

THE PUBLIC
COMPETITION
ENFORCEMENT
REVIEW

TWELFTH EDITION

Editor
Aidan Synnott

THE LAWREVIEWS

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This article was first published in May 2020
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Aidan Synnott

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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK

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ISBN 978-1-83862-493-4

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

MEXICO

*Luis Gerardo García Santos Coy, Carlos Mena-Labarthe and
Sara Gutiérrez Ruiz de Chávez¹*

I OVERVIEW

Antitrust enforcement is a relatively young and constantly evolving field in Mexico. Although the 1857 and 1917 Federal Constitutions already included provisions against monopolies, it was not until 1993 when the first Federal Economic Competition Law entered into force and an authority was created, embracing internationally accepted antitrust concepts and tools, such as: merger control, per se prohibition of cartel behaviour, and a rule of reason type of approach for abuse of dominance.

It was not long, however, before it became evident that the powers invested in the former competition agency were insufficient. Initial attempts to address this problem² were rounded up by a major constitutional amendment taking place in 2013. As a result, the constitutional framework was updated and better adapted to fit actual competition enforcement needs through the creation of a constitutionally autonomous enforcer, the Federal Economic Competition Commission (COFECE) holding jurisdiction over all economic markets except for the broadcasting and telecoms sectors in which competition enforcement is entrusted to another autonomous regulator, the Federal Telecommunications Institute (IFT).

Accordingly, in 2014 a new Federal Economic Competition Law was enacted. This new Law embraced the already available traditional tools with certain additions and updates, complemented with ‘incremental tools’, such as the power to conduct market investigations with remedial action.³

While competition enforcement is one of the scopes (albeit an important one) that the IFT needs to cover,⁴ COFECE has a constitutional mandate to procure the application of the Law in all other economic areas, subject of course to resources constraints,⁵ calling for efficient prioritisation.

1 Luis Gerardo García Santos Coy and Carlos Mena-Labarthe are partners, and Sara Gutiérrez Ruiz de Chávez is a counsel at Creel, García-Cuellar, Aiza y Enríquez.

2 The 1992 Law was subject to different amendments, the most significant ones in 2006 (mainly increasing fines and including additional conduct in the abuse of dominance catalogue) and 2011 (again increasing fines as well as investigative tools and powers).

3 For a more complete history of the evolution of competition enforcement in Mexico, see Carlos Mena-Labarthe, ‘New Competition Policy in Mexico’, in Paulo Burnier da Silveira (editor), *Competition Law and Policy in Latin America*, Wolters Kluwer, 2017.

4 Competition enforcement accounted for a maximum of 3.2 per cent of matters resolved by the IFT, pursuant to IFT (2019) First, Second and Third Quarterly Reports of Activities 2019, about 20 per cent more than the preceding year.

5 COFECE’s assigned budget for 2020 accounts for 38 per cent of IFT’s assigned budget (slightly below to the preceding year). Budget for Federation Expenses for the Fiscal Years 2019 and 2020.

Within this context, and pursuant to COFECE's Strategic Plan for 2018–2021,⁶ enforcement efforts are focused in markets likely to produce the highest impact in terms of economic growth and welfare, considering six indicators: contribution to economic growth – pursuant to market size and growth rate; generalised consumption; impact in related or downstream markets (e.g., intermediate goods and services or inputs); harm to the lower-income population; regulated sectors; and markets prone to anticompetitive behaviour.⁷

Pursuant to these indicators, COFECE has been targeting the financial, agrifood, energy, transport and health sectors, along with public procurement, for enforcement in the 2018–2021 term. Many of the relevant cases and advocacy efforts that will be further addressed below are indeed consistent with this criterion. As for the year 2019, after a somewhat complicated beginning, starting with the agencies challenging the Public Officers Remuneration Law,⁸ it appears that the regulators managed to stay reasonably apart from political discussion. Consistently, COFECE has secured a beneficial alliance with the Ministry of the Public Administration (the Federal Controllershship), allowing for mutual trainings and information exchange.⁹

In terms of regulation, COFECE efforts during 2019 focused on clarifications or changes to the merger regime, mainly a switch to a mandatory digital process. Another relevant addition to the competition framework was the adoption of regulations related to client–attorney privilege protection in the context of antitrust investigations. The IFT, in turn, issued guidance applicable to market condition investigations and commitments for early termination of abuse of dominance and unlawful concentration cases.

