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USE OF MARKERS IN LENIENCY PROGRAMS

-- Mexico --

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. The Mexican Federal Economic Competition Commission's Leniency Program has proven to be successful in fighting cartels, along with other detection and investigation tools at competition authority's disposal.
2. Leniency programs provide the opportunity for companies involved in a cartel to expose the anticompetitive conduct and reduce or avoid sanctions. The "first through the door" policy incentivizes cartelists to self-report and hand over evidence.
3. This means that the first eligible applicant is given either total or conditional immunity from fines or a marker, even on the basis of incomplete evidence.
4. A "marker" is the assurance awarded by a competition agency to an applicant for the sustenance of the report's chronological position. The applicant's position is reserved for a limited time in the queue on the condition that the agent provide further information within a certain time frame. Therefore, the "marker" provides applicants with certainty and clarity.
5. This system is considered a best practice among competition agencies around the world as it helps them reach the goals of leniency program implementation. This system encourages firms not only to self-report anticompetitive behavior, it also promotes a race to contact the agency among cartel participants. Relevant information is therefore provided in a timely fashion and complies with a pre-established quality standard.
6. This contribution intends to provide: (1) a brief background of Mexico's competition agency and legal framework; (2) an introduction to the Mexican Leniency Program including the confidentiality obligations it requires; (3) the Mexican marker system's purpose; (4) the system's main features; (4) an outline of the procedure following a marker award; and, finally (5) conclusions regarding the experience from implementing the marker system.

1. Background

7. Legal framework in Mexico regarding immunity and leniency has had several relevant amendments which have sought to implement international best practices. In brief, these changes are:
 - **Introduction of the Leniency Program (2006).** The most important addition incorporated in the 2006 amendments to the Federal Economic Competition Law (FECL)¹ regarding cartel provisions was the introduction of a leniency program. It was designed paying particular attention to international best practices and substantially improved the available tools to fight cartels in Mexico. Before this time, the Commission applied discretionary administrative fine reductions for cooperating agents involved in an on-going investigation.
 - **The Leniency Program is strengthened (2011).** With regard to cartels investigations, the agency could, after 2011, perform unannounced inspections. Also, the severity of sanctions for violations to competition law was increased.

These amendments aimed to raise firms' risk of being discovered while also, providing for harsh administrative fines and criminal sanctions for infringers.

¹ In 1993, Mexico adopted the Federal Economic Competition Law (FECL) and created the Federal Competition Commission to enforce it.

Prior to the reforms, the Commission was forced to announce searches to a company's premises in advance. In addition, the Commission could only search for documents it had previously requested. The 2011 eliminated these restrictions.

- **Constitutional reform of 2013: a Mexican competition policy overhaul.** The Federal Economic Competition Commission (COFECE for its acronym in Spanish) was established as a new, autonomous entity with broad enforcement powers. Its aim is to guarantee competition and free access to markets, and prevent, investigate and fight anticompetitive practices that hinder market efficiency and consumer welfare.

The reform also created the Federal Telecommunications Institute (IFT), charged with all regulatory matters, including competition issues, regarding telecommunications and broadcasting.

- **Enactment of the new Federal Economic Competition Law (FELC) (2014).** The FELC gives continuity to issues from the previous legislation, such as the nature of horizontal agreements, market power, mergers and vertical restraints. However, it also introduces new enforcement mechanisms such as essential facilities, divestitures and market conditions investigations as well as new rules and procedures, aligned with best practices, concerning due process and procedural rights for the parties.

8. As a result, the Leniency Program has also undergone changes that contributed to a better understanding of the Program's principles and incentives, as well as its utility and effectiveness for detecting cartel activity.

2. Introduction to Mexican Leniency Program and its regulatory framework

9. As mentioned before, the Leniency Program was introduced in 2006. Although, it is recent, it has proved to be very useful and effective for detecting and investigating both national and international cartels.

10. As in international practice, being accepted to the program in Mexico implies a total or partial immunity from the administrative fines and criminal sanctions that would result from being part of a conspiracy. Immunity is granted to firms that end their participation in the cartel and provide relevant, accurate and complete evidence and information to the competition authority.

11. The regulatory framework of the Program is: (1) the FELC², which provides the general purposes, incentives, standards and conditions related to the program; (2) the FELC regulatory provisions, which specify the interpretation and application of the statute and seek to provide interested parties with comprehensive legal certainty on the performance of their applications³; and (3) the Leniency Program Guidelines which offer a simplified explanation for applicants and interested parties.

12. COFECE has the obligation to disclose the manner in which it processes and resolves Leniency Program applications. New Guidelines shall be subject for public consultation very soon and will gather COFECE's previous effective practices and experience.

