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### ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Mexico

- Session II -

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More documentation related to this discussion can be found at: [oe.cd/eac](http://oe.cd/eac).

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## *Economic analysis and evidence in abuse cases*

### **– Contribution from Mexico –**

#### **Mexican Federal Economic Competition Commission (COFECE)**

##### **1. Introduction**

1. A proceeding in abuse of dominance cases is carried out in two stages. It begins with an investigative procedure, carried out by the Investigating Authority -which has independence of action-, where elements of proof (evidence) are gathered to configure the probable occurrence of a relative monopolistic practice (RMP per its acronym in Spanish) in accordance with the Federal Economic Competition Law (LFCE for its acronym in Spanish); subsequently, in the event that the Investigating Authority determines that there are elements of proof regarding the existence of a conduct, the Board of Commissioners refers the case file to the Technical Secretariat in order to carry out the Trial Like Procedure, where Economic Agents that have been notified or accused of a probable violation present their arguments and offer evidence related to the alleged accusations brought against them. Finally, in the event that the Board decides that the PMR has been carried out, and that it has not been demonstrated that its possible efficiencies exceed its negative effects on the market, it will then proceed to decide what it deems appropriate, including the imposition of a monetary sanction on the offender. In all these steps, economic analysis becomes not only essential, but also rigorous.

2. The contribution presents (i) an explanation of some theories of harm used in recent cases. In addition, (ii) the analytical and statistical tools that, according to article 59 of the LFCE, have been used for the preliminary determination of substantial market power are presented. Also, the contribution (iii) explains the role of economists in formulating requirements to agents and gathering information for a given investigation. This contribution also examines (iv) the analytical techniques that have been used to analyse the effects of abuse of dominance, which have been of two types: quantitative (descriptive and inferential) and qualitative. In addition, (v) it explores the role of economic analysis in the imposition of fines and the establishment of commitments. Finally, (vi) the contribution presents the *ex-ante* analysis performed to estimate the possible social and market benefits generated by the Commission's intervention.

##### **2. Theories of harm**

3. The Commission analyses cases of abuse of dominance by means of the "rule of reason". Although this rule does not expressly appear in the articles of the LFCE, it is up to the Competition Authorities (COFECE or the Federal Telecommunications Institute - IFT-) to determine how its application will be carried out, guaranteeing legal certainty to Economic Agents in order to determine whether the conduct examined is harmful or not to the competition process.

4. By using the "rule of reason", the Commission must evaluate the intention (the object) or the effects that the conduct under examination may cause or has caused in the relevant market and/or in related markets. Consequently, the economic analysis becomes not only essential, but also rigorous.

5. The Commission relies on different theories of harm to establish a causal relationship between the conduct under investigation and its (possible) effects. In accordance with the LFCE, a coherent theory of harm must determine whether a conduct has had or may have the object and/or effect of unduly displacing another Economic Agent (*exclude*), substantially impeding access to an entrant firm (*foreclose*), or establishing exclusive advantages in favour of third parties (*discriminate*); and thus argue how the conduct may or has generated harm to the competitive process.

6. The Commission has carried out several analyses of undue displacement, among which are cases of anti-competitive practices (as a mechanism of vertical or horizontal displacement) that:

- seek to favour a vertically integrated agent,
- encourage an alignment of incentives that cause effects similar to vertical integration (such as vertical restraints), including, among others, theories of harm associated with the commitment problem; or,
- the extension or strengthening of monopoly power (or monopoly extension) in certain markets; and
- preventing competition in the primary market by altering competition (or leveraging) in the secondary market.

7. In this diverse range, analytical techniques are employed to assess the consistency between these theories and the investigated facts. Such techniques may be counterfactual analyses, (quasi) natural experiments, or conducting a consistent qualitative analysis between the correspondence of the accrued evidence and the proposed theory of harm.

8. Illustrations 1 and 2 explain concisely how the theories of harm were addressed in two cases of auto-transport in the Mexico City and Cancun airports, using the commitment problem and the alignment of interests or revenues, respectively. The first case corresponds to a discrimination in treatment and prices, exercised by the Airport Administrator in Mexico City in order to displace some competitors in the *downstream* taxi service market, and thus restore its market power to charge high fees to previously established permit holders. In the second case, a refusal to deal by the Airport Administrator in Cancun sought to keep the market closed (*foreclosure*) and thus continue to obtain high fees, which were a function of the monopoly revenues obtained by the cab service permit holders at that airport.

Figure 1. Use of the commitment problem to explain the discrimination of treatment and prices of an Economic Agent (AE) by the airport administrator (AA) in Mexico City (file DE-015-2013)<sup>1</sup>

