

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 2 May 2018

Working Party No. 3 on Co-operation and Enforcement**Roundtable on challenges and co-ordination of leniency programmes - Note by
Mexico**

5 June 2018

This document reproduces a written contribution from Mexico submitted for Item 3 at the 127th Meeting of the Working Party No 3 on Co-operation and Enforcement on 5 June 2018.

More documentation related to this discussion can be found at

www.oecd.org/daf/competition/challenges-and-coordination-of-leniency-programmes.htm

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Mexico

1. Introduction

1. Leniency Programs emerged at the end of the 1990's and at the beginning of the 2000's. This investigative tool gained importance as it made the detection of cartels possible in exchange for cooperation with the antitrust agency. The first country to introduce a Leniency Program (Program) was the United States Department of Justice (DoJ) in 1978, followed by the European Union, which introduced a leniency policy in 1996.¹ By the end of 2012, all member states in the Organization for Economic Co-operation and Development (OECD) had “adopted leniency policies to ensure more effective detection and prosecution of cartels”.²

2. Mexico's Leniency Program in was introduced in 2006 when the Federal Economic Competition Law (FECL) was amended. The objective was to create a useful tool to detect cartels and collect information for effective competition law enforcement. 2007 saw the first Program applicant, but it was until 2011 that the former Federal Competition Commission (COFECO, as per the acronym in Spanish) first sanctioned cases with information provided by an applicant.³

3. In 2010, COFECO created Guidelines for the Leniency Program, which provided exposure and helped explain the benefits applicants could be granted, in accordance with international standards.⁴ COFECO had the power to grant fine reductions in exchange for economic agent's full cooperation with the agency. The Guidelines proved useful when 20 applications to the program were received in 2011 from both national and international cartels.

4. In 2013, a constitutional amendment resulted in the creation of a new competition commission. The Federal Economic Competition Commission (COFECE as per its acronym in Spanish) was created⁵ as an autonomous constitutional body, with full autonomy and independence. In 2014, a new Federal Economic Competition Law (FECL) was created,⁶ from which new Leniency Program Guidelines were drawn and published. The new agency, in charge of defending and advocating competition law in the country

¹ Richard Whish. (N/A). Leniency: Introduction, terminology and history. 18 Apr 2018, de King's College London. Web: <http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/sg%201%20call%20series/leniency%20-%20introduction,%20terminology%20and%20history.pdf>

² Organisation for Economic Co-operation and Development. (2012). Policy Roundtables- Leniency for Subsequent Applicants. 11 Apr, 2018, de OECD Sitio web: <http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf>

³ Files: IO-001-2010, IO-002-2011 and DE-020-2009.

⁴ International Competition Network. (2009). ANTI-CARTEL ENFORCEMENT MANUAL. 11 Apr, 2018, de ICN Web: <http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf>

⁵ The consolidated Law was published in the DOF on May 23rd, 2014

⁶ Published in the Federation's Official Gazette (DOF, for its acronym in Spanish) on May 23rd, 2014

saw its investigation area (Investigative Authority) separated from the area in charge of conducting trial-like procedures. The Leniency Program has consolidated over the past few years; a total of 130 applications have been received since its creation. In 2016, 26 applications were submitted; the most ever to date.

5. This paper will analyze the challenges COFECE has faced during the implementation of the Program. However, it will focus on a major challenge; how to increase Leniency applications and improve their quality (for cartel detection). The first chapter analyzes the challenges when implementing COFECE's (Commission) Leniency Program. The second chapter presents proposed improvements for COFECE and other jurisdictions, followed by a section on conclusions and final remarks.

2. COFECE's Leniency Program: Implementation Challenges

6. COFECE's Leniency Program derives from article 103 from the FECL; Regulatory Provisions articles 114, 115 and 116.⁷ The Leniency Program Guidelines published in 2014, available on the Commission's website provide individuals and firms with a tool to facilitate understanding.

2.1. Program Design: COFECE's Leniency Program⁸

7. The Program allows individuals or firms to report engagement, participation, contribution to, facilitation or instigation of a cartel. In doing so, they are required to provide COFECE with evidence and cooperate fully and permanently. First with the Investigative Authority during the investigation period and subsequently during the trial-like procedure. Applicants that meet these requisites may receive the following benefits: exception from criminal liability, and partial or total⁹ reduction¹⁰ of applicable fines or penalties according to the infringement of the FECL. The process is divided into three stages. During the first, the applicant explicitly requests to join the program by providing the specified information:

- Applicant's identity
- A statement regarding the applicant's intent to join the Program

⁷ The Program was created in 2006, therefore it has been in force for more than a decade.

⁸ COFECE's Leniency Program refers to the program that derived from the New FECL, and its Regulatory Provisions and the Guidelines published in 2014.

⁹ The sanction to first-in applicants is the minimum applicable fine; one UMA (Official Unit for Fine Determination), which in 2018 was set at 80.60 MXN, approximately 4.20 USD, according to April 25th's exchange rate.

¹⁰ 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.

- Applicant's or the legal representative's contact information
- The industry or the market and the goods or services in which the absolute monopolistic¹¹ (regularly know as cartel or collusive agreement) practice was committed

8. 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. With the code, the Investigative Authority will grant a marker.¹²

9. Additionally, the applicant will be informed of the date, time, and place he/she will meet with the Investigative Authority. During the meeting, the applicant is expected to deliver sufficient documents and information to allow the Investigative Authority to initiate an investigation or to presume the existence of an absolute monopolistic practice.

