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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session I: Cartels: Estimation of Harm in Public Enforcement Actions**

**-- Contribution from Mexico --**

**4-5 April 2017, Managua, Nicaragua**

*The attached document from Mexico (COFECE) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.*

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# LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



**15th Latin American and Caribbean Competition Forum**  
**4-5 APRIL 2017, Managua, Nicaragua**

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## **Session I: Cartels: Estimation of Harm in Public Enforcement Actions**

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### **-- CONTRIBUTION FROM MÉXICO (COFECE)\* --**

#### **1. Sanctions in the area of competition in Mexico**

1. The Federal Commission on Economic Competition (COFECE) derives its powers from the Federal Law on Economic Competition, which authorises the Commission to prevent, investigate and combat monopolies, monopolistic practices, concentrations and other restrictions on the efficient functioning of markets.

2. To this end, the Commission has various types of tools at its disposal, including the ability to impose sanctions for monopolistic practices or unlawful concentrations, as well as non-notified concentrations, among others.

3. The Competition Law provides for various types of procedures that may result in sanctions, such as investigation for sanctions due to monopolistic practices or unlawful concentrations; special procedures for non-notified concentrations; incidental procedures (brief procedures within more extensive ones that allow the punishment of conduct such as submitting false declarations), or the ability to impose fines as coercive measures, (in case of requests for information).

4. Only absolute monopolistic practices are subject to criminal prosecution, but this does not fall within the powers of COFECE, which is merely authorised to refer the matter to the competent authority, and to impose administrative sanctions.

#### **2. Constitutional and legal criteria for imposing sanctions**

5. In all cases where sanctions are imposed, the Commission must take constitutional and legal criteria into account in order to avoid violations of legal certainty and legality. These criteria involve essentially substantiation, motivation and proportionality.

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\* Contribución de la Comisión Federal de Competencia Económica.

6. In addition to the requirement that the penalty must be proportionate to the conduct being punished, the Law imposes certain requirements that the Commission must consider when imposing sanctions. These elements have to do with the gravity of the conduct and they consist of: (i) indications of intentionality; (ii) the violator's market share; (iii) the size of the affected market; (iv) the duration of the practice or concentration; (v) the economic capacity of the violator; (vi) the applicability or not of the Commission's powers; and lastly, (vii) the injury or damage caused.

7. The fines indicated in the Competition Law are maximum amounts in each case, and therefore, in determining the amount of the penalty to be imposed within that margin, the greatest possible objectivity must be exercised. The key element here is the approximate calculation of damage.

### **3. The role of damage in sanctions under the Competition Law in Mexico**

8. The damage caused is calculated in light of the conduct in question. As required by law, damage is considered in imposing penalties on all types of practice.

- Cases of non-notified concentrations, incidents of non-compliance, or fines as a coercive measure: damage is typically measured as a function of the harm caused to the powers of the Commission (in these cases, not all the criteria mentioned are applicable, as technically speaking the market is not damaged – in fact, a non-notified concentration cannot be judged on the market, and there must therefore be an investigation by the independent investigative body).
- Damage due to monopolistic practices or unlawful concentrations: in this case, it is very important to consider that the injury in question causes damage to the process of free competition. This is often confused with injury to the consumer, but it is not that. What happens is that the injury to the consumer is what is measured in imposing sanctions, because it is the easiest injury to quantify or to measure.

### **4. Differences between injury to the consumer and damage to the competition process**

9. COFECE has no authority to determine injury to the consumer (this falls within the purview of the consumer protection agency).

10. The reason why injury is measured is because it is necessary to have a criterion for graduating the fine within the maximum established by law, and this must be done in accordance with the principle of proportionality and with the law, which requires this element to be considered. Nevertheless, it is always made clear that the injury is measured only for purposes of the penalty and that this is only an approximation of the quantifiable impact.

11. The quantifiable damage is less than the total damage generated, as the latter relates to the competition process in general. It is not measurable, as it affects many factors that cannot be verified, and it implies a supposition about what would have happened in the absence of the anti-competitive conduct.

### **5. Challenges in calculating damage to the competition process**

12. Attempting to measure the damage in cases affecting the competition process (through illegal practices or concentrations) poses various challenges:

- In each case there is great variation in the variables that allow it to be quantified. Sometimes the duration, the overpricing or the market size is clear, and other times it is not.

- There are not always data available for a proper calculation. Any equation requires information. The market for banking services is not the same thing as the market for tortillas in terms of statistics, public information, tax declarations, income statements, etc.
- If the intent is to calculate on the basis of the investigation, this can be a problem, as it would be included in the accusation, and under the principle of legal security this cannot vary. This means that the parameters of the penalty could not be changed and no use could be made of the elements of proof obtained subsequently, primarily through challenges to the finding of probable liability. Moreover, economic agents would attack this form of imposing penalties and would open legal proceedings.
- The practice of challenging the likely sanction is becoming increasingly common, and this requires more sophisticated criteria.
- There are some very particular markets, such as markets where price increases are banned by government regulation, markets where supply is fixed, or markets with different elasticities.

## **6. Overcharge**

13. The principal criterion used is that of the overcharge. This concept consists of any gain obtained by the cartel member that it would not have obtained in the absence of the unlawful conduct.

