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Alternatives to Leniency Programmes – Contribution from Mexico (COFECE)

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More documentation related to this discussion can be found at: oe.cd/atlp.

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Alternatives to Leniency Programmes

- Contribution from Mexico (COFECE) –

1. Introduction

1. Mexico's Immunity and Sanction Reduction Programme (or Leniency Programme) has evolved through the years to become the solid tool for the detection and investigation of absolute monopolistic practices (also known as cartel or collusive agreements) that it is today.
2. The following contribution provides an overview of the Mexican Leniency Program. The first part covers its history, evolution, and impact, while the second part provides some reflections on the future of this tool as well as what alternatives could be implemented to further enforce competition law against cartels.

2. Evolution of the Mexican Leniency Programme

3. The first Leniency Programme in Mexico was introduced in 2006 by a reform to the Federal Economic Competition Law (LFCE for its initials in Spanish) with the objective of providing the former Federal Competition Commission (CFC per its acronym in Spanish) with a useful tool to detect cartels and gather information for effective competition law enforcement. This amendment allowed the CFC to grant reductions of fines to economic agents involved in collusive agreements in exchange for full and continuous cooperation.
4. In 2013, a constitutional reform replaced the CFC with an autonomous body, the Federal Economic Competition Commission and a year later a new LFCE entered into force. This reform introduced major changes to the Mexican competition law system, including new sanctions such as disqualification of individuals (also known as debarment in other jurisdictions) as well as increased economic and criminal sanctions for individuals participating in collusions.
5. The Leniency Programme is provided for in Article 103 of the new LFCE, establishing that those economic agents that *“are incurring or have incurred in an absolute monopolistic practice may come before the Commission to apply to the benefit of the reduction of the sanctions provided by the Law”* as long as they:
 1. Are the first ones, among the involved economic agents, to provide enough elements or evidence to allow the initiation of an investigation or to presume the existence of an absolute monopolistic practice (which is the term used by the LFCE for collusive agreements).
 2. Cooperate, in a full and continuous manner, with the investigation and, if applicable, also during the subsequent trial-like procedure.
 3. Carry out the necessary actions to end their participation in the unlawful practice.
6. In 2015 the Commission issued the *Guide for the Immunity and Sanction Reduction Programme* to provide economic agents and the general public guidance on how Cofece

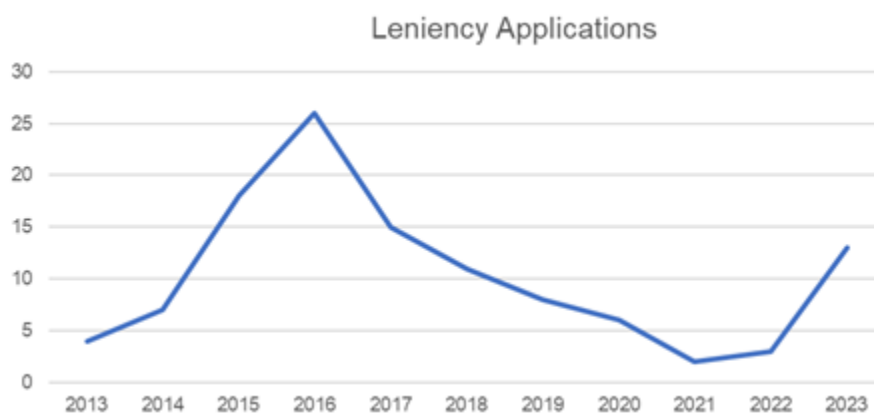
receives, analyses and resolves the applications to the Programme.¹ Additionally, in 2020 the Commission issued the *Regulatory Provisions of the Immunity and Sanction Reduction Program* which further explain and regulate how economic agents can apply to the Program.^{2 3} As a result of this Regulatory Provisions, an updated Guide was published in 2021.⁴ It is worth mentioning that both documents aim at providing greater legal and procedural certainty to economic agents, thus ensuring that the enforcement of competition policy is clear, comprehensive, coherent and consistent.