10. Should the Investigative Authority determine the information submitted by the applicant provides sufficient evidence for an investigation procedure to initiate or to presume the existence of an absolute monopolistic practice, conditional leniency will be granted.¹³ Nevertheless, Conditional Leniency will be revoked if the applicant does not fully and continuously cooperate during the investigation procedure¹⁴ (stage 2) and during the trial-like procedure (stage 3).

11. The Board of Commissioners issues a final resolution and determines 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 and the trial-like procedures. If the Board of Commissioners decides the applicant has cooperated

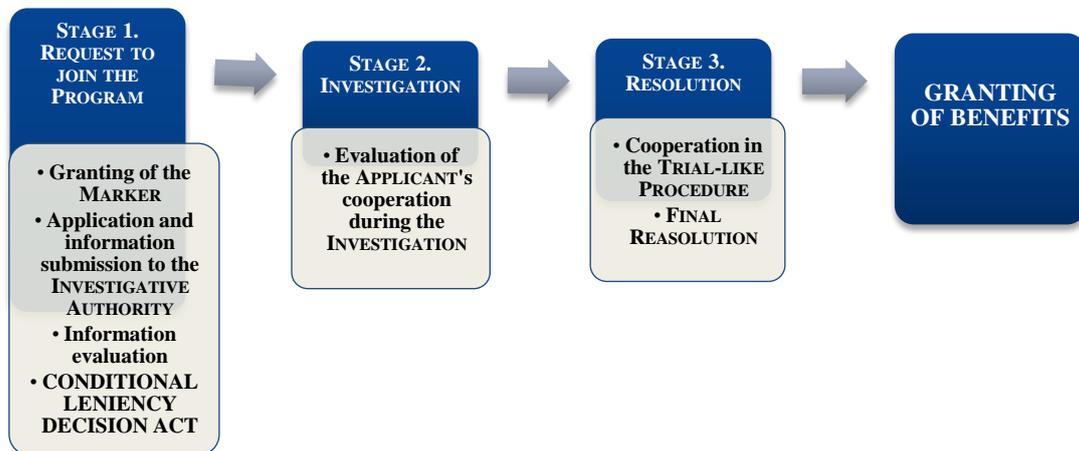
¹¹ The term absolute monopolistic practices is defined in the FECL.

¹² The marker is a recognition granted by the Investigative Authority to guarantee the chronological preference of an applicant in relation to other applicants for a limited time. Applicants will hold their Marker and order of preference while the Investigative Authority assesses the information's sufficiency and appropriateness.

¹³ Decision issued by the Investigative Authority which grants an applicant the Program's conditional benefits, through a letter which includes the chronological order of the application (code), the maximum percentage the fine may be reduced, and the applicant's obligation to fully and permanently cooperate with COFECE until she/he receives receiving definitive leniency benefits.

¹⁴ Full and continuous cooperation entails, additional to initial information provided to the Investigative Authority, for applicants to: i) Terminate participation in the absolute monopolistic practice, unless otherwise directed by the Investigative Authority, ii) Maintain confidentiality of the information provided to COFECE, iii) Expeditiously 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, by allowing unannounced inspections on their premises to take place, as well as providing documents or information requested and attending compulsory interviews, v) Carry out the necessary actions to assure individuals who participated in the reported absolute monopolistic practice cooperate during the investigation, and vi) Ensure no information regarding the absolute monopolistic practice, individuals or companies involved in the alleged conduct is destroyed, falsified or concealed from the Investigative Authority.

fully and continuously, it will issue a final leniency decision and the applicant will receive: a total or partial reduction of the applicable fines; immunity for individuals from receiving disqualification; and criminal immunity for individuals for engaging in an absolute monopolistic practice.



2.2. Leniency Development and Progress

12. In 2011, the Law was subject to a set of modifications, with which COFECO received the power to conduct dawn raids and reproduce the electronic information collected. Also, the maximum applicable fines were modified from a fixed cap to a percentage which depended on the offender's income. The Federal Criminal Code was modified to criminalize absolute monopolistic practices in Article 254 bis. The improvements were made to increase the possibility of detecting cartels, they added to the deterrent factor, and created incentives to join the Leniency Program and cooperate with the authority, as the cost of engaging in these practices became higher with the added criminal responsibility.

13. From 2006 to 2012, 61 applications were registered, 45 of which were presented after the implementation of the amendments to the FECL in April 2011, meaning that 42.6% of total applications in this period were presented in 2012. Applications by international and national economic agents increased 44.2%, reflecting the effectiveness of the 2011 amendments. Also, the implementation of unannounced inspections proved to be a useful tool when conducting investigation.

14. The Federal Economic Competition Commission (COFECE) was created as a constitutional autonomous body in 2013 through a constitutional reform. In 2014, the new Competition Law was issued. As a result, the minimum criminal penalty was increased from 3 to 5 years. In 2014, new Guidelines were published, the problems identified in the previous Guidelines were corrected.

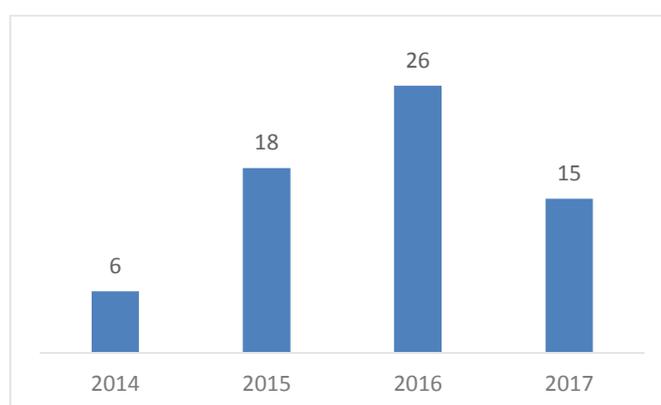
15. By 2014, COFECE received powers to conduct dawn raids and reproduce electronic information collected. This increased possibilities for detecting cartels. COFECE conducted 32 dawn raids in 2016 and 2017. It is noteworthy that last year

COFECE issued the highest sanction ever-imposed by the Commission, which totaled 1,100 million pesos (MXN) (equivalent to approximately 60.4m USD).¹⁵ These powers and sanctions contribute to deterring competitors from joining a cartel, and strengthen the incentives to join the Leniency Program, as the price and likelihood of getting caught increase.

