

Unclassified**English - Or. English**

27 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Working Party No. 3 on Co-operation and Enforcement****Access to the case file and protection of confidential information – Note by
Mexico**

3 December 2019

This document reproduces a written contribution from Mexico submitted for Item 4 of the 130th OECD Working Party 3 meeting on 2-3 December 2019.
More documents related to this discussion can be found at
www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm

Please contact Ms Despina PACHNOU if you have any questions about this document
[Despina.Pachnou@oecd.org, +(33-1) 45 24 95 25]

JT03455381

Contribution by Mexico's Federal Economic Competition Commission (COFECE)

1. Introduction

1. In 2013, the Decree enacting the Constitutional Reform of Broadcasting, Telecommunications and Economic Competition (Constitutional Reform) was published in the Official Gazette of the Federation. This Constitutional Reform introduced major changes into Mexico's competition regime creating two new competition authorities: the Federal Institute of Telecommunications (IFT for its acronym in Spanish), responsible for competition law enforcement in the telecommunications and broadcasting sectors, and the Federal Economic Competition Commission (hereinafter referred to as COFECE for its acronym in Spanish or Commission) in charge for enforcing competition law in all sectors of the economy, excluding those covered by the IFT.

2. Among the relevant changes derived from the Constitutional Reform is the separation between the investigative and adjudication functions in both authorities. On the one hand, the Investigative Authority has technical, administrative and operational autonomy, and is responsible of conducting the investigations of: (1) possible anticompetitive conducts (cartels, abuse of dominance and unlawful mergers); (2) existence of substantial market power; (3) barriers to entry; and (4) essential facilities. On the other hand, the adjudication body is the Board of Commissioners.

3. In COFECE, the Board of Commissioners is supported by a Technical Secretariat, who is in charge of the trial-like procedure, the ex-ante merger review, and of conducting market studies.

4. In the trial-like procedure, the Technical Secretariat notifies the relevant economic agents of any charges to which they have the right to respond and submit any contrary evidence.¹ In this procedure the Investigative Authority is also a party and can provide a view on any evidence submitted by the defendants. Once the evidence has been processed and the arguments presented, the Technical Secretariat drafts a proposal of the resolution, with recommendations either to close the case or to adopt an infringement decision, that is submitted to the Board's Commissioner-Rapporteur. The Commissioner-Rapporteur is charged with the duty of preparing the resolution project for the Board of Commissioners' approval or modification.²

5. The separation of the investigation and adjudication functions guarantees impartiality, objectivity and due process, particularly in on-going cases. Moreover, the Federal Economic Competition Law (hereinafter referred to as LFCE or competition law)

¹ Article 3, subsection I of the competition law establishes that economic agents are any natural or legal person, either for profit or non-profit, Federal, State or Municipal public administration agencies and entities, associations, business chambers and professional associations, trusts, or any other form of participation in economic activity.

² Article 83 of the LFCE establishes the provisions that must be followed in the trial-like procedure. Upon completion of the case-file it shall be assigned by the Commission's Chair to the Commissioner-Rapporteur, in a rotating manner, rigorously following the Commissioners' designation order, as well as the chronological order in which the file was completed.

establishes provisions that ensure due process for economic agents accused of an infringement. Among these provisions is the right to confront the evidence against them, included in the case file.

6. The next section of the contribution describes when and how access to a case file may be granted by the Commission, as well as the instances at which a decision for not granting access may be challenged.

7. The last section of the contribution describes the criteria used by the Commission to ensure the protection of reserved and confidential information. Confidential information is defined under Article 3, subsection IX of the LFCE as that which in case of disclosure may potentially damage the competitive position of the economic agent who provided it, which contains personal data the disclosure of which requires the economic agent's consent, may endanger its security or when its disclosure is legally prohibited. Commercially sensitive information and sensitive personal information are typically considered confidential. Article 3, subsection XI of the LFCE establishes that reserved information is that which may only be accessed by the economic agents with a legal standing in a Commission's procedure.³ Moreover, in September 2019 the Commission published its Regulatory Provisions for the qualification of information derived from legal counsel provided by economic agents, which establish measures for how information resulting from legal counsel between a lawyer and a client is handled.⁴

2. Access to the file

2.1. Investigation Phase

8. According to Article 124 of the LFCE, during the investigation phase, access to the file shall not be permitted.

9. In this phase, all the information included in a case file is related to (1) the investigated market; (2) the economic agents that participate in it; and (3) any information that supports the conduct subject to investigation, which the Investigative Authority has obtained in the exercise of its investigative tools (for example, dawn raids, requests for information, interviews, public source research, inspections). Information that is included in the case file is considered either reserved or confidential.⁵ Therefore, the Commission is impeded to give certified copies of the documents that belong to the investigation.