A very relevant feature in the preceding year is the interest both regulators have shown in the digital economy. COFECE (2019)¹⁰ specifically flags the digital and network markets as relevant challenges in the future ahead, while the IFT is contesting to gain jurisdiction over merger review in digital platforms.¹¹ A general concern is that favouring the IFT's jurisdiction in this matter would appear to grant the telecom regulator an ascendance over a new market.

II CARTELS

Consistent with international practice, in Mexico, agreements among competitors that reduce or soften competition will be considered illegal per se and penalised as an absolute monopolistic practice. One particularity of the Mexican system is that firms and individuals can incur an infringement without reaching an actual agreement, since the mere exchange of information between competitors with an anticompetitive impact is forbidden per se and may be criminally sanctioned.

6 https://www.cofece.mx/wp-content/uploads/2018/02/PE_2018-2021.pdf#pdf.

7 Indicators and most of the sectors marked as priority were recaptured from COFECE (2014) Strategic Plan 2014–2017: https://www.cofece.mx/wp-content/uploads/2017/11/pe_2014-2017_act_2015.pdf.

8 Which ordered generalised salary cuts for all public employees, including COFECE officers.

9 The Federal Controllershship is in charge of investigation and penalizing infringements to the Administrative and Public Procurement Laws. Collaboration agreement is visible at https://www.cofece.mx/wp-content/uploads/2019/08/Convenio_SFP_08_2019.pdf.

10 COFECE (2019) COFECE Model. A Perspective of Institutional Structuring: https://www.cofece.mx/wp-content/uploads/2019/11/Modelo-COFECE_web.pdf#pdf.

11 File CCA 4/2019. The decision to this matter is to be issued by the First Federal Specialized Court in Economic Competition, Telecom and Broadcasting in (early) 2020.

While not every interaction among competitors will update this infringement, an absolute monopolistic practice will take place in the face of hardcore collusion (i.e., agreements and information exchanges with the object or effect to fix or manipulate prices or their components; restrict output or input; allocate markets; or rig bids).

Note that violations may arise either by object or effect, implying that the enforcer will not need to prove actual market effects to ground an infringement. Absolute monopolistic practices are, by law, null and void.¹² Administrative fines for firms involved in cartel conduct can reach up to 10 per cent of the wrongdoer's annual accruable income. Firms can also be subject to private litigation claims (including collective actions) to recover damages or losses arising from conduct updating an infringement declared by the enforcer.

Furthermore, individuals executing the practice on behalf of a company will be personally liable and subject to both criminal and administrative penalties, including fines of up to US\$922,293¹³ five-year debarment, and five to 10 years' criminal imprisonment. Facilitators (whether companies or individuals) can also be fined up to US\$830,064.

While commitments and remedies are not legally available to settle cartel cases, as of 2006 the Law introduced a leniency programme. The benefit is available for first and also for subsequent applicants, all of which will be required to acknowledge – and terminate – their participation in the collusive agreement (or information exchange) and provide enough evidence to ground or strengthen the agency's case. In exchange, applicants will be released from criminal liability and administrative penalties will be reduced proportionally to the marker.

To keep this benefit, the applicant is bound to maintain full and continuous cooperation with the agency throughout the proceeding; failure to meet the cooperation standard will lead to COFECE withdrawing the leniency benefits.¹⁴ COFECE has, contestably, revoked several leniency agreements based on failing to cooperate.

i Significant cases

During 2019, COFECE resolved six cartel cases in the following markets:

- a* the tortilla market.¹⁵ COFECE found that tortilla producers agreed to sell tortillas at an overcharge price; while fine amounts are not significant (approximately US\$119,492) agri-food cases fall within the priority scope defined by COFECE in its Strategic Plan 2018–2021.
- b* air transportation passenger services.¹⁶ COFECE considered the involved airlines set base prices for air transportation services between 2008 and 2010, affecting over 100 national routes and 3.5 million travellers; aggregated fines amounted to US\$4.68 million.

