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Mexico

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Immunity or a 100 per cent reduction in sanctions

1. What benefits are available to the first applicant to qualify?

The first applicant will receive a significant reduction of the applicable fine and will only be required to pay the equivalent to one general minimum daily wage prevailing in Mexico City (currently, MX$67.29). Although this implies that there is no '100 per cent reduction in sanctions' in Mexico, for the purposes of this questionnaire, 'immunity' will apply to the first applicant for leniency.

Also, leniency protects the applicant and, and if requested by the applicant, its subsidiaries, affiliates, former and current employees and managers. Immunity also applies to criminal liability.

Applicants may still be subject to a civil claim derived from the illegal conduct.

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2. Do the protections extend to current and former officers, directors and employees?

Yes, if expressly requested by the applicant.

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3. Is immunity available after an investigation begins?

Yes. Immunity is available after an investigation begins, as long as it is requested prior to the issuance of a notice of probable responsibility by the Mexican Federal Economic Competition Commission ('FECC') or the Federal Institute of Telecommunications ('IFETEL', and together with the FECC, the 'Antitrust Authorities').

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4. What are the eligibility requirements before an investigation begins?

To qualify for immunity, an applicant must:

- be the first to apply and produce sufficient supporting evidence, that in the opinion of the Antitrust Authorities, allows them to begin an investigation or to prove the existence of the practice;
- cooperate fully and continuously with the Antitrust Authorities in their investigation and, as the case may be, in the administrative procedure in the form of a trial; and
- take the necessary actions to terminate its participation in the alleged illegal practice.

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5. What are the eligibility requirements after an investigation begins?

The same as those requirements before an investigation begins, in the understanding that the application for leniency shall be submitted prior to the formal conclusion of the investigation by the Antitrust Authorities.

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6. Will the applicant have to admit to a violation of law?

Yes.

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7. Are ringleaders or initiators of the conduct eligible?

Yes. The Federal Law of Economic Competition (the 'Mexican Competition Law') does not distinguish between ringleaders, initiators, followers or other economic agents involved in the conduct.

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8. When must the applicant terminate its involvement in the conduct?

The Mexican Competition Law provides that the applicant must commit to terminate its involvement when applying for the leniency programme; however, there is no specific provision on the timing in which such termination shall be effective. In practice, immunity is granted subject to termination of its involvement in the conduct.

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9. What constitutes termination of the conduct?

To cease any involvement in the illegal conduct, including among others, the termination of any type of contracts, agreements, arrangements, acts, etc.

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10. Will the applicant be required to make restitution to victims?

Not as a direct consequence of the leniency programme; however, as the leniency programme does not apply to civil claims for damages or losses (including class actions) derived from the illegal conduct, the applicant may liable for damages caused.

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11. Can more than one applicant qualify for immunity?

No; however, economic agents or individuals who apply after the first applicant may obtain a reduction of the fine of up to 50 per cent, 30 per cent or 20 per cent of the permitted maximum fine, respectively, subject to the chronological order of the application and as long as each:

- provides additional valuable information than the information submitted by the prior applicant in line;
- cooperates fully and continuously with the Antitrust Authorities; and
- takes the necessary steps to terminate its participation in the alleged illegal practice.

Leniency will also apply to criminal liability, although applicants will still be subject to civil claims (including class actions) for damages derived from the illegal conduct.

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12. Can an applicant qualify if one of its employees reports the conduct to the authority first?

Yes, however if the employee applied first independently from its employer, the employer will be considered as second, third or fourth, depending on the chronological order of its application.

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13. Does the afforded protection extend to any non-antitrust infringements?

Yes, leniency extends to criminal liability; however, it does not extend to civil claims for damages.

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14. What confidentiality assurances are given to the first applicant to report?

The identity of all applicants shall be kept confidential by the Antitrust Authorities at all times. Also, in order for the Antitrust Authorities to share any information with antitrust authorities in other jurisdictions, the corresponding applicant must grant a waiver authorising the Antitrust Authorities to do so, in the understanding that they may refuse granting such waivers, without such fact affecting their standing in the leniency programme.

