THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Eleventh Edition

Editor
Aidan Synnott

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PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the Autorité de la Concurrence and the Bundeskartellamt concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny

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by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different Luxottica deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2019

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Chapter 17

MEXICO

Luis Gerardo García Santos Coy, Carlos Mena-Labarthe and Sara Gutiérrez Ruiz de Chávez[1]

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 problem[2] 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 while overall competition policy was strengthened by 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).

In 2014 a new Federal Economic Competition Law was enacted and harmonised the legal framework to the updated constitutional regime, following the trend to provide effective tools to investigate and deter anticompetitive behaviour in Mexico. This new Law embraced the traditional tools introduced in the previous Law, with certain additions and updates, while complementing competition enforcement powers with so-called incremental tools, such as the power to conduct market investigations to restore effective competition conditions in the markets.[3]

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

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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.

Within this context, and pursuant to COFECE's Strategic Plan for 2018–2021,[6] resources are being allocated and enforcement efforts are focused in markets likely to produce the highest impact in terms of economic growth and welfare, considering six indicators:[7] 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.

Pursuant to these indicators, COFECE is 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 developments that will be further addressed below are indeed consistent with this criterion as well as advocacy efforts.

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.

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.[8] 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

4 Competition enforcement accounted for a maximum of 1.55 per cent of matters resolved by the IFT, pursuant to IFT (2018) First, Second and Third Quarterly Reports of Activities 2018. Retrieved from: http://cgpe.ift.org.mx/ita2018/home.

5 COFECE's assigned budget for 2019 accounts for 39 per cent of IFT's assigned budget. Budget for Federation Expenses for the Fiscal Year 2019.

6 COFECE (2019) Strategic Plan 2018–2021. 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 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.

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of up to US$884,249,[9] five-year debarment from carrying out director or counsel functions, and five to 10 years' criminal imprisonment. Facilitators (whether companies or individuals) can also be fined up to US$795,824.

While commitments and remedies are not legally available to settle cartel cases, as of 2006 the Law introduced a leniency programme that has increasingly become a cornerstone for cartel enforcement in Mexico,[10] although some critics say that in the past two years leniency applications have been declining rapidly.[11] 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), as well as 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 expected by the agency will lead to COFECE withdrawing the leniency benefits.[12] As in any other jurisdiction, the success of this programme will be subject to the confidence that economic agents and private practitioners have in the agency. Unfortunately, recent revocations to the benefits granted have jeopardised this confidence.

i Significant cases

During 2018, COFECE resolved two major cartel cases in the following markets:

a Investigation on public procurement of condoms and latex catheters.[13] COFECE found that five companies and seven individuals engaged in collusive agreements affecting several public tenders from 2011 to 2013. Pursuant to public procurement laws, public bids are capped by a maximum accepted price set through market research. COFECE found that the conspirators had manipulated the maximum price through such market research and engaged in bid rigging. Aggregated fines amounted to 112 million pesos.

b Investigation on cash-in-transit services.[14] COFECE found that seven companies and 10 individuals engaged in price fixing and market allocation by jointly setting a common fee to enter each other's facilities, setting minimum prices and not competing for each other's clients during price adjustment terms. Agreements took place between 2005 and 2011 and led to the imposition of aggregated fines of approximately 123.5 million pesos.

9 All exchange rates in this document were calculated at 19.11 pesos per US dollar. Fines were calculated based on the 2019 reference unit UMA.

10 Unfortunately, updated leniency 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, Retrieved from: https://www.cofece.mx/wp-content/uploads/2017/11/Impacto10AnosProgramaInmunidad.pdf#pdf.

11 Pursuant to COFECE (2018) COFECE in numbers 2017. Retrieved from https://www.cofece.mx/wp-content/uploads/2018/06/LCN_COFECEenNumeros_APP.pdf#pdf leniency applications dropped from 26 in 2016 to 15 in 2017; figures for 2018 are not public yet.

12 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.

