

Unclassified**English - Or. English****20 September 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I:
Fining methodologies for competition law infringements****- Contribution from Mexico-****24-25 September 2019, San Pedro Sula, Honduras**

The attached document from Mexico is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 24-25 September 2019 in Honduras.

Ms. Lynn Robertson, Manager GFC, LACCF ; Competition Expert - Lynn.Robertson@oecd.org.

JT03451372

Session I: Fining methodologies for competition law infringements

- Contribution from Mexico* -

Federal Economic Competition Commission

1. Introduction

1. Among the issues that article 28 of the Political Constitution of the United Mexican States (CPEUM or Constitution) entrusts to the Comisión Federal de Competencia Económica [Federal Economic Competition Commission, also referred to as COFECE or Commission] are the safeguarding of market competition, as well as the prevention, investigation and combating of monopolistic practices, unlawful concentrations and other restrictions to the efficient functioning of the markets.

2. To achieve this constitutional objective and enforce compliance with the Federal Economic Competition Law (LFCE or Law), COFECE is authorised to impose various sanctions, including those of an economic nature, mainly on economic agents who have behaved in contravention of the Law. To avoid confusion and to clarify the scope of this analysis, the fines set out in the LFCE fall into two categories: i) "***finas as a coercive measure***" (article 126, section II of the LFCE), which are imposed to enforce compliance with the decisions issued by COFECE in the exercise of its functions, for example, in the event of failing to act on a request for information, not appearing at a summons to testify, not allowing a verification visit, etc.,¹ and ii) "***finas as a sanction***" (article 127, sections

* This contribution was prepared by the Comisión Federal de Competencia Económica (Federal Economic Competition Commission, COFECE) and the Instituto Federal de Telecomunicaciones (Federal Telecommunications Institute, IFT) of Mexico.

¹ These fines may amount to a daily sum equivalent to 3,000 times the *Unidad de Medida y Actualización* (UMA) – the economic yardstick in Mexican pesos for determining the amount of payment under the obligations and assumptions stipulated in federal laws – which has a value in 2019 of 84.49 Mexican pesos. As such, the amount could be up to 253,470.00 pesos (US\$12,594.59 at the exchange rate to settle payment obligations outlined in US dollars, payable in the Mexican Republic on 2 September 2019. This will be the exchange rate used in the rest of the document where reference is made to dollars).

It should be noted that there are various provisions in the LFCE, such as those referring to fines, that use the current general daily minimum wage in the Federal District (SMGDVDF by its Spanish acronym) as the basis for calculation. However, in accordance with the provisions set out in the *Decree declaring amendments and additions to various provisions of the Political Constitution of the United Mexican States, regarding deindexation of the minimum wage*, published in the Official Federal Gazette (*Diario Oficial de la Federación* – DOF) on 27 January 2016, as of 28 January of the same year, the basis for calculation ceased to be the SMGDVDF, since according to that decree, the minimum wage may not be used as an index, unit, basis, measure or reference for purposes beyond its nature. Therefore, to perform the calculations to determine the amounts that would have been based on the SMGDVDF, the UMA, with a daily, monthly and annual value, will henceforth be used. Accordingly, in the event that fines are imposed by the Commission, although the LFCE makes reference to the SMGDVDF, these fines have been imposed for more than three years based on the UMA.

III, IV, V, VII, VIII, IX, X, XI, XII, XIII, XIV and XV of the LFCE), which are imposed in the event of an infringement of the LFCE, such as engaging in absolute monopolistic practices,² relative monopolistic practices,³ unlawful concentrations (by failing to notify a concentration), or when a COFECE resolution is not complied with.

3. This contribution focuses on fines as a sanction, which are intended to penalise the offender, repair the damage caused to the market and deter others from violating the LFCE.

4. Once the Commission has identified, investigated and confirmed violations of the LFCE, it is authorised to economically penalise the economic agents responsible for the conduct or omissions in contravention of the Law. In this regard, the fine as a sanction represents a penalty for companies or individuals for violating the Law.

5. Furthermore, fines as a sanction also have a restorative effect, in that, through the economic sanction imposed, the offenders repair the economic damage caused for society by infringing the Law. It should be noted that, according to article 127 of the Law, it is the Federal Executive that executes the fines imposed by the Commission, and the Commission is expressly prohibited from administering or possessing the funds collected through the application of the economic sanctions to which article 127 refers.

6. As for fines serving as a deterrent, given the probability of becoming creditors of a fine, individuals or companies are inhibited from engaging in practices, acts or omissions prohibited by the Law. We will go into more detail on this element to ascertain whether or not the format of imposing fines, which are left to the Commission to determine on a case-by-case basis, fulfils the objective of deterring unlawful conduct in LFCE terms.

