THE PUBLIC COMPETITION ENFORCEMENT REVIEW

Thirteenth Edition

Editor
Aidan Synnott

THE LAWREVIEWS

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THIRTEENTH EDITION

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This article was first published in March 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-818-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ACTECON

ANJIE LAW FIRM

ASSEGAF HAMZAH AND PARTNERS

BAKER & MCKENZIE (GAIKOKUHO JOINT ENTERPRISE)

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PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. Of particular note this year, many chapters discuss the covid-19 pandemic and related competition matters, including price-gouging investigations and policy statements on collaborations to fight the pandemic. Relatedly, several jurisdictions paid particular attention to sectors such as healthcare, online commerce and retail food. Despite the pandemic, competition enforcement in many jurisdictions continued in line with past practice, while a few jurisdictions saw record fines or activity in certain areas. Meanwhile our contributors from Mexico describe a 'challenging political environment' related to competition enforcement.

Several agencies, including those in Argentina, Japan, Poland and the United States had a change in leadership. Perhaps the most significant change comes from the United Kingdom. That chapter provides an informative overview of the UK competition law regime post-Brexit and discusses the competencies and priorities of the Competition and Markets Authority (CMA) as the United Kingdom emerges from the transition period under the European Union Withdrawal Agreement. Our authors note an active agenda for the CMA. Now, for example, 'global mergers can expect to face parallel reviews on both sides of the English Channel.'

Merger review and enforcement activity remains robust. The chapters that follow note activity in many sectors and several overlapping investigations. Of particular note, both the UK and US chapters discuss the *Sabre/Farelogix* transaction, which was allowed by a court in the United States but blocked by the CMA. We also learn that in 2020, the French Competition Authority blocked a merger for the first time ever. Our authors note that the merger 'would have created a duopoly between the hypermarket retailers Carrefour and E Leclerc in the conurbation of Troyes city'. Our contributors from Poland note that authorities there issued a record number of merger decisions, and the chapter from Indonesia notes an increase in merger filings there 'partly due to the expansion of the scope of mergers and transactions that must be notified' to the Indonesia Competition Commission. Enforcers in several jurisdictions issued merger enforcement guidance. The UK published draft merger assessment guidelines, French authorities published new merger control guidelines and the US federal enforcement agencies published vertical merger guidelines.

The policing of cartels remains a focus of competition agencies around the globe. Japan issued fines for bid rigging in the construction industry. The Canadian Competition Bureau concluded investigations into municipal contract bid-rigging. Greek authorities also conducted several bid-rigging investigations, including in construction and security services. A price-fixing investigation in the banking sector in Greece 'triggered the biggest dawn-raid ever witnessed' to date. Cartel fines in Taiwan 'soared in 2020,' our authors note, as a result

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of fines issued in connection with the hard disk drive suspension products cartel matter there. Portuguese authorities also levied their largest fines ever. These were in cases involving telecommunications services and in the retail food sector.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. Several agencies established groups specifically focused on this area. For example, Japan enacted a Digital Platform Transaction Transparency Act and established an Office of Policy Planning and Research for Digital Markets. French authorities have created a dedicated Digital Economy Unit and are investigating the digital sector. Greek authorities launched a sectoral inquiry into e-commerce and fintech. Several jurisdictions are also investigating digital platforms. Italy is pursuing investigations into Amazon, Apple and Google; Canada is investigating Amazon; France implemented interim measures against Google. And of course the enforcement authorities in the United States filed antitrust cases against Google and Facebook. Turkish authorities are also investigating platforms and are working on a Digitalization and Competition Policy Report. The Mexican COFECE published a Digital Market Strategy and 'created a special Digital Market Division'.

In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe. For example, UK and Japanese authorities took actions against bid rigging in this sector. Turkey conducted an investigation into alleged collusion for eye treatment drugs. The French Competition Authority also imposed fines in this area. The Italian Council of State upheld a fine imposed by competition authorities there against a pharmaceutical company for 'excessive prices' for certain drugs. Canada concluded an inquiry into conduct involving the ability of generic pharmaceutical manufacturers to access samples of branded drugs for regulatory purposes. The United States also took notable action against pharmaceutical companies.

