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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Strengthening
incentives for leniency agreements**

– Contribution from Mexico –

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The attached document from Mexico is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 27 28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session I: Strengthening incentives for leniency agreements

- Contribution from Mexico¹ -

1. History of Mexico's leniency and sanctions reduction programme for economic competition

1. The history of Mexico's leniency and sanctions reduction programme can be divided into four main stages: i) the creation of this tool for competition matters in the country; ii) an expansion stage in which the number of applications rose and programme promotion increased; iii) the creation of a new competition law and competition authority, through which the fines and sanctions applicable for participating in a collusive agreement were increased; and iv) a review stage in which the programme was re-evaluated, resulting in the issuance of the first regulatory provisions of the leniency and sanctions reduction programme.

2. Mexico's leniency and sanctions reduction programme was created in 2006 (2006 Reform) through an amendment to the country's first competition law,² and was enforced by the now-defunct Federal Competition Commission between 2006 and 2013. The programme was established to implement international best practice after a review of the use of leniency programmes in other jurisdictions. In addition to establishing the programme, the 2006 Reform increased the penalty amount imposed on participants in collusive agreements, contributors and repeat offenders. This increase was to toughen sanctions and raise the cost of participating in cartels. This first stage established the principles of competition leniency programmes in Mexico. The sanctioning element not only served as a deterrent to entering into collusive agreements, but also incentivised applications to the Federal Competition Commission's leniency programme and encouraged co-operation with the authority in this type of proceedings.

3. The second stage of leniency programme implementation began in 2010 with the publication of the first programme guide, and with important reforms to the Federal Economic Competition Law in 2011 (2011 Reform). The guide was issued to provide legal and procedural certainty to potential applicants. On the other hand, the 2011 Reform incorporated the power to conduct surprise verification visits without the need to obtain a court order. In addition, criminal penalties were introduced for participating in collusive agreements and a new method of quantifying penalties was established, based on the percentage of the economic agent's income. This increased the risk of detecting collusive agreements and toughened the consequences, which strengthened and developed the leniency programme. From 2011 onwards, it became a key mechanism for detecting and investigating competition infringements in Mexico. This was a period of growth for the leniency programme, with 600% more first-in applications received in 2011 than the previous year, demonstrating the programme's usefulness as a detection tool.

¹ Contribution of the COFECE.

² The first competition law in Mexico was created in 1992, after the signing of the North American Free Trade Agreement, which is available at www.diputados.gob.mx/LeyesBiblio/abro/lfce/LFCE_abro.pdf.

4. Subsequently, 2013 marked a milestone in the history of competition in Mexico. A constitutional reform established the Federal Economic Competition Commission (COFECE) as an autonomous constitutional agency.³ This signalled the beginning of the third stage of the leniency programme. In addition, the new Federal Economic Competition Law (LFCE) was enacted,⁴ which introduced penalties for cartels, including possible disqualification from holding management positions and increased minimum prison sentences for participating in this crime. This led to the issuance of a new programme guide, published in 2015,⁵ resulting in 25 national applications being received the following year, the highest number in the leniency programme's history. In addition, an independent and autonomous investigating authority was established,⁶ whose main purpose is to investigate anti-competitive behaviour, including cartel cases. Programme implementation has therefore evolved, with the authority responsible for processing leniency programme applications and investigating anti-competitive conduct separated from the authority responsible for conducting court proceedings and granting the final benefit to the applicant (Plenary).

5. The last stage began in 2019, when the implementation of the leniency programme was re-evaluated, with the aim of effectively fulfilling its dual function as a detection and investigation mechanism for the investigating authority. This stage addressed the first challenges that emerged from implementation of the programme by the COFECE. The main elements that have hampered leniency programme implementation in this last stage are outlined below. The strategies that have been implemented to tackle these obstacles are then addressed.

2. Main challenges in the implementation of the COFECE leniency and sanction reduction programme

6. As in several countries, Mexico has also seen a downward trend in the number of applications to the leniency programme. Although it is difficult to specify the specific causes of this trend in Mexico, five main factors have been identified that may have led to a decrease in the number of applications received.

