

Cartel Leniency: Mexico

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A Q&A guide to cartel leniency law in Mexico.

The Q&A gives a succinct overview of leniency and immunity, the applicable procedure and the regulatory authorities. In particular, it covers the conditions to be satisfied, the method of making an application, availability of immunity from civil fines to individuals, the scope of leniency, circumstances when leniency may be withdrawn, leniency plus, confidentiality and disclosure, and proposals for reform.

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For a full list of jurisdictional Competition Q&As which provide a high level overview of merger control, restrictive agreements and practices, monopolies and abuse of market power, and joint ventures in multiple jurisdictions, visit www.practicallaw.com/competition-mjg.

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Regulation

1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

Applicable laws and guidance

The Mexican Anti-trust Act (*Ley Federal de Competencia Económica*) (MAA) was reformed in 2006. Regulations (*Reglamento de la Ley Federal de Competencia Económica*) made under the MAA in 2007, include a leniency programme for those companies involved in absolute monopolistic practices to voluntarily report their activities. Under the MAA, companies or individuals that have participated in absolute monopolistic practices may reduce or avoid sanctions (which can include criminal sanctions), provided they denounce the illegal acts in question and take the necessary steps to terminate their participation.

Regulatory authority

The Mexican Anti-trust Commission (*Comisión Federal de Competencia*) (Commission) is the authority responsible for analysing, investigating and enforcing anti-trust law in Mexico, including the application of the leniency programme.

Scope of application

2. What infringements of competition law does the leniency programme cover?

The leniency programme covers all possible breaches arising from absolute monopolistic practices. Absolute monopolistic practices are any agreement between competitors with the goal of (MAA):

Fixing prices.

Limiting or restricting the available product supply.

Dividing markets.

Agreeing on postures regarding public biddings.

The leniency programme applies to the breaches in relation to both administrative (see *Question 4*) and criminal law (see *Question 7*).

Recent cases

3. What notable recent cases have applied the leniency programme?

Since its implementation in 2006, the Commission has obtained information from individuals and companies that helped it to discover the existence of absolute monopolistic practices in several markets (the first case was in 2009).

In 2011, 20 applications under the leniency programme were made to the Commission. The most important cases included those regarding the marine transportation services market in the state of Quintana Roo; and the trucking market in the state of Baja California Sur. In each of these cases an applicant in the market filed an application under the leniency programme and provided information that successfully proved to the Commission the existence of absolute monopolistic practices, which led to a significant reduction in the fines imposed on the applicant.

Availability of leniency

Civil liability

4. Is full immunity from civil fines available? What conditions must be met for immunity to be granted?

Full immunity from imposition of a fine can be granted by the Commission if absolute monopolistic practices have been carried out. In order for any company or individual to be granted full immunity, the following conditions must be met by the company or individual. They must:

Be the first of the involved companies and individuals to provide sufficient evidence in their possession and that it can make available and which, in the Commission's opinion, can verify the existence of absolute monopolistic practices.

Fully and continuously co-operate with the Commission with the research and investigation undertaken by the Commission and, if necessary, in the trial proceedings.

Undertake all necessary actions to end their participation in all actions related to practices in breach of anti-trust law.

However, where the company or individual has previously been fined for engaging in absolute monopolistic practices, the company will not be eligible for immunity under the leniency programme.

Immunity is granted exclusively by the Commission. This means that third parties affected by the practices engaged in by the company or individual that applied for leniency may be subject to civil claims for damages caused by the breach of the law.

5. Is there a sliding scale of available leniency from civil fines?

Companies or individuals that are involved in absolute monopolistic practices, but who were not the first to successfully apply under the leniency programme and therefore receive immunity (*see Question 4*), may receive a reduced fine of up to 50%, 30% or 20% of the maximum fine allowed. This is as long as they provide sufficient evidence, in addition to the evidence gathered from the Commission's own research, and the evidence presented by any other previous companies or individuals that have already applied for leniency and that the information and documents provide the

Commission with additional evidence (either confirming the information already filed or detailing its contents).