7. In this regard, it is worth mentioning that from the first LFCE initiative, its Statement of Intent made clear that the sanctions should act as a genuine deterrent to minimise the incentives for infringing the Law, and that, although the pecuniary sanctions proposed were greater than those established in other laws, this was justified because the monetary gains from monopolistic practices are, in general, extremely high, to the extent that if the pecuniary sanction were small, the incentives to infringe the Law would not be eliminated, thereby causing great damage to society. Similarly, in the Statement of Intent of the current LFCE, the legislator emphasises that the pecuniary sanctions for violating the Law are intended to act as a deterrent. In this regard, the Supreme Court of Justice of the Nation (SCJN) has recognised that the sanctions provided for in the LFCE act as a deterrent since they are not only intended to repair the damage, but also to restrict and deter the perpetration of illicit acts.⁴

² They are also known as “collusive practices” or “cartels”. In accordance with article 53 of the LFCE, “absolute monopolistic practices, consisting of contracts, agreements, arrangements or combinations between competing economic agents, are considered unlawful”.

³ Article 54 of the LFCE defines them as those practices that “are carried out by one or more economic agents that individually or jointly have substantial power in the same relevant market in which the practice is being carried out, and III: Has or may have the aim or intention, in the relevant market or in a related market, of unduly displacing other economic agents, substantially preventing their access or creating exclusive advantages in favour of one or more economic agents.

⁴ *Amparo* (extraordinary constitutional appeal) under revision 453/2012 of the SCJN index.

2. Deterrent effect of fines imposed by the LFCE

8. Article 127 of the LFCE sets out the amounts for fines as a sanction as follows:
- Up to the equivalent of 165,000 UMA,⁵ for having falsely declared or submitted false information to the Commission;
 - Up to the equivalent of 10 per cent of the economic agent's income,⁶ for having engaged in an absolute monopolistic practice;
 - Up to 8 per cent of the economic agent's income, for having engaged in a relative monopolistic practice;
 - Up to 8 per cent of the economic agent's income, for having engaged in an unlawful concentration;
 - 5,000 UMA⁷ and up to the equivalent of 5 per cent of the economic agent's income for not having notified the concentration, when this was legally required;
 - Up to the equivalent of 10 per cent of the economic agent's income, for having failed to comply with the conditions established in the resolution of a concentration;
 - Up to the equivalent of 200,000 UMA,⁸ for those who participate directly or indirectly in monopolistic practices or unlawful concentrations, as representatives or on behalf of legal entities;
 - Up to the equivalent of 180,000 UMA,⁹ for those who have contributed to, promoted or engaged in monopolistic practices, unlawful concentrations or other restrictions to the efficient functioning of the markets in terms of the Law;
 - Up to 8 per cent of the economic agent's income, for failing to comply with the resolution issued with respect to article 101 of the LFCE, for failing to comply with resolutions demanding the correction or elimination of unlawful practices or concentrations, or for failing to comply with the resolution demanding the partial or total break-up of an unlawful concentration or the termination or elimination of the acts ordered by the Commission;
 - Up to the equivalent of 187,000 UMA,¹⁰ for public notaries involved in acts related to a concentration that has not been authorised by the Commission;

⁵ Equivalent to 13,940,850 pesos (US\$692,703).

⁶ Article 127 of the LFCE refers to the cumulative revenue for the economic agent involved, excluding that which is obtained abroad, as well as taxable income if they are subject to a preferential tax regime, for income tax from the last fiscal year in which the respective infringement was committed. If this information is not available, the information corresponding to the previous fiscal year is used.

⁷ Equivalent to 422,450 pesos (US\$20,990.99).

⁸ Equivalent to 16,898,000 pesos (US\$839,640).

⁹ Equivalent to 15,208,200 pesos (US\$755,676).

¹⁰ Equivalent to 15,799,630 pesos (US\$785,063).

- Up to the equivalent of 10 per cent of the income of an economic agent who controls an essential input, for failing to comply with the regulations established for said input, and who does not obey the order to eliminate a barrier to competition;
 - Up to the equivalent of 10 per cent of the economic agent's income, for failing to comply with the precautionary order to which the LFCE refers.
9. To determine the exact amount of the fines, the Commission may ask the offender or the competent authority for the necessary tax information. In the event of a repeat offence, a fine of up to double that determined by the Commission may be imposed.¹¹
10. In addition, article 128 of the LFCE sets out that for the economic agents that do not declare cumulative income or whose cumulative income has not been determined, the following fines will be applied:
- Up to the equivalent of 1,500,000 UMA,¹² for infringements consisting of absolute monopolistic practices, non-compliance with conditions, non-compliance with regulation of an essential input or order to eliminate barriers or non-compliance with a precautionary order;
 - Up to the equivalent of 900,000 UMA,¹³ for infringements consisting of relative monopolistic practices, unlawful concentration, breach of commitments or failure to comply with the break-up order;
 - Up to the equivalent of 400,000 UMA,¹⁴ for an infringement consisting of failure to notify a concentration.
11. From the information provided in this section, it can be inferred that the legislator proposed fines that duly create a deterrent effect, since in the event of the detailed breaches it established hefty sanctions for economic agents. The amounts set out by the legislator are considered – at least in principle and in comparison with other types of economic sanctions – sufficient to produce an inhibitory effect on forms of conduct prohibited by the LFCE.

