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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session II: Leniency Programmes in Latin America and the Caribbean –  
Recent Experiences and Lessons Learned**

-- Contribution from Mexico --

12-13 April 2016, Mexico City, Mexico

*The attached document from Mexico (IFT) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 12-13 April 2016 in Mexico.*

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# LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



## 14th Latin American and Caribbean Competition Forum 12-13 APRIL 2016, Mexico City, Mexico

### Session II: Leniency Programmes in Latin America and the Caribbean – Recent Experiences and Lessons Learned

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#### The programme of reduced penalties in the economic competition area in Mexico and its implementation in the telecommunications and broadcasting sectors

-- CONTRIBUTION FROM MEXICO (IFT) \* --

#### 1. Description of the penalty reduction programme: origins and development in Mexico

1. Through the "Decree reforming and adding various provisions to articles 6, 7, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States in the area of telecommunications", published in the DOF (*Diario Oficial de la Federación*, the Official Gazette) on 11 June 2013 (hereinafter "the Decree"), the Federal Telecommunications Institute (IFT) was created as "an autonomous body, with legal personality and its own capital, the purpose of which is to promote the efficient development of broadcasting and telecommunications, in accordance with the provisions of this Constitution and the terms established by law". The agency was established on 11 September 2013, after the Senate of the Republic ratified the appointment of the seven commissioners who make up its Plenary.

2. From its establishment, the IFT has had powers in the area of economic competition for the telecommunications and broadcasting sectors. In this respect, the Decree provides that the IFT "shall also be the authority in the area of economic competition in the broadcasting and telecommunications sectors, and in those sectors it shall exercise exclusively the powers established by this article for the Federal Economic Competition Commission". The second paragraph of Transitional Article 7 of the Decree provides that "proceedings initiated prior to establishment of the Federal Economic Competition Commission and the Federal Telecommunications Institute shall continue to be processed before these bodies under the terms of the legislation applicable at the time they were initiated."

\* Contribution of the Federal Telecommunications Institute (Instituto Federal de Telecomunicaciones, IFT) to Session II: Leniency programmes in Latin America and the Caribbean: Recent experiences and lessons learned.

3. Consequently, the IFT undertakes all investigations into monopolistic practices in the telecommunications and broadcasting sectors and has exclusive and independent power to enforce the Federal Economic Competition Act (LFCE)<sup>1</sup> in those sectors.

4. One of the functions of the IFT, then, is to achieve the economic competition goals established in the Mexican Constitution and in the LFCE in the telecommunications and broadcasting sectors.

5. As part of this work, the IFT is the competent authority for promoting and implementing the penalty reduction programme provided for in the LFCE, through which it seeks to encourage economic agents to collaborate with the competition authority in the telecommunications and broadcasting sectors when it comes to initiating investigations into suspected absolute monopolistic practices, and in this way to gather more evidence for their detection and punishment, recognising that in Mexico absolute monopolistic practices (cartels) are punishable per se, i.e. the “rule of reason” cannot be invoked in the case of cartel investigations. For this reason, and because absolute monopolistic practices are prosecuted through both the administrative and the criminal justice routes, economic agents involved in collusion strive to keep such behaviour hidden, and they will strive at all costs to prevent anti-competitive practices from coming to light. Such conduct impedes the competition authorities in their efforts to compile evidence as to the existence of collusive agreements.

6. Consequently, and for the purposes of having a tool that will allow the authority to compile information for punishing collusions, the Federal Economic Competition Act (LFCE 92),<sup>2</sup> was amended in 2006 with the introduction of a penalty reduction programme intended to offer a benefit to those economic agents who admitted before the (former) Federal Competition Commission (CFC)<sup>3</sup> that they were or had been party to anticompetitive agreements with their competitors.

7. The programme was designed to take advantage of experience with best international practices, i.e. experience of authorities in such countries as the United States, Canada, Spain, France, Germany, United Kingdom, Japan and Australia, as well as the European Union's General Directorate of Competition.

8. In 2011, reforms were made to the LFCE 92 and to the Federal Penal Code (CPF) to include the penalty reduction programme, and it was with this reform that the benefit of penalty reduction came to apply as well to the criminal liability of physical persons.

9. Lastly, in 2014, as a result of the constitutional amendment regarding economic competition published via the Decree, the LFCE was published, abrogating the LFCE 92 upon entry into force. This new LFCE included an article relating to the penalty reduction programme for economic agents who engage in absolute monopolistic practices.

10. The main differences between the penalty reduction programme stipulated in the LFCE 92, including the 2011 reforms, and the penalty reduction programme in the current LFCE are as follows:

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<sup>1</sup> Published in the DOF of 23 May 2014.

<sup>2</sup> Published in the DOF of 24 December 1992.

<sup>3</sup> A decentralised administrative organ of the Ministry of Economy, created by the decree issuing the LFCE 92, published in the DOF on 24 December 2002, and abolished by the "Decree reforming and adding various provisions to articles 6, 7, 27, 28, 73, 78, 94 and 105 of the Political Constitution of the United Mexican States in the area of telecommunications", published in the DOF on 11 June 2013 (Decree).