2.3. The Program Today

16. From 2013 to 2014 the number of applications decreased. Institutional changes introduced, as a response to the 2013 constitutional amendment could explain the reduction of applications. Notwithstanding, since the Program's implementation, the Commission has received a total of 130 applications. The Program has consolidated over the past three years, i.e. in 2016, 26 applications were submitted, see Figure 1.

Figure 1. Applications Received (2014-2017)



Source: COFECE, 2018.

17. The Program has proven its effectiveness over the past four years, as 9 cases in which at least an application was submitted, resulted in sanctions (Table 1). Additionally, from the investigations that were opened during the same period, 18.5% derived from leniency applications.

Table 1. Cases Sanctioned where at Least One Application was Submitted (2014-2018)

2014	Hermetic compressors
2015	Passenger transportation services in Chiapas

¹⁵ The case was related to collusive agreements conducted by financial institutions in retirement fund management services. From: Comisión Federal de Competencia Económica. (2017). Sanciona COFECE a Afores por Pactar Convenios para Reducir los Traspasos de Cuentas Individuales. 10 Apr, 2018, from COFECE. Web: <https://www.cofece.mx/sanciona-cofece-a-afores-por-pactar-convenios-para-reducir-los-traspasos-de-cuentas-individuales/>

2016	Air conditioning compressors
	Crane services in Guerrero
2017	Retirement fund services
	Maritime transportation
	Latex gloves
	Media monitoring
2018	Latex products

Source: COFECE 2018.

2.4. Implementation Challenges

18. When analyzing the numbers, there is a significant drop in applications from 2016 to 2017, 11 applications less than the previous year. It is too soon to determine contributing factors. COFECE will be revising the Program and the Guidelines throughout 2018 to identify areas for improvement, given the last Guidelines were created in 2014 and the Program was created more than a decade ago. The following are some of the major challenges COFECE has faced when implementing the program.¹⁶

19. One of the major benefits that stem from the creation of a Leniency Program is the deterrence of economic agents from engaging in cartel behavior. This requires fear of being caught to be present and self-evident. As cartel detection grows and criminal complaints become a tangible possibility, applications should increase, however, these predictions were not fulfilled last year (2017), given the number of applications reduced by 11 and international cartels did not file to join.

20. The Commission's Program should be predictable; potential applicant, i.e. economic agents who have been involved in a cartel, must have certainty of how it works, who is eligible, and the ultimate benefits that can be granted. The FECL is a general law which must be applicable regardless of case, market and time. In this sense, it must be interpretable to fit all circumstances in which anticompetitive practices take place. Hence, Regulatory Provisions and the Guidelines are created to interpret the Law, to explain the procedural aspect of the Program and its subject matter; they serve as dissemination documents for public consultation.

21. Nonetheless, regulation is only one factor that may hinder understanding of the program. As with most leniency policies "lack of clarity mainly due to the subjective wording [... and] an inherent lack of certainty as to how a firm would be treated once it approached the Commission" are issues that arise.¹⁷ This results in a limited part of the

¹⁶ Data collected and calculated internally by COFECE's staff

¹⁷ Jiří Šorf. (2012). THE LENIENCY POLICY. 11 Apr, 2018, de CHARLES UNIVERSITY IN PRAGUE. Web: <https://is.cuni.cz/webapps/zzp/download/120093863>

population understanding the program, i.e. lawyers (who must advise their clients of their available options when they participate in a cartel) and competition and antitrust specialists.¹⁸

22. Therefore, potential applicants and all economic agents should be aware of the existence of the Program. However, when evaluating public perception of the Leniency Program in a study last year (2017), most executives surveyed confirmed they had no knowledge of its existence, the same was observed in opinion leaders and public officers.¹⁹ In response, COFECE is taking actions to publicize the Program and generate a competition culture in Mexico.

23. The Commission's actions to foster competition in national markets include: issuance of recommendations on competition matters (e.g. recommendations to promote free competition in public procurement),²⁰ drafting of reports on relevant sectors (e.g. Report on the Conditions of Competition in the Agri-food Sector),²¹ proposals for economic growth (Platform for Economic Development 2018-2024),²² issuance of opinions (e.g. opinion issued to the Energy Regulatory Commission -CRE as per its acronym in Spanish, on the flexibilization program for gasoline and diesel consumer prices),²³ among others. In terms of the Program's promotion, COFECE held a conference last year (2017) with the Attorney General to find cooperation opportunities for the enforcement of competition law – and Leniency Program, for effective prosecution of absolute monopolistic practices.

