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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Mexico (COFECE) --

15-17 June 2016

This document reproduces a written contribution from Mexico (COFECE) submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

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1. Introduction

1. As any other antitrust authority, the Mexican Federal Economic Competition Commission (COFECE) seeks to increase social welfare by furthering and preserving the competition and free market access process. Effective enforcement of the competition law is a key factor for ensuring a “level playing field” for economic agents and for the deterrence of anticompetitive practices. To achieve this, the Federal Economic Competition Law (FECL) provides the Commission with several enforcement powers and tools.

2. One of these powers is the possibility of negotiating commitments. However, deciding in which cases are settlements better solutions than fines is maybe one of the most important decisions a competition authority has to take considering that this will impact its legitimacy and credibility.

3. Furthermore, commitments negotiation allows the Commission to dispose cases where this kind of arrangements are believed to be the most useful tool to end rapidly the anticompetitive practice and the damage to the market and free up resources to be used in the prosecution or investigation of other cases. For economic agents, commitments help them avoid reputation damages and fines.¹

4. It is important for the authority to consider that the increasing reliance on commitments could move the negotiation of remedies to the center of the enforcement process.

5. Bearing in mind that commitment measures are not essentially punitive, in Mexico their use is mainly for settling a case before a decision is made by the Commission.

6. Under the Mexican competition law, commitments are only available for merger and *relative monopolistic practices* cases (abuse of dominance) as well as for the new procedure to eliminate barriers to competition and regulation of essential facilities.^{2,3} In cartel cases, the only procedure to avoid a sanction is through the Leniency Program where wrongdoers can apply before or during an investigation.

7. Until now, all abuse of dominance cases involving settlements have been resolved with behavioral remedies including cease and desist orders.

8. Pursuant to Article 85 of the law, where COFECE’s finds an infringement of Article 56 of the FECL, it may by decision order the undertakings concerned to bring such infringement to an end (cease); it may also impose any necessary remedy (behavioural or structural) to restore competition in the market, and a fine.

9. The following contribution will explain how commitments are reached under the Mexican competition law, their characteristics and some relevant cases in which COFECE has used them as a way of closing abuse of dominance cases.

¹ Article 127 fractions V and VII of the FECL state that the Commission may impose a maximum fine equivalent to eight percent of the Economic Agent’s annual income, for having incurred in a relative monopolistic practice or in an unlawful concentration in terms of the Law, regardless of the corresponding civil liability.

² Chapter IV of the FECL.

³ Article 94 of the FECL.

2. COFECE's power to accept commitments

10. The Commission has had the power of investigating relative monopolistic practices (abuse of dominance cases) since the 1990s.⁴ The Constitutional Reform of 2013 and the approval and implementation of the new Federal Economic Competition Law in 2014 granted enhanced powers to the Commission and new tools to improve its efficacy and tackle structural problems, while strengthening Mexico's overall competition regime.

11. Along with the traditional enforcement tools, the new FECL deepened the Commission's capacities including the possibility for parties to terminate a procedure in an anticipated manner by reaching pro-competitive solutions without the delay and drain of resources associated to in-depth investigations.⁵ According to Articles 100, 101 and 102 of the law, Economic Agents involved in abuse of dominance investigations may request an exemption or a fine reduction benefit by offering viable commitments to the Commission considering the following:⁶

- The request must be presented in writing before the issuance of the Statement of Probable Responsibility, which marks the conclusion of an investigation.
- The interested Economic Agent must prove its commitment by discontinuing, eliminating or correcting the corresponding practice in order to restore competition and free market access.
- The proposed commitments must be legally and economically feasible, and appropriate to avoid, or eliminate the anticompetitive practice under investigation, stating the timeframes and terms of verification thereof.
- Economic Agents may receive these benefits only once every five years.
- Notwithstanding the resolution, third parties may claim damages for civil liability in connection with the relative monopolistic practice.

12. With the filing of the aforementioned request, the on-going investigation will be temporarily put on hold by COFECE's Investigative Authority, which, if deemed necessary, may request the Economic Agents to submit relevant clarifications regarding the submitted information in order to assert the arguments made available to it under the Law. Once the Authority has analysed and submitted its opinion on the case, COFECE's Board of Commissioners shall issue a resolution by which it may decide to dismiss the proposal, in which case, the investigation is reinstated; alternatively it may: i) grant the Economic

⁴ On its Article 54 the FECL defines a relative monopolistic practices as acts, contracts, agreements, procedures or other combinations that agents, individually or collectively, endowed with substantial power in a relevant market, undertake with the purpose or effect of unduly displacing other agents from or substantively restricting their access to markets, or establishing exclusive benefits that favor one or various parties.

