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**LATIN AMERICAN COMPETITION FORUM**

**Session I: Criteria for Setting Fines for Competition Law Infringements**

**Contribution from Mexico**

**3-4 September 2013, Lima, Peru**

*The attached document from Mexico is circulated to the Latin American Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 3-4 September 2013 in Peru.*

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## LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

### Session I: Criteria for Setting Fines for Competition Law Infringements

#### CONTRIBUTION FROM MEXICO (CFC)

#### 1. Introduction

1. Mexico's antitrust law, the Federal Law on Economic Competition (*Ley Federal de Competencia Económica* or LFCE) aims to protect the competition and free market process by preventing and eliminating monopolies, monopolistic practices and other restrictions that hinder the efficient operation of the goods and services market (Article 3). To accomplish this purpose, the LFCE authorizes the Federal Competition Commission (*Comisión Federal de Competencia de México* or CFC) to prevent, investigate and combat monopolies, monopolistic practices and concentrations (Article 23). It also provides guidelines for sanctioning individuals and companies.

2. There are three possible situations for which the CFC may impose sanctions:<sup>1</sup>

- Committing, aiding and abetting or representing anyone who conducts absolute monopolistic practices<sup>2</sup>, relative monopolistic practices<sup>3</sup> or unlawful concentrations.
- Breaching any of the restraints imposed by a CFC decision.
- Falsely declaring or submitting false information to the CFC.

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<sup>1</sup> These are described in greater detail in item 5 of this contribution.

<sup>2</sup> The LFCE defines absolute monopolistic practices as contracts, agreements, arrangements, or combinations among competitive economic agents, with the goal of fixing or raising the prices of goods or services, limiting or restricting the available product supply, dividing markets, or agreeing on postures regarding public biddings (Article 9).

<sup>3</sup> As per the LFCE, relative monopolistic practices are those acts, contracts, agreements, procedures or combinations, of such with the purpose or effect of improperly displacing competitors from the market; substantially limiting their access to the market or establishing exclusive advantages in favour of one or more competitors (Article 10).

## 2. Type of sanction

3. In general, the LFCE includes rules for the following types of sanctions to be applied for committing any of the aforementioned punishable actions (Article 35):

- Order to suspend or eliminate the conduct for being a monopolistic practice, or correct its effects (Section I, Article 35);
- Order of partial or total divestiture of any improper concentration or company merger (Section II, Article 35);
- Criminal sanctions for economic agents who commit absolute monopolistic practices (Article 254 bis of the Mexican Federal Criminal Code);
- Administrative Fines (Sections III-XIII, Article 35).

4. The amount of the administrative fines varies based on the type of infringement committed and the violator's characteristics. The CFC's calculation of the fines uses a simple and transparent method that provides legal certainty to economic agents and facilitates compliance with the antitrust law. To this end, the LFCE establishes that the CFC may fine both companies and individuals pursuant to the following:

## 3. Type of infringement committed

5. The following is a list of the types of infringements addressed by the LFCE:

- Submitting false information, up to 175 thousand times the general minimum wage in the Federal District (GMWFD), approximately USD 876.712,54 (Section III, Article 35).<sup>4</sup>
- Committing an absolute monopolistic practice, up to 10% of the violator's annual income, as well as a three to ten year prison term (Section IV, Article 35b and Article 254 bis of the Federal Criminal Code).
- Committing a relative monopolistic practice, up to 8% of the violator's annual income (Section V, Article 35).
- Conducting an unlawful concentration or merger, up to 8% of the violator's annual income. (Section VI, Article 35)
- Failing to report a concentration or merger, up to 5% of the violator's annual income (Section VII, Article 35).
- Breach of restraints imposed by the CFC, up to 10% of the violator's annual income (Section VIII, Article 35).
- Direct participation in absolute monopolistic practices or prohibited concentrations, up to 200 times the GMWFD, approximately USD 1.001.957,20 (Section IX, Article 35)

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<sup>4</sup> Hereinafter, the GMWFD will be calculated as MXN 64,76 and the exchange rate used is MXN 12,9267 = USD 1, as published in the Mexican Official Gazette.