13. Some significant characteristics of the Leniency Program are:

² Considering only the Federal Economic Competition Law, published in May of 2014. To this date COFECE is conducting nine applications; two of them conducted under the new law.

³ The regulatory provisions were issued by COFECE on [*].

- An applicant may obtain total immunity under the Leniency Program if he or she is the first to inform the Commission of a cartel. The applicant must also provide sufficient information about the illegal conduct. If these conditions are met, the applicant is granted with the first marker. The second applicant may get reductions of 50%, if all applicable requirements and conditions are complied with.

As previously mentioned, any person who in any way participates, facilitates or mandates the implementation of a cartel may face criminal prosecution. Consequently, the program's scope also encompasses criminal immunity which may be awarded regardless of marker position.

- If granted, these benefits imply that the applicant shall provide COFECE with the information and evidence it requires regarding the illegal conduct. Moreover, this information provided shall allow the COFECE to launch an investigation or to presume the existence of the cartel.
- Any agent, individual or corporation, may try to obtain a marker.
- The applicant's identity is classified and strictly confidential.
- The program's benefits are only available for horizontal practices - cartels. Benefits are conditionally granted, thus full and continuous cooperation and, the termination of the conduct is required.
- Applications may be received at any time before the end of an investigation.

3. Confidentiality

14. The Mexican Leniency Program clearly states that applicants' identity is strictly confidential. For that reason, all applicants are assigned and identified by a code. COFECE's practice is to make best efforts and diligence to keep these identities confidential, this also applies to the identities of the interested parties, regardless if they have a marker or not.

15. As such, all application records or contacts with COFECE's officials are treated as confidential information to which only certain officials have authorized access. Also, the applicant must not disclose the information filed before the agency.

16. In this regard, COFECE cannot share information with other agencies, unless the applicant gives its written consent. These waivers are commonly used by the agency, mainly regarding cartels with an international scope. Although there is no written rule regarding their use, COFECE has followed international best practices in this matter and has promoted that parties provide waivers to the broadest extent possible in order to enable the agency to cooperate with other competition agencies.

17. A waiver must specify: the grantor, grantee, scope of application, nature of the information which is permitted and the conditions of information management.

18. **The purposes sought with the Marker system adopted in Mexico** The initial objective of the program is to encourage a self-reporting race amongst cartel participants to the competition authority. This strategy is expressed through the difference in fine reduction benefits which are available to different applicants according to the chronological positions in which applications are presented. The Marker system was first introduced in 2007 and is considered today an essential aspect of the Leniency Program.

19. Throughout the years, the Marker System has been improved and today the results have allowed COFECE to clearly identify the system's purposes and advantages as follows: (1) to encourage the race to contact the agency and report the conspiracy, by allowing the applicants to hold their place while they gather information and documents concerning the illegal conduct; (2) to provide certainty to potential applicants, by guaranteeing that everyone has the same chance to hold a place and remain in line for leniency, maintaining the interest of subsequent applicants to obtain a marker too; (3) to generate a first step for applicants to demonstrate good-faith to the authority; and (4) to allow the Commission to limit the time for considering an application as a serious and committed one.

4. Features of the marker

20. Although the Code of Regulations of the Federal Economic Competition Law considers the marker, there is no an explicit definition of the entity known as marker or about the time that constitutes it in the Code or any other law in the regulatory framework pointed before.

21. However, in practice, the Commission understands the marker as the period between the moment the code is assigned to the first meeting between COFECE's officials and the applicant.

22. As mentioned above, a marker indicates the period that applicants can hold their place and chronological preference in the line of applicants. The following paragraphs highlight relevant features of the Marker concept.

4.1 Availability

23. The program is only applicable to collusion or hardcore cartel offense cases. According to the FECL, hardcore offences are price fixing, bid rigging, market sharing or the exchange of information with the objective or effect of any of the aforementioned conducts between competitors. Nevertheless, the availability of the marker is determined by product or service reported, not by conduct.

24. The Mexican Leniency Program does not limit the number of applications or applicants by product or service. That means that the marker is available to anyone, so all the applicants –the first and the subsequent ones- can obtain a marker.

25. The only restriction to obtaining a marker is timing, as applications can only be made before the conclusion of the related investigation, if there is any.

4.2 Eligibility and requirements

26. Anyone, individual or corporation, who has taken part of a cartel and is interested in obtaining leniency is eligible to be awarded with a marker if they comply with some basic requirements. The participation in the conspiracy can be direct –by the execution of the arrangements- or indirect –by promoting or contributing to their execution.

