OECD Peer Reviews of Competition Law and Policy

MEXICO

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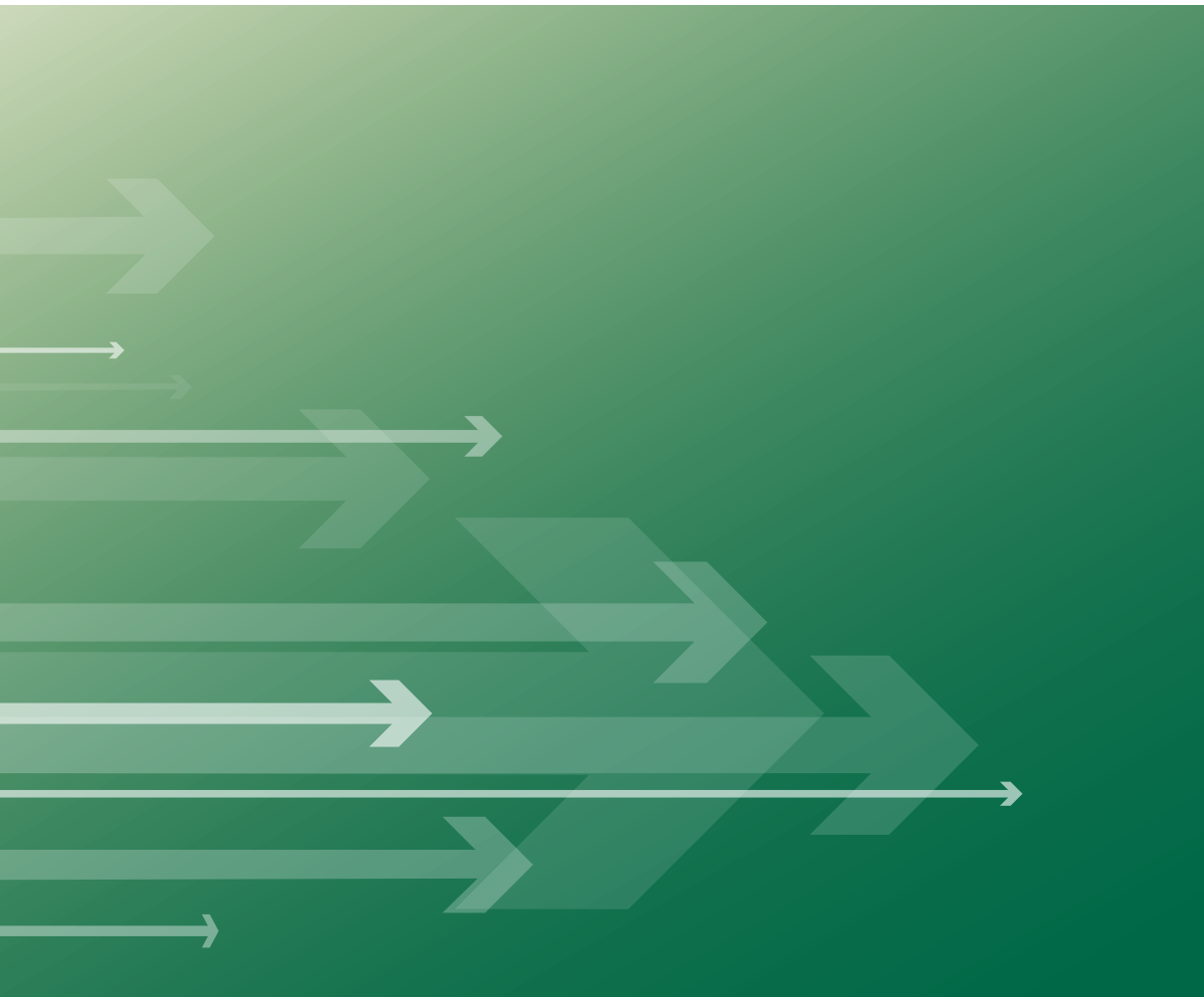

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Foreword

Peer reviews of national competition laws and policies are an important tool in helping to strengthen competition institutions and improve economic performance. Competition peer reviews are a core element of the OECD's activities. They are the result of the willingness of a country to submit its laws and policies to substantive review by other members of the international community. This process provides valuable insights to the country under review, it promotes transparency and mutual understanding for the benefit of all. There is an emerging international consensus on best practices in competition law enforcement and the importance of pro-competitive reform. Peer reviews are an important part of this process. They strengthen competition institutions, promote and protect competition, which increases productivity and overall economic performance.

This OECD report was prepared by Mona Caroline Chammas, consultant, and Iratxe Gurpegui, Competition Expert at the OECD Competition Division under the supervision of Antonio Capobianco, Acting Head of the OECD Competition Division and Antonio Gomes, Acting Deputy Director of the OECD Directorate for Financial and Enterprise Affairs. The OECD team is very thankful for all the support received from Mexico's competition authorities (COFECE and IFT) and the Ministry of Economy (Secretaría de Economía). To assist the review, the OECD team collected valuable contributions from interviewed stakeholders (i.e. representatives of the Presidency of the Republic, the Federal Congress, the Judiciary, the Central Bank (Banxico), the Treasury (SHCP), the Energy Ministry (Secretaría de Energía), the Secretary of Public Administration (SFP), the Consumer Protection Authority (PROFECO), various sector regulators (CONAMER, CRE , ARTF), academics, think tanks, as well as private sector lawyers, economists and companies). The interviews were carried out during two fact-finding missions that took place in Mexico in November 2018 and February 2019.

The report served as the basis for the examination of Mexico's competition regime on a 23 September 2019 session held at the margins of the OECD-IADB Latin American and Caribbean Competition Forum (LACCF), and at a OECD Competition Committee session on 3 December 2019. The country reviewers leading this process were Brazil (represented by Guilherme Resende and Diogo Thomson de Andrade), Chile (represented by Ricardo Riesco), Norway (represented by Lars Sørgard) and United States (represented by Christine Wilson and Alden Abbott). The Delegation representing Mexico during the peer review sessions was formed by: Alejandra Palacios Prieto, President of COFECE, Brenda Hernández Ramírez, Commissioner of COFECE, Ramiro Camacho Castillo and Sóstenes Díaz González, Commissioners of IFT and Jorge Arreola, Head of the Competition and Competitiveness Unit at the Ministry of Economy. The peer review session held on 23 September 2019 was chaired by Frédéric Jenny (Chair of the OECD Competition Committee) with the participation of Antonio Gomes and Iratxe Gurpegui. The session held on 3 December 2019 was also chaired by Frédéric Jenny with the support of Mona Caroline Chammas, Iratxe Gurpegui and Antonio Capobianco.

This is the third report on Mexico prepared by the OECD as part of a full peer review process. The first peer review of Mexico was carried out in 1998. Mexico underwent a second peer review in 2004 and follow-up reviews took place in 2007 and 2012. The Mexican Competition Law was modified twice since the 2004 peer review, in 2006 and 2011, with the aim to strengthen competition policy and enforcement in Mexico. A constitutional reform in 2013 further introduced major changes to Mexico´s competition regime, prompting the adoption of a new Competition Law in 2014. This report provides an analysis of the 2014 Competition Law, policies and enforcement practices in Mexico, including the achievements brought by the 2013 constitutional reform and the remaining areas of opportunity. The review concludes that Mexico´s regime is equipped with strong powers, solid institutions and enforcement tools and draws recommendations in line with OECD competition policy instruments and international practices.

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Abbreviations and acronyms

ACODECO	Authority for Consumer and Competition Protection, Panama.
AIC	Cancun International Airport (Aeropuerto Internacional de Cancún)
AICM	Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México)
ANATEL	National Telecommunications Agency, Brazil.
ANE	National Spectrum Agency, Colombia
APEC	Asia-Pacific Economic Co-operation
BIT	Telecommunications Information Bank (Banco de Información de Telecomunicaciones)
CAC	Audiovisual Council of Catalonia, Spain.
CADE	Administrative Council for Economic Defence, Brazil.
CCF	Federal Civil Code (Código Civil Federal)
CDPC	Commission for the Defence and Protection of Competition, Honduras.
CEABAD	Centre for Advanced Studies in Broadband for Development, Nicaragua
CFC	(former) Federal Competition Commission (Comisión Federal de Competencia)
CIA	Cumulative Impact Assessment
CIC	Credit Information Company
CIE	American Entertainment Company (Corporación Interamericana de Entretenamiento)
CIDE	Centre of Economic Research and Teaching (Centro de Investigación y Docencia Económicas)
CNDC	National Commission for Protection of Competition, Argentina.
CNSF	National Insurance and Bond Commission (Comisión Nacional de Seguros y Finanzas)
COFECE	Federal Commission of Economic Competition (Comisión Federal de Competencia Económica)
COFETEL	(former) Federal Commission of Telecommunications (Comisión Federal de Telecomunicaciones)
CONACOM	National Commission of Competition, Paraguay.

CONAMER	National Commission for Regulatory Improvement (Comisión Nacional para la Mejora Regulatoria)
CPR	Competition Peer Review
CRE	Commission for Energy Regulation (Comisión Reguladora de Energía)
DES	COFECE's Department of Economic Studies (Departamento de Estudios Económicos)
DG COMP	European Commission's Directorate General for Competition.
DPR	Opinion of probable liability or statement of objections (Dictamen de Probable Responsabilidad)
ECU	Economic Competition Unit (Unidad de Competencia Económica)
ENACOM	National Communications Entity, Argentina.
FAS	Federal Anti-trust Service, Russia.
FNE	National Economic Prosecutor, Chile.
FTA	Free-Trade Agreement
FTA EU-MX	Free Trade Agreement between Mexico and the European Union
GFC	OECD Global Forum on Competition (
IA	Investigation Authority (Autoridad Investigadora)
IADB	Inter-American Development Bank
ICN	International Competition Network
IFT	Federal Institute of Telecommunications (Instituto Federal de Telecomunicaciones)
IMSS	Mexican Social Security Institute (Instituto Mexicano del Seguro Social
INAI	National Institute of Access to Information (Instituto Nacional de Acceso a la Información)
INDECOPI	Institute for the Protection of Competition and Intellectual Property, Peru.
INDOTEL	Dominican Telecommunications Institute, Dominican Republic.
INEGI	National Institute of Statistics and Geography (Instituto Nacional Estadística y Geografía)
INE	National Electoral Institute (Instituto Nacional Electoral)
INEE	(former) National Institute for the Evaluation of Education (Instituto Nacional para la Evaluación de la Educación)
KFTC	Fair Trade Commission, Korea.
LAASSP	Mexican Procurement Law (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público)
LACCF	OECD-IADB Latin American and Caribbean Competition Forum.
LFCE	Federal Economic Competition Act (Ley Federal de Competencia Económica)

LFRT	Federal Telecommunications and Broadcasting Act (Ley Federal de Telecomunicaciones y Radiodifusión)
LPG	Liquid-Petroleum Gas
LRSIC	Law Regulating Credit Information Systems (Ley para Regular las Sociedades de Información Crediticia)
MinTIC	Ministry of Information and Communication Technologies, Colombia.
NAFTA	North American Free Trade Agreement
OSIPTEL	Supervisory Agency for Private Investment in Telecommunications, Peru.
PGR	Office of the Attorney General (Procuraduría General de la República)
PEF	Federal Expenditure Budget (Presupuesto de Egresos de la Federación)
PROCOMPETENCIA	National Institute for the Promotion of Competition, Nicaragua.
PROCOMPETENCIA	National Commission for the Defence of Competition, Dominican Republic.
PROFECO	Office of the Federal Prosecutor for the Consumer (Procuradoría Federal del Consumidor)
RELEX	Ministry of Foreign Relations (Secretaría de Relaciones Exteriores)
RIA	Regulatory Impact Assessment.
RFI	Requests for Information.
SAT	Tax Administration Service (Servicio de Administración Tributaria)
SC	Superintendence of Competition, El Salvador.
SCJN	National Supreme Court (Suprema Corte de Justicia de la Nación)
SCPM	Superintendence of Control of Market Power, Ecuador.
SCT	Ministry of Communications and Transport (Secretaría de Comunicaciones y Transporte)
SE	Ministry of Economy (Secretaría de Economía)
SFP	Ministry of Public Administration (Secretaría de la Función Pública)
SHCP	Secretariat of Finance and Public Credit (Secretaría de Hacienda y Crédito
SIC	Superintendence of Industry and Commerce, Colombia.
TS	Technical Secretariat (Secretaría Técnica)
UMA	Unit of Measurement and Actualisation (Unidad de Medida y Actualización)
USMCA	Agreement among the United States of America, the United Mexican States, and Canada

Executive Summary

Mexico's competition regime has been modified three times in the last 14 years. The reforms and, in particular, the adoption of the 2014 competition law are the result of Mexico's ambitious efforts to set a level-playing field for all economic agents and to improve the effectiveness of competition enforcement. Some of the main achievements brought by the various reforms of the competition law are: (i) the possibility for defendants to argue economic efficiency gains offsetting the anti-competitive effects of unilateral and vertical conduct; (ii) the possibility to offer commitments, (iii) the competition agencies' power to conduct surprise inspections; (iv) the criminalisation of hard-core cartels, (v) the possibility to claim competition damages and (vi) the creation of the specialised courts.