- Aiding and abetting the conduct of a monopolistic practice or unlawful concentration, up to 180 thousand times the GMWDF, approximately USD 901.761,50 (Section X, Article 35).
- Non-compliance with a CFC decision, up to 8% of the violator's annual income (Section XI, Article 35).
- Failing to comply with an order to refrain from completing a concentration or merger, up to 8% of the violator's annual income (Section XII, Article 35).
- Failing to comply with a temporary order to suspend activities, up to 10% of the violator's annual income (Section XIII, Article 35).

#### **4. Characteristics of the infringement and the violator.**

6. In addition to the aforementioned guidelines, when calculating the amount of a fine, the CFC takes into account the characteristics of both the infringement and the violator, as well as the circumstances of the conduct. Pursuant to Article 36 of the LFCE, when the CFC imposes fines, it must consider a) the seriousness of the infringement, b) the damage caused, c) whether it was intentional or unintentional, d) the violator's market share, e) the size of the affected market, f) the duration of the illicit practice or concentration, g) the violator's history or recidivism, and h) its ability to pay.

7. The fines must be significant enough to act as a deterrent on individuals and economic agents being sanctioned against and would-be violators, so that there is no incentive to violate the antitrust laws.

#### **5. Calculating the fine amount**

8. In order to calculate the amount of a fine in a predictable and transparent way, the CFC generally uses the method described in the Technical Criteria for Setting Competition Fines<sup>5</sup>. As such, it takes into consideration:

- a. The violator's market share, the size of the affected market, and the duration of the unlawful practice or concentration.*

9. The amount of the fine must be proportional to the impact of the unlawful conduct on the market's operation, and this impact is closely related to the violator's market share, the size of the affected market and the duration of the monopolistic practice or prohibited concentration.

10. These three factors are used to determine the *Affected Sales*, which represent all transactions that were or could have been manipulated by the conduct that violated the LFCE.

11. Specifically, the *Affected Sales* are the product of multiplying the market size by the violator's market share and the duration of the monopolistic practice or prohibited concentration.<sup>6</sup>

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<sup>5</sup> Information available in Spanish at: <http://www.cfc.gob.mx/images/stories/Noticias/DocsDiadelaCompetencia2011/4imposiciondemultas.pdf>

<sup>6</sup> To determine the market size, a value for the annual sales of the good or service in question must be obtained. The market share equals the violator's sales as a percentage of the market size. The duration is the number of years and months, proportionately, that the monopolistic practice was going on or that the unlawful concentration was in effect, according to the CFC's investigation.

$$AS = M \times V \times D$$

AS = Affected Sales

M = Market size

V = Violator's market share

D = Duration

12. The *Affected Sales* determines the *Base Fine*, that is, the preliminary amount of the individualized sanction. Specifically, the *Base Fine* is arrived at by:

- a. Multiplying the *Affected Sales* by a factor that reflects the damage caused by the punishable conduct (called the *Damage Factor*), and
- b. Multiplying the result of the paragraph above by a factor that reflects the seriousness of the conduct (called the *Severity Factor*).

$$BF = AS \times DF \times SF$$

Where:

BF = Base Fine

AS = Affected Sales

DF = Damage Factor

SF = Severity Factor

13. Both the *Damage Factor* and the *Severity Factor* are calculated as follows:

*b. Damage Caused*

14. The damage caused is defined as the cost to society that is or may be a direct result of a monopolistic practice or unlawful concentration due to the unfavorable effect that these can create in otherwise healthy markets. This damage includes the waste of public and private funds caused by said practice or concentration, as well as the potential negative impact on the distribution of income and economic growth as a result of these types of behaviors.

15. The quantitative estimate of the damage caused mainly calculates the unfair transfer of funds by consumers or users who acquire the good or service in question from the economic agent conducting the infringement. This transfer could also be equal to the illicit profits generated by the economic agents who participated in said infringement.

