THE DOMINANCE AND MONOPOLIES REVIEW

FIFTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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Maurits Dolmans and Henry Mostyn

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PREFACE

Previous editions of the *Dominance and Monopolies Review* spoke of the law of abuse of dominance undergoing evolutionary – rather than revolutionary – change. Although we do not yet see competition lawyers mounting the barricades, abuse of dominance law appears to be entering a phase of more rapid development. Increasing international protectionism in industrial policy, overlapping parallel investigations, novel theories of harm deployed in rapidly changing markets, and around 100 jurisdictions applying competition law (often in starkly different ways) mean that it is harder than ever before for businesses to understand how to regulate their conduct.

This Fifth Edition of *The Dominance and Monopolies Review* is, therefore, more welcome than ever. As with previous years, each chapter summarises the abuse of dominance rules in a jurisdiction, as well as providing a review of the regime's enforcement activity in the past year and a prediction for future developments. From the thoughtful contributions of the specialist chapter authors, this editorial – as in previous years – attempts to identify a common theme to global competition enforcement. This year's theme is 'fairness'.

Competition regulators have recently emphasised that they see the role of competition enforcement as ensuring that everyone has a 'fair chance', creating 'fair conditions' in the markets, 'keeping markets fair' and sending 'a message of fairness'. It is fair enough in political discourse to explain competition policy in simple terms, but using them as criteria for a finding of infringement creates serious risks of antitrust populism, endangering the rule of law. It is not always clear what is meant by 'fair'. Fairness can mean different things to different people in different countries at different times – for example, equality (everybody should receive the same), equity (rewards are somehow allocated in proportion to deservedness) or need (those with the greatest need are protected).

And some concepts of fairness can be diametrically opposed to the goals of competition law. Equality of outcomes (i.e., the notion that everyone should receive an equal share) contradicts the purpose of competition. Equality of resources, cooperation, and sharing of information may facilitate the ultimate evil of antitrust – collusion. Equality of treatment (in the EU at least) is inconsistent with the principle that only dominant companies are subject to special responsibilities. And fairness in the sense of sharing assets conflicts with the rule that only essential facilities and state monopolies have a duty to assist rivals. Indeed, requiring such asset-sharing depresses innovation and investment in resources. The invocation of 'fairness' appears to be a tool to justify political intervention in the decision-making process, and creates the risk of arbitrary decision-making.

This is not to say that fairness has no role in competition law. But in our view, fairness is best achieved by relying on the following more precise and better-defined concepts: consumer welfare and allocative efficiency as the goal of competition law; competition on the merits

as the criterion for assessing a firm's unilateral conduct; proportionality and 'useful effect' as benchmarks for remedies; and due process and the rule of law as the hallmark of a proper procedure for applying the law.

The developments from the last year described below illustrate how 'fairness' can be applied in different ways in the antitrust context. While ostensibly these cases may refer to fair pricing, fair conduct, or fair processes, at core they are about one of the four concepts outlined above.

The first development is the return of unfair or excessive pricing cases – at least on the eastern side of the Atlantic. In the UK, the Competition and Markets Authority (CMA) imposed a record £85.2 million fine on Pfizer (as well as a £5.2 million fine on Flynn Pharma) for increasing the price of an anti-epilepsy drug by 2,600 per cent overnight. The EU Commission has recently opened a probe into Aspen Pharma's pricing of cancer drugs, with its press release referring to 'unjustified price increases of up to several hundred per cent'. (The Italian authority has already adopted an infringement decision against Aspen concerning the same conduct.) And Gazprom's recently proposed commitments to the EU Commission include price review mechanisms based on competitive price benchmarks. In *Facebook*, the German antitrust authority is reviewing Facebook's imposition of allegedly unfair privacy terms.

The renewed focus on excessive pricing is not only limited to Europe. In China, an authority has imposed fines on five gas suppliers that were determined to be charging customers unfairly high prices. In Israel, declarations of excessive pricing have led to class actions against Tamar (in the natural gas market) and Tnuva (in the dairy product market).

By contrast, Patricia Brink of the US Department of Justice recently discussed whether excessive prices are a matter for competition enforcement. She stated, 'in the United States, both historically and at present, the answer is an unequivocal no'. Ms Brink pointed to the statement by Justice Scalia in *Trinko* that the opportunity to charge monopoly prices is what attracts business acumen, induces risk taking, promotes innovation and encourages economic growth.

The conflicting positions, however, are not necessarily irreconcilable. In the CMA's *Pfizer/Flynn* decision, the drug at issue, phenytoin sodium, was first synthesised in 1908 and has not changed since then. Flynn acquired the distribution rights in 2012, at the time phenytoin sodium was debranded (and, therefore, no longer subject to price regulation). Around 48,000 patients in the UK still take the capsules, and these patients cannot be changed to a new manufacturer's product without risking therapeutic failure and toxic side effects. The CMA considered that the 2,600 per cent price increase at the time of debranding was excessive compared to the costs incurred and a reasonable rate of return. In these circumstances, it is quite difficult to see on its face how the decision risks restricting innovation or investment in the way that worried Justice Scalia in *Trinko*. The CMA's reasoning is that the fact epilepsy patients are locked in to one manufacturer's drug permitted the excessive price hike; the price had nothing to do with risk taking, investment, or innovation because there had not been any in very many years.

This is presumably what Advocate General Wahl had in mind when, in his recent opinion in the Latvian collecting society case, he advised that an excessive price cannot exist in a free and competitive market. Concerns only arise if there are legal barriers to entry or expansion and there is a legal monopoly (which, in effect, existed in the CMA case because official guidance prohibited switching patients to a different manufacturer's drug).

