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Latin American and Caribbean Competition Forum

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - SESSION II: INTERIM
MEASURES**

- Contribution from Mexico -

9-10 October 2024

This attached document from Mexico is circulated to the Latin American and Caribbean Competition Forum (LACCF) FOR DISCUSSION under Session II at its forthcoming meeting to be held on 9-10 October 2024 in Santo Domingo, Dominican Republic.

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Session II: Interim Measures

- Contribution from Mexico¹ -

1. Introduction

1. This contribution addresses the specific aspects of interim measures in antitrust matters in Mexico. Specifically, this document focuses on the applicable legal framework, as well as the purpose of these measures, their characteristics and the actors involved in requesting they are imposed, or lifted.

2. Interim measures in Mexico

2.1. Legal and institutional framework

2. In antitrust matters, interim measures are regulated by three different laws: the Federal Economic Competition Law (FECL, or the Competition Law), the Regulatory Provisions of the Federal Economic Competition Law, and the Technical Criteria of the Comisión Federal de Competencia Económica (Federal Economic Competition Commission, COFECE, or the Commission) for the request and issuance of interim measures, and for setting bonds.² In this regard, the regulatory framework for imposing interim measures in antitrust matters is specific to the subject matter.

3. The purpose of interim measures in antitrust matters is to prevent any damage to the process of free competition and economic competition that would be difficult to repair, or to ensure the effective outcome of an investigation and the resolution of corresponding proceedings. Interim measures include: (i) orders to suspend any act constituting probable prohibited conduct under the FECL; (ii) orders to engage in or refrain from specific conduct in connection with the subject matter of a complaint or investigation; (iii) measures aimed at protecting information and documentation; and (iv) any others deemed necessary or appropriate.

4. COFECE may impose any type of interim measure, even if it is not expressly listed in the regulation, as long as it complies with the necessary parameters for imposing it. Likewise, an application for an interim measure consisting of an order to suspend acts or actions that constitute probable prohibited conduct under the FECL can only be made after a summons has been served on the alleged offending party; that is to say, it cannot be made during the investigation.

5. Only the investigating authority may request that interim measures be imposed. For this purpose, incidental proceedings are held in which the party concerned is given a hearing so that it may state whatever it deems is in its best interest and, if applicable, offer evidence for a decision by the plenary session of the Commission, which has the power to impose interim measures. The decision issued by the plenary session of the Commission does not prejudice the merits of the case.

¹ Mexican Federal Economic Competition Commission (COFECE)

² Available in Spanish at <https://www.cofece.mx/publicaciones/marco-juridico-y-normativo/>.

6. The regulations also provide for the possibility of lifting the interim measure by means of a surety bond granted by the economic agent subject to the interim measure (which in other jurisdictions is known as a substitute bond or counter-guarantee).

7. When interim measures are issued, the time period for which they have been granted must be indicated, justifying the duration. This is without prejudice to the possibility of requesting that the interim measure be extended at a later date, if necessary. However, their maximum duration is the date on which the plenary session of the Commission issues a decision confirming the existence of monopolistic practices or unlawful mergers or closing the investigation.

2.2. Features of the application of interim measures

8. To date, there has been no request to implement interim measures in any case, nor is there any experience of co-operating with other competition authorities in the context of interim measures. However, the features of such measures imposed are described in the following paragraph.

9. Although as a general rule, priority is given to promptness and speed when imposing interim measures and in other matters, no prior hearing is required. On the other hand, under regulations governing the application of interim measures in antitrust matters, the party concerned is entitled to a hearing so that it may state whatever it deems is in its best interest, offer any supporting evidence it considers pertinent and, if it deems it appropriate, propose alternative measures to those proposed by the investigating authority.

2.3. Key policy considerations

10. In antitrust matters, interim measures are important tools to prevent damage that is difficult to repair from occurring during an investigation or proceedings, and to ensure the effective outcome of an investigation and the resolution of corresponding proceedings. However, they are exceptional in nature and their effectiveness depends on the information and the market in which they are implemented.

11. The request made by the investigating authority must describe, among other things, the way in which the acts or omissions for which the interim measure is requested could impede the effectiveness of an investigation and the resolution of proceedings or, if applicable, damage the process of free competition and economic competition that would be difficult to repair. It must also justify that the requested measure is an appropriate way to secure an effective outcome in the least burdensome manner for the economic agent and that it is in proportion to its purpose. In cases in which it is a question of avoiding damage to the process of free competition and economic competition that would be difficult to repair, the investigating authority must also estimate the potential damage it seeks to avoid.

12. On this basis, and using the information submitted by the economic agent, the plenary session of the Commission will determine whether the interim measure is appropriate. In this regard, doctrine and judicial criteria in other matters refer to the following as a basis for imposing interim measures: (i) the appearance of good faith, namely the existence of justifiable, circumstantial causes for requesting the measure; and (ii) the danger of delay, which lies in the urgent need for action due to the serious risk of damage to the process of competition and free competition that would be difficult to repair, or to the effective outcome of an investigation and resolution of proceedings. Although these elements are not expressly included in antitrust regulations, they may be taken into consideration when deciding whether to impose interim measures.

13. On the other hand, in accordance with Mexico's antitrust regulations, interim measures can be lifted by means of a surety bond at the request of the economic agent bound by the interim measure. In such cases, the surety bond must be sufficient to repair the damage that could be caused to the process of free competition and economic competition if a favourable resolution is not obtained for the economic agent.

14. In February 2024, COFECE reformed the rules for interim measures set forth in the Regulatory Provisions of the Federal Economic Competition Law. Furthermore, the Technical Criteria of the Federal Economic Competition Commission for the request and issuance of interim measures, and for the setting of surety bonds, are expected to be updated later in the year. This is intended to promote the use of this tool in Mexico.

3. Conclusions

15. Interim measures are powerful tools that allow access to justice and prevent major damage occurring that could impact how markets operate. However, several elements must be considered when imposing any measures, to ensure the Competition Law is applied effectively and to prevent damage to the market.

16. Given the need to act quickly when imposing interim measures and to protect the rights of those who could be affected by the measures, Mexican antitrust regulations entitle the economic agent to a hearing. This is an opportunity for it to express its views, offer evidence and even propose alternative measures before the plenary session of the Commission determines whether interim measures are to be imposed.

17. On the other hand, in Mexico, the request for interim measures can only be made by the investigating authority and not by those potentially affected by the economic agent's conduct. In addition, decisions are issued by the plenary session of the Commission, which is an administrative authority, without the need for confirmation by a court of law.

18. Finally, unlike in other jurisdictions, under Mexican law the economic agent bound by an interim measure may apply for it to be lifted through the granting of a sufficient surety bond.