Also, pursuant to Article 12 of the LFCE, when calculating the relevant market, the following criteria must be taken into consideration:

I. The possibility of substituting the applicable goods or services with others, of either domestic or foreign origin, considering technological capabilities, the extent to which consumers use substitutes and the time required to make such a substitution; II. The cost difference in the distribution of said goods, their raw materials, complementary goods and substitutes, compared with other territories or abroad (taking into account the cost of freight, insurance, tariffs and non-tariff restrictions, restrictions imposed by economic agents or their associations, and the time required to supply the market from those regions); III. The possibility that users and consumers have to search in other markets and the costs associated with this; and IV. Federal, local or international regulatory restrictions that limit users' or consumers' access to alternative supply sources, or limit providers' access to alternative clients.

16. Calculation of the damage caused is based on the estimate of the effect that the punishable conduct may have had on prices paid by consumers for the good or service in question. This effect, called the *Mark-up*, is defined as the difference between the observed price and the estimated market price that would have prevailed in the absence of the monopolistic practice or unlawful concentration, expressing the difference as a percentage of this estimated fair market price.

17. Depending upon the availability of information, the *Mark-up* is calculated in one of the following ways:

- If there is sufficient case-specific information available in order to reasonably estimate the effect on the market, or the damage caused, the percentage yielded from that estimate must be used. Preferably, the estimated Markup should be calculated for the entire period that the monopolistic practice or unlawful concentration was in effect, but if this is not possible, then the *Mark-up* should be calculated for the last calendar year that the practice was going on, and
- If there is insufficient case-specific information, which probably occurs in the majority of the cases, the following percentages should be used:
  - 20% for an absolute monopolistic practice case, and
  - 10% for a relative monopolistic case or prohibited concentration.

This percentage difference reflects the greater damage that is generally caused by absolute monopolistic practices relative to other types of conduct that violate the LFCE.

18. The *Damage Factor* is calculated by multiplying the *Mark-up* by two, which incorporates a punitive element meant to deter future illegal conduct by companies or individuals.

$$DF = M \times 2$$

Where:

DF = Damage Factor

M = Mark-up

*c. Seriousness of the infringement and degree of intention*

19. The seriousness of the infringement and degree of intention are calculated jointly since both factors are normally found to be closely related.

20. The *Severity Factor* is determined by considering all of the case's mitigating or aggravating circumstances which would affect the nature of the conduct as well as the degree to which the violator committed the infringement intentionally. This *Severity Factor* ranges between 50 percent as the lower limit and 200 percent as the maximum. The lower limit sets the *Base Fine* which is only equal to the damage caused, while the maximum limit is meant to appropriately sanction against conduct of a more serious nature.

$$0.5 \leq SF \leq 2$$

Where:

SF = Severity Factor

21. The following is a list of mitigating circumstances that are weighed:

- Cooperation with the CFC, over and above the violator's legal obligations, which allowed the proceeding to be concluded in a more expeditious or effective manner;
- Termination of the infringement prior to, or at the onset of CFC intervention;
- Absence of any intent to hide the conduct or deceive consumers;
- The government's authorization or encouragement of the anti-competitive practices;
- Improvements in efficiency gained by the conduct in relative monopolistic cases, even when these have not been enough to excuse the practice from being sanctioned;
- Voluntary compensation by the offender to the economic agents or individuals that were harmed by the conduct under investigation;
- Proof that the infringement was only committed by lower level members of the organization, without the approval or knowledge of the company's management, and
- Absence of wilful misconduct by the violator.

22. The following is a list of aggravating circumstances that are weighed:

- Refusal to cooperate with the CFC or obstruction of investigation efforts;
- Any retaliatory measures against the other economic agents or individuals aimed at ensuring continuation of the infringement;
- Any attempt to hide the conduct or deceive consumers and users;
- Any pressure placed upon public authorities or lobbying for the government to ratify or encourage anti-competitive practices;
- If the affected market pertains to goods and services that are critical to the nation's economy or the general public;
- Leading role, coordinator or instigator of an absolute monopolistic practice;
- High level executive participation at the company in committing the infringement, and
- Proof of wilful misconduct by the violator.