3. Means of imposing fines

12. To impose sanctions, COFECE observes constitutional parameters and the regulatory framework governing economic competition, as well as precedents and jurisprudence issued by the Judicial Branch of the Federal government.

¹¹ Repeat offenders are considered as those: **a)** who having committed an infringement that has been sanctioned, commit another violation of this Law, regardless of its type or nature; **b)** for whom, at the beginning of the second or subsequent proceedings, there is a previous resolution that has been adopted; and **c)** for whom, between the beginning of the proceedings and the resolution that has been adopted, no more than ten years have passed.

¹² Equivalent to 126,735,000 pesos (US\$6,297,297).

¹³ Equivalent to 76,041,000 pesos (US\$3,778,378).

¹⁴ Equivalent to 33,796,000 pesos (US\$1,679,279).

13. By constitutional provision,¹⁵ the sanctions imposed by the authorities must follow the principle of exact application of the Law, that is, for a form of conduct or omission to be sanctioned it must be regulated or criminalised in the applicable legal system. In this regard, in order for the Commission to be able to fine the person or persons who have infringed the Law, their conduct or omission must be classified as prohibited or sanctionable in such legislation that regulates competition.

14. In addition, to determine the sum of the pecuniary sanction to be imposed in each case, COFECE adheres to the principles of proportionality, reasonableness and equity, that is, it observes that there is causal logic between the degree to which the legal goods protected by the Law have been affected and the sum of the fine to be imposed.

15. For its part, the legislator established in article 130 of the LFCE that, once the Commission identifies, investigates and proves an infringement of the Law, to tailor the amount and adjust the seriousness of the sanction, it should take into account the following elements:

“Article 130. In imposing fines, consideration shall be given to certain elements to determine the seriousness of the infringement, such as the damage caused; indications of intent; market share of the offender; size of the market affected; duration of the practice or concentration; as well as the offender’s economic capacity; and, where appropriate, how the infringement affects the exercise of the Commission’s powers.”

16. Thus, the Commission takes into account the objective elements from such a list to establish the sum of the administrative sanctions and the subjective elements to tailor them, relaxing or increasing them depending on the circumstances of the conduct in question for each of the sanctioned entities. In any case, the elements taken into consideration to evaluate the sanction are considered as a whole, with the aim of determining the intensity of the sanction and, ultimately, fixing the amount of the sanction on a case-by-case basis.

17. In turn, the Regulatory Provisions of the Federal Economic Competition Law (DRLFCE) establish parameters that the Commission must take into account when considering the elements of article 130 of the LFCE, which are detailed in the following paragraphs and which reflect the practical approach taken by the Commission when imposing fines.

18. To determine the size of the affected market, as well as the offender’s market share of the affected market, the DRLFCE set out that these elements can be calculated based on the information available to the Commission regarding the total sales of the offending party. This is sometimes problematic, given that the Commission relies on economic agents providing the necessary information or sources of public information being available to estimate the size of the market and the offender’s market share, and the LFCE stipulates that COFECE is obliged to resolve the situation with the best information available on the case.

19. As for the duration of the practice, this can be counted in years, months or days from the time it was first carried out until the moment it ceases to be or until the moment a decision is taken by the plenary.

20. To determine the duration, the Commission takes into account the elements in the case that can determine the period within which the unlawful conduct was carried out,

¹⁵ Articles 14, 16, 18, 19, 20, 21 and 22 of the CPEUM.

noting whether the sanctioned conduct is instant, permanent, continuous or continued. The intention, among other issues, is to establish what amount of the UMA is applicable, since the conduct must be sanctioned in accordance with the LFCE and the UMA in effect at the time the infringement was committed.

21. The damage caused is determined based on objective, quantifiable data and in accordance with the best information available on the case, so as to preserve the legal security of those sanctioned and the principle of proportionality of sanctions.

22. With respect to indications of intent, article 182 of the DRLFCE states that the following must be considered: i) termination of the conduct sanctioned by the Law before, at the beginning of, and during the corresponding investigation, during the ensuing proceedings in the form of a trial or during the corresponding proceedings; ii) proof that the unlawful conduct was carried out at the suggestion, instigation or encouragement of the public authorities; iii) actions carried out to conceal the conduct; and iv) confirmation that the conduct was carried out at the instigation of another economic agent, without the offender having played a leading role in adopting and implementing the conduct. From the analysis of the aforementioned circumstances, the Commission may consider aggravating or extenuating elements when tailoring the fine.

23. Regarding the exercise of the Commission's powers, this element is analysed to determine the seriousness of the infringement. In this regard, article 183 of the DRLFCE states that this element will be considered as mitigating the conduct of the offender and its degree of cooperation with the Commission, for which the act of engaging in the sanctioned conduct and its termination must be recognised.

24. Finally, with respect to the economic capacity of the offender, the Commission determines the maximum amount of the fine in accordance with article 127 of the LFCE and the type of conduct demonstrated.

