

# AMERICAS ANTITRUST REVIEW 2021

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### **Preface**

Global Competition Review's *Americas Antitrust Review 2021* is one of a series of regional reviews that have been conceived to deliver specialist intelligence and research to our readers – general counsel, government agencies and private practice lawyers – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Asia-Pacific, and Europe, the Middle East and Africa, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in the field.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws over the coming year.

**Global Competition Review** 

London

August 2020

Alejandra Palacios

Chair

#### In summary

COFECE continues to focus on mass consumption markets where competition may impact the welfare of families. In enforcement matters, the Commission has several ongoing high-profile investigations in several markets, including the fuel, transport and the health sectors. In 2019, the Commission: filed its second criminal complaint against individuals possibly engaged in bid rigging in health sector public tenders; blocked a landmark operation in which Walmart intended to acquire Cornershop; published two important market studies; and issued its Digital Strategy to deepen its understanding of digital markets and strengthen its capacity to bring benefits to consumers.

#### **Discussion points**

- High-profile cases in the oil market
- Sanctions imposed for cartel and gun-jumping activity
- Federal Judiciary Branch ruling in COFECE's favour over conflict of jurisdiction in digital markets
- COFECE awarded second-level EDGE certification and 'Great Place to Work' registration
- COFECE filed second criminal complaint to the Office of the Attorney General

#### Referenced in this article

- Blocked Walmart/Cornershop merger
- Disney/Fox merger
- Uber/Cornershop judiciary precedent
- Transition towards competed energy markets study: petrol and diesel
- Market study on competition in federal passenger transportation
- COFECE Model: An Institutional Building Perspective
- COFECE Digital Strategy

#### Introduction

Competition can improve the welfare of Mexican families by providing quality products at the lowest possible prices. Since its creation, the Federal Economic Competition Commission (COFECE) has been committed to focusing its enforcement and advocacy activities on mass consumption products and services in the Mexican markets, where it can make a difference in the welfare of households, especially those in the lowest levels of income. For example, the Commission's efforts encompass markets such as medicine, petrol, LP gas, public debt and passenger auto transport services. We have also actively combated collusion in public procurement.

#### **Enforcement against anticompetitive practices**

Several high-profile cases were initiated over the course of 2019. Three of these included oil-related markets: two investigations into the market of the retail of petrol and diesel at service stations and a third analysing competition barriers into the national aviation fuel market. Other cases involved a possible cartel in the commercialisation of corn flour, and a probe for possible unilateral conducts in the market of federal ground passenger transportation at Mexico City International Airport.

The Commission also continued investigating cases rolled over from the previous year. One of these involves a notorious cartel conduct investigation in the market for the recruitment of football players (involving possible non-poaching agreements).<sup>4</sup>

COFECE also issued several statements of objection. In one of these cases the Commission had knowledge of collusive agreements to manipulate the price of debt securities or impose obligations to not commercialise or acquire a part of these. In relation to this case, which is still pending with the Commission, some of the alleged offenders were accused of damage in the United States. The class action was filed in March 2018 by several pension funds that claimed that the possible offenders operated as a cartel from January 2006 to April 2017. This claim was dismissed by a New York Federal Court. Nevertheless, and given COFECE's statement of objections of October 2019, the case reopened, and some banks have decided to settle to resolve the class action.

See Press Release COFECE-044-2019, available at www.cofece.mx/wp-content/uploads/2019/11/ COFECE-044-2019-English.pdf.

<sup>2</sup> See Press Release COFECE-021-2019, available at www.cofece.mx/wp-content/uploads/2019/04/ COFECE-021-2019-English.pdf.

<sup>3</sup> See Press Release COFECE-010-2019, available at www.cofece.mx/wp-content/uploads/2019/02/ COFECE-010-2019-English.pdf.

<sup>4</sup> See Press Release COFECE-050-2018, available at www.cofece.mx/wp-content/uploads/2018/11/ COFECE-050-2018-English.pdf.

<sup>5</sup> See Press Release COFECE-040-2019, available at www.cofece.mx/wp-content/uploads/2019/10/ COFECE-040-2019-English.pdf.

<sup>6</sup> In re Mexican Government Bonds Antitrust Litig., No. 18-cv-2830 (S.D.N.Y.). See 'JPMorgan, Barclays To Pay Mexican Bond Investors \$20.7M', Law360, available at www.law360.com/articles/1279000.