Indeed, the excessive-pricing cases are rare examples of enforcement against exploitative abuses – where a firm uses its market power or privileged position to extract rents from consumers directly, thereby reducing consumer welfare. As Advocate General Wahl recently advised, the prices are abusive because 'being excessively high, they exploit customers'. That requires there to be an excess (a 'significant difference') between the price actually charged and the competitive price, and for there to be no valid justification for the difference. In our view, referring to a more amorphous 'unfairness' standard makes this already difficult task only more tricky.

The second development concerning fairness is the continued focus on the licensing of standard essential patents (SEPs) on fair, reasonable, and non-discriminatory (FRAND) terms. In 2015, China's NDRC fined Qualcomm $975 million for failing to license its SEPs according to its FRAND promise. In December 2016, the Korean Fair Trade Commission (KFTC) followed suit, fining Qualcomm $854 million. In essence, Qualcomm engaged in a variety of interrelated behaviours that together excluded rivals from the market and allowed Qualcomm to impose unfair terms and conditions: a refusal to license SEPs to rival modem chipset makers, thus requiring device makers who buy and use these chipsets to take a licence directly from Qualcomm. Qualcomm then imposed unfair terms on device makers, including a royalty-free cross-licence that provided it with a unique advantage over rival chipset makers (Qualcomm was the only chipset maker that could offer its customers the full package of SEPs and non-SEPs, including patents from all other device makers). If device makers objected to the demand to cross-license their patents for free, Qualcomm refused to supply chipsets. 'No license, no chips', as the US Federal Trade Commission put it in a parallel claim against Qualcomm.

The Taiwan Fair Trade Commission is investigating similar conduct. Likewise, in January 2017, in conjunction with Apple initiating litigation against Qualcomm, the US FTC sued Qualcomm for its SEP licensing practices. Finally, the European Commission is poised to adopt decisions against Qualcomm for selective predatory pricing and loyalty rebates. This series of investigations and cases on three continents is worth watching closely.

In a related development, a UK court has ruled, for the first time, on what constitutes a FRAND rate. Mr Justice Birss held that that there is only one FRAND rate, and this should be determined (as a first step) by looking at a wide range of comparable licences.[1] In terms of the interaction with competition law, the judge found that there is no correlation with what is a contractual FRAND offer and what is anticompetitive. For a price to be excessive under Article 102 TFEU, it has to be 'substantially more than FRAND' (i.e., the price can be 'unfair' and in breach of the contractual FRAND promise, but still not 'unfair' according to competition law). Conversely, the judge found that a price can be discriminatory and in breach of the contractual FRAND promise only if it also violates competition law – a discrepancy that remains puzzling and may be explored on appeal.

The underlying purpose of the FRAND undertaking is to secure a fair and reasonable reward for innovation while avoiding a hold-up and holdout. Competition law can intervene to prohibit the conduct of SEP owners if they use their market power gleaned through the standard to restrict competition (e.g., through premature litigation). The touchstone for

1 The judge held that the FRAND terms are the terms that a truly willing licensor and truly willing licensee would agree upon in the relevant negotiation in the relevant circumstances absent irrelevant factors, such as hold-up and holdout.

the assessment is whether the conduct deviates from competition on the merits and harms the competitive process. The difference in what is 'fair' in the contractual FRAND promise and in competition law contexts (identified by Mr Justice Birss) confirms the inherent ambiguity underlying 'fairness' as a concept. The concepts developed in SEP cases could also appropriately be applied in other cases where IP owners violate legitimate expectations and use hold-up techniques to extract unreasonable royalties.

The third development concerns the debate, discussed in previous editorials, of the circumstances in which a full effects analysis is necessary to prove an abuse of dominance. Advocate General Wahl's Opinion in *Intel*, discussed in the EU chapter of this book, affirms the general proposition that competition law analysis should not be purely abstract and should not deal with mere possibilities. Outside the narrow exceptions of 'by nature abuses', a 'fully-fledged effects analysis must be performed'. This is because, ultimately, 'EU competition rules seek to capture behaviour that has anticompetitive effects'. (In *Unwired Planet,* Mr Justice Birss similarly recently held that outside 'by nature' abuses, 'a close analysis of the actual effects would be required'.)

The move to a more rigorous effects analysis is mirrored in other jurisdictions. In Australia, proposed new legislation will introduce an effects standard for assessing unilateral conduct. The Competition Commission of India in *XYZ v. REC Power Distribution Company Ltd* confirmed that establishing a denial of access abuse in India requires proving 'anti-competitive effect/distortion in the market in which denial has taken place'. This reinforces older statements from the Indian Competition Appellate Tribunal in *Schott Glass* that, unless the conduct at issue harms competition and, ultimately, consumers, there can be no abuse. And in the KFTC's *Qualcomm* decision, the exclusionary effects caused by Qualcomm's conduct were an important part of the case, with the KFTC insisting on such proof as a precondition to finding an infringement.

In these instances, the courts' and authorities' enforcement is not guided solely by seeking to achieve a 'fair' outcome. Rather, the cases examine the factual, legal and economic circumstances to assess whether there is a deviation from competition on the merits and harm to the competitive process. Those are the circumstances in which an abuse of dominance can properly be established.

The fourth development on 'fairness' relates to the continued international focus on due process. Here, the picture is mixed. In relation to competition law in Korea, for example, Gregory Sidak wrote a colourful open letter to President Trump criticising the KFTC's decision in the *Qualcomm* case as being based on an 'autocratic brand of due process.' But a review of the KFTC's process in that case shows that it complied with and perhaps even surpassed many international norms on due process: for example, Qualcomm received access to the authority's file, had the opportunity to rebut the KFTC's preliminary concerns, appeared at multiple hearings and could cross-examine witnesses. The investigative team was completely separate from the decision-makers (the Commissioners), and the latter all read the entire file and attended all hearings. Qualcomm can also appeal the decision to an active and discerning judiciary – which has several times in the past overturned KFTC decisions. This is a contrast with the European Commission, where the case team is directly involved in both investigation and decision-making, and the Commissioner for Competition (let alone the College of Commissioners that decides the cases) does not read the file and does not attend the hearing. As explained in previous prefaces, this situation creates a serious risk of confirmation bias and, thus, undermining due process.

