

From the enforcer: Federal Economic Competition Commission

25 November 2021

Mexico: from the enforcer

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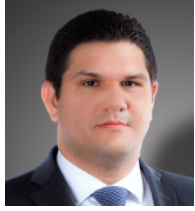
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Questions and answers

Mexico: from the enforcer's competition economists



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How long is the head of agency's term of office?

The term of office of the Chair Commissioner of the Federal Economic Competition Commission of Mexico (COFECE) is four years, after which the head may be reappointed for a second period of the same duration. Article 19 of the Competition Act provides that in a case of absence or vacancy of the chair, the most senior Commissioner shall replace the chair.

When is he or she due for reappointment?

On 10 September 2021, Commissioner Brenda Gisela Hernández Ramírez took office as Acting Chair Commissioner in accordance with article 19 of the Competition Act, while the Senate appoints COFECE's new Chair for a four-year term.

Which posts within the organisation are political appointments?

After a technical examination procedure, candidates to Commissioners are nominated by the President of Mexico for a non-renewable nine-year period and have to be ratified by the Senate.

The procedure for appointing Commissioners is briefly described below:

- Upon the existence of a vacancy in a Commissioner position, an independent reviewing committee (RC) shall issue a public call. Positions are open to any interested person, but any Commissioner shall fulfil several requirements, including experience, outstanding professional performance and no recent links with agents that have been subject to any procedure before the antitrust agency.
- Eligible applicants shall take a technical test on competition matters.
- For each vacancy, the RC shall submit to the President of Mexico a list of the applicants who obtained the highest test scores (minimum three and maximum five individuals).
- The President shall select, among said list, a nominee for each vacant position, to be ratified by the Senate.
- Ratification by the Senate requires a qualified vote (at least two-thirds).
- Commissioner positions have tenure of nine years with no reappointment.
- The head of the agency (Chairperson) is appointed by a two-thirds majority vote from the Senate from among the Commissioners in functions.

The Commission currently has three vacancies for Commissioners. For two of these vacancies, the RC submitted to the President of Mexico the corresponding lists of eligible candidates (one on 20 November 2020 and for the other one on 20 April 2021). There is no legal deadline for the President to select a nominee from each of the lists, and to date, no candidates from these lists have been submitted to the Senate for ratification. As for the third vacancy, last September 2021 the RC issued a public call for nominations.

What is the agency's annual budget?

The 2021 budget is 598,670,029 Mexican pesos.

How many staff are employed by the agency?

The total number of positions at COFECE is 453; as of 30 September 2021, the number of staff employed by COFECE is 431.

To whom does the head of the agency report?

COFECE is independent but as part of its accountability obligations it must submit an annual work programme and quarterly activity reports to the President and Federal Legislative body. The chair appears before Senate on an annual basis and may be summoned for extraordinary hearings.

Do any industry-specific regulators have competition powers?

As per the Constitutional Reform of 2013, the Federal Telecommunications Institute (IFT) is both the regulator and the competition authority for the broadcasting and telecommunications sectors. COFECE has no competition powers in these sectors.

If so, how do these relate to your role?

COFECE and the IFT must enforce the Federal Law on Economic Competition (FLEC) in their respective areas of authority. Both agencies are fully autonomous and perform their activities independently. However, both institutions have put in place several cooperation agreements in order to promote coherence in the enforcement of the law, share experiences, exchange information and foster competition.

Do politicians have any right to overrule or disregard the decisions of the authority?

No. COFECE's final decisions may only be overruled judicially by means of a constitutional recourse denominated indirect *amparo*.

Does the law allow non-competition aims to be considered when taking decisions?

No.

Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this?

The only judicial body that may hear appeals against COFECE's final decisions are the Federal Courts Specialised in Competition, Broadcasting and Telecommunications, and the only form of judicial review is by indirect *amparo*. Further, the Supreme Court has the power to attract appeals pending before the Specialised Courts.