Competition law applies to anticompetitive conducts with effects in the Mexican territory. In line with good international practices, Mexico's competition law establishes a merger control regime, prohibits and sanctions hard-core cartels without requiring an assessment of their effects on competition and fights vertical agreements and abuses of dominant position when they have anticompetitive effects. In addition to these powers, competition agencies in Mexico may regulate the access to an essential facility and require economic agents to remove barriers to competition if a market investigation justifies these measures.

Mexico has two competition authorities: IFT, responsible for competition law enforcement and ex ante regulation in the telecommunications and broadcasting sectors, and COFECE in charge of enforcing competition law in all sectors other than those covered by IFT. Both competition authorities are constitutional autonomous bodies (*órgano autónomo*), the highest level of institutional independence in Mexico and are well regarded domestically and internationally within the practitioners community, peer agencies and the Mexican administration. The need to preserve competition

authorities' independence was identified as a priority as well as the need to ensure that competition agencies can dispose freely of their budgets when setting salaries.

The Mexican competition law regulates how cases should be allocated between IFT and COFECE. Agencies should cooperate and reach an agreement on who should be in charge of solving hybrid cases. If agencies disagree, the allocation of cases is decided by the specialised courts. COFECE and IFT report that the boundaries of cases falling under each other's jurisdiction are clear. Observers have called for more transparency on the division of tasks between COFECE and IFT and the review concluded that Mexico should consider adopting guidance on the criteria for case allocation.

In line with a number of other jurisdictions, Mexico has adopted an institutional model based on a strict separation between adjudication and investigation functions inside the competition agencies. This model has been praised by observers as a guarantee of impartiality and due process, in particular in relation to on-going cases. It is, however, of paramount importance that that the investigation and adjudication bodies strengthen their co-operation to provide clear guidance on standard of proof, substantive analysis of cases and procedural issues.

Competition agencies' employees are highly qualified and are viewed by the antitrust community in Mexico as professional and committed. Mexico has made substantial efforts to retain senior staff and promote gender balance through a number of "work-life balance" initiatives, such as longer maternity and paternity leave than required by law. The rapid development of the digital economy should prompt the recruitment of staff with IT forensic, digital and technological profiles. Competition agencies should also adopt measures to strengthen their economic expertise to foster complex economic effects-based analysis required to sanction anticompetitive practices and conducting merger analysis. The present report identifies a number of solutions to tackle this issue. One of them consist in the creation of a Chief Economist position, independent from the Board and the Investigative Authority, in charge of giving independent economic advice on the decision-making process.

Competition authorities' powers to collect information in the context of antitrust enforcement investigations are in line with international practices. Competition agencies can conduct dawn raids; send requests for information, and interview individuals. COFECE investment in

additional IT forensic equipment and investment in acquiring IT forensic equipment by IFT to complement more traditional investigation tools would reinforce competition agencies' ability to carry out unannounced inspections.

Mexico competition law provides for a wide range of administrative sanctions and remedies to punish anticompetitive conduct and re-establish the competitive process in the market. However, Mexico should consider including big rigging among the violations that could trigger public procurement debarment. Clarity and legal predictability would benefit from the adoption of guidelines on the calculation of fines, in particular in relation to turnover in zero-price business models, liability of parent companies for the actions of their subsidiaries; and criteria or ranges around gravity and mitigating and aggravating circumstances.

The Mexican competition law limits the prohibition of horizontal agreements to the five categories expressly listed under Article 53 of the Mexican competition law. The legal text and the formalistic and literal interpretation of this provision by the competition authorities and the judiciary has prevented the prosecution and sanctioning of other types of horizontal agreements. As competition knowledge and experience grow, Mexico should adopt a less formalistic and more effects-based analysis of non hard-core horizontal agreements in line with international practices. Guidance on joint ventures and co-operation agreements among competitors is also recommended.

COFECE's antitrust enforcement has focused on investigating and sanctioning hard-core cartels, including bid rigging. Vertical and unilateral conduct has not been the main enforcement area for the Commission. There have been few investigations and fewer infringement decisions in relation to vertical agreements and abuse of dominance as most cases have been subject to commitments.

As in other OECD jurisdictions, telecommunications and broadcasting sectors in Mexico include large and few players, some of them controlling access to key infrastructure. These sectors are, thus, more likely to be affected by unilateral conduct, which IFT combats through ex ante regulatory intervention and competition enforcement.

Competition authorities should rely less on commitment decisions in order to generate a body of case law on vertical and unilateral practices. Fully-fledged analysis of effect-based infringements would

indeed support better understanding and lead to the building of a sound case law. Competition authorities should develop guidelines on the substantive economic analysis distinguishing between the analytical framework applicable to unilateral conducts and the one applicable to non-horizontal agreements.

COFECE and IFT have been extremely active in reviewing mergers. Merger control applies to all sectors of the economy with the exception of non-preponderant agents in the telecommunications and broadcasting sectors. The OECD has already identified this exception as unnecessary and unsuited to protect competition in the telecommunications and broadcasting markets and recommended its elimination. With regard to the competitive assessment of mergers, international practices would suggest a more economic-based analysis and further development of the statistical and econometric tools in Mexico.

COFECE and IFT have been actively advocating for competition with very positive effects in the outreach of a competition culture in Mexico since the 2013 constitutional reform. Competition advocacy initiatives have been broad and diverse. The OECD recommends a more targeted and impactful advocacy strategy. Ex post assessment of advocacy efforts would allow to understand which initiatives have worked best, focus on those ones and drop less successful actions.

The 2013 Constitutional Reform has substantially improved the judicial review of competition decisions. This includes the creation of specialised courts in competition, telecommunications and broadcasting, the elimination of the suspensive effects of appeals (*amparos)* and the limitation of *amparos* to final decisions (decisions concerning intermediate acts may no longer be appealed). Mexico should however adopt measures to allow specialised judges to acquire the necessary specialised knowledge by, for example, allowing longer terms of appointment and investing on regular capacity-building programmes. Private and criminal enforcement is possible in Mexico and it should be further developed.

COFECE's and IFT efforts in building international co-operation in competition are impressive. The report mentions concrete examples of successful enforcement co-operation with other international agencies. Mexico should, however, consider entering into second-generation co-operation agreements, which allow the exchange of confidential information without the prior consent from the owner of the information.

Chapter 1. Introduction

1.1. Benefits of competition policy

Competition – the process of business rivalry between companies – can drive economic growth and development. By encouraging firms to improve their products and reduce costs, competition leads to enhanced productivity, innovation and faster economic growth. Companies that best meet their customers' needs tend to thrive, while those producing inferior or overpriced goods fail. Competition also benefits consumers, through greater choice and lower prices. (OECD, 2015[1]) Evidence shows that industries that are more competitive typically have higher rates of productivity growth, and that less competitive sectors are slower to innovate. (OECD, 2014[2])

Properly implemented competition policy can prevent inefficiency, and help to keep businesses competing fairly in the marketplace and governments accountable. For competition to benefit the economy and consumers, however, a good competition authority and law is not sufficient. A culture of competition needs to be established in a country, not only among companies, but also among the legal system, politicians, and government agencies. Competition needs support from the policy environment and adequate framework conditions to work properly. A genuine market economy in which governments take the competitive effects of legislation and regulations into account is also necessary. (OECD, 2013[3])

In 2018, Mexico's Federal Commission of Economic Competition (COFECE) published Market Power and Social Welfare (Poder de Mercado y Bienestar Social), a study aimed at raising awareness about the benefits of competition in social welfare.[1] In the same year,

[1] This study focuses on the benefits of competition, particularly for the population with the lowest incomes. See, www.cofece.mx/wp-content/uploads/2018/10/Libro-CPC-PoderyBienestar-ver4.pdf#pdf.

Mexico's Federal Telecommunications Institute (IFT) published the study, Packaging and Discounts in Fixed Telecommunications Services (Estudio sobre empaquetamiento y descuento de los servicios fijos de telecomunicaciones), highlighting how packaging actions can have both positive and negative effects on the conditions of competition and consumer welfare.

Implementation of competition law and policy involves complex legal and economic assessments and requires flexibility in order to respond to the specific features of the case at hand and to changes in the markets in general. It requires a high degree of credible political support and commitment; the delegation of authority to an independent body helps address questions of credibility in commitments to pursue this policy with impartiality. Competition authorities' independence is a key element for insulating enforcement decision makers from political direction or influence. Independence from the political interests induces credibility, and the enforcement of competition rules in a stable and foreseeable manner contributes to the better functioning of the markets. (OCDE, 2016[4])

1.2. The competition peer review process

A competition peer review (CPR) consists of the assessment of the soundness and effectiveness of a country's competition law and policy, institutions and practices in light of international best practice. CPRs are independent reports produced by the OECD Secretariat and the result of a country's willingness to submit its laws and policies to substantive review by its peers.

Mexico has two institutions dealing with competition law enforcement: COFECE, the competition authority that is in charge of competition law enforcement in all sectors except telecommunication and broadcasting and IFT, the telecommunication and broadcasting sectoral regulator, which is in charge of enforcing competition law in those sectors.

The current review analyses COFECE and IFT´s competition law enforcement activities.

Unlike COFECE, which is not a sectoral regulator, IFT also plays a crucial role in establishing competitive conditions in the telecommunications and broadcasting markets through ex ante regulation. Although driven by competition-law principles and key to

improving competition in the sectors, IFT is ex ante regulatory activity is not part of the current review. This was extensively analysed in OECD Telecommunication and Broadcasting Review of Mexico 2017, which looked at IFT's regulatory functions in promoting competition and improving market conditions in the sectors. (OECD, 2017[5]))

The difference between the two institutions, the fact that competition law enforcement is only one of the tools at the disposal of IFT, and that the sectors under IFT's jurisdiction include markets with dominant players should be kept in mind when considering the results of this review. In that respect, IFT shares similar experiences and challenges with other sectoral regulators with competition powers in other OECD and non-OECD economies.

The first OECD study of Mexico's competition regime was undertaken in 1998. (OECD, 1998[6]) In 2004, the OECD Competition Committee undertook a peer review of Mexico's competition law and policy, which was funded by the Inter-American Development Bank. (OECD, 2004[7]). In 2007 and 2012, Mexico was one of a group of Latin American countries that volunteered to undergo follow-up peer reviews (OECD, 2007[8]) (OECD, 2012[9]).

Competition has been a priority for Mexico, in particular since the 2013 constitutional reform. The country has sought the OECD's support in relation to a large number of projects that aim to enhance competition policy and legislation, notably through the implementation of the Competition Assessment Toolkit and the Guidelines for Fighting Bid Rigging in Public Procurement. Some of these projects were developed within the framework of a co-operation agreement signed in 2014 between the Mexican Ministry of Economy (Secretaría de Economía, SE) and the OECD. The peer review was launched in 2018 as part of this co-operation agreement.

During the two fact-finding missions carried out in Mexico in October 2018 and February 2019, the OECD Secretariat interviewed relevant stakeholders: members of the Mexican Presidency, Senate and Congress, COFECE, IFT, SE, the Secretariat of Finance and Public Credit (Secretaría de Hacienda y Crédito Público, SHCP), the judiciary, the Central Bank (Banco de México, Banxico), the National Commission for Regulatory Improvement (Comisión Nacional para la Mejora Regulatoria, CONAMER), the Commission for Energy Regulation (Comisión Reguladora de Energía, CRE), lawyers, economists, academic experts, and business representatives.

Chapter 2. Competition law in Mexico

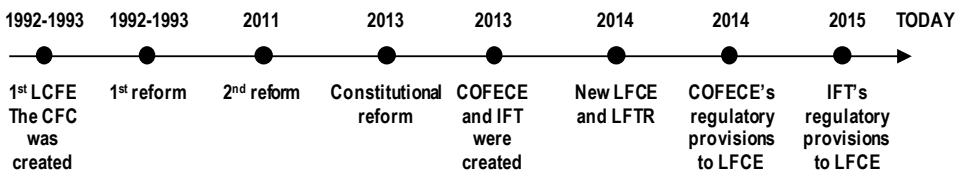
2.1. Historical evolution

Article 28 of Mexico's Constitution (Constitución Política de los Estados Unidos Mexicanos)[2] recognises competition as a fundamental right. The Federal Economic Competition Act (Ley Federal de Competencia Económica, LFCE) adopted in 1992 regulated the operational aspects of Article 28 and created one competition authority, the Federal Competition Commission (CFC), at that time subordinated to the Ministry of Commerce and Industry.

As shown in Figure 1, the LFCE underwent two reforms in 2006 and 2011. The Constitution and its Article 28 were significantly reformed in June 2013 and a new LFCE was adopted in 2014. As part of the 2013 constitutional reform, a new Federal Law on Telecommunications and Broadcasting, (Ley Federal de Telecomunicaciones y Radiodifusión, LFRT) was also adopted in 2014.

The two reforms of the LFCE and the new LFCE adopted in 2014 brought important improvements and have contributed to the success of Mexico's competition law regime and enforcement.

Figure 1. Evolution of competition policy in Mexico



Source: IFT

[2] See, www.diputados.gob.mx/LeyesBiblio/ref/cpeum.htm.

One particularity of Mexico's competition-law system is the terms used to name anticompetitive conducts. In Mexico, anticompetitive behaviour is referred to as monopolistic practices, of which there are two types: absolute monopolistic practices (absolute practices), which include horizontal agreements and are regulated under Article 53 of the current LFCE, and relative monopolistic practices (prácticas relativas, relative practices), which correspond to unilateral conducts and vertical agreements and are regulated under Articles 54 to 56 of the current LFCE.