In contrast to Korea, there are troubling developments in India, where the government has passed legislation to dissolve the specialist Competition Appellate Tribunal (COMPAT), and replace it with a more general tribunal focused on company law. Worryingly, the legislation follows a number of high-profile instances of the COMPAT overturning decisions made by the Competition Commission of India (CCI) on due process grounds (e.g., *Hiranandani* and *GSK*). Even more worryingly, the legislation permits the government to remove tribunal members at any time by paying them three month's salary. These developments undermine one of the most basic principles of 'due process' in competition enforcement – that a full appeal on facts and law to an independent judiciary must always be available.

In conclusion, in our view it is unhelpful to discuss 'fairness' as the yardstick of competition law enforcement. Fairness is too subjective and vague a criterion for authorities to decide cases, or for firms to determine their commercial conduct. Experiments conducted by Kahnemann, Knetsch and Taylor show that humans have irrational conceptions of what constitutes a fair price.[2] For example, consumers perceive changes in price as unfair even if they are rational, reasonable and good for consumers in the long run. And consumers were almost unanimous in concluding that any increase in price because of a decrease in competition – for example, because of a store temporarily closing – was unfair. Importing these irrational biases into competition policy creates serious risks or arbitrary and inefficient results.

Instead, we should stick to the more objective and precise concepts of consumer welfare, competition on the merits, proportionality and due process. These concepts, which capture the same goals as 'fairness', are less ambiguous, relatively well defined in case law and less susceptible to lead to outcome-focused – instead of fact-driven – results.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this fifth edition of the *The Dominance and Monopolies Review*. We look forward to seeing what evolutions – or even revolutions – 2017 holds for the next edition of this book.

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Cleary Gottlieb Steen & Hamilton LLP
London
June 2017

2 Kahnemann, Knetsch, and Taylor, Fairness as a Constraint on Profit Seeking: Entitlements in the Market, *American Economic Review*, Vol. 76, No. 4 (September 1986), pp. 728–741.

Chapter 17

MEXICO

Luis Gerardo García Santos Coy, Mauricio Serralde Rodríguez and Jorge Kargl Pavía[1]

I INTRODUCTION

i Statutory framework

In Mexico, antitrust matters are governed mainly by Article 28 of the Political Constitution of the United Mexican States (the Constitution), the Federal Economic Competition Law (the Competition Law)[2] and the Regulatory Provisions of the Competition Law (the Regulations).[3]

The agencies in charge of enforcing the Competition Law and the Regulations, and in doing so, preventing and investigating anticompetitive conduct and vertical restraints are (1) the Federal Institute of Telecommunications (IFT), an autonomous constitutional body with exclusive jurisdiction over competition issues in the telecommunications and broadcasting sectors; and (2) the Federal Economic Competition Commission (COFECE), also an autonomous constitutional body with exclusive jurisdiction over competition matters in all areas and industries other than the broadcasting and telecoms sectors. This chapter refers to both agencies as the Antitrust Authorities.

The Competition Law is applicable to any private individuals or entities, profit or non-profit, government entities at national, state or municipal levels, associations, commercial chambers and associations, trusts or any other forms of involvement in an economic activity (economic agents).

In this regard, the Competition Law provides that monopolies, monopolistic practices and barriers which reduce, damage, hinder or condition in any way free and open competition in the production, processing, distribution or commercialisation of goods and services are forbidden in Mexico. For such purposes, the Competition Law establishes the specific provisions and proceedings applicable to the investigation of relative monopolistic practices (abuse of dominance), absolute monopolistic practices (cartel activity), concentrations

1 Luis Gerardo García Santos Coy and Mauricio Serralde Rodríguez are partners and Jorge Kargl Pavía is a senior associate at Creel, García-Cuéllar, Aiza y Enríquez SC.

2 The first Mexican competition law was enacted in 1993, and was subject to several amendments. In 2014, a competently new Competition Law was enacted, which became effective on 7 July 2014.

3 Both the Federal Economic Competition Commission and the Federal Institute of Telecommunications issued their own Regulations to the Competition Law, the first issued on 10 November 2014 (amended on 5 February 2016), and the second on 12 January 2015. It should be noted that, other than the Competition Law and the Regulations, there is no statutory guidance with respect to relative monopolistic practices; nevertheless, both COFECE and the IFT encourage economic agents to approach them to discuss, either formally or not, any questions they may have with respect to a specific matter.

(mergers and acquisitions), barriers to entry and the determination of the existence of essential inputs, and the determination of market power on behalf of an economic agent.[4] For purposes of this chapter, we will only look at relative monopolistic practices.

Relative monopolistic practices are similar to conduct analysed under the rule of reason in other jurisdictions, since for such conduct to be illegal, certain requirements must be met (as opposed to cartel activity, which is *per se* illegal) and, on a general basis, are carried out in vertical relationships within the production chain (between non-competing agents). Such requirements and practices are further detailed in Section IV, *infra*.

ii Antitrust Authorities

The supreme authority of each of the Antitrust Authorities is vested in its plenum, composed of seven commissioners, each with a term of office of nine years.[5] The commissioners are appointed by proposal of the President of Mexico,[6] and must be ratified by the Senate. Each Antitrust Authority also has a president, appointed by the Senate, for a four-year term. In most cases, decisions by the plenum are adopted by the majority vote of the commissioners, except for those cases in which a qualified majority is required, such as the designation or removal of the technical secretary and the head of the investigative authority.

