



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

Cancels & replaces the same document of 08 June 2010

Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Mexico --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Decision-making process

1.1 What procedures does your agency have in place to ensure that decision-makers consider all relevant evidence and remain open to considering different explanations for the conduct under investigation?

1. Investigation procedures of the Mexican Federal Competition Commission (CFC or Commission) are conducted by independent teams that are obliged to include into the case file all relevant information obtained/provided during the course of the investigation.

2. Once a Statement of Objections is issued, parties under investigation gain access to the case files and may present evidence supporting their claims. During this stage, they also have access to information presented by third parties and have the chance to present their view before the General Counsel's office, which do not participate directly in the investigation phase.

3. The Plenum of the CFC makes its decision once the case file has been fully compiled by the General Counsel, who is not subordinate to the commissioners and makes an independent recommendation to them.

1.2 Are independent teams used internally?

4. Yes, see response to Question 1.

5. The Commission is organized in specialized divisions, each of them with a different area of responsibility (cartels, abuse of dominance, mergers, regulated sectors, economic studies, legal and litigation affairs). Cases are handled by investigative teams formed in each of these divisions. Divisions, meanwhile, are coordinated by the Executive Secretary. Investigative decisions are taken by the Executive Secretary and the corresponding "lead division". Depending on the complexity of the case "lead teams" can include members from the economic or legal division.

1.3 Is there an independent review of the case by specialized economists?

6. Yes, in complex cases the Direction General for Economic Studies normally reviews the soundness of the economic analysis used by the investigative teams. However, there is a single recommendation submitted to the Plenum by the Executive Secretary.

1.4 Are there other channels of input directly to the decision-makers?

7. Yes, during any stage of an investigation interested parties can have informal meetings with case handlers. It is common practice, moreover, that before their case is decided by the Plenum, they meet with the commissioners.

1.5 Are outside analysts or experts used to help decision-makers?

8. Assistance from outside experts is rarely used by the Commission. However, interested parties may submit expert evidence, which the CFC must review and analyze.

1.6 *What other techniques or practices has your agency adopted to promote sound decision-making?*

9. The CFC has implemented an electronic filing system (SIIC by its acronym in Spanish) that allows full simultaneous access to all the information included in a case file. The system also enables case handlers to review relevant previous investigations and decisions.

10. Another practice that has encouraged sound decision-making inside the Commission is the internal peer review of investigations before the statement of objections is issued.

2. Confidentiality

2.1 *How does your agency balance a defendant's right to review and respond to evidence that will be used against it with the need to protect confidentiality?*

11. Under the Federal Law of Economic Competition (FLEC), parties must submit a summary along with the information they might consider to be confidential.

12. Confidentiality will only be granted if the information in question negatively impacts, upon disclosure, the market position of the submitting party. Any information classified as confidential cannot be disclosed.

13. In some cases, access to classified information may be given to outside legal counsel subject to confidentiality. Also, if a case is subject to judicial review, a judge may eventually grant access to classified information in order to ensure due legal process and proper defense.

2.2 *Are there special procedures available for disclosure necessary to protect rights of defense, e.g. by limiting the disclosure to legal representatives so as to ensure that business secrets are not divulged to competing businesses? how is confidential information defined?*

14. Yes, see response to Question 7.

2.3 *What rules apply to the protection of confidential information obtained from parties by your agency?*

15. Confidential information must be kept separate from public information and must be secured.

2.4 *Is such information automatically considered to be confidential, or does the party have to identify it as such?*

16. According to the FLEC, the economic agent submitting the information must identify which information shall be kept as confidential. This submission is reviewed by the CFC to guarantee that it meets the requirements established in the law.

17. In addition, the CFC must observe the criteria established in the Federal Law of Transparency and Access to Government Public Information regarding the confidentiality of personal information.

2.5 *If such information is to be disclosed to other parties or made public, does the party have a prior right to object to the disclosure?*

18. In the FLEC it is stipulated that once the information has been classified as confidential, it cannot be made public by any means.

19. To protect confidential information CFC's resolutions are always notified along with a draft public version for review and possible objections.

2.6 *How does your agency balance the benefits of public disclosure of ongoing investigations with the need to respect confidentiality of targets of proceedings and possible effects on their reputation?*

20. The FLEC severely limits the CFC's room of maneuver in this regard. Indeed, it provides that during the proceedings details of the investigations cannot be made public except for the identification of the market and that parties do not have access to the file until a Statement of Objections is issued. Moreover, it establishes that public statements can be made by the Commission once the Plenum has taken a final decision and the resolution has been notified directly to the parties involved. Finally, the FCEC stipulates that public versions of the resolutions must be published within 15 days.