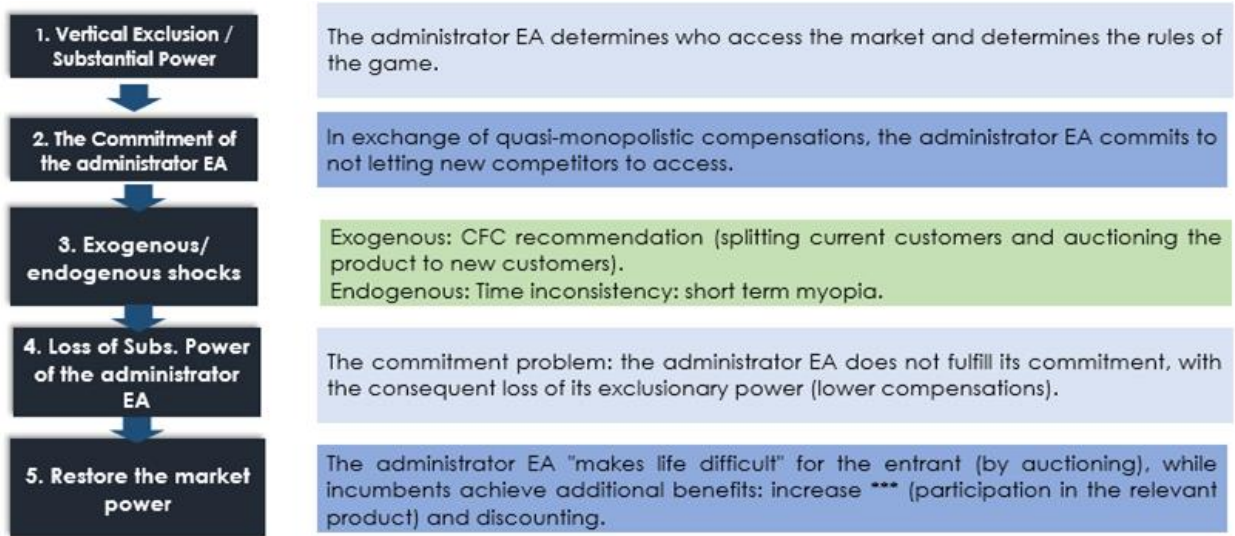
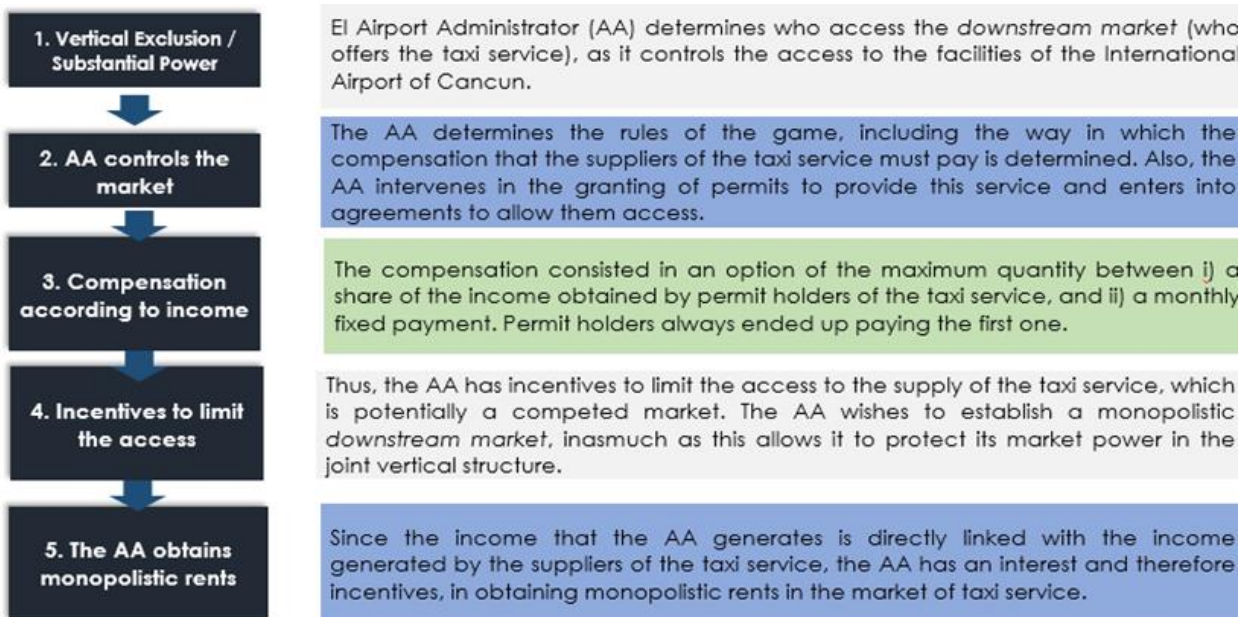


Figure 2. Alignment of interests and revenue transfer to explain the refusal of access of some economic agents by the (AA) in Cancun, Quintana Roo (file DE-008-2016)<sup>2</sup>



<sup>1</sup> The theoretical reference was P. Rey and J. Tirole (2007), "A premier on foreclosure".

<sup>2</sup> *Ídem.*

9. In addition, there are other tools used to diagnose the anticompetitive character of different behaviours that could potentially contribute to the articulation of plausible theories of harm: a) Profit sacrifice test<sup>3</sup>, b) Lack of economic sense test<sup>4</sup>, c) As-efficient competitor test<sup>5</sup>, d) Efficiency test<sup>6</sup>, y e) Consumer welfare effects test<sup>7</sup>.

### 3. Tools for the assessment of market power

10. For theories of harm to be applied, it is necessary that the conduct be carried out by an agent with substantial power. COFECE has used economic principles and tools to evaluate the substantial power of one or several economic agents. In this regard, the process of determining substantial market power is based on articles 58 (Relevant Market) and 59 (Substantial Market Power) of the LFCE.

11. One or more companies are said to have substantial market power in a relevant market -previously defined- when their actions in that market cannot be counteracted by their competitors -generally in the establishment of high prices-. In this regard, article 59 of the LFCE establishes for the determination of substantial market power, among other elements, the market share, the ability to set prices, the behaviour of market participants, barriers to entry and the availability or access to inputs.