Documents and information that are new to the Commission, will be admitted only if they relate to the cartel for which information was provided by the first applicant. If the Commission considers that the information and documents submitted relate to an additional absolute monopolistic practice, the application will be taken into account as an application made for another cartel. To determine the amount of the reduction, the Commission will consider the chronological order of filing, the value of the evidence and the timing of the offered evidence.

6. Is immunity or leniency for civil fines available to individuals? If so, what conditions apply?

If a company applies for leniency, its officers and employees may be granted a reduction of applicable civil sanctions and fines. This will mainly affect those officers and employees who have been directly involved in the execution of absolute monopolistic practices. To this end, the company must request the protection of any employees when applying under the leniency programme. They will benefit from protection as long as they fully and continuously co-operate with the Commission on the same terms as the company. The same principle applies when the applicant is an individual and his employees want to benefit from the leniency programme.

In addition, officers or employees that do not work for the company or individual that has applied for leniency at the time, may also be granted a fine reduction or leniency, after the Commission determines their participation in the absolute monopolistic practice on behalf of the company or individual, as long as their names are mentioned in the application and they fully and continuously co-operate with the Commission. However, officers and employees directly involved in the absolute monopolistic practices may apply for leniency on their own account directly and independently of their employer.

Criminal liability

7. Is immunity or leniency available for companies and/or individuals in relation to criminal prosecution? What are the implications for individuals when an undertaking has been granted immunity or leniency?

Circumstances

Companies cannot be subject to criminal liabilities for breaching anti-trust law.

Proceedings against individuals

Individuals can be subject to criminal liability. However, individuals subject to the leniency programme before the Commission will not be subject to criminal liability, as long as the Commission issues a notification to the Mexican Prosecution Ministry that the application for leniency has been duly submitted. Even though criminal liability is an uncommon practice of the Commission, any individual

applying to the leniency programme must be successful in its application for leniency to be free from criminal liability.

Employees' interests

When a company applies for leniency, all employees that are or may be subject to the investigation are commonly included in the leniency programme request notice. However, since individuals can be subject to both civil and criminal sanctions, an employee can also apply for leniency individually if the company does not apply for such leniency programme. However, companies may apply internal sanctions or fines to employees that breached anti-trust law when representing the company.

Application proceedings

8. When should an application for leniency be made?

Companies and individuals can file an application at any time, but they must do so before the Commission issues the notice that concludes the investigation proceedings. The Commission considers the order in which applications for leniency are filed when determining the amount by which the fine is reduced (*see Question 5*).

9. What are the procedural rules for leniency applications?

Relevant authority

All applications for the leniency programme must be filed with the Commission.

Applicant

Any individual employee can submit the application. However, it is advisable to have a legal representative with sufficient powers of attorney submit the application on the employee's behalf.

In the case of companies' applications, the person submitting the application must have sufficient powers of attorney (at least, powers of attorney for administrative acts) or a special power of attorney to act before the Commission. This is because all applications from companies are considered a corporate act, which must be executed by a person with the necessary powers of attorney to act on the company's behalf.

Informal guidance

Those interested in submitting an application for leniency can request guidance from the Commission as to what information may be necessary or advisable to submit to make an application. However, the Commission cannot determine if an undertaking will qualify for immunity or leniency until the application is submitted and the information is presented and assessed by the Commission.

Form of application

Initial applications for leniency can be submitted either:

By a voice message to the Commission's voice mail phone number (+52 278 966 32).

By e-mail to the Commission's e-mail address (*inmunidad@cfc.gob.mx*).

There is no standard application form. However, in all applications, companies or individuals must clearly state their desire to be subject to the leniency programme and provide sufficient contact information for the Commission to contact them, in order to review the information to be presented for analysis.

Markers

Once the application has been made with the necessary information, the Commission will assign a marker (*Clave*), which is an alphanumeric number to:

Identify the application.

Secure the chronological order of the application in relation to other possible applications for the same absolute monopolistic practices.

Ensure the confidentiality of the applicants.

All subsequent communications between the Commission and the applicants will be done using the assigned marker.