- The first factor is the lack of transparency and clarity in the rules governing the processing of the programme, as well as the requirements and conditions that economic agents must meet to qualify for the benefit. As an example, economic agents and the COFECE had a different understanding of co-operation during the investigative procedure and in court proceedings. Therefore, the COFECE revoked the conditional immunity agreement on two occasions once the investigation stage was concluded,⁷ as it considered that the economic agents had failed to comply with their obligation to co-operate fully and continuously throughout the entire process. These revocations were also due to statements made by an applicant during the court proceedings, denying their participation in the agreement in question. As a

³ In accordance with Article 28 of the Political Constitution of Mexico, which is available at www.diputados.gob.mx/LeyesBiblio/pdf/CPEUM.pdf.

⁴ The LFCE is available in Spanish at www.diputados.gob.mx/LeyesBiblio/pdf/LFCE_200521.pdf.

⁵ The 2015 version of the guide is available at www.cofece.mx/wp-content/uploads/2017/12/guia-0032015_programa_inm.pdf.

⁶ In accordance with Article 26 of the LFCE.

⁷ Cases IO-001-2013 and IO-003-2015.

result, one of the companies whose conditional benefits were revoked filed an *amparo* (extraordinary constitutional appeal) in the Courts Specialised in Economic Competition, Broadcasting and Telecommunications, alleging that the Commission had violated its right to be heard, and the Federal Judiciary ruled in its favour. This created uncertainty for economic agents because they pointed out that the rules and procedure through which an immunity agreement would be revoked were unclear. Consequently, it was felt that the 2015 programme guide, being soft law, did not necessarily provide the tools needed for applicants to have a high degree of certainty as to how they would be treated if they were to apply to the leniency programme. Therefore, as described in the following section, regulations were sought that would 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, and the applicable procedures and penalties.

- The second factor that has hindered leniency programme application in Mexico is related to the criminal sanctions that economic agents may face for entering into a collusive agreement. Pursuant to Article 28, Section VII of the LFCE, the investigating authority has the power to bring an action before the Attorney General's Office for the crime provided in Article 254 bis of the Federal Criminal Code, which essentially coincides with the conducts prohibited by the LFCE for constituting absolute monopolistic practices. In this sense, the investigating authority may bring the action once the investigation procedure is concluded, presenting the finding of probable responsibility as an element of conviction.⁸ The investigating authority has filed several complaints in this way; however, the Attorney General's Office is yet to conclude the prosecution of these crimes.⁹ Therefore, it has not yet demonstrated effective consequences in criminal matters for economic agents that commit collusive agreements. In addition, according to the recommendation of the Organisation for Economic Co-operation and Development (OECD),¹⁰ close and pro-active co-operation with the Attorney General's Office is imperative, given the lack of competition specialists in this agency.
- The third factor is the SARS-CoV-2 pandemic, declared by the World Health Organization in March 2020.¹¹ In the specific case of the 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 re-activated, introducing measures that would allow the COFECE to continue its procedures while avoiding the spread of the virus, such as filing proceedings electronically. Although at no time did the investigating authority suspend receipt of applications to the leniency programme,

⁸ In accordance with Article 77 of the LFCE.

⁹ Collusive agreements are defined as a crime in the Federal Criminal Code, Book Two, Title Fourteen, Chapter I, Article 254 bis, www.diputados.gob.mx/LeyesBiblio/pdf_mov/Codigo_Penal_Federal.pdf.

¹⁰ This recommendation was made in the *OECD-IDD Peer Reviews of Competition Law and Policy: Mexico* (2020). The complete document is available at www.oecd.org/daf/competition/Mexico-Peer-Reviews-of-Competition-Law-and-Policy-en.pdf.

¹¹ World Health Organization, Timeline: WHO's response to COVID-19, www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline#event-19 (accessed 04 August 2022).