12. COFECE's Investigating Authority estimates market shares using metrics such as units sold, revenues, number of customers, among others. Regarding the analysis of barriers to entry, there is a complete list of possible elements that could be considered as such in the Mexican legislation. This list includes, among others, the analysis of sunk costs and significant investments that new suppliers must face and that may delay or prevent access, the estimation of advertising expenses that a new supplier should incur, the determination of economies of scale in the market, the estimation of specific costs to obtain access permits or to comply with specific regulations of the sector.

13. The Investigating Authority of the Commission has also used statistical tools to determine if the Economic Agent that is carrying out the conduct has substantial market power, for example: (i) calculation of elasticities (own and cross elasticities), (ii) "leader-follower" competition models, (iii) effective price model, (iv) regression models (linear, segmented). Specifically, we have sought to use these tools to determine the capacity to set prices, restrict supply or determine the ability to counteract the market power of an agent.

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<sup>3</sup> It assumes the unlawfulness of a dominant firm's strategy that leads to a reduction in profits in the short term if it only makes sense in the medium term by excluding competitors.

<sup>4</sup> Under this standard, a strategy adopted by a dominant firm that lacks any economic sense in itself except for eliminating or diminishing competition will be unlawful.

<sup>5</sup> It raises the question of whether a certain strategy of a dominant firm would be capable of excluding a firm at least as efficient as the dominant firm and only under such a scenario should its unlawfulness be concluded.

<sup>6</sup> It proposes to determine the lawfulness of unilateral conduct by posing two rules based on the effect of the allegedly anticompetitive conduct on the efficiency of the incumbent and its rivals. In this regard, it poses a two basic questions: does the conduct under investigation (1) lead to the observed strengthening of market power only if the monopolist has improved its efficiency; or (2) does it strengthen it by harming the efficiency of its rivals, regardless of whether or not it raises its own efficiency?

<sup>7</sup> Shows that the conduct affects or may affect consumer welfare by creating conditions that impose real risks of restricting the product, its quality and service conditions or raising prices.

14. The reasoning used in some cases when applying econometric models is explained below. In one case, related to the wholesale marketing of a set of products, the "leader-follower" model was used to identify whether the incumbent had the ability to lead the dynamics of defined prices (i.e., that it has the ability to establish or set a price) in the relevant markets, for which a statistical model was estimated in which a dynamic Stackelberg model was simulated with prices as the decision variable.<sup>8</sup> It was considered that the leading company chose prices in the first period while the followers chose prices in the next period. For the modelling, it was considered that:  $F$  is the set of firms competing in the market;  $I$  is the set of differentiated products, associated with the industry; with  $i \in I$ , a product associated with a differentiation characteristic and  $d \in F$  is a firm that is defined as the market leader. The estimated model was as follows:

$$P_{i,t}^f = \beta_1 + \sum_g^F \gamma_i P_{i,t}^g + \beta_2 P_{i,t-n}^d + U_{i,t}, \text{ with } i \in I, g \in F, f \in F, g \neq f \neq d \in F$$

$P_{i,t}^f$ : Is the wholesale price associated with a product  $i$ , the firm  $f$  at time  $t$ .

$P_{i,t}^g$ : Is the wholesale price associated with a product  $i$  the competing firm  $g$  at time  $t$ .

$P_{i,t-n}^d$ : Is the wholesale price of the good  $i$  of the leading firm at time  $t - n$ .

$U_{i,t}$ : The error term at time  $t$ , whose distribution is normal, with zero mean and constant variance.

15. Likewise, this analysis was complemented with the calculation of the estimation of the causality in the *Granger* sense between the prices of the incumbent and its competitors in the relevant markets.

16. In another case analysed by COFECE, in case file DE-040-2016, the General Directorate of Market Investigations (DGIM for its acronym in Spanish) used a segmented regression model to identify the effect on prices derived from the entry of a new participant to the market. The model suggested that the entry of a new competitor caused the incumbent's prices to drop to competitive levels so it was not possible to state that the incumbent could set prices without its competitors having the ability to counteract it. The model proposed was:<sup>9</sup>

$$P_t = \alpha_0 + \alpha_1 D + \varepsilon_t$$

$P_t$ : s the time series of the incumbent's monthly average prices from two thousand ten to two thousand eighteen.

$\alpha_0$ : intercept term.

$\alpha_1$ : represents the effect of the entry of a new competitor to the market.

$D$ : represents the "dummy", where  $D=0$  hen there was no competitor in the market and  $D=1$  when it was registered the entrance of a new competitor in the market.

$\varepsilon_t$ : is the error term, whose distribution is normal, with zero mean and constant variance.

The variable of interest ( $\alpha_1$ ) suggested a significant decline in the market prices.

<sup>8</sup> Average daily prices of each of the market participants.

<sup>9</sup> Additionally, a segmented regression model was estimated in three time slices, finding similar results.

## 4. Evidence gathering and the role of economists

17. For both, the evaluation of market power and behaviours, as well as the evaluation of the object or effects of behaviours, the collection of sound quantitative evidence is important. In this sense, the role of economists in formulating questionnaires and collecting data for a given research is important. Economists are involved in determining what information is to be collected through the Commission's proceedings; in addition to participating in the review of the data obtained, especially if it involves extensive databases, which must be reviewed by economists beforehand to avoid inconsistent or incomplete information, and then recorded and analysed.