Each of the Antitrust Authorities has a specific investigative authority in charge of all investigations for anticompetitive behaviour, including relative monopolistic practices, absolute monopolistic practices and illegal concentrations (mergers). These new investigative authorities (similar to a prosecutor) are in charge of conducting the investigation, as well as acting as prosecutor in the formal administrative procedures (following the formalities of a trial) in those cases involving conduct in which the Antitrust Authorities have gathered sufficient evidence of the existence of illegal conduct pursuant to the Competition Law.

Neither of the Antitrust Authorities has issued any specific key policy statement with respect to the investigation and prosecution of relative monopolistic practices – in

4 The proceeding to determine barriers to entry and essential inputs is similar to that in the UK regime. Such proceeding allows the Antitrust Authorities to: (1) issue recommendations to governmental authorities in order to eliminate legal provisions which unduly limit free and open competition, (2) order the corresponding economic agent to eliminate a specific barrier to entry, (3) impose asymmetric regulations with respect to an essential input; and (4) order the divestiture of assets or stock as necessary in order to eliminate any anticompetitive effects, which will only be imposed in those cases in which other remedies are not enough to eliminate the identified anticompetitive effects.

5 It should be noted that, upon the creation of both Antitrust Authorities, each of their commissioners were appointed for terms of three, four, five, six, seven, eight and nine years in order for their replacement to be staggered. As from the first time in which each new replacement is appointed, each commissioner will be appointed for a term of nine years.

6 The process for the appointment of commissioners is the following. All candidates shall successfully pass a test prepared by an evaluation committee (comprised by the heads of the Bank of Mexico, the National Institute for Evaluation of Education and the National Institute of Statistics and Geography) with the opinion of at least one education institution and in accordance with best practices. The evaluation committee then sends to the President of Mexico a list with three to five candidates for each available position. The President of Mexico then selects from such list the definitive candidate and sends it to the Senate for its ratification.

It should be noted that the Constitution also sets out the impediments to be a commissioner, such as, not having been Secretary of the State, Federal Attorney General, senator, federal or local representative, governor of any state or Chief Minister of the Federal District, within the year prior to appointment.

fact, none of their annual programmes expressly refer to such anticompetitive practices.[7] Notwithstanding the foregoing, and although none of these actions are aimed directly at preventing the existence of relative monopolistic practices, some actions provided for in the Antitrust Authorities' annual programmes will doubtless lead to the identification of potential relative monopolistic practices and therefore, cause investigations in this regard to be carried out.

II YEAR IN REVIEW

Because of substantial changes to Mexican antitrust legislation and the relatively recent creation of the Antitrust Authorities, many investigations initiated by the former Competition Commission are still ongoing; nonetheless, during the past year some important decisions in connection with several investigations have been issued by the Antitrust Authorities. The following chart contains a description of the investigations into relative monopolistic practices that have been concluded by the Antitrust Authorities since October 2014:

Recent investigations

Antitrust Authority	(File) Type of case	Resolution
COFECE	File DE-003-2015. Investigation involving tied sales, exclusive agreements and refusal to deal in the provision container shipping services and logistics.	Closed owing to lack of evidence.
COFECE	File DE-002-2015. Investigation involving refusal to deal, price discrimination and discriminatory treatment with respect to an essential input consisting of the provision of special marine diesel.	Derived from commitments on behalf of Pemex (investigated economic agent) to terminate the investigated practice, COFECE issued an early termination, imposing upon Pemex the obligation to fulfil such commitments.
COFECE	File DE-017-2013. Investigation involving refusal to deal and increasing competitors' costs in the market of the provision of storage and shipping services of non-crystallising honeys and their liquid-derived products.	Closed owing to lack of evidence.

7 COFECE's annual programme for 2017 includes specific actions aimed to: (1) expedite the merger review process by establishing an electronic system for the notification procedure; (2) conclude ongoing investigations of monopolistic practices, barriers to entry and essential inputs; (3) publish a document describing the general principles applicable to investigations carried out by the investigative authority; (4) publish a document for the analysis of collaboration agreements among competitors; (5) encourage a pro-competitive design for public tenders; (6) analyse the structure of the LP gas market; (7) develop workshops for the general public and government officials on economic competition matters; and (8) analyse disruptive technologies from a competition perspective (COFECE, 2017 Work Programme, available at www.cofece.mx/cofece/attachments/article/38/pat_2017.pdf).
IFT's annual programme for 2017 focuses on (1) encouraging consumers' access to better options for public telecommunications and broadcasting services by enhancing competition and free access to markets; (2) encouraging universal access to telecommunications and broadcasting services; (3) ensuring that telecommunications and broadcasting services are provided in accordance with international standards; (4) encouraging respect for users' and audience rights on behalf of service providers; and (5) strengthening the IFT as an institution. With respect to the enhancement of competition, the IFT intends to (1) review and update asymmetric regulations imposed upon preponderant economic agents; (2) issue guidelines for pre-merger filings; and (3) issue guidelines to define markets and competitive conditions. (IFT, 2017 Work Programme, available at www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/pat2017vf_0.pdf).

Antitrust Authority	(File) Type of case	Resolution
COFECE	File DE-015-2013. Investigation involving displacement of economic agents, hindering their access to the market or granting exclusive advantages in favour of one or more economic agents with respect to the access to parking spaces in Mexico City Airport for the provision of public transportation services.	COFECE imposed a fine of 63 million pesos on Mexico City Airport, as well as certain behavioural remedies.
COFECE	File DE-030-2011. Investigation involving tied sales and refusal to sell in the market of exportation of Mexican avocados to the United States of America.	Originally, the case was closed owing to the acceptance of remedies offered by the economic agent. Nonetheless, the economic agent failed to implement such remedies and was fined with 36.8 million pesos.
COFECE	File DE-026-2009. Investigation involving resale price maintenance, imposition of resale conditions and refusal to sell in the bulk distribution of magazines market in the Mexico City area.	Closed owing to lack of evidence.
IFT	File E-IFT/UC/DGIPM/PMR/0003/2013 and accumulated files. Investigation involving refusal to deal and hindering the production process or unduly reducing the demand faced by competitors in the market of the commercialization of TV content.	Closed owing to lack of evidence.
IFT	File E-IFT/UC/DGIPM/PMR/0008/2013. Investigation involving discounts subject to exclusivity and hindering the production process or unduly reducing the demand faced by competitors in the market of the provision of pay TV services in the state of Sinaloa.	Closed owing to lack of evidence.

