IMMUNITY, SANCTIONS & SETTLEMENTS 2019 KNOW HOW

Mexico

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GCR INSIGHT

Immunity or a 100 per cent reduction in sanctions

1 What benefits are available to the first applicant to qualify?

The first applicant will receive a significant reduction of the applicable fine and will only be required to pay the equivalent to one "measurement and update unit" (formerly known as the general minimum daily wage prevailing in Mexico City, currently 84.49 pesos). Although this implies that there is no "100 per cent reduction in sanctions" in Mexico, for the purposes of this chapter, "immunity" will apply to the first applicant for leniency.

Also, leniency protects the applicant and, and if requested by the applicant, its subsidiaries, affiliates, former and current employees and managers.

There have been some cases where the protection has even protected agents.

Individuals applying directly for immunity or cooperating with the authority under the leniency application by the company they work for will not be subject to criminal liability.

Applicants may still be subject to a civil claim derived from the illegal conduct.

2 Do the protections extend to current and former officers, directors and employees?

Yes, if expressly requested by the applicant.

3 Is immunity available after an investigation begins?

Yes. Immunity is available after an investigation begins, if it is requested prior to the formal conclusion of the investigation by the Investigative Authority of the Mexican Federal Economic Competition Commission (COFECE) or of the Federal Institute of Telecommunications (IFT), which is the antitrust authority in the telecommunications and broadcasting industries (together, the Antitrust Authorities).

It is important to mention that each of the Antitrust Authorities now has an independent body (the investigative authority or Chief Prosecutor) that is responsible for all investigations, including absolute monopolistic practices, abuse of dominance, illegal concentrations (mergers), barriers to entry and essential inputs. These investigative authorities oversee the investigations, and act as prosecutor at the formal administrative procedures (following the formalities of a trial). Likewise, these investigative authorities handle all leniency applications.

4 What are the eligibility requirements before an investigation begins?

To qualify for immunity, an applicant must:

- be the first to apply and produce sufficient supporting evidence, that in the opinion of the investigative authorities, allows them to begin an investigation or to presume the existence of the alleged illegal conduct;
- cooperate fully and continuously with the Antitrust Authorities in their investigation and in the administrative procedure in the form of a trial; and
- take the necessary actions to terminate its participation in the alleged illegal conduct.

5 What are the eligibility requirements after an investigation begins?

The same as those requirements before an investigation begins, in the understanding that the application for leniency shall be submitted prior to the formal conclusion of the investigation by the Antitrust Authorities and additional evidence is provided.

6 Will the applicant have to admit to a violation of law?

Yes.

7 Are ringleaders or initiators of the conduct eligible?

Yes. Neither the Federal Economic Competition Law (the Mexican Competition Law), nor the Regulations of the Federal Economic Competition Law (the Regulations) issued by COFECE and IFT distinguish between ringleaders, initiators, followers or other economic agents involved in the conduct.

8 When must the applicant terminate its involvement in the conduct?

The Mexican Competition Law provides that the applicant must commit to terminate its involvement when applying for the leniency programme; however, there is no specific provision on the timing in which such termination shall be effective. In practice, immunity is granted subject to termination of its involvement in the conduct, but the authority may work in the timing of the termination to protect the identity of the applicant to the leniency programme and the collection of evidence.

9 What constitutes termination of the conduct?

To cease any involvement in the alleged illegal conduct, including among others, the termination of any type of contracts, agreements, arrangements, actions, etc.

10 Will the applicant be required to make restitution to victims?

Not as a direct consequence of the leniency programme; however, as the leniency programme does not protect applicant from civil claims for damages or losses (including class actions) derived from the illegal conduct, applicants may be liable for damages caused.

11 Can more than one applicant qualify for immunity?

No; however, economic agents or individuals who apply after the first applicant may obtain a reduction of the fine of up to 50 per cent, 30 per cent or 20 per cent of the permitted maximum fine, subject to the chronological order of the application and if they:

- provide valuable information in addition to that provided by the previous applicant;
- cooperates fully and continuously with the Antitrust Authorities; and
- takes the necessary steps to terminate its participation in the alleged illegal practice.

Leniency will also apply for criminal liability, although applicants will still be subject to civil claims (including class actions) for damages derived from the illegal conduct.

12 Can an applicant qualify if one of its employees reports the conduct to the authority first?

Yes; however, if the employee applied first independently from its employer, the employer will be considered as a second, third or fourth applicant, depending on the chronological order of its application.

13 Does the afforded protection extend to any non-antitrust infringements?

No.