18. Among the relevant information for economists in cases of abuse of dominance or monopolization is the identification of the relevant aspects of the demand and supply of the good/service to be analysed, including at least the following aspects: (i) characteristics and alternative uses of the good/service to be analysed, (ii) customers, buying amounts and purchase prices, (iii) substitute goods and complementary goods (domestic and imported), (iv) particular characteristics of the inputs and conditions of supplies, (v) stakeholders involved in the case (companies, consumers, government agencies, etc.), and (vi) potential impact of the good/service on priority sectors, among other aspects.

### 4.1. Quantitative evidence

19. The information gathered by economists in the investigation process involves both quantitative information from: i) open sources (information from public sources, social networks, open access news pages, public access databases), ii) "grey" sources (databases or information services where there are restrictions on access because they usually require a fee, such as EBSCO, Jstor, ComScore, Statista, etc.), and iii) closed sources (economic agents or authorities participating in the investigation who may be called to testify (individuals and public officials) or sent questionnaires in the form of requests for information.

20. Also, COFECE has tools that allow economists to access greater sources of quantitative information through third parties.

### 4.2. Strategies to obtain data from third parties

21. The LFCE allows the Commission to obtain the means of conviction it deems necessary to learn about the facts of the proceeding in question. The foregoing, as long as the means are immediately related to the facts that are the subject matter of the proceeding.

22. In this regard, the internal rules of COFECE's Investigating Authority allow the collection of economic information to substantiate the investigations through information from third parties, such as<sup>10</sup>:

- requesting the elaboration of sectorial studies by experts, consultancies and peer review meetings to either learn about particular facts of the market in which the Commission has faced information limitations, as well as to contrast and verify the analytical approach investigated and explore other lines of investigation and alternative sources of information. These actions are carried out by independent academics or industry specialists under contracts that avoid potential conflicts of interest.

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<sup>10</sup> Based on articles 28 and 73 of the LFCE, and article 61 of the Commission's Regulatory Provisions.

- elaboration of surveys, either "in-house" or conducted by independent third parties, as well as requesting economic agents to provide the Commission with any studies or surveys conducted by it or at the request of this agent.
- COFECE may resort to information from third parties (i.e., use grey sources), by accessing information from agreements with different authorities such as Profeco, Condusef, SAT, INEGI, the Ministry of Economy, CNBV, SAT, etc. In addition to the contracting of different database access services, previously mentioned, as a way of complementing the data provided by those directly involved and participants in the market under investigation.

### 4.3. Theoretical evidence

23. An important part of the collection of evidence carried out by economists is the compilation of conceptual and empirical elements that allow the proper analytical foundation of the research being carried out. These elements are usually the product of international academic efforts and are regularly documented in peer-reviewed journals and specialized texts on the subject. In this regard, COFECE has electronic access to various academic repositories and a specialized library. These sources allow the Commission's economists to consult and compile the concepts and methods necessary for the development of their research.

24. Another element in the collection of evidence by economists is to document and constantly update the state of the art of cases evaluated and resolved by other competition authorities in the world. This is particularly relevant when the markets and theories of harm that are analysed in other jurisdictions present elements related to the investigations carried out by COFECE.

## 5. Analytical techniques to evaluate the effects of conduct

25. The analytical techniques that have been used to analyse the effects of abuse of dominance have been of two types: quantitative (descriptive and inferential) and qualitative.

26. The application of certain quantitative techniques to assess the effects of market conduct is restricted to the availability of data available during the investigation.

27. Sometimes, when sufficient data is available, the Commission resorts to the comparison of some variables over time in the markets affected by the conduct (prices, market concentration, cost of entering the market), comparing them with those observed in other markets that have not been affected by the conduct (i.e., counterfactuals, including the market itself, in a periodicity different from when the conduct took place). For example, in case IO-008-2016, the fares of the taxi service departing from Cancun International Airport (AIC) were compared with the prices of the service provided, in the same location, by other auto-transport providers. In this same case, variables corresponding to the supply of cab service were compared over time, identifying a significant increase in the concentration of the number of passengers and revenues per cab service provider, while the behaviour was in force; with the consequent increase in the AIC operator's revenues during that period.

28. Likewise, other techniques used by the Commission and related to theories of harm linked to abuse of dominance, are based on identifying possible cost increases of a rival and whether these effects were caused by the implementation of the conduct. For example, when analysing a case of refusal to deal in case IO-001-2015, it was determined that the



conduct contributed to an increase in the operating costs of the only competitor of the dominant agent; which translated into an increase in the prices offered of the relevant product to its few customers, reducing its scale in the supply of products characterized by network economies, i.e., the implementation of the conduct was preventing the competitor from fully entering the market.

29. In other cases, when sufficient information is available, it is possible to make econometric estimates that describe the facts and, therefore, from the econometric estimates we can calculate the effects. In other cases, the analysis is prospective and econometric techniques help us to infer future effects. In view of the above, it is considered that when adequate data are available, it is preferable to perform a quantitative analysis that complements the legal and qualitative analysis that is carried out.

30. On the other hand, regardless of whether statistical techniques are used, a convincing and logically consistent qualitative analysis is performed on the facts found, determining compatibility and causality between the incentives of the agent with substantial power with the effects of his conduct. In case DE-015-2013, for example, the theory of harm was configured arguing that the access permits granted to offer taxi service from Mexico City Airport were offered by a single agent, the administrator of Mexico City Airport, which imposed differential treatment to new entrants in the supply of taxi service, to prevent them from competing adequately; in an effort to restore the advantages of the already established permit holders. In this context, the Commission observed that the absence of a clear methodology in the determination of discounts in favour of already established permit holders had the effect that the administrator of the Mexico City Airport re-established its reputation as an agent with substantial market power, and that the conduct guaranteed the permanence of the already established taxi service providers without them having to compete to remain in the market.