12 Still, the enforcer is empowered to order the parties to cease or correct any actions related to the practice and to restore competition, if applicable.

13 All exchange rates in this document were calculated at 18.84 pesos per US dollar. Fines were calculated based on the 2020 reference unit UMA.

14 COFECE (2015), Guide 003/2015: Guidelines for the Immunity and Fine Reduction Program. Retrieved from https://www.cofece.mx/wp-content/uploads/2017/12/guia-0032015_programa_inm.pdf.

15 COFECE File DE-031-2017.

16 COFECE File IO-002-2015.

- c* the public procurement of dental brushes for the health sector.¹⁷ Alleged bid-rigging in the market led to three companies being fined an aggregated amount of US\$960,396 for rigging health department bids.
- d* watt meters. Regarding the investigation for alleged price fixing, COFECE Plenary decided to close this file without declaring an infringement, based on the consideration that the charged companies were part of the same economic group and not effectively acting in the market as competitors. It however, recommended a change in public bid design to boost competition.¹⁸

The following are recent important court precedents on this subject:

- a* Supreme and Specialised Court's non-binding decisions on leniency. The Supreme Court analysed the leniency obligation as the need to cooperate totally, without obstacles or interruptions of any kind. The Specialized Court furthered by clarifying this will not restrict the applicant's right to put forward defences during the proceeding.¹⁹
- b* Specialised Court's non-binding decision on applicable jurisdiction. The Court clarified that cartel conduct taking place outside of Mexico, but having an impact in Mexican markets, will be subject to antitrust enforcement in Mexico.²⁰
- c* Specialised Court's non-binding decision on per se rule interpretation in cartel cases. This confirms that the per se rule (applicable to cartel behaviour assessment) implies that arguments related to conduct rationality or justifications will be dismissed.²¹

ii Trends, developments and strategies

The fight against cartels remains a priority for COFECE. For many years, the leniency programme has acted as a cornerstone for cartel enforcement in Mexico.²² The boom of the early years, however, appears to be fading. In past years, leniency applications have been declining at approximately -38 per cent annually.²³ While this might just be consistent with international trends, questionable revocations of the leniency benefit could have played a role by reducing the programme certainty. Acknowledging this as a relevant issue, during 2019

17 COFECE File IO-005-2016.

18 COFECE File DE-23-2017. File IO-004-2015 (production and marketing of egg) was also closed by the plenary, due to lack of evidence to ground an infringement.

19 First Chamber of the Supreme Court. A.R. 106/2018 and First Specialised Court A.R. 60/2017. Note that assessment was made in the context of the previous Law, but criteria – although not binding – are indicative also regarding cases handled with the new Law, recapturing the same concept.

20 First Collegiate Court Specialised in Competition, Broadcasting and Telecom Matters A.R. 60/2017. For simplicity, in what follows these Collegiate Courts will be referred to only as Specialised Court(s).

21 Second Specialised Court A.R. 161/2017.

22 Unfortunately, updated statistics are not available. However, by 2016 about 16 per cent of all *ex officio* investigations in cartel cases had been triggered by leniency. COFECE (2016), 10 years since the implementation of the Federal Economic Competition Commission's Leniency Program: what has been its impact: <https://www.cofece.mx/wp-content/uploads/2017/11/Impacto10AnosProgramaInmunidad.pdf#pdf>.

23 Pursuant to COFECE (2019) COFECE in numbers 2018: www.cofece.mx/wp-content/uploads/2019/03/CFCN2018_v270319.pdf, leniency applications dropped from 26 in 2016 to 15 in 2017 and 10 in 2018; complete figures for 2019 are not public yet, but according to COFECE (2019) COFECE Model. A Perspective of Institutional Structuring, as of June 2019 only 3 applications had been reported, indicating this trend is likely to present again for 2019.

COFECE engaged in a public consultation process to draft new and additional regulations to the leniency programme, which in fact were recently voted and approved. These, however, had not been published nor entered into force by the closing of February 2020.

According to COFECE's 2018–2021 Strategic Plan, the agency continues to aim to promote leniency applications as a cornerstone of cartel enforcement.