*d. The violator's history or recidivism*

23. In the event of recidivism, there is a *Recidivism Adjusted Base Fine* which is the higher amount of either:

- Double the calculated fine based on the previously described method;

- 10% of the violator's total annual sales for the prior fiscal year, adjusted for inflation. This fine would apply to all sales and transfers of the economic agent's goods and services, not just those pertaining to the affected sales of goods and services in the market where the infringement occurred, or
- 10% of the value of the violator's assets, adjusted for inflation.

$$RF = \text{Max} [BF \times 2, TS \times 0.1, TA \times 0.1]$$

Where:

RF = Recidivism Adjusted Base Fine

BF = Base Fine

TS = Total Annual Sales

TA = Total Assets

*e. Ability to pay or financial capacity*

24. The *Base Fine* or *Recidivism Adjusted Base Fine* may also be adjusted to fit the violator's ability to pay the fine, which is determined in order of preference as the CFC deems appropriate, and depending upon the available information, based on:

- The total income of the individual or entity in the prior fiscal year or latest available fiscal year, adjusted for inflation,
- The value of the violator's assets, adjusted for inflation,
- The best estimate of financial capacity or ability to pay that the CFC can make, when the information mentioned in the last two paragraphs is not a useful representation of the violator's ability to pay.

25. The CFC may require the violator to provide any information that may be considered relevant for purposes of determining its ability to pay fines. If the violator does not respond to this request, the CFC then estimates the violator's ability to pay based upon the best readily available information.

26. The *Financial Capacity Adjusted Fine* is the lesser amount of either 10 percent of the violator's financial capacity or the *Base Fine* (or if applicable, the *Recidivism Adjusted Base Fine*).

$$FCF = \text{Min} [BF \text{ or } RF, 0.1 \times FC]$$

Where:

FCF = Financial Capacity Adjusted Fine

BF = Base Fine

RF = Recidivism Adjusted Base Fine

FC = Financial Capacity (total income or total assets)

27. The *Final Fine* amount is the lesser of either the *Financial Capacity Adjusted Fine* or the *Maximum Fine*, which is defined as the limit described in Article 35 of the LFCE.<sup>7</sup>

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<sup>7</sup> In 2012, the Federal Tax and Administrative Justice Court (*Tribunal Federal de Justicia Fiscal y Administrativa*, or TFJFA) annulled the CFC decision in official notice number DGIMR-10-096-2011-153 of case file DE-013-2010, whereby a fine was imposed upon an economic agent for failing to provide

$$FF = \text{Min} [FCF, MF]$$

Where:

FF = Final Fine

FCF = Financial Capacity Adjusted Fine

MF = Maximum Fine (Article 35 of the LFCE)

28. The chart below shows data for the number of fines imposed<sup>8</sup> and set in administrative settlements with the CFC<sup>9</sup>, as well as the aggregate amount of fines for the country from 2005 to 2012.

	CASES	AMOUNT
2005	5	729.720.819,60
2006	1	2.447.986,70
2007	3	11.732.531,46
2008	0	-
2009	3	455.785.769,60
2010	5	189.362.289,82
2011	4	123.789.515,07
2012	4	68.326.313,50

Source: Federal Competition Commission (Mexico).  
Amounts shown in Mexican Pesos

## 6. Leniency: Early conclusion or reduction in sanctions

29. Notwithstanding all of the above, the CFC's main purpose and objective is not to punish economic agents, but to protect the competition and free market process.

30. Therefore, the LFCE provides for leniency toward economic agents who violate the antitrust law and who wilfully cooperate with the authority in order to preserve competition in the market.

31. One way to receive a leniency concession is for an economic agent conducting a relative monopolistic practice to request for an early conclusion of the CFC proceeding, in exchange for meeting certain commitments that ensure the competition and free market process in the market (Article 33 bis 2). To receive this form leniency, the accused party must present a written statement to the CFC proposing corrective measures that ensure competition with evidence that:

- The competition and free market process will be restored once the effects of the monopolistic practice are rectified, or the practice itself is terminated;

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information and documents requested by the CFC. In its ruling, the court found that the fine imposed by the CFC was illegal because it was not properly individualized given the fact that the CFC did not adequately determine the economic agent's ability to pay. In this regard, the court considered that the economic agent's argument was valid when it stated that only its assets factored into the CFC's equation when determining its ability to pay, when it should have also taken its liabilities into account when calculating its financial capacity and therefore, its ability to pay when setting the fine amount. TFJFA File: 218/12-EOR-01-10.