³ Pursuant to article 41 of the COFECE's Transparency, Access to Public Information and Protection of Personal Information Bylaw (Transparency Bylaw), files and documents classified as reserved information shall be approved by the Transparency Committee.

⁴ See press release COFECE-039-2019. Available at: <https://www.cofece.mx/wp-content/uploads/2019/10/COFECE-039-2019-English.pdf>

⁵ Article 76 of the LFCE establishes that information and documents that have been obtained by the Investigative

Authority in the exercise of its powers shall be considered as reserved, confidential or public in the terms of LFCE.

2.2. Trial-like Procedure

10. Once the Statement of Probable Responsibility (SPR) has been issued and the trial-like procedure begins, the case file is handed in to the Technical Secretariat. During this procedure, the case file is made available, with the exception of any information classified as confidential, to those economic agents with legal standing.

11. Therefore, it is the Technical Secretariat who has the faculty to grant access to the file. The rationale behind this is that economic agents need access to the case file in order to prepare an adequate defense against the allegations made by the Investigative Authority.

12. Access is only granted once the interested party has demonstrated legal interest in the case, which is recognized by the Commission. In this sense, any person who requests access to the file must either be personally involved in the case, have power-of-attorney from the relevant economic agent or be authorized by the legal representative of the economic agent in accordance to Article 111 of the LFCE.

13. Article 43 of the Regulatory Provisions of the Federal Economic Competition Law (Regulatory Provisions) establishes that those with legal standing in the trial-like procedure will have access to the file and can use any means of reproduction to obtain copies of the file's documents. This will happen only if they comply with the following: (1) exhibit a current official identification document, in original or certified copy; (2) access to the file is done within the Commission's premises, without the use of its resources; (3) do not hamper or obstruct the work of the Commission's staff; (4) do not alter documents; and (5) a record is elaborated which states the documents that were accessed and copied.⁶ In no case copies of the confidential data and documents of the case file can be obtained, with the exception of the owners of this data and documents.⁷

14. When a case file contains information provided by third parties, those with legal standing to access it may only review the information of public nature.

15. In the event that the case file includes reports prepared by experts, access will be provided as long as there is a decision issued by the Board and the report does not include confidential information. When there is information in the case file that was provided by other institutions, access to it will be provided if this was submitted by a public institution. If the information in the case file was obtained from the leniency and immunity program, only the economic agent who provided it will have access to it. Therefore, the rest of the economic agents investigated will not be able to know who received the benefit set forth in the program.⁸

⁶ Article 44 of the Regulatory Provisions establishes that the record of the accessed or copied documents shall have, at least, the: (1) case file number; (2) date and hour in which the access to the file was initiated and concluded; (3) name, signature and means of identification of those who accessed the file; (4) if the authorized person to access the file is a legal representative or the interested person; (5) the folio of the pages accessed or copied; and (6) the name and signature of the official that granted access to the case file.

⁷ In merger cases, economic agents will have access only to the information that belongs to them. However, the common legal representative and common authorized agents may access the information provided by all notifying economic agents.

⁸ The second last paragraph of Article 103 of the LFCE establishes that The Commission shall uphold the confidential nature of the identity of the economic agent and the individuals who seek to apply for the benefits of the program.

16. Once the case has been closed by the Commission, the interested economic agents may still access the file, especially when the case is under judicial review. There is no specific deadline for accessing the file, however there are protocols to destroy information after a specific period, which depend on the status of each case and the type of storage. For example, paper case files can be destroyed after 10 years of the closing of the procedure.⁹

2.3. Challenges to decisions for not granting access to information in the case file

17. The Commission may deny access to any third party that does not demonstrate having legal standing. This decision may be challenged before the Specialized Competition Courts through the filing of an *amparo*.¹⁰ Consequently, these courts can oblige the Commission to make the case file accessible to the complainant.

18. The Commission is also bound by transparency laws which exist with the purpose of guaranteeing the right to access information from any authority. The National Institute for Transparency, Access to Information and Personal Data Protection (hereinafter referred to as INAI for its acronym in Spanish or the Institute) is an autonomous constitutional body responsible for upholding the right to access to public information held by any authority.