3. Recent trends of the Mexican Leniency Programme

7. The effectiveness of a Leniency Program can be assessed based on its ability to facilitate the successful detection and prosecution of cartels, while ensuring that it also offers the necessary certainty and incentives for applicants to fully cooperate with the Commission. Thus, to conduct its assessment, the Commission considers two key indicators: i) the number of applications received and ii) the number of investigations that initiated derived from leniency applications.

8. From January 2013 to October 2023, the Programme has received a total of 113 applications. 2015 and 2016 were peak years in applications, with a subsequent decline from 2017 to 2020. Derived from the changes implemented with the issuance of the 2020/2021 Regulatory Provisions and Guide, in 2023 the Commission has detected a resurgence in the number of applications, an upwards trend that is expected to continue in the incoming years. The following figure provides an overview of the applications received in the last ten years:

Figure 1. Number of applications received to Cofece's Leniency Program (2013-2023)



¹ The Guide is available, in Spanish, at https://www.cofece.mx/wp-content/uploads/2017/11/guia_programa_inmunidad.pdf

² Regulatory Provisions are a type of regulation issued by the Board of Commissioners in the exercise of their powers provided by the LFCE. This type of documents has greater weight than a soft law document, such as the Guide.

³ A courtesy translation into English of the Regulatory Provisions is available at <https://www.cofece.mx/wp-content/uploads/2020/08/DRsdeInmunidadTraduccion.pdf>

⁴ The 2021 version of the Guide is available, in Spanish, at <https://www.cofece.mx/wp-content/uploads/2021/02/Acuerdo-CFCE-312-2020.pdf>

9. To understand the downwards trend in the number of applications from 2016 to 2022, which is also observed in several jurisdictions, the Commission has weighed in several factors such as:

1. The different interpretation on the rules governing the Programme between economic agents and Cofece, as well as the requirements and conditions that economic agents must meet to qualify for the benefit. Due to these discrepancies, the Commission has had to revoke conditional immunity agreements on two separate occasions. This was one of the main factors behind the issuance of the regulatory provisions of Leniency Programme and the updated guide in 2021, so that all the requirements would be clear and not subject to interpretation.
 2. The challenge derived from criminal sanctions. Although cartels are criminally sanctionable since 2011, their prosecution has not been concluded effectively by the Judiciary. In this sense, there has not been a case in which criminal sanctions have been imposed, so economic agents do not really “perceive” this as a risk. Additionally, the current design of the Programme does not foresee the cooperation of the applicants with the Office of the Attorney General, which further complicates the process.
 3. The effects of the Covid-19 pandemic. While the capacity of Cofece to receive applications was not suspended at any time during the emergency, the uncertainty derived from this situation contributed to a decrease in applications in 2020 and 2021 since it could have been interpreted that the Commission had reduced capacities to detect and investigate cartels due to the sanitary restrictions.
 4. An international downwards trend in the number of applications to leniency programs, particularly in international cartels. This trend has been observed in most OECD member countries.⁵
10. Overall, the Mexican Leniency Programme has had a come a long way to become a solid tool for the detection and investigation of cartels. However, such development has entailed a series of challenges that the Commission has been able to promptly detect and address in order to implement solutions for the areas of opportunity that are identified. In the incoming years, Cofece will continue explore further tools that could be implemented for the consolidation a more robust, effective and clear Leniency Programme.

4. Alternative detection methods

11. When detecting, investigating and sanctioning cartels, the Commission’s strategy has included different methods that complement each other. In terms of detection, even though the Leniency Programme has proven to be an effective tool, Cofece maintains a proactive approach to detect cases through other methods rather than Leniency applications. Since 2014, three out of four cartel investigations have been detected through other methods; additionally, to this day 45% of cartel investigations derive from a formal complaint and approximately 26% were initiated as a result of intelligence work carried out by the General Directorate of Market Intelligence. Until now, the Commission has not experienced any major challenges or conflicts between its detection methods. In fact, these

⁵ According to the OECD, there has been a 46% decrease in total leniency applications between 2015 and 2020. For more information, see 2022 OECD Competition Trends available at <https://www.oecd.org/daf/competition/oecdcompetition-trends-2022.pdf>

other methods have complemented the Leniency Programme, resulting in some investigations being initiated due to first-in applications and in stronger sanctions where leniency application were received in an ongoing investigation.