⁵ On its Article 33 bis 2, the previous Federal Economic Competition Law (FECL), issued in 1992 and reformed in 2006 and 2011, considered a procedure by which economic agents involved in a relative monopolistic practice investigation could present before the Commission a written commitment to suspend, suppress, correct or not perform the corresponding monopolistic practice. With this information, the Commission could resolve to exempt the Economic Agent from or reduce the fine that would have been imposed. Economic Agents could only receive the benefit under this article once every five years. FECL document available at: http://www.diputados.gob.mx/LeyesBiblio/abro/lfce/LFCE_abro.pdf

⁶ Article 100° to 102° of the Federal Economic Competition Law (FECL) issued in 2014. Document available at : https://www.cofece.mx/cofece/images/Documentos_Micrositios/Federal_Economic_Competition_Law.pdf

Agent the corresponding exemption and fine reduction benefit; and ii) inform the corresponding measures to be implemented by the Economic Agent to restore competition and free market access.

13. When used properly, commitments provide the agency with greater power to promote competitive market behaviours. These kinds of measures are commonly divided into two groups: structural and behavioural. Although there isn't a generally accepted definition for them, for the purpose of this contribution we refer to:⁷ i) *structural remedies* as those which tend to target a firm's environment, output or property rights (tangible and intangible assets); and ii) *behavioural remedies* related to those that change the incentives of the addressee to behave in a certain way or prescribe certain behaviour.

14. *Structural remedies* don't require an ongoing monitoring by the enforcement authority nor establish ongoing links between the Economic Agents. On the other hand, *behavioural remedies*, commonly used in abuse of dominance cases, require permanent monitoring and enforcement due to the fact that, unlike structural ones, these types of remedies don't eliminate the incentive of the Economic Agent to restrict competition.

15. In this sense, one must bear in mind that, if wrongly used, settlements may endanger the deterrent principle that discourages business from engaging in future anticompetitive practices upon which competition law is built. Hence the importance for COFECE to analyse each case in detail (case-by case) by studying and understanding the market in depth, and selecting and proposing remedies considering basic principles such as necessity, proportionality and certainty.

16. Economic Agents may or may not accept the Board's resolution. If so, they must accept the definitive resolution expressly and in writing within fifteen working days following the formal notification. In the event they decide not to expressly accept or fail to respond within the established timeframe, the interrupted procedures will be reinstated. After the benefits are granted, COFECE's Technical Secretariat will be in charge of implementing the decisions and resolutions adopted by the Board of Commissioners, as well as monitoring compliance by the Economic Agents.⁸

17. Furthermore, and as means of providing certainty to Economic Agents, in 2015 COFECE published the "*Guidelines on the Procedure for the Exemption and Fine Reduction Benefit for Abuses of Dominance and Unlawful Concentrations*"⁹ by which it defines a standardized approach that in turn increases the procedures' transparency and predictability.

18. This document details the procedure to access such benefits including: timeframes for each step, the elements Economic Agents should include in their requests, the elements the Board of Commissioners takes into account when reviewing the proposed settlements, and the different resolutions (rejection, inadmissibility, exemption or reduction) that may be issued by the Board of Commissioners, among others. Additionally, it provides guidance to economic agents in terms of the Commission's powers, particularly those pertaining to such investigations. COFECE's intention is to create a general conscience of the possibility Economic Agents have for negotiating settlements, as well as providing guidance for them to be able to present the best possible commitments considering its feasibility.¹⁰

⁷ Philip Lowe, Mel Marquis and Giorgio Monti "European Competition Law Annual 2013: Effective and Legitimate Enforcement of Competition Law", (Hart Publishing, Oxford/Portland, 2016) pp. 209-210

⁸ FECL's Article 20 fraction VI

⁹ Pursuant to Article 12 fraction XXII of the FECL, the Commission shall issue directives, guides, guidelines and technical criteria regarding, among others: the imposition of sanctions; concentrations; investigations; **exemption and fine reduction benefit**; suspension of acts constituting probable monopolistic practices or probable unlawful concentrations and those necessary for the effective compliance of this Law.

¹⁰ Guidelines available in Spanish at: [file:///C:/Users/iarzo/Downloads/guia_dispensa_161215%20\(1\).pdf](file:///C:/Users/iarzo/Downloads/guia_dispensa_161215%20(1).pdf)

3. COFECE's experience in cases regarding commitments

19. As mentioned before, the Commission can only adopt commitment decisions for merger and abuse of dominance cases. It is in this last one where the Commission has faced several interesting cases. In most of them commitments through behavioural remedies have proven useful. However, there are some cases where the parties have failed to comply.