On the other hand, the most recent investigations initiated by the Antitrust Authorities into relative monopolistic practices and to determine the existence of barriers to entry and essential inputs are the following:

Ongoing investigations

Antitrust Authority	Type of case	Case/market
COFECE	Relative monopolistic practices	File DE-004-2016 – Hindering the production process or unduly reducing the demand faced by competitors in the market of the access to, and provision of, maritime port services in the States of Jalisco and Nayarit.
COFECE	Relative monopolistic practices	File DE-016-2015 – Market allocation or output restriction among non-competing economic agents, refusal to deal and hindering the production process or unduly reducing the demand faced by competitors in the market of the production, distribution and wholesale commercialisation of salt.
COFECE	Relative monopolistic practices	File IO-005-2015 – Exclusive dealership, refusal to deal and hindering the production process or unduly reducing the demand faced by competitors in the market of the production and marketing of live shows, operation and administration of entertainment centres for live shows and the automatic distribution and commercialisation of tickets.
COFECE	Relative monopolistic practices	File IO-001-2015 – Price discrimination and hindering the production process or unduly reducing the demand faced by competitors in the market of the generation, processing and commercialisation of credit information.
COFECE	Relative monopolistic practices	File DE-006-2014 – Tied sales, exclusive dealership and hindering the production process or unduly reducing the demand faced by competitors in the market of the production, distribution and commercialisation of gases in general.
COFECE	Existence of barriers to entry and essential inputs	File IEBC-001-2015 – Provision of air transportation services in the Mexico City International Airport.
COFECE	Existence of barriers to entry and essential inputs	File IEBC-002-2015 – Provision of public cargo transportation services in the State of Sinaloa.
COFECE	Existence of barriers to entry and essential inputs	File IEBC-001-2016 – Production, distribution and commercialisation of malt barley seed and grain in the brewing industry.

Antitrust Authority	Type of case	Case/market
COFECE	Existence of effective competition	File DC-002-2016 – Interconnection, rights of way and dragging rights for the provision of rail freight services.
IFT	Relative monopolistic practices	File AI/DE-003-2016 – Predatory pricing, price discrimination, increasing costs, margin-squeezing and hindering the production process or unduly reducing the demand faced by competitors in the market of the production, distribution and commercialisation of public telephony services offered to end users through public-use telephones in Mexico.
IFT	Relative monopolistic practices	File AI/DE-002-2016 – Refusal to deal, increasing costs, hindering the production process or unduly reducing the demand faced by competitors in the markets of interconnection services, access to broadband, corporate broadband, access and shared-use of active/passive infrastructure and the provision of dark fibre in Mexico.
IFT	Relative monopolistic practices	File AI/IO-002-2016 – Exclusive agreements, boycott and hindering the production process or unduly reducing the demand faced by competitors in the market of the sale of advertising spaces in free over-the-air and pay-TV in Mexico.
IFT	Relative monopolistic practices	File UCE/DE-003-2014 – Refusal to deal, boycott, price discrimination and hindering the production process or unduly reducing the demand faced by competitors in the market of the sale of advertising space in broadcasting TV in Mexico.
IFT	Relative monopolistic practices	File UCE/DE-001-2014 – Predatory pricing, cross-subsidising, price discrimination and hindering the production process or unduly reducing the demand faced by competitors in the market of the commercialisation of telecommunications services, provision of internet services and distribution and commercialisation of contents transmitted through internet and pay TV.
IFT	Relative monopolistic practices	File E-IFT/UCE/DGIPM/PMR/0006/2013 – Refusal to deal, discounts subject to exclusivity and hindering the production process or unduly reducing the demand faced by competitors in the market of the distribution and commercialisation of electronic airtime recharges for mobile services in Mexico.

It is also important to mention that during the past year the specialised federal courts have issued several decisions involving procedural aspects of the investigations carried out by the Antitrust Authorities: in principle, the courts have supported the fact that economic agents subject to investigations by the Antitrust Authorities cannot – in principle – challenge any of their actions until a final resolution is issued. This means that even if an economic agent considers that a specific action by the Antitrust Authorities is contrary to the Constitution or implies a violation to the economic agent's constitutional rights, the agent must wait until a final decision is issued by the Antitrust Authorities, without any injunctive relief being available until then. In addition, a federal court has also issued a decision involving the protection of privileged client–attorney communications.

Last, it is important to bear in mind that until now, it has been unclear what policy the Antitrust Authorities will follow with respect to the types of relative monopolistic practices that will be prosecuted. There are also certain aspects that remain unclear, such as the guarantee against self-incrimination.

III MARKET DEFINITION AND MARKET POWER

Similar to other jurisdictions, in Mexico, the definition of relevant market broadly encompasses two concepts: (1) the relevant product market, which refers to the goods and services involved in a specific analysis; and (2) the geographical market, which is the geographical area in which such goods and services are offered.[8]

i Relevant product market

The relevant product market includes all products or services that are considered substitutes. This is determined based on a substitutability test that may be supported by econometric and statistic tests.

Whether a product or service is a substitute for another product or service and hence, should be deemed a relevant product, is determined on a case-by-case basis, usually concerning the price, the product's or service's characteristics, and its intended purpose.

It is not uncommon for the Antitrust Authorities to carry out substitutability tests in terms of demand-side (and in some cases, supply-side) substitution, as well as the potential competition (e.g., the introduction of new technologies).