25. However, due to the fact that the current LFCE has been in force for five years, that the duration of investigations is 463 working days and that of ensuing administrative proceedings in the form of a trial is an average of 164 working days, and that in Mexico there are only two courts of justice and two courts specialised in competition, broadcasting and telecommunications, there are few strong precedents of the Judicial Branch that analyse the elements of article 130 of the LFCE. Nevertheless, criteria exist that have laid the foundations on which the Commission should act when imposing fines as a sanction.

26. In this regard, in various resolutions, the Judicial Branch has determined that the Commission must analyse the particular circumstances of each case. This is why it must not apply and analyse these elements rigidly, but should rather base and duly rationalise its application to arrive at a final decision on whether the seriousness of the infringement in question is mild, moderate or serious.

27. For example, in resolving VCN-002-2017 on the procedure for verifying the failure to notify a concentration, the Commission considered that in order to determine the seriousness of the infringement, it was unnecessary to take into account elements relating to the damage caused, the offender's market share, the size of the affected market and the duration of the practice or concentration, and instead only considered indications of intent, the effect on the exercise of the Commission's powers and economic capacity. However, in the review of that decision, the Judicial Branch indicated that the SCJN, by resolving the *amparo* (extraordinary constitutional appeal) under revision 235/2017, stated that in terms of article 36 of the LFCE (abrogated), the COFECE must comply, without fail, with all the elements set out in this article, regarding the individualisation of the sanction for not having

notified a concentration when this was legally required, and in general for the imposition of sanctions.

28. Furthermore, with respect to the element of intent, the Judicial Branch has considered as excluding from liability the inexigibility of other conduct, that is, when the economic agents can fully demonstrate that, in committing the infringement, they acted under coercion or force, this situation exempts them from the liability established in the Law, for which reason, in those cases, they are not eligible for a fine.¹⁶

29. Furthermore, regarding the element of damage caused, the Judicial Branch has indicated that since the Commission is permitted to calculate said damage based on presumptions or circumstantial evidence, the amount of damage caused established in the resolution could be imprecise.¹⁷

30. Regarding the maximum amount that can be established as a sanction, the Judicial Branch has indicated that the imposition of the fine based only on economic capacity is untenable since the purpose of such an element is for the Commission to analyse the particular circumstances of the sanctioned agent in order to foresee the maximum amount that may be paid for the unlawful act that was committed. Therefore, when imposing the sanction, all other elements of article 130 of the LFCE that may support said decision must be analysed.¹⁸

31. These Judicial Branch criteria, among others, have led the Commission to weigh a case-by-case analysis that enables it to consider the particularities of each case, with the intention that the resolutions that are issued remain final in the courts. For this reason, there is currently no formula for calculating fines as a sanction.

32. Finally, it should be noted that in 2018, the Commission imposed a total of 38 fines as sanctions, of which 31 were imposed for engaging in absolute monopolistic practices, three for relative monopolistic practices, two for non-notified concentrations, one for breach of commitments and one for breach of conditions.¹⁹

33. The status of the fines indicated can be seen in Table 1:

¹⁶ J.A. 12/2015, from the index of the First Collegiate Court Specialised in Economic Competition, Broadcasting and Telecommunications. Case COFECE IO-004-2012.

¹⁷ J.A. 1285/2017, from the index of the First Court Specialised in Economic Competition, Broadcasting and Telecommunications. Case COFECE IO-003-2015.

¹⁸ J.A. 355-2017 of the index of the Second Collegiate Court Specialised in Economic Competition, Broadcasting and Telecommunications. Case COFECE DE-009-2014.

¹⁹ Source Informe de multas 2018 [Fines Report], available at: <https://www.cofece.mx/wp-content/uploads/2019/07/26072019-Informe-Multas.pdf>

Table 1. Status of fines imposed by COFECE in 2018

STATUS 2018	NO. OF FINES	% OF NO. OF FINES	AMOUNT (MILLIONS)	% OF AMOUNT
Waiting period	0	0.0%	0	0%
Sent to SAT*	0	0.0%	0	0%
Appealed	10	26.3%	689.52	80.3%
Without effect	2	5.3%	21.08	2.5%
Paid	26	68.4%	147.97	17.2%
SAT	0	0.0%	0	0.0%
Voluntary	26	68.4%	147.97	17%
TOTAL	38	100%	858.57	100%

Source: COFECE

* Servicio de Administración Tributaria (Mexican Tax Administration Service)

34. The table shows that, of the fines imposed as a sanction, a high percentage are paid, which could send a signal to economic agents that the fines imposed by COFECE are, for the most part, final. This could therefore deter engagement in unlawful conduct.

4. Conclusions

35. The fines applied as a sanction by COFECE are considered to be dissuasive in nature, that is, the Law sets out sufficient amounts to discourage engagement in conduct prohibited by the LFCE. As for their practical application, the Commission is looking for ways to apply the fines as best as possible, taking into account the elements of article 130, the information pertaining to each case and the specific circumstances of each case, as well as the applicable criteria issued by the Judicial Branch of the Federal government.

Federal Telecommunications Institute

1. Introduction

36. This contribution presents the general elements set out in the LFCE to sanction prohibited conduct, the criteria adopted in the application of the Law by the Federal Telecommunications Institute (IFT) and the judicial criteria on such applications.