Another important case (the broadest investigation yet handled by COFECE) addresses the health sector. Several economic agents were notified of probable cartel conduct in the entire chain of commercialisation and distribution of pharmaceuticals.<sup>7</sup>

During 2019, COFECE imposed diverse fines on companies that committed anticompetitive conduct. Cancun International Airport, for instance, was sanctioned 72.5 million Mexican pesos for preventing new taxi groups from providing ground transport services from the airport. This practice resulted in an estimated harm of 98 million Mexican pesos as a result of an average overcharge of 8 per cent on taxi fares.

The Commission also fined Dun & Bradstreet 27.4 million Mexican pesos for refusing to deal in the national market for the collection and processing of credit information belonging to legal entities and natural persons. Dun & Bradstreet refused to share the credit information of businesses and individuals with competing companies, despite an obligation to do so established in the Law to Regulate Credit Information Systems. Estimates show a 15.5 million Mexican peso harm on the market.

COFECE also imposed sanctions on four cartels. The most notorious case involved air transportation. The Commission fined Aeroméxico and Mexicana 88 million Mexican pesos and the minimum applicable fine (as the latter company had formally filed for bankruptcy), respectively, for agreeing on the exchange of information for final ticketing prices for at least 112 domestic routes. We estimate that this anticompetitive practice directly affected more than 3.6 million passengers and caused damages of 2.8 billion Mexican pesos.

Two other cartel sanctions involved local markets for corn tortillas, a staple product in the Mexican diet, particularly for low-income households. In one of these cases COFECE fined 11 economic agents a total of 344,000 Mexican pesos in the municipality of Ángel Albino Corzo in Chiapas. The Commission found that the cartel had been fixing prices as well as imposing obligations to solely distribute this staple in tortilla shops. The second case fined eight economic agents a total of 2.1 million Mexican pesos in the city of Palenque in Chiapas for fixing per-kilogram prices of tortillas at between 10 and 17 Mexican pesos and for publicly advertising the agreed price on posters displayed in tortilla shops and other retail locations. Additionally, the economic agents segmented markets by establishing minimum distances between tortilla shops.

<sup>7</sup> See Press Release COFECE-033-2019, available at www.cofece.mx/wp-content/uploads/2019/06/ COFECE-033-2019-English.pdf.

<sup>8</sup> See Press Release COFECE-037-2019, available at www.cofece.mx/wp-content/uploads/2019/09/ COFECE-037-2019\_Airport\_Cancun\_ENG.pdf.

<sup>9</sup> See Press Release COFECE-011-2019, available at www.cofece.mx/wp-content/uploads/2019/02/ COFECE-011-2019-English.pdf.

<sup>10</sup> See Public version of the resolution of file I0-002-2015, available at www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V299/0/4790610.pdf.

<sup>11</sup> See Press Release COFECE-041-2019, available at www.cofece.mx/wp-content/uploads/2019/10/ COFECE-041-2019-English.pdf.

<sup>12</sup> See Press Release COFECE-035-2019, available at www.cofece.mx/wp-content/uploads/2019/09/ COFECE-035-2019\_English\_final.pdf.

In the health sector, the Board of Commissioners found that three companies coordinated and fixed bids for toothbrushes sold in the public health sector. Here, the Commission imposed a total fine of 18 million Mexican pesos. <sup>13</sup> In early 2020, two of these companies were also sanctioned by COFECE for coordinating prices and discounts in their bids submitted for public tenders convened by the Mexican Social Security Institute to procure disposable polyethylene gloves. <sup>14</sup>

Finally, three gun-jumping cases were sanctioned during 2019. One of these involved BorgWarner and Remy Holdings International, who were fined 2.9 million Mexican pesos for failing to notify a concentration. In the second case, the Commission imposed a total fine of 1.5 million Mexican pesos on Banco Ve por Más and Bankaool for failing to notify a concentration before closing the operation. The last case was the unnotified merger between Nestlé México, Société des Produits Nestlé, Nestec and Innovación de Alimentos, amounting to a total fine of 7.92 million Mexican pesos. To

In 2019, the Commission also participated in a criminal prosecution. The agency filed its second criminal complaint before the Office of the Attorney General (FGR) against individuals who allegedly engaged in bid-rigging practices in public tenders in the health sector (primarily between 2011 and 2015). Once a complaint is filed, the FGR should compile the corresponding investigation criminal file and, if deemed necessary, exercise criminal action against those that are likely to be involved in the cartel conduct.

Finally, to bring greater legal certainty to its work, COFECE issued two important regulatory provisions.