1. In the LFCE, in the face of an application to reduce penalties by a means other than that established in the Regulatory Provisions to the Federal Economic Competition Act for the telecommunications and broadcasting sectors<sup>4</sup> (DRs), i.e. via e-mail or voicemail, the application will be deemed not to have been submitted, whereas article 43 of the Regulations to the LFCE 92 (RLFCE)<sup>5</sup> provided that in this case the application would be deemed to have been presented as a *denuncia* (complaint); and
2. In the DRs, the investigative authority was given a longer time limit – 40 days, extendable up to four times – to verify the information supplied by the applicant, whereas the RLFCE granted only 15 days, extendable, for such verification.

11. In this sense, the LFCE creates the penalty reduction programme and the DRs regulate the procedure to be followed when an economic agent submits an application to benefit from the programme.

12. The IFT Investigative Authority is now working on the preparation of the Manual for the Penalty Reduction Programme, intended to improve understanding as to the scope and application of the regulatory provisions related to that programme, and to make its application and operation transparent so as to give security and certainty to firms and individuals that seek to enter that programme and enjoy its benefits. The Manual will be issued by the IFT Plenary as guidance only, and will not be binding.

13. Notwithstanding the foregoing, since the creation of the penalty reduction programme in Mexico no application has been submitted relating to the telecommunications and broadcasting markets.

## **2. The main purpose of the penalty reduction programme**

14. The purpose of the penalty reduction programme is to eliminate, or at least achieve a sizable reduction in, the instances of absolute monopolistic conduct in the telecommunications and broadcasting sectors.

15. With achievement of this objective, the IFT investigative authority will be in a position to compile, through the penalty reduction programme, the evidence that will allow it to investigate and, as the case may be, presume the probable liability of economic agents involved in such conduct.

16. At the same time, an economic agent that is accepted into the programme could benefit from a reduction in the applicable penalty pursuant to article 127 of the LFCE,<sup>6</sup> and if that agent is the first applicant the minimum fine will apply.<sup>7</sup>

17. This programme is governed by the principles of clarity, certainty, confidentiality as to the identity of the petitioners, and priority in the order of applications submitted. It thus sows uncertainty among colluding economic agents, who will not know whether their competitor or ally in the cartel will report the absolute monopolistic practice to the IFT and petition to join the programme.

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<sup>4</sup> Published in the DOF of 12 January 2015.

<sup>5</sup> Published in the DOF of 12 October 2007.

<sup>6</sup> The last fines imposed by the IFT ranged from MXN14.4 million to MXN53.8 million (2014).

<sup>7</sup> In theory, the "minimum fine" could start from one day's general minimum wage in the Federal District (now Mexico City), but that interpretation is not binding. In any case, the reduction in the penalty should be more than 50% of the amount of the fine, as that is the amount applicable to the second economic agent applying for the programme.

**3. Treatment reserved for subsequent applicants under the penalty reduction programme**

18. Pursuant to LFCE article 103, economic agents or individuals who apply for admission to the penalty reduction programme after the first applicant may receive a reduction in their fine of up to 50, 30 or 20% of the maximum allowed, provided they supply evidence for the investigation additional to that obtained by the IFT investigative authority.

19. Applicants must also cooperate fully and continuously in the substantiation of the investigation and in any subsequent administrative court proceedings. To this end they must take all actions necessary to terminate their participation in the practice prohibited by the LFCE.

**4. Requirements placed on applicants who wish to benefit from the penalty reduction programme**

20. The requirements stipulated in article 103 of the LFCE for eligibility for the penalty reduction programme are the following. The applicant:

- must be the first among the economic agents or individuals involved in the conduct to provide sufficient evidence, from its own or other sources, that will, in the judgment of the IFT, allow the opening of an investigation and, as the case may be, a presumption of absolute monopolistic practice;
- cooperate fully and continuously in the substantiation of the investigation and in any subsequent administrative court proceedings; and
- take all action necessary to terminate its participation in the practice prohibited by the LFCE.

**5. Assessment of the degree of cooperation from applicants under the penalty reduction programme**

21. As noted earlier, from the time the penalty reduction programme was introduced in 2006 to the beginning of 2016 no application for eligibility under that programme was received from any economic agent in the telecommunications and broadcasting sectors.

22. However, the IFT Plenary, in deciding on the amount of the fine that would have to be imposed on an economic agent and/or individual applying for the immunity programme, could assess whether that agent or individual was cooperating fully and continuously in the investigation itself and in any subsequent administrative court proceedings.

23. Full and continuous cooperation is deemed to mean, among other things, that:

1. The applicant or applicants must present all the information and documentation in their possession, and these must relate to the absolute monopolistic practice;
2. The applicant or applicants must agree to appear if summoned by the investigating authority within the scope of its powers; and
3. The applicant or applicants must take the steps necessary to terminate their participation in anticompetitive practice contrary to the LFCE, following the recommendations given to it by the investigating authority during the investigation, and the IFT Plenary, taking into account those elements, may determine the amount by which the fine will be reduced on a case-by-case basis.