14 What confidentiality assurances are given to the first applicant to report?

The identity of all applicants shall be kept confidential by the Antitrust Authorities at all times. Also, for the Antitrust Authorities to share any information with Antitrust Authorities in other jurisdictions, the corresponding applicant must grant a waiver authorising the Antitrust Authorities to do so, in the understanding that they may refuse granting such waivers, without such fact affecting their standing in the leniency programme.

15 Does the authority publish guidance regarding the application of the programme?

Yes. On 25 June 2015, COFECE issued the Guidelines for the Programme on Immunity and Reduction of Sanctions (Guía del Programa de Inmunidad y Reducción de Sanciones), which are available at https://www.cofece.mx/wp-content/uploads/2017/12/guia-0032015_programa_inm.pdf.

IFT has also recently issued guidelines for its Leniency Programme.

16 Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

Not to our knowledge. It is our understanding that in some jurisdictions it is required for the applicants to deliver a waiver for the corresponding antitrust authorities to exchange information with other authorities; in Mexico, however, this is not a requirement and all applicants may refuse granting waiver without this affecting their standing within the leniency programme.

Immunity application and marker process

17 What is the initial process for making an application?

Applicants may submit their application to the programme either by email or by voicemail. Within the following five days (in the case of COFECE) or two business days (in the case of the IFT), from the date on which the application is made, the Antitrust Authorities will contact the applicant to schedule the formal meeting, whereby the applicant will have to provide all the documents and information available to evidence the conduct (there is no specific timing for the date in which such formal meeting shall be carried out).

Together with all the documents that will have to be delivered at the formal meeting, the applicant will also need to provide a complete description of all the backgrounds and facts of the conduct, as well as disclose the names of the officers involved. It must be noted that the Antitrust Authorities will not disclose at any time the identity of the applicant; however, once an administrative procedure is initiated, all defendants (which will also include the applicant for purposes of covering its identity as applicant) will have access to non-confidential documents, as well as to the names of the officers who rendered depositions.

18 What information is required to secure a marker?

Applicants must include:

- a statement of their formal intention to apply to the programme, identifying the market affected by the conduct, and the products or services related thereto;
- contact details including at least, the name, telephone number and address of the person who will be the contact for the Antitrust Authorities; and
- additional information such as email address, contact details of the counsel assisting in the matter and a general description on the industry, product or service where the conduct occurred, is also advisable.

19 How much time will an applicant have to perfect its marker?

There is no provision regarding the time to have a formal meeting. In practice, a negotiation occurs with the Investigative Authority of COFECE. They are flexible on the timing if it is needed for gathering the required information to perfect the marker.

The Regulations provide that within the 40 business days following the date of the formal meeting, the Antitrust Authorities shall verify and validate the information provided at the formal meeting, in the understanding that such term can be extended for up to four additional times. This may be given to provide more information or to clarify what was provided in the first meeting to perfect the marker.

20 Can the deadline for perfecting the marker be extended?

The Regulations provide that within the 40 business days following the date of that formal meeting, the Antitrust Authorities shall verify and validate the information provided at the formal meeting, in the understanding that this term can be extended for up to four additional times. This may be given to provide more information or to clarify what was provided in the first meeting to perfect the marker.

In practice, COFECE grants the required extensions, as long as it considers the applicant is acting in good faith and devoting its best efforts to gather the required information.

21 What is required to perfect the marker?

To perfect the marker, it is required that the applicants provide the documents and information that allow the Antitrust Authorities to initiate an investigation or to provide evidence that is sufficient to presume the conduct may exist (and in case of international conducts, to evidence its effects in Mexico).

22 Can the scope of the marker be expanded if additional information is discovered by the applicant?

Yes. If new evidence reveals the involvement of additional employees or managers, the marker may be expanded to include such employees or managers. However, if such additional information refers to different conduct or markets, then a new application shall be made for such new conduct.

23 Can an applicant lose its marker if a second applicant comes forward with better information?

No, the Antitrust Authorities can only analyse one application at a time, and shall rule on granting leniency prior to analysing the information provided by other applicants. The only way in which an applicant may lose its marker is if the information it provides does not allow the Antitrust Authorities to presume the conduct exists, then the Antitrust Authorities will reject the application and will analyse the information provided by the second applicant and subsequent applicants.

24 What if the applicant's investigation reveals that no violation exists?

If the Antitrust Authorities determine that no violation existed, it will not initiate a formal investigation or, if initiated, will close the investigation and will return all the information and documents that were provided by the applicant.