When the Commission becomes aware of acts or general regulations contrary to competition and free market access, issued by a state or a municipality, it may notify such circumstance to the President of Mexico (or a competent authority), and if said authority(ies) deems it pertinent, it will initiate an action of unconstitutionality.

If the Commission becomes aware of acts or general provisions issued by Congress, or the President of Mexico, which contravene the exercise of the Commission's powers, it may file a constitutional controversy before the Supreme Court.

Has the authority ever blocked a proposed merger?

In 2020 and to date, there have been no mergers blocked. This is due to the following three situations that were observed in 2020: (1) mergers cleared without conditions after modifications were made to the original terms of the transaction; (2) abandoned cases by the parties; and (3) more corporate restructures than usual, which are non-complex mergers.

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The first situation refers to those mergers in which the notifying parties decided to modify the original terms of the transaction after informal conversations with COFECE about possible risks stemming from the transaction. This practice allows the Commission to authorise (without conditions) these transactions after modifications have been made by the parties. An example of these modifications occurs when the notifying parties change certain terms of the contract, such as when they decide not to acquire a particular line of business. Examples of transactions that fell under this situation are: *Bayer/Elanco*, *Danfoss A/S*, *Eaton Corporation PLC & Interpump Group S.p.A.*, *Hypera/Eurofarma*, *KSPV/Señor Pago*, *Funo/Servicios Funerarios* and *SBLA Holdco I LLC/ WeWork Companies (International) B.V.* The second situation refers to mergers in which the notifying parties abandoned the operation. This has been the case of *McGrawHill/Cengage* and *AirCanada/Air Transat*, where notifiers withdrew the transaction since risks were found in several jurisdictions. Finally, many of the transactions filed before COFECE in 2020 were non-complex cases related to corporate restructures. These mainly aimed at diversifying risks, particularly in companies participating in the energy sector (especially in the gas market, and companies that had exploitation contracts within the framework of the hydrocarbons law).

Has the authority ever imposed conditions on a proposed merger?

Conditions were not imposed on proposed mergers during 2020. However, it has imposed conditions in several mergers in previous years.

Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.

The FLEC does not foresee two distinct investigation phases in merger analysis. However, COFECE conducted and concluded seven in-depth merger analyses during 2020:

1. File number: CNT-090-2019. Live Nation Entertainment, Inc., Ticketmaster New Ventures, S. de R.L. de C.V., Grupo Televisa, S.A.B., natural persons, Promo-Industrias Metropolitanas, S.A. de C.V., & Corporación Interamericana de Entretenimiento, S.A.B. de C.V. The transaction involved the sale by Televisa of its equity stake in OCESA Entretenimiento to Live Nation. The Commission authorized the operation.
2. File number: CNT-111-2019. Uber Technologies, Inc., Cornershop, Accel XII, L.P., Accel Growth Fund IV., L.P., & natural persons. The operation involved the acquisition of Cornershop by Uber. The Commission approved the transaction as it did not constitute a significant risk to the competition process in Mexico.
3. File number: CNT-118-2019. EssilorLuxottica, S.A., HAL Optical Investments B.V. & GrandVision N.V. The operation consisted of the acquisition of GrandVision shares by Essilor Luxottica. GrandVision offers eye-care services and sells optical products around the world. The Commission authorized the transaction.
4. File number: CNT-038-2020. Grupo Axo, S.A.P.I. de C.V. & C&A México, S. de R.L. (CNT-038-2020) The operation involved the acquisition of C&A Mexico by Grupo Axo. The Commission approved the transaction.
5. File number: CNT-057-2020. Despegar.com Corp., BestDay, natural persons & others. The transaction involved the acquisition of Best Day's Viajes Beda and Transporturist, by Despegar.com. The Commission approved the operation.
6. File number: CNT-127-2019. Metso Corporation & Outotec Oyj, The operation involved the merger of Metso's and Outotec's mineral business. The Commission approved the operation.
7. File number: CNT-031-2020. Rapiditos, natural persons and others. The operation consisted of the acquisition of Rapiditos shares by natural persons. Rapiditos operates gas stations in Mexico. The Commission authorised the transaction.

Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.

Not during 2020.

Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?

Yes. The Leniency and Sanction Reduction Programme, foreseen in article 103 of the Federal Economic Competition Law, allows any person or business that has participated in or is currently part of a cartel conduct, to receive a reduction in sanctions and penal immunity. These benefits may be provided upon submission of information and full cooperation with COFECE.

Interested parties may file their applications by voicemail at +52 55 2789 6632 or by email addressed to inmunidad@cofece.mx. Applications should clearly indicate a desire to request protection as part of the immunity programme and include contact information.

In 2020, COFECE issued the Regulatory Provisions of the Leniency and Sanction Reduction Program. These Regulatory Provisions bring greater predictability and transparency to the program. For instance, these provide clarity when an application is received and, on the rights, and obligations of the applicants; these also provide key information for applicants to know their position in the queue for all the applicants; and establish the steps to follow when the Commission decides that conditional benefits of applicant to the Program should be removed. The Provisions are legally binding.

In 2021, COFECE issued the Guidelines for the Leniency and Sanction Reduction Program as a tool to provide guidance on how COFECE receives, analyses and resolves applications to the Immunity and Reduction of Sanctions Program. These Guidelines do not interpret or replace the programme regulation established in the competition act and the regulatory provisions of the programme. However, they reflect the operational practice of the Commission in the processing of the procedure, in such a way that it constitutes a tool that provides greater transparency and certainty to economic agents.

Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?

Yes. Since 2011, cartel offences (such as price fixing, output restriction, market allocation and bid-rigging) are considered criminal violations under competition and criminal laws.

As a result of the new FLEC, enacted in 2014, the minimum criminal sanction was raised from three years in prison to five, the maximum remaining at 10 years. Additionally, the alteration or destruction of information with the purpose of hindering or obstructing an investigation became a crime punishable with a minimum of three months and a maximum of one year in prison.

According to the new FLEC, once an administrative investigation has concluded, the Investigative Authority may file a criminal complaint against such individuals who participated in a cartel. The criminal investigation would run parallel to the administrative proceeding conducted by COFECE. The Investigative Authority is the only body within COFECE with powers to file this complaint and the Attorney General's Office is in charge of the criminal investigation.

To date, COFECE's Investigative Authority has referred two cases to the Attorney General's Office, both related to bid-rigging in the health sector. The first case was lodged in February 2017, against several bidders that coordinated bids in tenders called by the health sector between 2009 and 2015. Then in October 2019, the Commission used this power for the second time against several individuals, for possible bid-rigging which took place between 2011 and 2015.

Are there any plans to reform the competition law?

No.

When did the last review of the law occur?

The new FLEC was published in the Federal Official Gazette on 23 May 2014 and entered into force on 7 July 2014. On 27 January 2017, a minor reform was made to some provisions of the FLEC with the objective of defining the functions of the Internal Control Body. The amendments include details on the appointment of the head of the Internal Control Body, such as age and previous experience; as well as new accountability obligations for the head, such as submitting quarterly and annual activity reports to COFECE with a copy to the Chamber of Deputies.

Do you have a separate economics team? If so please give details.

Yes. COFECE has a Directorate General of Economic Studies that serves as a stand-alone bureau of economics within the agency. The directorate provides technical assistance to other areas in COFECE, particularly when they deal with complex economic issues. In addition, it is responsible for conducting market studies that could serve as grounds for the Commission's advocacy efforts and/or enforcement actions.

The Directorate General is led by:

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Director General of Economic Studies

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Has the authority conducted a dawn raid?

