

Unclassified

DAF/COMP/GF/WD(2016)30

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

28-Oct-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

## **Global Forum on Competition**

### **SANCTIONS IN ANTITRUST CASES**

#### **Contribution by Mexico**

-- Session IV --

**1-2 December 2016**

*This contribution is submitted by Mexico under Session IV of the Global Forum on Competition to be held on 1-2 December 2016.*

Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,  
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecd.org.

**JT03404054**

Complete document available on OLIS in its original format

*This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.*

DAF/COMP/GF/WD(2016)30  
Unclassified

English - Or. English

## SANCTIONS IN ANTITRUST CASES

-- Mexico --

### 1. Introduction

1. On July 7, 2014, a new Federal Economic Competition Law<sup>1</sup> (hereinafter FECL or competition law) came into force. Derived from the constitutional amendments to article 28, major changes were introduced into the Mexican competition law system. The Law needed to be strengthened and improved to be compatible with the new institutional arrangement and for laying down the procedures for COFECE's new powers.

2. As regards to the sanctioning scheme, to a large extent, the new legal framework preserved the "heart" of the previous competition law. However, some new additions were made to raise the expected costs of breaching the Competition Law and effectively deter anticompetitive conducts, including amendments to the Mexican Federal Criminal Code.

### 2. Type and nature of sanctions

3. Article 12 of the FECL establishes that the Mexican Federal Economic Competition Commission (hereinafter COFECE or Commission) has the power and duty to guarantee free market access and competition in all markets of the economy;<sup>2</sup> prevent, investigate and fight monopolies, monopolistic practices, concentrations and other restrictions to the efficient functioning of the markets, and to impose the sanctions related to such conducts.

4. In keeping with the powers conferred by the FECL, COFECE imposes sanctions in the following cases:

- To economic agents<sup>3</sup> who have engaged or are engaging in anticompetitive conducts;<sup>4</sup> to those who have participated directly, on behalf or by account and order of undertakings in these conducts, and to economic agents that have contributed, fostered, induced or participated in the execution of an anticompetitive conduct;

---

<sup>1</sup> Available at COFECE's website: <https://www.cofece.mx/cofece/index.php/normateca>

<sup>2</sup> Except telecommunications and broadcasting.

<sup>3</sup> Economic agents are defined by the Competition Law as any natural or legal person, either for profit or non-profit, including Federal, State or Municipal public administration agencies and entities, associations, business chambers and professional associations, trusts, or any other form of participation in economic activity. All economic agents are subject to this Law.

<sup>4</sup> Article 52 of the FECL prohibits anticompetitive conducts such as monopolies, monopolistic practices, unlawful concentrations, and the barriers that hinder, harm, impede or condition free market access or competition in production, processing, distribution and marketing of goods or services.

- To economic agents breaching or non-complying with conditions of COFECE's resolutions or any other order;
- To economic agents rendering false statements or submitting false information before COFECE.
- To economic agents who fail to comply with regulations for essential facilities.

5. Accordingly, COFECE may enforce administrative sanctions and fines (Article 127 of the FECL) and criminal sanctions (Article 254 bis and 254 bis 1 of the Mexican Federal Criminal Code) for infringements to the Competition Law. Administrative sanctions apply to both companies and individuals, while criminal sanctions only apply to individuals.

6. As mentioned before, new sanctions were added into the legal framework to raise the expected costs of breaching the Competition Law and effectively deter anticompetitive conducts. These new sanctions, described further below, include disqualification of directors and executives that participate in absolute monopolistic practices (Section X, Article 127 of the FECL), divestiture of assets in case of recidivism (Article 130 of the FECL), measures to regulate access to essential facilities (Section VI, Article 127 of the FECL), more severe criminal sanctions for absolute monopolistic practices (Article 254 bis of the Federal Criminal Code) and criminalization for the destruction or alteration of documents during on-site inspections (Article 254 bis 1 of the same Code).