31. Furthermore, the evidentiary standard, and therefore its analysis and collection of economic data, of certain conducts is more intensive than others. An example of this is price predation, in which COFECE must use economic techniques to analyse the conduct and its possible unlawfulness. In this regard, the rules themselves require a comparison and analysis of the relationship between average cost and price, for which it could be used diverse information from financial statements and annual reports of the companies. Also, it is required that there are elements to presume that the Economic Agent will be able to recover, or has already recovered its losses, through future price increases. This raises the need to resort to detailed economic information to prove the conduct.

## 6. Role of economists in the imposition of fines and the establishment of commitments with parties

### 6.1. Imposition of fines

32. The economists from the Commission actively collaborate in the estimation of fines, either as an enforcement measure or as a sanction derived from a resolution for violations to the LFCE.<sup>11</sup> The above with the purpose of generating the adequate incentives to eliminate, reduce and prevent practices contrary to the Law.

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<sup>11</sup> The set of sanctions that the Commission may impose is listed in Article 127 of the LFCE, where it is included that the Commission may order the correction or suppression of the monopolistic practice in question (section 1); besides establishing that the fine could reach up to the equivalent of eight percent of the revenues of the Economic Agent, for having incurred in a relative monopolistic practice (conduct of abuse of dominion), regardless of the civil liability incurred;

33. Regarding the former, it is imperative to impose fines as a measure of compliance with administrative acts issued by the Commission, for example, to requests for information and documents, by an Economic Agent or any person obliged to provide everything in its possession and declare before COFECE. Likewise, actions that impede the due course of the proceedings must be inhibited, or discipline must be imposed in those cases in which they do not conduct themselves with respect towards the authority or distract the human and material resources entrusted to the Commission through frivolous or notoriously improper promotions. In these circumstances, economists contribute in the quantification of the fine imposed, based on the economic capacity of the Economic Agent (measured, for example, based on revenues or annual sales volume), whether there has been a repeat offense, the type of information not provided or omitted, and the relevance of the Economic Agent in the investigation.<sup>12</sup> The quantification uses a formula that considers both the aggravating factor and the economic capacity of the Economic Agent to determine the fine.<sup>13</sup>

34. Regarding the estimation of the sanctions imposed by COFECE's Board of Commissioners derived from a resolution for violations to the LFCE, article 127 of the LFCE provides a catalogue of sanctions that includes the correction or suppression of the prohibited conduct, total or partial divestiture (if certain assumptions are met), as well as the imposition of fines, without prejudice of the corresponding criminal sanctions and the subsequent procedures carried out by the affected economic agents to compensate the possible damages and prejudices.

35. Pursuant to the LFCE, there are elements of analysis for the imposition and quantification of fines, imposed as a sanction in case it is determined that an economic agent carried out a practice prohibited by such law. Among these elements, it is mentioned that in order to determine the seriousness of the infringement, the following must be taken into account: (i) the damage caused, (ii) the indications of intentionality, (iii) the participation of the infringer in the markets, (iv) the size of the affected market, and (v) the duration of the practice or concentration. Additionally, the economic capacity of the possible infringer must be analysed and, if applicable, the impact on the exercise of the Commission's powers.<sup>14</sup>

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As well as to order measures to regulate the access to the Essential Inputs under control of one or several Economic Agents, for having incurred in the relative monopolistic practice foreseen in article 56, section XII of this Law.

<sup>12</sup> In this regard, it is worth mentioning that the proposed formula for the calculation of the fine is based on the maximum amount that the Commission may impose as a measure of constraint, so that the Economic Agents that generate a greater aggravating factor for the development of the investigation and, according to their economic capacity, will be imposed an amount close to the maximum.

<sup>13</sup> Regarding the aggravating factor, it will depend on the amount of information provided, the type of Economic Agent that provides it, its persistence, or the fault or conduct committed against the LFCE that is intended to be corrected. In this sense, the aggravating factor is determined by the affectation, the relevance and, if it exists, the recidivism. The aggravating circumstance of not providing a response, or providing a partial response, to a request for information will be a weighted average of these elements. Taking into consideration that the LFCE does not indicate that there are degrees of importance among the criteria to be considered for the determination of the amount of a fine, it can be interpreted that they are equally important for its calculation. The economic capacity will be taken into consideration to see the financial possibilities that the economic agent has to face the fine. In this sense, the size of the company will be considered as an indicator to determine if the Economic Agent can be imposed the maximum fine, in order to avoid confiscatory fines and, at the same time, to eliminate incentives to not comply with the Commission's order. In order to determine the size of the company, the revenues obtained during the last year will be taken as an indicator, thus, it will be assumed that companies that qualify as large companies can face the maximum amount of the fine, while those that qualify as micro companies can only face a percentage of the maximum.

<sup>14</sup> Article 130 of the LFCE.

36. In this regard, the economists of the Technical Secretariat of the Commission and the Board of Commissioners contribute to the imposition and quantification of fines in determining the seriousness of the infringement, specifically, in determining the damage caused, the participation of the offender in the markets, the market size and in the analysis of the economic capacity of the potential offender.