14. The approaches to measuring overcharge also vary case-by-case. They can be divided as follows:

- Analyse the competitive price prior to the unlawful practice. This is difficult in cases that have persisted for a long time, or where historically there was no free competition, or in markets where it is difficult to obtain historical records.
- Analyse the competitive price subsequent to the unlawful practice. The complexity of this method lies in the fact that subsequent to the practice it is difficult for competitive prices to be restored quickly because the effects of a monopolistic practice (in particular an absolute one) on the market can last for a long time, meaning that the sample will be "contaminated" once again.
- • Analyse the competitive price of a similar market (the "yardstick method"). This is difficult because, on one hand, economic agents can argue that the market taken as the yardstick has characteristics different from the market affected by the monopolistic practice. Another problem is that studies show that related markets quickly suffer impacts deriving from practices in markets with collusive competitors.
- • Economic models. This is a complex method that still presents challenges of credibility before the courts. It is typically the method used when all the others have failed, but there must be information available.
- Analyse competitors in the same market that are not party to the collusion, and take their price as the benchmark.
- Given these difficulties, COFECE has turned to alternative methodologies, taking as its final option that of estimating the overcharge on the basis of articles and studies (reducing it a little to the "benefit" of the economic agents sanctioned).

## **7. Different theories about the overcharge**

15. The overcharge is a controversial notion: one view holds that overcharging can only exist when the price rises. The opposing view sees overcharging as a broader concept that implies that the price does not necessarily have to rise, since maintaining the same price but lowering the quality of a product or service by virtue of a cartel means, strictly speaking, that the price has gone up. In the end, the stance of COFECE has been to impose sanctions on the basis of an overcharge, but in the end it can opt for any theory provided it is recognised that the nominal price of a product or service does not have to rise in order to produce an undue profit for the cartel. This profit, moreover, is only one measurable aspect of the totality of damage generated for the competition process. The quantifiable damage is not the total effect of the practice (there are cartels that can damage the market solely by their objective, without being implemented). In punishing for the mere objective of committing the practice, the competition law in Mexico recognises this reality.

16. Overcharges or undue profits can be obtained by anyone who commits the practice, but there have been cases in which the first direct benefit from a cartel flows to another economic agent, usually in another link of the production chain. In these cases, the undue profit is deemed to be transferred eventually to the party committing the practice, and calculation of the damage summates all the undue profits generated by the cartel (it is not necessary for the party committing the practice to absorb the undue profit if the undue profit generated is attributable to its conduct).

## **8. Damage in international cartels**

17. Damage in international cartels plays a distinct role, because in contrast to domestic cartels there must be an observable injury within the national territory in order to establish a causal link with Mexican jurisdiction.

## **9. Criteria for dissuasion**

18. The quantifiable damage often predicts the profit obtained by the party committing the practice. Because the sanctions are essentially dissuasive, it is useful to measure an approximation of the profit generated by the party committing the practice. Historically, COFECE's role has been to multiply this amount (the quantifiable damage) by a factor of two in case of grave misconduct, and then to multiply that amount by another factor of two if the conduct is intentional.

## **10. Recent experience**

19. Overpricing in the transportation market of Chiapas was easily determined because there were agreements that raised the price, and consequently overcharging was detected in the agreement.

20. Overcharging in the shipping market in Quintana Roo was determined by means of a maverick competitor who entered the market after years of collusion. Punishment for this practice was imposed twice on different economic agents, some of whom were repeat offenders.

21. Overcharging in the market for sealed compressors was demonstrated by comparing the collusive price with the price subsequent to the practice.

22. In non-notified concentration, it was noted that the damage was to the preventive powers of COFECE, caused by putting the process of competition at risk.

## ANNEX

### Sanctions available to COFECE

The Commission may apply the following sanctions:

- order the correction or elimination of the monopolistic practice or unlawful concentration;;
- order the partial or total unwinding of an unlawful concentration, termination of control, or elimination of acts;
- impose a fine of up to UMA<sup>1</sup> 175,000, or approximately USD 660,800<sup>2</sup>, for having made a false declaration or having delivered false information to the Commission;
- impose a fine of up to 10% of the economic agent's income, for absolute monopolistic practices;
- impose a fine of up to 8% of the economic agent's income, for relative monopolistic practices;
- order measures to regulate access to essential consumables;
- impose a fine of up to 8% of the economic agent's income, for unlawful concentration;
- impose a fine of UMA 5,000, or approximately USD 18,800, and up to 5% of the economic agent's income, for failing to notify a concentration when legally required to do so;
- impose a fine of up to 10% of the economic agent's income, for non-compliance with the conditions established in the resolution of a concentration;
- prohibit persons from serving in an executive or management capacity for a term of five years, and impose fines of up to UMA 200,000, or approximately USD 755,200, for direct or indirect participation in monopolistic practices or unlawful concentrations, on behalf of or for the account or order of legal persons;
- impose fines of up to UMA 180,000, or approximately USD 679,700, for aiding, abetting or inducing monopolistic practices and unlawful concentrations;
- impose a fine of up to 8% of the economic agent's income for non-compliance with the resolution issued under the terms of article 101 of the Competition Law;
- order measures to regulate access to essential consumables;
- impose fines of up to UMA 180,000, approximately USD 679,700, for public notaries involved in acts concerning an unauthorised concentration;
- impose a fine of up to 10% of the economic agent's income for non-compliance with regulations governing essential consumables, and for not obeying the order to eliminate a barrier to competition;
- impose a fine of up to 10% of the economic agent's income for failure to comply with an interim order [*orden cautelar*].

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<sup>1</sup> The UMA (*Unidad de Medida y Actualización*) is the economic yardstick in Mexican pesos for determining the amount of payment under the obligations and assumptions stipulated in federal laws. For 2017, its value was set at 75.49 Mexican pesos, equivalent to approximately USD 3.80.

<sup>2</sup> Calculated at the closing exchange rate for February 2017, MXN 19.99 = USD 1, published at <http://www.banxico.org.mx/>.