13 COFECE File DE-24-2013.

14 COFECE File DE-06-2015.

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The following are recent important court precedents on this subject:

a Supreme Court non-binding decision on leniency. The Supreme Court analysed the leniency obligation to fully and continuously cooperate with the agency; this was considered consistent with the legal certainty principle and understood as the need to cooperate totally (i.e., without obstacles or interruptions of any kind).[15]

b Specialised Court's non-binding decision on firm liability. The Court decided that the competition agency must analyse whether the firm charged with an infringement was not capable of behaving in a different manner (e.g., when facing possible threats to its patrimony or the integrity of its employees), when deciding on the firm's liability for antitrust infringements.[16]

ii Trends, developments and strategies

The fight against cartels remains a priority for COFECE. Furthermore, according to COFECE's 2018–2021 Strategic Plan, the agency continues to aim to promote leniency applications as a cornerstone of cartel enforcement. The IFT, in turn, has requested comments on the draft guidelines for the IFT leniency programme and applications within the telecoms and broadcasting market.

Although COFECE made it a policy objective to criminally prosecute cartel cases, and made some referrals for criminal prosecution in 2017, there is no public record of criminal liability being pursued in any of the cases from 2018.[17] Also, there is no public information on how the 2017 referrals have evolved.

One of COFECE's most recently launched investigations in cartel enforcement refers to collusive agreements in the recruitment process for professional soccer players. This investigation is not only relevant in terms of substance but also in the media attention it has brought to COFECE. It could therefore be expected that COFECE will further use the public's interest in this matter, to further promote competition enforcement and principles.

iii Outlook

In 2019 COFECE's investigative authority is actively using investigation tools (requests for written information, depositions and possibly dawn raids) in the nine cartel investigation cases announced in the past year (markets for liquefied petroleum gas, public procurement of iron, corn tortillas in different cities, ground passenger transportation services, cellulose based hygiene products, highway maintenance, production and marketing of sugar, and recruitment of soccer players).[18] These, in addition to previously published and still ongoing investigations in other relevant markets such as air transportation passenger services, production and marketing of medicines, laboratory studies and blood-banks, among others.

15 First Chamber of the Supreme Court. A.R. 106/2018. 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.

16 First Collegiate Court Specialised in Competition, Broadcasting and Telecom Matters. A.R. 20/2017.

17 COFECE lodged criminal complaints against several individuals who allegedly colluded to sell goods to the health sector. Retrieved from https://www.cofece.mx/wp-content/uploads/2018/02/COFECE-08-2017.pdf#pdf.

18 COFECE Files DE-22-2017, DE-20-2017, DE-031-2017, DE-043-2017, IO-003-2017, IO-004-2017, IO-005-2017, IO-006-2017 and IO-002-2018.

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COFECE has announced its intention to conclude the investigation stage in at least five of these files.[19] At that moment, 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. Other cartel investigations at such second-level stage during the upcoming year include:[20]

a alleged agreements to set base prices for air transportation services;[21]
b alleged information exchange between producers of egg;[22]
c alleged bid rigging in the market of public procurement of dental brushes for the health sector;[23] and
d alleged price fixing and output restriction in the corn tortilla market in different municipalities.[24]

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;
d exclusivities including territorial or customer allocation among non-competing parties;[25] 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.[26]

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

19 COFECE (2019) Work Plan 2019. Retrieved from https://www.cofece.mx/wp-content/uploads/2019/01/PAT2019.pdf#pdf.
20 COFECE (2019), 15 Relevant Actions in 2018. Retrieved from https://www.cofece.mx/wp-content/uploads/2019/01/15-del-18-verfinal.pdf#pdf.
21 COFECE File IO-002-2015.
22 COFECE File IO-004-2015.
23 COFECE File IO-005-2016.
24 COFECE File DE-043-2017.
25 Allocation among competitors would update an absolute monopolistic practice.
26 The action consisting in reducing rivals' margin by increasing the cost of an essential input, while lowering the price of the downstream good.