20. COFECE's experience with abuse of dominance cases and commitment decisions has resulted in a considerable use of behavioural remedies such as: cease and desist orders, prohibitive duties and affirmative obligations such as granting low interconnection rates¹¹ or implementing compliance programs.¹²

21. To illustrate this, we present two cases in which commitment decisions were reached.

3.1 *Beers Case*

22. In August 2010, the former Federal Competition Commission (CFC) initiated at the request of *SAB Miller*, which alleged monopolistic practices by *Cervecería Cuauhtémoc Moctezuma (CCM)* and *Grupo Modelo*. According to the allegation, the companies granted cash and non-cash incentives to establishments on the condition that they avoided selling their competitor's products. The same year, the Commission began an investigation for alleged relative monopolistic practices in the market of distribution services, marketing and sale of beers, with special focus on exclusivity deals.

23. In 2013, the CFC finalized the investigation in an anticipated manner due to the fact that, *Grupo Modelo* and *Cuauhtémoc Moctezuma* offered a range of behavioral commitments in order to eliminate the anticompetitive practice. Some of the proposed commitments were:

- ***Craft beers will enjoy an open and unrestricted access to every restaurant, bar and tavern.*** The existence of exclusivity deals celebrated between *Modelo* and *Cuauhtémoc* with these shops could not, under any circumstance, limit the sale of craft beers manufactured by small-scale producers within the national territory.
- ***Every exclusivity deal should be written, transparent and of limited duration, with clear cancellation rules.*** No exclusivity obligation could exist without a written contract. Both companies, *Modelo* and *Cuauhtémoc*, had to inform the general public about these conditions through national newspapers and directly inform all grocery stores, restaurants, bars and taverns to which they supply their products. Additionally, the companies had to set up a free phone line to address all questions and/or complaints.
- The exclusivity contracts could not exceed 25% of the total number of establishments in which these companies sold its products, this percentage had to be reduced gradually to 20% within the next five years. - With this they would ensure that the exclusivity agreements would not constitute an entry barrier to other competitors since they could still have access to all the remaining establishments (all the ones not included within the 25%). At the same time, it recognized the benefits to consumers derived from having efficient contracts (for example, when funding is given for the improvement or expansion of beer sales counters) with a limited coverage.

¹¹ File DE-037-2006, Federal Official Gazette (2006), (Mex).

¹² File DE-148-2008, Federal Official Gazette (2008), (Mex).

24. The Commission concluded that efficiencies could justify some exclusive contracts, such as when exclusivity is a condition for the brewery's financing improvements or expansion of the retailer's premises. Some breweries had argued that a great number of the family-owned retailers lacked the funds for adequate refrigeration and upkeep to attract consumers and exclusivity agreements gave breweries an incentive to invest in them without having a competing producer benefiting and free riding on the improvements.

25. Since then, the Commission monitors the compliance of the aforementioned commitments. Within its Quarterly Reports the Commission includes the follow up of these commitments. Additionally, the Commission has:

- Undertaken on-site inspections to the headquarters of *Cervezas Cuauhtémoc* and *Grupo Modelo* to verify the exclusivity percentage allowed and the content of the supply contracts with a unique format.
- The Commission monitors that *CCM* and *Grupo Modelo*'s web sites include: i) the existence of the free phone line number "01-800", and ii) a statement by which it expresses their approval for establishments to sell beers produced by microbrewers. The companies were granted a two years period, subsequent to the investigation's resolution, to comply with these commitments.¹³

26. The decision established a penalty equal to 8 per cent of annual Mexican turnover for failure to meet the CFC's conditions.¹⁴

3.2 *Avocados Case*

27. In March 2015, COFECE's Board of Commissioners concluded the proceedings against the Association of Producers, Packers and Exporters of Avocados of Mexico (*APEAM*), in order to put an end to the relative monopolistic practice of tied selling initiated in 2011 by accepting the commitments proposed by the *APEAM* without imputing liability.

28. This involved a supplier conditioning the sale of a product or service under the obligation of buying or hiring a different one, thus preventing Hass avocado exports to the United States for any packers that were not affiliated to *APEAM*. With this practice, *APEAM* hindered Hass avocado's exports to United States of America (USA) by harming all the packers that were not members of the said association being the USA the main export market for Mexican avocado producers, with a clear upward trend.

29. In Mexico, *APEAM* is the only body authorised for the management and billing of the phytosanitary monitoring and verification services of the Department of Agriculture (USDA-APHIS), necessary to export Hass avocados from Mexico to the United States.

30. Pursuant to Articles 100 and 102 of the FECL, the parties of an investigation have the possibility of terminating and investigation in an anticipated manner by reaching a pro-competitive solution with the Commission (settlement) with the intention of restoring competition and free access process affected by the imputed practices.

¹³ An example of this can be viewed at Grupo Modelo's website:

http://www.grupomodelo.com.mx/repository/cofeces/esp_1449853848098.pdf.

¹⁴ Article 127 fraction XII of the FECL establishes that the Commission may impose a maximum fine equivalent to eight percent of the Economic Agent's annual income, for failing to comply with the resolution issued pursuant to article 101 of the Law, regardless of the corresponding criminal.