37. It lists the cases sanctioned by the IFT and details a case corresponding to the sanction of a cartel (absolute monopolistic practice) to illustrate the deliberation of the criteria applicable to the imposition of sanctions by the IFT and by specialised courts.

2. General elements for the imposition of sanctions

38. Article 28 of the Constitution (first and second paragraphs) prohibits the realisation of concentrations and anticompetitive practices, and empowers and mandates the authorities to efficiently prosecute, among other conduct, any agreement, proceeding or combination of producers, industries, merchants or service providers that in any way sets out to prevent free competition or competition among each other.

39. The LFCE is the statutory Law of Article 28 of the Constitution. This Law establishes the criteria for identifying concentrations and practices that are anticompetitive and, therefore, unlawful and sanctionable, as well as the elements to be analysed to determine the sanctions.

2.1. Sanctions provided for in the LFCE

40. The sanctions regime consists of articles 127, 130 and 131 of the LFCE and is subject to the general principles of *proportionality and reasonableness*, the main elements of which are presented below.

41. **Sanctionable conduct** – The Law permits the sanctioning of absolute and relative monopolistic practices; unlawful concentrations; the submission of false information to the authorities; failure to comply with the obligation to notify a concentration before it is realised, when the Law obliges this to be done; the involvement of notaries in acts related to a concentration that has not been authorised; failure to comply with the regulations established for an essential input and for those who do not obey the order to eliminate a barrier to competition; and failure to comply with precautionary orders.

42. **Sanctionable subjects** – Sanctions are applicable to economic agents declared responsible for carrying out the sanctioned conduct and to those who have contributed to, promoted or engaged in said conduct. In addition, the Law goes as far as to provide for disqualification for acting as adviser, administrator, director, manager, executive, agent, representative or proxy for a legal person for a maximum term of five years with fines, if as natural persons they participated either directly or indirectly in the sanctioned conduct as a representative or in the name of, or on behalf of, legal persons.

43. **Types of sanctions** – Sanctions may include pecuniary (fines) and non-pecuniary measures consisting of orders to take certain action (e.g. deconcentrate or give access to essential elements) or to cease certain actions (e.g. stop carrying out the sanctioned acts).

44. **Structure of fines** – Fines are set as multiples of a unit of measurement. Originally, the general daily minimum wage in force in the Federal District (now Mexico City) was used, determined by a labour commission distinct from the economic competition authorities.

45. In 2016, the Constitution was amended so that any determination of the amount for payment of obligations and assumptions stipulated in the federal laws of the federal entities, as well as in the legal provisions issued from all of the above, should use the UMA as a reference, in place of the minimum wage.²⁰

46. Fines have maximum ceilings, which address the requirement to act as a deterrent for violating the Law, without compromising the viability of the offender(s). In the event of a repeat offence, fines of up to double that established by the Law may be imposed.

47. The Law is such that it distinguishes sanctions by the nature of the conduct sanctioned. It sets out different maximum amounts for each type of infringement. For example, absolute monopolistic practices merit higher fines than relative monopolistic practices.

48. **Criteria for individualising fines:** In imposing fines, the competition authority must determine and prove the seriousness of the infringement, for which it *must consider elements such as the damage caused; indications of intent; market share of the offender; size of the affected market; duration of the practice or concentration; as well as the offender's economic capacity; and, where appropriate, how the infringement affects the exercise of the Commission's powers.*²¹

49. According to IFT practice, these elements are indicative and not limiting. In this way, the competition authority may, with due cause, consider other elements necessary for determining the amount of the fine to be imposed, as long as it does not exceed the maximum ceiling and is subject to the general principles of proportionality and reasonableness.

50. **Methodology for individualising fines:** The IFT has not yet issued guidelines on the methodology for imposing fines. However, in each resolution it explains the reasoning used to impose the specific sanction, which is included in the public versions of its decisions.²² The elements used in IFT practice are listed below, for information purposes, and are not binding for the IFT Plenary, as they are determined on a case-by-case basis:

- *The damage caused, the size of the affected market and the duration of the sanctioned conduct* are interrelated elements. The size of the market that has been affected by the sanctioned conduct, which corresponds to the volume of sales, revenue, profit or other relevant indicators, is estimated for each of the time periods in which this conduct has been carried out.
- *Indications of intent* correspond to the purpose of and/or intentions behind the conduct, as well as the degree of responsibility or intent in committing the unlawful act on the part of the economic agent (e.g. whether they were an instigator or a

²⁰ Available at: http://dof.gob.mx/nota_detalle.php?codigo=5423663&fecha=27/01/2016

²¹ Article 130 of the LFCE.

²² The reasoning and metrics are public, although the quantitative information of the cases may be kept confidential because it corresponds to the activities of the sanctioned economic agent(s).

follower). Thus, for example, the conduct of the offender during the proceedings may provide aggravating or extenuating elements when assessing this criterion.