The 2014 LFTR grants IFT exclusive ex ante regulatory powers to prevent anticompetitive concentration and monopolistic practices.

2.1.1. 2006 competition law reform

The 2006 reform introduced the ability of defendants to argue economic efficiency gains offsetting any anticompetitive effects of relative practices. In addition, five practices were added to the list of relative practices: predatory pricing; rebates and loyalty discounts; cross-subsidisation; price discrimination and raising rivals' costs. This modification followed a Supreme Court ruling that the LFCE's catchall provision on relative practices was unconstitutional for being too vague, as it only included general criteria.[3]

The reform of the LFCE introduced the possibility of early termination of an investigation into relative practices and unlawful mergers in exchange for commitments proposed by investigated companies.[4]

Merger notification thresholds were increased by 50% to allow the CFC to focus on transactions that were most likely problematic. The CFC was allowed to conduct on-site inspections, subject to prior authorisation by the judiciary[5] and prior notice to the investigated companies, and to grant immunity for co-operation in the context of investigations against absolute practices. The 2006 reform increased the level of fines and included the sanction of asset divestiture in cases of recidivism.

[3] Article 10, paragraph VII.

[4] This was already possible under the previous Regulation of the LFCE.

[5] This requirement remained in the 2006 Law, but was later eliminated by court decision AI 33/2006.

The CFC was also granted the power to issue binding opinions on secondary regulation (preliminary draft provisions, rules, agreements, circulars and other administrative acts from agencies and entities of the federal public administration) imposing competitive restrictions.

2.1.2. 2011 competition law reform

The 2011 reform removed some notification obligations, such as corporate restructuring, and streamlined the simplified notification procedure for clearly unproblematic mergers.

The CFC was allowed to carry out on-site visits without judicial warrant or earlier notice to investigated companies, which has facilitated evidence gathering. It was also granted the power to adopt interim measures.

Economic agents under investigation by the CFC were allowed to request an oral hearing before the CFC Board to present their arguments.

Fines were raised to up to 10% of a firm's annual national revenues for an absolute practice and up to 8% for a relative practice. In addition, the Federal Criminal Code[6] was modified to establish for the first time individual criminal sanctions of 3 to 10 years imprisonment for absolute practices.

Finally, a reform allowing for class actions was approved in 2011 to facilitate civil actions for competition damages. Article 38 of the LFCE was amended to allow victims of anticompetitive practices to claim damages, and Article 585 of the Code of Federal Civil Proceedings was modified to enable CFC to initiate collective actions.

[6] Decree by which various provisions of the Federal Law of Economic Competition, the Federal Penal Code and the Fiscal Code of the Federation are reformed, added and repealed. Original Spanish version available at: http://dof.gob.mx/nota_detalle.php?codigo=5188624&fecha=10/05/2011

2.1.3. 2013 Constitutional reform

The constitutional reform introduced major changes into Mexican competition policy[7]. As a result, a new LFCE[8] was adopted in 2014 alongside the LFTR. Regulations implementing the LFCE were also adopted in 2014 and 2015 by COFECE and IFT (LFCE Implementing Regulations)[9]. The reform was prompted by the 2012 OECD Review of Telecommunication Policy and Regulation in Mexico (OECD, 2012[10]), and the Agreement for Mexico (Pacto por Mexico), a national political agreement signed by the main political parties in December 2012.

The 2013 reform replaced the Mexican competition authority, CFC, by two new authorities: IFT, responsible for competition law enforcement and ex ante regulation in the telecommunications and broadcasting sectors, and COFECE in charge of enforcing competition law in all sectors other than those covered by IFT (COFECE and IFT are hereinafter collectively referred to as the competition authorities). Both COFECE and IFT competition authorities feature: 1) an independent investigation authority (IA); 2) a Technical Secretariat (TS) at COFECE or Economic Competition Unit (ECU) at IFT, reporting to the Board of Commissioners; and 3) a Board of Commissioners. The reform conferred COFECE and IFT constitutional autonomy (see Table 1). At COFECE, the TS deals exclusively with competition enforcement matters, while the IFT's ECU deals with competition enforcement matters, enforces competition provisions contained in the LFTR, and is also charged with providing opinions on the application of the LFTR, based on competition law principles and criteria.

[7] Decree modifying several provisions of Articles 6, 7, 27, 28, 73, 78, 94 and 105 regarding telecommunications of the Mexican Constitution. Original Spanish version available at: www.dof.gob.mx/nota_detalle.php?codigo=5301941&fecha=11/06/2013

[8] See,www.cofece.mx/wp-content/uploads/2018/03/Federal_Economic_Competition_Law.pdf and www.ift.org.mx/sites/default/files/traduccion_lfce-2.pdf

[9] See, www.cofece.mx/wp-content/uploads/2018/02/Disposiciones_Regulatorias_14_02_2018.pdf and http://www.ift.org.mx/sites/default/files/drlfce_010219.pdf.

Competition authorities were entrusted with the power to order the removal of barriers to competition, the divestment of assets and to identify and regulate essential facilities if a market investigation justifies the measures. These are known in Mexico as "incremental powers" (facultades incrementales). The SE may make requests to COFECE and IFT to open a market examination under Article 94 LFCE. These requests should be treated as preferential (Article 66 of the LFCE).

IFT has additional powers granted by the Constitution, such as the power to impose asymmetrical ex ante regulation in the telecommunications and broadcasting markets with the purpose of effectively eliminating barriers to competition and establishing free market access, to impose limits on frequency concentration, concessions and cross ownership and to order the divestiture of assets or rights to ensure compliance with these limits.

Courts with nationwide jurisdiction specialised in competition, telecommunications and broadcasting were established in Mexico City in August 2013: two new District Courts in charge of reviewing cases in first instance and two Collegiate Circuit Courts for appeals.[10] The scope and the effect of the administrative appeals used to contest competition decisions (known as juicios de amparo) were reduced. The reform provided that only final decisions adopted by the Board (and not intermediary acts such as orders authorising a dawn raid) could be contested in court. Moreover, the reform eliminated the suspensive effects of administrative appeals except for those against competition authorities' decisions on fines and structural remedies.

The competition authorities signed a co-ordination agreement in 2013 to enhance their regulatory efficiency by supporting each other's their activities. The agreement included the creation of working groups.

[10] See General Agreement 22/2013 of the Federal Judicial Council, published on 9 August 2013 in the DOF. Original Spanish version available at: http://dof.gob.mx/nota_detalle.php?codigo=5309912&fecha=09/08/2013

Chapter 3.
Scope and limitations of competition law

3.1. Scope of competition law

Competition law applies to any economic agent, defined as any natural or legal person, 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 the economic activity (Section 1 of Article 3 of the LFCE).

The LFCE considers jointly and severally liable those economic agents that decide to carry out an anti-competitive conduct, those who instructed or exerted a decisive influence on the decision and those who have been directly involve in its execution. (Article 4 of the LFCE).

Article 2 of the LFCE prohibits monopolies, monopolistic practices, unlawful concentrations, barriers to entry and to economic competition, as well as other restrictions on the efficient operation of markets. These practices have been placed into four categories: absolute practices (Article 53); relative practices (Article 54, 55 and 56); unlawful mergers (Articles 62); and barriers to competition or essential facilities (Article 57 and 60). As shown in Chapter 7. , the LFCE contains an exhaustive list of conducts that qualify as absolute and relative practices. Competition authorities must place specific behaviour into the prescribed categories when enforcing competition law.

The LFCE applies to conduct likely to create effects in Mexico, irrespective of the nationality or location of economic agents. Associations or co-operatives of producers that sell directly to foreign markets do not fall under competition law, subject to a number of conditions.[11]

[11] Provided the products are 1) the main economic source of the region; 2) not essential items; 3) not sold in national territory; and 4) authorised and supervised by the local or federal government. Membership of the association

The statute of limitations on investigations into monopolistic practices is 10 years after the termination of the unlawful conduct. Unlawful mergers may be investigated up to 10 years from the execution of the transaction in the case of gun jumping (notifiable mergers that were never notified or were consummated before clearance) and 1 year from execution in the case of below-threshold unlawful mergers.

3.2. Exclusions and authorisations

The OECD's Recommendation of the Council on Competition Policy and Exempted or Regulated Sectors provides that governments should commit to apply competition law as broadly as possible and to regularly re-assess any exclusion from the application of competition law. (OECD, 1979[11]) Exclusions and exemptions to competition law should, therefore be narrowly designed and interpreted.

Paragraphs 4 and 7 of Article 28 of the Constitution lay down a list of strategic sectors excluded from the application of the LFCE provided they are exercised exclusively by the state. Strategic sectors include: postal services; telegraph and radiotelegraphy; exploration and extraction of petroleum and other hydrocarbons;[12] basic petrochemicals; radioactive minerals; nuclear energy; planning and control of the national electricity system; public transmission and distribution of electrical power; as well as the central bank's function of producing and issuing currency.[13] Economic agents active in strategic sectors may, however, be subject to the LFCE for action not specifically related to these sectors.

Moreover, the LFTR exempts from IFT's merger control all concentrations by non-preponderant economic actors in the telecommunication or broadcasting sectors (see Section 8.1.3).

or co-operative must also be voluntary and allow for free entry and exit, and no permits or authorizations are granted that correspond to another authority.

[12] The Energy Reform limited the strategic oil and hydrocarbons sector to the "upstream" market.

[13] Article 28, paragraphs 4 and 7 of the Constitution.

Chapter 4. Institutional framework

The two competition authorities are perceived as strong institutions contributing to the effective application of the law, independent, serious, trusted, ethical and with a high level of expertise. COFECE, IFT and their technical capabilities have excellent reputation within the competition-authority community, both nationally and internationally, within the business community and the government administration.

They are seen to act with integrity and to the highest standards of public service. They have adopted codes of conduct and conflict of interest screenings and have not been involved in any corruption cases. Both authorities are also open to external objective checks and auditing of their activities and performance.

4.1. Independence

Independence is essential for sound and effective enforcement of competition law as it enables competition authorities to take decisions based solely on legal and economic grounds, as well as to design and implement pro-competitive regulation, as the IFT does, without political considerations. Jurisdictions around the world increasingly value independent competition enforcement and all reforms point towards strengthening independence.

It is in Mexico's economic interest to ensure that competition authorities have adequate resourcing and independence to carry out their mandates effectively (OECD, 2019[12]). Trade, investment opportunities and international agreements also rely on strong, competent and independent competition authorities.[14]

[14] Independence of competition authorities is recurrently a condition and provision in FTAs and bilateral co-operation agreements signed by Mexico.

In Mexico, competition authorities are constitutional autonomous bodies (órgano autónomo), the highest level of institutional independence. In decreasing order, these levels are: 1) autonomous bodies, such as COFECE, IFT and Banxico; 2) decentralised bodies, such as the regulatory improvement commission CONAMER and consumer body PROFECO; and 3) deconcentrated bodies (see Table 1) such as the former CFC, the sanitary commission Cofepris and Comisión Nacional de Seguros y Fianzas. The status of autonomous body is granted by the Constitution to generate specialisation and guarantee technical and neutral decisions, while protecting institutions from political interference.

Competition authorities are not part of the executive or legislative branches, and cannot receive instructions from any other entity. Their autonomy is organisational, technical, operational, normative and budgetary. Competition authorities have: 1) distinct legal statuses and budgets; 2) full independence in the decision-making process; 3) budgetary spending autonomy; 4) the power to enact rules regarding their administrative organisations; 5) the power to enact implementing regulations; and 6) the power to file a constitutional claim before the Supreme Court if the federal legislative and executive branches or any other federal autonomous entity violates or affects their powers.

Table 1 compares the levels of independence between the now dissolved CFC, a deconcentrated body, and COFECE and IFT, which are constitutionally autonomous.

Consistent provisions on the independence of both COFECE and IFT in national and international agreements should be encouraged and ensured.

Table 1. Competition authorities: evolution of independence

FEATURES	CONSTITUTIONAL AUTONOMOUS BODIES (COFECE, IFT)	DECONCENTRATED BODY (former CFC)
Creation	By constitution	By law or decree of the Congress
Relationship to other powers	Co-ordination	Subordination (to the executive)
Organisational autonomy	Yes	No, belonged to the executive
Normative autonomy	Yes, may issue its own organisational statute and technical regulation.	No
Technical autonomy	Yes	Yes
Own legal regime	Yes	No
Own legal personality	Yes	No
Own patrimony	Yes	No
Officials' appointments	Special appointment procedure based upon technical qualifications and political counterbalances (executive and the Senate)	Directly by the executive.
Officials' dismissal	By the Senate with a two-thirds vote when there is a qualified cause established in the law	Normally undertaken by the federal executive power, with or without a qualified cause
Accountability	Own internal comptroller, appointed by the Chamber of Deputies Congress	By the federal executive power through the Ministry of Public Administration
Federal superior audit	Yes	Yes
Standing to initiate constitutional controversies (appeals to solve conflicts between, among others, autonomous bodies and the legislative and executive powers)	Yes	No

Source: COFECE and IFT

The independence of competition authorities is also embedded in international free trade agreements, such as the United States-Mexico-Canada agreement (USMCA)[15]. The negotiations for the new free trade agreement between Mexico and the European Union (FTA EU-MX) have also led to an agreement (still pending ratification) to keep independent and appropriately equipped authorities (in terms of powers and resources) responsible for the full application and the effective enforcement of competition law.

