

# AMERICAS ANTITRUST REVIEW 2020

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### Mexico: Federal Economic Competition Commission

Alejandra Palacios Prieto Chair

The year 2018 was a milestone for Mexican competition policy. For one, this policy reached its 25th anniversary; also, the new Mexican Federal Economic Competition Commission (COFECE) completed its first five years in existence, after its creation as part of the 2013 competition constitutional reform. Since 2013, COFECE has addressed conduct and obstacles that hinder market competition, with a special emphasis on those that most affect Mexican households, such as transportation, food, energy, financial services and healthcare.

One of the most important challenges competition authorities face is the detection and sanction of cartels, whose activities are considered the most harmful anticompetitive conduct. To this end, approximately 48 per cent of the Commission's non-administrative staff is involved in anticartel activities. During 2018, the Commission's investigative authority issued five statements of objections in markets such as eggs, tortillas, fuels and healthcare.

Furthermore, after the conclusion of two trial-like procedures, COFECE's Board of Commissioners imposed sanctions on cartels in securities custody-related transportation and assurance markets, as well as in the market for latex products procured by the Mexican public sector. In the latex case, five companies and seven persons colluded to raise reference prices on latex condoms and catheters that the Mexican Social Security Institute would establish in its market research phase, and conspired to present or withhold, or both, proposals in various bidding processes the institute required. Fines reached approximately US\$5.8 million. In the securities custody case, COFECE discovered a seven-company and 10-individual collusion to establish minimum reference-prices for their services and segment the market by respecting each other's clients during price-adjustment periods. Fines reached approximately US\$6.4 million.

One noteworthy probe initiated by the investigative authority in 2018 is that of a 'no-poach' agreement in the professional football player recruitment market. The case resonated widely in Mexico, thus supporting COFECE's efforts to raise awareness of competition's benefits. As for the

<sup>1</sup> Except in telecoms and broadcasting markets, which fall under the scope of the Federal Telecommunications Institute.

competition community, these horizontal restraints on recruitment and hiring have generated considerable debate (eg, whether it is more of a labour policy issue) as well as research; with no doubt this experience will be relevant to the state-of-the-art competition enforcement in Mexico and in the international arena.

Successfully identifying and sanctioning cartel practices has been possible due to three central features of the Commission's work, specifically: (i) the secrecy of investigations in the first phase of the proceedings; (ii) discretion surrounding dawn raids; and (iii) the effective linkage that has come about between dawn raids and COFECE's immunity programme. In 2018, we carried out dawn raids for 10 separate cases, and our immunity programme received 11 applications, of which four fell into the 'first in' category.

As noted, one of the cartels fined in 2018 was related to government acquisitions of latex products. Bid-rigging as in this case exerts a direct impact on society, by raising prices for products and services bought by the public sector, hence reducing government capacity to cover the population's needs. In contrast, competition in public procurement ensures the quality of products and services obtained by the government, as well as licit public spending. This is relevant since public procurement is at the centre of Mexico's national agenda, and is one of the key sectors identified by the Commission's 2018–2021 Strategic Plan.

To that end, with the objective of further contributing to foster competition in public tenders, the Commission published an advocacy document entitled 'Competition Agenda Towards Public Procurement Integrity'. This agenda is a timely contribution that will help channel ongoing transformation in Mexico, especially because it coincides with plans to tackle corruption announced by the new presidential administration.

With respect to abuse of dominance cases, in 2018, COFECE undertook three new investigations, including an ex officio probe into petroleum-product commercialisation, storage and transportation. Diversifying the supply options for these products is of paramount importance; their availability is fundamental to the national economy. In the seven decades previous to 2013, the gasoline and diesel market had been exclusively state-handled and closed to competition. As of 2019, Pemex, the state-owned enterprise, controls more than 90 per cent of the wholesale market, alongside most storage and transportation infrastructure.

