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Note on the Regulatory Provisions of the Immunity and Reduction of Sanctions Program

After more than ten years of history of the implementation of the leniency program, the Federal Economic Competition Commission (the "**Commission**") has identified that this tool has been very useful to start investigations on which it would have been difficult to have knowledge; however, throughout these years it has also faced unforeseen scenarios that generated gaps at the time of program implementation. Through these new regulatory provisions, the Commission seems to want to grant certainty so that the program continues to build trust and be used successfully.

I. INTRODUCTION

On March 4, 2020, it was published in the Official Federal Gazette the official communication No. CFCE-049-2020, issued by the Board of the Federal Economic Competition Commission (the "**Commission**") on February 12, 2020, on March 4, 2020 (the "**Ruling**").

Pursuant the Ruling: *(i)* it were issued the Regulatory Provisions of the Immunity and Reduction of Sanctions Program established in Article 103 of the Federal Economic Competition Law (the "**Provisions**"); and *(ii)* were repealed articles 114, 115 and 116 of the Regulatory Provisions of the Federal Economic Competition Law which previously established the requirements and procedure for joining the immunity and reduction of sanctions program (the "**Leniency Program**"). These provisions entered into force on March 5, 2020.

II. RELEVANT CHANGES

Although the Provisions do not change the stages and time periods of the procedure for joining the Leniency Program, it is important to consider three substantial aspects that change its operation should be taken into account.

A. New powers of the Investigative Authority

1. To require the applicant to *continue its participation in the absolute monopolistic practice (cartel)*, for the purpose of collecting information and documentation useful for the investigation (article 6, section II).

2. To authorize the petitioner to, instead of presenting documentation, make *oral declarations* detailing the circumstances of time, mode and place under which the absolute monopolistic practices were committed (article 7).

3. To recommend to the Board not to grant definitively the benefits of the Leniency Program to the applicant who stops cooperating during the investigation stage, for which it must indicate the elements that show the lack of cooperation and notify the applicant of this circumstance (article 9).

B. Conduct that proves "full and continuous cooperation"

Article 6 of the Provisions set forth a series of behaviors that the petitioner must observe to be considered to have offered "full and continuous cooperation" in both the investigation stage and the trial-like proceeding. This is so the Commission can consider the requirement set forth in article 103, section II of the Federal Economic Competition Law (the "**FECL**") to have been complied with.

It should be emphasized that during the trial-like proceeding, the petitioner is obligated "not to deny its participation in the conduct with respect to which it requested the benefit" (article 6, part B, section I). In this respect, the investigation for absolute monopolistic practices identified with case number IO-003-2012, in the market of management of workers' retirement funds in national territory, is relevant.

When issuing the final decision of the trial-like proceeding in that case, the Board of the Commission denied the benefit of the Leniency Program to several companies and individuals under investigation. To do so it argued that those petitioners did not comply with the requirement of "full and continuous cooperation", because they responded to the accusations of the Investigative Authority with statements tending to deny or dispute their responsibility and the possibility of the Commission to sanction them, which in itself is incompatible with the requirement of admitting having committed absolute monopolistic practices (*see.* pp. 573-580 of the ruling).

Several economic agents filed constitutional recourse (amparo) against the final decision of this case before the Specialized in Economic Competition, Broadcasting and Telecommunications District Courts. On this matter, the head of the First Court ruled in favor of the complainants in the indirect amparo proceeding 1282/2017, asserting that:

- The cooperation of the petitioner must be analyzed in the full context that includes both phases of the proceeding before the Commission; it cannot be considered interrupted by the sole fact of expressing an idea or argument, if with that the willingness to cooperate reflected previously is not obstructed.

- The Board of the Commission gave an isolated and restricted interpretation of the statements the complainants made in their response to the statement of objections, as well as their general conduct during the investigation stage and the trial-like procedure. Such analysis is insufficient and therefore violates the fundamental rights of legality and legal certainty, a proper defense and judicial protection.