4.1. The role of complaints as a detection method

12. Per the LFCE, complaints must be in writing either in person or through the Commission's Filing Office or electronically via email. For a complaint to be processed it must comply with the requirements of Article 68 of the Law.

13. Once the complaint is filed and processed, Article 69 of the LFCE mandates the analysis of the complaint by the Investigative Authority which, within a fifteen-day timeframe, can:

1. Order the initiation of the investigation,
2. Partially or completely dismiss the complaint for being notoriously inadmissible⁶, or
3. Inform the complainant, on one occasion, that the written complaint fails to meet the requirements established by the Law and thus grant the possibility for the complainant to clarify or complete it within the following fifteen days.

14. It is worth noting that, of the total formal complaints received for cartel cases between 2013 and 2023, 26% had sufficient elements to order the initiation of a cartel investigation.

15. In addition to the formal complaints, the Commission also has an informal channel to report anticompetitive practices by phone or in writing through its website in an anonymous (if the person reporting wishes to) safe and confidential manner. To submit such reports, those interested just need to provide a name (optional), an email address, a telephone number and a brief description of the acts they consider are violating the law. These informal complaints may help the Investigative Authority to initiate *ex officio* investigations, but they do not constitute a sufficient cause to initiate an investigation.⁷

5. Proactive detection tools: intelligence and industry monitoring

16. The Investigative Authority of Cofece has several investigative tools for detecting cartels. Among these are dawn raids, information requests, interviews or depositions, inspections, and complaints. These tools have allowed the Commission to conduct investigations effectively and obtain the necessary evidence to fight and enforce the law

⁶ Article 70 of the LFCE provides that the Investigative Authority can dismiss a complaint for being notoriously inadmissible when: i) the alleged facts do not constitute an infringement to the Law, ii) it is evident that the economic agent included in the complaint does not have substantial power in the relevant market (in the case of relative monopolistic practices and unlawful concentrations), iii) the economic agent included in the complaint, the stated facts and conditions of the relevant market have been subject matter of a previous resolution, iv) there is a pending procedure at the Commission concerning the same relevant market and conduct, and v) the claimed acts involved a notified concentration pending resolution from the Board of Commissioners.

⁷ These reports can be made in the following website: <https://www.cofece.mx/autoridad-investigadora/denuncia-o-reporta-practicas-anticompetitivas/reporta-practicas-anticompetitivas/>

against cartels. In terms of intelligence and industry monitoring, the Commission's General Directorate of Market Intelligence is responsible for contributing to this effort.

17. Created in 2014, the Commission's Market Intelligence Unit detects potential anticompetitive conducts and competition issues in the Mexican markets. It provides support to the Cartel, Unilateral Conducts and Regulated Markets teams by providing them with insights resulting from the collection and analysis of key information from markets, as well as companies. Furthermore, the Intelligence Unit also conducts forensic acquisition of digital information during dawn raids and processes economic and digital data from investigations to aid in substantive cases. To achieve this task, the Unit has two types of tools:

1. Data and economic analysis tools: which include the use of structural-behavioural screening techniques in public procurement, the development and application of market monitoring algorithms (considering prices, quantities, and other supply variables), the monitoring of multiple information platforms, as well as social media, among others.
2. Intelligence tools.

18. By combining both types of tools, the Unit has been able to provide positive results that have translated into the initiation of ex office investigations, mostly regarding public procurement. In addition, ongoing investigations that derived from complaints are also benefited from the existing screening capabilities to strengthen the economic robustness of the case. This is particularly important in Mexico as the Supreme Court has determined that the use of economic analysis can also be considered as valid indirect evidence to support the existence of an anticompetitive practice.

