

## ***"Strengthening Competition Policy in Mexico with a New Leniency Program"***

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In June, 2006 the Federal Economic Competition Law (FECL) was amended to include article 33 *bis* 3 that incorporates for the first time into Mexican Law a fully legislative supported leniency program. The program allows reducing administrative penalties to those companies that cooperate with authorities in the investigation of hard core cartels. The OECD has defined a Hard Core Cartel as an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangements by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce.<sup>2</sup>

The Cartel Working Group of the International Competition Network has stated that leniency programs have been developed by many countries to encourage violators to confess and implicate their co-conspirators with first-hand, direct “insider” evidence that provides proof of conduct parties want to conceal<sup>3</sup>. This type of programs help to uncover collusive conduct that is hard to detect and provides an incentive to break a cartel, creating a threat to normally unstable collusive agreements by making them more difficult to maintain.

The OECD says that experience shows that these programs work. According to OECD since the US program was revised in 1993 to make the scope of amnesty clearer and somewhat broader, the number of applications has multiplied to more than 20 per year and led to dozens of convictions and to fines totalling well over \$1 billion<sup>4</sup>. Australia, Canada, Cyprus, Czech Republic, the EU, Finland, France, Germany, Hungary, Ireland, Israel, Japan, Korea, Latvia, Netherlands, New Zealand, Romania, South Africa, Sweden and the UK have experienced with leniency programs.

Mexico tried in 2005 to create a leniency program based only on administrative regulation without much success. Apparently the lack of a specific legislative provision that gave enough powers to the Federal Competition Commission and confidentiality assurance to applicants was a mayor impediment for the leniency program to work. Mexican Lawyers were not confident enough to recommend clients their participation in a program that did not have a clear support in the law.

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<sup>1</sup> The views I give, of course, are my own and do not reflect the official views of the Commission or any other Commissioner.

<sup>2</sup> Recommendation of the Council concerning Effective Action Against Hard Core Cartel, adopted by the OECD Council at its 921 session on 25 March 1998.

<sup>3</sup> “*Anti-cartel Enforcement Manual, Chapter 2 Drafting and Implementing an Effective Leniency Program*” Internacional Competition Network, April 2006.

<sup>4</sup> [http://www.oecd.org/document/3/0,2340,en\\_2649\\_201185\\_1890435\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/3/0,2340,en_2649_201185_1890435_1_1_1_1,00.html)

However, after a fierce fight in Congress, in June 2006, the FECL (enacted in 1992) was amended for the first time, having as one of its main features the strengthening of the Commissions powers to detect and combat hard core cartels - in accordance with Mexican Law hard core cartels are considered “absolute monopolistic practices”. The FECL determines that “absolute monopolistic practices” are contracts, agreements, arrangements, or combinations among competitive economic agents, whose aim or effect are any of the following:

- I. To fix, raise, agree upon or manipulate the purchase or sale price of the goods or services supplied or demanded in the markets, or to exchange information with the same aim or effect;
- II. To establish the obligation to produce, process, distribute or market only a restricted or limited amount of goods, or to render a specific volume, number, or frequency of restricted or limited services;
- III. To divide, distribute, assign or impose portions or segments of the current or potential market of goods and services, by means of a determinable group of customers, suppliers, time or spaces; or
- IV. To establish, agree upon or coordinate bids or to abstain from bids, tenders, public auctions or bidding.

The new power -provided by the amended FECL- allows the Commission to partially exonerate penalties that would otherwise be applicable to a cartel member who reports its cartel membership or collusive conduct. Penalties regarding this conduct in Mexico can go up to seven million dollars; the amount can be doubled if the offense is repeated, or it can even be transformed into a 10% annual sales penalty.

Mexico’s Congress was sending a strong message to economic agents while passing the amendments to the FECL, since tougher penalties and a vigorous program was needed to create an incentive for cartel participants to self report their breaches of competition law. Now, through the implementation of the program the Commission has the opportunity to build into this momentum and generate real fear of imminent detection and prosecution to offenders.