- The *market share of the offender* is determined by considering the best indicator of the economic activity analysed, which may be in terms of sales revenue, profits, assets, or other relevant indicator(s).
- *Other elements* considered in IFT practice include the use of a deterring factor. In addition, the Constitution mandates *severe penalties* for any concentration or *monopolistic practice that affects competition*.

2.2. Cases sanctioned

51. Since its establishment in September 2013, the IFT has imposed 13 sanctions, as shown in the following table.

Table 2. Summary of fines imposed by the IFT

CASE	ECONOMIC AGENT	AMOUNT ²³
E-IFT/DGIPM/PMA/0001/2013 (Absolute monopolistic practice – allocation of geographic markets) ²⁴ Date 17-Feb-14	Cablevisión, S.A. de C.V.	8,733,746.00 MXN or 493,744.40 EUR
E-IFT/UC/RR/0004/2013-1 (Violation of conditions imposed on a concentration) ²⁵ Date 15-Aug-14	Corporativo Vasco de Quiroga, S.A. de C.V.	53,838,000.00 MXN or 3,043,620.82 EUR
E-IFT/UC/DGIPM/PMR/0002/2013 (Relative monopolistic practice – hindering the competitor production process) ²⁶ Date 3-Sep-14	Teléfonos de México, S.A.B de C.V.	49,320,000.00 MXN or 2,788,204.96 EUR
E-IFT/UC/DGIPM/PMR/0003/2013 (Non-notified concentration) ²⁷ Date 7-Jan-15	Teléfonos de México, S.A.B de C.V.	10,518,000.00 MXN or 597,074.23 EUR
	Teninver, S.A. de C.V.	3,895,600.00 MXN or 221,141.12 EUR
	Comercializadora de Frecuencias Satelitales, S. de R.L. de C.V.	3,098,249.30 MXN or 175,878.00 EUR
	Corporativo Mexicano de Frecuencia Dish, S.A. de C.V.	8,553,789.20 MXN or 485,572.07 EUR
	Dish México Holdings, S. de R. L., de C.V.	10,518,000.00 MXN or 597,074.23 EUR
	Dish México, S. de R.L. de C.V.	10,518,000.00 MXN or 597,074.23 EUR
	Grupo Frecuencia Modulada Televisión, S.A. de C.V.	10,518,000.00 MXN or 597,074.23 EUR
	Frecuencias Satelitales, S. de R.L. de C.V.	3,098,249.30 MXN or 175,878.00 EUR
E-IFT/UCE/DGIPM/PMR/0006/2013 (Relative monopolistic practice – providing incentives to not market third-party services) ²⁸ Date 12-Apr-18	América Móvil, S.A.B. de C.V., and Radiomóvil Dipsa, S.A. de C.V.	96,825,831.51 MXN or 4,264,440.00 EUR
E-IFT/DGIPM/PMA/0001/2013 (Absolute monopolistic practice – allocation of geographic markets) Date 19-Sep-18	Mega Cable, S.A. de C.V.	10,299,937.81 MXN or 453,633.84 EUR

Source: IFT.

²³ Average annualised exchange rate: 2014: 1 EUR = 17.6888 MXN; 2015: 1 EUR = 17.6159 MXN; 2018: 1 EUR = 22.7054 MXN.

²⁴ Public version available at:

http://apps.ift.org.mx/publicdata/P_IFT_EXT_170214_70_Version_Publica_UCE.pdf

²⁵ Source: http://apps.ift.org.mx/publicdata/Version_Publica_P_IFT_EXT_150814_196.pdf

²⁶ Source: http://apps.ift.org.mx/publicdata/P_IFT_030914_297_Version_Publica_UCE.pdf

²⁷ Source:

<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/versionpublicapift07011530.pdf>

²⁸ Source: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift120418293noct.pdf>

52. In general, judicial reviews have supported the amount and the fines imposed. However, the previous criterion (d) was subject to a recent review by a specialised court, as shown in the following case example.

3. Case: sanction of a cartel (absolute monopolistic practice)

53. Economic cartels (absolute monopolistic practices) are agreements between two or more competing economic agents, i.e. agents engaged in the same economic activity. Under the LFCE, this conduct exists when competing economic agents enter into contracts, agreements, arrangements or combinations (i.e. agreements), or exchange information with the aim or intention of establishing prices,²⁹ determining quantity,³⁰ allocating portions or segments of the market³¹ or agreeing bids in public tenders.³²

54. Such agreements reduce or eliminate the incentives for economic agents to collude to compete in the market and on quantities, quality, availability or other market attributes. This results in a serious distortion of the market mechanism that determines the transfer of resources between its participants.

55. To prove engagement in an absolute monopolistic practice, the LFCE does not require the definition or analysis of the *relevant market* in which the practice was carried out – in terms of product, geography and time – nor the verification of the benefit(s) obtained by the economic agents involved in the conduct because, having proved the other elements set out in the Law, the net impact will always be negative on the consumer and the economy in general.

56. Owing to their seriousness, the LFCE declares absolute monopolistic practices unlawful under any circumstances (*per se*). To sanction them, it is sufficient to prove either that their aim or intention is to carry out any of those elements specifically provided for in the Law or the existence of an agreement *between competing economic agents*. Furthermore, there can be no justification for these practices based on efficiencies.