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 proceedings, especially verification visits. Therefore, a total of eight applications were submitted between 2020 and 2021, of which only one was international. To address these challenges, the COFECE has implemented various strategies on several fronts, as described in the following section.

- The fourth factor is the risk that economic agents may face claims for damages, especially in other jurisdictions, which the benefit of reduced penalties does not cover. A case was even identified in which the economic agent stopped co-operating under the leniency programme due to the threat of a lawsuit for damages in another country.
- Finally, the downward trend in the number of applications to leniency programmes globally, especially 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 2020.¹²

3. Lines of action to maintain incentives for the COFECE leniency and sanction reduction programme

7. To alleviate these factors, greater legal and procedural certainty was sought for economic agents interested in the leniency programme. It was therefore decided to issue regulatory provisions in 2020.¹³ The provisions serve as an official interpretation of competition law and have greater weight than a soft law document, such as the 2015 guide. In addition, prior to their issuance, the draft regulatory provisions were sent to different competition authorities for comments, to ensure that the leniency policy complies with international best practices and aligns with the basic principles of other jurisdictions. This last element not only solidifies the COFECE leniency programme, but also creates incentives for multinational companies to apply to leniency programmes in different jurisdictions, reducing the risk of double jeopardy. Consequently, the regulatory provisions of the COFECE leniency and sanction reduction programme specify who may apply to the programme; the application procedure; the conditions to obtain a unique marker for each file; what is understood as full and continuous co-operation by the applicants throughout the procedure (including both the investigation stage and subsequent court proceedings); the applicant's ability to present oral statements; the exclusive power of the Plenary to revoke the conditional benefit; the possibility of the investigating authority issuing a recommendation to the Plenary, once the investigation is concluded, to revoke the conditional immunity agreement with precise justification; the ability of the Technical Secretariat to notify the applicant during the court proceedings of a failure in its obligations regarding the programme; and finally, that the benefits are granted as long as all of the above are complied with. In short, the provisions clearly and concretely establish the rules regarding the processing and implementation of the leniency programme.

¹² In OECD (2022). *Competition Trends 2022*, Organisation for Economic Co-operation and Development, p. 26, www.oecd.org/daf/competition/oecd-competition-trends-2022.pdf.

¹³ The regulatory provisions are available at www.cofece.mx/wp-content/uploads/2020/03/DOF-4Marzo2020-01.pdf.

8. Prior to the final issuance of the provisions, a preliminary draft was issued for public consultation¹⁴ with the participation of national and international bar associations, including the American Bar Association, which issued five recommendations to the draft.¹⁵ These recommendations were addressed in the official document.

9. The issuance of new provisions resulted in a new leniency programme guide, issued in January 2021,¹⁶ ensuring that the application of competition policy in the country is clear, comprehensive, coherent and consistent. The issuance of these documents means that the Commission's actions are continually updated to comply with international standards and to promote the benefits offered by the programme to those who violate the LFCE. These regulatory changes help reinforce the programme incentives; however, as they were implemented less than two years ago in the changing context of the COVID-19 pandemic, measuring the effectiveness of these changes remains difficult. Therefore, a new analysis is needed in approximately three years to evaluate the impact of these changes on the effectiveness of the leniency programme as a tool for detecting and investigating absolute monopolistic practices. The Commission's strategy for detecting, investigating and sanctioning cartels must be addressed from several fronts. In terms of detection, the COFECE must be pro-active 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 programme by increasing the risk of detecting anti-competitive agreements. To ensure effective use of the available resources, the COFECE Strategic Plan¹⁷ establishes priority sectors¹⁸ for the Commission's actions. In addition, the investigating authority uses prioritisation criteria to initiate *ex officio* investigations.¹⁹ These are used in turn by the Directorate-General for Market Intelligence, which is responsible for reporting the initiation of *ex officio* investigations. With the aim of adapting to digital markets and increasing detection capabilities, the Directorate-General for Market Intelligence has created a DataLab Project, which uses specialised infrastructure to explore the performance of specific technologies in virtual spaces and assess their potential impact on competition. It is also able to exploit the possibilities offered by new data analysis techniques. Therefore, since 2014, at least half of the cases that have been initiated for absolute monopolistic

¹⁴ The public consultation took place between 15 October and 3 November 2019 and the preliminary draft is available at www.cofece.mx/wp-content/uploads/2019/10/AnteproyectoDRs-inmunidad.pdf.

