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LATIN AMERICAN COMPETITION FORUM

Session III: Unannounced Inspections in Antitrust Investigations

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 III 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 III: Unannounced Inspections in Antitrust Investigations

CONTRIBUTION FROM MEXICO (FEDERAL COMPETITION COMMISSION)

1. Legal authority to carry out inspection visits without prior notification

a) Please describe your powers to conduct unannounced inspections in antitrust investigations, the legal basis for those powers, when they were acquired and how they have evolved. Have you engaged in advocacy before government or legislators to obtain or reinforce these powers? If so, please describe the arguments put forward to overcome any concerns or perceptions relating to granting those powers to the competition authority.

1. The Federal Law on Economic Competition (FLEC) empowers the Federal Competition Commission (the Commission) to carry out surprise inspection visits (Article 24, Section II¹) in order to collect evidence for its investigations (Article 31).²

2. The authority to carry out inspection visits was granted to the Commission in the 2006 amendments to the FLEC.³ In Section II of Article 24 as amended in 2006⁴ the Commission was required

¹ Article 24, Section II. "To conduct, as part of its investigations, inspection visits under the terms of Article 31 of this law, and to require the presentation of papers, books, documents, archives and information created by electronic, optical or any other technological means in order to confirm compliance with this law, as well as to require the support of public authorities or other federal, state or municipal authorities for the effective exercise of the powers referred to in this section."

² Article 31. "The Commission may requisition those reports and documents it deems relevant and pertinent to the conduct of its investigations, subpoena those who are connected to the facts in question, and order and carry out inspection visits in the home of the party under investigation, where it is presumed that elements necessary for the proper conduct of the investigation may be found. (...)"

³ Decree by which amendments, additions and repeals were made to various provisions of the FLEC, published in the Official Gazette of the Federation on June 28, 2006.

to request authorization from the competent judicial authority to conduct inspection visits, as well as to require presentation of data and documents.

3. However, the Mexican Supreme Court declared this Section together with the first paragraph, and sections I, II, III, and VIII of Article 31 of the then recently amended FLEC to be unconstitutional.⁵ As stated in the Supreme Court's ruling, the provisions subordinated the Commission's authority to the orders of another branch of government. For this reason these provisions were declared invalid – solely insofar as they provided for the intervention of the Judiciary – since they violated the principle of separation of powers by obliging the Commission to request authorization from the Judiciary to conduct inspection visits.

4. This ruling did not invalidate the Commission's new powers to conduct inspection visits. To the contrary, the Supreme Court affirmed that in accordance with Article 16 of the Constitution⁶ the Commission could conduct visits for the purpose of monitoring compliance with regulations in matters of economic competition.

5. Although since 2006 the Commission has possessed this new investigative tool which granted the possibility of obtaining evidence from the premises of those under investigation to support the Commission's accusations and final rulings, these visits were subject to rules that eliminated the element of surprise and therefore undermined their effectiveness. These rules included the requirement to inform the party under investigation before the visit; leave official notification if the legal representative of the economic agent under investigation was not present; and the impossibility of removing original information or making copies of hard disks, among others.

6. In May 2011, the FLEC was again amended⁷ with a view to strengthening the powers to prevent, detect and combat anticompetitive practices. Among other modifications, administrative sanctions for engaging in monopolistic practices were increased, the Federal Penal Code was changed to establish criminal penalties for signing or implementing collusive agreements; and the element of surprise was included in the powers to conduct inspection visits.

7. Thus, the Commission was authorized to conduct inspection visits, without the need for prior notification, on the premises of the party being investigated, where it is presumed that elements necessary for the proper conduct of the investigation may be found. This enabled the possibility of conducting visits in the private residence and/or workplace of any economic agent under investigation.

8. The 2006 and 2011 FLEC amendments were the result of intense Commission lobbying and promotional work regarding the benefits of competition. During the debate about these reforms, a lobbying strategy was developed on several fronts in order to create agreement and gain allies in support of the amendments. In addition, the Commission held numerous events to promote its activities and explain their legitimacy.