2.7 *What are the penalties for negligent/intentional violation of confidentiality rules?*

21. Any negligence from the CFC's personnel when handling information can be subject to an administrative sanction, which can range from a fine, or/and up to a temporary or definite suspension from his/her position. The aggrieved parties can claim civil damages in a legal dispute and the offender can also be subject to a criminal sanction, depending of severity and intention of the violation.

3. Requests for information to targets of investigations

3.1 *Does your agency have procedures to review information requests with the party?*

22. Yes. Although the FLEC and the bylaws do not contemplate a formal procedure to review information requests with the party, it is common practice that case handlers discuss them with the party both before and after they are issued.

3.2 *Is the party informed of the theory of the case and reasons for requesting the information?*

23. Not during the investigation. Parties are informed as to whether they are the object of the investigation or if they are only being asked for the information because of their participation as a client/supplier/expert in the relevant or a related market.

24. The Executive Secretary will engage the parties involved as to what its conclusions are before making recommendations to the Plenum. Parties are given full chance to respond and argue their case after the Statement of Objections is issued.

3.3 *Can a party ask for a reconsideration of the information requested and/or deadlines, or appeal to a review office within the agency?*

25. The FLEC does not contemplate the possibility of a party asking for a reconsideration of the information request. In practice, however, the CFC normally adopts a flexible approach to this issue in those cases where the demands of the party are justified. It should also be noted that parties are not required to submit information that they do not have.

26. Following the FLEC, the CFC is allowed to extend the deadlines of an information requirement upon request.

3.4 *Do procedures and practices differ if the addressee of the request for information is not a party to the proceeding?*

27. No, the FLEC does not make any difference in this regard. That is, regardless of their status in the proceeding, addressees of a request for information have the obligation to respond or face possible fines for non-compliance.

4. *Agreed resolutions of enforcement proceedings*

4.1 *At what stages or stages of an investigation and/or litigation can the parties resolve an enforcement matter by means of a mutually agreed disposition with your agency?*

28. Parties can resolve an enforcement matter by means of mutually agreed disposition with the CFC generally after a Statement of Objections or after a resolution (before an appeal before the CFC). In merger cases, moreover, parties can submit “commitments” before the CFC during the investigation phase. To be accepted by the CFC, these commitments need to meet the following requisites: a) restore the process of competition and free access to market by suspending or suppressing the anticompetitive practice, and b) be economically viable.

4.2 *Are there restrictions on the type of cases that can be settled in this manner?*

29. The “commitments” only apply to abuse of dominant position and merger cases (not for cartel cases).

4.3 *Does your agency actively seek to settle cases?*

30. The CFC would like to employ this remedy more often to solve enforcement procedures. However, due to lack of precision of the law, the CFC currently faces some constraints to adopt this strategy.

5. *Judicial review and interim relief*

5.1 *At what point in the competition law enforcement process does an independent judicial body have an opportunity to review the conclusions of your agency as to whether a violation of the law has occurred?*

31. After the initial decision, parties may appeal directly to the CFC. Once the appeal has been decided, they may challenge legality of the decision before administrative or judicial tribunals (“amparo”).

5.2 *What level of deference does the judicial body grant to the agency’s decision?*

32. Since competition law is relatively new in Mexico (it was introduced in 1993), the judiciary is not yet very familiar with the substance of the work of the CFC and, therefore, its review of cases has been mostly on procedural grounds. In recent years, however, the courts have expanded their interest on the substantial part of the proceedings and, as a result, the level of deference granted to the CFC’s decision has increased substantially.

5.3 *If the agency's decision has resulted in a sanction or remedy, what is the effect of the pending judicial review on the sanction or remedy?*

33. Depending on the nature of the case, a stay may be imposed on the sanction or remedy. In general, however, while fines are not collected until after a judicial decision has been made, stays on conducts deemed to be anticompetitive are limited during judicial review.

5.4 *Can the judicial body grant interim relief?*

34. Yes. See above.

5.5 *What is the timing of the review by the judicial body, and are there procedures for expedited review of time-sensitive business transactions or conduct?*

35. In Mexico, the legal system does not consider expedite procedures. The judicial review could take place in a two stages process. In the first stage (“*amparo*” review”), resolutions can be reached in an average of nine months. If the resolutions from the first stage are sent into a “*revision process*”, this second stage lasts in average 11 months¹.

¹ The revision process can be conducted by a collegiate tribunal or the Mexican Supreme Court.