An agency with institutional safeguards for independence may, however, still be susceptible to political influence if those safeguards

[15] Pending signature at the time of drafting.

are not respected. (OECD, 2015[13]) (Kovacic and Winerman, n.d.[14]) During the OECD fact-finding missions, stakeholders identified as a priority the need to preserve competition authorities' independence. Salary caps and budget constraints imposed by the government were presented as elements that could weaken the operational autonomy of the competition authorities. In addition, stakeholders expressed concerns about the government's public statements in relation to a, then ongoing, merger case (Disney/Fox). The presidents of COFECE and IFT appeared before the Chamber of Deputies Committee in charge of Economic Affairs, Trade and Competitiveness and the Committee for Television and Radio over doubts about their impartiality in relation to the case, once it had been closed.

Although the OECD fact-finding missions have not identified any direct or indirect undue influence from private companies, political interference with independent competition authorities may legitimise lobbying attempts by the private sector. (Jenny, 2016[15])[16].

4.2. Two competition agencies

As explained, two competition authorities enforce competition law in Mexico: COFECE deals with competition enforcement in the whole economy except for the telecommunications and broadcasting sector and IFT, the sectoral regulator, deals with competition enforcement in these two sectors and with ex ante regulation promoting competition in those sectors. Other jurisdictions around the world also feature a general and a sectoral competition authority, including the UK, Peru and Costa Rica. IFT's enforcement actions and activities reflect closely the experiences of similar regulators is such jurisdictions. COFECE and IFT have headquarters in Mexico City and are competent to enforce competition law across the country.[17]

[16] Independence "limits the incentive of economic agents to lobby the authority since this lobbying is less likely to be successful, thus freeing resources which can be put to a better use for society". Frederic Jenny, "The institutional design of Competition Authorities: Debates and Trends", http://www.europarl.europa.eu/cmsdata/100755/Frederic%20Jenny%20The%20institutional%20design%20of%20Competition%20Authorities.pdf

[17] Under Article 7, paragraph 6,of the LFTR, IFT has the possibility to establish local delegations or representation offices in any part of the Mexican

The two authorities were established by the 2013 reform, one of whose objectives was the strengthening of regulation and competition enforcement in the highly technical and complex telecommunications and broadcasting sectors, and to deal with powerful private interests and players.

Before the 2013 reform, the power of economic agents in the telecommunications and broadcasting sectors increased without the CFC being able to counteract it. A large amount of the competition authority's resources was devoted to this sector (more than 60%), restricting the capacity to attend to other sectors.

The CFC was in charge of defining the relevant markets, identifying dominant agents and analysing market conditions that would justify the imposition of ex ante regulatory measures in the telecommunications and broadcasting sectors. On the basis of this analysis, COFETEL, the former telecom regulator, would then design and impose specific regulations on the dominant operator. Institutional design was sub-optimal and prevented regulatory entities from performing efficiently.[18] (OECD, 2012[16]) The majority of independent telecommunications regulatory bodies in OECD countries are empowered to define and analyse markets, as well as designing and imposing relevant regulation. These precedents and other reasons, including the increasing relevance of the telecommunications and broadcasting sectors for the development of the economy, led to the creation of the IFT as a sectoral regulator and competition authority in 2013.[19] It was granted powers to adopt ex ante regulation to prevent unfair or anticompetitive practices and establish corrective measures for economic agents with substantial market power in the telecoms and broadcasting sectors. The reform created the figure of "preponderant economic agent" and allowed IFT to impose pro-competitive requirements on these operators. It also

territory that it deems relevant or necessary. Due to budgetary constraints, however, it has a sole location, in Mexico City.

[18] *Estudio de la OCDE sobre políticas y regulación de telecomunicaciones en México 2012*, OECD Publishing, Paris, https://doi.org/10.1787/9789264280656-es, p.53.

[19] *Estudio de la OCDE sobre políticas y regulación de telecomunicaciones en México 2012*, OECD Publishing, Paris, https://doi.org/10.1787/9789264280656-es, p.53.

imposed must-carry and must-offer obligations on broadcasters and pay-TV service providers, ex ante measures aimed at preventing the risks of refusals to allow access to TV content and broadcasting networks.

4.2.1. COFECE

COFECE's mandate is to ensure free competition and market participation, as well as investigating and combating monopolies, monopolistic practices, concentrations, and other restrictions to the efficient functioning of markets. COFECE was given a wide set of powers to allow it to fulfil its purpose effectively. These include the ability to issue orders directed at eliminating barriers to competition and free market participation; to regulate access to essential inputs; and to command the divestiture of assets, rights, partnership interests or shares of economic agents, which are required to eliminate anticompetitive effects. (OECD, 2017[5])

4.2.2. IFT

With a wider mandate than COFECE, IFT's mission consists of the efficient development of telecommunication and broadcasting services. To this end, IFT is in charge of the regulation of the use, development and exploitation of the radio spectrum and networks, and of the provision of telecommunication and broadcasting services, as well as access to active and passive infrastructure and other essential inputs. Furthermore, the IFT is enshrined as the sole competition authority in charge of enforcing competition law in the telecommunication and broadcasting sectors. It may also impose limitations on concentration of spectrum frequencies, cross-ownership of media outlets in the same market or geographical coverage area, among other issues. (OECD, 2017[5])

While COFECE's activities are fully devoted to competition enforcement and advocacy, IFT is in charge of both imposing ex ante pro-competitive regulation and enforcing competition law. The promotion of competition is a horizontal objective for both regulation and competition enforcement. IFT exercises these dual powers as complementary, not in isolation, and decides on the appropriateness of solving market failures through regulation or competition enforcement, based on specific legislative requirements and considerations of effectiveness. The IFT's Compliance Unit and its Investigation Authority (IA) have established a regular and informal

dialogue to avoid the application of both competition enforcement and regulation to the same cases. They decide on whether competition law (LFCE) or telecommunications law (LFTR) is best suited to creating the most efficient and effective solution to develop and improve competitive conditions and generate benefits for consumers (see Box 1).

Box 1. Megacable, and Telcel and Blue Label cases

Megacable case

As a preponderant economic agent in the telecommunications sector, Telmex is subject to a regulatory obligation requiring it to make available and share its passive infrastructure services with other operators. Telmex is able to decide which kind of access constitutes the best solution, either by: 1) granting access to high-capacity optical pipelines for alternative operators to deploy their own fibre or 2) leasing its own optical fibre when there is limited capacity in a pipeline or when there are no alternative routes. In view of this obligation, Telmex submitted a reference offer containing the conditions under which it would share its passive infrastructure for IFT's authorisation. That offer containing the option of granting access to capacity in its optical pipelines was approved by IFT.

Contrary to the terms set out in the reference offer, Megacable requested that Telmex lease it optical fibre. IFT rejected this request, a decision confirmed in *amparo* trials initiated by Megacable.

Megacable then submitted a competition complaint to the IA regarding Telmex's refusal to lease its optical fibre. IFT closed the investigation on grounds that Telmex was compliant with preponderance measures (by providing access to capacity in its optical pipelines) and was not obliged to lease its optical fibre.

Megacable appealed the competition decision, but the court concluded that the anticompetitive conduct was not proven since access to capacity in the optical pipelines was provided, not refused. IFT's decision was confirmed.

Telcel and Blue Label case

Following a complaint from several companies that the exclusive distribution by Blue Label of Telcel's airtime was a possible relative practice, the IA initiated an investigation. It found that, from 31 March 2012 to 31 August 2014, América Móvil and Telcel granted incentives to Blue Label to distribute only Telcel's airtime at its points of sale, which constituted an infringement of Article 10, subsection VIII, of the previous LFCE.

The LFTR (Article 208, second paragraph, Section V) prohibits similar behaviour and requires telecommunications concessionaires declared as preponderant economic agents (as América Móvil and Telcel) not to conclude exclusive distribution contracts with any point of sale.

In view of the overlap of the provisions of the previous LFCE and the LFTR, in its opinion of probable liability (*dictamen de probable responsabilidad*, DPR), the IA only considered the period up to the entry in force of the LFTR to accuse Blue Label of a relative conduct. This avoided a double sanction of the same conduct (as a relative practice and as infringement of a regulatory obligation).

The Board agreed with the IA's suggestion and sanctioned the exclusivity agreement for the proposed period.

Source: Board resolutions available at:
http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/pift07021885.pdf
http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift120418293noct.pdf

The OECD Telecommunication and Broadcasting Review of Mexico 2017 extensively reviewed IFT's regulatory activities and issued recommendations to promote further competition, improve market conditions, strengthen the institutional framework and implement national policies that effectively meet the reform's targets. The OECD acknowledges that ex ante regulation plays an important role in promoting competition in the telecommunications and broadcasting sectors, and the 2013 reform and the ex ante regulatory measures adopted by IFT have had a positive impact in improving competition conditions in both sectors. This has benefitted businesses and consumers through lower prices, higher-quality service, and a wider array of service offers. Broadband penetration levels have increased, new mobile operators have entered the market, and the quality of services has improved (particularly for broadband speeds and data volumes). In the national economic context, between 2012 and 2016, prices for telecommunication services significantly decreased, leading to an important increase in subscriptions, especially in mobile markets: over 50 million new subscriptions to the mobile Internet and, from a small base, the use of the Internet for online transactions has multiplied by a factor of four. In addition, foreign investment increased in the telecommunications sector. (OECD, 2017[5])

As mentioned, the current review focuses on IFT's functions as a competition law enforcer. The analysis in this report should be complemented by the extensive ex ante regulatory activity of IFT to foster competitive conditions in the telecommunications and broadcasting markets.

4.3. Allocation of cases between COFECE and IFT

According to Article 5 of the LFCE, COFECE and IFT must co-operate in relation to cases falling fully or partially outside the scope of their jurisdiction. They may agree to share a case in which IFT is responsible for all the aspects related to telecommunications and broadcasting and COFECE for the remainder. They may also reach an agreement and fully allocate the case to one agency. Where a conflict of jurisdiction arises, it issubmitted to and decided by the specialised courts (juzgados y tribunales especializados en materia de competencia económica, radiodifusión y telecomunicaciones) within 10 working days.

To date, the specialised courts have ruled on only two conflicts of jurisdiction concerning mergers affecting the telecommunications and broadcasting markets and as other markets: the 2016 Nokia/Alcatel-Lucent merger and the 2018 acquisition of Time Warner by AT&T. The first case was exclusively allocated to IFT on grounds of sectoral specialisation; in the second, the court required both competition authorities to deal with the aspects of the merger falling under their mandates.

In light of the AT&T/Time Warner ruling, lawyers and economists representing the parties decided to refer the 2019 acquisition of 21st Century Fox by Disney to both competition authorities. IFT and COFECE agreed to share the review of the acquisition of Fox by Disney and each issued its decision in relation to the markets falling under its specific jurisdiction as explained in Box 8.

The difficulties of having cases reviewed by both competition authorities include cost duplication, inefficiencies, legal uncertainty and the risk of inconsistencies. Moreover, as digital markets, online platforms and businesses grow and develop in Mexico, shared matters will most likely increase and make case allocation between COFECE and IFT more complex. COFECE and IFT report that the boundaries of cases falling under each other's jurisdiction are clear. This clarity

is, however, not perceived by stakeholders that call for more transparency on the division of tasks between COFECE and IFT.

4.4. Internal structure

Like a number of other jurisdictions, Mexico has adopted an institutional model that includes a strict separation between adjudication and investigation functions.[20] Mexico stands out, however, because of its internal structure: each competition authority has its own investigation authority (IA) and a board of commissioners (a decision-making body), to which an entity – TS at COFECE and ECU at IFT – reports directly. The TS and ECU are in charge of receiving and analysing the investigated parties' defence and drafting a proposed decision for the Board's consideration (see Figure 2, Figure 3 and Figure for the full organigrams of COFECE and IFT).

Figure 2. Competition authorities' internal structure

The IAs, which enjoy technical, administrative and operational autonomy,[21] are responsible for conducting investigations by gathering evidence of possible anticompetitive practices, the existence of substantial power, barriers to entry, and essential facilities. Once an investigation is completed, the IA advises the Board as to whether it should initiate a case following a trial-like procedure, known as a procedimiento en forma de juicio, or to close the investigation in the absence of sufficient evidence of a possible infringement.

The TS and ECU are in charge of the trial-like procedure. They notify the relevant companies of any charges, to which they then have the right to respond and submit any contrary evidence. The TS or ECU then hears the IA's view on any evidence submitted by the defendants.

[20] See, http://dx.doi.org/10.2139/ssrn.2894893 (p. 19 seq.) and www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/M(2015)1/ANN6/FINAL&docLanguage=en.

[21] Article 26 of the LFCE.

Once the facts have been established, the evidence processed, and the arguments presented, the TS or ECU makes a proposal of resolution to the Board, which will then adopt a final decision after hearing all the parties.

Separation of the investigation and adjudication bodies ensures impartiality and due process, in particular in relation to on-going cases. A number of stakeholders have, however, indicated that the separation in Mexico has been extreme, leading to a sense of isolation on both sides. A number of stakeholders have observed that internal dialogue and guidance between the investigation and adjudication on general issues, such as standard of proof, substantial case analysis or procedural matters, would help in the consistent treatment of cases, informed decision-making at the Board, and building cases solid enough to be successful in court. The lack of interaction between the IA and the Board is aggravated by the TS or ECU's role. This leads to inefficiencies, loss of investigation knowledge, duplication of work, and time-consuming procedures.[22]

At COFECE, both the IA and the Board are aware of the situation and suggest fostering feedback from the Board as to how investigations could improve to meet the its standards, and exchanging views between the IA and the Board on how decision-making could better address practical issues, case reality and novel markets or conducts.