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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.

i Significant cases

During the past year COFECE concluded two relative monopolistic cases through settlements and remedies:

a Investigation on exclusivity restrictions in the oxygen, nitrogen and argon markets. Three suppliers agreed to settle the investigation by eliminating or restricting exclusivity clauses ruling the provision of their services as well as restricting automatic agreement renewal for one year.[27]

b Investigation on exclusivity restrictions in the market for live events, entertainment centres and automated ticket sales. Six companies of the same economic group requested early termination of the investigation. COFECE granted this benefit subject to the elimination of existing exclusivity rights with promoters and operators and for the following 10 years, and the commitment not to increase rights over premises with specific capacities.[28]

In terms of penalties, COFECE fined Pemex Tri US$21,889,551 for breaching the remedies approved by COFECE to settle file DE-002-2015, in which Pemex Tri was being investigated for discriminatory pricing and sale conditions to special marine diesel distributors.[29] Additionally, pursuant to a court order COFECE re-evaluated file DE-015-2013 and fined Mexico City International Airport US$3,301,413 for imposing discriminatory conditions in the provision of ground transportation services for passengers to and from the airport.[30]

27 COFECE Decision to File DE-06-2014. Retrieved at https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V256/0/4283181.pdf.

28 COFECE Decision to File IO-005-2015. Retrieved from https://www.cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V2633/8/4511785.pdf.

29 COFECE Files COMP-001-2016-II and DE-002-2015 https://www.cofece.mx/CFCResoluciones/docs/Condiciones/V77/63/4429182.pdf.

30 COFECE File DE-015-2013 https://www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V258/0/4407919.pdf.

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IFT, in turn, fined Telcel US$5,066,763 for relative monopolistic practices in the market of airtime distribution. The IFT Plenary found that between 2012 and 2014, América Móvil and Telcel restricted competition through an exclusive agreement by means of which Blue Label would receive economic incentives for the exclusive distribution of Telcel airtime.

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.[31]

In practice, COFECE holds a significantly high standard to process a claim. During 2018, nine claims were dismissed and another seven were not processed.[32] In this regard, the Supreme Court issued a recent non-binding decision related to the claimant's nature and rights in a competition investigation; overall it was concluded that the claimant has a legal right to demand from the agency a decision to its case.[33] COFECE should revise its own standards for dismissing claims to be able to improve enforcement results.

COFECE has made public its intention to settle cases where remedies are sufficient to correct the market failure. However, the question remains regarding the possibility of claims for damages from private parties affected by the practice. COFECE can claim damages and file class actions, but this has not happened to date.

iii Outlook

One of the most relevant new investigations in which COFECE will be focusing its investigative efforts involves possible relative monopolistic practices in e-commerce platform services in Mexico. This *ex officio* investigation is the first of its kind, as the digital market has never previously been investigated by COFECE. At this stage, however, the proceeding is strictly confidential, thus it is not possible to access information on investigated parties or lines of investigation. Another recently launched investigation relates to marketing, storage and transportation of oil and related markets.

COFECE intends to conclude at least three investigations in the upcoming year.[34]

In terms of charged vertical infringements, the COFECE Plenary will be dealing with highly relevant cases such as:

a refusal to sell and price discrimination in the generation, processing and marketing of credit information;

b refusal to provide ground transportation passenger services to and from Cancun International Airport;[35] and

c refusal to sell in the wholesale salt market.[36]

31 Strategic Plan for 2018–2021, COFECE, Mexico City. Retrieved from https://www.cofece.mx/wp-content/uploads/2018/02/PE_2018-2021.pdf#pdf.

32 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. There is also no information currently available on the number of claims that were actually accepted and processed.

33 Second Chamber of the Supreme Court. A.R. 413/2014.

34 COFECE (2019) Workplan 2019.

35 COFECE Files DE-008-2016 and DE-08-2007.

36 COFECE File DE-016-2015.

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In terms of judicial interpretation, the Specialised Courts have issued non-binding criteria related to the investigation proceeding, considering that COFECE may validly use the information that was obtained through any of its preventive or corrective files to open a different infringement investigation if necessary. COFECE may also continue to gather information internally after the investigation term elapses, but will not be able to continue investigative actions with third parties.[37] Finally, the Courts revised the nature of commitments reached to achieve early termination of infringement investigations, concluding that these constitute unilateral declarations of will which, consistent with civil law, become binding for the firm offering them.[38]

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 problemme[39] 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 such problems – so-called 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 seven market investigations have been initiated to date, most of which relate in some way to anticompetitive regulation or public actions. Consistently, COFECE intends to keep using this tool along with advocacy instruments, to prevent and correct the anticompetitive impact of governmental decisions.[40]

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 the transport sector. Of course, one of the main topics connecting competition and regulation is carried out in the telecoms arena, by the IFT.