In September 2019, the Regulatory Provisions for the Qualification of Information Derived from Legal Counsel Provided to Economic Agents were approved by the Board of Commissioners and published in the Federal Official Gazette. <sup>19</sup> These Provisions seek to provide measures for the treatment of client–attorney privileged information by establishing how information resulting from legal counsel between a lawyer and a client will be handled by COFECE and, if applicable, protected to safeguard the rights of economic agents and guarantee impartial probes and due process. This is a milestone in Mexico as there is no other regulation in the country addressing this issue.

<sup>13</sup> See Press Release COFECE-034-2019, available at www.cofece.mx/wp-content/uploads/2019/07/ COFECE-034-2019-Eng.pdf.

<sup>14</sup> See Press Release COFECE-006-2020, available at www.cofece.mx/wp-content/uploads/2020/02/ COFECE-006-2020.pdf.

<sup>15</sup> See Press Release COFECE-006-2019, available at www.cofece.mx/wp-content/uploads/2019/02/COFECE-006-2019-English.pdf.

<sup>16</sup> See Press Release COFECE-003-2019, available at www.cofece.mx/wp-content/uploads/2019/01/ COFECE-003-2019-English.pdf.

<sup>17</sup> See Press Release COFECE-015-2019, available at www.cofece.mx/wp-content/uploads/2019/03/COFECE-015-2019\_English.pdf.

<sup>18</sup> See Press Release COFECE-042-2019, available at www.cofece.mx/wp-content/uploads/2019/10/ COFECE-042-2019-English.pdf.

<sup>19</sup> See Press Release COFECE-039-2019, available at www.cofece.mx/wp-content/uploads/2019/10/ COFECE-039-2019-English.pdf.

In early 2020, after a public consultation held in 2019, the Commission published new Regulatory Provisions of the Leniency and Sanction Reduction Programme foreseen in article 103 of the Federal Economic Competition Law.<sup>20</sup> The purpose of these Provisions is to provide greater legal certainty to interested leniency applicants, clarifying issues such as conditions for revoking leniency or the handling of information provided by applicants. Today, the Commission is working on a new leniency guideline that adequately explains the changes that are included in the new Regulatory Provisions.

#### Mergers

In 2019, COFECE received 153 merger filings. 21 Among these transactions, a landmark operation was Cornershop's acquisition by Walmart. This merger was blocked by the Commission. 22

Walmart is a retail company that operates supermarkets, membership price clubs, pharmacies and online stores, and is the largest chain of retail stores in the country, measured both in the number of stores and total sales (in fact, its total sales are four times larger than those of its closest competitor). Cornershop is a Mexican partnership that offers logistical services for the exhibition, purchase and immediate delivery of products offered by retailers through their website and a mobile app. Cornershop is the largest economic agent with these services in the cities in which it operates. The merger would operate as vertical integration.

COFECE's analysis identified the following potential risks if the concentration was carried out: Cornershop could refuse to offer its services to Walmart's competitors, Walmart could refuse to retail its products on platforms operated by Cornershop's competitors, and the new economic agent resulting from the transaction could induce Walmart's competitors to abandon the Cornershop platform through the strategic use of information produced and provided by competitors to retail their products. Although the parties submitted remedies, these were deemed as insufficient to avoid possible negative effects on competition.

Cornershop subsequently found another potential buyer (Uber) and notified this transaction to COFECE in October 2019. However, the Federal Institute of Telecommunications (IFT), the authority charged with sectoral regulation for the broadcasting and telecommunications sector, as well as for enforcing the Mexican competition law in those sectors only, also considered itself as the competent authority to handle the concentration, thus giving rise to a conflict of scope of powers in the legal competition framework in Mexico. In accordance with the Competition Act, the Federal Judiciary Branch settles this type of conflict after hearing arguments from both agencies.

<sup>20</sup> See Press Release COFECE-008-2020, available at www.cofece.mx/wp-content/uploads/2020/03/ COFECE-008-2020.pdf.

<sup>21</sup> See 'Cuarto Informe Trimestral 2019', available at www.cofece.mx/cofece/images/Transparencia/PNT/ Fraccion\_29/4IT2019.pdf#pdf.

<sup>22</sup> See Press Release COFECE-032-2019, available at www.cofece.mx/wp-content/uploads/2019/06/ COFECE-032-2019-English.pdf.

On the one hand, the IFT argued that the digital platforms are applications that operate and are accessed via the internet. Thus, the digital platforms operated by Uber and Cornershop belong to the value chain of the telecoms sector. On the other hand, COFECE argued that digital platforms such as Uber and Cornershop do not provide telecommunications services, but only use these as an input to offer their respective services.