4.5. Appointments and dismissals

The board of commissioners that govern the two competition authorities in Mexico are composed of seven commissioners appointed for a non-renewable term of nine years, with one appointed president for a renewable term of four years. The current presidents of COFECE and IFT were confirmed in 2017 for additional four-year terms. Staggered rotation allows for partial renewals and continuity within each Board. Decisions are adopted by majority[23] and all commissioners are required to vote.[24] This makes it paramount that

[22] Article of the 18 of the LFCE.

[23] Qualified majority for the appointment and removal of the head of an IA, the head of the TS or ECU, and the director general for litigation (*contencioso*).

[24] If a commissioner is absent, he or she must leave a written vote before the session or vote within five days after the session. If a commissioner cannot

continuity is ensured and that no empty seat is left on the Board when each commissioner's term ends.

A qualified majority of the Senate appoints commissioners.[25] Each new candidate is nominated by the president of Mexico from a list of three to five candidates who have successfully passed an evaluation and selection process. The process is organised by an evaluation committee[26] composed of members of Banxico, the National Institute of Statistics and Geography (Instituto Nacional Estadística y Geografía, INEGI) and, until its abolition in 2019, the National Institute for the Evaluation of Education (Instituto Nacional para la Evaluación de la Educación, INEE). The committee is charged with organising a written examination to test candidates' technical knowledge and verifying that they meet the eligibility criteria (see Box 2). A selection process is launched every time a commissioner's term is close to its end.

Box 2. Commissioners' eligibility criteria

- Mexican national by birth and in possession of full civil and political rights.
- Over the age of 35.
- Good reputation and standing and no past criminal sentence of more than one year in prison.
- Professional university degree.
- Minimum three-year competition and/or telecommunications experience in professional activities, public service or academia.
- Relevant technical knowledge.
- Did not hold in the previous year the function of secretary of state, public prosecutor, senator, federal or local congressman, governor of a state or of Mexico City.
- Did not hold in the previous three years a function, job or task in companies falling within the scope of COFECE and IFT's competences.

Source: Article 28 of the Mexican Constitution.

issue a vote for justified reasons or is impeded to doing so, and there is a tie in a deliberation, the president will be granted a casting vote.

[25] A two-third majority of senators present at the voting session, under Article 28 of the Constitution.

[26] See, www.comitedeevaluacion.org.mx

Commissioners may be removed by the Senate only for the serious causes listed in Article 23 of the LFCE, such as participating in a political campaign while acting as a representative of the authority.

COFECE's current board is composed of five economists and two lawyers; IFT's of two lawyers, two economists and three engineers. One commissioner in COFECE and one IFT will be replaced each year, as their terms expire.

The selection process for commissioners is based on objective criteria and focuses on candidates' technical knowledge. Stakeholders agree that the process is highly impartial and immune to any form of manipulation. According to many stakeholders, however, the written examination is too academic and lacks practical legal and economic testing.

In terms of other high-level positions within the competition authorities, each Board appoints – and may remove – by a qualified majority of minimum five commissioners the head of the IA and the head of the TS or ECU. In the case of COFECE, this also applies to the director general for litigation (contencioso). COFECE and IFT's presidents propose the candidates for these positions. COFECE's president directly appoints the head of planning, liaison and international affairs. IFT's president directly appoints the heads of legal affairs, general co-ordination of strategic planning, general co-ordination of international affairs, and general co-ordination of liaison.

Eligibility criteria for the head of the IA are laid down in the LFCE and are similar to those applied to commissioners (Box 2).[27]

4.6. Incompatibilities

During their appointed terms, competition-authority officials are subject to the principles of legality, objectivity, accuracy, honesty and transparency. They may not hold any other professional activity, appointment or function, whether in the public or private sector, except for academic teaching. In addition, conflicts of interests are strictly prohibited and prevented. Article 24 of the LFCE provides that commissioners cannot and must immediately recuse themselves from adjudicating on cases if they consider that their independence, professionalism and impartiality may be called into question. Specific

[27] Article 30 of the LFCE; compare with Article 28 of the Constitution.

situations giving rise to direct or indirect conflicts of interest are listed in the same article. Violation of incompatibility or conflict of interest rules may be cause for a commissioner's removal under the LFCE.[28]

Commissioners have the right to express in public a technical opinion, explain the legal grounds and reasoning behind a decision or dissenting votes, and participate in public forums and events. These are not considered conflicts of interest and are not causes for removal.[29]

After leaving their posts, commissioners and heads of the IA are barred, for a period representing one third of the time spent in their position, from becoming board members, administrators, directors, managers, executives, agents, representatives or attorneys of economic agents that were subject to procedures under their responsibility. A revolving door of staff moving between the public and private sectors can be seen as good in that it stimulates the development of skills and competencies, but it may also raise the risk of conflicts of interest, such as misuse of insider information by a public servant for the benefit of private companies. Cooling-off periods are a general practice in the majority of the OECD jurisdictions.[30] (Neyrinck and Petit, 2014[17]). A cooling-off period that largely exceeds that applied in the LFCE (Table 2) does, however, have the potential to prevent competition authorities from attracting talented and experience personnel.

[28] See Article 23 about plenum commissioners and Article 31 about the head of the IA. Furthermore, all officials are subject to the general rule of impeachment and liabilities under Title IV of the Constitution.

[29] Article 24, paragraph 3, and Article 5, paragraph 7, of the LFCE

[30] One year in Canada, two years at the European Commission and the US, and five years in France.

Table 2. Comparison of conflict of interest regulation and cooling-off periods

Country	General Legislation	Conflict of Interest Regulation in the Competition Law
Germany	Act on Federal Civil Servants cooling off =5 years	
Brazil	Code of Conduct for the Senior Government Officers at the Federal executive branch of 2000 cooling off = 4 months	Law Nº 12.529 of November 30, 2011 cooling off = 120 days
Canada	Conflict of Interest Act S.C. 2006, c. 9, s. 2 cooling off = 1 year; 2 years for Ministers Policy on Conflict of Interest and Post-Employment cooling off =1 year	
Chile		Decreto Ley No. 2011 que fija normas para la defensa de la libre competencia cooling off =6 months for the Tribunal of the Defense of Competition Law (TDLC) Article 58 of the Law 18.575, sobre Bases Generales de la Administración del Estado Cooling off=6 months for the National Economic Attorney Office (Fiscalia Nacional Económica, FNE)
Spain	Ley 5/2006, de 10 de abril, de regulación de los conflictos de intereses de los miembros del Gobierno y de los Altos Cargos de la Administración General del Estado cooling off =2 years	Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia. cooling off =2 years
United States	18 U.S. Code cooling off =2 yearsc Honest Leadership and Open Government Act cooling off =2 years for Secretaries of State	
France	Code Pénal Statut général des fonctionnaires cooling off= 3 years Statut général des fonctionnaires cooling off =3 years	
UK	Civil Service management code cooling off =2 years	

Source: COFECE

4.7. Other public authorities with competition-related powers

COFECE and IFT share the main responsibility for competition policy and law enforcement. However, the SE and the Bank of Mexico hold other competition-related powers in Mexico.

Table 3. Competition-related powers of public entities other than COFECE and IFT

Institutions	Competition-related powers	Examples
Ministry of Economy (SE)	Requests to COFECE or IFT for opening a market examination under Article 94 LFCE in specific areas where competition restrictions may exist. These requests should be treated as preferential (Article 66 LFCE). Requests to COFECE and IFT to initiate investigations in relation to absolute and relative practices.	Market investigations carried out by COFECE, after an official SE request: freight transport in Sinaloa (2015) and cow's milk in Chihuahua (2017)
	Study certain markets for competition and non-competition related purposes, often in co-operation with specialised organisations. For example, the SE signed a co-operation agreement with the OECD to support competition policy and competitiveness in Mexico.	Areas of SE-OECD competition co-operation This peer review (2019) Gas sector (2019) Grocery retail (2019) Pork (2019) Asset divestiture (2019) Standard setting and competition (2018) Chicken (2018) Private enforcement of competition law (2018) Digital platforms (2018) Meat and medicines (2018) Judicial competition resolution (2017) Market examinations (2016).
Financial authorities (Ministry of Finance (SHCP), Banxico, CNBV, CONSAR, CONDUSEF, CNSF)	Powers to regulate financial markets to promote competition and open access.	In 2010, the Bank of Mexico adopted regulation on the commissions charged by banks for financial products in order to reduce clients switching costs. In 2018, the Bank of Mexico adopted regulation to improve employees' access to credit which main source of financing is their payroll.

Source: LFCE, Financial Services Transparency and Regulation Law (LTSOF), http://www.oecd.org/competition/mexico-competition.htm

4.8. Domestic co-operation

Competition authorities have developed co-operation channels with a large number of authorities and government entities.[31] These vary in depth, scope and time, ranging from formal and deep to informal and punctual. To date, COFECE has 54 co-operation agreements in place with other public authorities, including the SE, National Regulatory Improvement Commission, (Comisión Nacional de Mejora Regulatoria, CONAMER; ex-COFEMER), Bank of Mexico, the Tax Administration Service (Servicio de Administración Tributaria, SAT), Mexican Social Security Institute (Instituto Mexicano del Seguro Social, IMSS), Energy Regulatory Commission (Comisión Reguladora de Energía, CRE), Office of the Federal Prosecutor for the Consumer (Procuradoría Federal del Consumidor, PROFECO), and the National Institute of Access to Information (Instituto Nacional de Acceso a la Información, INAI). COFECE's most recent co-operation agreement negotiations were held in 2018 with authorities in the energy, hydrocarbons, financial services and railway transportation sectors.

IFT has 18 co-operation agreements in place with other public authorities,[32] including agreements with PROFECO regarding

[31] The legal basis for co-operation agreements is found in Article 12, paragraph IV, of the LFCE. This section does not cover co-operation between COFECE and IFT, nor does it cover advocacy efforts and incremental powers explored in Chapters 5 and 9 respectively, which play an important role in raising competition awareness and fostering domestic co-operation. Furthermore, international co-operation is explored separately in Chapter 13.

[32] Other public entities that have signed co-operation agreements with IFT include: Ministry of National Defence (Secretaría de la Defensa Nacional, SEDENA); Ministry of Public Administration (Secretaría de la Función Pública, SFP); INEGI; National Electoral Institute (Instituto Nacional Electoral, INE); Tax Administration Service (Servicio de Administración Tributaria, SAT); Ministry of Finance and Public Credit (Secretaría de Hacienda y Crédito Público, SHCP); Management Service and Property Disposal Department (Servicio de Administración y Enajenación de Bienes, SAE); National Council to Prevent Discrimination (Consejo Nacional para Prevenir la Discriminación, CONAPRED); National Council for the Development and Inclusion of Persons with Disabilities (Consejo Nacional para el Desarrollo y la Inclusión de las Personas con Discapacidad, CONADIS); and the Executive Secretariat of the National Anticorruption System (Sistema Nacional de Anticorrupción, SNA).

telecommunications users and consumer protection,[33] National Electoral Institute (Instituto Nacional Electoral, INE) and the Ministry of Communications and Transport (Secretaría de Comunicaciones y Transporte, SCT). IFT's vast mandate means that these agreements tend to relate to other public policy areas, such as pro-competitive ex ante regulatory functions, in addition to competition enforcement.

One illustrative example of domestic co-operation is the agreements signed by COFECE and IFT with PROFECO, the Mexican consumer-protection authority. PROFECO has a number of pro-consumer tools, such as consumer price screens, a consumer-complaint platform, and a team dedicated to class actions against consumer-law violators. In 2015, COFECE signed a memorandum of understanding (MOU) with PROFECO to share information on consumer prices, which is used by COFECE for screening collusive behaviour.

Since consumers can play a significant role in the competitive process, authorities can help advance competition by helping to empower them. Since 2013, PROFECO and IFT have agreed to collaborate and improve the efficiency of their compliance with legal mandates. Explicitly, Article 191 of the LFTR establishes that IFT and PROFECO must exchange information related to, among others, a consumer complaint and the market behaviour of an economic agent. IFT and PROFECO have therefore been closely collaborating since July 2015 on the "Soy Usuario" project, an online platform that allows consumers to access information about their consumer rights and complaints. This collaboration promotes competition by enhancing consumer awareness and facilitating legal compliance of consumer rights.

The OECD fact-finding mission has identified two challenges regarding domestic co-operation. First, the high staff-turnover rate in the government and public authorities has required newcomers being regularly updated on the importance and benefits of competition and the need for co-operation. Second, most states and local authorities have been reluctant to co-operate in competition matters despite being legally required to facilitate competition enforcement activities in their regions. Lack of co-operation at state and local levels has led to limited competition awareness in certain communities. Neither COFECE nor

[33] Original Spanish version available at: www.ift.org.mx/sites/default/files/contenidogeneral/coordinacion-de-archivos-de-transparencia/conveniomarcodecolaboracionift-profeco20deseptiembrede2016acc.pdf.

IFT have a physical network of offices in the states or municipalities. Therefore, they use SE or PROFECO's local offices to do outreach in remote areas, collect complaints and gather information in relation to cases.

