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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Mexico

- Session IV -

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This contribution is submitted by Mexico (COFECE) under Session IV of the Global Forum on Competition to be held on 1-2 December 2022.

More documentation related to this discussion can be found at: oe.cd/sctr.

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Remedies and Commitments in Abuse Cases

- Contribution from Mexico (COFECE) -

1. Introduction

1. In accordance with Articles 53, 54 and 62 of the Federal Economic Competition Law (LFCE), relative monopolistic practices (or abuse of dominance) and unlawful concentrations are illegal. The Investigative Authority of the Mexican Federal Economic Competition Commission (COFECE or Commission) is responsible to investigate these conducts and issue an investigation that may result in: (i) a Statement of Probable Responsibility (DPR), (ii) a closure due to lack of evidence, or (iii) a benefit for early termination of a procedure when the *Exemption and Reduction of the Amount of Fines* is granted in favor of an economic agent.^{1,2,3}

2. Any economic agent subject to an investigation for abuse of dominance or an unlawful concentration, before a statement of probable responsibility is issued, may benefit with an *Exemption and Reduction of the Amount of Fines* (hereinafter benefit). To do so, according to article 100 of the LFCE, the economic agent must prove to COFECE (i) its commitment to suspend, suppress or correct the corresponding practice or concentration in order to restore the process of competition and free market access and (ii) that the proposed means are legally and economically viable and suitable to terminate the practice or concentration, indicating deadlines and terms for its verification.

3. That is, to receive the benefit, the investigated economic agent must present a set of proposals and commitments to COFECE's Board of Commissioners, which may approve it only if the commitments actually suspend, suppress or correct the abuse of dominance conduct or unlawful concentration. If the proposed commitments are not enough to achieve this objective, the Board may deny the benefits or request modifications. The proposed commitments must be legally, economically viable and adequate to address the competition concerns so that the economic agent receives the benefit of elimination of the fine that would apply in accordance with the provisions of the Law or a fine (depending on the commitments agreed and approved by COFECE's Board).

2. Procedures for Exemption and Reduction of the Amount of Fines

- In order to follow international best practices and provide clarity and certainty on how the Investigative Authority and COFECE's Board apply this benefit, in 2020, the *Guide to the Procedures for Exemption and Reduction of the Amount of Fines*

¹ Relative monopolistic practices are best known as abuse of dominance and unilateral conduct; the LFCE establishes 13 conducts in Article 56, which may be punishable in the event that harm to competition in the relevant market identified during the investigation is proven.

² According to article 62 of the Law, concentrations whose purpose or effect is to hinder, diminish, damage or impede free market access or economic competition

³ Article 26 of the Federal Economic Competition Law.

was issued.⁴ This document provides the steps to be followed by the Commission and the economic agents investigated.

4. For an early termination of cases, the LFCE offers a mechanism through which the investigated economic agent offers commitments before the investigation procedure is concluded. The following is the process applicable to this procedure.

2.1. Request to the Investigative Authority

5. Any economic agent may apply for or request the benefit once every five years, provided that there is an open investigation for abuse of dominance, or an unlawful concentration and no Statement of Probable Responsibility has been issued. Investigations can last between 30 and 600 working days,⁵ so the economic agent under investigation is recommended to submit commitments as soon as it identifies that it may implement actions to address the competition concerns identified by COFECE's Investigative Authority. This, considering that the investigation could conclude at any time within this period and once a Statement of Probable Responsibility has been issued, the benefits established in article 100 of the LFCE cannot longer be requested.

6. Taking into account that the request for the benefit may be done on a single occasion, the economic agent has the possibility to meet or interview with the Investigative Authority⁶ to informally explain its intentions to present commitments, without this implying any responsibility. The Investigative Authority may advise the economic agent, but may not provide information contained in the file, as it is confidential information and considering that the investigation could continue if the request is not submitted, or if COFECE's Board orders the reactivation of the investigation procedure. This discussion can be held in different sessions before the economic agent submits its formal request.

7. There are key elements that should be included in such request:

- the data of the economic agent, in addition to the elements with which it plans to resolve or leave without effect the abuse of dominance conduct or the illegal concentration, also known as the commitments (these must be suitable, as well as legally and economically viable,⁷ and must be duly justified and supported by the economic agent in the request); and
- a compliance plan establishing deadlines and terms through which the proposed commitments will be implemented.

8. COFECE's Investigative Authority is in charge of the investigation procedures of abuse of dominance and unlawful concentrations, will receive the request for commitments and will have 5 days to request clarifications and additional information from the investigated economic agent. The applicant will have 5 days to respond to the request of

⁴ [The Guide to the Procedures for Exemption and Reduction of the Amount of Fines is available in Spanish 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)

⁵ Article 71 of the LFCE establishes that the investigation period will begin when the initiation decision is issued and may not be less than 30 nor exceed 120 days. This may be extended for an equal term up to 4 times.