24. Another significant challenge when implementing the Program is the array of restrictions imposed by both the FECL and the Federal Criminal Code regarding available cooperation mechanisms with the Office of the Attorney General (agency in charge of conducting the criminal investigation for prosecution and enforcement) and COFECE, as

¹⁸ Mark Leddy. (2012). Cartel leniency programs: Some caveats. 15 Apr, 2018, from Concurrences. Web: <http://awa2012.concurrences.com/academic/article/cartel-leniency-programs-some>

¹⁹ McKinsey&Company. (2017). Estudio y análisis de la percepción sobre temas de competencia económica y la labor de la COFECE. 10 Apr, 2018, de COFECE. Web: <https://www.cofece.mx/wp-content/uploads/2018/01/Estudio-labor-COFECE-17.pdf#pdf>

²⁰ Comisión Federal de Competencia Económica. (2016). Publica Cofece Recomendaciones para Promover la Competencia en Contrataciones Publicas. 19 APR, 2018, de COFECE. Web: <https://www.cofece.mx/publica-cofece-recomendaciones-para-promover-la-competencia-en-contrataciones-publicas/>

²¹ Comisión Federal de Competencia Económica . (2015). Reporte sobre las condiciones de competencia en el sector agroalimentario. 18 Apr, 2018, de COFECE. Web: <https://www.cofece.mx/reporte-sobre-las-condiciones-de-competencia-en-el-sector-agroalimentario/>

²² Comisión Federal de Competencia Económica. (2017). Reporte Mensual, Diciembre 2017. 17 Apr, 2018, de COFECE. Web: <https://www.cofece.mx/wp-content/uploads/2018/01/Reporte-Mensual-diciembre-2017-ver1.pdf#pdf>

²³ Comisión Federal de Competencia Económica. (2016). Remite Cofece a la CRE Opinion en Materia de Competencia en torno al Cronograma de Flexibilizacion de los Precios al Publico de las Gasolinas y Diesel. 18 Apr, 2018, de COFECE. Web: <https://www.cofece.mx/remite-cofece-a-la-cre-opinion-en-materia-de-competencia-en-torno-al-cronograma-de-flexibilizacion-de-los-precios-al-publico-de-las-gasolinas-y-diesel/>

well as the data that can be exchanged. This restrains the federal agencies from effectively enforcing criminal sanctions. The Program stipulates applicant's full and continuous cooperation is limited to COFECE's procedures. This translates into harder criminal prosecution, as applicants are not compelled to cooperate with the Office of the Attorney General.

25. According to Article 28, section VII of the FECL, the Investigative Authority has the power to file a criminal complaint before the Attorney General for cartel cases. The complaint must be filled with the Statement of Probable Responsibility as proof that antitrust laws have been violated. Nevertheless, according to the Law, applicant's identity is confidential and shall not be made public under any circumstances. This may limit COFECE from sharing the names of the applicants with other law enforcement agencies, thus complicating the criminal case process.

26. The final challenge applicable to the national aspect of the Program's implementation is the pressing need to align competition and corruption incentives to jointly fight cases in which illicit competition conducts are committed with acts of corruption. In this regard, it is important to point out, that the 2017 Corruption Perceptions Index ranks Mexico in 135th place on the list of 180 countries with a score of 29, one point less than the previous year. These results make Mexico the worst ranked country in both the OECD and the G-20.²⁴ However, COFECE's powers derive from the FECL, excluding all corruption acts from its powers.

27. The difference between anticompetitive acts and acts of corruption is that anticompetitive acts consist of activities performed by economic agents to maximize their profits in markets through acts that diminish, damage, block or condition competition, or establish entry barriers to competitors, whereas acts of corruption are actions through which economic agents execute payments – not necessarily economical, to third parties (mainly agents who hold public office where impunity exists) to obtain an illicit profit.

28. COFECE's Strategic Plan 2018-2021²⁵ establishes the Commission's priority sectors according to their contribution to the national economy's prosperity, as well as and effectively identifies those sectors which are vulnerable to anticompetitive practices, as is the case of cartels in public procurement, which according to the OECD, is also susceptible to acts of corruption.²⁶ Even with legal limitations to prosecute corruption acts, one of COFECE's goals is to indirectly fight these conducts, as they tend to occur with monopolistic practices. As is the Brazilian renounced case, *operation car-wash*,²⁷ in

²⁴ "No Improvement for Mexico on the Global Corruption Index." Mexico News Daily, 23 Feb. 2018, mexiconewsdaily.com/news/no-improvement-on-the-corruption-index/

²⁵ Comisión Federal de Competencia Económica. (2018). Plan Estratégico 2018-2021. 19 Apr, 2018, de COFEE. Web: https://www.cofece.mx/wp-content/uploads/2018/02/PE_2018-2021.pdf#pdf

²⁶ Organisation for Economic Co-operation and Development. (2014). FIGHTING CORRUPTION AND PROMOTING COMPETITION. 20 Apr, 2018, de OECD. Web: [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2014\)12/FINAL&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2014)12/FINAL&doclanguage=en)

²⁷ Popularly known as Oderbetsch. From Ron Knox. (2017). CADE: Amnesty-plus driving Operation Car Wash. 21 Apr, 2018, de Global Competition Review. Web: <https://globalcompetitionreview.com/article/1143003/cade-amnesty-plus-driving-operation-car-wash>

which public procurement collusion and corruption were prosecuted jointly by Authorities, which resulted in more than 240 criminal charges against the possible perpetrators, and 118 arrest warrants, including business people and politicians.²⁸

29. The above are the challenges identified applicable specifically to COFECE's Leniency Program. Nonetheless, there are other challenges that are non-specific to COFECE, but apply to most antitrust agencies' leniency or amnesty programs.

30. Statistics from other jurisdictions reveal 2016 saw a decrease in leniency program applications, as countries with the most consolidated programs showed. When the European Commission's Directorate-General for Competition (DG Comp), Cecilio Madero, was asked about the trend in leniency applications over the last two years he said, "it is not going up".²⁹ It is too early to declare a trend, yet Mexico seems to be going down the same path; the Commission received 26 applications in 2016,³⁰ whereas in 2017 only 15 economic agents applied to the Program, none of which were related to an international cartel.

