooperation. It is expected that this trend will continue in the coming years.