Another area of similarity is enforcement against resale price maintenance (RPM). Several jurisdictions took actions against such practices. We read that the UK has 'a renewed focus' in this area and concluded a matter involving musical instruments. Musical equipment RPM also attracted regulatory attention by Polish authorities. And resale price maintenance and other potential violations in the Greek wristwatch industry generated a statement of objections from authorities there. Finnish authorities recommended a penalty for a hardware company for engaging in resale price maintenance.

In the coming year, we will watch with interest to see how enforcers around the world approach these (and perhaps other) common areas of interest.

Aidan Synnott
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New York
March 2021

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Chapter 12

MEXICO

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

I OVERVIEW

It is the end of an era of change and challenge for the world, and the antitrust enforcement arena is no exception. The global pandemic has hindered usual enforcement actions while boosting market changes that might not have otherwise been brought about, at least not at such speed. In the face of this massive disruption, antitrust agencies were forced to adopt interim measures and procedural changes to guarantee enforcement continuity in a context of extreme health and sanitary restrictions leading to important economic changes.[2] This led many agencies to wonder whether their usual processes and available toolkits were effective enough to address the upcoming challenges.

In the case of Mexico, this debate was opened a few months earlier, with the Peers Review released by OECD at the beginning of 2020.[3] OECD recommendations have historically been taken seriously by the agencies; thus, one could very well expect shifts consistent with the recommendations in competition policy, or even regulation in the upcoming years.

Jurisdictional fights between authorities, challenge of new government regulations and scandals around low fines in specific cases have been important recent developments leading to a convoluted competition scene in the country.

Change and evolution is not, however, unusual for antitrust enforcement, as a relatively young and constantly evolving field in Mexico. By way of context, 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[4] were rounded

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

2 COFECE and IFT were forced to interrupt terms and deadlines in most competition enforcement files as a result of the pandemic (excluding most urgent ones such as merger control and for COFECE, leniency applications among others). COFECE has gone further with some additional measures, including priority processing of covid-19 related deals or guidance requests; adoption of procedural changes allowing for remote sessions, servings and online processes and others. See https://www.cofece.mx/covid19/ for a complete list of covid-19 related actions by COFECE.

3 See OECD (2020), OECD Peer Reviews of Competition Law and Policy: Mexico www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-mexico-2020.htm.

4 The 1992 Law was subject to different amendments, the most significant ones in 2006 and 2011.

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up by a major constitutional amendment taking place in 2013. As a result, the constitutional framework was updated and better adapted to fit actual competition enforcement needs through the creation of a constitutionally autonomous enforcer, the Federal Economic Competition Commission (COFECE) holding jurisdiction over all economic markets except for the broadcasting and telecoms sectors in which competition enforcement is entrusted to another autonomous regulator, the Federal Telecommunications Institute (IFT).

Accordingly, in 2014 a new Federal Economic Competition Law was enacted. This new Law embraced the already available traditional tools with certain additions and updates, complemented with 'incremental tools', such as the power to conduct market investigations with remedial action.[5]

While competition enforcement is one of the scopes (albeit an important one) that the IFT needs to cover, COFECE has a constitutional mandate to procure the application of the Law in all other economic areas, subject of course to resources constraints,[6] calling for efficient prioritisation.

Within this context, and pursuant to COFECE's Strategic Plan for 2018–2021,[7] enforcement efforts have been focused in markets likely to produce the highest impact in terms of economic growth and welfare. For approximately a decade, COFECE has been targeting the financial, agrifood, energy, transport and health sectors, along with public procurement. Many of the relevant cases and advocacy efforts further addressed below are indeed consistent with this criterion.

