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To Cooperate, or not to Cooperate: The Mexican Leniency Program

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April 2016

Main Thoughts

1. International experience demonstrates that Leniency Programs -if correctly implemented- constitute an effective tool to prosecute cartels
2. "*Fine tuning*" of incentives + awareness + trust over the Program have been the major challenges for its implementation in Mexico
3. Regulatory reforms in Mexico and other developments have changed the "risk/reward calculation" over Leniency applications
4. In general, Mexican practitioners find the Program transparent and reliable, but some believe that there's still some room for improvement
5. As it happens in countries, Mexican Leniency Program should be in constant evaluation in order to react to new challenges (*Fine tuning*)

Leniency Programs constitute an effective tool to prosecute cartels

OECD

REPORTS

Hard Core Cartels

2000

"Hard core" cartels are anticompetitive agreements by competitors to fix prices, restrict output, submit collusive tenders, or divide or share markets. The 1998 Recommendation condemns such cartels as the most egregious violations of competition law, noting that by raising prices and restricting supply they make goods and services completely unavailable to some purchasers and unnecessarily expensive for others. It urges OECD countries to improve the effectiveness of their anti-cartel programs and their international co-operation, and also invites implementation by non-Member countries.

the most egregious violations

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Leniency Programs constitute an effective tool to prosecute cartels

Leniency Programs Objectives

Destabilize existing cartels

Deter/prevent cartels

vs.

Optimal deterrence framework → risk/reward calculation

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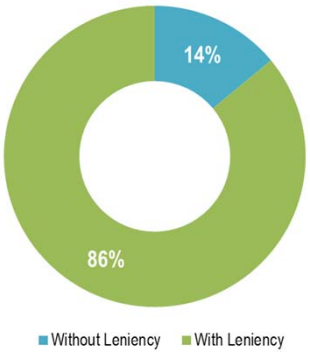
Leniency Programs constitute an effective tool to prosecute cartels

European Commission Cartel Decisions
2001-2012



Joan-Ramon Borrell, et al. *The leniency programme: obstacles on the way to collude* Journal of Antitrust Enforcement, 2015, 0, 1-14. doi: 10-1093/jaenfo/jnu013 http://www.ub.edu/gim/wp-content/uploads/2014/02/jaenfo.jnu013.full_.pdf

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Major challenges for the implementation of the Program in Mexico

Evolution of the Mexican Leniency Program

2006	2009-2010	2011	2013	2014	2015
• Introduction of the Program	• Public Consultation • Issue of Guidelines	• Unannounced Raids • Increase of fines [10% turnover] • Introduction of criminal liability	• New COFECE/IFT • Specialized tribunals • Limits on challenges	• "*Fine tuning*" • Strengthening Raids • Disqualification • Increase criminal liability	• Public Consultation • Issue of Guidelines
Amendment FLEC 1992		Amendment FLEC 1992 + CC	Constitutional Reform	New FLEC Amendment CC	

Before 2006, discretionary reduction of administrative fines for cooperation

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Major challenges for the implementation of the Program in Mexico

2006 Leniency Program: Key elements for a well designed program

- Public and open anticipated offer
- Marker system
- Cooperation
- Confidentiality
- Total or partial benefits

BUT MOST IMPORTANT

*"the key to an effective leniency programme is that there should be a high degree of predictability, transparency and certainty, together with a low burden of proof, heavy penalties and an emphasis on priority"**

*OECD, Report on Leniency Programmes, available at http://www.oecd.org/LongAbstract/0,3425,en_2649_40381615_2474436_119666_1_1_1,00.html

Companies
+
Authorities

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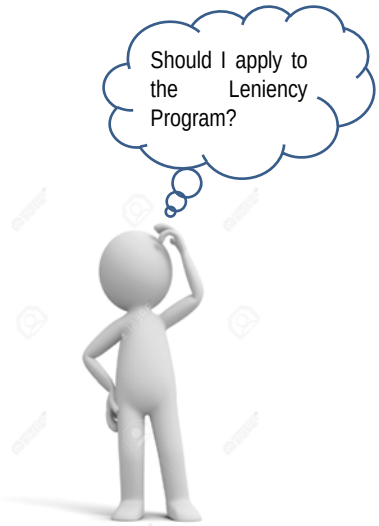
Major challenges for the implementation of the Program in Mexico



1 Incentives
- Size of penalty
- Probability detection/sanction
- Reward

+

2 Culture
- Moral/legal perception
- Awareness
- Reputation

+

3 Reliability
- Trust
- Approachability
- Fairness

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Major challenges for the implementation of the Program in Mexico

Awareness

cofece Comisión Federal de Competencia Económica

Convenio de colaboración entre COFECE y CCE para promover la cultura de la competencia

EL ECONOMISTA

Programa de inmunidad, freno antimonopolios

Sanción menor es un incentivo para empresas, pero a pesar de colaborar ésta debe ser mayor para desincentivar el ilícito, expertos.