⁴ Article 24, Section II. As amended in 2006 it established "To request of the competent judicial authority authorization to conduct inspection visits and to require the presentation of papers, books, documents, archives and information created by electronic, optical or any other technological means in order to confirm compliance with this Law and other applicable provisions;"

⁵ Ruling of the Mexican Supreme Court in the Declaration of Unconstitutionality 33/2006, published in the Official Gazette of the Federation on July 12, 2007.

⁶ Political Constitution of the United Mexican States. See <http://info4juridicas.unam.mx/ijure/fed/9/17/htm>

⁷ The amendments were published in the Official Gazette of the Federation on 10th May, 2011.

9. During both the 2006 and 2011 reform processes, months of work were needed to successfully drive forward such an ambitious project and for the Commission to explain the benefits of the changes to the average citizen.

10. In the specific case of the inspection visits, in 2006 the Commission warned that this investigative tool was important for obtaining evidence that could be hidden or destroyed by those engaged in anticompetitive behaviour.

11. In 2011, the Commission pointed out the difficulty of conducting effective inspection visits owing to the rules visits were subject to. As mentioned previously, in practice the rules for conducting these tasks hobbled the Commission's investigative powers, since they provided an opportunity for economic agents to destroy potentially compromising information in the time between notification and the effective start of the inspection visit. For this reason it was proposed to make the inspection visits so-called unannounced or surprise visits, as used in other jurisdictions, as well as including the possibility of securing the evidence obtained.

12. The arguments the Commission used to promote the amendments were based on international best practice. Specifically, the experiences that were considered examples for conducting inspection visits in Mexico were those of the European Union, the United Kingdom, the United States of America, Australia, Brazil, Spain and Germany.

b) Please describe the role played by the judiciary or any other public bodies, such as police forces, in conducting unannounced inspections. If a warrant or judicial authorization from a Court to conduct a search is required in your jurisdiction, have you faced any difficulties or reluctance from the judiciary to provide the necessary warrants? How would you describe the level of initial evidence necessary to justify carrying out an inspection and how has it affected your investigations?

13. The 2011 reforms replaced the FLEC provisions that the Supreme Court had declared unconstitutional because they established the requirement to obtain judicial authorization to conduct inspection visits. The 2011 amendments called only for the authorization of the Commission's Plenary as the essential requirement for conducting visits.

14. Nevertheless, the Commission may request the assistance of public law enforcement (federal or state police) when that is justified.⁸

15. It is worth noting that inspection visits are an act of administrative authority that can be contested through an *amparo* (injunction) proceeding before the Judiciary if the private party believes that his or her constitutional rights are being violated.

16. With regard to the sufficient justification of exercise of the power to conduct inspection visits, the Commission must have good reason to assume that elements necessary for the proper conduct of the investigation are to be found on the premises where the inspection is to be undertaken.

17. In accordance with Article 16 of the Constitution, an administrative authority – in this case the Commission – may conduct home visits (or inspection visits as established in the FLEC) to monitor the conduct of private parties and to ensure that this conduct meets applicable public order regulations.⁹

⁸ Article 31, Section VI, Second Paragraph. "For the effective conduct of the inspection visit, the Commission Plenary may authorize public servants carrying out the inspection visit to request immediate assistance from public law enforcement."

18. Furthermore, as an individual guarantee for those under governance, the same article provides for the inviolability of the home and for legal certainty, which limits the power of authorities to conduct home visits. This does not, however, imply that the Commission may not conduct this type of procedures. Rather, it implies that the Commission must comply with the provisions of the first paragraph of Article 16 of the Constitution, meaning that the legal grounds for the “disturbance” are set out in writing.

c) In case your competition authority does not have the powers to conduct unannounced inspections, please discuss, illustrating with some examples, whether the lack of this investigatory tool has affected your ability to investigate antitrust infringements. Please describe whether your authority has been seeking to obtain these powers and the arguments you may have put forward before government or legislators. If your authority may conduct inspections but is required to give advance notice to the targeted parties, please discuss the difficulties which may arise from such a legal framework.