6. Proactive detection tools: screening

19. The use of screenings to detect collusions is primarily used in public procurement and bid rigging cases. For this matter, the Market Intelligence Unit has created automated and semi-automated routines for collecting and processing data, which are capable of acquiring substantial amounts of market information from several sources. Additionally, algorithms have been developed to analysed information and detect potential anticompetitive patterns.

20. Most of the data used for screening is obtained from public sources such as the Office of the Federal Attorney for Consumers (Profeco, for its acronym in Spanish) which provides information on consumer prices through a website; the National Institute of Statistics and Geography which provides statistics on the number of companies, sales, production prices, among other indicators; and the Ministry of Public Administration that operates a website called *CompraNet* that aims at organizing, categorizing and displaying information on public tenders and government purchases.

21. To improve the quality and veracity of the information gathered and processed through screenings, the Market Intelligence Unit has developed in-house web tools and techniques to find solid and reliable information to substantiate and objective cause, which is the ground upon which a in investigation can be initiated in accordance with the LFCE. In addition, several tools that collect and analyse broad sets of data in strategic sectors have been developed. All these tools facilitate the continuous monitoring and analysis of the markets to have better and more substantiated cases.

22. Also, for cases involving public procurement, the Intelligence Unit has developed behavioural and structural screening applications which draw from the available literature

and international best practices, such as the OECD Guidelines for Fighting Bid Rigging in Public Procurement. Through these tools, the Commission aims at identifying specific potential issues or irregular behaviours. The analysis of the elements of the market and the behaviour of the companies constitutes indirect evidence that can be used to prove the existence of anticompetitive agreements and complement direct evidence acquired during the investigation.

23. Digital screening is possible when there are sufficient data sources with general consistency and quality. However, in the Mexican context, not every sector or economic activity complies with these conditions which leads to limited and insufficient data sources. For instance, in the case of economic activities associated with primary sectors, such as agriculture and farming, data availability and reliability are not adequate to facilitate potential screenings. To overcome this challenge, the Commission has chosen to use supplementary techniques to obtain data from publicly available sources.

24. Finally, another challenge has to do with the results obtained from screenings which may be helpful as an initial measure to flag unusual behaviours, but they would not be sufficient and would require more in-depth analysis of the specifics that could either support or refute the preliminary case theory. In this sense, additional evidence is required to support the existence of anticompetitive practices and avoid false positives.

25. Technology is increasingly playing a key role in competition enforcement. The Commission is aware that the challenge is not only about understanding how disruptive technologies work but also on how to execute its legal mandate in an effective and efficient manner while increasing the likelihood of success of the cases. Thus, Cofece firmly believes in the integrating and embracing technology as a key element of its everyday work. In this regard, the Investigative Authority has undertaken several in-house efforts to advance technology in its investigative processes by incorporating natural language processing, geomatics, geospatial data and machine learning, big data, high-performance computing, and data science.

7. Recent fines and sanctions resulting from non-leniency cases.

26. Thanks to the work of the Market Intelligence Unit and to the effective processing of complaints, Cofece has been able to sanction and fine several cartel cases in the recent years. The fines imposed in these cases have been quite significant and range from approximately 3 million to 120 million USD. Some examples are detailed next.