19. Any person may present a request before any regulated entity bound by transparency laws in order to obtain information that is in its possession.¹¹ When a request of this nature is received by the Transparency Unit of the Commission, an analysis is done in order to determine whether the Commission can legally provide such information. The Commission denies any request of information when the case file is still in the investigation

⁹ In 2018 the COFECE published in the Official Gazette of the Federation an Agreement of the Board of Commissioners to issue the Guidelines of the Institutional Archive System of the Commission (Guidelines). Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5540272&fecha=08/10/2018. Article 4, subsection XI, of the Guidelines establishes the instruments for archive control that shall be used to organize and preserve the Commission's documents according to a specified life cycle established in a catalog. The Commission's Documentary Layout Catalog of March 2019 (Catalog) establishes that the investigation case files shall have a total preservation period of 10 years. After this period the Commission may destroy the information of the case file according to the provisions established in the Guidelines. The Catalog establishes that information pertaining to the leniency and immunity program shall be kept for 100 years. The Catalog is available at: https://www.cofece.mx/cofece/images/Transparencia/PNT/Fraccion_45/ACTUALIZACION_CATALOGO_DE_DISPOSICION_DOCUMENTAL.pdf.

¹⁰ *"In Mexico these appeals proceedings are similar to the habeas corpus figure in other countries. They are established by the Constitution, to grant all persons protection against acts of government. These can be brought by any party based on wide-ranging grounds, including that a law is unconstitutional or that any government action is not supported by substantial evidence or founded on reasoning that is illogical or contrary to general principle of the law."* See OECD (2016), The resolution of competition cases by specialized and generalist courts: Stocktaking of international experiences. Available at: <http://www.oecd.org/daf/competition/The-resolution-of-competition-cases-by-Specialised-and-Generalist-Courts-2016.pdf>.

¹¹ Article 23 of the General Law of Transparency and Access to Public Information establishes that regulated entities are obliged to make transparent and ensure effective access to their information and protect personal data held by them. These regulated entities are any authority, entity, body or agency of the Legislative, Executive and Judicial Branches, autonomous bodies, political parties, trusts and public funds, as well as any individual, legal entity or union who receives and uses public resources or performs acts of authority of the Federation, the States and the municipalities.

phase and even during the trial-like procedure, in accordance to the limits imposed by law under Article 124 and 125 of the LFCE.

20. Once a final decision is issued by the Board of Commissioners, and no judicial review is pending, COFECE may give access to the requested information from the case file, except for confidential or reserved information. In any case, the Commission will render a public version of the information required, this is done in order to maintain confidential or reserved information unavailable. COFECE may provide the requested information either by email, copies (not certified), certified mail, through INAI's platform or through electronic storage devices (for example, CDs or USBs).

21. The Commission may deny submitting information or grant access to a file when it is legally bound to maintain such information undisclosed. Subsequently, the Institute, based on the response rendered by the Commission, will either provide the information to the requesting party or notify the reasons why the information cannot be made available. The petitioner may file a revision recourse before the Institute. In case the Institute confirms the Commission's decision to deny a request of information, this decision may be challenged through an *amparo*. It should be highlighted that the decisions made by the INAI that oblige authorities to render information are undisputable, meaning there is no ordinary legal recourse available for the authorities against such decisions. Nonetheless, if INAI's decision orders to provide information the affects the Commission's faculties or affects what the Supreme Court of Justices of the Nation has denominated as the "guarantee of autonomy" of the constitutional autonomous bodies, COFECE is empowered to initiate a Constitutional Controversy against these acts.¹²

3. Protection of confidential information

22. In cases where the right to access information of the economic agents who have been summoned to the trial-like procedure needs to be balanced with the need to protect confidential information, the general criteria is that the information provided to the economic agents has to be enough for them to be able to provide an adequate defense.

3.1. Determination of confidential information

23. The protection of confidential information is determined by the LFCE, the Regulatory Provisions of the LFCE and the Transparency Bylaw, in accordance with the transparency laws in force.¹³ This regulatory framework allows the Commission to standardize criteria so that confidentiality is granted under the same grounds, which in turn provides legal certainty to economic agents.

24. Article 4 of the General Law of Transparency and Access to Public Information establishes that all information generated obtained, acquired, processed or held by the

¹² Constitutional controversies can be filed by acts adopted by another constitutional autonomous body, Congress or the Federal Executive Branch if they violate the exercise COFECE's powers. In November 2019, COFECE filed a Constitutional Controversy with respect to two decisions issued by INAI in 2019.

¹³ COFECE's Transparency, Access to Public Information and Protection of Personal Information Bylaw is available at: http://www.dof.gob.mx/nota_detalle.php?codigo=5482147&fecha=10/05/2017.

regulated entities is public and accessible to anyone, except for that classified as reserved or confidential information. According to the aforementioned principles of maximum publicity and availability of information, pursuant to Article 30 of the Transparency Bylaw all the Commissions information must be public except that classified as reserved or confidential. Consequently, Article 124 of the LFCE establishes that information and documents obtained directly by the Commission during its investigations and on-site inspections shall be considered as reserved, confidential or public.