31. It is crucial to collect more data in the years to come to determine if there is a clear international tendency in application decline or if other factors intervened in 2016, and possibly 2017.³¹ It may be the case that, as a consequence of active antitrust enforcement over the past years, the number of cartels has decreased, hence, lowering the number of international cartel applications. To illustrate this, the following chart compiles the number of leniency applications from 2012-2016, from seven different jurisdictions.

Table 2. International Leniency Applications

Country	2012	2013	2014	2015	2016
Germany	51	64	72	76	59
European Union	41	33	46	32	24
Brazil	10	10	10	69	73
United Kingdom	13	22	32	24	21
Canada	19	28	43	51	37

²⁸ Transparency International. (2016). OPERATION CAR WASH TASK FORCE: PROSECUTORS - BRAZIL. 19 Apr, 2018, de Transparency International Organization-

Web: http://www.transparency.org/getinvolved/awardwinner/operation_car_wash_task_force

²⁹ Pallavi Guniganti. (2018). Leniency applications are "not going up", says DG Comp official. 22 Apr, 2018, de Global Competition Review. Web: <https://globalcompetitionreview.com/article/1159219/leniency-applications-are-%E2%80%9Cnot-going-up%E2%80%9D-says-dg-comp-official>

³⁰ From those 26, 2 were related to international cartels.

³¹ COFECE data is available for 2017, but the GCR, so far gathers information until 2016.

Mexico	26	4	6	18	26
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Source: COFECE 2018.

32. The decrease could be attributed to the increasingly rapid development of digital economies. This, considering that over the past 10 years the most profitable markets have shifted from banks and energy to information and technology.³² Today, more than 46% of the total world population has access to the Internet,³³ which has direct implications on how people purchase goods and services, but most importantly, it changes the mechanisms through which companies collude, making it increasingly difficult to detect and sanction these conducts with the use of traditional tools.

33. Another major factor that could influence these numbers is the interconnectedness of economies. For example, 50% of world trade occurs due to the more than 300 bilateral Free Trade Agreements around the world.³⁴ This accentuates the size and power of the largest international corporations, given that around 10% of global GDP is held by these companies.^{35,36} As a result, multibillion profit companies may have little or no incentives to join Leniency Programs, because:

- If they cooperate with a jurisdiction, it could result in an investigation-sanction, domino effect; as agencies around the world identify that such company also operates in its country and that the same anticompetitive conduct could be affecting its markets.
- If companies were to apply to Leniency Programs in all jurisdictions in which they are affecting markets, they may not get the same marker in all of them, which would result in double jeopardy.
- They may not want to share the mechanisms they are using to collude, as they seem to be working and very difficult to detect.

³² In 2006 the company with biggest market capitalization was Exxon Mobil (in 2016 it was the 5th), as for 2016, the three major ones were tech-giants; Apple, Alphabet and Microsoft. From Alex Gray. (2017). These are the world's 10 biggest corporate giants. 11 Apr, 2018, de World Economic Forum. Web: <https://www.weforum.org/agenda/2017/01/worlds-biggest-corporate-giants/>

³³ World Bank Data. (2018). Individuals using the Internet . 11 Apr, 2018, de WB. Web: <https://data.worldbank.org/indicator/it.net.user.zs?end=2016&start=1960&view=chart>

³⁴ World Trade Organization. (2017). Welcome to the Regional Trade Agreements Information System. 11 Apr, 2018, de WTO Sitio web: <http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx>

³⁵ According to the World Economic Forum, the 10 biggest in 2016 were, Apple, Alphabet, Microsoft, Berkshire Hathaway, Exxon Mobil, Amazon, Facebook, Johnson & Johnson, General Electric and China Mobile. Ibid.

³⁶ Richard Dobbs, Jonathan Woetzel, and James Manyika. (2015). The new global competition for corporate profits By Richard Dobbs, Tim Koller, Sree Ramaswamy, Jonathan Woetzel, James Manyika, Rohit Krishnan, and Nicolo Andreula. 12 Apr, 2018, de McKinsey&Company. Web: <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-new-global-competition-for-corporate-profits>

- The use of algorithms and big data to take financial and commercial decisions (e.g. price allocation) may have negative effects in the markets that are difficult to identify.
- Companies may not self-report in jurisdictions where the mechanism of class action exists, in fear of being subject to this procedure.

34. Apart from the size of companies, collusive agreements occur tend to be more sophisticated, and therefore harder to detect. This means, that as cartel detection tools – such as leniency programs– improve, so do cartel’s strategies to hide (as regularly happens with pricing algorithms),³⁷ given that cartels tend to simulate business to ensure effectiveness “and participants had to learn to work with one another to build more sophisticated structures over time.”³⁸

35. In addition, antitrust agencies’ cooperation with other agencies is limited by their regulation and leniency programs. Mexico has been active in implementing cooperation tools to its competition policy, through the use of federal mechanisms such as the Mexican Secretariat of Foreign Affairs,³⁹ Free Trade Agreements and Implementing Competition Agreements.⁴⁰

36. These mechanisms, although useful, are sometimes too broad for antitrust enforcement, particularly in cartel cases. In response, COFECE has carried out two main actions to broaden cooperation, these are: celebration of Memorandums of Understanding,⁴¹ and bilateral cooperation⁴² with agencies on specific subjects. These

³⁷ Sophie Lawrance and Matthew Hunt. (2017). Will pricing algorithms be the European Commission’s next antitrust target? . 24 Apr, 2018, de Lexology. Web: <https://www.lexology.com/library/detail.aspx?g=b9aca10a-ba0e-4249-81a5-5eab63b90876>

³⁸ Jeffrey Fear. (2006). Cartels and Competition: Neither Markets nor Hierarchies. 24 Apr, 2018, de Harvard Business School. Web: <https://www.hbs.edu/faculty/Publication%20Files/07-011.pdf>

³⁹ For example, the Commission has been able to give notice to companies and individuals abroad and has conducted similar proceedings to depositions in other countries, which has been particularly useful throughout investigation procedures of international cartels.