25 What if the authority decides not to investigate?

The applicant cannot challenge the Antitrust Authorities' decision not to investigate based on the evidence provided by the applicant. However, in any case, the antitrust authorities will not be allowed to use the information provided by an applicant if it changes its decision not to investigate.

Immunity cooperation obligations

26 What is the applicant required to produce?

All the evidence they have in their power and that can be reasonably produced by them.

The Mexican Competition Law provides that the applicant shall provide the information or documentation that allows the Antitrust Authorities to begin an investigation (in the case of the first applicant) or to presume the conduct, and to fully cooperate with them during the investigation and, if applicable, the administrative procedure. In this regard, the Mexican Competition Law grants the Antitrust Authorities the discretion to determine which evidence is useful for such purpose. Usually, the evidence and information requested by the Antitrust Authorities consists of emails, agreements, documents, waivers (either procedural or substantive), testimonies, affidavits, etc.

27 Will the applicant be required to make a written confession?

No. Applicants may confess their participation in the illegal conduct in writing or orally.

28 Can third parties obtain access to the materials provided by the applicant?

Not during the investigation stage; however, the Antitrust Authorities will include the information provided in the file of the investigation, the notice of probable responsibility (statement of objections) and its resolution (only information considered as confidential under Mexican Law will be preserved as strictly confidential, eg, industrial or trade secrets as well as the leniency application itself). It shall be noted that during the administrative procedure

in the form of a trial, access to the file is not public, it is only for the defendants. The above does not prevent defendants disclosing information contained therein or in the notice of probable responsibility.

Lastly, it should be noted that after issuing a resolution, the Antitrust Authorities will publish a public version thereof, redacting sensitive information, which will be treated as confidential.

29 Will the applicant lose its protection if one or more of its employees refuses to cooperate?

No, the applicant will have to report this circumstance to the Antitrust Authorities for them to consider such employees separately, which means that such employee or employees will lose their protection.

30 Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

Obstructive conduct before the application does not prevent applying to the programme. If obstructive conduct occurs after the application, the applicant will have to inform the Antitrust Authorities of this circumstance and will affect the employee directly involved in obstruction. If the obstruction is considered a corporate act, then it will also affect the applicant.

31 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

These doctrines are not legally recognised in Mexico. Recent judicial decisions provide that attorney–client privilege applies to external right of defence advice only.

To our knowledge, COFECE's investigative authority has not requested these types of documents in leniency applications.

Granting immunity

32 How does the authority announce its promise not to charge or sanction?

Once the evidence provided by the applicant has been analysed and the Antitrust Authorities consider it is enough to grant leniency, the Antitrust Authorities will formally notify the applicant in writing that leniency has been granted, and the reduction in the fine to which the applicant will be subject. Such official communication is considered confidential, including its mere existence to any third party and even to officers of the Antitrust Authorities not involved in the investigation.

33 Does the authority put its commitment in writing?

Yes, although if requested by the applicant to be protected for discovery purposes, such communication may not be delivered.

34 Who is given access to the document?

Only the applicant and the officers involved in the investigation will have access to it.

35 Does the authority publish a model letter for conferring immunity?

No.

Individual immunity or leniency

36 Is there an individual immunity programme?

Not as a separate programme as it is the same leniency programme, however, individuals may apply on their own behalf (independently from their employer).

37 What is the process for applying?

The same process described in response to question 17.

38 What are the criteria for qualifying?

The same criteria as described in question 4.

Revocation of immunity

39 On what basis can corporate immunity be revoked?

Once granted, immunity may be revoked if the applicant does not comply with the requirements for obtaining leniency, such as:

- cooperating fully and continuously with the Antitrust Authorities in its investigation and in any subsequent proceedings; and
- taking the necessary steps to terminate its participation in the alleged illegal practice.

40 When can it be revoked?

At any time during the investigation and, as the case may be, during the administrative procedure in the form of a trial.

41 What notice is required to revoke?

Pursuant to the Guidelines for the Programme on Immunity and Reduction of Sanctions issued by COFECE, the authority must notify the applicant the recommendation on behalf of the investigative authority to revoke the benefits of the programme, summoning the applicant to a meeting with the investigative authority to discuss such recommendation.

If COFECE revokes the benefits of the programme previously granted to a specific applicant, COFECE will not return the documents and information provided by the applicant and may use them in both the notice of probable responsibility and in the resolution. This is not applicable if an applicant does not provide evidence of an illegal conduct in the case of the first applicant or does not provide additional information to that already provided by prior applicants in the case of subsequent applicants (see questions 24 and 25).