25. The procedure followed to grant confidentiality uses the general rule that establishes that the provider of information has the burden to request and justify the need to protect certain information as confidential, this is established in Article 125 of the LFCE where confidential information shall only be considered as such at the economic agent's request, and upon validation that the information has this characteristic. If an economic agent considers that part of the information provided is confidential it must submit a request to the Commission explaining and justifying the reasons why the information has such nature. Likewise, the economic agent shall provide a summary of the information, satisfactory to the Commission, for its inclusion in the file.

26. The aforementioned summary should be as accurate as possible, describing the information requested to be identified as confidential, specifying (1) the harm or damage that may be caused to the competitive position of the economic agent; (2) if it is personal information; (3) the risk to the economic agent's safety if the information is disclosed; and/or (4) the legal provisions prohibiting its disclosure. This summary will be included in the case file. If the economic agent is unable to provide said summary, it shall express the reasons for said inability, in which case the Commission may draft the corresponding summary.

27. In cases where the economic agent does not make the aforesaid request, the Commission will explicitly ask for this, specifying that if no answer is submitted, the Commission will do the classification in an ex officio manner, and such information will be separated from the case file.

28. Pursuant to Chapter II of the Transparency Bylaw, the Commission has a Transparency Committee responsible of overseeing compliance of the regulatory framework describe in paragraph 23 of the is contribution. This Committee, among other faculties, can have access to confidential or reserved information in order to determine its due classification, declassification or right to grant access to it, applying a harm test when needed. According to the Transparency Bylaw, the Investigative Authority will not be subject to the control of the aforementioned Committee, instead, the Head of the Investigative Authority will have the same responsibilities as the Committee, that can be exercised independently.

29. Lastly, according paragraphs four, five and six of Article 18 of the LFCE, The Board of Commissioners' sessions shall be public, except such portions where confidential information is discussed. Confidential information shall only be considered as such when declared as such pursuant the regulatory framework describe in paragraph 23 of this contribution. The Commission shall publish the stenographic version of its sessions,¹⁴ and the decisions issued by the Board shall also be public and the parts that contain confidential or reserved information shall be classified.

¹⁴ The last paragraph of Article 35 of the Transparency Bylaw establishes the procedure for the elaboration of public versions.

3.2. Leniency and immunity program information

30. With respect to the leniency and immunity program, confidentiality is a key element to ensure its effectiveness, therefore there are specific safeguards for the handling of information obtained from program. The Commission has separate case files which are stored in an area with an access system limited to the General Director of Cartels and those directly designated by him or her.

31. In the event the Commission had to cooperate with another authority and had to share information related to a program's application, the Commission must receive a waiver from the applicant and the information to be shared should be limited to the scope of that agreed in the waiver. The Commission has used waivers for this purpose, meeting international best practices, for example by using the ICN Model Waiver Form,¹⁵ which has been extremely useful.

32. As mentioned in the previous section, an applicant's identity is confidential and shall not be made public under any circumstances. Even when certain information is integrated to the case file, confidentiality measures are always maintained, and the applicant's identity remains hidden. If there was disagreement regarding a decision by the Commission to refuse to disclose this information, COFECE's decision may be challenged through an *amparo* trial.¹⁶

3.3. Obligations of the staff to protect confidential information

33. The Commission's public officers shall abstain from publicly expressing or disclosing information related to the case files or procedures before the Commission and that directly damages the parties involved, until the economic agents subject to investigation have been notified of the Board of Commissioners' decision. When confidential information is inadvertently disclosed, the public servant responsible for the protection of such information shall be subject to responsibility in accordance to Articles 124 and 125 of the LFCE. If the information is disclosed by any individual to which access was granted to the case file, and who is not the owner of the information, the owner has the possibility to initiate a judicial procedure to claim damages caused by said disclosure.¹⁷

34. Moreover, Commissioners, the Head of the Investigative Authority and the Internal Comptroller may be removed when using, for personal benefit or that of third parties, the confidential or reserved information at their disposal by means of their office, as well as disclosing said information in infringement of the LFCE.

¹⁵ See ICN (2014), Leniency waiver templates and explanatory note. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_LeniencyWaiverNote.pdf

¹⁶ See Jurisprudence by the Supreme Court of Justice of the Nation. Época: Décima Época Registro: 2009916. Gaceta del Semanario Judicial de la Federación, Libro 22, Septiembre de 2015, Tomo I, Materia(s): Común, Tesis: P./J. 26/2015 (10a.), Pag. 28.

¹⁷ To date this has not been an extended practice. However, there is the possibility of initiating civil or administrative actions of financial liability nature, regardless of the merits of each possible claim.