A very relevant feature in recent years has been the interest both regulators have shown in the digital economy. While the contest initiated in 2019 by the IFT to gain jurisdiction over merger review in digital platforms (the *Uber/Cornershop* case) was resolved in favour of COFECE,[8] the matter is far from settled, as proven by the market investigation launched afterwards by IFT to tackle potential barriers to competition in online search engines, social media, mobile OS and cloud services. COFECE, in turn, by August 2020 had already published a Digital Market Strategy, created a special Digital Market Division and launched an investigation for potential abuse of dominance in online advertising. Considering the impact of the pandemic in the development of online services, enforcement in this arena will no doubt remain a focal point (and source of tension) between both agencies.

On top of the inherent challenges arising from the global pandemic, 2020 was also marked by a challenging political environment, with the President questioning the regulators' need for and (lack of) social impact, and COFECE in turn pushing back and challenging

5 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.

6 COFECE's assigned budget for 2020 accounts for 40 per cent of IFT's assigned budget (slightly above to the preceding year). Budget for Federation Expenses for the Fiscal Years 2020 and 2021.

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

8 File CCA 4/2019. The First Appeal Court Specialised in Competition, Broadcasting and Telecom Matters ruled that the matter should be decided by COFECE given that (1) the parties are not telecom operators; (2) they render logistics – rather than telecom – services and do not charge for telecom services; (3) parties only use internet services as input for their services. For simplicity, in what follows, these collegiate courts will be referred to only as specialised courts.

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potentially anticompetitive governmental policies and regulations. All of this added up to an interesting 2020, with relatively fewer, albeit important developments in terms of solved cases and case law. [9]

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.[10] Administrative fines for firms involved in cartel conduct can reach up to 10 per cent of the wrongdoer's annual accruable income. Firms can also be subject to private litigation claims (including collective actions) to recover damages or losses arising from conduct updating an infringement declared by the enforcer.

Furthermore, individuals executing the practice on behalf of a company will be personally liable and subject to both criminal and administrative penalties, including fines of up to US$832,510[11] five-year debarment, and five to 10 years' criminal imprisonment. Facilitators (whether companies or individuals) can also be fined up to US$749,259.

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

To keep this benefit, the applicant is bound to maintain full and continuous cooperation with the agency throughout the proceeding; failure to meet the cooperation standard will lead to COFECE withdrawing the leniency benefits.[12] COFECE has, contestably, revoked several leniency agreements based on failing to cooperate.

9 Investigation rulings in COFECE were reduced by the covid-19 term suspension from seven in the third quarter of 2019 to four one year after. Specialised Courts were further affected given the restriction imposed to address only urgent matters.

10 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.

11 All exchange rates in this document were calculated at 21.53 pesos per US dollar. Fines were calculated based on the 2021 reference unit UMA.

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.

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i Significant cases

During 2020, COFECE resolved four cartel cases in the following markets:

a Tenders for polyethylene gloves and medical healing materials. Following judicial review,[13] COFECE found that two companies, part of the same economic group, incurred in illegal bid rigging by appearing independently and presenting 'competing' bids to the Mexican Social Security Institute (IMSS). Overall damage was calculated at US$2 million; aggregated fines amounted for US$1.34 million.

b Tenders for laboratory tests and blood banks.[14] Eleven companies and 14 individuals were fined with an aggregated amount of US$29 million for information exchange and coordination of seven bids convened by the IMSS and the Institute for Social Security and Social Services for State Workers (ISSTE). Companies were found to take turns to submit winning or losing bids pursuant to their installed capacity. Overall impact was estimated in US$9.29 million in overprices.

c Retail gasoline prices in Baja California, Mexico.[15] COFECE found that several companies – and individuals – in the retail gasoline business, assisted by two industry associations fixed prices to reach the legal cap, through the suppression of discounts and tax incentives. Impact was estimated in US$1.27 million while aggregated fines reached US$2.37 million.