In May 2020, a specialised circuit court unanimously decided to grant COFECE the competence to assess and resolve the concentration between Uber and Cornershop arguing that: (i) the notifying parties are not telecommunications concessionaries, but rather use telecommunications for providing their services through a digital platform; (ii) the provided services are not telecommunications, but logistics and intermediation between users, drivers and delivery; and (iii) the notifying parties use the internet as an input, which does not constitute the platform's service or its source of income.<sup>23</sup>

This decision was the most important dispute in the court in 2019 and sets an important precedent for defining the scope of powers between COFECE and the IFT in the context of digital markets. As a result of this judicial resolution, there is now a clearer interpretation of which authority assesses mergers that involve digital platforms that do not provide telecommunications or broadcasting services.

COFECE also assessed the *Disney/Fox* merger.<sup>24</sup> For this operation to be approved, the parties notified COFECE of a modification to the transaction to eliminate any possible risk to competition in the market for film distribution for exhibition in theatres. Accordingly, Disney would end its alliance with Sony Pictures in the market, eliminating all possible competition risks. Other markets such as cable entertainment and regional sport channels fell under the jurisdiction of the IFT, which has sole competition power in the broadcasting and telecommunications markets.

Also in 2019, COFECE issued guidelines and regulatory provisions for online merger submissions. <sup>25</sup> During 2019, of the 153 notifications received, 44 were submitted online. In January 2020, it became mandatory for all merger notifications to be submitted through the electronic procedure system on the Commission's website. <sup>26</sup> This measure has simplified the procedure and reduced the associated costs and times. Moreover, during the covid-19 pandemic this system has allowed for the uninterrupted review of cases.

#### **Advocacy**

COFECE continued to advocate competition and free market access in 2019. Two important projects involved the publication of market studies by the Commission.

<sup>23</sup> See Press Release COFECE-020-2020, available at www.cofece.mx/wp-content/uploads/2020/05/ COFECE-020-2020\_-cornershop-uber.pdf.

<sup>24</sup> See Press Release COFECE-009-2019, available at www.cofece.mx/wp-content/uploads/2019/02/ COFECE-009-2019-English.pdf.

<sup>25</sup> See Press Release COFECE-029-2019, available at www.cofece.mx/wp-content/uploads/2019/05/ COFECE-029-2019-English.pdf.

<sup>26</sup> See Press Release COFECE-024-2020, available at www.cofece.mx/wp-content/uploads/2020/06/ COFECE-024-2020.pdf.

One of these studies, 'Transition towards competed energy markets: petrol and diesel', is an update of a previous document issued in 2016 with the same title. This new report constitutes an assessment of the implementation of the energy reform of 2013 in the petrol and diesel markets. It includes public policy recommendations to foster efficient supply of these fossil fuels. These policy changes will create better conditions for greater competition and lower prices in these markets. Given the importance of petrol and diesel in the welfare of Mexican households and companies, it is fundamental to promote and ease the entrance of more participants in both wholesale and retail, and to encourage investment across the entire production chain. Among the key aspects conveyed by the report are the need to reduce barriers to promote capital inflow for the creation of storage and transport infrastructure, the removal of red tape for obtaining import permits and authorisation for new service stations and the elimination of any regulation that favours the state-owned enterprise, Petróleos Mexicanos, which still holds – at least in wholesale – a very large market share.

The second study, 'Market study on competition in federal passenger transportation', identifies the role of regulations in hindering competition in this market.<sup>28</sup> Although it was partially deregulated in 1993, this service currently displays slow technological change and a general lack of innovative business models. The study found that 76.8 per cent of the 5,877 inter-urban routes studied are covered by a sole operator, and federal regulation hinders the participation of more suppliers. COFECE identified a series of these obstacles limiting entry and competition. The Commission's estimates show that if pro-competitive measures were to be enacted, the entry of one new competitor on a route could reduce the price by 40 per cent per kilometre. This study is relevant because federal land passenger transportation is the main means of public inter-urban transportation in Mexico.

#### Institutional strengthening

In 2019, the Commission made major strides in institutional growth to ensure stability and reduce the turnover of its personnel. The Commission implemented a programme in which its officials have the opportunity to spend important time in foreign agencies to broaden their perspective of competition policy (the programme was launched in 2019 with the Australian Competition and Consumer Commission and the US Federal Trade Commission). Moreover, the Commission moved into a more accessible and centrally located office building, with easy access to public transportation and some of Mexico City's main streets. This has significantly reduced commuting times, improving quality of life and reducing staff turnover.