Yes. In 2011, COFECE was given the power to conduct dawn raids. This power was confirmed and strengthened with the new FLEC of 2014. Since 2013, the Commission has carried out 103 dawn raids. In the midst of the covid-19 pandemic, the Commission has been able to conduct two dawn raids. The number of dawn raids conducted between 2020 and 2021 has depended on two factors. On the one hand, the Commission halted investigative proceedings for safety reasons from March to July 2020 and from December 2020 to February 2021. On the other hand, almost all operations have been carried out mainly remotely, both for the Commission staff and the economic agents involved in proceedings. In the coming months, dawn raids will be resumed under strict sanitary protocols.

Has the authority imposed penalties on officers or directors of companies for offences committed by the company?

Yes. In particular, in 2020 and 2021:

1. File DE-020-2014: COFECE imposed fines totalling 28.2 million Mexican pesos on two companies (Productos Galeno and Holiday de Mexico) and two individuals for coordinating discounts and prices in the market of disposable polyethylene gloves purchased by the Mexican Institute for Social Security (IMSS, from its acronym in Spanish).
2. File DE-022-2015: COFECE imposed fines totalling 51 million Mexican pesos on companies of the following economic interest groups: Gasmart, Rendichicas, Appro, Magigas, Eco; and of the partnerships Colorado, Florida, Becktrop, Ravello, Dagal and Cargas; as well as 11 natural persons who acted on their behalf, for agreeing to maintain retail gasoline prices at the maximum determined by the Ministry of Finance and Public Credit (SHCP, from its acronym in Spanish) and abstaining from offering discounts in the municipalities of Tijuana and Mexicali, in Baja California. Also, Onexpo Baja, the Association of Gasoline Stations of Tijuana, the Association of Gas Stations of Mexicali and four individuals were sanctioned for contributing, encouraging or inducing said anticompetitive conduct.
3. File DE-011-2016: COFECE imposed fines totalling 626.5 million Mexican pesos on 11 companies (Selecciones Médicas, Selecciones Médicas del Centro, Centrum Promotora Internacional, Impromed, Hemoser, Instrumentos y Equipos Falcón, Dicipa, Grupo Vitalmex, Vitalmex Internacional, Vitalmex Administración and Vitalmex Soporte Técnico) and 14 natural persons for coordinating bids or abstaining from tenders convened by the IMSS and the Institute for Social Security and Social Services for State Workers (ISSSTE, from its acronym in Spanish) for the procurement of services for laboratory tests and blood banks.
4. File IO-001-2016: COFECE sanctioned Casa Marzam, Casa Saba, Fármacos Nacionales, Nadro and Almacén de Drogas, as well as 21 natural persons who participated in their representation in agreements to restrict the supply of medicines, as well as to fix, manipulate and increase the price of medicines. Also, the Asociación de Distribuidores de Productos Farmacéuticos de la República Mexicana and a natural person were fined for collaborating in the execution of this conduct. As a result of the above, fines for a total of 903,479,000 pesos were imposed and 10 directors were disqualified from serving as advisers, administrators, executives, agents or representatives of said companies for periods ranging from six months to four years. As for the latter disqualifications, this is the first time that COFECE has applied this type of sanction, after a careful consideration of the intent, intentionality and duration of the conduct, which seriously affected a particularly sensitive market for families.
5. File IO-004-2017: COFECE imposed fines totalling 313,473,000 Mexican pesos on Essity Higiene y Salud México, Kimberly Clark de México and Productos Internacionales Mabe, as well as nine natural persons who acted on their behalf, for their responsibility in the exchange of information and in the agreement to increase prices of products and/ or the elimination of promotions in the market for the sale of baby diapers, products for feminine sanitary protection and incontinence, all very important products for the health and hygiene of Mexican

families. The sanction conduct also included the verification compliance with the agreement as well as various acts to maintain secrecy of communications once they were detected by the Commission.