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15. Does the authority publish guidance regarding the application of the programme?

Yes. The former Federal Competition Commission (the 'Former FCC') issued the Guidelines for the Programme on Immunity and Reduction of Sanctions (*Guía del Programa de Inmunidad y Reducción de Sanciones*), which were adopted by the FECC and are available at http://189.206.114.203/images/stories/Documentos/guias/cfcguia.pdf . IFETEL has not issued any guidelines regarding the application of the programme, therefore, there is no certainty if the Guidelines for the Programme on Immunity and Reduction of Sanctions issued by the former FCC are applicable in the telecommunications and broadcasting industries.

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16. Do the rules for obtaining immunity in your jurisdiction conflict with the immunity rules in other jurisdictions?

Not to our knowledge. It is our understanding that in some jurisdictions it is required for the applicants to deliver a waiver for the corresponding antitrust authorities to exchange information with other authorities; in Mexico, however, this is not a requirement and all applicants may refuse granting waiver without this affecting their standing within the leniency programme.

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Immunity application and marker process

17. What is the initial process for making an application?

Considering IFETEL has not issued any guidelines regarding the application of the programme, this section will only refer to the Guidelines for the Programme on Immunity and Reduction of Sanctions issued by the Former FCC which were adopted by the FECC.

Applicants may submit their application to the programme either by email or by voicemail. Within the following two business days from the date in which the application is made, the FECC will contact the applicant to schedule the formal meeting, whereby the applicant will have to provide all the documents and information available to evidence the conduct (there is no specific timing for the date in which such formal meeting shall be carried out). Together with all the documents that will have to be delivered at the formal meeting, the applicant will also need to provide a complete description of all the antecedents and facts of the conduct, as well as disclose the names of officers involved. It shall be noted that the FECC will not disclose at any time the identity of the applicant; however, once an administrative procedure is initiated, all defendants (which will also include the applicant for purposes of covering its identity as applicant) will have access to non-confidential documents, as well as to the names of officers who rendered depositions.

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18. What information is required to secure a marker?

Applicants must include:

- a statement in the sense that they wish to apply to the programme; and
- contact details including at least, the name, telephone number and address of the person who will be the contact with the FECC.

Additional information such as email address, contact details of the counsel to be assisting in the matter and a general description on the industry, product or service where the conduct occurred, is also advisable.

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19. How much time will an applicant have to perfect its marker?

There is no provision regarding the time an applicant has to perfect its marker; however, in practice, the FECC is flexible on the timing to gather the required information.

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20. Can the deadline for perfecting the marker be extended?

There is no specific deadline for perfecting a market; however, the Regulations to the Mexican Competition Law provide that within the 15 business days following the date of the formal meeting, the FECC shall verify and validate the information provided at the formal meeting, in the understanding that such term can be extended. In practice, the FECC grants the required extensions, as long it considers the applicant is, in good faith, devoting its best efforts to gather the required information.

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21. What is required to perfect the marker?

To provide the documents and information that allow the FECC to evidence the conduct (and in case of international conducts, to evidence its effects in Mexico).

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22. Can the scope of the marker be expanded if additional information is discovered by the applicant?

Yes. If new evidence reveals involvement of additional employees or managers, the marker may be expanded to include such employees or managers. However, if such additional information refers to different conducts/markets, then a new application shall be made for such new conducts.

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23. Can an applicant lose its marker if a second applicant comes forward with better information?

No, the FECC can only analyse one marker at a time, and shall rule on granting leniency prior to analysing the information provided by other applicants. The only way in which an applicant may lose its marker is if the information it provides does not allow the FECC to evidence the conduct, then the FECC will reject the application and will analyse the information provided by the second applicant, and subsequent applicants.

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24. What if the applicant's investigation reveals that no violation exists?

If the FECC determines that no violation existed, it will not initiate a formal investigation or, if initiated, will close the investigation and will return all the information and documents that were provided by the applicant.

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25. What if the authority decides not to investigate?