7. Article 127 of the FECL provides the administrative sanctions to be imposed according to the types of violations to the Competition Law:<sup>5</sup>

- Order to suspend or eliminate the monopolistic practice or unlawful concentration.
- Order of partial or total divestiture of an unlawful concentration.
- Up to approximately USD 680,000<sup>6,7</sup> fine for submitting false information.
- Up to 10% of the economic agent's annual turnover for committing an absolute monopolistic practice.<sup>8</sup>

---

<sup>5</sup> Regardless of the corresponding civil or criminal liability.

<sup>6</sup> 175 thousand times the current daily general minimum wage in the Federal District. The FECL states that the general current minimum wage for the Federal District should be considered as a basis for calculating monetary sanctions. However, in accordance with Transitory Article 3 of the "*Decree that reforms and adds several provisions to the Constitution*" published in January 2016 in the Mexican Federal Official Journal, all references to the minimum wage as a unit of account, index, basis, or as a reference to determine the amount of obligations and liabilities under federal laws must be understood as referring to the "*Unit of Measure and Update*" (UMA for its acronym in Spanish). In 2016, the value of the UMA is MXN 73.04 or USD 3.8, as published in the website of the National Institute of Statistics and Geography (INEGI for its acronym in Spanish), [www.inegi.org.mx](http://www.inegi.org.mx)

<sup>7</sup> The exchange rate used is MXN 18.7953 = USD 1, as published in the Mexican Federal Official Journal.

<sup>8</sup> Absolute monopolistic practices are defined in Article 53 of the FECL as contracts, agreements, arrangements or combinations among competitors with the purpose or effect to fix or raise the prices of goods and services, limiting or restriction the available market supply, dividing markets, bid-rigging in public procurement, and exchange of information with any of the purposes of effects of the aforementioned practices.

- Up to 8% of the economic agent's annual turnover for committing a relative monopolistic practice.<sup>9</sup>
- Order measures to regulate access to essential facilities, for having incurred in a relative monopolistic practice established under Section XII of Article 56.
- Up to 8% of the economic agent's annual turnover for conducting an unlawful concentration.
- Up to approximately USD 19,430<sup>10</sup> fine or up to 5% of the economic agent's annual income, when failing to notify a concentration.
- Up to 10% of the economic agent's income when failing to comply with the conditions imposed in a concentration resolution.
- Disqualification of directors and executives of a company for up to 5 years and up to approximately USD 777,215<sup>11</sup> fine for anyone who directly or indirectly participates in any monopolistic practice or unlawful concentration.
- Up to approximately USD 69,950<sup>12</sup> fine for anyone who contributes, induces or participates in any monopolistic practice or unlawful concentration.
- Up to 8% of the economic agent's income for non-compliance with a COFECE resolution.
- Up to approximately USD 69,950<sup>13</sup> fine for notaries, which have formalized unauthorized concentrations.
- Up to 10% of company's income that controls an essential facility when failing to comply with the regulation and for non-compliance with an order to eliminate a barrier to competition.
- Up to 10% of the economic agent's income when failing to comply with a temporary order to suspend activities.

8. In case of recidivism, fines imposed by the Commission can be doubled. The Competition Law considers a recidivist when: 1) Having incurred in a previous infringement of the FECL that has been punished, an economic agent incurs in another conduct prohibited by this Law, regardless of it being of the same type or nature; 2) At the beginning of the second or subsequent procedure there is a prior final resolution, and 3) No more than ten years have passed between the initiation of a procedure and the definitive resolution.

---

<sup>9</sup> Relative monopolistic practices, as defined in Article 54 of the FECL as any act, contract, agreement, procedure or combination which are carried out by one or more economic agents with substantial market power in the same relevant market in which the anticompetitive practice is being conducted, with the purpose or effect of improperly displacing competitors from the market; substantially limiting their access to the market or establishing exclusive advantages in favor of one or more competitors.

<sup>10</sup> Five thousand times the UMA.

<sup>11</sup> Two hundred thousand times the UMA.

<sup>12</sup> 180 thousand times the UMA.

<sup>13</sup> 180 thousand times the UMA.