37. In the case file DE-008-2016<sup>15</sup>, the Commission established a sanction for \$72,540,000.00 (seventy-two million five hundred forty thousand pesos 00/100 M.N.). For the calculation of the established fine, the Commission considered the elements (i) to (v) described, as well as the economic capacity of the AIC operator and the affectation to the exercise of the Commission's attributions. In this regard, it was observed that the accredited practice started at least since February 2010 and until April 2018 (date of conclusion of the investigation). Damages were identified in two markets, in the relevant market (access to the airport) with affectations also in the related market (cab service); on the other hand, being AIC the only participant in the market it was determined that its market share amounted to 100% (one hundred percent) and it was considered that the credited practice affected between 2010 and 2017 to, on average, seventeen million users, annually, who had to pay a surcharge derived from the practice committed by AIC. The commission estimated, through a *la Cournot* competition model, that the overpricing amounted to 8.73% (eight point seventy-three percent) and in sum to \$98,082,780.43 (ninety-eight million eighty-two thousand seven hundred and eighty pesos 43/100 M.N.).<sup>16</sup> Regarding the intentionality on the part of the AIC, the Commission considered that the AIC "*intentionally denied the provision of the ACCESS SERVICE in the AIC*"<sup>17</sup>, also considered that there was no damage or affectation to the exercise of the Commission's powers. Regarding the economic capacity of the AIC, it considered the accruable income of the fiscal year two thousand seventeen and that the AIC had sufficient economic capacity so that in conclusion, the Commission considered that "*the conducts that are sanctioned are of high gravity*"<sup>18</sup>

## 6.2. Establishment of commitments

38. With respect to the analysis of the commitments, understood as the procedure by which Economic Agents request the benefit of dispensation or reduction of fines<sup>19</sup>, understood as the procedure by which Economic Agents request the benefit of dispensation or reduction of fines, the economists of the Commission (from the Investigating Authority as well as from the Technical Secretariat and the Board of Commissioners) are actively involved. In this regard, the Economic Agent is the one who initially proposes the measures that could eventually restore the possible competition problem, for which the Investigating Authority analyses and issues an opinion on the suitability and feasibility of the proposed commitments so that, subsequently, the Board of Commissioners may decide whether to accept the proposal of the Economic Agent or, if applicable, propose certain adjustments to the proposed measures.

<sup>15</sup> Resolution available at <https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V314/1/4904737.pdf>.

<sup>16</sup> The effect of the conduct committed by the AIC operator on the supply of taxis was determined based on the differential between the price charged by the incumbent or incumbent permit holders and the price that would prevail in the market in the absence of the conduct (called surplus). In particular, the price that would have been observed in the supply of the taxi service in the absence of the conduct considered the effect that the entry of the participants to which access was denied would have.

<sup>17</sup> Page 513 of resolution DE-008-2016 and accumulated.

<sup>18</sup> Page 514 of resolution DE-008-2016 and accumulated.

<sup>19</sup> Available at: [https://www.cofece.mx/wp-content/uploads/2017/12/gua-0052015\\_disp\\_y\\_redmult.pdf](https://www.cofece.mx/wp-content/uploads/2017/12/gua-0052015_disp_y_redmult.pdf)

39. As such, the Commission's economists contribute mainly in the analysis of the following elements: a) the commitment to suspend, suppress or correct the corresponding practice of abuse of dominance or monopolization, in order to restore the process of free concurrence and economic competition, b) that the proposed means are economically viable and suitable to avoid carrying out or, if applicable, to leave without effects, the practice object of the investigation, indicating the terms and terms for its verification and, if applicable, c) propose adjustments to the proposed commitments.

40. In the case file IO-005-2015,<sup>20</sup> the Commission assessed the commitments proposed by the companies established in the market in order to determine whether these commitments suspended, eliminated or corrected the exclusivities identified pursuant to section IV of article 56 of the LFCE. In this regard, it was analysed whether these commitments were legally and economically feasible and suitable. The Commission considered that the commitment offered by the petitioners consisting of the "... *Development and Implementation of a Code of Conduct*", does not have a restorative effect by itself, so it considered that this commitment would not be part of the commitments of the final resolution.<sup>21</sup>

## 7. *Ex-ante* evaluation of abuse of dominance cases

41. COFECE regularly performs *ex-ante* analyses to determine the possible impact of the resolutions issued by the Board of Commissioners.<sup>22</sup> Specifically, some *ex-ante* analyses of abuse of dominance have been prepared. However, an *ex-post* analysis of a case of abuse of dominance or monopolization has not been carried out so far.<sup>23</sup>

42. The following table briefly describes two cases of abuse in which an *ex-ante* analysis was performed.<sup>24</sup>

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<sup>20</sup> Resolution available at <https://www.cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V2633/8/4511785.pdf>

<sup>21</sup> Pages 19 and 20 of resolution IO-005-2015.

<sup>22</sup> For more detailed information on how the Commission conducts *ex post* evaluations of COFECE's interventions: [https://www.cofece.mx/cofece/images/informes/metodologia\\_ev\\_expost\\_cofece.pdf](https://www.cofece.mx/cofece/images/informes/metodologia_ev_expost_cofece.pdf)

<sup>23</sup> Other *ex post* analyses carried out can be consulted at the following link: <https://www.cofece.mx/planeacion-y-evaluacion/>.