¹⁵ The document issued by the American Bar Association on the preliminary draft of the regulatory provisions for the COFECE leniency and sanction reduction programme is available at www.cofece.mx/wp-content/uploads/2019/12/Opinion-ABA.pdf.

¹⁶ The new programme guide is available at www.dof.gob.mx/nota_detalle.php?codigo=5610359&fecha=26/01/2021#gsc.tab=0.

¹⁷ The Strategic Plan covers the 2022-2025 period and provides a road map to guide the Commission's actions over the next four years. This serves as an accountability and transparency document and can be accessed at www.cofece.mx/wp-content/uploads/2022/03/PE2022-2025_VF.pdf.

¹⁸ Food and beverages, transportation and logistics, financial sector, construction and real estate services, energy sector, health sector, public procurement and digital markets.

¹⁹ These criteria are the economic activities with potential competition problems, the impact or relevance of the economic activities, and the strategic priority of the sector. They are set out in COFECE (2017), *Principios Generales que Rigen el Desarrollo de las Investigaciones Conducidas por la Autoridad Investigadora* [General principles governing the conduct of investigations by the investigating authority], www.cofece.mx/cofece/images/Consulta/Principios_generales_AI_01062017.pdf.

practices have been *ex officio*, including cases initiated following an application for leniency (with the objective of maintaining the confidentiality of the applicant), which account for more than 30% of the total.

10. Subsequently, once an investigation has been opened, either *ex officio* or by complaint, the investigating authority must use the full spectrum of investigative tools available to effectively enforce the law and create incentives to apply to the leniency programme. In this sense, verification visits are the most useful tool as the head of the investigating authority has the power to issue a visit order without the need for judicial authorisation.²⁰ In addition, investigations may be kept confidential during the first 120 days of the proceedings, which allows the authority to conduct visits without providing information about the start of the investigation, increasing the possibility of obtaining useful information to support the case file. After this power was introduced,²¹ the number of applications to the leniency programme more than doubled. In addition, the use of this tool results in more robust cases, which effectively translate into sanctions. For example, at least one verification visit was conducted in 74% of cases that the COFECE has sanctioned since 2014. The alignment of these strategies strengthens the leniency programme by making its benefits more attractive to those who have participated in a collusive agreement.

11. To increase detection of cartels – and therefore leniency applications – the investigating authority has created a protocol for conducting verification visits in the context of the pandemic, thereby re-activating a key tool for conducting cartel investigations, which, in turn, increases the incentives of the leniency programme.

12. Currently, the investigating authority is re-evaluating the use of all available legal and regulatory tools to strengthen detection and raise the cost of collusion for economic agents.

13. In conclusion, Mexico's leniency and sanctions reduction programme for economic competition has been through a long process to become the solid tool for the detection and investigation of absolute monopolistic practices that it is today. However, this development has entailed and continues to entail a series of implementation challenges, which the Commission has detected promptly and effectively in order to implement the best solutions in the areas identified, in which it will continue its efforts. The most recent regulatory changes were the regulatory provisions to the leniency programme, which provided legal and procedural clarity to potential programme applicants, in addition to a guide that explains in detail the key elements of the provisions. Finally, the investigating authority has tools and powers that it seeks to implement in the coming years to effectively investigate anti-competitive behaviour, which will help create a more robust and solid leniency programme with clear incentives.

²⁰ Pursuant to Article 75 of the Federal Economic Competition Law, the head of the investigating 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 proceedings, which allows the authority to conduct visits in secret, increasing the possibility of obtaining useful information to support the case file.

²¹ Power established in the 2011 Reform.