31. To this end, the *APEAM* submitted a proposal with a commitment to eliminate such barriers in accessing this market, allowing access to packers who do not wish to be members of the association. The proposed commitments were:

- All Economic Agents could join *APEAM* exclusively by paying export fees determined by the General Delegate Assembly, and in return receive all the services developed by the association.
- *APEAM* would open a window through which the certification service would be offered to those enterprises not willing to join the Association. By this, those Economic Agents would only have to pay the certification's costs.

32. The full implementation of the settlements was planned to be carried out in two stages. In the first one, *APEAM* would modify its statutes; implement internal procedures to charge the service applicants; and would request the approval of the General Directorate of Plant Health and USDA-APHIS. Once the aforementioned were concluded, on a second stage, *APEAM* would provide the service to packagers in either of the two proposed modalities.

33. In order to verify the compliance of the proposed commitments, *APEAM* had to provide the Commission with all the requested information and supporting documentation. Hereof, in September 2015, the Commission requested several documents to monitor the companies' compliance. However, the information submitted by *APEAM* could not prove the implementation of the agreed commitment. Such failure to comply with the convened, posed a great risk to the competition process since this one could not be restored.

34. As a response to the actions carried out by *APEAM*, on April 11th 2016, the Commission sanctioned the Association with MXN\$ 36, 830, 898 (USD\$2.05 million¹⁵) for failing to comply, within the established timeframe, with the commitments offered to the Commission in order to eliminate and correct the effects caused by their conduct and forced it to comply with the agreed commitments.

35. From that moment on and in order to verify the compliance of the settlements, COFECE may issue information requests to *APEAM*, any of its members or any related person to the subject; likewise the Commission may also summon anyone related with the fulfillment of the settlements, undertake on-site inspections or any other proceeding considered necessary.

¹⁵ The official average exchange rate during April 2016 was 17.49 MXN/USD, as published by the Mexican Central Bank (Banxico).

4. Conclusions

36. With all the information stated above, we could conclude that settlements through commitment decisions should be carefully used and not be considered as a substitute of regular enforcement actions. These kind of procedures should never be used in cases where the agency has sufficient evidence to prove an abuse of dominance violation. Hence, this process is especially important for young agencies, such as Mexico.

37. In this sense, “settlements should be conceived as a procedural and technical instrument at the disposal of the administrative authorities, and should always be kept as an enforcement tool, overshadowing any political implications it may have, whit agencies being transparent and consistent in their settlement practices.¹⁶” Also, and while considering the difficulties agencies face when designing or analysing proposed settlements some authors coincide that, in order to enhance their methods, agencies should take into account the following principles¹⁷:

- Settlements should be discarded in definite and serious infringements where there is a strong indicia or proof of a violation, because the competition authority would risk too much deterrence value for administrative savings and early termination cases.
- In the rest of the cases, settlements should be restricted to those in which the benefits in terms of earlier termination of the violation and saving of the cost of proceedings outweigh the loss of deterrence in punishing the violations.
- Too early in the investigation, settlements should be avoided as it presents greater risk of negative effects to deterrence.
- Market tests of the settlements proposal through opinion by third parties¹⁸ are useful in the assessment of soundness and terms of settlements.
- Settlement policy and practices should be made as transparent and public as possible.

38. As seen in the two cases mentioned in section II, there is work yet to be done to ensure the full success of settling cases through commitments, especially with regard to compliance and assessment of their effectiveness.

39. Cases such as the avocado one are evidence that sometimes commitment decisions do not guarantee an end to anticompetitive practices, therefore the Commission has undertaken several actions, such as the publication of related Guidelines, to strengthen its compliance mechanisms while providing Economic Agents with greater certainty and transparency.

40. Since COFECE may be considered to be in a young stage, there are still no specialized studies on the impact or effectiveness of behavioural settlements.

41. Additionally, it is important to acknowledge that an assessment of these measures has to be done in order to define if the commitments have addressed competition concerns. The use of ex-post evaluations is a viable option and especially considering the good results this type of evaluations have given other agencies by allowing them to identify the elements that have affected the effectiveness of settlements in order to improve the solution for further cases.

¹⁶ Francisco Marcos, “Diminishing enforcement: negative effects for deterrence of mistaken settlements and misguided competition promotion and advocacy”, *Working Paper IE Law School*, (July 2012) pp. 10

¹⁷ *Ibíd.*

¹⁸ In Mexico, the “Guidelines on the Procedure for the Exemption and Fine Reduction Benefit “ foresee that before presenting its opinion to the Board of Commissioners, COFECE’s Investigative Authority shall consult with plaintiffs (other companies, Executive Branch, Economy Secretariat or the Federal Consumer Office (PROFECO)) and, if the case may be, consider their opinion on the matter.