42 Can the applicant file a judicial challenge to a decision to revoke?

Yes, however, such filing may only be submitted after the Antitrust Authorities have issued a final decision in their investigation. This, since the revocation would be considered as an intra-process action and hence, the Constitution expressly states that such actions may only be challenged once a final decision has been issued by the Antitrust Authorities.

Reduction in sanctions

43 Does the leniency programme allow for reductions in sanctions?

Yes. As mentioned in question 1, the first applicant will be subject to a reduction of the fine to the equivalent to one measurement and update unit (currently, 75.49 pesos). Economic agents or individuals who are not the first applicant may obtain a reduction of the fine of up to 50 per cent, 30 per cent or 20 per cent of the permitted maximum, respectively, depending on the order in which they applied, and the evidence provided.

44 What is the process for seeking a reduction in sanctions?

Regarding cartel activities, there is no process for seeking a reduction of fines other than the leniency programme.

45 Is there a marker process similar to immunity applications?

Yes. The Mexican Competition Law provides that to obtain a marker for second, third, etc, the applicant shall provide information that allows the Antitrust Authorities to evidence the alleged illegal conduct; however, in this case, the information that shall be considered by the Antitrust Authorities shall comply at least with the following:

- in principle, it shall be different to the information provided by the first (or subsequent) applicant(s);
- if the information is similar, it shall contain additional elements (eg, more details/facts); and
- the information shall be related to the same activities referred by the first applicant.

46 Are the reductions in sanctions fixed or discretionary?

In the case of the first applicant, the amount of the fine is fixed (ie, the equivalent to one 'measurement and update unit'). In the case of the subsequent applicant, the reductions are fixed as to the percentage applied to be reduced from the permitted maximum fine; however, the fine will be calculated by the Antitrust Authorities, considering the criteria in question 48.

47 How are the reductions in sanctions calculated?

A company obtaining a fine reduction will get an official notice stating the percentage of reduction credit.

The amount of the reductions is calculated based on the fines effectively determined by the antitrust authorities in their resolution.

48 Are there sentencing guidelines?

The law establishes the criteria the authority shall follow to determine the fines.

To calculate the amount of the fine to which the corresponding reduction will apply, the Antitrust Authorities shall consider the following elements (and consequently duly justify them in the resolution where the fine is imposed):

- seriousness of the violation;
- the damage caused;
- the degree of premeditation;
- the participation in the markets;
- the size of the market affected;
- the length of the practice; and
- the background, repeated offences and the financial condition of the infringer.

Therefore, the final amount of the fine will vary depending on those circumstances, and the applicable reduction to the applicant.

49 If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

No, as leniency is granted only to the conduct stated in the application. If an additional conduct is detected, it is advisable to submit a new application with respect to such additional conduct. It may be the case, however, that the Antitrust Authorities consider that both applications refer to the same market and therefore, should be investigated in a single file; otherwise, if the Antitrust Authorities were to consider both applications separately, two different investigations will be conducted. The benefit applicable to each application would be determined based on the marker of each applicant on each investigation.

50 Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

In the case of the first applicant, the amount of the fine is fixed (ie, the equivalent to one 'measurement and update unit'). In the case of the subsequent applicant, the reductions are fixed as to the percentage applied to be reduced from the permitted maximum fine; however, the fine will be calculated by the antitrust authorities, considering the criteria mentioned in question 48.

51 Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

Leniency also protects all applicants and their former and current employees and managers included in the application against criminal liability. In addition, such individuals will not be sanctioned with the prohibition to act as board member, manager, director, executive, agent or legal representative for up to five years.

52 Does the competition authority publish guidance regarding sentencing reductions?

No, the only guidance is with respect to the percentage to be applied to the reduction, and the criteria for imposing fines mentioned in response to question 48.

53 Does the authority provide for "Amnesty Plus" benefits?

No.

54 How is the Amnesty Plus discount calculated?

Amnesty Plus does not apply in Mexico. Cooperation obligations for sentencing reductions

55 Are the cooperation obligations similar to those for immunity applicants?

Yes. The same.

56 Will the applicant be required to make a written confession?

No. It can be provided orally.

57 Can third parties obtain access to the materials provided by the applicant?

Not at the investigation stage; however, if an administrative procedure in the form of a trial is initiated, then the defendants will have access to all information and documents available at the file of the investigation (except for those classified by the Antitrust Authorities as confidential, including the leniency application itself). Furthermore, a non-confidential version of the resolution to be issued by the Antitrust Authorities will be available on their website.

58 Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

See question 29.

59 Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

See question 30.

60 Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

See question 31.