Also, in early 2020, the Commission was certified as a 'Great Place to Work' institution and moved one step closer to a world-leading gender equality certification.<sup>29</sup> Today, the Commission is certified at the intermediate level two ('Move'), which means that the authority's policies

<sup>27</sup> See Press Release COFECE-005-2019, available at www.cofece.mx/wp-content/uploads/2019/01/ COFECE-005-2019-English.pdf.

<sup>28</sup> See Press Release COFECE-023-2019, available at www.cofece.mx/wp-content/uploads/2019/04/ COFECE-023-2019-English.pdf.

<sup>29</sup> Economic for Gender Equality, EDGE Certificate.

and practices have reached a systematic balance, guaranteeing equal growth and development between men and women, thus fostering an inclusive workplace culture. It is worth highlighting that worldwide there are very few government institutions that have obtained the latter certification.<sup>30</sup>

We are especially proud that these efforts have been made under a new administration that has cut salaries of senior public officials and has established a 10-year cooling-off period. Despite these new policies, the Commission's turnover has dropped, and no senior officers left the institution in 2019.

In 2019, Mexico's competition law and policy underwent an examination by the Organisation for Economic Co-operation and Development (OECD). The peer review report concludes that COFECE is perceived as a 'strong institution contributing to the effective application of the law, independent, serious, trusted, ethical and with a high level of expertise'. <sup>31</sup> The document also recognises that the Commission has an '[e]xcellent reputation within the competition-authority community, both nationally and internationally, within the business community and the government administration . . . [and is s]een to act with integrity and to the highest standards of public service'. <sup>32</sup> Examples of COFECE's international recognition are the celebration of international workshops hosted by the Commission in 2019: one with the OECD on cartel detection and one for the ICN's Unilateral Conduct Working Group.

To preserve the institutional legacy developed since the creation of COFECE, the Commission published COFECE Model: An Institutional Building Perspective in 2019.<sup>33</sup> This document describes the trajectory to develop an impartial, technical and internationally recognised institution. The essay outlines our model for establishing technical rigour, high specialisation and a vocation for public service, which are decisive factors for the success of competition policy in Mexico.

#### Final remarks

COFECE recognises that its work is far from done. Going forward, we hope to further understand competition dynamics in digital markets. In early 2020, we launched a digital strategy to handle these markets, including strengthening our technological infrastructure and the capacities of our staff in this area, creating a digital markets unit within the institution and strengthening international cooperation and contact with international experts.<sup>34</sup>

<sup>30</sup> See Press Release COFECE-003-2020, available at www.cofece.mx/wp-content/uploads/2020/02/ COFECE-003-2020.pdf.

<sup>31</sup> OECD (2020), OECD Peer Reviews of Competition Law and Policy: Mexico, available at www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-mexico-2020.htm.

<sup>32</sup> ibid.

<sup>33</sup> See 'Modelo COFECE: Una perspectiva de construcción institucional', available at www.cofece.mx/wp-content/uploads/2019/11/Modelo-COFECE\_web.pdf#pdf.

<sup>34</sup> See Press Release COFECE-013-2020, available at www.cofece.mx/wp-content/uploads/2020/03/ COFECE-013-2020-DIGITAL-STRATEGY-Vf.pdf.



**Alejandra Palacios**Federal Economic Competition Commission

Alejandra Palacios is Chair of Mexico's antitrust agency and the first woman to head the authority. Alejandra was first appointed by Congress in 2013 and was re-elected in 2017 for a second four-year tenure. She is vice president of the International Competition Network and a member of the OECD Competition Committee and the International Women's Forum, Mexico chapter. In 2019, the Women@Competition organisation included her in its list of '40 in their 40s' as one of the 40 most notable women in competition in the Americas, Asia and Europe.

Ms Palacios holds a master's degree in business administration and a bachelor's degree in economics from the Instituto 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.

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



Comisión Federal de Competencia Económica

COFECE is an autonomous body with its own legal personality and patrimony; its purpose is to promote, protect and guarantee free market access and economic competition, as well as to prevent, investigate and combat monopolistic practices, unlawful concentrations and other restrictions to the efficient functioning of markets. COFECE may order actions to eliminate barriers to competition and free market access and determine the existence of and regulate access to essential facilities, as well as order the divestiture of assets, rights, partnership interest or stock pertaining to economic agents.

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