3.4. Information resulting from legal counsel between a lawyer and a client

35. Lastly, in September 2019 the Commission issued its Regulatory Provisions for the qualification of information derived from legal counsel provided to economic agents, which establish measures for how information resulting from legal counsel between a lawyer and a client is handled. This type of communications must be protected and lack evidentiary value.

36. These provisions establish: (1) the elements economic agents should provide when requesting that certain information be qualified as protected by legal privilege; (2) The obligation to establish measures to be followed by public officials of the Investigative Authority during investigations and of the Technical Secretariat during proceedings resulting from said investigations, for safeguarding, protecting and qualification of such information; (3) the requirements for the establishment of committees tasked with qualifying information to be considered as part of attorney-client communications; (4) the description of the proceeding by which committees may handle and, in certain instances, exclude such information from a file. Should this case arise, physical evidence will be returned to petitioners; and electronic evidence, will be deleted from the file; and (5) the measures to prevent attorney-client communications from being known by public officials in charge of the corresponding proceeding, as well as the exclusion of public officials from such proceedings when they come into contact with such communications during their work.

37. With the publication of the provisions the Commission seeks to bring legal certainty to economic agents and to the COFECE itself.

38. The Commission does not need to provide a notice to economic agents claiming of its intention to disclose confidential information when: (1) the information is already included in public records or sources of public access; (2) by law the information should be classified as public; (3) there is a judicial order to disclose it; (4) for reasons of national security, general sanitation, or to protect the right of third parties and its publication is required; and (5) when it is transmitted amongst government entities or international government institutions, under the framework of agreements or treaties, and only if the requested information shall be used in the exercise of its corresponding powers. Request of access to information made to the Commission are explained in the previous section of this contribution.

39. The Constitutional Reform establishes that amparos can only be filed before Specialized Competition Courts against a final decision made by the Board of Commissioners. Some exceptions are made when it is determined that with no judicial intervention certain rights will be irreparably damaged. However, to this day, the decisions on confidential treatment have not yet been subject to such amparos.

40. Even though the LFCE establishes that under no circumstances shall the Commission be compelled to provide confidential information, confidential information shall be provided to the Specialized Competition Courts when it is necessary for its decision. In this case, the courts are responsible for maintaining confidential information and to decide to whom the information should be disclosed.

Contribution by Mexico's Federal Telecommunications Institute (IFT)

4. Introduction

41. The Federal Telecommunications Institute (IFT) is a convergent authority on competition and regulation of the broadcasting and telecommunications sectors in Mexico.

42. The Federal Economic Competition Law (LFCE) empowers the IFT to investigate anticompetitive conducts and to carry the trial-like procedure if it finds sufficient evidence to identify an anticompetitive conduct. As the Competition Authority, IFT also has powers to declare substantial market power, the existence of essential facilities, to set measures to eliminate competition barriers, and to carry out merger control in the aforementioned sectors.

43. When carrying out competition procedures, the IFT obtains large quantities of information. Its sources include written complaints, responses to requests,¹⁸ on-site inspections, interviews, allegations and evidence. The IFT also can employ the information contained in its files, either open or concluded, as *well-known* or *notorious* facts.

44. The LFCE provides three categories to classify the information: public, reserved or confidential. The applicable legal framework to classify information also includes Constitutional provisions and laws on transparency and access to public information.

45. The Mexican Constitution, the LFCE and other laws and jurisprudence, also protect the right of due process, which includes the right to confront the evidence and argue against the alleged infringement and thus, the right to access that evidence to prepare a proper defence.

46. The Supreme Court has defined the elements required to comply with due process and have a proper defence. These criteria mandate authorities to ensure four main features of due process:

1. Notify the beginning of the procedure and its consequences;
2. Grant the opportunity to offer evidence;
3. Guarantee the chance to make pleadings, and
4. Issue a decision that addresses all the aspects of the dispute.

47. Both, data protection and due defence are human rights enjoying Constitutional and legal protection. Therefore, the ultimate duty to protect them rests upon the authorities responsible for the file, both in administrative and judiciary levels. Secondary laws and guidelines provide criteria to classify information and procedures to grant confidential or reserved treatment in a competition procedure, on a case-by-case basis.

48. Complying with the aforementioned, the IFT shall protect confidential information under its custody, and take the necessary measures to observe both mandates: to avoid undue information disclosure and to grant due access when processing competition cases.

¹⁸ This is similar to a subpoena. The IFT itself can issue such request. It does not require any additional approval or authorization.

This requires a delicate balance between both rights, subject to criteria and provisions from the LFCE and the legal system. Likewise, it is imperative to consider the criteria issued by the Federal Judiciary, as the sole instance that can review competition authorities' decisions.