Because of the relatively recent creation of the Antitrust Authorities, there are still a limited number of precedents; therefore, it is not always possible to foresee what criteria will be applied when defining a specific relevant market – in the case of investigations. Nevertheless, the former Competition Commission issued several decisions across a wide number of industries that may be helpful in anticipating the approach that the current Antitrust Authorities may follow in a specific case.

ii Geographical market

The geographical market refers to the region, zone or place in which the relevant product is commercialised under similar distribution or provision conditions, without facing significant barriers both from the demand side and the supply side. This implies that the geographical market will correspond with the area in which an economic agent may increase the price of a product or service without attracting sellers from other areas, and without causing consumers to move to other areas to acquire the relevant product. A geographical market may be as broad as a global market or as limited as a specific zone or region within a city.

8 Pursuant to Article 58 of the Competition Law, the following shall be taken into account in defining the relevant market:

a the possibility of substituting a product or service for others, domestic or foreign, taking into account any technological capabilities, the extent to which consumers have access to substitute products and the time required for such substitution;

b the distribution cost of the product itself, of its relevant inputs; of its supplements and of substitutes from other regions and from other countries, including freight, insurance, tariffs and non-tariff restrictions, restrictions imposed by economic agents or by their associations, and the time required to supply the market from such regions;

c the cost and probabilities that users or consumers have to reach out to other markets; and

d federal, state or international legal provisions which limit access on behalf of users or consumers to alternative supply sources or access by suppliers to alternative customers.

The elements that determine the scope of the geographical area include legal restrictions, transportation costs and tariffs, and the life cycle of a product, among others. These elements determine the ability of consumers to move to another area or of suppliers to enter into a specific area.

The Antitrust Authorities also analyse the volume of imports and exports of a specific product, as well as their destination and origin, in order to determine whether a geographical market should be defined as national or international; more restrictive geographical markets are usually defined in those cases involving services that, owing to their nature, are only provided in specific areas.

iii Market power

In Mexico there is no specific market share threshold at which the existence of market power on behalf of one or more economic agents is presumed, and this must be analysed on a case-by-case basis: a high market share does not necessary imply the existence of market power, whereas a low market share does not necessary imply the absence thereof.

The Competition Law provides that in order to determine whether one or more economic agents have market power, the Antitrust Authorities must take into consideration (1) their market share and whether they can set prices or limit supply in the relevant market without their competitors being able to countervail such power; (2) barriers to entry; (3) the existence and power of their competitors; (4) access by the economic agents and their competitors to input sources; and (5) the economic agent's recent behaviour.

Additionally, the Antitrust Authorities take into account the products' or services' positioning in the relevant market, the lack of access to importations or the existence of high importation rates, and the existence of relevant price differences that consumers may face when reaching out to other suppliers.

The Competition Law provides for the possibility of joint market power (a concept introduced in the former Competition Law in 2011). When determining the existence of joint market power on behalf of independent economic agents, COFECE considers whether the corresponding economic agents differentiate themselves from the other agents participating in the relevant market, taking into account factors that favour common incentives or interdependent strategic behaviour, or that such economic agents show a similar behaviour (the IFT has not issued any regulations in this regard). It should be noted, however, that there are no legal precedents on this specific subject, neither by the former Competition Commission nor by the Antitrust Authorities and therefore, it is unclear the criteria that such authorities would follow when analysing this provision.

IV ABUSE

i Overview

Relative monopolistic practices (abuse of dominance) refer to certain behaviour on behalf of one or more economic agents that (1) falls within any conduct defined as such in the Competition Law; (2) is carried out by one or more economic agents which, individually or jointly, have market power in the same market as that in which the conduct takes place; (3) has or may have as purpose or effect, to improperly displace other economic agents from the relevant market or related markets, to materially hinder them from entering the market, or to establish exclusive advantages in favour of one or more economic agents.

In Mexico, conduct classified as relative monopolistic practices include exclusionary abuses, discrimination and exploitative abuses, all of which are addressed further below.

The Competition Law provides that a relative monopolistic practice will not be deemed illegal as long as the conduct generates efficiencies and has a positive impact on free and open competition, outweighing the conduct's anticompetitive effects resulting in benefits to consumers, in which case such conduct should be considered as competitive on the merits and therefore legal pursuant to the Competition Law.

In this regard, the Competition Law recognises as efficiency gains:

a the introduction of new products or services;

b the utilisation of leftovers, defective products or perishable products;

c cost reductions derived from the creation of new production techniques and methods, asset integration, increases in the production scale and the production of different products or services with the same production factors;

d the introduction of technological advances that produce new or improved products or services;

e the combination of productive assets or investments and their recoup that improves the quality or increases the usages for the products or services;

f improvements in quality, investments, and their recoup, opportunity and service that have a positive impact within the distribution chain; and

g any other factors that demonstrate the contribution to consumer welfare derived from the conduct outweighing its anticompetitive effects.

It should be noted from (g) that the list of efficiencies provided under the Competition Law is not exhaustive and so economic agents may submit evidence of additional efficiencies generated by an investigated conduct.

ii Exclusionary abuses

Relative monopolistic practices in the form of exclusionary abuse are tied sales; exclusive dealing; refusal to deal; boycotts; predatory pricing; exclusivity or discounts, incentives or benefits subject to exclusivity; cross-subsidisation; any conduct carried out by one or more economic agents whose direct or indirect purpose or effect is to increase other economic agents' costs, hinder their productive processes or reduce the demand for their products; denial of access to or price discrimination of an essential input; and margin squeeze.

Tied sales

This refers to the sale or transaction subject to the purchase, acquisition, sale or the obligation to provide a different product or service, usually different or distinguishable, or upon the basis of reciprocity. Tied sales must necessarily include a main product or service and a tied product or service, in which case the displacement or material hindering in prejudice of other economic agents must occur with respect to the commercialisation of the tied product or service.