COFECE closed four abuse of dominance cases in 2018, all of them with commitments. In one case, entertainment and media group Grupo CIE and several of its subsidiaries pledged to restore competition in Mexico's live events production, entertainment centre operations and automated ticket sales markets. The commitment came out of a probe into tied sales for event venue ticketing and its production and administration.

In the other three cases, the Commission investigated abuse of dominance in terms of conditioned sales and exclusivity clauses in industrial oxygen, nitrogen and argon bulk distribution markets. Interested parties put forth commitments to re-establish competition in these markets, which included eliminating the exclusivity clauses for the supply of these gases; limiting exclusivity clauses for the use of the cryogenic tanks and infrastructure, allowing competitors to install tanks on the same property; limiting automatic renewals of supply contracts; and that all of these commitments would be eligible and applicable within the sphere of current and new contracts

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between them and their customers. The importance of these cases rests on their impact on other industries such as steel, glass, plastic, ceramics, mining, hydrocarbons, poultry, agriculture, textiles, cement, metallurgy, pharmaceuticals, chemicals, construction and water treatment.

A notable 2018 case, also regarding abuse of dominance, is the issuance of a statement of objections in a case in which refusal to deal and price discrimination in the market for generation, processing and commercialisation of credit information was suspected. In 2019, the Board of Commissioners handed down a more than US\$1.4 million sanction for blocking competitor access to the credit information market.

COFECE closed a probe into the market for the access to infrastructure and port services in the Mexican states of Jalisco and Nayarit, as there was insufficient evidence to prove abuse of dominance. That said, the probe did reveal that different regulations can generate disadvantages among market participants, leading to a Board of Commissioners' statement citing the need for the Ministry of Communications and Transportation to revise Mexican port regulations to promote market competition.

With respect to merger analysis, in 2018, 183 merger notifications were filed before the Commission. Seven led to in-depth reviews: in financial services, water heater manufacture, agriculture, retail, lumber, hardware market security modules, and transportation and logistics.<sup>2</sup> Out of these seven, three mergers were blocked: two in retail stores and one in the water heater manufacture segment.

One example of an in-depth merger review was that undertaken in the *Bayer/Monsanto* deal, one of the world's largest agriculture-industry transactions ever. COFECE concluded that the operation Bayer initially submitted would significantly reduce competition on price and innovation in the markets of modified cotton seeds and multiple crops. Thus, the merger was conditioned to divestment.

COFECE carried out major efforts to reduce average response times in non-complex merger cases, processing them in an average 18.1 out of the maximum 60 working days the Federal Economic Competition Law (LFCE) establishes. COFECE also launched its electronic mergers filing system, allowing for permanent access to remote filing and file status, replacing in-person office visits. The system is expected to further reduce merger resolution times throughout 2019.

The Commission has powers to conduct in-depth reviews of mergers that have not been formally notified before the agency, as long as negative effects on competition are reasonably suspected (unlawful concentrations). Instances for review might be when the transaction is below legal thresholds for compulsory notification, or when notifiable but not submitted. In 2018, non-notified mergers were reviewed in the milk, fuels and pharmaceutical markets. In the latter,

<sup>2</sup> Bayer Aktiengesellschaft (Bayer)/The Monsanto Company (Monsanto), file: CNT-024-2017; Grupo Financiero Banorte, SAB de CV/Grupo Financiero Interacciones, SAB DE CV, file: CNT-152-2017; Rheem Manufacturing Company/Rheem US Holding Inc/Grupo Industrial Saltillo SAB de CV/INGIS, SA de CV, file: CNT-072-2017; Organización Soriana, SAB de CV/WAL-MART de México, SAB de CV, file: CNT-092-2017; Masisa, SA/Inversiones Arauco Internacional Limitada/ARAUCOMEX, SA DE CV, file: CNT-016-2018; Gemalto NV/Thales, SA, file: CNT-112-2018; Westinghouse Air Brake Tech Corporation/Wabtec US Rail, INC/General Electric Company, file: CNT-124-2018.

journalism published regarding the Panama Papers recounted a possible two-distributor merger in the pharmaceutical market, leading to COFECE's investigation. In consequence, in October 2018, two economic agents, one that participated directly and another one with an indirect participation in the merger, accepted commitments to restore competition, resulting in the early closure of the investigation.