<sup>24</sup> In this regard, it can be mentioned that the Commission has conducted *ex ante* analyses for cases of abuse of dominance or monopolization in the following cases: **DE-006-2014** (Industrial Gases); **IO-005-2015** (Live Events); **DE-015-2013** (Access Service for the provision of Taxi service at the Mexico City International Airport); **IO-001-2015** (Credit Information Companies); **DE-008-2016** (Access Service for the provision of Taxi service at the Cancun International Airport) and **DE-018-2018** (Affiliation service to public brokers' colleges).

Table 1.

Case file	Sanction	Estimated benefits
DE-015-2013	The Board of Commissioners sanctioned the administrator of the Mexico City International Airport for discrimination of price and treatment in the taxi market within the airport premises. In this sense, the Commission ordered the suppression and correction of the sanctioned practice, eliminating the anti-competitive clauses of the contracts or agreements; establishing bids or tenders for the assignment of new contracts for access to the federal zone, as well as for the increase of vehicle units.	The welfare impact resulting from the Commission's intervention is the sum of the consumer benefit and the irrecoverable efficiency loss avoided. The total figure amounts to 621 million 909 thousand 708 pesos at 2016 prices. <sup>25</sup>
DE-008-2016	The Board of Commissioners sanctioned the AIC operator for refusal of deal in the taxi market within the airport premises.	The welfare impact as a result of the Commission's intervention was between 121 million 322 thousand 937 pesos and 623 million 154 thousand 762 pesos at July 2019 prices. <sup>26</sup>

<sup>25</sup> [https://www.cofece.mx/cofece/phocadownload/PlaneacionE/de-015-2013\\_boe\\_taxi\\_aicm.pdf](https://www.cofece.mx/cofece/phocadownload/PlaneacionE/de-015-2013_boe_taxi_aicm.pdf)

<sup>26</sup> <https://www.cofece.mx/wp-content/uploads/2020/07/Beneficio-económico-de-las-Intervenciones-de-la-COFECE-2019.pdf>

## Mexico - Federal Telecommunications Institute (IFT)

### 1. Introduction

43. The Mexican legal framework acknowledges on one hand, the existence of absolute monopolistic practices, also known as *cartels*, and on the other hand the existence of relative monopolistic practices, known as *abuse of dominance*. In this sense, the purpose of this contribution is to describe some of the tools, technics and methods carried out by the Investigative Authority (AI, by its acronym in Spanish) of the Federal Telecommunications Institute (IFT, by its acronym in Spanish) regarding abuse of dominance investigations.

44. In accordance with the Federal Economic Competition Law (LFCE, by its acronym in Spanish), a relative monopolistic practice, or abuse of dominance conduct consists in any act, contract, agreement, procedure or combination carried out by one or more economic agents<sup>27</sup> that individually or jointly have substantial power in the same relevant market in which the practice is carried out.

45. Furthermore, it is necessary that such conduct has or may have as purpose or effect in the relevant market or in any related market to unduly displace other economic agents, prevent substantial access or establish exclusive advantage in favor of one or a number of economic agents and may consist, among others, in exclusivities; margin squeeze; boycott; cross-subsidy. It is important to mention that the use of techniques and tools to measure the effect of an anticompetitive practice depends on the case and the best available information.

### 2. Considerations to determine the probable existence of abuse of dominance conducts

46. To initiate an investigation on relative monopolistic practices, an objective cause is required. Any indicia on the existence of an abuse of dominance conduct is an objective cause. The investigation period shall begin from the issuance of the corresponding initiation decision and may not be shorter than thirty days nor longer than one hundred twenty days, although, this period may be extended.

47. During the stage of investigation, the AI must determine the relevant market by considering, among others, the possibilities of substituting the good or service in question by others, both of domestic or foreign origin, considering technological possibilities, the extent to which consumers have substitutes and the time required for such substitution. Other elements that the AI takes into account are the distribution costs of the good itself; relevant inputs; complementary goods and substitutes from other regions and abroad, considering freight, insurance, tariffs and nontariff restrictions, restrictions imposed by economic agents or associations thereof, and the time required to supply market from such regions. In addition, when determining a relevant market, the costs and possibilities for users or consumers to access other markets are also considered.

48. Additionally, it is essential that the AI determines whether the probable responsible economic agent(s) has substantial power in said market. The determination of market power, in the relevant market where the conduct is carried out, is established by law, as follows: (i) the participation in the relevant market and whether the agents can set prices or

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<sup>27</sup> Economic Agent: Any for profit or nonprofit individual or legal person, agencies and entities of the federal, local or municipal public administration, associations, business chambers, professional groups, trusts or any other form of participation in the economic activity. (Art. 3, I, LFCE)

restrict supply in the relevant market by themselves, without the competing agents being able, currently or potentially, to counteract such power; (ii) the existence of entry barriers and the elements that could foreseeably alter both barriers stated and the supply of other competitors; (iii) the existence and power of competitors; (iv) the possibilities of access of other company or companies and their competitors to sources of inputs; and (v) the recent behavior of the company or companies participating in said market.

49. Economic tools have been implemented for the analysis of substantial market power. For example, for the market share in cases of exclusivities and service packaging, the proportions of income and subscribers are taken into account. An analysis of the existence of barriers to entry is carried out using information on investment and the possibility of financing. Competitors' participations, utilities, investment indicators, among others, are used to determine their ability to respond in the market. An analysis of the availability and access to resources to provide services, the behavior of the agents that participate in the market, among others, is also conducted.

50. Likewise, market power assessment includes three factors. First, an assessment of changes in market shares over time; for example, stable or growing shares could be consistent with the presence of market power. Second, an assessment of profit margins, where persistently high margins tend to be consistent with market power. Finally, an assessment of the records of entry and exit in the market, since if there are considerably more firms exiting the market than those entering, it may suggest the presence of market power.