Exclusive dealing

This refers to the sale of a product or service subject to the obligation not to use, acquire, sell, commercialise or provide the products or services produced, processed, distributed or commercialised by a third party.

Refusal to deal

This refers to a unilateral refusal to sell, commercialise or provide to a specific economic agent, products or services available and normally offered to third parties. It should be noted that on a general basis, this conduct requires that the economic agent refusing to deal does not have a valid justification for such a refusal in order to be deemed as illegal.

Boycott

This refers to an agreement among several economic agents or an invitation to these to exert pressure against an economic agent or to refuse to sell, commercialise or acquire products or services to or from such economic agent with the purpose of dissuading it from engaging in a specific conduct, retaliating against it or compelling it to act in a specific way.

Predatory pricing

This refers to the sale of products or services at prices lower than their variable median cost or lower than their total median cost but higher than their variable median cost, when there is evidence to assume that such losses will be regained through future price increases.

Specifically, when the Antitrust Authorities analyse this conduct with respect to multi-product companies, such authorities will also consider the distribution of the total median cost and the variable median cost between sub-products or co-products, for which the technical characteristics of the production, distribution or commercialisation process will be taken into account, as well as the economic principles applicable to the determination of costs. The median cost should be calculated for the period of time in which the conduct has been analysed. Additionally, in the event an investigation has been triggered as a consequence of a claim filed by a party, such party must provide the basis for the cost calculation referred to in its claim. Finally, the Antitrust Authorities should also consider that the corresponding economic agents may regain their losses when, in addition to having market power in the relevant market, there are arguments that they will maintain such market power when regaining such losses.

Discounts, incentives or benefits subject to exclusivity

This refers to the granting of discounts, incentives or benefits on behalf of producers or suppliers to purchasers subject to an obligation not to use, acquire, sell, commercialise or provide the products or services produced, processed, distributed or commercialised by a third party. This also refers to an obligation imposed by a purchaser on a producer or supplier not to sell, commercialise or supply to a third party the products or services subject to the transaction.

Cross-subsidisation

This refers to the use of profits made by an economic agent from the sale, commercialisation or provision of a product or service to finance the losses derived from the sale, commercialisation or provision of a different product or service.

Margin squeeze

This refers to the reduction of margins between the access price to an essential input provided by one or more economic agents and the price of the product or service offered to end consumers by those same economic agents, using for its production the same input.

iii Discrimination

Relative monopolistic practices in the form of discrimination consist of imposing different prices or sale conditions with respect to different customers or suppliers that should be considered in equal or equivalent conditions.

iv Exploitative abuses

Exploitative abuses are described by the Competition Law in the form of resale price maintenance and territory or customer allocation among non-competing economic agents. It should be noted that in Mexico excessive pricing is not considered illegal *per se*.

Resale price maintenance

This refers to the imposition of prices or other conditions upon a distributor or supplier with respect to the provision, commercialisation or distribution of products or services.

Territory or customer allocation

This refers to agreements between economic agents that are not competitors among themselves to fix, impose or establish exclusive commercialisation of distribution of products or services based on subject, geographical area, or determined time periods, including the division, distribution or allocation of customers or suppliers, as well as to the imposition of an obligation not to produce or distribute products or provide services for a determined or determinable period of time. It should be noted that should this conduct be carried out by competing economic agents, it will not be considered a relative monopolistic practice but rather an absolute monopolistic practice (cartel activity).

V REMEDIES AND SANCTIONS

i Sanctions

For participating in a relative monopolistic practice, a penalty of up to 8 per cent of the economic agent's turnover within the past year in which the conduct was committed may be imposed, excluding revenues originating from sources outside Mexico, as well as taxable income if it is subject to preferential tax treatment. When imposing a fine, the Antitrust Authorities will take various elements into account to determine the seriousness of the violation, such as the damaged caused, the indications of intent, the corresponding market share, the size of the affected market, the duration of the conduct, the corresponding economic agent's financial capacity and, if applicable, any obstruction to the Antitrust Authorities' actions.

ii Behavioural remedies

In those cases in which the Antitrust Authorities find an economic agent guilty of a relative monopolistic practice, in addition to the fine previously mentioned, the Antitrust Authorities may impose upon the corresponding economic agent an obligation to cease the sanctioned conduct.

The Antitrust Authorities may also impose injunctive relief during the investigation of relative monopolistic practices in cases in which the investigative authority considers that continuation of the conduct may cause damage that is difficult to repair or may cause

difficulties in guaranteeing the efficiency of the investigation. Such injunctive relief may consist, *inter alia*, of an order to suppress the conduct and an obligation to engage in or refrain from a specific conduct related to the investigation.

Finally, economic agents subject to an investigation of relative monopolistic practices may offer remedies consisting of cessation of such conduct to restore free and open competition to terminate the investigation by the Antitrust Authorities early, and even to reach a settlement obtaining a reduction to the applicable fine or not be fined at all. An economic agent may only apply for this benefit once every five years, and such application must be filed before an order of probable responsibility is issued by the Antitrust Authorities (such order is further addressed in Section VI, *infra*).

iii Structural remedies

In the event of repeated offences, the Antitrust Authorities may order the divestiture or sale of assets, interests or shares of the economic agents in order to eliminate the anticompetitive effects.

VI PROCEDURE

The Competition Law establishes an administrative procedure for the investigation of relative monopolistic practices that may be initiated *ex officio* by the Antitrust Authorities, at the request of the President of Mexico (directly or through the Ministry of Finance), at the request of the Bureau of Consumer Protection, or as a consequence of a claim filed by any party, even if it is not affected by the practice. It should be noted that the Competition Law provides that, to start an investigation, the Antitrust Authorities require the existence of an objective cause.

Investigations carried out by the Antitrust Authorities with respect to relative monopolistic practices are divided into two stages: the investigation stage and the administrative procedure.