5. Confidential information

5.1. Legal framework

49. Articles 6 and 16 of the Mexican Constitution protect data from undue disclosure, and articles 14 and 16 protect the right of due process. Having both Constitutional protection as human rights, all authorities shall balance them with each other, and with other applicable principles.

50. Constitutional protection to data translates into a prohibition to both authorities and individuals to disclose personal data and information regarding assets of an individual or undertaking, and those related to the right to privacy, honour, and image.

51. The Constitution refers to secondary laws for establishing the elements from which it is possible to identify specific information as confidential and the way to ensure its treatment and protection. The Mexican legal system protects such data with the legal character of *confidential information*.

52. Transparency laws include the General Law on Transparency and Access to Public Information (LGTAIP), the Federal Law on Transparency and Access to Public Information (LFTAIP), and the "General Guidelines on the classification and declassification of information, as well as for the preparation of public versions" (Guidelines), which contain specific rules to classify information, including confidential and reserved.

53. The National Institute of Transparency, Access to Information and Protection of Personal Data (INAI)¹⁹ issues interpretation criteria related to classification and access of information matters, which are usually guiding legal elements considered during the classification process. The IFT, as a public authority, has to employ such criteria. The INAI is the authority empowered to review how public authorities adopt such criteria into their practice, and when necessary order or recommend changes.

54. In the same way, LFCE also contains specific rules regarding confidential information. Article 9 section IX²⁰ defines that confidential information is personal and any other data that upon "*(...) disclosure may potentially damage the competitive position of the economic agent who provided it (...)*". Additionally, article 125 of LFCE establishes that "*(...) Confidential Information shall only be considered as such at the economic agent's request, and upon validation that the information has this characteristic.*"

55. Therefore, the IFT is compelled to classify information as confidential if the party requests it, and if the information complies with the criteria settled by the LFCE and transparency regulations. If parties do not request such classification, the LFCE obliges the

¹⁹ In Mexico, it is the autonomous body responsible for guaranteeing in the federal limits, the exercise of the rights of access to information and the protection of personal data.

²⁰ LFCE is available at: http://www.ift.org.mx/sites/default/files/traduccion_lfce-2.pdf

IFT to do it *ex officio* (article 14 section VII).²¹ The nature of this classification remains as long as the causes of such classification exist.

56. Failures to comply are sanctioned in terms of the LFCE (article 124, third paragraph), which establish that “*Public servants shall be subject to liability in the event of disclosure of information submitted to their consideration. When there is an order by competent authority to submit information, the Commission and such authority must dictate measures to safeguard such confidential information in terms of this Law*”. Additionally, IFT’s public officials may be subject to the General Law of Administrative Responsibility in case of infringements.

57. The severity of the sanctions creates incentives for parties to skip requesting such classification. They do it upon the knowledge that officers at the competition authority have to review the information and safeguard confidential information *ex officio*. Therefore, frequently, competition authorities’ officials must take up the responsibility to elaborate the summary, and assume the correspondent burden of proof and the liability in case of misclassifications and the consequent infringement.

58. This situation is also fertile ground for claims against the summaries, prepared either by other parties or by the IFT. Besides, the current regulatory framework has not effective tools to enforce the obligation of the parties to request and proof the necessity to classify the information as confidential (or reserved).

59. Consequently, it is also necessary that parties internalize the costs of providing confidential information in a competition procedure. It is in their best interest to make summaries of the information of the confidential information they provide since they know it better than the competition authorities and they are in a better position to make a summary that best suits their needs and display its contents without ambiguity.

5.2. Types of confidential information

60. By the applicable legal framework, the IFT shall classify as confidential only the following types of information:

- Personal data concerning an identified or identifiable individual;
- Bank, fiduciary, industrial, commercial, fiscal, stock market and postal secrets, whose ownership corresponds to individuals, subjects of international law or obligated subjects when they do not involve the exercise of public resources;
- Presented by individuals to authorities, provided that they have the right to do so under the provisions of laws or international treaties;
- Information whose disclosure may cause damage or prejudice in the competitive position of the person who provided it, and
- Information whose disclosure may jeopardize a person’s security or when a legal provision prohibits its disclosure.

²¹ “VII. In compliance with constitutional principles regarding transparency, to classify information received and generated because of their functions, and agree information to be classified as reserved or confidential and the way in which it must guarantee, in every case, the protection of the personal data;”

5.3. Measures to grant confidential treatment and access

61. Access to confidential information is granted to its owner, his legal representatives and IFT officials. During the investigation, all information is reserved and no individual has access to the case file. In the trial-like procedure, parties with legal standing can access to file information except to confidential information of another party.