d Secondary market of the intermediation service of debt securities issued by the Mexican government.[16] Seven banks and 11 traders were fined with an aggregated amount of US$1.6 million for setting 142 agreements to manipulate prices, establish the obligation not to trade or not to acquire certain government securities in specific transactions (not general agreements), which had a direct impact on the prices of the related instruments in such transactions in the secondary market. The impact was estimated at US$1.4 million.[17]

During 2020, the Investigative Authority (IA) in COFECE closed two investigations on public procurement of iron and highway maintenance, given the lack of supporting evidence to ground an infringement.[18] The most relevant court precedent was given by the Second Specialised Court, addressing explicit and tacit collusion in oligopolistic markets. The Court concluded that indirect evidence pointing to an anticompetitive outcome must be perfected by 'plus factors' that prove that such outcome is a result of a collusive agreement rather than (legal) parallel behaviour, which is rationally expected in oligopolistic markets.[19] This decision is not formally binding, but it will likely impact the agency's approach in future cases.

13 COFECE File DE-020-2014 was originally dismissed by COFECE and processed in compliance with the order given by the Second Specialised Court in A.R. 84/2018.

14 COFECE File DE-011-2016.

15 COFECE File DE-022-2016.

16 COFECE File IO-006-2016.

17 Please note that this file was resolved in January 2021; however, given the relevance of the resolution it was included in this edition.

18 COFECE Files DE-20-2017 and IO-005-2017.

19 Second Specialized Court R.A 114/2018.

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ii Trends, developments and strategies

The fight against cartels remains a priority for COFECE. For many years, the leniency programme has acted as a cornerstone for cartel enforcement in Mexico.[20] The boom of the early years, however, appears to be fading, as it is in many other jurisdictions. In past years, leniency applications have been declining at approximately -38 per cent annually.[21] While this might just be consistent with international trends, questionable revocations of the leniency benefit could have played a role by reducing the programme certainty. Acknowledging this as a relevant issue, in March 2020 the new regulations to the leniency programme entered into force, aimed at providing increased transparency with regards to applicants' rights and obligations under the programme, as well as further regulating the process to withdraw the leniency benefit. COFECE also conducted a consultation to update the programme´s guidelines, released early on 2021.

iii Outlook

COFECE launched four new cartel investigations related to marine diesel, tortillas, waterproofing products and the leasing of non-residential real estate spaces; the latter follows a warning issued to the real estate associations for potential information exchange and agreements to suggest or fix maximum discounts during the covid-19 lockdown.[22]

In addition, during 2020 COFECE's IA is likely to follow up and possibly conclude some of the pending cartel investigations, namely: marketing of gasoline and diesel, recruitment of professional soccer players, renewal and upkeep of technology and systems for highways, and corn starch.[23]

Once an investigation is completed, the IA will assess whether to close the file or to formally charge alleged wrongdoers with a probable infringement, to proceed to a second – trial-like – phase to be resolved by the Plenary. Cartel investigations at the second-level stage during the upcoming year include: [24]

a alleged price fixing in the production of tortillas in Chiapas; and

b alleged price fixing and market allocation in the production distribution and marketing of medicines.

20 By 2016 about 16 per cent of all *ex officio* investigations in cartel cases had been triggered by leniency (See COFECE (2016), 10 years since the implementation of the Federal Economic Competition Commission's Leniency Program: what has been its impact: https://www.cofece.mx/wp-content/uploads/2017/11/Impacto10AnosProgramaInmunidad.pdf#pdf). Pursuant to OECD (2020), currently about 20% of all cartel cases are still being triggered by leniency.

21 Pursuant to COFECE (2019) COFECE in numbers 2018: www.cofece.mx/wp-content/uploads/2019/03/CFCN2018_v270319.pdf, leniency applications dropped from 26 in 2016 to 15 in 2017 and 10 in 2018; figures for 2020 are not public yet, but according to COFECE (2019) COFECE Model. A Perspective of Institutional Structuring, as of June 2019 only three applications had been reported, indicating this trend was likely maintained.