The applicant cannot challenge the FECC's decision of not to investigate based on the evidence provided by the applicant. However, in any case, the FECC will not be allowed to use the information provided by an applicant if it changes the decision not to investigate.

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Immunity cooperation obligations

26. What is the applicant required to produce?

The Mexican Competition Law only provides that the applicant shall provide the information / documentation that allows the Antitrust Authorities to begin an investigation (in the case of the first applicant) or to evidence the conduct, and to fully cooperate with them during the investigation and, if applicable, the administrative procedure. In this regard, the Mexican Competition Law grants the Antitrust Authorities with the authority and discretion to determine which evidence is useful for such purpose. Usually, the evidence and information requested by the Antitrust Authorities consists of emails, agreements, documents, waivers (either procedural or substantive), testimonies, affidavits, etc.

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27. Will the applicant be required to make a written confession?

No. Even though the applicants confess their participation in the illegal conduct, such confession may be either in writing or oral.

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28. Can third parties obtain access to the materials provided by the applicant?

Not during the investigation stage; however, the Antitrust Authorities will include the information provided in the file of the investigation, in the presumed guilty order as well and its resolution (only information, such as industrial/trade secrets as well as the leniency application itself will be preserved as strictly confidential). It shall be noted that during the administrative procedure in the form of a trial, access to the file is not public, as only the defendants have access to it. The above does not prevent defendants disclosing information contained therein or in the presumed guilty order.

Lastly, please note that after issuing a resolution, the Antitrust Authorities will publish a public version thereof, redacting sensitive information (such as identity of the leniency applicants and industrial secrets,) which will be treated as confidential.

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29. Will the applicant lose its protection if one or more of its employees refuses to cooperate?

In principle no, however, the applicant will have to inform this circumstance to the Antitrust Authorities for them to consider such employees separately, which means that such employee or employees will lose their protection.

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30. Will the applicant lose its protection if one of its employees engages in obstructive conduct before or after the application?

In principle no, however, the applicant will have to inform the Antitrust Authorities of this circumstance.

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31. Will the applicant be required to provide materials protected by attorney-client privileges or work-product doctrine?

Not in principle, as these documents will not usually contain direct evidence of communications or agreements between competitors; however, it may be in the applicant's interest to submit them as they may be helpful to provide the Antitrust Authorities with additional information that could be useful for their investigation.

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Granting immunity

32. How does the authority announce its promise not to charge or sanction?

Once the evidence provided by the applicant has been analysed and the Antitrust Authorities consider it is enough to grant leniency, the Antitrust Authorities will formally notify to the applicant that leniency has been granted, and the reduction in the fine to which the applicant will be subject. Such official communication is considered confidential, including its mere existence to any third party and even, to Antitrust Authorities officers not involved in the investigation.

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33. Does the authority put its commitment in writing?

Yes, although if requested by the applicant to be protected for discovery purposes, such communication may not be delivered.

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34. Who is given access to the document?

Only the applicant and the officers involved in the investigation will have access to it.

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35. Does the authority publish a model letter for conferring immunity?

No.

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Individual immunity or leniency

36. Is there an individual immunity programme?

Not as a separate programme as it is the same leniency programme, however, individuals may apply on their own behalf.

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37. What is the process for applying?

The same process described in response to question 17.

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38. What are the criteria for qualifying?

Same criteria described in response to question 4.

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Revocation of immunity

39. On what basis can corporate immunity be revoked?

Once granted, immunity may be revoked if the applicant does not comply with the requirements for obtaining leniency, such as:

- cooperating fully and continuously with the Antitrust Authorities in its investigation and, as the case may be, in any subsequent proceedings; and
- taking the necessary steps to terminate its participation in the alleged illegal practice.

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40. When can it be revoked?

At any time during the investigation and, as the case may be, during the administrative procedure in the form of a trial.

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41. What notice is required to revoke?

Although neither the Mexican Competition Law nor the Guidelines for the Programme on Immunity and Reduction of Sanctions have a specific provision on this regard, in principle, an official communication shall be notified to the applicant stating the specific grounds that were considered for the revocation of immunity.

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42. Can the applicant file a judicial challenge to a decision to revoke?