<sup>8</sup> This is the number of cases sanctioned for anti-competitive conduct and prohibited concentrations.

<sup>9</sup> Does not include data from court rulings.

- The proposed measures are economically feasible and will be able to eliminate the monopolistic practice and its effects, giving time frames and evidence to prove it.

32. This request must be presented before the CFC issues a definitive decision and the economic agents may only seek this leniency once every five years.

33. The early conclusion procedure was introduced with the publication of the 2011 reforms to the LFCE and to date there have been three cases in which different economic agents have received leniency for ceasing to participate in relative monopolistic practices.<sup>10</sup>

34. Another way for an economic agent that has participated in or is participating in an absolute monopolistic practice to receive leniency is to admit its actions to the CFC and seek relief through the immunity programme with a reduction in sanctions (Article 33 bis 3), only by:

- Being the first of the economic agents involved to provide enough evidence, as the CFC deems fit, to prove that the practice was indeed occurring. Others who do not qualify as the first to approach the CFC, may also receive leniency in terms of a fine reductions, but to a lesser extent.
- Cooperating fully and on an ongoing basis with the CFC during the investigation and, if applicable, in the subsequent administrative court proceeding.
- Taking the necessary actions to terminate its participation in the practice.

35. Once the above requirements are met, the CFC will render a decision and impose a minimum fine. The CFC will protect the confidentiality and identity of any economic agents who seek leniency.

36. From 2006 to the end of 2012, the CFC has recorded a total of 61 requests to adhere to the leniency programme or receive a reduction in sanctions, most of which, happened after the LFCE reforms in 2011, as can be seen below.

- 2006 there were no requests
- 2007 there were 2 requests
- 2008 there were 3 requests
- 2009 there were 3 requests
- 2010 there were 7 requests
- 2011 there were 20 requests
- 2012 there were 26 requests

37. From these requests, the CFC has conducted 15 investigations, out of which 5 were sanctioned. The most recent cases are illustrated in tables 1, 2 and 3.

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<sup>10</sup> Case Files: DE-148-2008, DE-012-2010, DE-013-2010.

**Table 1: IO-002-2011 (Ballast)**

<b>Level of Responsibility</b>	<b>Sanctioned Economic Agent</b>		
Violation of sections in Article 9°	Agent 1	Agent 2	Agent 3 (Immunity)
Aiding and Abetting Article 35 Sect. X	-----	-----	Agent 3 (Immunity)
Individuals representing or on behalf of an entity Article 35 Sect. IX	Individual 1	Individual 2	Individuals 3 and 4 (both with immunity)

38. This case shows that 8 agents were sanctioned against according to different levels of responsibility, and four of these received leniency through reduced sanctions.

**Table 2: IO-005-2009 IA (Poultry)**

<b>Level of Responsibility</b>	<b>Sanctioned Economic Agent</b>		
Violation of sections in Article 9°	Agent 1	Agent 2	Agent 3
Aiding and Abetting Article 35 Sect. X	Agent 5 and its sales manager (both with immunity)	Agent 6 and its sales manager (both with immunity)	-----
Individuals representing or on behalf of an entity Article 35 Sect. IX	-----	-----	-----

39. This case shows that 7 agents were sanctioned against according to different levels of responsibility, and four of these received leniency through reduced sanctions.

**Table 3: IO-005-2009 IB (Poultry)**

<b>Level of Responsibility</b>	<b>Sanctioned Economic Agent</b>		
Violation of sections in Article 9°	Agent 1	Agent 2	Agent 3
Aiding and Abetting Article 35 Sect. X	Agent 5 and its sales manager (both with immunity)	Agent 6 and its sales manager (both with immunity)	-----
Individuals representing or on behalf of an entity Article 35 Sect. IX	-----	-----	-----

40. This case shows that 7 agents were sanctioned against according to different levels of responsibility, and four of these received leniency through reduced sanctions.