- In exercising their fundamental rights, the complainants must be able to reserve the power to challenge the constitutionality of a law or in general make any legal claims. An expression of defense cannot be interpreted against the petitioner to determine that its cooperation was interrupted, unless it reveals a "significant behavioral change".

- The arguments contained in the responses to the statement of objections can be interpreted as a "mere rhetorical exercise" to convince the authority that in that case there was a lesser degree of guilt and seriousness of the sanctionable conduct. This exercise must be considered permissible within the exercise of the fundamental rights to a hearing, defense and access to justice, in compliance with the right to freedom of speech, since otherwise if a certain argumentative parameter is required of them, it could become "unlawful censure".

The Commission filed a motion for review against the final decision of the indirect amparo proceeding 1282/2017. The Supreme Court of Justice of the Nation resumed its original competency to analyze the matter, and it was registered in its docket under the amparo in review case 1030/2019 which is pending resolution as of this date.

It should also be mentioned that when the Technical Secretary observes acts or omissions that could be presumed to violate the requirements of the Leniency Program, it will issue an official communication informing the applicant of this situation, so it may offer clarifications or take actions to remedy the violation, if possible (article 10). In this way, the applicants may manifest their rights and anticipate, with a certain degree of certainty, the possibility that the benefit may be revoked in the final ruling issued by the Board.

C. Changes in the order of priority

Article 103 of the FECL sets forth that the applicants who meet the requirements of the Leniency Program may obtain a reduction of any sanctions eventually imposed on them in function of the chronological order in which the respective petitions are presented (minimum fine or reduction of 50, 30 or 20 percent of the fine).

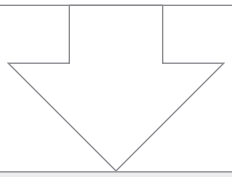
Previously the consequences of one of the applicants being denied the benefit of immunity and reduction of sanctions were not established, and therefore it was argued that the position of the economic agent excluded from the Leniency Program should be occupied by the applicant that followed it in chronological order and the rest of the places would fall in successively.

The Provisions resolve this legislative vacuum, for which two situations are distinguished, as follows: *(a)* cancellation of the request for the conditional benefit and *(b)* revocation of the conditional benefit, according to the following table.

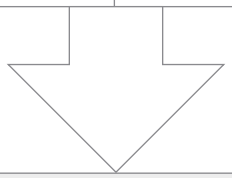
	Cancellation of the request	**Revocation of the conditional benefit**
Motives	a) Missing the first meeting with the Investigative Authority; or b) Not having provided sufficient information, in the judgment of the Investigative Authority.	Not fully and continuously cooperating in the trial-like proceeding.
Issuer	The Investigative Authority, when ruling on the request for the conditional benefit.	The Board, when ruling on the trial-like proceeding.
Effects	• The priority is lost with respect to other applicants to the Leniency Program (the positions are moved up). • A new request can be presented (until before the ruling concluding the investigation is issued).	The other applicants of the Leniency Program keep their position according to the chronological order in which they filed their requests (the positions are not moved up).

III. PROCEDURE FOR JOINING THE PROGRAM

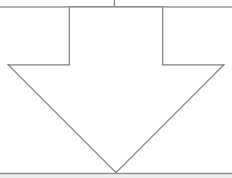
(1) File the request		
Contact information	Statement of desire to make use of the benefit	Corresponding market(s), goods and services



(2) First meeting	
A date and time is set within 5 days after the filing of the request.	A deferment can be requested (at least 3 days before the original date).



(3) Analysis of the information	
Period of 40 business days, extendible up to 4 times	The Commission continues to need the cooperation of the applicant



(4) Ruling on the request	
(a) If the information provided is sufficient, a "Conditional Ruling of Immunity" is issued.	(b) If the information provided is insufficient, the request is cancelled.

To obtain additional information contact our expert:

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VON WOBESER Y SIERRA, S.C.
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