As for criminal prosecution, during 2019 COFECE lodged a second referral, again with regard to cartel behaviour in the health sector.

iii Outlook

In 2020 COFECE's investigative authority is likely to follow up and possibly conclude some of the three cartel investigation cases announced in the past year, namely marketing of gasoline and diesel, renewal and upkeep of technology and systems for highways and corn starch,²⁴ along with other previously published and still ongoing investigations in liquefied petroleum gas, public procurement of iron, highway maintenance, production and marketing of sugar and recruitment of professional soccer players.²⁵

Once the investigation is completed, the Investigative Authority will assess whether to close the file or to formally charge alleged wrongdoers with a probable infringement, to proceed to a second – trial-like – phase to be resolved by the Plenary. Cartel investigations at the second-level stage²⁶ during the upcoming year include:

- a* alleged price fixing in the production of tortilla in Chiapas;²⁷
- b* alleged price fixing in the supply of gasoline and diesel in Baja California;²⁸
- c* alleged price fixing and market allocation in the production distribution and marketing of medicines;²⁹
- d* the brokerage of debt securities where price fixing or output restriction is alleged;³⁰
- e* alleged bid-rigging in the provision of laboratory studies and blood banks to the public health sector.³¹

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

Consistently with international trends and best practices, the Law provides for a catalogue of vertical restrictions and abuse of dominance situations that, under specific market circumstances, may raise anticompetitive concerns, namely:

- a* vertical non-compete agreements;
- b* resale price maintenance and imposition of resale conditions;
- c* tied sales;

24 COFECE Files DE-009-2019, IO-003-2018, IO-004-2018.

25 COFECE Files DE-22-2017, DE-20-2017, IO-004-2017, IO-005-2017, IO-006-2017 and IO-002-2018.

26 COFECE (2019), 15 Relevant Actions in 2018. Retrieved from <https://www.cofece.mx/wp-content/uploads/2019/01/15-del-18-verfinal.pdf#pdf>.

27 COFECE File DE-043-2017.

28 COFECE File DE-022-2015.

29 COFECE File IO-001-2016.

30 COFECE File IO-006-2016.

31 COFECE File DE-011-2016.

- d* exclusivities including territorial or customer allocation among non-competing parties;³² exclusive supply, distribution or sale; benefits based on exclusive rights; or exclusive resale restrictions;
- e* refusal to sell available and regularly offered goods;
- f* boycott (i.e., joint pressure to force third-party action or inaction or to penalise it);
- g* predatory pricing and cross-subsidies;
- h* discriminatory pricing;
- i* raising rivals' costs; hindering third parties' production processes or artificially reducing demand; and
- j* anticompetitive use of essential inputs through discriminatory sale, refusal to sell, or margin squeeze.³³

The Law acknowledges that conduct falling within any of the above descriptions may cause both positive and negative effects in the marketplace. As a result, relative monopolistic practices will only be illegal if (1) parties hold – joint or individual – substantial market power; (2) the object or effect of the conduct is foreclosing or blocking third-party access to the relevant or related markets or creating exclusive advantages; and (3) efficiencies arising from the conduct are not enough to counterweigh possible market harm, to the benefit of the competition process and creating overall consumer welfare.

In the presence of all three of these conditions, the practice will be illegal and may be fined with up to 8 per cent of the wrongdoer's annual accruable income. As is the case in absolute monopolistic practices, the agency will order the practice to cease while the affected parties may recover damages or losses through private litigation. Individuals acting on behalf of the dominant firm or facilitating the conduct may also be subject to civil fines and disablement, although not to criminal liability, which is reserved for cartel conduct.

Conversely to cartel cases, settlements for relative monopolistic practice cases are available and a relatively common path to terminate an investigation. Applicants must show commitment to cease the investigated practice and restore the competition process. If offered remedies are viable and effective, the agency will either waive or reduce the fine. This process, however, will not exclude private enforcement by affected parties. While no case was terminated through commitments during 2019, in the past few years COFECE has been increasingly investigating and penalising breaches to ongoing commitments. As is mentioned below, courts have been also active in analysing and interpreting the matter.

i Significant cases

During the past year COFECE concluded two relative monopolistic cases:

- a* an investigation on refusal to sell in the credit information market. The dominant agent was fined US\$1.46 million for refusing to provide access to basic credit information as obliged by the applicable laws thereby blocking market access to a competitor;³⁴ and
- b* an investigation on refusal to provide ground transportation passenger services to and from Cancun International Airport. COFECE considered that the airport operator

³² Allocation among competitors would update an absolute monopolistic practice.