Yes, however, such filing may only be submitted after the Antitrust Authorities have issued a final decision in their investigation. This, due to the fact that the revocation would be considered as an intra-process act and hence, the Constitution expressly states that such acts may only be challenged once a final decision has been issued by the Antitrust Authorities.

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Reduction in sanctions

43. Does the leniency programme allow for reductions in sanctions?

Yes. As mentioned in response to question 1, the first applicant will be subject to a reduction of the fine to the equivalent to one general minimum daily wage in Mexico City (currently, MX$67.29). Economic agents or individuals who are not the first applicant may obtain a reduction of the fine of up to 50 per cent, 30 per cent or 20 per cent of the permitted maximum, respectively, depending on the order in which they applied.

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44. What is the process for seeking a reduction in sanctions?

Regarding cartel activities, there is no different or specific process for seeking a reduction of fines other than the leniency programme.

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45. Is there a marker process similar to immunity applications?

Yes. The Mexican Competition Law provides that to obtain a marker for second, third, etc, the applicant shall provide information that allows the Antitrust Authorities to evidence the alleged illegal conduct; however, in this case, the information that shall be considered by the Antitrust Authorities shall comply at least with the following:

- in principle, it shall be different to the information provided by the first (or subsequent) applicant(s);
- if the information is similar, it shall contain additional elements (eg, more details/facts); and
- the information shall be related to the same activities referred by the first applicant.

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46. Are the reductions in sanctions fixed or discretionary?

In the case of the first applicant, the amount of the fine is fixed (ie, the equivalent to one general minimum daily wage). In the case of the subsequent applicant, the reductions are fixed as to the percentage applied to be reduced from the permitted maximum fine; however, the fine will be calculated by the Antitrust Authorities, considering the criteria mentioned in response to question 48.

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47. How are the reductions in sanctions calculated?

They are calculated based on the fines effectively determined by the Antitrust Authorities in their resolution and the final marker of each applicant within the programme.

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48. Are there sentencing guidelines?

To calculate the amount of the fine to which the corresponding reduction will apply, the Antitrust Authorities shall consider the following elements (and consequently duly justify them in the resolution where the fine is imposed):

- seriousness of the violation,
- the damage caused,
- the degree of premeditation,
- the participation in the markets,
- the size of the market affected,
- the length of the practice, and
- the background, repeated offences and the financial condition of the infringer.

Therefore, the final amount of the fine will vary depending on those circumstances, and the applicable reduction to the applicant.

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49. If an applicant's cooperation reveals self-incriminating information that expands the scope of the conduct known to the authority, will that conduct be factored into the fine calculation?

No, as leniency is granted only to the conduct stated in the application. If an additional conduct is detected, it is advisable to submit a new application with respect to such additional conduct. It may be the case, however, that the Antitrust Authorities consider that both applications refer to the same market and therefore, should be investigated in a single file; otherwise, if the Antitrust Authorities were to consider both applications separately, two different investigations will be conducted. The benefit applicable to each application would be determined based on the marker of each applicant on each investigation.

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50. Are there fixed or discretionary discounts for the first applicant to cooperate after the immunity applicant (assuming there is an immunity applicant)?

Please refer to response to question 46.

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51. Other than fine reductions, are there additional incentives offered to an applicant that is the first non-immunity applicant?

Leniency also protects all applicants and their former and current employees and managers included in the application against criminal liability.

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52. Does the competition authority publish guidance regarding sentencing reductions?

No, the only guidance is with respect to the percentage to be applied to the reduction, and the criteria for imposing fines mentioned in response to question 48.

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53. Does the authority provide for "Amnesty Plus" benefits?

No.

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54. How is the Amnesty Plus discount calculated?

Amnesty Plus does not apply in Mexico.

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Cooperation obligations for sentencing reductions

55. Are the cooperation obligations similar to those for immunity applicants?

Yes.

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56. Will the applicant be required to make a written confession?

No. Please refer to response to question 27.

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57. Can third parties obtain access to the materials provided by the applicant?