7.1. Gasoline prices in Baja California

27. Derived from a complaint filed in 2015, on September 2020, the Board of Commissioners determined that several companies that belonged to five economic interest groups, as well as six partnerships, along with 11 natural persons who acted on their behalf, entered into illegal agreements to maintain gasoline prices in the municipalities of Tijuana and Mexicali, in the Mexican northern state of Baja California, at the maximum price determined by the Ministry of Public Finance and Credit. Likewise, it concluded that three associations of service stations and four natural persons contributed to, encouraged, and/or induced these illegal agreements. Consequently, fines for approximately 3 million USD were imposed to the economic agents who participated in this cartel.⁸

⁸ See Press Release COFECE-034-2020 available at https://www.cofece.mx/wp-content/uploads/2020/09/COFECE-034-2020_ENG.pdf

7.2. Bid rigging in laboratory tests and blood banks

28. In August 2020, the Board of Commissioners resolved a case, derived from a complaint filed by the Mexican Institute of Social Security (IMSS), in which it was determined that 11 companies and 14 natural persons agreed to and/or exchanged information to coordinate bids or to abstain from participating in tenders convened by the IMSS and the Institute for Social Security and Services for State Workers (ISSSTE), for the procurement of comprehensive services for laboratory tests and blood banks.⁹

29. The Commission found that the economic agents established a non-aggression pact, avoiding competition and allocating the items of the tenders through intense communications via email and phone calls. Consequently, the Board of Commissioners determined to fine the participants of the cartel with the maximum fines mandated by the LFCE, which in this case reached almost 32 million USD. Additionally, the Board determined to notify this matter to the Ministry of Public Administration, as well both to the IMSS and the ISSSTE for the corresponding legal effects in case they found corruption related acts.

7.3. Collusive agreements regarding professional soccer players

30. In 2018, following an internal investigation conducted by the Market Intelligence Unit, the Commission initiated an investigation into a possible cartel in the market for the drafting of professional soccer players. In September 2021, the Board of Commissioners confirmed the anticompetitive practice and fined 12 soccer clubs, the Mexican Football Federation and 8 natural persons with more than 8 million USD.¹⁰ The Commission found that the clubs colluded to avoid or inhibit competition in the market by engaging in two conducts: i) imposing maximum wage caps for female players, further deepening the pay gap between male and female players, and ii) segmenting the market of male players by establishing a mechanism known as “Gentlemen’s Pact” that prevented players from freely negotiating and signing with new teams.

31. In the first conduct, the prices (that is, the wages of female players) were manipulated, thus preventing clubs from competing for the hiring of players through better wages, not only negatively impacting their income, but also widening the gender pay gap. As for the second conduct, the collusive agreement segmented the market and limited competition of clubs in the hiring of male players, unduly restricting their mobility and limiting their bargaining capacity to obtain better wages by signing with another club. Together, these conducts generated a harm estimated at almost 4 million USD. This case is also significant as it represents the first investigation into labour markets in Mexico, setting a precedent for the Commission to investigate and prosecute no-poach agreements.

8. Proactive detection tools: education and outreach

32. Cofece proactively undertakes several efforts to promote and increase the awareness about competition law and its benefits, as well as to encourage compliance with the law by economic agents. To maximize the impact of this actions, the Commission

⁹ See Press Release COFECE-031-2020 available at https://www.cofece.mx/wp-content/uploads/2020/08/COFECE-031-2020_ENG.pdf

¹⁰ See Press Release COFECE-028-2021 available at https://www.cofece.mx/wp-content/uploads/2021/09/COFECE-028-2021_ENG.pdf

produces tailored materials and contents according to the target audience it intends to reach. For example, materials for the private sector will focus on the risks of breaching the law and how to comply with it; while materials for the academic or public sectors would focus more on the basics of the law, case studies or specific markets or sectors. The following sections describe some efforts carried out by Cofece on this matter.

8.1. Online courses

33. The Commission has an online learning platform in which it offers free courses on different topics related to competition law and policy.¹¹ Among these are trainings on rights and obligations under the competition law, concentrations and economic competition, competition in the digital economy and how to design pro-competitive bidding processes and detect collusion in them. Specially in the latter, the training includes information about the Leniency Program and how to apply to it.

34. With this strategy, the Commission has been able to approach a variety of audiences to increase the knowledge and awareness of competition policy. To this day, more than 5,000 people have registered to at least one online course and users have rated the platform with 90% of general satisfaction. This platform was particularly useful during the pandemic as in-person events and trainings were not possible, thus, Cofece was able to continue engaging with the business community and the general public by providing them with an online alternative.