³³ The action consisting in reducing rivals' margin by increasing the cost of an essential input, while lowering the price of the downstream good.

³⁴ COFECE File DE-016-2015.

restricted taxi options between 2010 and 2018 (at least) causing an estimated 8 per cent overcharge for users; the airport operator was ordered to allow access to all parties holding the corresponding permit and fined US\$3.85 million.³⁵

Dealing with court precedents, very interesting decisions were issued in relation to commitments. First, the courts decided that commitments cannot waive legal rights or actions or will be invalid.³⁶ Regarding commitment breach, the court decided that commitments are different in nature, whether substantive (i.e., those related directly with correcting the conduct that raised antitrust concern) or formal (i.e., those that allow monitoring of substantive commitments); breaches should be consistently differentiated and fined accordingly.³⁷

The IFT, in turn, closed a number of files related to abuses of dominant position that were not upheld, including the investigation against Telcel, for alleged predatory pricing, discrimination and margin squeeze in the market of fixed public lines,³⁸ and the investigation for alleged tied sales, exclusivities and predation in marketing services in the broadcasting television market.³⁹

ii Trends, developments and strategies

Pursuant to COFECE's 2018–2021 Strategic Plan, COFECE plans to achieve effective law enforcement by promoting founded claims and referring to market intelligence and screening to directly detect anticompetitive practices.⁴⁰

In practice, COFECE holds a significantly high standard to process a claim. During 2017, a total of 38 claims were dismissed. Pursuant to COFECE's official figures, the numbers are not improving; during 2018; another 39 claims are reported as dismissed, and by the end of the third trimester, the number had already reached 37.⁴¹ COFECE should revise its own standards for dismissing claims to be able to improve enforcement results and meet its goal to promote claims.

iii Outlook

COFECE has announced new investigations in the markets of accounting affiliation services, liquid gas petroleum and ground transportation services to and from the Mexico City International Airport.⁴²

35 COFECE Files DE-008-2016.

36 Second Specialised Court A.R 10/2015

37 First Specialised Court A.R 173/2017

38 IFT File AI/DE-003-2016.

39 IFT File AI/IO-002-2016.

40 Strategic Plan for 2018–2021, COFECE, Mexico City.

41 COFECE (2019) COFECE in numbers 2018 and COFECE (2018) COFECE in numbers 2017: https://www.cofece.mx/wp-content/uploads/2018/06/LCN_COFECEenNumeros_APP.pdf#pdf. Note that public information does not show the type of infringement that was covered by these claims and thus, unprocessed claims could relate to either absolute, relative monopolistic practices or unlawful concentrations.

42 COFECE files DE-008-2018, DE-044-2018 and DE-013-2018.

COFECE will of course, also continue focusing on two previously launched and still ongoing investigations in e-commerce platforms, marketing, storage and transportation of oil and related markets.⁴³

In terms of charged vertical infringements, the COFECE Plenary will be dealing with the investigation on refusal to sell in the wholesale salt market.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

As anticipated in Section I, the 2013 and 2014 structural changes to the competition framework led to the provision of incremental tools for competition enforcement, including the power to conduct market investigations.

While many jurisdictions (Mexico included) allow for advocacy tools, such as market studies, to generally assess market conditions in a given industry, market investigations in Mexico resemble the UK tool in the sense that the competition enforcer will be entitled not only to assess competition in the investigated market and locate the sources of the competition problem but also to impose remedies.

These powers allow COFECE not only to assess competition conditions in each market but also to detect and correct the conditions leading to these problems – such as barriers to competition or essential input access restrictions, whether structural, regulatory or behavioural.

This tool is intended for markets in which anticompetitive conditions arise from a series of factors that would not easily be captured through traditional competition enforcement tools, calling for overall correction.