In the investigation stage, the investigative authority must gather all evidence required to prove the existence of illegal activities. Such investigation stage may last between 30 and 120 business days from the date on which the order to begin the investigation was issued, a term that may be extended for up to four additional terms of between 30 and 120 business days.

During the investigation stage, the Antitrust Authorities may gather documents and information by written requests for information from parties that may have information useful to the investigation. Such requests usually include details of the relevant businesses, market data, information about the alleged infringement and copies of relevant documents.

The Antitrust Authorities may also carry out surprise visits (dawn raids) and request the use of the public forces for such purposes. Likewise, pursuant to the Competition Law, the Antitrust Authorities are authorised to seize documents or devices, as well as to question the economic agent's employees and officers.

The administrative procedure in the form of a trial is where the parties will be able to defend themselves against the allegations resulting from the investigative authority and any findings resulting from the investigation. During this second stage, both the investigative authority and the economic agent will be considered parties to the procedure.

The administrative procedure in the form of a trial begins within 60 business days of the conclusion of the investigation stage, in which the investigative authority must submit an opinion for the consideration of the plenum to either begin the trial phase or close the investigation.

In the event the plenum orders the beginning of the administrative procedure in the form of a trial, the Antitrust Authority will issue an order of probable responsibility to the accused economic agents (similar to a statement of objections), who then have 45 business days to submit arguments in their defence and to provide the relevant evidence.

The investigative authority then has up to 15 business days to respond to the agents' arguments. Once these 15 business days elapse, the Antitrust Authority will determine whether the evidence should be dismissed or admitted, and will schedule a date for production of the admitted evidence (such production should be made within 20 business days of the evidence being admitted).

Once the production of the admitted evidence has been carried out, both the agents and the investigative authorities will have 10 business days to submit their closing arguments, after which the Antitrust Authority should issue a final resolution within the next 40 business days.

Final decisions issued by the Antitrust Authorities may only be challenged by economic agents by way of a constitutional appeal (*amparo*) before a federal specialised court with no injunctive relief available to them, except for those cases in which COFECE imposes fines or orders a divestiture, in which cases a constitutional appeal will suspend application of the COFECE's determination until a definitive ruling is issued by the courts (this injunction does not apply to decisions issued by the IFT).

VII PRIVATE ENFORCEMENT

The Competition Law provides that a person who has suffered damages or lost profits as a consequence of a monopolistic practice (including relative monopolistic practices) may file a civil claim for damages before the federal courts once a decision by the Antitrust Authorities is final. In this regard, the statute of limitations for filing such claim will be suspended as of the date in which the order to begin an investigation has been issued.

Furthermore, a decision by the Antitrust Authorities finding an economic agent guilty of engaging in illegal conduct will also provide evidence of the responsibility of such economic agent for the purposes of the civil claim.

These civil claims may be filed either as individual or class actions, pursuant to the provisions of the Federal Code of Civil Proceedings. With respect to class actions, these may be filed by the Bureau of Consumer Protection, the Antitrust Authorities, the common representative of a class, non-profit organisations related to competition matters, or the Federal Attorney General.

Private enforcement is still an emerging area in Mexico, and there have been only a few cases of civil action deriving from the commission of relative monopolistic practices and, to our knowledge, none has been successful; this means that there is an absence of case law or criteria as to the calculation of damages and lost profits. Recently, the Federal Supreme Court of Justice ruled in favour of awarding punitive damages to a claimant in a civil case involving negligence in safety measures on behalf of a defendant, which led to the death of a customer in a hotel pool. Although this case is not related to antitrust matters, it opens the door to impose punitive damages in other practice areas.

VIII FUTURE DEVELOPMENTS

Competition continues to be one of the key elements of the agenda of the current federal administration. In particular, as a consequence of relatively recent changes to the legal framework, the activities of legal practitioners and economic agents face multiple challenges to come.

The success of the relatively new legislation depends on the ability of COFECE and the IFT in enforcing the law and creating a better environment for developing economic competition in Mexico. Their actions will continue to be tested on a daily basis by the specialised courts.

During 2016–2017, the Antitrust Authorities have increased their activity in the investigation of relative monopolistic practices, a trend that we expect to continue in the near future.

Appendix 1

ABOUT THE AUTHORS

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Mr García has published (as author or co-author) several articles, including 'Jurisdiction of Antitrust Authorities in Mexico: The case of the Nokia / Alcatel-Lucent merger', published in *Expert Guides* (Euromoney) in 2016; the Chapter 'The analysis of efficiencies in merger control: a comparative view' in the publication *Competition Law in Mexico*, published by Editorial Porrúa in 2015 (in Spanish), *The Cartels and Leniency Review*, published by Law Business Research, in 2013, 2014 and 2015; the 'Mexico' chapter in the publication *Inmunity, Sanctions and Settlements*, published by Global Competition Review in 2016 and 2015; the 'Mexico' chapter in the publication *The Dominance and Monopolies Review*, published by Law Business Research, in 2015 and 2016; the 'Mexico' chapter in the publication *The Cartels & Leniency Review*, published by Law Business Research, in 2013, 2014 and 2015; the 'Mexico' chapter in the publication *Immunity, Sanctions & Settlements*, published by Global Competition Review in 2014; 'Mexico: New Antitrust Authorities and a New Federal Economic Competition Law', published in the *Journal of European Competition Law & Practice*, Oxford University Press in 2014; 'The Mexican Parliament adopts sweeping telecom reform aiming at cracking down on dominant operators, inducing significant reform of competition law and agency', published by e-Competitions in 2013; *The Merger Control Review*, published by Law Business Research, in 2010, 2011, and 2012; 'Competition and antitrust developments in Mexico' published in *Euromoney* in 2012, as well as several other articles published in *Euromoney*, *International Financial Law Review*, *Latin Lawyer* and *International Law Office*.

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