6. File IO-002-2018: COFECE imposed fines totalling 177.6 million Mexican pesos on 17 soccer clubs of the Liga MX, and for collaborating with them, on the Mexican Football Federation and eight natural persons, for their responsibility in colluding to avoid or inhibit competition in the market for soccer players' draft through two acts: (1) imposing maximum wage caps for women players, which further deepened the pay gap between female and male soccer players; and (2) segmenting the market of male players by establishing a mechanism that prevented them from freely negotiating and signing with new teams.

What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?

The FLEC provides that mergers shall be notified in accordance with the following:

- When the transaction exceeds 18 million Units of Measure and Update (UMA); approximately US\$79.1 million;
- When the transaction implies the accumulation of 35 per cent of the equity of an economic agent with annual sales or assets in Mexican territory of 18 million UMAs; approximately US\$79.1 million; and
- When the transaction implies the accumulation of equity of approximately 8.4 million UMAs; approximately US\$36.9 million, and the participants in the merger have annual sales or assets in Mexican territory, jointly or separately, that exceed 48 million UMAs; approximately US\$210.9 million.

*In 2021, 1 UMA equals 89.62 Mexican pesos or US\$4.39 – at the exchange rate of 20.40 Mexican pesos per US\$ (18/10/2021).

Are there any restrictions on minority investments?

There are no restrictions on minority investments. Moreover, the FLEC provides for an expedited merger review procedure for transactions where it is evident that the merger shall not diminish, damage or impede competition. They include, for instance, transactions where the acquirer will not obtain decision-making power due to its relative participation or the internal corporate structure of the company.

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How many economists do you employ?

Mexico's Federal Economic Competition Commission (COFECE) employs 101 economists as of 30 September 2021.

Do you have a separate economics unit?

Yes, the General Directorate of Economic Studies (the Directorate) serves as a stand-alone 'bureau of economics' within the agency. The Directorate provides technical assistance to several areas within COFECE (except for the Investigative Authority), particularly when they deal with complex cases. In addition, the Directorate is responsible for conducting market studies that could serve as grounds for COFECE's advocacy efforts and/or enforcement actions.

Do you have a chief economist?

The acting chief economist is Juan Manuel Espino Bravo, director general of Economic Studies.

To whom does the chief economist report?

To the head of the Technical Secretariat, Fidel Gerardo Sierra Aranda.

Does the chief economist have the power to hire his or her own staff?

Yes, subject to the requirements established by the COFECE's Human Resources Policies.

How many of your economists have a PhD in Industrial Economics?

Two. One commissioner, and one economist working in the Investigative Authority.

Does the agency include a specialist economist on every case team? If not, why not?

Yes, each General Directorate carrying out substantive tasks assigns a specialised economist as part of the case team.

Is the economics unit a 'second pair of eyes' during cases – is it one of the agency's checks and balances? If not, why not?

COFECE's institutional arrangement provides that all enforcement cases are managed through two phases. The Investigative Authority is responsible for conducting the investigation phase, through its General Directorates of Investigation (cartels, market investigations and regulated sectors) and the General Directorate of Market Intelligence, which have economists working in all the respective case teams. In addition, the Investigative Authority has a Coordination Office which functions as a 'second pair of eyes' by reviewing the economic and legal robustness of the investigated cases.

On the other hand, the Technical Secretariat oversees the adversarial phase whereby the Investigative Authority and the economic agent against which an accusation is filed are parties. The General Directorate of Economic Studies is part of the Technical Secretariat and as such may act as a 'second pair of eyes' to cases being conducted under the adversarial trial-like procedure. During the trial-like procedure the alleged offenders have the right to argue in their favour and submit evidence related to the allegations presented against them.

In this sense, this arrangement does provide several checks and balances: (1) by separating the authority charged with investigating from the authority in charge of procedural oversight, and (2) in both cases an economic unit does oversee the cases.

How much economics work is outsourced? What type of work is outsourced?

In selected cases, economic work may be outsourced. COFECE may use external experts when special expertise is required, but it is not the norm.

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