⁴⁰ In the case of Mexico, the FTAs that include competition clauses are celebrated with: The United States and Canada (North America Free Trade Agreement-NAFTA), the European Union (FTA EU-MX), Bolivia, Chile, Colombia (G-2), Uruguay, Venezuela, Costa Rica, El Salvador, Guatemala and Honduras (Triángulo del Norte), Nicaragua, and Israel.⁴⁰

⁴¹ COFECE has celebrated one with an international organization and five with antitrust agencies: Memorandum of Understanding between the Administrative Council for Economic Defense of the Federal Republic of Brazil (CADE) and the Federal Economic Competition Commission of Mexico (COFECE) (30 November 2016), Agreement on Antitrust Co-operation Between the Federal Economic Competition Commission of Mexico (COFECE), of the One Part, and the he Superintendence of Industry and Commerce (SIC) of Colombia, Agreement between the Federal Antimonopoly Service of the Russian Federation and the Federal Competition Commission of the United Mexican States on Co-operation in the field of competition policy (15 June 2010), Agreement between the Federal Competition Commission (CFC) of Mexico and the FNE on enforcement of legislation concerning competition matters (14 June 2004) and Arrangement between the Fair Trade Commission of the Republic of Korea and the Federal Competition Commission of the United Mexican States Regarding the Application of Their Competition Laws (23 April 2004). COFECE has also an existing MoU with the Inter-American Bank for Development. Information on MoUs with other jurisdictions from: Organisation for Economic Co-operation and Development. (2017). LIST OF AGENCY-TO-AGENCY MEMORANDA OF

tools and mechanisms have proved to be significantly useful, mainly, during investigation procedures. However, none relate directly to Leniency Programs. The above-mentioned factors will be analyzed in the following chapters, along with proposed improvements to tackle them.

3. Proposed Improvements

37. The proposed improvements will focus on what is applicable at a national level and then, internationally. As previously mentioned, a decrease in leniency applications has been perceived; Cecilio Madero⁴³ said he is unsure of whether the number of applications is simply cyclical, or an indication that cartelists are waiting to see whether they are detected.⁴⁴

38. In this sense, even though COFECE's Leniency Program, complies with international best practices⁴⁵ and has a consistent number of applications when compared with other jurisdictions, there was an evident drop from 2016 to 2017 (respectively 26 and 15 applications were received). In this regard, COFECE's greatest challenge is to attract more leniency applicants and of better quality. The latter refers to applicants that provide information for the detection and initiation of an *ex officio* investigation and applicants from international cartels (considering last year no applications from international cartels were submitted). This last objective could be better achieved through the strengthening of international cooperation, an aspect in which some of the proposed improvements focus on.

39. Considering the FECL is a general competition law, COFECE's Leniency Program may be subject to legal ambiguity. The Guidelines and Regulatory Provisions help clarify relevant matters in the Program. The existing Leniency and Immunity Guidelines will be revised throughout 2018 to clearly explain how it works, who is eligible, and the benefits that can be granted if eligible applicants fully cooperate with COFECE. As stated in the ICN Anti-cartel Enforcement Manual for an effective Leniency Program to exist:

UNDERSTANDING (MOUS). 11 Apr, 2018, de OECD. Web: <https://www.oecd.org/daf/competition/mou-inventory-list.pdf>

⁴² COFECE's internship program for public officials has included participation from: Brazil, Argentina, Panama and Ecuador, and it has received technical assistance from other jurisdictions (i.e. the United States Department of Justice (DoJ) has provided technical assistance, with emphasis on key issues such as e-commerce, false and deceptive advertising, electronic payments, financial services, cross border complaints, privacy and data security. Also, in 2016, the Federal Trade Commission provided training on credit reporting, data brokers and mobile device tracking, as well as effective investigation tools for the health care sector. From United States Federal Trade Commission. (2014). FY2014 TECHNICAL ASSISTANCE REPORT. 12 Apr, 2018, de FTC. Web: <https://www.ftc.gov/system/files/documents/reports/ftc-office-international-affairs-technical-assistance-report-fy2014/fy2014oiatarpt.pdf>)

⁴³ European Commission's Directorate-General for Competition

⁴⁴ Ibid.

⁴⁵ Form a list of fifteen requirements, COFECE's Leniency Program includes 13 of the list established in the. Anti-cartel Enforcement Manual, p. 22-23

40. There must be transparency and certainty in the operation of a leniency policy. Competition agencies need to build the trust of leniency applicants and their attorneys by consistently applying the leniency policy. A leniency applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports anticompetitive conduct and what the consequences will be if it does not come forward. Therefore, competition agencies should ensure that their leniency policies are clear, comprehensive, regularly updated, well publicized, coherently applied, and sufficiently attractive for the applicants in terms of the rewards that may be granted.⁴⁶

41. In the new Guidelines, COFECE intends to provide greater clarity on the procedural aspect of the Program and applicant's obligations when applying to the Program (as well as the requirements that must be fulfilled for the granting of leniency benefits). The new Guidelines will be submitted by the end of 2018 for public consultation, so an improved set of guidelines is made available to enhance the Program's success by 2019. Given the high level of unfamiliarity in respect to the Program, it must be advertised for the public to become familiar with its benefits and the risks of not joining (in case of cartel participants).