Information/evidence

In order to complete the application the evidence provided by applicants should be thorough and sufficient to allow the Commission to prove the existence of absolute monopolistic practices. As the assistance from applicants must be "continuous and full", any additional information or evidence the applicant has must be presented to the Commission.

The Commission recommends providing the following evidence to all applicants, based on international experience:

Digital evidence taken from computers, smartphones and other electronic devices belonging to those implicated in absolute monopolistic practices, because the information contained in the devices is owned by the applicant.

Phone records of high level officers or directors.

Information that can help the Commission contact those involved in the cartel or with knowledge of its existence.

Oral statements

Oral and written statements from employees or personnel that can directly confirm the execution of absolute monopolistic practices are accepted in the leniency programme.

Short-form applications

Not applicable.

10. What are the applicable procedures and timetable?

On receiving the application, the Commission will provide the applicant with its marker and the date and time to attend a formal meeting, during which the applicant will provide all evidence necessary to help the Commission prove any absolute monopolistic activity. The formal meeting will be scheduled, taking into consideration the applicant's availability and residence. After the formal meeting, the applicant must help the Commission throughout the investigation and/or trial stage of the proceedings at all times, in order to be considered subject to the leniency programme.

Once the Commission has analysed all evidence delivered by the applicant and it considers that the evidence is sufficient to prove that absolute monopolistic practices have been executed, a Sanction Reduction Notice will be given, taking into consideration:

If the received evidence is sufficient.

The chronological order of the application.

Depending on the chronological order, whether immunity is available or the applicable fine percentage reduction.

The commitment of the applicant to co-operate continuously and fully during the investigation and/or the trial stage of the proceedings.

Withdrawal of leniency

11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

Withdrawal of leniency can be submitted before the Commission at any time, as long as it is done before the Sanction Reduction Notice is made (*see Question 10*). Since the Sanction Reduction Notice is the document in which the Commission determines that it has studied the evidence provided and that such evidence is sufficient to prove the existence of absolute monopolistic practices, the Commission cannot withdraw the Sanction Reduction Notice once it has been notified to the company or individual that applied to the leniency programme.

If an applicant decides to withdraw from the leniency programme, the chronological order of all subsequent applications and the possible fine reductions for all subsequent applicants will be adjusted accordingly to reflect their new standing in the list of applicants.

Scope of protection

12. What is the scope of leniency protection after it has been granted?

In order to prove absolute monopolistic practices, the Commission must analyse all information gathered during the investigation and/or trial stage of the proceedings. This information is obtained not only from the applicants but from all parties involved or requested by the Commission to provide evidence.

Therefore, the amount or percentage of the sanction reduction available will be based on how much the evidence submitted by the applicants helped the Commission prove the existence of absolute monopolistic practices, taking into consideration all additional information the Commission gathered. However, if the Commission is only able to prove the execution of absolute monopolistic practices solely from the information provided by the applicant, the sanction reduction percentage will be the highest one available to the applicant. Since the Commission investigates the execution of absolute monopolistic practices, any information disclosed by the applicant will be considered by the Commission. The leniency will relate to the full extent of the infringement identified from all evidence filed, or discovered by the Commission during the investigation, regardless of the infringements disclosed by the applicant. However, the more information the applicant provides regarding any absolute monopolistic practice, the more likely the Commission will grant a higher leniency protection.

13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

The Commission does not grant leniency for evidence provided in a different market from the market being investigated.

Confidentiality and disclosure

14. What are the rules relating to confidentiality during a leniency application?

Identity disclosure

Once the application has been submitted, the Commission will not disclose the applicant's identity at any time, even during a final decision or judgment or during court proceedings. The applicant follows its involvement in the leniency programme by using its marker, which keeps the applicant's identity confidential to anyone outside the Commission.

Furthermore, the Commission can request the applicants to undertake or refrain from certain activities, if it considers that the activities or omissions will avoid the applicants being identified by other companies or individuals involved, as long as their actions do not further breach anti-trust law.

Information disclosure

No information or evidence delivered by the applicants is disclosed or passed on to other undertakings under investigation.