Not at the investigation stage; however, if an administrative procedure in the form of a trial is initiated, then the defendants will have access to all information and documents available at the file of the investigation (except for those classified by the Antitrust Authorities as confidential, including the leniency application itself). Furthermore, please note that a non-confidential version of the resolution to be issued by the Antitrust Authorities will be available at their website.

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58. Will an applicant qualify for sentencing reductions if one or more of its employees refuse to cooperate?

The same response as in question 29.

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59. Will the applicant lose its protections if one of its employees engages in obstructive conduct before or after the application?

The same response as in question 30.

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60. Will the applicant be required to provide materials protected by attorney-client privilege or work-product doctrine?

The same response as in question 31.

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61. Can an applicant challenge the amount of the reduction of sanctions?

To our knowledge, there are no precedents in this regard, although it could be possible. Such challenge, however, would only be possible once the Antitrust Authorities have issued a final decision in the investigation.

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Settlements

62. How is the settlement process initiated?

In Mexico, settlements are not available for cartel activities. Please note that there is a procedure which may be considered as a 'settlement' is only available with respect to relative monopolist practices (abuse of dominance) and illegal concentrations.

Under such procedure, before the Antitrust Authorities issue a final decision, the investigated economic agent may offer commitments that:

- have as a consequence, the restoration or protection of the process of free and open competition; and
- the proposed restoration measures are adequate and economically viable to prevent or cease the relative monopolistic practice or the prohibited concentration, indicating the periods and terms for verifying this.

This procedure can only be applied once every five years.

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63. Is the amount of the sanction always fixed in the settlement agreement?

No. The Antitrust Authorities at their discretion, may opt to

- close the file without imposing any sanction; or
- (ii) impose a fine of up to 50 per cent of the maximum fine that would apply in terms of the Mexican Competition Law.

In the latter case, the economic agent will also be subject to civil liability.

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64. What role, if any, do the courts play in the settlement process?

None during the settlement process, however, if the investigated economic agents were to challenge the final decision (for example, against the calculation of the sanctioned applied by the Antitrust Authorities), this challenge would be decided by a federal court.

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65. Are the settlement documents, including any factual admissions, made public?

Yes, except for any confidential information (ie, industrial/trade secrets).

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66. Is an admission of wrongdoing required?

No, investigated economic agents may offer commitments to stop the investigated practices without acknowledging any wrongdoing.

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67. Do companies that enter into settlement agreements receive an automatic sentencing discount?

No. The amount of discount in the fine (and in some cases the exemption from a fine), is subject to the discretion of the Antitrust Authorities.

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68. Do all of the subjects of an investigation have to agree to the settlement procedure before it is initiated by the authority?

Legally speaking, the procedure has to be reached between one investigated economic agent and the Antitrust Authorities (even in those cases in which an investigation was triggered by a claim from a third party); however, in practice, when there are multiple subjects of the investigation, the Antitrust Authorities will negotiate with all the parties to try to reach only one agreement with them.

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69. Will the authority settle with subjects who refuse to cooperate?

As mentioned in the response to question 62, settlements are not available for cartel activities. Regarding investigations of relative monopolistic practices, the investigated economic agent may offer commitments that have as a consequence, the restoration or protection of the process of free and open competition. In this regard, if such commitments are approved by the Antitrust Authorities and consequently included in its final resolution, the economic agents must accept such commitments in writing in order for the investigation file to be terminated. If the economic agents do not comply with the accepted commitments, they may be subject to a fine of up to 8 per cent their annual revenues.

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70. If the settlement discussions terminate without an agreement, may any information provided or statements made during the negotiations be used against the parties?

No, as the commitments submitted by the parties do not require a confession for recognising an illegal conduct.

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71. May a party to the settlement agreement void the agreement after it is entered?

This procedure does not result in an agreement with the Antitrust Authorities, but rather in a resolution issued by such Antitrust Authorities which the economic agents must accept in writing. In case of accepting it, they may not be able to challenge it in courts, and consequently in case of breach, they may be subject to a fine of up to 8 per cent of their annual revenues.

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72. Does the competition authority publish guidance regarding settlements?

No.

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