19. See the response to question 1.a.)

2. The Scope of Inspection Powers

a) Please describe the scope of your inspection powers regarding paper documents and digital evidence. Please describe any limitation which may apply regarding the scope of your inspection powers (legal professional privilege rules relating to in-house or to external legal counsel; privacy, data protection, protection of correspondence, protection of banking secrecy, time limitations, amongst others). Please discuss how these limitations may affect your ability to investigate antitrust infringements, whilst taking into consideration the underlying rationale for such limitations.

20. In accordance with FLEC Article 31, the Commission may request copies or reproduce by any means the papers, books, documents, archives and information created by electronic, optical or any other technological means related to the investigation. In no instance may it “*seize or appropriate information belonging to the party visited*”. In addition, the Commission has the authority to secure information and/or offices that may contain evidence, and for this purpose may seal or mark them, and may also order that such information be maintained securely under the care of the party visited. This article sets out an important restriction insofar as the visit must not limit the economic agent’s ability to produce, distribute or market their goods and services.

21. Finally, FLEC Article 31 Section V establishes that the parties visited are obligated to (i) allow authorized personnel access to carry out the administrative procedure; (ii) allow the administrative procedure to be carried out; (iii) provide the information and documents requested of them and that are related to the subject matter of the visit, and to effect this, they must allow access to offices, computers, electronic devices, storage devices, filing cabinets and other apparatus or any other items that may contain evidence of the conduct of acts or deeds sanctioned by the FLEC. If the visit is impeded, the Commission may impose fines as a means of inducing compliance, in addition to criminal penalties that may be applicable to those disobeying an authority’s legitimate requirement.

⁹ Article 31, First paragraph. “The Commission may requisition those reports and documents it deems relevant and pertinent to the conduct of its investigations, subpoena those who are connected to the facts in question, and order and carry out inspection visits in the home of the party under investigation, where it is presumed that elements necessary for the proper conduct of the investigation may be found.”

b) *If evidence is found relating to an infringement of competition rules not covered by the initial inspection decision or court warrant, how does your authority proceed regarding such evidence?*

22. The Commission can only reproduce or copy files, documents or information found on the visited party's premises that are related to the investigation under which the visit is being conducted, such that if evidence is found of some other behaviour that is not the subject of the investigation in progress, the Commission may not reproduce said evidence for use against any economic agent. In consequence, the Commission may initiate a new investigation under the law if it has objective cause to do so, and it may conduct a visit as part of that investigation to obtain evidence in relation to that investigation.

3. Leniency programmes and inspection powers

a) *Please discuss how the powers provided by your current legal framework regarding unannounced inspections may influence the effectiveness of a leniency programme. Please describe how your leniency programme has evolved in relation to the evolution of your inspection powers.*

23. The programme for immunity or penalty reduction established in FLEC Article 33 subparagraph 3 allows any party which has been part of or is involved in illegal agreements with its competitors to receive a reduction in penalties that apply to it in exchange for cooperating with the Commission.

24. The Commission's immunity programme was designed to undermine or deter cartels.¹⁰ Its goal is not to penalize but to dissuade by increasing the probability of detection and by sanctioning anticompetitive behaviours. The immunity programme creates incentives for cartel members to provide information that would otherwise be difficult to obtain, since those who engage in this type of anticompetitive behaviours are aware of the risks (large fines and sometimes prison sentences) and endeavour to leave no trace of such activities.

25. The immunity programme was included in the 2006 FLEC. However, it is only since the entry into force of the 2011 amendments (which gave the Commission better instruments for investigation; increased the amounts of fines and included criminal penalties¹¹) that the number of petitions for immunity received have substantially increased.

Table 1. Number of Immunity Programme Applications

Year	No. of applications
2006	0
2007	2
2008	3
2009	3
2010	7
2011	20
2012	26

Source: Federal Competition Commission 2012 Annual Report.

¹⁰ Defined in FLEC Article 9 as absolute monopolistic practices. Absolute monopolistic practices are those agreements between economic agents, competitors among themselves, for the purpose of manipulating the sales or purchase price, restricting production or purchase of good, sharing geographic markets or coordinating positions in public bid processes.