## **6. Criteria used to determine the appropriate level of discount for fines**

24. The benefit of the penalty reduction programme is granted according to the chronological order in which the applicant declares its desire to receive that benefit, vis-à-vis other economic agents.

25. Thus, the firm or individual who is “first through the door” in applying for the benefit of the programme will be liable for a minimum fine, while those firms or individuals that apply subsequently (in second, third or fourth place) may obtain a reduction in their fine of up to 50, 30 or 20% respectively of the maximum permitted.

26. In all cases, that economic agent or individual will have to supply evidence during the investigation, cooperate fully and continuously in substantiating the investigation and, as the case may be, in subsequent administrative court proceedings, as well as taking the steps necessary to terminate its participation in the practice prohibited by the LFCE.

## **7. The marker system in the penalty reduction programme**

27. As established in the preceding paragraph, and for the purpose of recognising the order in which applications are filed, a marker system will be created. Details on that system will be included in the Manual for the Penalty Reduction Programme referred to earlier, which will be issued shortly by the IFT Plenary.

## **8. Timing of application for the penalty reduction programme**

28. According to article 127 of the DRs, economic agents may apply for the benefits of the penalty reduction programme prior to issuance of the announcement concluding an investigation. Once that announcement is issued, no application will be accepted.

## **9. Revocation of penalty reduction**

29. According to article 127 of the DRs, the IPT Plenary, in the final resolution of the administrative court proceedings, will determine the reduction in the amount of the fine for which the applicant is eligible. In deciding this amount it must consider whether the firm or individual cooperated fully and continuously, whether it took the steps necessary to terminate its participation in the anticompetitive practice prohibited by the LFCE, and the chronological order in which the application for that benefit was submitted.

## **10. The penalty reduction programme and other enforcement tools**

30. In terms of the LFCE, the IFT may impose the following penalties for commission of or participation in an absolute monopolistic practice<sup>8</sup>:

- Up to 10% of the economic agent's income, regardless of any civil and criminal liability, when that agent engages in an absolute monopolistic practice pursuant to article 127 (IV) of the LFCE;
- Prohibition from acting as an advisor, administrator, director, manager, executive, agent, representative or attorney in a legal capacity for up to five years, and up to 200,000 times the general minimum wage valid in the Federal District (SMGVDF), for any person who directly or indirectly participates in a monopolistic practice on behalf or for the account of a legal person, pursuant to article 127 (X) of the LFCE; and

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<sup>8</sup> Under the terms of LFCE article 127, the penalty for repeat offences may be up to twice the level that would otherwise be set.

- Up to 180,000 times the SMGVDF for anyone who aids and abets or induces the commission of a monopolistic practice, pursuant to article 127 (XI) of the LFCE.

31. In addition, article 254 *bis* of the CPF, contained in Title 14, "Crimes against the Public Economy", provides that "a penalty of imprisonment of 5 to 10 years and a fine of 1,000 to 10,000 days shall be incurred by anyone who signs, orders or executes contracts, agreements, arrangements or combinations among competing economic agents to any of the following purposes or effects:" (i) fixing prices; (ii) restricting supply; (iii) segmenting the market, (iv) rigging bids in public tendering; and (v) sharing information to the purposes or effects indicated above.

32. Criminal penalties are independent of administrative penalties imposed pursuant to the LFCE. The offence defined in article 254 *bis* of the CPF is pursued through legal action brought by the IFT, which may only lay charges with a finding of probable liability prepared by the Investigating Authority of the IFT in terms of the LFCE.

33. In this respect, attention must be drawn to the provisions of article 254 *bis* of the CPF, as follows:

*"[...]There shall be no criminal liability for economic agents who are accorded the benefit referred to in article 103 of the LFCE, subject to a resolution of the Federal Economic Competition Commission or the Federal Telecommunications Institute finding that the terms established in that provision and other applicable provisions have been fulfilled.*

*"The proceedings pursued for this offence may be dismissed at the petition of the Plenary of the Federal Economic Competition Commission or the Federal Telecommunications Institute when the persons targeted by those proceedings comply with the administrative penalties imposed and when the requirements stipulated in the technical criteria issued by the Federal Economic Competition Commission or the Federal Telecommunications Institute are fulfilled".*

34. The provisions of the preceding paragraph, taken in relation to article 103 of the LFCE, constitute a "dual" benefit under law, as any person who has committed, aided and abetted, encouraged, induced or participated directly or indirectly in the commission of absolute monopolistic practices, or is currently doing so, will enjoy two benefits:

1. The reduction of the administrative penalty provided in the LFCE, and
2. The exclusion of criminal liability in terms of the CPF, provided the party in question has been accepted by the IFT under the penalty reduction programme and complies fully with the requirements established in the LFCE and the DRs.