

Specialised Competition Court annuls FECC's resolution revoking immunity under leniency programme

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FECC decision

***Amparo* action**

Specialised Competition Court decision

Comment

FECC decision

On July 5 2016 the Federal Economic Competition Commission (FECC) imposed total fines of \$3,882,378.52(1) on Denso and Mitsubishi for commissioning an absolute monopolistic practice in a sensible commercial information exchange, the object and effect of which was the manipulation of the price of automobile air conditioner compressors.

In its ruling, the FECC revoked the immunity granted to Denso, on the grounds that it had failed to fulfil its obligation to cooperate fully and continuously with the FECC during all phases of the antitrust procedure. The FECC held that 'cooperating' under the leniency programme means to "act jointly with another or others to reach a common goal; act favourably in accordance to the interests or purposes of someone". This implies that, under the leniency programme, economic agents should not deny a practice or try to impede the FECC from imposing a penalty.

***Amparo* action**

Denso challenged the FECC's resolution through an *amparo* action (ie, based on constitutional grounds) submitted on August 5 2016 before the first judge of the Specialised Competition Court. Denso's main arguments were as follows:

- Section II of Article 33*bis*(3) of the former Federal Law of Economic Competition, repealed on May 24 2014, which was applicable to the FECC's proceeding against Denso, was unconstitutional. As such, the FECC's interpretation of 'full and continuous cooperation' under the leniency programme had been discretionary.
- The FECC cannot penalise actions and conduct undertaken abroad, such as the collusive conduct attributed to Denso.
- Denso's right to be heard and its right to a defence – as well as the legality principle – had been violated, as the immunity benefit granted to it under the leniency programme had been revoked because it challenged the FECC's competence to penalise its conduct. This was interpreted by the FECC as a failure to cooperate fully and continuously during all phases of the antitrust procedure.

Specialised Competition Court decision

On January 3 2017 the first judge of the Specialised Competition Court resolved as follows:

- Section II of Article 33*bis*(3) of the former Federal Economic Competition Law was not unconstitutional, as it establishes that undertakings which have participated in the

AUTHORS

[Lucía Ojeda Cárdenas](#)



[Felipe García Cuevas](#)



commission of absolute monopolistic practices can admit to this before the FECC and request immunity under the leniency programme to obtain a reduced penalty. To obtain such a benefit, the undertaking requires, among other things, "full and continuous cooperation" with the FECC during the antitrust procedure. Therefore, the interpretation of this article is not discretionary, as it clearly establishes that cooperation must be full and continuous – both in the investigation and in a trial. Consequently, if such cooperation is no longer provided, the benefit will be revoked.

- The FECC was competent to penalise Denso for commissioning absolute monopolistic practices outside Mexico, as economic competition legislation applies when actions or events that occur abroad aim to or affect the Mexican market. In Denso's case, even though the agreements with the other undertakings had been carried out abroad, their consequences had effects in Mexico.
- Even if an undertaking cooperates with the FECC under the leniency programme, its right to be heard cannot be restricted. In this respect, the right to be heard and the right to a defence commence with the start of a trial. According to the judge, the FECC cannot assume that the exercise of such rights implies a challenge to its allegations. As such, in the case at hand, it could not assume a lack of full and continuous cooperation on Denso's part.

The FECC requested a review of the Specialised Competition Court's resolution, which is pending.

Comment

The Specialised Competition Court's decision is relevant, as it sets the criteria for determining to what extent an economic agent can challenge the application of law in a specific case. On the one hand, while it is clear that an economic agent cannot deny the facts ascertained during an antitrust procedure, it is unclear whether it must accept the FECC's motivation and reasoning in relation to the illegal conduct. On the other hand, it is clear that economic agents must cooperate with the FECC in such a way that ensures that the procedure is effective. Permitting an economic agent to act strategically when adhering to the leniency programme may affect the programme's effectiveness.

For further information on this topic please contact [Lucía Ojeda Cárdenas](#) or [Felipe García Cuevas](#) at SAI Consultores SC by telephone (+52 55 59 85 6618) or email (loc@sai.com.mx or fgc@sai.com.mx). The SAI Consultores website can be accessed at www.sai.com.mx.

Endnotes

(1) Calculated at an exchange rate of 18.5505 Mexican pesos per US dollar.

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