At least eight market investigations have been initiated to date, most of which relate in some way to anticompetitive regulation or public actions. Success rate, however, is not encouraging with three closed investigations due to a lack of evidence, three pending and only two files resolved with actual remedies tackling effective competition problems.⁴⁴

In terms of regulated markets, COFECE has additional preventive powers, for example, to revise and authorise *ex ante* participation in certain bids or procurement processes, mainly in regulated sectors. Of course, one of the main topics connecting competition and regulation is carried out in the telecoms arena, by the IFT.

i Significant cases

Major developments in market investigation cases include:

- a* the investigation into aeroplane fuel. COFECE opening this file implies it suspects an absence of effective competition conditions and the need for corrective measures to restore the competition process;⁴⁵

⁴³ COFECE files IO-004-2016 (milk) and DE-040-2016 (laboratory tests and certifications in the rubber industry) were not further pursued by the Investigative Authority due to lack of evidence of an infringement.

⁴⁴ As noted below, effects on one of these, however, were significantly restricted by the courts.

⁴⁵ COFECE File IEBC-002-2019.

- b* the investigation into card payment systems. This ongoing investigation has caught the attention of practitioners since, due to the investigated market, the final impact could be very relevant;⁴⁶ and
- c* the preliminary decision indicating the existence of regulatory barriers to competition in the supply of raw milk to the dairy industry in Chihuahua. The file is still being processed and might be resolved in the upcoming year by the Plenary, which will revise the Investigative Authority suggestions along with the arguments put forward by the affected parties, to assess whether definite correction (in this case a recommendation to the local Congress to change legal provisions) is in order.⁴⁷

At the judiciary level, the first relevant decisions regarding market investigation proceedings were issued in 2019. Specifically, the Supreme Court decided it is the sector regulator and not COFECE, which holds ‘primary jurisdiction’ over a regulated market. This means that COFECE can only recommend the adoption of measures but cannot supersede the original regulatory authority of the executive branch by directly indicating how to regulate. This has a definite impact in the strength and reach of this tool when it comes to regulated markets and will certainly be a landmark resolution for future cases.⁴⁸

ii Trends, developments and strategies

As anticipated, COFECE has, for some time now, focused heavily on preventing and correcting anticompetitive impacts arising from government actions. In addition to market investigation tools, COFECE has made use of its advocacy tools to raise awareness on how uneven public policy may deeply affect market structures.

In this regard, COFECE has analysed and publicly discussed the competitive impact of some laws and drafts (e.g., the Tabasco Procurement Law, the Draft Transparency of Financial Services Law, Ports Law and INFONAVIT regulations) including recommendations aimed at protecting or enhancing competition. In particular, during 2019 COFECE issued antitrust opinions against regulation that would endanger the (competitively desirable) vertical independence in the Federal Electricity Commission.

These advocacy tools have produced practical effects, for example, the elimination of ASA exclusive rights for the supply of fuel for planes in Mexican airports. They also signal the markets that have a particular relevance or interest for COFECE.

iii Outlook

In the upcoming months, COFECE may focus significantly on its recently launched market study research on the retail food and beverage market. This is an ambitious project that will provide relevant insight for several industries and could lead to further action in terms of enforcement.

⁴⁶ COFECE File IEBC-005-2018.

⁴⁷ COFECE File IEBC-002-2017. For press release (English) refer to <https://www.cofece.mx/wp-content/uploads/2018/12/COFECE-056-2018-English.pdf>.

⁴⁸ First Specialised Court A.R. 142/2018.

V STATE AID

In contrast with what happens in other jurisdictions, in Mexico competition law does not include specific provisions or processes for the competition agencies to challenge state aid from an antitrust perspective, implying no significant cases, trends, strategies or others can be identified.

Note, however, this does not mean governmental actions or decisions (whether federal, state or local) will be excluded from competition principles. On the one hand, competition agencies could deal with these through advocacy tools (market studies and non-binding opinions) and, whenever possible, through market investigations. In addition, and as noted in our Introduction, competition principles flow directly from the Federal Constitution, which directly protects free competition and free entry as a fundamental right; this opens the door for independent constitutional processes (e.g., *amparo* actions) to be evaluated whenever a state decision fails to honor these principles.

VI MERGER REVIEW

The merger control regime in Mexico is structured based on *ex ante* review of relevant transactions. The Law sets forth specific economic thresholds to determine which transactions will require mandatory notification and approval before closing.