22 COFECE Files DE-029-2019, DE-32-2019, IO-002-2019 and IO-004-2020.

23 COFECE Files DE-009-2019, IO-02-2018, IO-003-2018, IO-004-2018.

24 COFECE Files DE-043-2017, IO-001-2016.

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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 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; in fact, OECD has marked that these should be used more selectively, to also produce deterrent precedents. 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. In the past few years COFECE has been increasingly investigating and penalising breaches to ongoing commitments. As is mentioned below, courts have been also active in analysing and interpreting the matter.

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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i Significant cases

During the past year COFECE closed the following relative monopolistic cases:

a Refusal to sell in the wholesale salt market. The file was closed by the Plenary, who rejected the geographic market definition proposed by the IA, thus concluding that the charges were not duly supported.[27] An investigation on tied sales in e-commerce platforms was also closed, this time by the IA who decided not to press charges since the information gathered during the investigation phase indicated that the parties had not actually implemented a tied sale.[28]

b Discrimination in affiliation to the public brokers association. The AI had found that certain associations implemented differentiated affiliation fees for public brokers changing locations, potentially inhibiting relocation, and competitive pressure thereof. Three associations avoided fines settling the case through commitments, by agreeing to revoke all differentiated fees and avoid discriminatory effects in future fees.[29]

Main court precedents in this arena have been, for a while, centred on commitments.[30] During 2020, the Second Specialised Court analysed the commitments accepted in a relatively old exclusive dealing case in the beer market. The court not only conducted a substantive assessment on the merits of the case (resulting in an order to reject the commitments), but also determined that in case new commitments were offered, the agency should include explicit assessment on the illegal conduct and potential damages, to safeguard a claimant's right to recover damages in a civil claim.[31]

ii Trends, developments and strategies

Pursuant to COFECE's 2018–2021 Strategic Plan, COFECE planned to achieve effective law enforcement by promoting founded claims and referring to market intelligence and screening to directly detect anticompetitive practices.[32]

In practice, COFECE holds a significantly high standard to process a claim:[33] COFECE should revise its own standards for dismissing claims to be able to improve enforcement results and meet its goal to promote claims.

As noted by the relevant examples above, most unilateral conduct enforcement in recent years relates to cases settled through commitments; the truth is that there has not been a significant unilateral conduct case in years, which in turn has an impact on judicial interpretation. Following OCDE recommendation and recent court precedents, parties subject to investigation from now on are likely to face higher standards to reach a commitment arrangement with COFECE.

27 COFECE File DE-016-2015.

28 COFECE File IO-002-2017.

29 COFECE File DE-018-2018.

30 Second Specialised Court A.R 10/2015 defined that commitments cannot include waivers to legal rights while First Specialised Court A.R 173/2017 ruled that breaches to commitments directly aiming to correct anticompetitive concerns, should be sanctioned differently to formal breaches (e.g., those allowing for monitoring).

31 Second Specialised Court R.A 28/2016.

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

33 Pursuant to COFECE (2020) COFECE in numbers 2019: https://www.cofece.mx/wp-content/uploads/2020/03/Numeros2019_10032020.pdf only four out of 59 claims processed throughout 2019 were admitted; data for 2020 is not yet available.

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iii Outlook

COFECE has announced new investigations consisting on potential exclusivities in the supply of medical oxygen, abuse of dominance in wholesale supply and retail marketing of consumption goods – likely aimed at supermarket chains[34] – and potential tied sales or raising rivals' costs strategies for online advertising.[35]

COFECE will of course, also continue focusing on its previously launched and still ongoing investigations namely, liquid gas petroleum, ground transportation services to and from the Mexico City International Airport and oil marketing, storage, and transportation.[36]

The IFT, in turn, launched a probe on alleged refusal to sell or discriminatory access to wholesale leased premises dedicated link for local and national distance, and will continue processing its pending nationwide investigations on predatory pricing, cross subsiding and raising rivals' costs in internet services and online content, raising rivals' costs in internet and streaming services and devices, discriminatory restriction to an essential input in the wholesale of unbundling services of the local network of the preponderant economic agent in the telecommunications sector raising rivals' costs in mobile telecommunications and marketing of mobile terminal equipment.[37]

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The 2013–2014 structural changes to the competition framework led to the provision of incremental tools for competition enforcement, including the power to conduct market investigations.