⁶ The meeting or interview will be held in terms of the provisions of article 56 of the Organic Statute of the Federal Economic Competition Commission, for which economic agents must send the request to the following email: dgim_punto_de_contacto@cofece.mx (Point of contact).

⁷ Article 100, sections I and II of the LFCE.

the Investigative Authority and once all the necessary elements have been clarified, an agreement to suspend the investigation will be issued. If it is not necessary to request additional information from the applicant, once the request has been received, the agreement for the suspension of the investigation will be issued.⁸

9. After the issuance of the aforementioned agreement, Investigative Authority will have 10 working days to issue a statement to COFECE's Board, through the Technical Secretariat, with its opinion regarding the commitments presented by the applicant. In this, the Investigative Authority must include the key elements of the investigation procedure, without revealing sensitive information such as the investigation strategy, so that the Board has sufficient information to determine if the proposed commitments are suitable, as well as economically and legally viable.⁹

2.2. Reception by COFECE's Board

10. COFECE's Board will have 20 days to analyze the statement and the measures proposed by the applicant. To carry out the assessment of suitability and economic and legal viability of the commitments, the Board may consider the following elements and any other that it deems necessary for the issuance of a resolution:

- proposed commitments are effective to restore the competitive process and free market access;
- proposed commitments are proportional to the harm that could have been generated by the economic agent's conduct;
- proposed commitments do not generate negative externalities that harm the competitive process; and
- proposed commitments provide the necessary means to enable the Commission to monitor that the conducts that could harm the process of competition have ceased.¹⁰

11. Once its analysis has been concluded, the Commission's Board may issue four different types of decisions:

1. **Inadmissibility of the request:** when the benefits requested by the economic agent will not be granted since: (i) the benefit had already been requested by the economic agent within the framework of the current file; or (ii) said economic agent had already received the benefit in a period of less than five years.
2. **Refusal of the request:** decision not to grant the benefit because the proposed commitments do not suppress or correct the conduct and / or are not legally and economically viable and suitable to avoid carrying out or leaving without effect the

⁸ For cases initiated by complaint, the Investigative Authority will give the complainant a hearing of the reserved version of the request of the Exemption and Reduction of the Amount of Fines, which within a period of 5 business days must make the statements it deems relevant.

⁹ Article 101 of the LFCE

¹⁰ Section B of page 15 of the Guide to the Procedures for Exemption and Reduction of the Amount of Fines

abuse of dominance or unlawful concentration object of the investigation, or that no deadlines and terms are established for compliance.¹¹

3. **Exemption:** when the commitments presented are legally and economically suitable to avoid carrying out the abuse of dominance or the unlawful concentration. In these cases, no fine will be imposed, nor will explicit reference be made to the existence and degree of participation in the investigated conduct of the economic agent in the resolution issued.
 4. **Reduction of the fine's amount:** the commitments proposed by the applicant are legally and economically suitable to suspend, suppress or correct the practice or unlawful concentration, in order to restore the competitive process, for which a smaller fine than that which would correspond to it originally is imposed. In this case, the existence of the conduct and degree of participation in it are established.
12. In resolutions referred to in points 3 and 4,¹² the Board may include complementary measures to those proposed by the applicant to restore the process of competition.¹³
13. The economic agent must expressly accept in writing the final decision of the Board.¹⁴ In case of not submitting the letter of acceptance,¹⁵ it will be considered that the commitments are not assumed, and the investigation will be resumed, without the applicant being able to resubmit a second request to obtain the benefit. The investigation will also be resumed in cases where the Board's decision determines the request as inadmissible, or the commitments proposed by the economic agent have been refused.¹⁶
14. In cases where one of the economic agents involved in the investigation presents commitments, the procedure will be suspended for the rest of the economic agents involved, until these commitments have been accepted by the Board. For the rest of the economic agents that have not proposed commitments or in the event that those submitted are not accepted by the Board, the investigation will be resumed.
15. The resolution will include the mechanisms and deadlines for compliance with the commitments to which the economic agent must adhere. These will be monitored by the Technical Secretariat of the Commission and in case of detecting any type of non-compliance, economic agents may receive sanctions up to the equivalent of 8% of their

¹¹ In the event that the resolution is resolved in accordance with the provisions of numeral 1 and 2 explained in this section, the investigation will be resumed, stating in the file the decision issued by the Board.

¹² Once the resolution has been issued by the Board, the Technical Secretariat will have a period of 5 working days to notify the Applicant about the decision of the Board.

¹³ Article 12, sections II and XXX of the Law and 5, fractions II and XXXIX of the Statute, referring to the attributions of the Board.

