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CREEL GARCÍA-CUÉLLAR AIZA Y ENRÍQUEZ

Mexico – Antitrust / What to be expected in 2023

The beginning of a new year is the perfect time to reflect on which will be the trends and facts to be considered and analyzed when providing legal advice on competition matters in Mexico. Below you will find a very straight forward summary on those main aspects.

COFECE and IFT developments

Following a battle in the Supreme Court of Justice derived from a constitutional controversy initiated by COFECE against the Executive branch for not submitting to the Senate a proposal of the candidates to fill in the three vacant COFECE Commissioner positions, the Supreme Court ruled in favor of COFECE and the Executive has complied with the ruling. While the IFT also filed a constitutional controversy, it is still pending and hence, the Executive has not submitted any proposals to fill the three vacant IFT Commissioner positions, although the outcome of such controversy will be the same.

Derived from the above, the Senate has appointed Andrea Marván, a lawyer, as COFECE Commissioner for a period of 9 years. With her appointment, COFECE now has five out of seven Commissioners.

The Executive has also proposed to the Senate the two other candidates to fill the other vacant positions: Rodrigo Alcázar and Giovanni Tapia, both economists. It is expected that the Senate will approve both candidates soon.

Upon completion of this process, COFECE's plenum will be comprised of three lawyers and four economists.

While Brenda Hernandez is currently COFECE's acting president, it is expected the Senate to appoint a new president in the upcoming months, which could reshape COFECE's strategy and policy for the upcoming years, even if prioritizing the markets included in COFECE's Strategic Plan for 2022-2025 which include food and beverages, transportation and logistics, financial services, construction and real estate services, energy, health, public procurement and digital markets.

In 2022, COFECE approved 149 transactions, without blocking or conditioning any transactions. As a result of the new composition of the plenum, we expect COFECE to increase scrutiny on the economic aspects of transactions involving horizontal overlaps or vertical integrations, as well as to follow international trends in conducting in-depth reviews regarding non-compete and no-solicitation provisions, as well as crossed participations, particularly, when involving private equity funds.

On the enforcement side, in 2022 COFECE initiated 6 cartel investigations, 3 investigations for abuse of dominance and 4 investigations for barriers to entry and essential facilities. It also imposed fines in 2 cartel cases and 1 abuse of dominance case, contrasting with 7 fines imposed in gun jumping cases. We also expect COFECE to become much more active in this arena based on the new composition of its Plenum.



Jurisdictional fights

During 2022 we saw an increasing number of jurisdictional fights between COFECE and IFT, and we see no space for agreements to be reached by the two agencies to determine which markets should be analyzed by each of them. We anticipate this trend to continue, which will certainly cause significant delays in merger control proceedings related to markets where there can be a minimum room for interpretation on which agency has jurisdiction.

Updated Merger Control Thresholds

As from February 1, 2023, merger control thresholds pursuant to the Federal Economic Competition Law have been adjusted. The new thresholds are the following (considering an exchange rate of MXN $19 per USD):

I. If the transaction or series of transactions, regardless of the place of execution, represent, within Mexico, directly or indirectly, a value greater than MXN $1,867.32 million pesos (approximately USD $98.28 million); and/or

II. If the transaction or series of transactions result in the acquisition of 35% or more of the assets or shares of an economic agent whose total assets or annual sales located/originated in Mexico are worth more than MXN $1,867.32 million pesos (approximately USD $98.28 million); and/or

III. If the transaction or series of transactions result in (1) an accumulation within Mexico of assets or capital stock in excess of MXN $871.416 million pesos (approximately USD $45.86 million), and (2) the assets located in Mexico or annual sales originated in Mexico of all of the economic agents involved in the concentration (seller, purchaser and target), jointly or separately, are worth more than MXN $4,979.52 million pesos (approximately USD $262.08 million).

Updated Merger Control Filing Fees

As from January 1, 2023, filing fees with COFECE amount to $227,241 pesos (approximately $11,960 dollars).

There are no filing fees for merger control filings with the Federal Institute of Telecommunications.

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