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MEXICO: An Introduction to Mexico Mijares Angoitia Cortés Y Fuentes, S.C.

Mexican competition enforcement is entrusted to the Mexican Federal Economic Competition Commission (“COFECE”) and the Federal Institute of Telecommunications (“IFT”, jointly with COFECE, the “Agencies”); the latter focuses exclusively on the telecoms and broadcasting sectors. Since their creation back in 2013, the Agencies have been quite busy promoting and enforcing their respective competition policies. Ultimately, the rulings issued by the Agencies are subject to federal judiciary scrutiny, which is handled by specialized Federal District Courts and Collegiate Circuit Courts.

The Mexican antitrust legal framework is founded in the Constitution, the Federal Economic Competition Law (the “FECL”) enacted back in 2014 – which replaced the previous competition law from 1992 – and regulatory provisions of the FECL that COFECE and IFT issued for their respective enforcement sectors, as well as diverse rules and non-binding guidelines.

One of the most relevant incorporations to the legal framework in the past months was the issuance of COFECE’s rules for the treatment of client-attorney communications gathered by COFECE in the course of an investigation. Although the rules were issued because of recent judicial criteria, no case has been brought to the courts (or at least decided by the courts) to rule on their constitutionality.

The most common procedures applied by the Agencies to carry their enforcement are the following:

1. Merger Control

The FECL establishes the obligation for economic agents that operate any type of concentration, exceeding one or more of the monetary thresholds set forth therein, to obtain clearance from one or the two Agencies – each one has jurisdiction to assess the transaction in their respective sectors, when applicable – prior the closing of the transaction. In general terms, the thresholds look at the size of the transaction, the target and the parties involved, with respect to Mexico. The FECL concept of “concentration” is quite broad, and therefore parties need to pay special attention when assessing whether a transaction triggers these thresholds, as any breach in this obligation could lead to significant fines. When analysing a transaction, the Agencies can clear the transaction, impose conditions, or oppose it.

Since 2018, COFECE is pushing towards modernization of its merger control procedure by enacting and applying new regulations to conducting electronic filings in order to expedite the issuance of its rulings. COFECE expects that in the near future all merger filings will be conducted electronically.

2. Investigations

The Agencies are empowered by the FECL to conduct investigations and, if applicable, initiate administrative proceedings to impose fines and other sanctions to the economic agents involved in anticompetitive conduct. According to COFECE’s strategic plan for 2018-2021, it currently prioritises the financial, agri-food, energy, transport, health, and public contracts sectors as areas where it seeks greater impact of its competition policy. It is therefore not a surprise that most of the investigations opened in the last few years (based on information published in the Official Gazette) focus on these sectors.

2.1. Cartels (Absolute Monopolistic Practices)

The FECL deems as per se unlawful any agreement carried out between two or more competitors which has as its purpose or effect to: fix prices, reduce supply, allocate markets, or rig bids, as well as any exchange of

information with the purpose or effect of any of the aforementioned conducts. Agents conducting absolute monopolistic practices may be subject to fines of up to ten percent of their revenue from the previous year and subject to criminal sanctions, including five to ten years in prison. In 2019, for the second time since its inception, COFECE requested that the Federal Prosecutor initiate criminal proceedings against economic agents for their alleged participation in a cartel.

The FECL establishes a leniency procedure pursuant to which one or more of the economic agents involved in a cartel can come forth to the competent Agency to acknowledge its participation in a cartel, provide sufficient conviction elements which allow the beginning of the investigation or presume the existence of an absolute monopolistic practice, fully cooperate with the Agency during the investigation and the procedure and terminate its participation in the illegal conduct. The first economic agent to come forward can be subject to the imposition of a minimum fine (less than US\$10), whereas the subsequent may obtain lower fine reductions (from 50% to 20%) when they provide additional conviction elements. The parties that obtain leniency will not be subject to criminal prosecution.

During 2019, COFECE was active in an important number of ongoing investigations. Early in the year, it imposed fines on two airlines and several individuals for their participation in a price fixing cartel in the air passenger transport services market with origin/destination within Mexican territory.

More recently COFECE finalized an investigation into the government bond market where it alleged that certain banks conducted market manipulation; COFECE will now carry out an administrative proceeding whereby the parties involved will have the opportunity to reply to COFECE’s Investigative Authority findings.

2.2 Abuse of Market Power (Relative Monopolistic Practices)

The Agencies can investigate and fine economic agents abusing their market power in a relevant market, particularly when conducting acts, agreements or any type of combination whose purpose or effect is or may be to improperly displace other economic agents from the marketplace, to materially hinder them from entering the market, or to establish exclusive advantages in favour of one or more persons, in any of the following cases: territory or client allocations, restricting output, resale price maintenance, tying and bundling, refusal to deal, boycott, predatory pricing, exclusivities, margin squeeze, price discrimination, and cross subsidies, among others. These cases are assessed under the rule of reason. Hence, the economic agents involved can argue and prove the existence of improvements in efficiency and a favourable impact upon the process of free and open competition that exceed any anti-competitive effects of the investigated conducts. If found responsible, the economic agents may be subject to fines of up to eight percent of their revenue from the previous year.

While COFECE is currently focused on cartels, it is also active in investigating relative monopolistic practices, including an investigation against the operator of Cancun International Airport for refusing to grant access to certain economic agents to the airport taxi infrastructure and, in the financial sector, against credit information agencies for alleged price discrimination practices.

2.3 Illegal Concentrations and Gun Jumping

The Agencies can also investigate and fine economic agents for conducting an illegal concentration and for achieving a concentration without obtaining clearance from the competent Agency prior to

closing, i.e. the point when they were legally obliged (this is referred to as gun jumping). In these cases, the economic agents may be subject to fines up to eight or five percent of their revenue from the previous year, respectively.

During 2019 COFECE imposed fines on economic agents for gun jumping. Thus, it is important that economic agents not only assess

whether the Agencies' approval is required for a given transaction and obtain clearance prior to its closing but also to close the transaction on the same terms in which it was approved by the Agencies. Likewise, special attention is required not to conduct any act prior to obtaining clearance that might imply any complete or partial closing of the transaction, as this could also be considered gun jumping.