The process will start by filing a notification of concentration; the agency is empowered to request basic and additional information before the staff submits its recommendation to the Plenary, who may reject, authorise or impose remedies to the transaction. Once a concentration has been approved, it cannot be challenged again for its competitive effects in the marketplace, except if approved based on false information. Note that the only available means to challenge a decision made under the Law is a constitutional *amparo* trial, which based on expected timings is usually not used for these purposes.⁴⁹

Ex ante assessment, however, will not cover all merger control enforcement needs, as transactions lying below the notification thresholds may also raise anticompetitive concerns that need to be addressed.⁵⁰ Additionally, since the Mexican regime is suspensory, there may also be gun-jumping cases – whether involving firms that notified in time but did not wait for clearance, or companies simply not filing at all. These infringements will be addressed by *ex post* enforcement, usually involving fines that can reach 8 per cent of the parties' annual accruable income in case of unlawful concentrations, or up to 5 per cent of such income as a penalty for closing before receiving clearance (for mandatory notice cases). Cases involving the latter have been increasingly common in recent years.

i Significant cases

In terms of *ex ante* tools, the most relevant transactions recently revised include:

- a* *Walmart/Cornershop*. This was the first digital platform case analysed by COFEC. To the surprise of international practitioners and agencies, the transaction was rejected

⁴⁹ Explaining the absence of judicial precedents in the topic.

⁵⁰ This is the reason why particularly complex cases may be voluntarily filed, to increase parties' certainty even when economic thresholds are not triggered.

based on the arguments that Walmart may deny its competitors access to the platform, or that Walmart's competitors may decide to leave the Cornershop app to avoid sharing their data with Walmart.⁵¹

- b The Walt Disney Company/Twenty-First Century Fox.* The parties filed notice before both COFECE and the IFT showing a new example⁵² of possible overlap between both agencies. COFECE unconditionally authorised the transaction with regard to film distribution for cinemas, home entertainment licensing (audio/video), non-digital music licensing; live entertainment and general licensing. The IFT granted a conditional approval of the transaction pursuant to risks associated with the provision and licensing of pay-TV in the sports and factual categories (including cultural, documentary and reality shows). The decision includes structural remedies consisting in the divestiture of the entire Fox Sports business, as well as behavioural measures for the factual category, including separate provision and licensing of Disney & Fox factual content for both pay and audio TV and internet.⁵³
- c Natura/Avon.* This transaction involved the merger of two entities involved in the beauty and personal care industry that historically have participated in direct selling. The transaction was approved by COFECE after a thorough analysis of the position of the parties in the industry and the market dynamics.

In terms of *ex post* merger control, COFECE closed two investigations for unlawful concentration (milk and marketing of gasoline and diesel markets) without pursuing charges in a trial-like phase. The IFT, in turn, decided to pursue an unlawful concentration case for a series of unauthorised broadcasting transfers.⁵⁴

In terms of penalties, most COFECE cases refer to failure to notify a concentration:

- a In Nestle/Lala,* parties were fined an aggregated amount of US\$420,519.
- b In BorgWarner/Remy Holdings International,* parties were fined a total of US\$155,074.
- c In Banco Ve por Mas/Bankaool,* parties were fined US\$80,138.

COFECE clarified the fine in the latter two was reduced based on the fact that the parties accepted their responsibility for not notifying the transaction.

Regarding court cases, the specialised courts have issued non-binding criteria stating that: (1) merger guidelines are not binding but COFECE may refer to them, as this adds to legal certainty; (2) legal thresholds set forth in the Law refer to different scenarios without being exclusive.⁵⁵ More recently, a first instance court interpreted that, whenever a claim for unlawful concentration is filed while a merger notice is being processed, COFECE needs to reassess whether the facts that are the object of the claim are equal to those addressed in the merger notice, before dismissing the claim.⁵⁶

51 COFECE File USE/CNC-004/2016; COFECE File CNT-006-2017.

52 Following *AT&T/Time Warner*. IFT File USE/CNC-004/2016; COFECE File CNT-006-2017.

53 IFT File P/IFT/110319/122; COFECE File CNT-126-2018.

54 IFT File AI/IO-001-2016.

55 Second Specialised Court. A.R. 1/2017.

56 First Instance Specialised Court J.A. 121/2019; currently under appeal.

ii Trends, developments and strategies

Most regulatory efforts carried out in 2019 refer precisely to the merger framework. The regulatory provisions were changed to clarify how COFECE will carry out its obligation to notify the parties of detected antitrust concerns in a notified transaction and to clarify the proceeding to penalise failure to gain pre-merger clearance. In terms of efficiency, COFECE also updated its regulations for electronic submissions. As of January this year, all submissions must be made through digital means.