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

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

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

34 This investigation is a result of the findings on COFECE´s Market Study to retail sales of food and beverages in the modern channel, released on November 2020: https://www.cofece.mx/estudio-de-competencia-en-el-canal-moderno-del-comercio-al-menudeo-de-alimentos-y-bebidas/?lang=en. COFECE concluded here that there are state and county obstacles causing elevated levels of market concentration in few supermarket chains, which could be affecting competition increasing prices or causing other market distortions related to supply terms and conditions.

35 COFECE files IO-001-2020, IO-002-2020 and IO-003-2020.

36 COFECE files DE-044-2018, DE-013-2018 and IO-001-2018.

37 IFT Files AI/DE-001-2020, AI/DE-002-2017, AI/DE-003-2018, AI/DE-002-2019 and AI/DE-003-2019.

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At least 11 market investigations have been initiated, most of which relate in some way to anticompetitive regulation or public actions. Success rate, however, is not encouraging with three closed investigations due to a lack of evidence, and only three files resolved with actual remedies tackling effective competition problems.[38]

In terms of regulated markets, both COFECE and IFT have additional powers to assess effective competition, substantial market power or other competition related items that act as a gateway to enable regulation with competition impact (e.g., price caps).

i Significant cases

Major developments in market investigation cases include:

a Investigation into the supply of raw milk in Chihuahua. COFECE's Plenary decided that state regulations were imposing an unnecessary burden on raw milk producers, thereby reducing competition and affecting prices in Chihuahua; recommendations for regulatory changes were issued to the governor, local congress and other authorities.[39]

b Preliminary decision indicating the existence of barriers to competition in card payment systems. This ongoing investigation has caught the attention of practitioners since, due to the investigated market, the final impact could be very relevant; the Plenary will revise the IA suggestions along with the arguments put forward by the affected parties with regards to the suggested remedies (e.g., the divestiture of 51 per cent of the shares of the clearinghouses currently owned by some banks, in addition to regulatory recommendations to the Central Bank and the National Banking and Securities Commission).[40]

At the judiciary level, the first relevant decisions regarding market investigation proceedings were issued in 2019, in connection with the market investigation on airport slots. The Supreme Court decided it is the sector regulator and not COFECE, which holds 'primary jurisdiction' over a regulated market. This means that COFECE can only recommend the adoption of measures but cannot supersede the original regulator power.[41] As a result, COFECE decided in early 2020 that its suggested remedies in this case cannot be put partially into effect, as this could cause more distortions than those intended to be addressed. Nevertheless, COFECE ratified its decision on the lack of effective competition and essential input definition, announcing the potential use of traditional or advocacy tools to address these concerns.[42]

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.

38 As noted below, effects on one, however, were significantly restricted by the courts.

39 COFECE File IEBC-002-2017.

40 COFECE File IEBC-005-2018.

41 Constitutional Dispute 301/2017. First Specialised Court A.R. 142/2018.

42 COFECE File IEBC-001-2015.

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In this regard, COFECE has analysed and publicly discussed the competitive impact of some laws and drafts, including recommendations aimed at protecting or enhancing competition. During 2020 this put COFECE in the middle of the political discussion, primarily in the following topics:

a Sustainable energy related actions: COFECE issued non-binding opinions on energy policies raising anticompetitive concerns and entry barriers restricting wind and solar farms from connecting to the electric grid; in parallel COFECE filed also a constitutional dispute against a general policy issued by the Energy Ministry with the same goal; the latter not only gained an injunction that preliminarily prevented the policy from entering into force, but was ultimately resolved in favour of COFECE early 2021.[43]

b Pension fund regulation: COFECE issued two non-binding opinions related to pension fund draft legislation with potentially anticompetitive features.[44]

c Gasoline and Hydrocarbons regulation: COFECE issued also two non-binding opinions related to anticompetitive features arising from regulation or draft regulation in these markets.[45]