9. The Constitutional reform has also provided a new framework for the judicial process in competition matters. Consequently, the resolutions of the Commission can only be contested by an appeal trial (*juicio de amparo indirecto*) and the decisions cannot be suspended, except in cases in which the Commission imposes fines or the divestiture of assets. Also, fines can only be executed (or collected) when the appeal trial has ended, and the resolution is favorable to the Commission.

### **3. Criteria for determining sanctions**

10. For determining sanctions for breaches of the Competition Law, elements contained in the FECL and the principle of proportionality must be addressed.

11. The principle of proportionality, as it is understood and implemented in COFECE's decisions, requires to take into consideration the following factors:

- The purpose of sanctions is fundamentally to act as deterrents of anticompetitive conducts;
- Sanctions should be individualized according to objective and subjective criteria;
- The amount of administrative fines should be determined, in principle, based on objective elements, that is, damages to public interest generated by the infringement;
- Subjective elements should be considered to individualize sanctions, mitigating or aggravating it, taking into account particular circumstances of the anticompetitive conduct of each of the sanctioned infringers; and
- In all cases, the elements to evaluate sanctions must be weighed as a whole in order to determine their amount.

12. The FECL provides the objective and subjective elements that must be considered for the purposes of determining the seriousness of the breach, such as the damage caused by such breach, evidence of intention, the infringer's share in the affected market, the market's size, the duration of the monopolistic practice or concentration, economic capacity, and if the case may be, interfering with COFECE's mandate.

13. The Regulatory Provisions of the FECL establish the general criteria for setting fines. In Article 181 it is stated that for calculating the damage caused by a breach of the Competition Law, the Commission may consider the market situation that would have prevailed in the absence of such monopolistic practice or unlawful concentration.

14. For the analysis of evidence of intention, among others, the following factors will be considered to determine the amount of the fine:

- Termination of the monopolistic practice or unlawful concentration before, at the beginning, during the corresponding investigation or during the trial-like procedure;
- Documentary evidence that the illegal conduct was committed by the suggestion, instigation or encouragement of public authorities;
- Intent to hide the anticompetitive conduct; and

- Proof that the conduct was committed at the instigation of another economic agent, without the infringer playing a leading role in the adoption and implementation of the anticompetitive conduct.

15. As a new element of the FECL, interference with COFECE's mandate is an aggravating factor when calculating fines. In terms of Article 183 of the Regulatory Provisions, behavior of the infringer during the investigation and degree of cooperation with the Commission, as well as, infringer's cooperation to expedite COFECE's trial-like procedure will be taken into account in determining the fine.

16. The size of the market and the infringer's market share are determined with regard to the estimated total sales in the market and total sales of the infringer. The duration of the practice is related to the number of days, months or years that the monopolistic practice was going on for or the unlawful concentration lasted.

17. To determine the infringer's economic capacity, the Commission may request the necessary tax information to the economic agents or the competent tax authority in order to determine the amount of the fines.

18. The recent case resolved by the COFECE in the Mexican market of sugar can be used to illustrate the criteria used to determine sanctions.<sup>14</sup> In June 2016, the Commission sanctioned seven companies and ten individuals for committing absolute monopolistic practices during 42 days between October and December 2013. In addition to them, the National Chamber of Sugar and Alcohol Industries (CNIAA for its acronym in Spanish) and its General Director were found responsible of fostering and inducing the implementation and enactment of the agreement.

19. The sanctioned companies, with CNIAA's intermediation, agreed to fix the sugar wholesale market prices and on the spot prices at 350 pesos per package. Furthermore, they agreed to restrict, in the national territory, the sale of the standard and refined sugar to wholesalers and suppliers to avoid further resales at lower prices than those offered by sugar refineries, hence ensuring that prices did not further collapse.