Knowledge

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Major challenges for the implementation of the Program in Mexico

Applications to the Leniency Program
2012- March 2016

	Applicant		
	National	International	Total
2012	2	24	26
2013	1	3	4
2014	2	4	6
2015	17	1	18
2016	6	0	6
Total	28	32	60

*Source: COFECE
Note: 2007 to 2010, 6 applications

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“Risk/reward calculation” has been changing

Applications in 2015 increased and it is expected that such tendency will be maintained, but WHY?

2014-2015

1. “Reloaded” Authorities (Constitutional Reform)
2. Increased criminal liability + penalties to individuals
3. Perception of high degree of deference from Specialized Tribunals
4. Confirmation by Supreme Court of key matters [Indirect Evidence and “Excessive Prices”]
5. More active investigatory actions [Dawn Raids/building capacity]

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“Risk/reward calculation” has been changing

Challenges: Authorities have to build reputation of effective prosecution of criminal liability and penalties to individuals.

1. Liability of individuals has been successfully challenged in Courts

2. No incarceration yet

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“Risk/reward calculation” has been changing

Ratio International vs National applicants

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Over the time, there has been a shift between international and national applications

Challenge: Standard of proof to show effects in Mexico

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Mexican practitioners recognize usefulness of the Program

What do practitioners think about the Leniency Program in Mexico?

Reliable

Attorneys do recommend to their clients the application to the Leniency Program when evidence of an Absolute Monopolistic Practices arise

Confidentiality

Most of the attorneys considered the identity confidentiality of the applicant offered in the Leniency Program to be **determinant** for them to apply

FECC’s officers establish adequate confidentiality measures although other practitioners raised some concerns in this regard

Expectations

In general, the Program applies as expected

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Mexican practitioners recognize usefulness of the Program

More acceptation between foreign clients

- Much more resistance from their national clients than from their foreign ones.

Elements that discourage the application

- Negative perception from the industry/reputation
- Admitting the Absolut Monopolistic Practice [gray areas]
- Lack judicial criteria with respect to sensible issues
- No certainty of place "in the line" (marker) + calculation of fine

Calculation of fines and opportunity to challenge → relevant for 2nd and 3rd place

Disadvantages to apply

- Possibility that the applicants' identity can be inferred in the process
- Exposure to Claims for Damages and violations of other laws (procurement)
- Recidivism

Evaluation requires a serious investigation → lot of time and resources

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Mexican practitioners recognize usefulness of the Program

Recent judicial criteria on Confidentiality

→ Only Applicants have standing to challenge the Resolution of granting Leniency

Objective: Protect confidentiality

→ Confirm protection of maintaining the identity of the applicant in strict confidentiality

BUT: Other criteria have recognized access to confidential information when it is indispensable to effectively exercise rights of defense [Q.161616A 129/2015 AMBIDERM]

Relevant for potential Claims for Damages

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Mexican practitioners recognize usefulness of the Program

Recent judicial criteria on Confidentiality

REDUCCIÓN DE SANCIONES EN EL PROCEDIMIENTO DE INVESTIGACIÓN DE PRÁCTICAS MONOPÓLICAS ABSOLUTAS, PREVISTA EN EL ARTÍCULO 33 BIS 3 DE LA ABROGADA LEY FEDERAL DE COMPETENCIA ECONÓMICA. ES NOTORIA LA IMPROCEDENCIA DE LA DEMANDA DE AMPARO INDIRECTO CONTRA LA RESOLUCIÓN RELATIVA, INTERPUESTA POR PERSONA DISTINTA DEL BENEFICIADO.