42. Additionally, COFECE will examine the possibility of implementing new mechanisms for cartel participants to cooperate with the Commission, if first-in application is no longer available or, if the investigation procedure of the Investigative Authority has concluded. That is, the objective is to expand the available options for both economic agents and COFECE, in the case of the former, to reduce applicable sanctions and for the latter, to effectively enforce the FECL.

43. However, it is important to note confidentiality is one of the Program's core principles, which limits the Commission's ability to increase the Program's transparency. Accordingly, applicant's identity is confidential, inhibiting the Commission from providing the names of the program's beneficiaries at the time a criminal complaint is filed. One option could be for applicants to sign a waiver allowing the Commission to share information with the Office of the Attorney General. However, given this option would be voluntary, COFECE must closely collaborate with the Office of the Attorney General, in order to increase the enforcement probabilities. To do so, it is necessary, to establish cooperation mechanisms between both authorities. Furthermore, instruments to share information must be defined, without violating legislation regarding personal data protection.

44. As a first step, the Commission will continue to gain experience in the field by submitting more criminal complaints,⁴⁷ to ensure it is using all tools at its disposal to guarantee competition conditions are met in national markets. Both businesses and individuals in Mexico should expect to see more criminal enforcement actions in the future, as COFECE is planning to increase the number of criminal actions. This, will continue to consolidate the Program and send a clear message that competition authorities will use all available tools to enforce competition law.

⁴⁶ Ibid

⁴⁷ In February last year (2017), COFECE exercised this power for the first time and filled a complaint before the Attorney General against individuals for committing the crime of absolute monopolistic practices, regarding public purchases in the health sector.

45. Secondly, as applicant's cooperation is limited to COFECE's procedure, the Commission must work closely with the Office of the Attorney General, to collect, during the investigation procedure the evidence that will make possible, both criminal and antitrust enforcement. In this regard, the Program was created to ensure cartel detection would be ever-present, reason for which sanctions were increased and prison became a possibility for individuals. This increases the incentives for economic agents to join the Program, as possibilities of detection increase.

46. Other actions, that involve agency coordination in Mexico are also part of COFECE's reactive enforcement. Competition and anti-corruption laws have the common goal of solving failures and dysfunctions in the markets to ensure economic agents compete under fair conditions; thus, consumers get the best value for their money. Where corruption exists, competition is negatively affected, therefore in 2015 the National Anticorruption System (NAS) was created, a system that intends to achieve coordinated anticorruption strategies among authorities.⁴⁸ The new system entered into force in July 2017, with new regulations that include a Leniency Program based on COFECE's Program, allowing individuals who have been involved in acts of corruption to self-report and receive reduced sanctions.⁴⁹

47. Though cooperation with this new System, COFECE will be able to detect a higher number of cartel cases, especially, bid-rigging, in which the NAS has experience and data related to significant markets and sectors. In order to improve the degree of cooperation with the NAS, it would be useful to celebrate a Memorandum of Understanding (MOU) to align objectives and strategies when fighting corruption and antitrust cases.

48. In the international sphere, in 2009, the International Competition Network (ICN) published the Antitrust Manual, which included a Chapter on "Defining and Implementing an effective leniency policy". The document compiled the most relevant issues discussed in the 2004 Leniency Workshop. It introduced a list of best practices concerning the drafting and implementation of effective leniency policy. The list was updated, as part of the manual in 2014, which included fifteen best practices related to leniency programs,⁵⁰ thirteen of which are compiled in the Commission's Leniency Program.⁵¹

⁴⁸ Diario Oficial de la Federación. (2015). DECRETO por el que se reforman, adicionan y derogan diversas disposiciones de la Constitución Política de los Estados Unidos Mexicanos, en materia de combate a la corrupción. 12 Apr, 2018, de Secretaría de Gobernación. Web: http://www.dof.gob.mx/nota_detalle.php?codigo=5394003&fecha=27/05/2015

⁴⁹ Art. 89 Ley General de Responsabilidades Administrativas, Diario Oficial de la Federación. (2015). LEY GENERAL DE RESPONSABILIDADES ADMINISTRATIVAS. Apr 10, 2018, de Secretaría de Gobernación. Web: <http://www.diputados.gob.mx/LeyesBiblio/pdf/LGRA.pdf>

⁵⁰ See full document in the following link: <http://www.internationalcompetitionnetwork.org/uploads/library/doc1005.pdf>

⁵¹ i) To make lenient treatment available when the leniency applicant facilitates the competition agency's ability to prove a cartel, ii) To make lenient treatment available when the competition agency is unaware of the cartel and when the competition agency is aware of the cartel but it does not have sufficient evidence to prosecute the cartel, iii) To use markers in the leniency application process and grant extensions to the applicant while allowing it to preserve its marker periods where a leniency applicant is making a good faith effort to complete its application in a timely

49. The ICN's document is of great value when creating or improving a leniency program, especially if it is regularly updated. Nonetheless, it would be useful, not only to have a check-list list of best international practices, but also a list of general concepts (e.g. marker, applicant, cartel, etcetera) that must be included in all Leniency Programs, now that all member countries of the OECD have a functioning program.⁵² This would enable agencies update or analyze if their program complies with the "concept check-list", helping reduce legal uncertainty. Also, if concepts from leniency/amnesty programs align, cooperation between agencies would be easier, thus diminishing the gap between programs from emerging and developed countries. The proposed list could be created by an international body, such as the ICN or the OECD to avoid biases.