The OECD fact-finding missions have identified areas of opportunity for co-operation with:

- ***Presidency and Congress.*** Independence should not prevent competition authorities from establishing co-operation channels with the executive and legislative branches. Domestic co-operation at the highest level is essential to sustain the government and congress's competition expertise and consistent approach with other public policies and laws, such as anti-corruption, consumer protection, infrastructure, competitiveness and inclusion.
- ***Ministry of Economy (SE)***. Co-operation between the SE and the COFECE has proven useful in supporting effective competition policy. The SE and COFECE signed a co-operation agreement in 2015 and co-operate on market investigations, collection of complaints at local level and general data sharing. Both sides agree, however, that the co-operation agreement could still lead to more systematic information-sharing and more competition outreach initiatives at local level using the local presence of SE, and to further promote competition across initiatives and policies at the SE.
- ***Ministry of Public Administration (Secretaría de la Función Pública, SFP) and Ministry of Finance and Public Credit (Secretaría de Hacienda y Crédito Público, SHCP).*** Open and competitive public procurement ensures value for (public) money. To that end, Mexico and the OECD have worked closely on fostering competition in public procurement. COFECE has also invested resources in fighting collusion and promoting competition in public procurement by adopting recommendations, organising capacity-building events for public procurement officials and sanctioning bid-rigging schemes.

Certain recent developments call for further co-operation in this field. Despite COFECE and OECD's recommendations to limit direct award of government contracts, this process has been used in certain major projects with private companies. The Ministry of Finance has been given the task of centralising government purchases and is currently designing the necessary processes and strategy. Moreover, in some

bid-rigging cases, COFECE has identified possible illegal involvement of public officials in anti-competitive behaviour and reported its suspicions of corruption to the SFP. Although most of the reported cases had passed the statute of limitations, SFP has investigated a non-prescribed corruption case involving public tenders for media monitoring services. SFP's investigation was supported by elements of COFECE's case of a bid-rigging practice in the same market. As a result of the investigation, on 28 August 2019, SFP imposed a fine of MXN 977 000 and debarred one company for a period of two years and three months for providing false information in a procurement procedure.[34]

- ***Anti-corruption Attorney (Fiscalía Anti-corrupción) and SFP.*** It remains extremely challenging for people to report wrongdoings, just as it is to identify the exact nature of wrongdoing (for example, whether it is corruption or collusion) and the authority charged with prosecuting them. Collusive schemes, in particular, bid rigging in public procurement and corruption are particularly difficult to prosecute as they often occur simultaneously and are mutually reinforcing. For example, a procurement official may accept bribes from collusive companies to award a contract to a bidder designated by the bid-rigging scheme. The rents generated by the collusive agreement may then allow continued bribe paying to procurement officials. On 27 August 2019, COFECE and SFP signed a co-operation agreement to fight corruption and collusion in public procurement in Mexico.[35] In line with this interesting initiative, Mexico should also explore formal and long-term channels of co-operation between competition authorities and the anti-corruption attorney.

- ***SHCP in relation to CompraNet.*** Investigations and enforcement largely depend on the availability of relevant data and evidence. CompraNet, the Mexican e-procurement platform managed by SHCP, contains procurement data extremely valuable to COFECE in detecting collusion and conducting bid-rigging investigations.

[34] See, https://directoriosancionados.funcionpublica.gob.mx/SanFicTec/jsp/Ficha_Tecnica/SancionadosN.htm

[35] See, https://www.gob.mx/sfp/articulos/para-evitar-corrupcion-en-contrataciones-publicas-la-funcion-publica-y-la-cofece-firman-convenio-de-colaboracion

However, the quality of data and the way they are collected on CompraNet makes it difficult to extract and use them for competition enforcement. (OECD, 2018[18]) IFT also recognises these limitations. IFT is launching a study on public procurement of telecommunication services and infrastructure in Mexico and best international practices to improve competition in this particular sector. In view of the difficulties, it has encountered in obtaining relevant information from SFP, SCHP and CompraNet, the IFT is conducting its own statistical analysis of the relevant data.

- ***CONAMER and sector regulators.*** The General Law of Better Regulation, which came into force in 2018, entrusts CONAMER with undertaking regulatory-impact assessments (RIAs) of all draft regulations proposed by the Executive. (OECD, 2018[19]) Regulatory proposals must pass CONAMER's filters before being adopted or implemented. COFECE and CONAMER signed a co-operation agreement in 2013 (modified in 2016), which provides for COFECE's involvement in the RIA process. This consists of issuing opinions identifying restrictions to competition imposed by draft regulations, which CONAMER must then take into consideration. OECD fact-finding indicates that CONAMER has exempted certain draft regulations with a potential impact upon competition from an RIA without a valid justification.[36] Moreover, a number of stakeholders observed that COFECE is not given sufficient time to carry out its technical assessment and issue opinions.

  CONAMER does not conduct RIAs in relation to IFT's sectoral regulation; they are instead undertaken internally at IFT by the General Co-ordination for Regulatory Improvement. IFT promotes regulatory improvement though transparency in the elaboration and application of regulations and a cost-benefit analysis of its rules. IFT has issued Guidelines on Public Consultation and Regulatory Impact Analysis[37], which establish and describe the tools it uses to improve

[36] For example, the attempt to create a logistics regulator for the gasoline market, or the modification of the requirements to operate gasoline transportation tankers.

[37] IFT's Regulatory Improvement Guidelines establishes that all proposed policies, laws and regulations before being approved by the Plenum must comply with a public consultation process and the Regulatory Impact Analysis (RIA). Hence, RIA is a systemic approach to critically assessing the

regulation. According to IFT, the RIA has had a positive impact on transparency and has improved the quality of regulatory decisions.

- ***INAI.*** With the development of digital platforms offering free services, competition authorities have started to consider privacy protection as a dimension of competition.[38] COFECE's co-operation with the INAI has been limited to its obligation to comply with the General Law on Protection of Personal Data and the General Law on Transparency and Access to Public Information. Privacy-protection implications in competition enforcement have not been considered. According to its *Regulatory Vision for 2019-2023*, IFT will seek to engage more actively in all aspects of the digital economy and intends to promote a more collaborative and holistic engagement with key stakeholders. In this sense, co-operation with INAI regarding privacy issues and their impact on competition enforcement is desirable.

- ***International co-operation / Ministry of Foreign Relations (Secretaría de Relaciones Exteriores, RELEX)***. IFT must go through RELEX for all cross-border co-operation on cases. Co-operation mechanisms are in place but RELEX has at times proven slow or unresponsive.

4.9. Resources

4.9.1. Budget

Competition authorities' main funding comes from the annual Federal Expenditure Budget (Presupuesto de Egresos de la Federación, PEF).[39] The Constitution requires Congress to guarantee that

positive and negative effects of proposed and existing regulations and non-regulatory alternatives.

[38] See, for example, the European Commission's decision in Microsoft/LinkedIn, European Commission Decision C(2016) 8404, Case M.8124 – Microsoft/LinkedIn, 6 December 2016, http://ec.europa.eu/competition/mergers/cases/decisions/m8124_1349_5.pdf.

[39] Another 4% approximately stems from merger filing fees, in line with article 77 of the Federal Contributions Law. IFT is not entitled to charge for merger filings. The Federal Budget is also the main source of financing for the IFT. IFT also receives financing from spectrum use rights (3.5% of those rights go to IFT´s budget). This additional source of income represents between 10 and 30% of the Federal Budget.

competition authorities are provided with the necessary budget to exercise their mandate in an effective and timely manner. Nevertheless, the 2019 "austerity national budget" significantly cut the funding of key independent institutions, many of which have roles central to integrity priorities. (OECD, 2019[12])

- COFECE's budget was reduced by 6%, from MXN 618 million (approx. EUR 28.8 million) in 2018 to MXN 583 million (approx. EUR 27.2 million) in 2019.
- IFT's federal budget decreased by 25% from MXN 2.164 million (approx. EUR 93.1 million) in 2018 to MXN 1.500 million (approx. EUR 69.9 million) in 2019. IFT's budget covering its competition mandate was reduced by 30.9% from MXN 709.43 million (approx. EUR 31.58 million)[40] in 2018 to MXN 455.04 million (approx. EUR 21.21 million) in 2019. IFT's competition-related budget represents 30.33% of its 2019 budget.

The two competition authorities have budgetary and spending autonomy. Table 4 shows how each allocates its budget, in accordance with its organisational regulations, Board and Presidency, TS or ECU, and IA.

[40] This includes the budget of the ECU, the IA (and 30% of the budget of the rest of the IFT dealing with ex ante regulation. The budget reported for the OECD COMP Stats is MXN 246 million and includes the resources allocated to the ECU, the IA and the Legal Affairs Unit.

Table 4. Allocation of COFECE and IFT's public budget to competition-enforcement functions, 2017-2019, in MXN, thousands.

COFECE				IFT			
	2017	**2018**	**2019 (forecast)**		**2017**	**2018**	**2019 (forecast)**
Overall Total COFECE	537 244	618 150	582 803	**Overall total IFT (including regulation and competition enforcement)**	2 111 137	2 164 642	1 507 899
Board total	94 427	110 218	107 706	**Board total**	130 115	138 977	113 800
Presidency total	155 042	188 710	160 185	**Executive coordination total**	12 523	12 155	10 511
				Technical Secretariat	40 596	38 917	22 624
Investigation Authority total	152 231	172 188	170 601	**Investigation Authority total**	79 210	91 676	71 192
Technical Secretariat total	122 155	134 509	131 307	**ECU total**	77 728	80 041	59 603
Internal comptroller	13 389	12 525	13 004				

Source: COFECE and IFT.

Bi-annual reviews and enforcement of ex ante asymmetric regulation imposed to the preponderant agents in the telecommunications and broadcasting sectors represent IFT's most important institutional efforts to promote competition. From 2016 to 2019, it allocated MXN 231.4 million (approx. EUR 10.7 million) to this activity.

4.9.2. Human resources and remuneration

Competition law and economics are highly technical, specialised fields. To attract and retain highly skilled talent, as well as to support competition authorities' independence, competitive salaries and fulfilling career paths matter. After the 2013 reform, COFECE and IFT began a recruitment process aimed at hiring and retaining competition specialists, in particular in their IAs and TS (for COFECE) and ECU (for IFT).

At the time of writing, COFECE's investigation team is made up of 53% lawyers, 32% economists, 9% engineers and 7% of staff with other backgrounds, including international affairs, accounting and business administration. Of COFECE's investigators, 40% hold a

master's degree, mainly in economics, law, regulation, and public administration. On average, investigators stay at COFECE for 3.3 years. The Mergers Unit is now organised by economic sectors allowing greater specialisation and efficiency, and has increased its staff from six in 2007 (at the CFC) to 25 today. IFT's Economic Competition Unit team is made up of 38% lawyers, 45% economists, and 17% staff with other backgrounds (public administration, international relations and industrial engineering), 2% of them hold a PhD, 30% hold a master's degree and 51% a bachelor's degree. IFT's sectorial specialisation in both its AI and ECU teams allows for greater efficiency.

IFT's investigation team is made up of 45% lawyers, 35% economists, 2% engineers, 9% mathematicians and 9% staff with other backgrounds (business administration, commercial relations, and communication science). Of its investigators, 56% hold a master's degree mainly in economics, law, regulation, public policy, telecommunications, competition, business administration and international law; a number are pursuing doctoral studies.

Salaries at COFECE and IFT are uncompetitive for mid- and senior-level staff with more than three to four years of experience, when compared to private-sector wages. Internal surveys have shown that staff workload and working hours have been increasing over time, which combined with more attractive offers in the private sector may explain the staff turnover rate of 12% at COFECE. IFT staff turnover rate is 9.6%.

In an effort to retain seniority and promote gender balance, COFECE and IFT have taken a number of "work-life balance" initiatives, including longer maternity and paternity leave than required by law (four months for mothers and 15 days for fathers in COFECE and three months for mothers and 20 days for fathers in IFT). They have also invested in capacity building and created transparent frameworks for career evaluation and evolution. A pilot project to allow COFECE staff to work from home a certain number of days a week has recently been approved. IFT has established flexible working conditions to help staff taking care of the elderly, children or people with special needs. New mothers at IFT and COFECE also now have access to breastfeeding cabinets.

A recent government measure to cap all public officials' pay at the same level as the Mexican president's (currently MXN 108 000 a month) has worsened the competition authorities' ability to hire and

retain mid-and senior-level talent. This cap implies a salary reduction for senior positions, notably commissioners, heads of units, directors general and high-level managers. In light of this, competition authorities have lodged constitutional complaints before the National Supreme Court (Suprema Corte de Justicia de la Nación, SCJN). COFECE challenged the 2019 cap in light of Article 127 of the Constitution, which stipulates that public officials with a specialised technical responsibility or function may receive a remuneration surplus, no greater than 50% of the President's remuneration. IFT argued that this provision was contrary to its regulatory functions provided for in Article 28 of the Constitution. On 12 June 2019 and 10 July 2019, the SCJN ordered interim measures allowing IFT and COFECE to continue applying 2018 salaries during 2019. At the time of writing, the SCJN was still looking into the main case and a final judgement was pending.

The government's decision to cap salaries weakens the competition authorities' autonomy by limiting their ability to attract and retain talent and control their own human-resources decisions. Competition authorities' main asset is human capital. COFECE invests 70% of its budget on staff and IFT devoted 62% of its 2019 budget to personnel.