62. To protect procedural fairness regarding confidential information, the LFCE (article 125) orders the parties to provide summaries of confidential information to the *satisfaction* of the competition authority to be attached to file, or else, reasons why such summary cannot be completed, and the IFT shall draft the pertinent summary (see paragraphs 14 and 19).

63. There are no rules or criteria to interpret the meaning of a summary “*satisfactory*” to competition authority. The IFT classifies information on a case-by-case basis due to the diverse casuistry. The information obtained by the competition authority is certainly heterogeneous and adopts a wide array of formats. There are other aspects to take into consideration such as the nature of the information itself. By this time, there is a general understanding that “one size fits all” guidelines is not appropriate, but the regulatory framework offers room to set a minimum referential standard.

64. In practice, once the information is classified as confidential, it is located in a separate tome of the file. The summary of the confidential information is attached to the file that can be consulted by the parties with legal standing in the specific procedure. The nature of this classification remains while the causes of such classification exist.

6. Reserved information

65. Transparency laws and LFCE (article 9, section XI) also recognize *reserved* information, which can “(...) *only be accessed by the Economic Agents with legal standing in a particular procedure.*” Complimentary, it (article 125, second paragraph) provides that during the procedure, the file’s information is *reserved*, except that which has been classified as *confidential*.

66. The concept of reserved information entails a temporary ban for third parties to access it. Once the reasons to establish that ban no longer exist, the authority shall disclose such information.

67. To classify a file’s information as reserved, provided of course it is not confidential, obeys to the rationale that there is not a final opinion or determination in the matter. If third parties have access to it, they would get to know the matters discussed. In that case, third parties could make lobby or pressure, or have an undue influence on the procedure.

68. Regarding a file’s interlocutory decisions, they are classified as reserved information and parties only have access to redacted versions. If they contain confidential information, parties have access to the correspondent summary.

7. The balance between data protection and due process

69. As mentioned above, the Constitution and regulations ultimately pose the duty to protect both rights on authorities. Accordingly, the IFT is compelled to protect both,

confidential information and take the necessary steps to guarantee due process to those affected by its determinations, in a harmonised and consistent way between competition law and transparency regulations.

70. The regulatory framework does not provide a fair balance between, on the one hand, observance of the fundamental right to personal data and, on the other hand, the right to a due process, including access to evidence relevant for the case. Because no such balance exists, authorities must provide it.

71. At first glance, it may be intuitive to grant access to such information to preserve procedural fairness. However, paradoxical situations may arise from this interpretation. For example, it is questionable that the alleged responsible of an anticompetitive conduct is entitled to access its competitor's information to prepare its defence. It may be worse if the anticompetitive conduct charged is a horizontal (i.e. collusive) one. In that scenario, the procedure to sanction such conduct would ironically be the conduit to access competitor's information that could damage competition against the very mandate of competition authorities.

72. Thus, the probably responsible agent of an anticompetitive practice accessing a client or provider confidential information will not only be able to stand a fair trial but will learn something about their business. This knowledge could be used as an advantage against these clients or providers if the probably responsible agent competes with them in an upstream or downstream market. This scenario by itself may potentially damage the competitive position of the client or provider who provided it.

73. Another critical issue refers to market shares. One key concept in assessing unilateral practices and the existence of effective competition is substantial market power, which requires information about market shares. This statistical information built upon multiple clients, revenue or assets and its disclosure can hamper independent competition in the relevant and the related markets. Therefore, this information is kept confidential, even if it constitutes evidence intended to establish the responsibility of the alleged infringer.

74. To avoid such situations, the LFCE protects the right of data protection by preventing third parties to have access to confidential information provided by one party. It also protects the right to have access to necessary evidence, by mandating the inclusion of adequate summaries of the confidential information into the file. Competition authority officers shall not disclose such information but only show the correspondent summary instead. The content and length of the summaries must balance both purposes and play a critical role in procedural fairness.

75. Parties preparing a defence seek access to confidential information frequently based on the claim that the summary is insufficient and does not provide enough data to make a proper defence. On the other hand, parties who provided the summarized confidential information often claim that the summary provides too much detail.

8. Means to challenge IFT's decisions on classifying file's information

76. Once the IFT classifies information in any competition procedure, there is no recourse or remedy to try before it to reverse it and have access to third parties confidential information.

77. The constitutional and legal framework explicitly states that there are not administrative instances for reviewing or challenging any interlocutory determination, including the refusal to access confidential or reserved information. Competition authorities' acts can only be challenged through *amparo* trials and are not subject to suspension. According to judicial criteria, the limitation to challenge the acts of the competition authority at a particular time does not prevent the defence of individuals, it only differs it until the issuance of the final determination of the procedure.²²

78. The current regulatory framework aims to deter incentives to abuse of administrative reviews and *amparos* to delay competition enforcement. Previously, parties could file for an administrative appeal before the competition authority, adjudged by its Board. They also could file *amparo* suits before Federal Courts against any competition authority's decision, either interlocutory or final. Additionally, they could request a suspension against the challenged acts whose effect could even suspend the respective procedure.