57. In 2013, the IFT sanctioned a cartel operating in the markets of production, distribution and marketing of fixed telephone, Internet access and television services restricted to end consumers in 13 municipalities of Mexico.³³

3.1. Sanctioned offence: agreement to geographically segment markets

58. The sanctioned offence consisted of a *co-ownership agreement for the use of a trade mark* (trade mark) entered into by two economic agents – Cablevisión and Megacable. Under this agreement, parties coordinated the provision of fixed telephone

²⁹ Article 53, section I of the current LFCE.

³⁰ Article 53, section II of the current LFCE.

³¹ Article 53, section III of the current LFCE.

³² Article 53, section IV of the current LFCE.

³³ While it is true that absolute monopolistic practices are carried out by two or more competitive economic agents, in the case presented and resulting from various judicial decisions, the fine imposed on one of the economic agents has remained void.

services, internet access and restricted television (services) offered separately or together (double and triple play offers) in order to *geographically segment the markets*.³⁴

59. The IFT concluded that both companies developed a commercial strategy consisting of the creation of a joint commercial brand under the protection of which they constantly exchanged information to segment the market, making use of a call centre, a webpage and end-user service centres.

60. Potential users had to provide their home *postal code*, from which the system directed them to either economic agent A or B according to their location. From this, the Institute concluded *that these systems directed users interested in purchasing triple play services from the same commercial brand according to their postal code, with the sole purpose of segmenting the market*. Both economic agents abstained from serving in localities where one already had a presence or where they had the possibility to do so.

3.2. Determination of the fine

61. On the basis of the criteria set out in the LFCE, amounts were determined corresponding to (i) the gravity of the infringement, (ii) damage caused, (iii) indication of intentionality, (iv) participation of the offender in the market, (v) size of the affected market, (vi) duration of the practice, (vii) repeat offence or criminal record of offenders and (viii) their economic capacity.

62. Regarding the characteristics of the offence, to begin with it was concluded that:

- It was extremely serious because it affected services of public interest and constituted a violation of rules of public order and social interest.³⁵
- The agreement caused damage to the market because it prevented the free determination of the availability of services on the market. It was the competitors and not the competition that determined the availability and coverage of services offered in each of the 13 municipalities analysed.
- The offence was carried out by the main providers, in terms of their market share, of restricted television services in Mexico.
- There was history of involvement in absolute monopolistic practices that also consisted of market segmentation. Repeat offence was not proven, because sanctions were not imposed.
- The offence was prolonged; it was identified as having begun in 2009. In some cases, this occurred from the beginning of the agreement, and in others, from when the participants in the agreement were granted authorisation to provide the services.

³⁴ There was also an accusation of *price fixing* that was not sanctioned by the IFT Plenary because the evidence was considered insufficient.

The public version is available at <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdologia/piftext17021470versionpublica.pdf>.

³⁵ In effect, according to Article 6, section B, paragraph II, of the Constitution, telecommunications are public services of general interest and it is up to the State to guarantee that they are provided under competitive conditions.

63. When imposing the fine, the IFT included a *deterrent to anticompetitive action by economic agents*. In this sense, the amount of the sanction imposed took into consideration the seriousness of the offence and that the sanction must be higher than the amount that those involved could obtain by engaging in the offence.

64. As it was about absolute monopolistic practices, the Institute was authorised to impose a sanction of up to one million five hundred thousand times the general minimum wage in force for the then Federal District – today the city of Mexico – for the year 2010,³⁶ an amount equivalent on that date to MXN 86,190,000.00 or EUR 5,149,853.01.³⁷

65. Because such practices have a widespread effect on the market, they are considered serious by the mere fact of being committed. In this sense, it was agreed that sanctions imposed on each responsible economic agent should act as a deterrent and reduce incentives to break the Law. Therefore, the double damage factor (i.e. multiplied by two) was applied.

66. While it is necessary to have such a deterrent, the fine must also be reasonable and proportionate to the economic capacity of the offender. In this case, the amount of the fine was considered reasonable in proportion to the economic capacity of the companies, since in the case of economic agent A it represented an amount equivalent to 1.65 per cent of operating profits, and in the case of economic agent B an amount equivalent to 10.88 per cent of operating profits.

67. For economic agent A, the amount of the fine represented about 10 per cent of the maximum allowed. For economic agent B, it represented about 39 per cent of the maximum possible fine for this type of infraction.

3.3. Proceedings before judicial bodies

68. Going against Resolution 1, Cablevisión and Megacable filed separate *amparo* lawsuits, which were reviewed by different specialised courts.