With regard to advocacy, the LFCE endows the Commission with powers to issue recommendations and opinions that promote economic competition. One notable achievement was the Financial Technology Institutions Regulation Act (the Fintech Law), which incorporated COFECE's recommendations. As there was a developing discussion with regard to how to regulate fintech companies within the banking sector, the Commission deemed desirable developing an adequate regulatory framework that guaranteed a level playing field. Therefore, in 2017, the Commission submitted pro-competitive recommendations for the fintech bill that the Mexican Congress was discussing. They stressed the Fintech Law should:

- establish that financial services users are owners of their information;
- ensure data transfers take place under non-discriminatory conditions between traditional banks and fintechs;
- ensure that credit institutions provide fintechs with banking services under nondiscriminatory conditions;
- prevent unreasonable interruptions from traditional financial institutions when these hand over information to fintechs;
- promote open software standards to facilitate the compatibility and interoperability of systems; and
- establish regulatory neutrality, avoiding regulation for fintechs becoming stricter than that applicable to the rest of the financial entities.

The Fintech Law was enacted in March 2018. In tandem, the Commission published 'Rethinking Competition in the Digital Economy', a document that covers challenges to enforcement-related powers competition authorities confront, as well as regulatory design issues that sectoral authorities face in the financial services markets, but also in accommodation or hospitality services, and electronic commerce, among others.

COFECE also issued its advocacy document, 'Transition Towards Competitive Energy Markets: LP Gas', a thorough review of the liquefied petroleum gas market's productive chain. The document provides regulatory recommendations so as to promote the entry of new players in a market that had been subject to maximum price regulation for 11 years and was liberalised in 2017.

One prominent 2018 COFECE advocacy initiative was recommending that the Ministry of Communications and Transportation eliminate the legal monopoly Airports and Ancillary Services (ASA) (ie, Mexican state-owned jet fuel provider) held to sell, distribute and provide services in airports across Mexico. The Mexican Directorate of Civil Aeronautics complied with COFECE's recommendation and repealed energy regulatory provisions that conferred ASA exclusive licence for jet fuel storage, distribution and supply services to air carriers and operators at all airports.

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Another financial sector opinion issued by COFECE relates to a Senate bill (November 2018) to prohibit banks from collecting certain banking fees. COFECE believes plausible arguments exist to specifically regulate some of them. The issue has been on COFECE's radar since 2014, when it conducted an exhaustive financial sector market study and identified opportunities for rethinking ATM-fee regulation as well as point-of-sale terminal discount rates. COFECE recommended the Senate to request Mexico's central bank (Banco de México) to study each banking fee on its own merit and, if necessary, issue regulatory measures specifically designed to address market failures identified in each of them, instead of a general prohibition. Mexico's Senate is still debating the initiative.

Last, the Commission issued a recommendation concerning a proposed draft of Mexico's official standard for powdered milk-related commercial information, testing methods and specifications. COFECE's analysis found the draft established standards even more restrictive than international benchmarks, alongside a unique set of physical-chemical parameters, regardless of the productive process. The Ministry of the Economy acknowledged the situation, leading to a regulation that adopts COFECE's recommendations on international benchmarks and best practices. Mexico is the world's second-largest powdered milk importer, reinforcing the need for assurance that trade barriers do not arise due to unfair regulation.

In relation to institution building, Congress is currently debating an LFCE amendment bill that would mandate a COFECE Advisory Council, appointed by the Board of Commissioners after a wide public consultation. The Advisory Council is projected to issue non-binding technical opinions on the work of COFECE and on issues of economic competition.