These advocacy tools, along with market studies, signal the markets that have a particular relevance or interest for COFECE as clearly shown by the Market Study on competition in the modern channel of retail commerce of food and beverages released on 2020, which led to the initiation of an abuse of dominance investigation.

iii Outlook

COFECE new cases for the upcoming year include market investigation on airplane fuel, and effective competition conditions assessment in maritime passenger transportation in Quintana Roo.[46]

Based on the political climate and recent adverse court precedents, we could also anticipate COFECE to keep addressing its competition concerns over policies and regulation through advocacy efforts and non-binding opinions.

IFT, as anticipated, will likely focus in its recently launched investigation to locate barriers to competition in online search engines, social media, mobile OS and cloud services, although COFECE may challenge jurisdiction over this investigation.[47]

V STATE AID

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

43 COFECE OPN-006-2020; Comments to the request of Regulatory Exemption re. RES/390/2017 and Constitutional dispute CC. 89/2020 before the Second Chamber of the Mexican Supreme Court.

44 COFECE OPN-005-2020 and OPN-10-2020.

45 COFECE OPN-007-2020 and OPN-011-2020.

46 COFECE Files IEBC-002-2019 and DC-001-2020.

47 IFT File AI/DC-001-2020 launched by IFT on October 2020.

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

During 2020 a clear example of this, was the significant flow of *amparo* actions against various decisions by the Energy Ministry and regulators, restricting entry and operation of wind and solar farms, brought before the specialised courts mainly on competition and sustainability grounds; these will likely lead to relevant antitrust precedents in the coming years.

VI MERGER REVIEW

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

The process will start by filing a notification of concentration; the agency is empowered to request basic and additional information before the staff submits its recommendation to the Plenary, who may reject, authorise or impose remedies to the transaction. Once a concentration has been approved, it cannot be challenged for its competitive effects, except if approved based on false information. 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.[48]

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.[49] 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 without or 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 *Uber/Cornershop*. Following the rejection of the *Walmart/Cornershop* deal (the first digital platform case analysed by COFECE) and a long assessment process due to the jurisdictional dispute lost by the IFT, COFECE decided to approve the acquisition of

48 Explaining the absence of judicial precedents in the topic.

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

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Cornershop by Uber (both online platforms) without any conditioning, following an in-depth assessment in which COFECE dismissed any actual overlaps or competitive pressure impact.[50]

b *Profluent Plastic Technologies/Plastic Technology Mexico*. The transaction referred to the acquisition of a Mexican company involved in the manufacturing and marketing of PVC and high-density polyethylene pipes and connections. While parties' activities did not overlap, the non-compete clause was assessed as excessive by COFECE.[51]

c *EssilorLuxottica/Grandvision*. COFECE approved the acquisition of GrandVision by EssilorLuxottica in spite of overlaps in certain wholesale and retail segments, given that concentration indexes fell within acceptable parameters and the absence of barriers to competition or substantial market power.

In terms of *ex post* control and penalties, most COFECE cases refer to failure to notify a concentration: [52]

a In *Softbank/WeWork*, parties were fined an aggregated amount of US$156,971.

b In *Santander/Elavon/UBS*, parties were fined an aggregated amount of US$100,882. COFECE considered that an *ex post* modification to the non-compete clause implied that the transaction was not closed under the approved terms, thereby implying it did not gain previous authorisation.

c In *BAS Corporation/EXI Solar*, parties were fined a total of US$45,378.

d In *KKR Rainbow/Coty*, parties were fined US$40,315.72.

e In addition, COFECE fined Moench Coöperatif and one individual for an aggregated amount of US$1.435 million due to a breach of the commitments offered to close unlawful concentration file IO-001-2017, pursuant to which the parties were supposed to prove the elimination of any link allowing Nadro to exert control over Marzam (both relevant distributors of pharmaceutical products in Mexico).