¹¹ Decree through which several provisions of the Federal Law on Economic Competition, the Federal Penal Code and the Fiscal Code of the Federation were changed, added to and repealed. Published in the Official Gazette of the Federation on 10th May, 2011.

4. Experience in conducting inspection visits without prior notification

a) Please describe how often are the powers to conduct unannounced inspections used, in which types of antitrust investigations do you consider using these powers and when would your authority opt for a different investigatory tool. Please discuss the importance of having the ability to carry-out inspections in the context of the investigatory tools at the disposal of the competition authority, illustrating with some examples of cases.

26. The Commission's experience in conducting surprise inspection visits is very recent. It should be noted that the 2011 reforms to the FLEC may only be applied to conduct that occurred after these amendments came into effect. In September 2011 a surprise inspection visit was conducted as part of an investigation in the health-care sector. This enabled the Commission to obtain the evidence necessary to duly establish its investigation and it was thus able to determine the probable responsibility of a number of economic agents for engaging in absolute monopolistic practices.

27. In accordance with FLEC Article 24, Sections I and II and Article 31, the Commission may conduct inspection visits as part of any investigation it is carrying out (for possible illegal concentrations, absolute monopolistic practices and relative monopolistic practices) in any location where it is presumed that elements necessary for the proper conduct of the investigation may be found.

28. The Commission chooses to carry out inspection visits as compared to other investigatory tools, such as requisitions of information or subpoenas, where there is an indication or suspicion that the economic agents will avoid providing, or may even destroy, evidence of engagement in a practice that the FLEC prohibits.

29. The visits are an especially useful tool in cases involving cartels, given their secret nature, and the fact that they are prohibited *per se* by the FLEC, and also because this is a conduct that the law penalizes more severely.

30. In accordance with FLEC Article 31, the Commission may requisition information and documents that it deems relevant and pertinent to carrying out investigations, and it may also subpoena those who are connected to the facts of an investigation. The Commission chooses to use these investigative tools, separate from inspection visits, when (i) it has sufficient evidence of involvement in anticompetitive behaviour, for example, through a request for immunity or denunciation; and/or (ii) it is only seeking information to determine the effects or scope of said conduct, the economic agent's market share, or seeks to corroborate or validate information collected by other means.

b) What are the main restrictions or difficulties your authority has faced in conducting effective inspections in antitrust investigations? Please also describe any issues raised by the targeted parties regarding an unannounced inspection. Has your authority faced any litigation case following an inspection? Please describe any case law from your jurisdiction in this context.

31. As yet there has been no recourse to *amparo* (injunction) or other interposition before the Judiciary protesting the inspection visits carried out by the Commission.

c) Please describe your experience of organizing and conducting unannounced inspections. Please describe how your authority plans and prepares for a search, the organization of the search teams, the main steps taken during the inspection, and the aftermath of the inspection. What kind of training do the staff involved in conducting inspections attend? Has your competition authority issued guidance for carrying-out unannounced inspections?

32. As mentioned in question 4.a), the Commission's experience in conducting inspection visits is very recent. Currently, the Commission's efforts have been primarily devoted to building a solid investigation team and to implementing procedures and practices and using the most advanced technologies for obtaining evidence that make it possible to prove anticompetitive practices. This includes developing a forensic information technology laboratory to be able to more effectively analyse and process digital evidence.

33. In this context, Commission personnel in the areas of investigation and forensic information technology have received visits from international experts and authorities from other jurisdictions and a variety of training on the subject of surprise inspection visits and the detection and management of digital evidence. In addition, the Commission is developing an internal manual covering inspection visits that provides detailed procedures and practices so that visits are conducted effectively.

5. International cooperation

a) Has your authority cooperated with another competition authority to conduct any joint unannounced inspections? In case you have agreements in place with foreign countries or authorities, do these allow your authority to conduct unannounced inspections on behalf of a competition authority from another jurisdiction?

34. Through international and bilateral treaties, the Commission may cooperate and coordinate activities with other competition authorities when activities implementing the FLEC are conducted. In this case, the Commission has not yet coordinated an inspection visit with another jurisdiction because, as mentioned in the previous question, its efforts have been focused on implementing the actions necessary for ensuring the success of forthcoming visits.