COFECE is fully committed to a culture that evaluates its outcomes. In compliance with its 2018–2021 Strategic Plan, the Institutional Performance Evaluation System was implemented to establish methodologies, rules and operative standards for constant performance monitoring. A fair portion of this system evaluates COFECE's achievements related to its diligence enforcing competition law; timeliness preventing and correcting anticompetitive markets conduct; effectiveness of positioning competition in the public agenda; and efficiency in consolidating a cutting-edge organisational model.

The team at COFECE is its number-one asset. More than 70 per cent of the institution's budget is used to pay wages. Its enforcement mandate's effective exercise is directly proportional to its ability to attract, train and retain specialised staff. In 2018, a new public officials remunerations act was passed, which, among other flaws, lacks definitions and certainty on how to regulate COFECE public officials' remuneration. As the act entered into force, most COFECE high-level appointees received salary cuts; the Commission's chair consideration was slashed by 30 per cent compared with 2018, for example. This is why its most pressing challenge for 2019 will be retaining staff. At this time, the law is under Supreme Court review after several institutions, COFECE included, filed related appeals.

Despite challenges, COFECE is undertaking special efforts to retain and develop staff, as evidenced by 2018's batch of certifications and recognitions, such as the Mexican Standard on Labour Equality and Anti-Discrimination and EDGE certification for gender equality. Extended maternity and paternity leaves, and senior staff empowerment development programmes were among the year's most notable institutional strengthening endeavours.

In the international arena, COFECE signed a cooperation agreement with the European Commission to deepen partnerships and put COFECE on the map as an important member of the global competition community. On a permanent basis, it also cooperated with Latin American competition authorities. During 2018, heads of the Strategic Latin American Alliance met on three occasions, leading to a joint declaration that emphasises the importance of the region's leniency and immunity programmes, known as the Charter of Paris, to which Argentina, Brazil, Chile, Mexico and Peru are signatories. Moreover, the 18th edition of *GCR Rating Enforcement* recognised the Commission as obtaining a 3.5 star ranking on performance and effectiveness.

Recent research by Dr Andres Aradillas, associate professor at Pennsylvania State University, published by COFECE in 2018, studies the impact of market power on Mexican household welfare in 12 basic product markets (corn tortilla, bread, chicken and egg, beef, processed meats, dairy, fruits, vegetables, non-alcoholic beverages, medicines, interurban passenger transport and building materials). He finds that for these products, Mexican households pay a 98 per cent market power-derived overprice. Moreover, welfare loss is 4.4 times greater for lower income households than for those at the top of the distribution. This ongoing reality, added to COFECE's success so far, inspires it to continue striving to protect and promote market competition, and to further contribute to both Mexican families' well-being and the nation's overall economic growth.



**Alejandra Palacios Prieto**Federal Economic Competition Commission

Alejandra Palacios Prieto was first awarded a four-year term as chair of Mexico's Federal Economic Competition Commission (COFECE) in September 2013 and received another four-year commission in April 2017. She is also vice chair of the International Competition Network and a member of the Organisation for Economic Co-operation and Development (OECD) Competition Committee's Bureau.

Ms Palacios holds a master's degree in business administration as well as a bachelor's degree in economics from the Instituto Tecnologico Autonomo de Mexico (ITAM). She also holds a master's degree in public administration and public policy from the Centro de Investigacion y Docencia Economicas.

Prior to her COFECE appointment, Ms Palacios was director of Good Governance Projects at the Mexican Institute for Competitiveness, a public policy think tank, where she oversaw research projects on economic regulation, public procurement and telecommunications, among other issues. She also served as a consultant to Mexico's former Federal Telecommunications Commission and the Mexican Institute for Social Security, mainly focused on carrying out research and evaluation projects that emerged from collaboration agreements between those institutions and the OECD.

Ms Palacios has also worked as a lecturer and academic coordinator at ITAM's Economics Department.

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