Table 5 and Table 6 show the evolution of the two competition authorities' workforces.

Table 5. COFECE staff

	Number of employees			Budget expenditure* (in MXN thousands)	
	Law Enforcement	Support	Total	Law enforcement functions	Support functions
2019 (forecast)	296	120	**416**	497 021	85 782
2018	304	121	**425**	508 376	109 774
2017	278	136	**414**	450 284	86 959
2016	250	125	**375**	413 428	64 629
2015	263	121	**384**	397 523	80 809

Source: COFECE.

Table 6. IFT staff

	Number of Employees		
	Enforcement	**Support**	**Total***
2019 (forecast)	125	389	515
2018	138	357	495
2017	112	346	458
2016	110	348	458
2015	115	343	458

Source: IFT.
Note: *This includes staff of the ECU, the IA and 30% of the staff of the IFT dealing with ex ante regulation. The staff headcount reported for the OECD COMP Stats is 206 and includes the resources allocated to the ECU, the IA and the Legal Affairs Unit.

A number of stakeholders have indicated the need to develop further the economic analysis of cases and to create a position of a chief economist responsible for enhancing the quality and consistency of effects-based reasoning in competition decisions (see Section 7.2.2). Forensic, digital and technology experts are also a human-resources priority for competition authorities, especially in view of the recent growth of the digital economy.

4.10. Accountability

The competition authorities publish annual work programmes and quarterly reports. Each competition authority's president also reports to the Senate annually.

Although not required by law, COFECE uses external, independent auditors to verify its financial statements, and has published four-year strategic plans since 2014. COFECE's Strategic Plan for 2018-2021 explicitly foresees its mission "to evaluate objectively the impact of COFECE's resolutions on markets and consumer welfare". Similarly, in 2018, the IFT's General Co-ordination for Strategic Planning published its 2019-2023 Regulatory Vision, setting out IFT's priorities for the adoption of pro-competitive regulation and competition enforcement on outstanding topics, such as, net neutrality, big data, OTT services, and deployment and infrastructure sharing. The document also highlights IFT's commitment to be more proactive in identifying essential facilities and barriers to competition in telecommunications and broadcasting.

The Directorate General for Planning and Evaluation at COFECE assesses the ex ante and ex post impact of key interventions using a specific methodology and framework. Ex ante assessment focuses on the impact upon the economy of an intervention by COFECE after the adoption of any subsequent resolution. A 2019 compilation of ex ante assessments shows a total estimated result of USD 309.4 million for 2018. [41] Ex post assessments calculate the impact of interventions two to four years after the adoption of resulting resolutions. To date, COFECE has published ex post evaluations regarding IMSS's procurement of serums and insulin;[42] the freight motor transport sector;[43] chicken meat;[44] and the chemical industry.[45] In 2018, COFECE has made two ex post evaluations, one on the railway-transportation sector and the other on the movie-theatre sector, whose publications are still pending. It is currently working on ex post studies on the sugar and airline-transportation sectors.

[41] *Beneficio económico de la intervenciones de COFECE: Evaluaciones ex ante en 2018*, COFECE, Mexico City, 2019, https://www.cofece.mx/wp-content/uploads/2019/08/Beneficio-economico-de-las-Intervenciones-de-la-COFECE-2018.pdf.

[42] Following the CFC's intervention, IMSS achieved direct savings of more than USD 57.1 million in its purchasing. See, "Estimación de los beneficios obtenidos por la sanción de un cártel en licitaciones públicas del IMSS en México", www.cofece.mx/cofece/phocadownload/PlaneacionE/imss_evaluacion_ex-post.pdf.

[43] Investigation of an absolute practice of a price surcharge of 79%. See, www.cofece.mx/cofece/phocadownload/PlaneacionE/cofece_evaluacion_mercado_de_autotransporte_de_carga.pdf.

[44] Investigation of an absolute practice showing a price surcharge of 32% and damage to consumers ranging between USD 9.3 and USD 16.8 million. See, www.cofece.mx/cofece/phocadownload/PlaneacionE/evaluacion_ex_post_pollos.pdf.

[45] Investigation of a conditioned merger that prevented a price increase of 36.26% and an output reduction of 21.38% See, www.cofece.mx/cofece/phocadownload/PlaneacionE/evexpost_industriaquimica.pdf.

Box 3. Ex post assessment of competition interventions: the IMSS case

In 2015, COFECE conducted an ex post study of the impact of a 2010 CFC resolution sanctioning pharmaceutical companies for bid rigging of IMSS tenders for the purchase of serums, solutions and human insulin. COFECE analysed a data panel of 238 tenders between 2003 and 2007 and used a difference-in-differences indicator to calculate the impact of the bid-rigging scheme. The results suggested that, on average, the IMSS paid a surcharge of 57.6% due to the bid-rigging agreements.

After CFC's investigation and once competition had been restored, IMSS made direct savings of more than MXN 622.7 million in its purchases. COFECE estimated that the savings could have been used to purchase (under competitive circumstances) approximately 292% more human insulin or 128% of the annual consumption of serum and other solutions. That level of savings would have allowed IMSS to have built 5 clinics or purchased 47 tomography units, 727 ambulances or 2 168 incubators.

Source: www.cofece.mx/attachments/article/37/IMSS_Evaluacion_ex-post.pdf.

COFECE also measures its performance through the Evaluation System of the Institutional Performance (Sistema de Evaluación del Desempeño Institucional or SEDI)[46]. IFT measures its performance through the annual evaluation methodology called ProTalento IFT.

IFT has also undertaken other initiatives to assess the impact of its interventions. IFT's ex post assessment is mainly aimed at measuring the effect of pro-competitive ex ante regulation on the telecommunications and broadcasting sectors. For instance, in 2017, IFT published Telecommunications in Mexico. Four Years After the Constitutional Reform. The document concludes that the reform brought substantial benefits to consumers in the form of broader offerings, lower prices, and a greater diversity of content. (IFT, 2016[20]) In 2017, the Institute performed an ex post evaluation of its

[46] The SEDI is the set of methodological, normative and operational elements that allow objectively monitoring and quantifying the integral performance of the institution, so that it is possible to evaluate the progress in meeting the objectives of the 2018-2021 Strategic Plan. The SEDI is composed of strategic level and management indicators that provide relevant and timely information for the improvement of institutional procedures.

pro-competitive ex ante intervention in telephone interconnection and long-distance call rates; it estimated annual average consumer savings of MXN 44 500 million (USD 2.4 billion). Moreover, every two years, IFT assesses whether the asymmetric ex ante regulation imposed on the preponderant operator is achieving its pro-competitive objectives, such as the reduction or elimination of barriers to entry, effective access to essential inputs and prevention of any anticompetitive behaviour. The 2016 review concluded that stronger measures were necessary to ensure non-discriminatory access to wholesale services provided by the telecommunications sector's preponderant operator. As a result, the IFT issued a new set of ex ante regulatory measures, including the functional separation of the wholesale and retail operations of fixed services (telephony and broadband) provided by Telmex and Telnor, two companies belonging to the economic interest group designated by IFT as the preponderant operator in the telecommunications sector.

4.11. Recommendations

4.11.1. Independence

Independence is essential to rigorous enforcement, the rule of law, technical quality and objective decision-making, in the public interest. Competition authorities' independence and autonomy, enshrined in the Mexican Constitution, should be respected at all levels in both public and private sectors.

Mexico should make sure that competition authorities can dispose freely of their budget. Competition authorities should be able to attract and retain highly skilled experts, set salary levels independently, and provide clarity and certainty to their staff over long-term career opportunities.

4.11.2. Allocation of cases between the two Competition Authorities

The growth of the digital economy may give rise to further uncertainty and complexity in relation to case allocation between COFECE and IFT, which calls for continued close cooperation between the competition authorities. Mexico should consider providing guidance on the criteria for case allocation between the competition authorities.

4.11.3. Institutional design

The separation of the investigative and decision-making bodies (as set out in Article 26 of the LFCE) may have been interpreted too rigidly. It should not prevent the development of common standards and best practices by the IA, the TS or ECU and the Board. Two-way sharing of learned lessons, feedback and intelligence could be strengthened outside of ongoing procedures. Guidance could be created for general issues such as standard of proof, substantial case analysis and procedural issues. This would allow the IA to continue meeting the standards required by the Board, while allowing the Board to adopt decisions that are more informed and avoid decisions being repealed due to lack of sufficient evidence or weak substantial analysis.

Mexico should streamline and simplify COFECE and IFT's internal procedures. Dialogue between the TS or ECU and the IA should be reinforced to ensure the efficient collection of evidence at the IA level. Once the DPR is with the TS or ECU, the units should also be allowed to request that the IA produce further evidence to respond to the parties' defence, if needed.

4.11.4. Appointments and incompatibility periods

While incompatibility rules after departure for high-level staff at the competition authorities avoid risks of conflicts of interest and are a general rule in most OECD jurisdictions, Mexico should keep the length of cooling-off period in line with international practices.

4.11.5. Domestic co-operation

IFT has established co-operation agreements with other public bodies. Co-operation and partnerships beyond its sectoral regulatory functions, also covering its competition-law enforcement mandate, could further strengthen its role as a competition enforcer in the telecommunications and broadcasting sectors.

COFECE has established many co-operation arrangements with public entities and the government. COFECE is party to 54 domestic co-operation agreements. Some of them, however, are underused and limited to punctual interactions. Competition authorities would obtain further benefits from domestic co-operation if they concentrated on co-operation initiatives that are key to competition policy and enforcement. These include:

- COFECE should actively seek co-operation channels with states and municipalities.
- Where co-operation lines have been adopted with a competition authority, public entities should adopt the necessary measures to ensure that co-operation is implemented consistently overtime despite high rates of staff turnover.
- A competition contact point in the presidency and Congress could be established to facilitate and streamline co-operation with competition authorities. Co-operation at the highest level is essential to support consistent approaches to other public policies and laws.
- The co-operation agreement between COFECE and SE could be used for more systematic mutual information sharing and for promoting competition as part of SE's initiatives and policies. SE's local presence should be available for use by COFECE for local competition-outreach initiatives.
- In view of the recent developments, existing co-operation between SHCP, which is in charge of CompraNet and competition authorities should be strengthened. Competition authorities and should collaborate with SHCP on ways to facilitate their extraction and use of the data collected and stored in procurement datasets (such as CompraNet).
- Both anti-corruption and competition-enforcement authorities would benefit from co-operation. Collaboration should, in particular, focus on sharing information about complaints and data about wrongdoings falling under each other's jurisdiction. They should also co-operate in relation to investigations of cases involving both anti-competitive behaviour (such as collusion) and corruption.
- Although a co-operation agreement exists between COFECE and CONAMER, further co-operation opportunities have been identified: a) COFECE should be consulted in relation to decisions about exemption from RIA draft regulations that could have an impact on competition; and b) COFECE should be given sufficient time to carry out any technical assessment.
- The growth of digital platforms and the zero-price economy calls for stronger co-operation with INAI, such as a formal co-

operation agreement between it and the competition authorities. Collaboration should focus on the competition implications of privacy protection and could consist in advocacy measures to build consumer awareness, and new regulatory proposals.

- IFT should be granted the right to co-operate directly across borders within its scope of jurisdiction without having to go through the Ministry of Foreign Affairs (RELEX).

4.11.6. Recruitment of staff

Competition authorities should consider further developing effects-based analysis of competition cases and mergers and create a position of chief economist to support this endeavour (see Sections 7.1.2, 7.2.2, 8.4 and Recommendation 7.3.3).

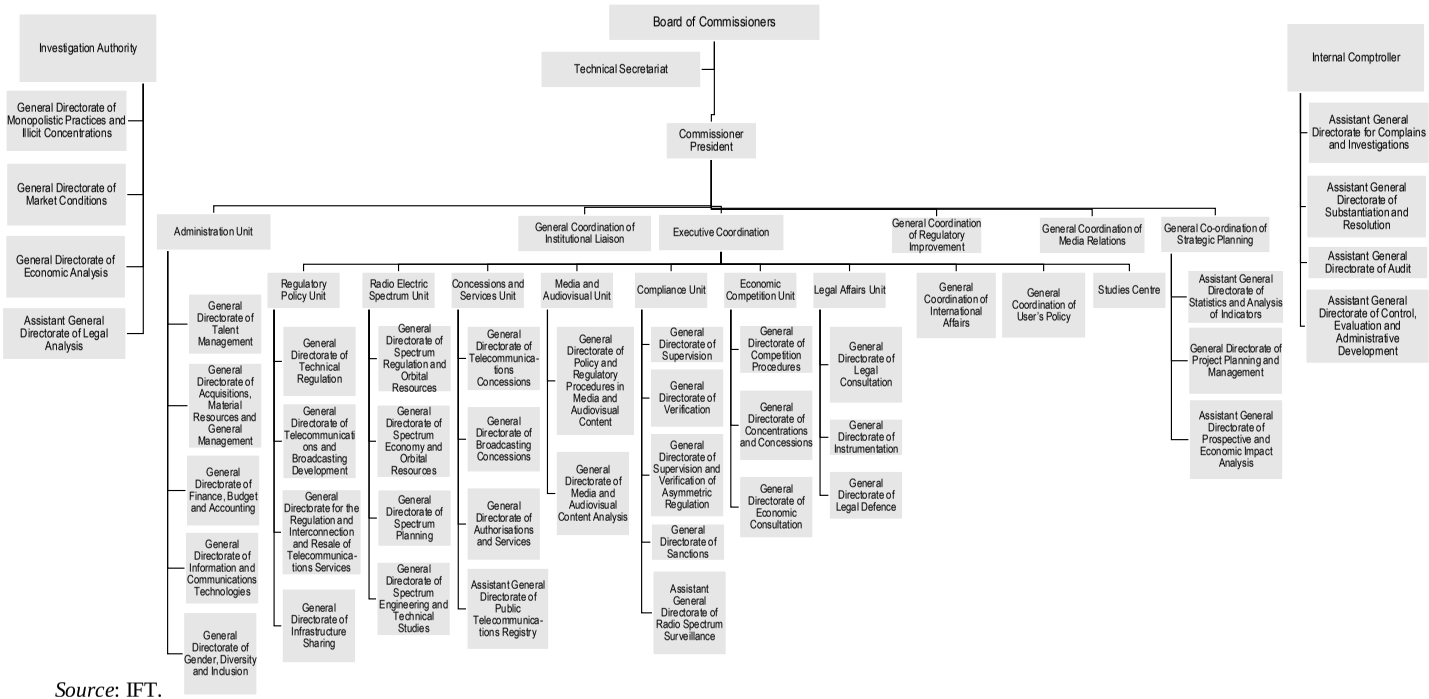
In view of the rapid development of the digital economy, competition authorities should consider recruiting staff with forensic, digital and technological profiles.