50. With regards to the design of leniency programs, most include the principle of cooperation by asking applicants if their cartel affects other markets and if so, if they have applied to leniency in all jurisdictions in which their conduct has effect (thus, asking for a waiver to have communication with such agencies).⁵³ However, it could be fruitful to extend such cooperation by establishing the principle of reciprocity when antitrust agencies receive an international cartel application. For example:

1. COFECE receives an application and questions the applicant if the reported practice has affected other markets.
2. The Applicant states that its cartel could be affecting that same market but in country B.
3. COFECE encourages the applicant to file for Leniency/Amnesty before the antitrust agency in country B (so long as country B has a consolidated Leniency Program).
4. If the applicant files for leniency, the antitrust agency in country B, may be more prone to urging applicants to file for COFECE Leniency Program when/if it receives an applicant that is affecting a Mexican market (in such case communication amongst agencies could occur).

manner, iv) To ensure that markers and extensions to marker periods maintain the incentives for cartel participants to self-report their involvement in a cartel, v) For the requirements for leniency to include full and frank disclosure of relevant information or evidence and ongoing cooperation by the leniency applicant, and if applicable, the leniency applicant's employees, vi) To provide lenient treatment (less than full leniency) for second and subsequent cooperating cartel participants, vii) Where applicable, to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred, viii) To encourage a leniency applicant to provide a waiver that allows a competition agency to discuss the application with relevant counterpart agencies, ix) To keep the identity of the leniency applicant and any information or provided by the leniency applicant confidential, x) To have maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures, the conditions for granting leniency and responsibilities and contact information for competition agency officials, xi) In a parallel system, it is important that the application of the leniency policy for civil and criminal cartel conduct is clearly articulated, xii) To ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, if any, have been imposed xiii) To encourage leniency applications through education and awareness campaigns

⁵² From Chairman letter: Roundtable on "Challenges and co-ordination of leniency programmes" (5 June 2018). OECD. March 2018.

⁵³ Ibid. pg. 5

51. As cooperation is generally stated in most leniency programs, the principle of agency reciprocity could also be included. To accomplish this, it would be useful for an internationally recognized organization, as the OECD, to stipulate it as an international best practice, thus, encouraging its use, and, as a result, further international cooperation.

52. The reciprocity principle proposal could be the first step to creating a more consolidated network of antitrust agencies. Therefore, it is important to consider that more than 70 jurisdictions worldwide apply leniency programs around the world, which translates into greater institutional power to fight international cartels, a greater level of worldwide enforcement and greater deterrence.⁵⁴

53. The International Chamber of Commerce (ICC) has proposed a one-stop-shop marker system, in which those who apply to leniency in one jurisdiction, would have the first-in Marker in all jurisdictions participating in the system. The applicants would be notified through a platform if the Marker was granted.⁵⁵

54. Although national regulation would make it highly difficult to achieve, the creation of a joint leniency program could serve as a mechanism to detect and investigate cartels worldwide, which could in turn avoid the problem of first and subsequent applicant issues (as in separate Leniency Programs reduction of fines could be, in one case optimal, and in another, far from it or even zero. This translates into lower incentives for companies to join separate Leniency Programs).⁵⁶ If implementing such mechanism, the value of the sanction could be determined in accordance with local laws when the applicant was not first-in. However, this model of cooperation, would be more effective if agencies imposed combined sanctions as a greater deterrent tool.

55. This system, has the potential to help incentivize leniency applications, and help detect international cartels, as notifications of suspected cartels would be issued amongst various jurisdictions. In this sense, agencies would have more information collecting tools. However, given that regulatory and legal modifications would have to be made, integration and cooperation between agencies could begin by strengthening the principle of reciprocity and harmonizing basic concepts for a gradual integration of leniency programs around the world.

4. Conclusions

56. Leniency programs have been of great importance to detect and sanction cartels worldwide. However, since most were created in the 1990's and the beginning of 2000's, there are great areas of opportunity. In response, several jurisdictions are revising their programs to increase their impact and Mexico is no exception. By 2019, COFECE will

⁵⁴ International Competition Network. (N/A). Leniency Materials Country. 18 Apr, 2018, de ICN Sitio web: <http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx>
<http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx>

⁵⁵ See full proposal in ICC's website: <https://iccwbo.org/publication/icc-proposal-icn-one-stop-shop-leniency-markers/>

⁵⁶ John M. Connor. (2010). Cartels & Antitrust Portrayed: Private International Cartels from 1990 to 2008. 09 Apr, 2018, de SSRN Sitio web: <https://ssrn.com/abstract=1535131>

publish a new set of Leniency Program Guidelines and is currently evaluating if improvements could be made to the Federal Economic Competition Law and its Regulatory Provisions. Also, it is constantly exploring mechanisms to strengthen its cooperation policy in matters of competition and antitrust.

57. As discussed throughout the document, much could be done both nationally and internationally. In the first case, there are several aspects in which implementation of COFECE's Leniency Program could improve, specifically, through four different mechanisms; the improvement of the Program Guidelines to reduce legal uncertainty; cooperation with the Office of the Attorney General throughout COFECE's investigation procedure to increase the chances of criminal enforcement; and the alignment of efforts with the NAS to prosecute cases in which both competition and collusion are committed. These mechanisms could be modified for their implementation in other jurisdictions that have identified similar challenges.

58. In the international realm, cooperation could be strengthened amongst antitrust agencies to increase the chances of detecting cartels and enforcing competition law. This could be achieved, to an extent and with the help of international bodies, by harmonizing the general concepts included in leniency programs, by introducing the principle of reciprocity in these programs and by ultimately creating a joint leniency program that would consolidate a detection-investigation international network.

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