Confidentiality requests

During an investigation, all information submitted by the parties (including the applicants) will only be confidential if the applicant requested its confidentiality, providing due justification to the Commission. The applicant can request the confidentiality of the information provided to the Commission when the information, if disclosed:

May harm its competitive position.

Contains personal information.

Might jeopardise the applicant's safety.

Is prohibited from disclosure by law.

15. What are the rules concerning disclosure of statements made in support of a leniency application?

Domestic submissions and domestic discovery

Discovery orders are not part of domestic court procedures in Mexico.

Domestic submissions and foreign discovery

The only information regarding an investigation available to third parties interested in the procedure is:

The extract of the public notice issued by the Commission and published in the *Official Daily Gazette* that briefly describes the possible absolute monopolistic practices that the Commission will investigate and the market(s) in which the practices are being investigated.

The final resolution given by the Commission.

If applicable, the final resolution of the appeal presented by any of the affected parties against the Commission's final resolution.

However, as an act of co-operation, foreign anti-trust agencies or authorities can request the disclosure of information gathered during the Commission's investigations that may have an effect on foreign markets.

Foreign submissions and domestic discovery

Discovery orders are not part of domestic court procedures in Mexico. However, under Mexican anti-trust legislation, during the investigations engaged in by the Commission, the Commission is entitled to request information or proof that absolute monopolistic practices have been committed in Mexico from foreign government agencies as an act of co-operation between government authorities to ensure compliance with anti-trust law. Further, the Commission is specifically empowered to execute and negotiate many types of agreements and international treaties regarding anti-trust and free competition.

Inter-agency co-operation

16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?

In cases of international importance or when the Commission sees fit, the Commission can request applicants to sign an authorisation letter by which the applicant authorises the disclosure of the information presented by the applicant, or the identity of the applicant, to regulatory authorities abroad. However, the applicant can refuse to sign the authorisation letter and the Commission will not interpret this refusal as a lack of co-operation during the domestic investigation.

Further, given the international co-operation between anti-trust agencies in several countries, the Commission may suggest that companies or individuals that have engaged in absolute monopolistic practices submit application under the immunity or leniency programmes of these agencies. This is because, since most resolutions of the Commission are public, anti-trust agencies in foreign countries might take into consideration the Commission's resolutions to determine the existence of absolute monopolistic practices abroad.

Proposals for reform

17. Are there any proposals for reform?

The Commission is currently drafting the new Regulations of the MAA (*Reglamento de la Ley Federal de Competencia Económica*), as well as several guidelines regarding how monopolistic practices will be detected, determined, analysed and sanctioned. These documents are being drafted to update them in accordance with recent amendments to the MAA, to strengthen and outline the Commission's activities regarding anti-trust law and monopolistic practices and to further inform the general population of how monopolistic practices are being detected and investigated by the Commission.

It is expected that these documents will be published and enter into full force and effect by the end of 2012.

The regulatory authority

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Responsibilities. Among its responsibilities, the Commission:

Investigates the existence of monopolies, monopolistic practices or prohibited mergers.

Analyses and authorises mergers that do not affect free trade and competition.

Carries out dawn raids, within the investigations carried out, and requires documents, records and information in order to verify compliance with the MAA.

Solves cases submitted to its jurisdiction, and imposes administrative sanctions for any breach of the MAA.

Orders the suspension of the acts of probable monopolistic practices or prohibited mergers.

Decides on anti-trust related conditions, effective competition or other issues concerning the process of competition and free trade in accordance with the applicable legislation.

Person/department to apply to. General Direction of Absolute Monopolistic Practices Investigations and Interstate Commerce Restrictions (*Dirección General de Investigaciones de Prácticas Monopólicas Absolutas y Restricciones al Comercio Interestatal*)

Procedure for obtaining application documents. Even though there is no standard application form, any questions and concerns regarding the leniency programme and its execution are to be submitted via e-mail to inmunidad@cfc.gob.mx, or by a voice message to the Commission's voice mail phone number (+52 2789 6632).

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