¹⁴ Within 15 working days of notification

¹⁵ The acceptance of the resolution must include at least the following elements: Name, denomination or company name; Name of the legal representative if applicable, and suitable document with which to prove his personality; as well as telephones, email or other data that allow his location; the statement under oath to tell the truth that knows and accepts each of the commitments established in the resolution issued by the Board; as well as its legal and economic scope; present or accept the terms of the information determined by the Board in its resolution; and Signature or fingerprint.

¹⁶ The resolution of the Board must be included in the investigation file, as proof of constancy and legality of the procedure.

income. This maximum fine is the same as the one provided for in case of prove of abuse of dominance and unlawful concentrations, which means that the LFCE gives the same weight to the breach of commitments as to the realization of the illegal conduct. The logic that underpins this rationale is the commitments seek to suppress or avoid such conduct.

3. Compliance mechanisms and monitoring of commitments

16. The Commission carries out assessments of the adequacy of the commitments through evaluations focused on each case. An example of this is described in the next paragraphs.

3.1. Abuse of dominance in the market for the production and promotion of live events, the operation of live entertainment centers and automated ticket sales¹⁷

17. In 2015, the Investigative Authority initiated a probe based on evidence suggesting that one or several members of Grupo CIE, company that distributes tickets for events and entertainment centers in the Mexican market through the operation of the Ticketmaster system, possibly unduly displaced, impeded market access, or established exclusive advantages in favor of the Group's firms, constituting an abuse of dominance.

18. During the investigation, it was identified that contracts of the Group for ticketing services with event promoters and venue operators, established that the Group's subsidiaries would exclusively provide the ticketing service. In August 2018, Grupo CIE presented a series of corrective measures to restore competition. The Board modified the proposal, and the Group accepted the conditions issued, so that the file would have an early closure. The terms of the commitments included: (i) removing exclusivity clauses from its contracts with third-party promoters and venue operators; (ii) refraining from including, for the next 10 years, similar clauses in future contracts; and (iii) waiving the accumulation of rights over third-party properties with a capacity of more than 15,000 spectators in Mexico City over the next 5 years.¹⁸

19. However, Grupo CIE's subsidiaries failed to include in 25 ticketing service contracts the non-exclusivity statement provided in the Board's decision. This omission prevented operators and promoters from being certain that they could freely choose with whom to contract this service; action that they complied with extemporaneously. Therefore, COFECE fined the companies within the Group with 1 million 30 thousand Mexican pesos for non-compliance.^{19, 20}

¹⁷ File IO-005-2015. Resolution available at: <https://www.cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V2633/8/4511785.pdf>

¹⁸ In addition, a number of measures were put in place to verify compliance with the Commitments: (i) the publication of a notice on the ticketing company's websites of the irrevocable and unconditional waiver of exclusivities in its existing contracts; ii) the presentation to COFECE of a letter expressing the Commitment of "non-concentration of real estate"; publication of Commitments in a newspaper with national circulation; and the issuance of an annual report to verify compliance with the Commitments assumed. See press release in English at: <https://www.cofece.mx/wp-content/uploads/2018/10/COFECE-046-2018-English.pdf>

¹⁹ More information available in Spanish at: [https://www.cofece.mx/reporte-mensual-agosto-2021/#nota2%20\(in%20Spanish\)](https://www.cofece.mx/reporte-mensual-agosto-2021/#nota2%20(in%20Spanish))

²⁰ As of the date of this contribution, this fine is under judicial review.

4. Challenges in the implementation of early terminations

20. The following are some of the challenges currently faced by COFECE in the implementation of the *Procedures for Exemption and Reduction of the Amount of Fines*:

- Time established in the LFCE, for the analysis and issuance of a decision regarding the suitability and viability of the commitments, is short. The Investigative Authority has 5 days to review the information, and if necessary, request additional information, after which it will have another 5 days to determine the viability and suitability of the proposed commitments and in 10 days issue its statement to the Board. The Board has 20 days to issue a decision. In case the benefit is granted; the investigation procedure is concluded, and no imputation of any conduct is issued. In case the Board decides not to grant the benefit the investigation is reactivated.
- Limited information to present and decide on the benefit request. Without revealing the lines of investigation, strategic or confidential information, the Investigative Authority must guide the applicant to present suitable, economically and legally viable commitments. The applicant must submit a proposal for commitments guided only by the information contained in the public notice that initiated the investigation or by the information requests that have been notified to it. The public notice only contains the investigated market and, sometimes, the conduct for which the investigation was initiated. The Board faces the same difficulty, since, without being able to access the case file and only with the information contained in the statement issued by the Investigative Authority, it must resolve in favor or against the benefit request.