8.2. Compliance events

35. The Commission organizes and hosts events (seminars, conferences, trainings), either in-person or virtually, on a regular basis. These events are aimed at reaching out to the business community to talk to them about the benefits of competition and the importance of complying with the Law. For example, in August 2019, Cofece hosted the *Forum on compliance programs “Fighting corruption and anticompetitive practices: a shared responsibility between authorities and companies”* in coordination with the Ministry of Public Administration and the International Chamber of Commerce Mexico.¹²

8.3. Compliance documents and materials

36. To foster compliance, as well as leniency applications, the Commission has published the following materials:

1. Recommendations for the private sector to comply with the Federal Economic Competition Law (2015).¹³
2. Video – *What is Cofece’s Leniency Programme?* (2015).¹⁴

¹¹ The online platform is available at <https://cursos.cofece.mx/>

¹² A memoir of the event is available at <https://www.cofece.mx/wp-content/uploads/2019/11/MemoriaForo.pdf>

¹³ Available at <https://www.cofece.mx/recommendations-for-compliance-with-the-federal-economic-competition-law-addressed-to-the-private-sector/>

¹⁴ Available at <https://www.youtube.com/watch?v=sitE5na-eFw>

3. Video – Recommendations on how to establish a compliance program (includes a mention to the Leniency Programme) (2017).¹⁵
4. Recommendations to comply with the Federal Economic Competition Law (An update to the 2015 document published in 2019).¹⁶

9. Proactive detection tools: Cooperation with other agencies

9.1. Cooperation with national agencies and regulators

37. Collaboration with other agencies is crucial for the detection, investigation and sanctioning of cartels. For example, investigations could be initiated following a complaint from a sectoral regulator or other public authorities, or cases involving bid-rigging schemes could be detected thanks to the collaboration with contracting authorities. Competition agencies must recognize that regulators are experts in their markets, they have broad knowledge of how they function and who participates in them. This knowledge is essential and especially helpful to bring investigations, even if they do not file a formal complaint. Regulators can help to shorten the horizon of where to look and what to ask for by giving strategic advice to competition agencies.

38. Bearing this in mind, Cofece has signed 54 cooperation agreements with other public authorities, including the Bank of Mexico, the Tax Administration Service, the Mexican Social Security Institute, the Energy Regulatory Commission, among others. Overall, the Commission constantly collaborates with other authorities and regulators, a strategic engagement that allows it to take advantage of their unique insight of the market and access to crucial information for ongoing or possible investigations.

9.2. International cooperation

39. International cooperation is one of the most effective tools a competition authority can use to effectively investigate, prosecute, and sanction anticompetitive practices. However, engaging in it can be challenging because of the different legal frameworks and limitations that make difficult to exchange confidential information. To address this challenge, the Commission has identified two important elements: first, it is key to build institutional soundness which translates into trust between competition authorities, and second, it is essential to build close relationships between staff members who are the ones who will potentially partake in cooperation activities.

40. Cofece has also identified that cooperation is more likely when authorities have similar procedures and standards. Consequently, the Commission has undertaken several actions to apply best international practices to procedural and substantive matters, for example:

1. The Commission's invites its peers to review and comment its guidelines, technical criteria, and regulatory provision to ensure that international standards are met.
2. Cofece actively participates in international trainings to contribute to effective application of our regulation and to align it to the best international practices.

¹⁵ Available in Spanish at https://www.facebook.com/cofece/videos/c%C3%B3mo-establecer-un-programa-de-cumplimiento-de-la-ley-de-comp/1419063281503674/?locale=es_ES

¹⁶ Available at https://www.cofece.mx/wp-content/uploads/2021/02/DYO_Recom-ENG.pdf

3. Cofece is also an active participant in international organization such as the International Competition Network (ICN) and the OECD, thus allowing its staff to engage in cooperation related activities and to also implement best international practices.