Regarding court cases, in recent years the specialised courts have issued non-binding criteria stating that: (1) merger guidelines are not binding but COFECE may refer to them, as this adds to legal certainty; (2) legal thresholds set forth in the Law refer to different scenarios without being exclusive;[53] and (3) whenever a claim for unlawful concentration is filed while a merger notice is being processed, COFECE needs to reassess whether the facts that are the object of the claim are equal to those addressed in the merger notice, before dismissing the claim.[54]

ii Trends, developments and strategies

As of January 2020, all submissions must be made through digital means, which significantly aid in overcoming the obstacles posed by the pandemic lockdown.

Enforcement and penalties arising from failure to notify or gain pre-merger clearance continue to gain relevance. Companies are advised to duly analyse competition thresholds in the jurisdiction to avoid unnecessary risk.

50 First Specialised Court File CC 4/2019 and COFECE File CNT-111-2019.

51 COFECE File CNT-002-2020.

52 COFECE Files VCN-002-2020, VCN-003-2020, VCN-001-2020, and VCN-004-2020.

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

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

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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.

Regarding unlawful concentration investigations, COFECE will likely finalise the probe launched in 2019 into the marketing and distribution of gasoline and diesel,[55] while IFT might finalise its 2018 probe into paid TV, audio and internet services.[56]

Late in 2020, COFECE opened a public consultation to revise the Merger Guidelines, a process which is still ongoing and which is expected to provide more certainty in merger review cases.

VII CONCLUSIONS

As noted, competition enforcement in Mexico has evolved significantly. The Mexican agencies are becoming more sophisticated and aggressive in their enforcement efforts. The antitrust arena worldwide is encountering interesting challenges, which current health and economic conditions will surely intensify. Changes are expected to continue, either through policy or amendment to legislation.

Given budget cuts, enforcers are tending to be more strategic and careful with the use of their powers. Political pressures with regards to their value to society will likely lead to further evaluations to justify the impact of their work.

The discussion of new institutional arrangements for the Mexican competition authorities will likely continue and will increase the political pressure on the agencies. So far, their independence has been clearly proven.

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. We believe long and complicated review of complex cases, especially in the digital markets, will become the norm. The specialised courts are also following this trend, starting to conduct deeper and more sophisticated assessments, based on complex economic concepts and evidence. This should be expected to raise the bar for the agencies and further push towards this technical trend in conduct investigation cases.

Competition enforcement outside of the administrative arena (e.g., criminal prosecution and private litigation) continues to be halted. It is to be seen if OECD recommendations to push these matters further are seriously pursued, potentially through legal modifications.

55 COFECE File IO-001-2019.

56 IFT File AI/DE-001/2018.

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Overall 2020 was a challenging year both from a practical and political point of view. The year 2021 also promises to be interesting, as a year marked not only by political pressure and Congress elections but also by very important changes within COFECE's internal composition, including the designation of one new Commissioner and a mandatory change of Chairman (due September 2021), raising the question of whether competition policy will remain consistent or change course in the coming years.

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Appendix 1

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He is a frequent speaker and has authored multiple articles and papers on antitrust and other legal subjects, ranked Band 1, Tier 1 or equivalent in antitrust and competition by many publications, including: *Chambers and Partners*, *Global Competition Review*, *The Legal 500*, *Best Lawyers* and *Who's Who Legal*.

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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 participated in many of the landmark cases that have paved the way for how antitrust provisions are interpreted and applied in Mexico. She focuses mainly on antitrust investigation proceedings of all kinds and related judicial litigation, along with preventive advise and compliance of antitrust and related matters.

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ISBN 978-1-83862-818-5

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