COFECE will be carrying out an assessment of *ex ante* impact during 2019. Enforcement and penalties arising from failure to notify or gain pre-merger clearance are becoming more common. Companies are advised to duly analyse competition thresholds in the jurisdiction to avoid unnecessary risk.

Moreover, one of the most relevant topics of the past year involves the IFT contesting jurisdiction over a digital platform merger. Even when arguments are not yet public, it seems the IFT believes that it holds jurisdiction over digital platforms which appears to be a too-wide scope for the regulator's reach and would give the IFT clear ascendancy over non-telecom and broadcasting sectors, where marketed through digital means. In clear tension with this, as anticipated, COFECE has consistently publicised interest in digital markets that are perceived as the future challenge for competition enforcement. In other words, both agencies have clear interest in gaining jurisdiction over the matter; consistently with international trends, both appear to regard digital markets as the future of competition enforcement and want to make sure they take part in this. The decision in this regard should be expected for early 2020.

iii Outlook

COFECE has been clear in its interpretation that merger control needs to be addressed in an *ex ante* manner, owing to the difficulties in restoring competition once a concentration has been completed. In this sense, we can expect to see COFECE further penalising any breaches to the obligation to secure clearance before closing.

VII CONCLUSIONS

As noted, competition enforcement in Mexico has evolved significantly and even when the agencies are becoming more sophisticated and aggressive in their enforcement efforts, the antitrust arena worldwide is encountering interesting challenges. Changes are obviously expected, either through policy, or amendment to legislation. The Law provides for tools of different scopes, nature and objectives to reach different enforcement needs.

Given recent budget cuts, enforcers are tending to be more strategic and careful with the use of their powers. Recent *ex ante* and *ex post* evaluations of their work as well as general studies of market conditions in Mexico are shedding more light on planning and strategic interventions.

Budget cuts can also create a problem in terms of specialisation and technical capability for the agencies, as very technical officers are leaving the regulators because of salary reductions in government.

In terms of COFECE, enforcement still appears to be highly focused on cartel conduct, although vertical restraints and market investigations are gradually getting more attention. In the merger control arena, COFECE has been showing a more aggressive approach to formal infringements (i.e., failure to obtain pre-merger clearance) as shown by recurrent fines.

COFECE has also become more technical in its analysis of mergers, using more sophisticated economic tools and taking more time in complex cases, but also trying to reduce time frames in less complex cases. The use of electronic notifications systems has also helped in the reduction of the time it takes from notification to final resolution. Massive requests for information in cases involving overlaps is becoming an unfortunate trend.

Despite the interest shown in preventing and correcting anticompetitive effects arising from regulation or governmental decisions, the available tools in the law are not quite effective. Strengthening COFECE's powers or incorporating further processes in this regard would be desirable, especially now that judiciary interpretation has further restricted the agency's powers in this matter.

Competition enforcement outside of the administrative arena (e.g., criminal prosecution and private litigation) this year showed some (although limited) development, with the second criminal referral. The civil arena has not shown significant developments except for the creation in 2018 of the Unitary Civil and Administrative Courts Specialised in Competition, Broadcasting and Telecom Matters for the First Circuit, for the attention of private litigation to recover damages caused by anticompetitive behaviour.⁵⁷ With some important traditionally claimant firms setting their eyes in the Mexican market, this trend could be reversed very quickly.

Overall, competition enforcement is becoming more mature, increasingly dealing with more challenges and complex cases. This will likely allow for other competition areas to flourish and become effective complements for government action in this matter.

⁵⁷ Official Gazette of the Federation, Counsel of the Federal Judiciary, 14 December 2018.

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ISBN 978-1-83862-493-4