20. To resolve on the seriousness of the breach, factors taken into consideration were:

- Seriousness because it is an absolute monopolistic practice: Article 28 of the Mexican Constitution considers that absolute monopolistic practices are very serious because they force consumers to pay exaggerated prices, damaging them and the economy in general. Furthermore, the Statement of Purpose of the reformed FECL states that it is unlikely that absolute monopolistic practices provide real gains in efficiency, but in contrast, these practices always have a direct and negative impact on consumers and the economy in general.
- Seriousness given the affected market: In Mexico, sugar is part of the staple diet, and it is part of the 86 products of the basic food basket. This basic basket of goods and services covers the basic needs that an individual or household requires. Poorest households allocate a greater percentage of their income to purchase products of the basic food basket. Therefore, the Commission considers that the anticompetitive conduct is particularly serious because it mainly affects lower-income consumers.

---

<sup>14</sup> Final resolution available at:  
<http://www.cofece.mx:8080/cfresoluciones/docs/Asuntos%20Juridicos/V162/1/3530816.pdf>

21. None of those responsible for committing the anticompetitive conduct had infringed the Competition Law before, therefore recidivism was not applicable.

22. Regarding evidence of intent, it was concluded that the conduct was intentional. The infringers recognized that they agreed to fix, rise, coordinate or manipulate the sale price of standard and refined sugar and that they restricted the sale of the product to one wholesaler. In addition to this, in October 2013, the infringers were warned of the seriousness of the breach, and yet the exchange of information through emails continued until December 2013. In the same way, the content of a confidentiality agreement between the infringers demonstrated their intention to maintain secrecy about the absolute monopolistic practices conducted.

23. The duration of the anticompetitive conduct was calculated for 42 days from October to December 2013, when the practice was conducted and came into effect.

24. The size of the affected market was calculated using public information on annual sales. It was observed that the infringers sold 74.51% of the total sales in 2013 in the country. But for calculating purposes, only those sales affected by the anticompetitive conduct were considered, which is that of November and December.

25. When calculating the market shares, COFECE took into consideration that each one of the companies was part of an Economic Interest Group,<sup>15</sup> therefore the market shares of each one of the companies was calculated by adding the sales of the members of the Economic Interest Group whose activities were the same, that is, where the related companies are dedicated to a greater or lesser extent to the production and marketing of sugar. Of the total annual sales of the Group, sales to related companies were subtracted. For the volume of affected sales, committed sales were discounted of the total sales, because the Commission considered that such sales were not affected by the agreement, as its volumes and prices were agreed before the anticompetitive conduct. Therefore, for the calculation of the sanction, sales monthly data for November and December 2013 was used.

26. Affected sales during the months of November and December were used as a parameter to determine the sanction. To calculate affected sales, the number of daily sales was obtained, and this was multiplied by the number of days that the practice was in force. As a result of these calculations, it was found that the affected sales amounted to 222 thousand tons and that the markup was of USD 20.80. Accordingly, the value of the damage was at least of USD 4.64 million.

27. These price manipulations caused an unduly transfer of wealth from consumers to colluded economic agents. Derived from this, and considering the severity of the conduct, the parties' background, their intent, duration of the practice, size of the affected market, market shares of the parties and damage estimation, COFECE's Board of Commission's imposed several fines to the involved economic agents amounting to USD 4.72 million.

---

<sup>15</sup> In accordance to available case law and jurisprudence, to be an Economic Interest Group, for the purposes of the Competition Law, it should be analyzed whether a person, directly or indirectly, coordinates the activities of the Group, and also can exercise decisive influence or control over the other parties, without requiring these to be exercised at the same time.

During a vertical relationship between companies in an Economic Interest Group, the Commission assumes that one company influences the other, allowing it to orchestrate and coordinate the implementation of an anticompetitive conduct. Given this circumstance, when the Commission sanctions an individual economic agent, it is responsibility of the latter to prove that it is not part of the Economic Interest Group, for which it will be required to prove that its commercial policies are determined autonomously and independently.

#### **4. Criminal sanctions**

28. The 2013 constitutional reforms on economic competition and the new Competition Law granted the COFECE with new powers. In accordance to these new powers, the Mexican Federal Criminal Code was also amended.