9. Judicial criteria regarding confidential information and procedural fairness

79. All claims on access to confidential and reserved information are intra-processes; therefore, parties cannot lodge a judicial appeal until the case is solved. Only Specialized Courts on Competition, Telecommunications and Broadcasting can review allegations on the final decision and intra-process actions, such as information classification and access to the file. Also, the Supreme Court intervenes in cases that warranted a constitutional assessment between both rights (i.e., data protection versus due process).

80. In addition to the legal framework applicable to competition processes, Judiciary also can use specific criteria. According to article 217 of *Amparo* Law, judicial criteria is only compelling to District Courts and Circuit Courts. They have to apply them when handling their cases. Thus, competition authorities do not need to disclose information in the manner set by judicial criteria.

81. The Supreme Court has emphasized the right to offer evidence as a necessary condition of due process. Considering this criterion, those affected by an IFT determination may request access to all the evidence considered in it to exercise its right to prepare a proper defence. District judges have the power to allow parties access to reserved parts of the file. Even though parties often request full access to confidential information to prepare a proper defence.

82. The Judiciary took several cases to provide guiding criteria on whether the lack of access to confidential information may impair the defence of those involved in any competition procedure.

83. The Supreme Court ruled that:

- District Courts decide —on the merits of each case and their direct responsibility— when, and to what extent, to grant access to the information considered *essential* for the parties' defense;

²² Jurisprudence derived from the contradiction 7/2016, resolved by the Plenary Circuit in Administrative Matters Specialized in Economic Competition, Broadcasting, and Telecommunications, with residence in Mexico City and jurisdiction throughout the Republic.

- To do so, they shall weight the rights involved,²³ and
- They shall ensure that parties do not copy, photograph, scan or reproduce the information.

84. Intuitively, this criteria implies that the District Court must weigh the right to a fair process of one party vis-à-vis the right to privacy of the other(s), on the merits of each case (i.e., qualitative and discretionary basis), taking into account the arguments of each party. The Supreme Court has not provided a criterion on how to grant access to information considered essential for a party's defence.

85. Each District Court can set the measures that it deems necessary on a case-by-case basis. Measures can vary from granting access to entire documents to only redacted versions.

86. Common claims before the District Courts deal with how much of the information is protected versus how much is disclosed to the counterpart. Taking a document as reference, one party can claim that the other party only needs to know parts of it, but not its entirety. The other party, of course, alleges the contrary on the basis that not knowing the entire document prevents it to verify the authenticity or context of the disclosed data.

10. Final Remarks

87. The LFCE's prohibition to disclose confidential information has a rationale. As mentioned above, disclosing information to other parties entails risk on competition when they are competitors, clients or providers. Therefore, under no circumstance information labelled as confidential shall be handed to any other party than its owner.

88. Judicial criteria regarding this matter are ambiguous. Several tests have to be applied. Each of them has a degree of discretion. Special emphasis has to be made in the weighing of the right to privacy of the party that handed the confidential information and the requesting party's right to due process. This discretionary test also encloses a degree of subjectivity. As mentioned above, no objective measure of these rights can be obtained. If the rationale behind the LFCE is applied, the right to privacy will always outweigh the right to due process because granting access to competitors, clients or providers information entails risk to competition and society as a whole.

89. The criteria to make exceptions to confidential information upon reasons related to due process are not mandatory for competition authorities, but only to the judiciary. There are no reasons to expect authorities to start making exceptions to allow parties access to confidential information. At least, it should not be expected from competition authorities because of the risks mentioned above.

90. Among these reasons are the summaries required by the LFCE that should enable any party's defence. At the very least, these summaries are the only legal source to provide access to third parties to get a glance to an abstract of confidential information provided by another party.

91. Judicial criteria are too broad in this regard. They are not focused on key aspects of competition law, but they can be applied to any aspect considered by the judges as critical

²³ Jurisprudence derived from the contradiction 12/2014, resolved by the Plenary Session of the Supreme Court of Justice of the Nation.

to a party's defence. It cannot be ruled out that upon these criteria, access to revenue, assets or any other sensitive information of another party can be granted. Essential elements to prepare a proper defence should be identified in the LFCE and should not be left to a judge's discretion, whose decision may not be perceived as fair by the parties.

92. The IFT expects that developments on this topic, both in competition cases and in the entire legal system, will build up more criteria and case law useful to improve the assessment on both rights –data protection and due process– with more certainty.