27. To obtain a marker it is necessary to submit an application by voicemail or email. The process is simple and COFECE requires a low standard of information related to the cartel for the obtainment of a marker. To be admitted, a leniency application has to include:

1. The confirmation that the applicant is interested in being admitted to the program;
2. The identity of the applicant;
3. The applicant's contact information for reaching the applicant; and

4. The market and/or the goods or services that were probably affected by the illegal conduct.

28. When this information is not enough to determine whether another application has already been submitted regarding the same product market or conduct and COFECE is not able to assign a place in the line, it can require additional information such as the period or duration of the conduct, or the possible geographic areas affected.

29. If the information is complete, the application will be admitted. However, failure to comply with any of these requirements shall result in the rejection of the application.

30. Once admitted, an alphanumeric code is assigned to the application and the applicant. This means that the applicant has been awarded a marker and is officially considered as an applicant and candidate to leniency treatment. This code given to the applicant by telephone or email, depending on the contact information given to COFECE.

31. The marker is intended to be used by the applicant to gather and organize all documents and information that will be handed over to COFECE. It is important to highlight that COFECE does not require a formal internal investigation.

32. Even if an applicant has a marker, further steps must be followed in order to receive conditional, and afterwards, final leniency.

4.3 Flexibility

33. Since there is no a mandatory written rule for a marker's duration, the Mexican agency determines it case by case, taking into account the intrinsic details of each situation and the justifications that the applicant presents for its request to get a marker For this purpose, the Commission published a Leniency Program Guide.⁴

34. This document is still used by the agency and applicants as a reference in this and other matters. The Guide states that the marker system must be of a reasonable and limited duration. It does not, however point out a specific amount of days. In practice, a "reasonable" period of time to grant a marker varies from 30 to 60 days, depending on the complexity of the conduct reported. This has proven to be consistent over the years.

35. In extraordinary cases, the marker can be extended upon request of the applicant and at the discretion of COFECE.

36. A meeting with the applicant must be held just after the expiration of the marker.

5. After getting a marker

37. COFECE and the eligible applicant must hold a meeting right after the marker expires. During this meeting the applicant must provide COFECE with all the information and documents -as conviction instruments- related to the conduct reported.

38. These documents and information will allow COFECE to initiate an investigation or to presume the existence of the cartel. There is no list for the information or documents that the leniency applicant

⁴ The Guide is available (only in Spanish) in: http://189.206.114.203/images/stories/Documentos/guias/Guia_programa_de_inmunidad_Marzo2013.pdf

must provide, nevertheless some examples of the information that an applicant is urged to show are: a detailed description of the good or service involved and an outline of the market or industry, the identification of the co-conspirators, the confession of being part of the conspiracy and a detailed description of the cartel, arrangements and functional mechanisms of the cartel, the geographical scope of the conduct and the documents supporting the statements.

39. After the meeting, the Commission has a finite period of time to evaluate the information provided and determine its adequacy. If the information is adequate, suitable and sufficient, then the applicant will be granted with conditional leniency. If this is not the case, the applicant will be dismissed from the Program and all the information and documents provided will be returned to the applicant. If this happens, the marker occupied will be available for the next applicant.

40. After this point and in line with the law and international best practices, the applicant must fully cooperate with COFECE throughout its procedure, provide it with all evidence in its possession and put an end to the infringement immediately order to benefit from final leniency. COFECE has the sole authority to grant immunity.

6. Conclusion: Some experiences with the Marker system

41. Throughout the years, the Leniency Program has proved effective as an instrument for cartel investigations and competition law enforcement in Mexico. The marker system has been a real cornerstone of the program. The marker system provides certainty and clarity to the public and potential applicants by ensuring that everyone has the same chance to hold a place and remain in the line for leniency.

42. It may be impracticable to expect applicants applying for leniency to complete a thorough investigation into allegations of cartel conduct before applying for leniency. The perk of the marker system is that this is done without providing all the information that would be necessary to complete the application.

43. It must be noted that five investigations in the last three years have been processed with more than one applicant. Showing it is useful to maintain the interest of second or subsequent applicants for obtaining a marker. In addition, all potential applicants can obtain more information to help them consider whether to apply for a marker, this means they can make strategic decisions. As a result, the applications submitted and the information provided to COFECE are more complete and suitable to initiate an investigation. For COFECE, it is also helpful to dismiss the less substantial applications or the uncommitted applicants. As a consequence, Program resources, including time and personnel, are better allocated.

44. In terms of the extension of the marker, experience has helped create standards to grant them. But it is clear from experience that the time period should be short so as not to disadvantage other potential applicants and to ensure that an investigation in the case can be carried out swiftly.

45. In light of these facts, both the marker system and the Leniency Program will remain as they are. The next step, included in COFECE's Strategic Plan for 2014-2017, is to publish the Leniency Program Guide, which will include experiences and best practices. This document will be subject to public consultation this year.