29. The most relevant changes are:

- Reinforcement of criminal sanctions: five to ten years of prison for those who order or participate in an absolute monopolistic practice set forth in the Competition Law. (Article 254 bis of the Federal Criminal Code).
- For criminal prosecution of absolute monopolistic practices, the Criminal Code requires COFECE to submit a complaint to the Federal Prosecutor when the Statement of Probable Responsibility is issued. This is relevant because it means that the criminal procedure will be conducted in parallel to COFECE's administrative trial-type procedure, significantly reducing the time spent on the procedures related to this type of anticompetitive conduct.
- A new criminal sanction: one to three years of prison for those that, either directly or indirectly, whether totally or partially, alter or destroy documents, images or electronic files containing information or data with the purpose of hindering or interfering with investigations or administrative proceedings (Article 254 Bis-1 of the Federal Criminal Code).

30. These powers correspond to the severity of the infringement for committing absolute monopolistic practices, which are considered the most harmful anticompetitive practices.

31. To date, there has been no criminal prosecution of anticompetitive practices in Mexico. This is because criminal sanctions were not incorporated until recently into the competition legislation; Mexican Constitution prohibits retroactive application of the law; so new criminal sanctions do not apply to conducts proved prior to the entry into force of the legal framework that allows for criminal sanctions; and iii) before the approval of the new law, for the criminal prosecution of anticompetitive conducts, the law required COFECE to submit the complaint to the General Attorney's Office, only after the resolution determining the responsibility of the economic agent was upheld (once the means of defense against the punitive resolution have been resolved).

#### **5. Reduction of sanctions: The Leniency Program**

32. The Leniency Program in Mexico was launched when the Federal Economic Competition Law was reformed in 2006. Before these amendments, the Commission applied discretionary administrative fine reductions for cooperating agents involved in an on-going investigation. In 2011, the program was strengthened, extending its scope to individuals and to criminal sanctions for absolute monopolistic practices added into the Law. The Leniency Program exempts from criminal liability. In this regard, COFECE has to watch that the applicant's identity is protected under the criminal procedure.

33. Under the 2014 FECL, economic agents need to provide the Commission with relevant evidence about the illegal conduct and enough elements that in the opinion of the Commission allow to initiate an investigation, or when appropriate, to presume the existence of an absolute monopolistic practice in order to benefit from the reduction of sanctions.

34. The Leniency program establishes that the first applicant to the program, providing sufficient information, will receive a significant fine reduction and will be required to pay one UMA, less than USD

4. The subsequent applicants may get reductions for as much as 50%, 30%, or 20% of the maximum fine, if all applicable requirements and conditions are complied with. These conditions include full and continuous cooperation with COFECE and the termination of participation in the anticompetitive conduct. The scope of the program also includes criminal immunity, but does not extend to civil claims for damages.

35. When economic agents fail to comply with the requirements of the Leniency Program, the benefits are suspended. For example, in the case of Mitsubishi Heavy Industries, Ltd. (MHI) and Denso Corporation (Denso) sanctioned in August 2016, with a fine amounting to USD 3.83 million for exchanging sensible commercial information with the objective and effect of manipulating the price of air conditioning compressors for automobiles; for the first time, COFECE decided to remove the Leniency Program benefits granted to one applicant, since during the trial-like procedure, the infringer suspended its full and continuous cooperation with the Commission.<sup>16</sup>

36. From 2013 to April 2016, COFECE has recorded a total of 34 requests (4 in 2013; 6 in 2014; 18 in 2015 and 6 until April 2016) to adhere to the leniency program and receive a sanction reduction. Since 2014, due to an increase in the severity of monetary and criminal sanctions, most of the applicants to the Leniency Program have been national.

37. On June 2015, COFECE issued the Leniency Guidelines, to provide certainty and clarity to the general public and potential applicants to the program.<sup>17</sup>

---

<sup>16</sup> Final resolution available at:  
<http://www.cofece.mx:8080/cfresoluciones/docs/Asuntos%20Juridicos/V164/1/3547846.pdf>

<sup>17</sup> Available at COFECE's website: <https://www.cofece.mx/cofece/index.php/normateca>