### 3. Theory of harm in abuse of dominance conduct investigations

51. The AI considers theories of harm that articulate the way in which competition or consumers may result affected. The theory of harm to be employed depends on the type of conduct under investigation and on the available findings related to that conduct. Accordingly, this IA has analyzed cases regarding margin squeeze, predatory pricing, cross subsidy, price discrimination, rising rivals' costs, tying and exclusive dealing.

52. One example is a case regarding exclusivities in which the dominant agent offered an exclusivity contract to an electronic platform that sells electronic air-time recharges for the mobile telecommunications service. The electronic platform was controlled by the main distribution and marketing company of bakery products in the country, which has links with small businesses, to which it delivered a device to recharge mobile telecommunications services. The exclusivity agreement left competitors out and they had no option for a real alternative in various localities of the country. In this case, the potential damage it could cause to the market was evaluated, by identifying areas in which there was a single store and at least two competitors, including the dominant company. This scenario became a key element to assess the potential damage to the market.

53. Another example is a case regarding service packaging in which the existence of cross subsidy was proven. The dominant agent included in its telephone service and fixed internet service (*Doble Play*) an audiovisual service (OTT) without additional charge, in order to setup a package that its competitors could not replicate. The dominant firm used internal contracts with the OTT provider company that belongs to the same economic group; these contracts contained economic conditions that were not commercially replicable by the dominant agent's competitors. The intention of the dominant agent was to consolidate its market power in the mobile telecommunications services by adding the audiovisual OTT service to its *Double Play* packages, and to subsidize the company of the same group.

54. As mentioned before, while developing the theory of harm for the case under analysis, the AI pretends that the referred theory explains the way in which the conduct reduces, damages, prevents or conditions in any way free competition or economic competition, in relation to a counterfactual scenario. Therefore, defining the nature of the competition process, as well as the mechanism by which the conduct negatively affects said process in the case. It should be noted that the theory of harm can evolve over time due to advances in the theoretical understanding of the investigated behaviors.

55. Since the evaluation of abuse of dominance cases is realized in retrospective, one way in which the counterfactual scenario can be constructed in each case is by considering the implications that the conducts would have on free competition and market access if the anticompetitive practice would have taken place. In this way, the economic theory and the industry knowledge are used, together with the specific theory of harm that is being used during the investigation to determine empirical market results that could serve as evidence of the anticompetitive conduct. Therefore, the theory of harm does not dictate the analytical result, it only provides an analytical framework, but the result depends largely on the circumstances surrounding the case.

#### 4. Collecting evidence for abuse of dominance investigations

56. The IFT is both a regulatory and a competition agency. In its role as a regulator, the IFT has information provided by the companies in compliance with their obligations and with the normativity/regulation. The data is very extensive, but it highlights the telecommunications market conditions and the technical aspects of services. In its role as a competition authority, the IFT may require this information, but in addition, it has the power to request information directly or indirectly from companies involved in the investigation of a case of possible anticompetitive practices.

57. In the case of exclusivities referred above, the AI collected information of the location of stores where air-time recharges for mobile telecommunications service were sold. This allowed the authority to identify the points of sale of the businesses committed to the exclusivity, where there is no other alternative point of sale within 2.5 kilometers around by using georeferencing tools (Google Maps). Furthermore, coverage maps of the mobile telecommunications service were used to identify the existence of at least two competitors, one of them the complainant. Through this exercise it was possible to establish the localities impacted by the behavior.

58. In the case of service packaging referred above, the AI collected information of the income and the costs per service to estimate profits. This allowed the authority to found profits and losses from the services. In addition, the authority collected information from transfers and payments between the companies involved to determine the existence of cross-subsidies.

59. As mentioned, the IFT has its own databases that are built upon the information provided by the companies based on their regulatory obligations as concessionaires. Some of these databases are the Public Registry of Rates, where companies register the information of their offers, and the Telecommunications Information Bank (BIT), where the main indicators of the telecommunications and broadcasting sectors are recorded. In addition, the IFT has its own surveys, such as the users survey on the consumption of telecommunication services, and users reports.



60. Indirect analysis techniques can also be used in the absence of information to carry out a test. For example, in the predation test, if detailed information on prices and costs for services is not available, total revenues and costs are used instead. In many cases, it is not necessary to carry out a quantitative test, because an analysis of the conditions that would be expected in a scenario of anticompetitive practice would suffice. Following the example of predatory pricing, it would be expected that the economic agent involved in the practice register losses in the short term, the existence of barriers to entry to ensure the recovery of losses when prices rise, among other conditions. If this does not occur, it is not credible that we are in a predation scenario and, therefore, it is unnecessary to have the information to perform the test.

61. Finally, competition law allows the competition authority to issue its opinions with the best information available, in situations when it does not obtain it.<sup>28</sup>

## 5. Final remarks

62. In conclusion, as a convergent authority, inside the AI, cases of anticompetitive practices are assigned to multidisciplinary teams composed of lawyers and economists within the entrusted unit. This work team carries out a legal and economic analysis based on the available information. Additionally, another team from the AI, comprised by economist, statisticians, and mathematicians provide support on data issues, data treatment, and the theory of harm linked to the case; the amount of support is dependent on the nature or complexity of the case.

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<sup>28</sup> Regulatory Provisions of the Federal Economic Competition Law, Article 62.