37 First Collegiate Court Specialised in Competition, Broadcasting and Telecom Matters. A.R. 83/2016.

38 First Collegiate Court Specialised in Competition, Broadcasting and Telecom Matters. A.R. 121/2016.

39 Market investigations will target (1) barriers to competition whether structural, regulatory or behavioural and (2) essential input access problems, both restricting effective competition to flourish in the marketplace.

40 COFECE (2018), Economic Competition A platform for Growth 2018–2024 https://www.cofece.mx/wp-content/uploads/2018/03/plataformaeconomica-EN-web2.pdf#pdf.

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i Significant cases

In terms of market investigations carried out by COFECE, the latest cases include:

a Initiation of a market investigation into card payment systems. The opening of a file implies an absence of effective competition conditions in the investigated market, and the need for corrective measures to restore the competition process.[41]

b Preliminary decision indicating the existence of regulatory barriers to competition in the supply of raw milk to the dairy industry in Chihuahua. After the conclusion of the investigation phase, the Investigative Authority has concluded that the absence of effective competition conditions in the investigated market may be due to anticompetitive regulation, creating undue advantages for local suppliers and excluding alternate supply from other states, and deriving in surcharges to the detriment of consumers. The Plenary will revise the 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.[42]

At the judiciary level, the first relevant decisions regarding market investigation proceedings is expected to be issued soon. Specifically, the Supreme Court will be analysing (and probably deciding on) the scope of the market investigation remedies imposed by COFECE and whether COFECE holds 'primary jurisdiction' once it has issued recommendations over a certain market, superseding the original regulatory authority of the Executive Branch. This will be a landmark resolution for future cases.

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) including recommendations aimed at protecting or enhancing competition. 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.

iii Outlook

In the upcoming months, COFECE may resolve the dairy market investigation and intends to conclude two of the ongoing market investigations.[43]

On the IFT side, there are at least four ongoing relative monopolistic practices investigations. Relevant markets include advertising spots on open and restricted television nationwide; public telephony; production and marketing of online content; marketing

41 COFECE File IEBC-005-2018.

42 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.

43 COFECE (2019) Workplan 2019.

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of equipment to reproduce online content and restricted television and audio services, all nationwide; along with two investigations for possible unlawful concentrations in audio broadcasting, fixed and mobile telephony and fixed and mobile internet access.

In terms of special proceedings, the IFT is processing two market investigations to locate possible barriers to competition in fixed telecom services at a regional level (Estado de Mexico and Guanajuato). The IFT will also issue *ex ante* opinions enabling participation in bidding proceedings.

V 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 Law does not provide for an ordinary appeal process; 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.[44]

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.[45] 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 *AT&T/Time Warner*. Filed before both agencies, this transaction set landmark criteria on cases involving concurring jurisdiction of the IFT and COFECE over the same transaction, concluding that the IFT should assess transactions 'substantially' related to the telecom and broadcasting services, while COFECE should decide on any other matters, even within one single transaction. As a result, both agencies cleared the transaction although it was the IFT that imposed behavioural remedies.[46]

b *The Walt Disney Company/Twenty-First Century Fox*. The parties filed notice before both COFECE and the IFT showing a new example[47] of possible overlap between

44 Explaining the absence of judicial precedents in the topic.

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

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

47 Following *AT&T/Time Warner.*

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both agencies. COFECE 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 has not resolved the matter to date, but a remedy negotiation process is ongoing. This transaction has gained significant attention as the President of Mexico has discussed the case during his daily press conferences (which may result in a game changer for competition policy in Mexico).