In accordance to article 33 *bis* 3 of the FECL in order to access to the benefits of the reduction of penalties an economic agent -that has incurred in “absolute monopolistic practices”- must:

- Provide the Commission with relevant evidence that can be used and leads that investigators can follow for other evidence;
- agree to ongoing and full cooperation with the Commission in the investigation;
- take any necessary action to cease its participation in the cartel; and
- Provide all information to the Commission before the end of the investigation.

Following good practices around the world, the leniency is available both where the Commission is unaware of the absolute monopolistic practice and where the Commission is

aware of the conduct but does not have sufficient evidence to finalize the investigation and proceed to initiate a process to adjudicate.

The Mexican leniency program also provides that full leniency be granted to the first eligible applicant who self-reports its involvement in the practice, provided that the relevant criteria are met. The program also provides for lenient treatment for second and subsequent applicants; in these cases the penalties exoneration will be up to 50%, 30% or 20%, when sufficient and additional evidence is provided and the other requirements are met. To determine the amount to be reduced the Commission will take into account the chronological order of the applications as well as the quality of the evidence presented.

The FECL emphatically establishes that the Commission must keep the identity and any information provided by the leniency applicants as confidential. In the past this would be a major concern for lawyers and business persons involved in competition issues in Mexico; however, now the law clearly has included necessary protection for applicants.

The process is simple, applicants must call a mail voice in Mexico City (52) (55) (27-89-66-32) or send an email to [inmunidad@cfc.gob.mx](mailto:inmunidad@cfc.gob.mx) (a protected e-mail) expressing their wish to access to the leniency program and providing necessary information for the Commission to establish personal contact with them. The Commission will assign a code to the applicant and further communications will be conducted using the provided code. No application will be taken into account if it is not processed through these means.

Two working days after the initial communication the Commission will contact the applicant to inform the place and date where he or she shall meet with the Commission to review the evidence and information that the applicant would be submitting. If the applicant does not attend the meeting, the application will be cancelled. After the meeting the Commission will have fifteen working days to determine and inform the applicant if the evidence and information is sufficient enough and the percentage of penalty reduction that could be applicable. If the information is not sufficient it will be returned to the applicant and the application and the code will be cancelled.

To enhance the transparency and consistency in the application of the leniency policy and processes only two officials within the Commission have been designated as contact points for applicants<sup>5</sup>. Contact points will have to track the exact time of the application or request, and this may be very important in some cases as applicants may apply very close in time and records must be kept to determine which applicant applied first.

Although the law was amended in June, 2006 different practical issues did not permit the Commission to launch the program accompanied with a broad education and awareness campaign. This understandable but unfortunate delay created some hesitation within the lawyer's community that expressed some doubts in relation to the program. However, in the last months the Commission has taken more decisive steps to assure the future success of the leniency program.

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<sup>5</sup> See [http://www.cfc.gob.mx/index.php?option=com\\_content&task=view&id=2997&Itemid=1](http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=2997&Itemid=1) (22 June 2007)

Last month the Commission announced the creation of a Directorate General in charge of investigating Hard Core Cartels and Restrictions to Interstate Commerce with the specific duty of investigating absolute monopolistic practices: collusive agreements including price fixing, market segmentation, restriction of supply and bid-rigging; restrictions to interstate commerce, as typified in the Mexican Constitution (article 117, section V); and the implementation of the CFC's Leniency Program. Likewise, in the next months new administrative regulations will be soon enacted to support the legal provisions granting legal certainty to potential applicants.

Italians say "*chi va piano, va sano e va lontano*" (one who goes slowly goes far and without peril), the Mexican competition policy started in 1992 with the enactment of the FELC, we started very late in comparison to other countries. Our leniency program was first launched in 2005 without success; the Commission has learned a lot since then and now has decided to take some months to develop a new program strengthened by the Law and analysis of practical issues considering the best practices in the world. We have been going slowly, things have been in due course taking their place; however, now that we are ready we cannot waste any time.