69. Megacable's *amparo* lawsuit was the first to be definitively resolved. The Specialised Court only granted *amparo* in order for the Institute to issue a new decision that would: (i) overrule Resolution 1, regarding said party only; (ii) determine whether or not the geographic areas in which the parties involved provided services constituted an element in determining their status as competitors; (iii) make an effective appraisal of each party's concession titles and coverage; (iv) identify the specific areas in which each company provided the services; (v) evaluate and confirm the argument regarding the purpose of the commercial strategy and, (vi) decide on the relevance or irrelevance of the economic effects of the commercial strategy for the determination of monopolistic practice (Executive M1).³⁸

³⁶ According to the LFCE, the minimum wage was still taken into account, which for the year 2010 was 57.46 (fifty-seven Mexican pesos 46 cents) in accordance with the resolution issued by the National Minimum Wage Commission, published in the Federation's Official Newsletter on 23 December 2009.

³⁷ Average annual exchange rate 2010: 1 EUR = 16.7364 MXN.

³⁸ http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1305/13050000168341360009009.docx_1&sec=lveth_L%C3%B3pez_Vergara&svp=1

70. Cablevisión's *amparo* lawsuit was dismissed. The Specialised Court determined that Executive M1 caused the cessation of the effects of Resolution 1 on Cablevisión (Executive A), having *determined its complete non-existence*.³⁹

71. In compliance with Executive M1, the Institute issued a new decision solely and exclusively for Megacable, which met the requirements requested by the Specialised Court and recognised the absolute monopolistic practice in the 13 municipalities investigated (Resolution 2).⁴⁰ The IFT was prevented from sanctioning the economic agent Cablevisión.

72. Going against Resolution 2, Megacable won a new *amparo*, granted by the same Specialised Court that resolved the previous one. This ruling ordered the issuing of a new resolution in which the absolute monopolistic practice was recognised in just *6 of the 13 municipalities investigated*, thus modifying *the sanction amount initially imposed* (Executive M2).⁴¹

3.4. Criteria considered in Executive M2

73. The Specialised Court for Executive M2 considered the following elements:

3.4.1. Proof of offence

- The range of evidence was sufficient to satisfy standards to prove the *geographical segmentation of the market*. Inspection visits to economic agents' call centres and service centres showed that the centres were an instrument used in dividing service provision by territory for 6 of the 13 municipalities analysed.
- From statements made by various economic agents, there is a strong conviction that the website served as an instrument to segment the provision of services *by using postal codes*.
- The IFT consulted the *website* to prove the existence of a single provider of telecommunications services in 6 of the 13 municipalities covered by the investigation, which was *corroborated by inspection visits to the service centres and call centres* of economic agents A and B, respectively.
- The Court found that for *7 of the 13 municipalities investigated*, there was *no record of inspection visits to the service centres and call centres* of economic agents A and B. Therefore, the existence of a single provider of telecommunications services in those municipalities was not corroborated.
- The Court found that evidence showed that the trademark agreement, the website, the call centre and the visits to service centres only proved market segmentation in 6 of the 13 locations. However, it moved away from the holistic method by not extrapolating that evidence to the rest of the localities. In addition, it considered the IFT's explanation insufficient that in the other seven localities, segmentation occurred due to the fact that it was more profitable for only one economic agent to

³⁹http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1304/13040000159320910021016011.doc_1&sec=Carlos_Luis_Guill%C3%A9n_Nu%C3%B1%C3%A9z&svp=1

⁴⁰<http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/versionpublicauepift/ext011215179.pdf>

⁴¹http://sise.cjf.gob.mx/SVP/word1.aspx?arch=1305/13050000219734020017016002.pdf_1&sec=Jeny_Jahaira_Santana_Albor&svp=1

provide services in each one of them. The Court rejected this theory, considering that, in those seven locations, companies had to provide services in order to comply with their concession title.

3.4.2. *Fine imposed*

74. Executive M2 concluded that the Institute did not state adequate reasons for the absolute monopolistic practice being judged *extremely serious*. In its assessment, considerations about the nature of the offence (i.e. whether it was a cartel) only correspond to the natural consequences of the unlawful conduct, which do nothing to assess its gravity and can be said of any case in which an infringement of this nature is considered proven.

75. It also considered that the general interest inherent in the affected public services is not sufficient to understand the qualifier of "*extremely*" serious, an expression that has connotations of greater stringency, which must be accompanied by a detailed explanation that justifies it, based on the particular circumstances of the case. In this case, the Court found that these circumstances were not put forward by the Institute. The same goes for its social impact and magnitude of the offence.

76. Likewise, doubling the damage caused as a "*deterrent*" was considered wrong since it is not stipulated in the LFCE. This decision only applies to this specific case and is a non-binding reference for future imposition of fines.

3.4.3. *Resolution in force*

77. In compliance with Executory M2, the Institute:

- ruled that market segmentation under Article 9, section III of the LFCE, was proven in only **6 of the 13 municipalities** concerned;
- **took into account 6 of the 13 municipalities investigated for the purpose of calculating the sanction;**
- considered the offence to be "serious"; and
- omitted to apply the **deterrent of doubling** the damage caused (Resolution 3).⁴²
- It is important to note that Resolution 3 has again been appealed by Megacable in court and is currently pending a decision. However, it serves to illustrate the exercise of judicial scrutiny with respect to the proof of conduct and the imposition of fines.

⁴² <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift190918581.pdf>