… Así, el beneficio de reducción de sanciones previsto en el último de los preceptos mencionados exige el cuidado de la confidencialidad en torno a la identidad de los agentes económicos que solicitaron acogerse a él, porque tiene como propósito dar mayor eficacia a la función de defensa de la competencia, en lo que se refiere a la investigación y sanción de las prácticas monopólicas absoluta..... Por esa razón, la resolución que se dicte sobre el beneficio indicado, sólo puede controvertirla el solicitante, en tanto le genere una afectación directa en su esfera de derechos, o en la de sus directivos y empleados, porque no se les otorgue o no lo obtengan en el nivel pretendido. En consecuencia, al no ser susceptible de producir un efecto favorable para otros sujetos, la resolución de reducción de sanciones no puede controvertirse en el amparo por un agente económico diverso del solicitante, pues daría lugar a que a través del juicio relativo la autoridad pudiera revelar información confidencial… Por tanto, es notoria la improcedencia de la demanda de amparo indirecto interpuesta por persona distinta del beneficiado con la resolución de reducción de sanciones en el procedimiento indicado, por carecer de interés legítimo o jurídico.

PRIMER TRIBUNAL COLEGIADO DE CIRCUITO EN MATERIA ADMINISTRATIVA ESPECIALIZADO EN COMPETENCIA ECONÓMICA, RADIODIFUSIÓN Y TELECOMUNICACIONES, CON RESIDENCIA EN EL DISTRITO FEDERAL Y JURISDICCIÓN EN TODA LA REPÚBLICA.

Queja 90/2015. Pleno de la Comisión Federal de Competencia Económica y otro. 15 de octubre de 2015. Unanimidad de votos. Ponente: Patricio González-Loyola Pérez. Secretario: Carlos Luis Guillén Núñez.

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…a través de los preceptos legales y reglamentarios mencionados, se implementó un procedimiento en donde la información debe manejarse confidencialmente, lo cual obliga a la autoridad a no revelar la identidad de la fuente de información, porque de eso depende la eficacia de ese medio para combatir las prácticas anticompetitivas absolutas y explica que sólo pueda tener acceso a las actuaciones el solicitante del beneficio, porque el propósito de esta medida es dar mayor eficacia a la función regulatoria en lo que se refiere a la investigación y sanción de las prácticas monopólicas absolutas, prohibidas por el artículo 28 de la Constitución Política de los Estados Unidos Mexicanos, así como a la conclusión de éstas para regularizar el adecuado funcionamiento de los mercados. Por esa razón, se considera que la sociedad está interesada en preservar la eficacia de la figura jurídica consistente en el reconocimiento de la participación de la comisión de una práctica monopólica absoluta y la colaboración en la investigación y cesación de ésta, lo que exige el cuidado de la confidencialidad de la identidad de los agentes económicos que soliciten acogerse al beneficio de reducción de las sanciones.

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Leniency Programs should be in constant evaluation in order to react to new challenges

Strengths

- ✓ FECC's Approachability and Accessibility
- ✓ FECC's lenient attitude: Everyone gets a chance to apply
- ✓ FECC attitude of erring in favor of the applicant where it is genuinely a "close call"

Challenges

- ✗ Not to rely in the Leniency Program as the only tool for the FECC to investigate and fine cartels.
- ✗ Right incentives for corporations to establish Effective Compliance Programs and individual liability. Employees rarely act alone.

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Leniency Programs should be in constant evaluation in order to react to new challenges

Issues to evaluate

- \+ Market screening as a common practice [increase risk of detection]
- \+ More flexibility towards admission of the practice in gray areas [atypical cartels/exchange of information]
- \+ Introduction of settlements / early termination of the procedure for applicant (when confidentiality is not an issue)

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Leniency Programs should be in constant evaluation in order to react to new challenges

Areas of improvement/provide more certainty

? Mechanisms to protect evidence provided during the Leniency Program for its use in claims for damages (private action) → Role of authority in encouraging claims? [ex-post evaluation of damages?]

? Criteria for dividing "cartels" for purpose of the Program [relevant for the place "in line"]

? More transparency on how information provided in the context of the Program will be incorporated into the case file

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Conclusions

Balance

"*Fine Tuning*" to react to challenges and maintain certainty

Mexican Leniency Program is working and has the trust of the specialized practitioners

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It should be in constant evaluation to make proper adjustment to react to new challenges

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No change in application should be made without ample public discussion and publicity

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Thank you!

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April 2016

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