c *Monsanto/Bayer* concentration. International transaction approved by COFECE subject to conditions related to the supply of genetically modified cotton seeds and vegetable seeds for several crops and non-selective herbicides. Remedies involve the divestiture of such businesses to Basf.[48]

d *Rheem/Grupo Industrial Saltillo (Calorex)* transaction was blocked, based on the absence of market participants that could pose a counterbalance to the resulting company, and the existence of entry and expansion barriers. Overlaps referred mainly to different types of water heaters.[49]

e *Arauco/Masisa*. This transaction was accepted under structural remedies, which were presented as a modification to the notified transaction. Such modification follows COFECE's identification of risk derived from the laminated particleboard market share of the resulting entity (approximately 60 per cent), important barriers to entry, difficulties associated with potential competition based on imports from other jurisdictions and the elimination of the main competitive constraint faced by Masisa as the leading player (pre-transaction).

Regarding unlawful concentrations, COFECE opened and settled an investigation in the pharmaceutical market. The parties agreed to offer measures to restore competition and eliminate COFECE concerns pointing at possible scenarios in which a relevant pharmaceutical distributor could acquire control over a competitor.[50]

The IFT, in turn, closed *ex officio* investigations arising from post-closing investigations in markets related to the leasing of dedicated links, internet access and telecom locations,[51] as well as advertising radio slots in certain municipalities.[52]

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

a In *BorgWarner/Remy Holdings International*: parties were fined a total of US$152,883.

b In *Alsea/Axo*: following a court order, COFECE re-evaluated the matter and imposed the parties aggregated fines for US$1,625,459. In *Banco Ve por Mas/Bankaool* parties were fined US$79,006 overall, a reduced fine based on the fact that the parties accepted their responsibility for not notifying the transaction.

Finally, Villacero & Savoy were also fined US$3,555,259 for breaching clearance conditions that imposed restrictions on how members of the board should be appointed.

48 COFECE File CNT-024-2017.

49 COFECE File CNT-024-2018.

50 COFECE File IO-001-2017.

51 IFT File AI/DC-003-2018. Closing decision retrieved from http://www.ift.org.mx/sites/default/files/contenidogeneral/industria/dpdc-003-2018publica03.10.2018censurado.pdf . The IFT concluded the American Tower Corporation transaction would not allow such economic group to gain a substantial market power position.

52 IFT File AI/DC-004-2018. The IFT concluded that Grupo Multimedios could not gain substantial market power as a result of the reported transaction.

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Regarding court cases, the specialised courts issued non-binding criteria stating that: (1) merger guidelines are not binding but COFECE may refer to them, as these adds to legal certainty; and (2) legal thresholds set forth in the Law refer to different scenarios without being exclusive.[53]

ii Trends, developments and strategies

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.

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.

In terms of substantive enforcement, the only public ongoing investigation by COFECE for possible unlawful concentration is related to the marketing, distribution and public sale of gasoline and diesel; the investigation is still at a confidential stage.[54]

VI CONCLUSIONS

As noted, competition enforcement in Mexico has evolved significantly and the agencies are becoming more sophisticated and aggressive in their enforcement efforts. 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.

53 Second Collegiate Court Specialised in Competition, Broadcasting and Telecom. A.R. 1/2017.

54 COFECE File DE-018-2017.

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The IFT has been receiving some political pressure to decide some of its merger cases such as the *Disney/Fox* case, something that has not been common in Mexico to date. If this trend continues, it can create a very different dynamic to the competition practice and how cases are approached by practitioners and firms.

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. Important decisions pending in the judiciary in this regard will help shed light on the limits of the regulators' powers.

Competition enforcement outside of the administrative arena (e.g., criminal prosecution and private litigation) has not shown significant developments, except for the creation last year 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.[55] 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.

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

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Appendix 1

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He has co-authored eight books on competition and regulation and is a lecturer at ITAM University. He has been recognised as one of the best competition lawyers in the world by *Global Competition Review*.

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Sara has been recognised as a leading practitioner by specialised publications and rankings, including *Chambers and Partners Latin America*. She is an active member of the Mexican Bar and a non-governmental adviser for the Mexican Authority at the International Competition Network. She has also been recognised for her research by the Competition Authority.

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