61 Can an applicant challenge the amount of the reduction of sanctions?

It is possible.

Settlements

62 How is the settlement process initiated?

In Mexico, settlements are not available for cartel activities. There is a procedure that may be considered as a 'settlement', which is only available with respect to relative monopolist practices (abuse of dominance) and illegal concentrations (mergers).

Under such procedure, before the Antitrust Authorities issue a final decision, the investigated economic agent may offer commitments that:

- have as a consequence, the restoration or protection of the process of free and open competition; and
- the proposed restoration measures are adequate and economically viable to prevent or cease the relative monopolistic practice or the prohibited concentration, indicating the periods and terms for verifying this.

A company can only obtain this benefit once every five years.

63 Is the amount of the sanction always fixed in the settlement agreement?

No. The Antitrust Authorities at their discretion, may opt to:

- close the file without imposing any sanction; or
- impose a fine of up to 50 per cent of the maximum fine that would apply in terms of the Mexican Competition Law. In the latter case, the economic agent will also be subject to civil liability.

64 What role, if any, do the courts play in the settlement process?

None during the settlement process. However, if the investigated economic agents were to challenge the final decision (for example, against the calculation of the sanctioned applied by the Antitrust Authorities), this challenge would be decided by a specialised federal court in competition and telecommunications.

65 Are the settlement documents, including any factual admissions, made public?

Yes, except for any confidential information (ie, industrial/trade secrets).

66 Is an admission of wrongdoing required?

No, investigated economic agents may offer commitments to stop the investigated practices without acknowledging any wrongdoing.

67 Do companies that enter into settlement agreements receive an automatic sentencing discount?

No. The amount of discount in the fine (and in some cases the exemption from a fine), is subject to the discretion of the Antitrust Authorities.

68 Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

Legally speaking, the procedure has to be reached between one investigated economic agent and the Antitrust Authorities (even in those cases in which an investigation was triggered by a claim from a third party); however, in practice, when there are multiple subjects of the investigation, the Antitrust Authorities will negotiate with all the parties to try to reach only one agreement with them.

69 Will the authority settle with subjects who refuse to cooperate?

As mentioned in question 62, settlements are not available for cartel activities. Regarding investigations of relative monopolistic practices, the investigated economic agent may offer commitments that have, therefore, the restoration or protection of the process of free and open competition. In this regard, if such commitments are approved by the Antitrust Authorities and consequently included in its final resolution, the economic agents must accept such commitments in writing in order for the investigation file to be terminated. If the economic agents do not comply with the accepted commitments, they may be subject to a fine of up to 8 per cent their annual revenues.

70 If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

No, as the commitments submitted by the parties do not require a confession for recognising an illegal conduct.

71 May a party to the settlement agreement void the agreement after it is entered?

This procedure does not result in an agreement with the antitrust authorities, but rather in a resolution issued by such Antitrust Authorities that the economic agents must accept in writing. If they accept it, they may not be able to challenge it in court, and consequently in case of breach, they may be subject to a fine of up to 8 per cent of their annual revenues.

72 Does the competition authority publish guidance regarding settlements?

No.



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Research, in 2010, 2011 and 2012; *The Cartels and Leniency Review*, published by Law Business Research, in 2013, 2014 and 2015; *The Dominance and Monopolies Review*, published by Law Business Research, in 2015 and 2016; 'Mexico: New Antitrust Authorities and a New Federal Economic Competition Law', published by the *Journal of European Competition Law & Practice*, Oxford University Press in 2014 and 'Jurisdiction of Antitrust Authorities in Mexico: The case of the *Nokia/Alcatel-Lucent merger'*, published by *Expert Guides* in 2016.



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Prior to joining the firm in July 2017, he served in the Mexican Federal Competition Commission (COFECE) for 10 years, where he was the first Investigative Authority (Chief Prosecutor) in charge of all enforcement efforts for the agency. He also held other senior leadership roles including Chief of Staff for the president and head of cartel investigations. Before being invited to enter into government work, he worked for national and international law firms.

Mr Mena-Labarthe was recognised as "Promising" in *Expansion* magazine's "Promising talent in their 30s" ranking (the leading Business publication in Mexico) in 2011 and has been recognised by *Global Competition Review's* "40 Under 40 Leading Competition Lawyers in the world". He is a member of the International Bar Association (IBA).

In the academic sphere, Mr Mena-Labarthe is professor at Instituto Tecnológico Autónomo de México (ITAM) since 2007, where he founded the Antitrust and Competition and the Law and Economics of Regulation Certifications. He is also co-author of five books on antitrust and competition.

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