Annex A. Organigrams of COFECE and IFT

Figure 3. Organigram of COFECE

Source: COFECE

Figure 4. Organigram of IFT



Source: IFT.

Chapter 5. Market investigations under Article 94 of the LFCE (incremental powers)

The 2013 legislative reform granted the competition authorities unprecedented powers to order the elimination of barriers to competition and free market access; to determine the existence of, and regulate access to, essential facilities; and to order the divestiture of assets, rights, partnership interests or stock of economic agents (paragraph 14, Article 28 of the Constitution and Article 12, II of LFCE). These "incremental powers" are similar to those of the UK Competition and Markets Authority (CMA) to conduct market investigations and impose behavioural and structural remedies.47

Incremental powers present undeniable benefits. By tackling barriers and essential facilities promptly, they allow the identification and addressing of structural, strategic or regulatory situations that affect the competitive process in the market. Market investigations may be a useful tool for swiftly addressing barriers in dynamic markets, such as digital platforms. Access to data, when considered an essential facility, could also be addressed through market investigations. Incremental powers, may, however, be used to bypass competition-law enforcement (especially for relative practices) by imposing remedies on economic agents without investigating and sanctioning any anti-competitive conduct. Incremental powers may also hinder investment

[47] In addition to the incremental powers granted by Article 94 of the LFCE, Articles 12, 96 and 98 provide that when expressly required by legal or regulatory provisions or when requested by a competent authority, competition authorities will: (i) establish whether a relevant market features effective competition or agent(s) with substantial market, as a condition for imposing or removing regulation, and (ii) review and issue opinions on the granting of licences, concessions, permits and on similar situations. IFT has initiated seven market reviews to determine SMP conditions and concluded that there were no convincing elements to determine the existence of an economic agent with substantial power in the analysed markets.

if there is no legal certainty as to what qualifies as a barrier or essential facility to justify public intervention.

5.1. Market-investigation process

Incremental powers may only be enforced after a market investigation has been carried out. The market-investigation process is regulated under Articles 94 and 95 of the LFCE[48] and may be initiated ex officio or following a request from the executive branch directly or through the SE. The initiation of market investigations must be justified by indications suggesting ineffective competition conditions caused by barriers or essential facilities. Competition authorities may use all enforcement investigation tools and resources to carry out market investigations, including requests for information, interrogations and unannounced on-site inspections.

The investigation period must last between 30 and 120 days and can be extended twice. Following its investigation, the IA may issue a preliminary opinion including measures necessary to address or eliminate the identified competition restrictions or propose to the Board to close the case. The proposed corrective measures must be notified to the economic agents concerned and, if any, to the relevant sectoral regulator or public authority for a non-binding opinion. Economic agents may make a counter-proposal of possible corrective measures that address any competition concerns identified by the agencies. Parties may also contest identified competition concerns by showing that the barrier or essential facility is justified by efficiency gains and positive impact on competition. Efficiency gains listed in the LFCE include innovation in the production, distribution, and marketing of goods and services.

The Board decides on the findings, arguments and proposed measures within 60 days of receipt of a complete file. If the Board does not endorse the measures proposed by the economic agents, it must explain why. A Board resolution can include:

- a recommendation to public authorities to address regulatory restrictions of competition and free market access

[48] This should not be confused with market studies under competition advocacy.

- the determination of essential facilities and guidelines for regulation, including access modes, prices, technical and quality conditions and a timeline to implement it
- an order addressed to the relevant companies to eliminate the identified barriers and/or
- an order addressed to the relevant companies to divest assets, rights, partnership interest or stock to the extent necessary to eliminate competition concerns, provided other less restrictive corrective measures are insufficient.[49]

The Board's resolutions must be published in the Official Gazette, while the federal executive and the co-ordinating authority of the relevant sector, and to the affected economic agents must be notified. Resolutions must also be published by the competition authority through its own distribution channels.

To date, COFECE has launched seven market investigations, two of which were requested by the SE.

IFT has launched two investigations to determine the existence of barriers to competition in the deployment of fixed telecommunications infrastructure.[50] Its Regulatory Vision of Telecommunications and Broadcasting, 2019-2023, indicates that in the future it will continue to be proactive in identifying essential facilities or barriers to competition in telecommunications and broadcasting.[51]

5.2. Scope and legal effects

Orders to economic agents resulting from market investigations are commonly understood to be binding. Following a market investigation, competition authorities may impose behavioural and structural remedies on economic agents who are then subject to a fine

[49] This should not be confused with divestiture ordered and qualifying as antitrust sanctions under Article 131 of the LFCE.

[50] See www.dof.gob.mx/nota_detalle.php?codigo=5513219&fecha=14/02/2018 and www.dof.gob.mx/nota_detalle.php?codigo=5513220&fecha=14/02/2018.

[51] See, http://www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/1vision19-23.pdf

of up to 10% of their turnover if they do not comply with the corrective measures.

A number of stakeholders have observed, however, that the scope and legal effects of recommendations to public authorities to remove regulatory barriers are still uncertain, particularly in sectors investigated by COFECE. This is less of an issue for IFT, which holds regulatory and competition enforcement powers under the same institution. Box 4 illustrates two cases where public authorities did not follow COFECE´s recommended corrective measures.

Box 4. COFECE's recommendations to public authorities following a market investigation

In June 2017, COFECE issued a decision determining that the runway and related infrastructure of Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México, AICM) constituted an essential facility in the market for airport landing and take-off slots and that its management was generating anticompetitive effects in the markets for air-passenger transport. COFECE ordered a set of corrective measures, including an auction to allocate airport slots, but in September 2017, the Executive and the Ministry of Transportation and Communications (SCT) adopted a decree on slot allocation at saturated airports that contradicted COFECE's corrective measures.

COFECE filed a constitutional controversy – an appeal to solve conflicts between, among others, autonomous bodies and the legislative and executive powers – against the decree before the Supreme Court in 2017. COFECE requested that the Supreme Court clarify the scope and legal effects of the incremental powers and determine whether the decree was a violation of COFECE's powers. At the moment of writing, the case was still pending.

In February 2017, COFECE issued a decision recommending that the governor and the Sinaloa state congress eliminate regulatory barriers to competition in the market for public freight transport services. COFECE's resolution included the possibility of sanctioning the state authorities if they did not comply with the obligations established in the decision. In June 2017, the congress modified its Transit and Transport Law in line with COFECE's resolution. In December 2017, however, the law was reformed again to include provisions that were contrary to the conclusions of COFECE's market investigation. In three amparo decisions regarding the case, the specialised courts ruled that recommendations by COFECE to public authorities were not binding.

Source: Decisions IEBC-001-2015 of 26 June 2017 (slots) and IEBC-002-2015 of 23 February 2017 (Sinaloa). Constitutional controversy 301/2017 (Slots).

The court judgement in the 2017 Sinaloa transport case gives competition authority recommendations to public authorities the same non-binding legal effects as opinions (see Table 7). Observers have indicated that this discourages COFECE´s use of incremental powers when the barriers are regulatory or their removal depends on the will of a public authority. Opinions, which are less burdensome in terms of procedure and resources because they do not require a fully-fledged

investigation as set out in Articles 94 and 95 of the LFCE, would suffice in these cases. Table 7 compares the opinions, decisions under incremental powers, and decisions for relative practices.

Table 7. Difference between opinions, market investigations and resolution on relative practices

	Opinions	Market investigations	Resolution on relative practices
Legal basis	Article 12 (XII-XVI, XVIII-XXI) and Articles 104 to 110 of the LFCE	Articles 12 (II), 57, 60, 94, 95 of the LFCE	Articles 54-56 of the LFCE
Requirement	Any competition concern	Barrier or essential facility (regardless of market power)	Market power and anti-competitive practice
Recipients	Wide and free target scope	Public authorities, regulators, or economic agents	Economic agents only
Investigation limitation	Not applicable	30 to 120 days, which can be extended twice.	30 to 120 days, this period may be extended up to 4 times for periods of up to 120 days.
Outcome	Opinion	Recommendation or order	Resolution
Effect	Non-binding	**Binding:** Orders to economic agents **Non-binding**: recommendations to public authorities to remove regulatory barriers	Binding on economic agents
Legal standing	No standing in court against non-compliance	**Orders to economic agents**: standing in specialised competition courts and in appeal before the Supreme Court **Remedies to public authorities**: direct constitutional standing if acts are adopted by constitutional autonomous entities, Congress or the federal executive branch and the executive is requested to initiate a constitutional controversy if acts come from the state or the municipality.	Standing in specialised competition courts and can be appealed before the Supreme Court when the subject matter related to a constitutional violation.

Source: OECD Secretariat based on the LFCE and case law.

Constitutional controversies are an alternative way to force public authorities to remove anticompetitive barriers. Competition agencies can initiate a constitutional controversy against acts adopted by another constitutional autonomous entity, Congress or the federal executive branch if they violate the exercise of the agencies' mandates. As shown in Box 4, this was COFECE's response to the decree on the allocation of slots at the AICM.

If the relevant acts come from a state or municipality, competition agencies do not have direct standing to initiate a constitutional dispute. They may simply inform the executive branch, which will decide whether to lodge a constitutional controversy before the Supreme Court. COFECE has requested the executive introduce a constitutional controversy in relation to several cases.[52]

5.3. Recommendations

The scope and legal effects of decisions adopted under Article 94 of the LFCE and addressed to public authorities should be clarified. Should decisions remain non-binding, it is recommended that public

[52] For example, the State Congress of Tabasco approved a decree of reform to the state's public procurement laws, which significantly increased the authority's margin of discretion to directly award contracts, regardless COFECE's recommendations. See: https://www.cofece.mx/el-decreto-que-reforma-las-leyes-de-obras-publicas-y-adquisiciones-de-tabasco-violenta-los-principios-constitucionales-de-libre-competencia-cofece/ In 2018, COFECE requested the Executive Power, through the Attorney's General Office (PGR), to bring an action of unconstitutionality against the aforementioned procurement law. COFECE requested the Legal Advisor of the Federal Executive Branch to submit before the Supreme Court of Justice of the Nation (SCJN) a request to initiate a review of the constitutionality of the reform, already approved and enacted, of the Law for Human Settlements and Urban Development in the State of Coahuila, which imposes minimum distance requirements between service stations, restricting their establishment. This was the first time that COFECE used this prerrogative, which aims at promoting pro-competitive regulatory frameworks.

In September 2015, COFECE recommended to the Governor of the state of Coahuila not to enact the reform approved by the State Congress, as it granted exclusivity to service stations already established in certain zones, by prohibiting the establishment of new businesses within a 1.5 km radius in urban areas and of 10 km radius in rural areas. In 2015, the State Executive returned the draft Decree to the local legislature to review it, in light of the opinion of the Commission, however it was approved in its original terms. For this reason, COFECE requested a review of the constitutionality of this law. See https://www.cofece.mx/solicita-cofece-al-gobierno-federal-que-analice-interponer-el-medio-de-control-constitucional-que-proceda-en-contra-de-coahuila-por-ley-estatal-que-impone-distancias-minimas-entre-gasolineras/

authorities inform the competition authorities of the objective grounds for not following their decision within a set timeframe.

When a restriction of competition imposed by a public act or provision is not justified by other public interest or when there are less restrictive alternatives to achieve the same result, competition authorities should have the possibility of directly challenging in court those acts or provisions, on constitutional grounds. Having to go through the executive is unnecessarily burdensome. Should indirect standing remain, competition authorities' requests should only be refused on objective and restrictive criteria.

Chapter 6. Public enforcement of competition law

Competition-law enforcement is set out in Article 28 of the Constitution, in the LFCE, and in competition authorities' respective regulations. The 2013 constitutional reform and the adoption of the 2014 LFCE have brought substantial changes and improvements to competition-law enforcement.

Enforcement in Mexico is articulated around three enforcement areas: merger control, absolute practices and relative practices. Absolute practices include horizontal agreements, while relative practices include abuse of dominance and vertical agreements. Merger control includes ex ante review of notified mergers[53] and ex post review of unlawful mergers that may raise competition concerns. While the Merger Units – under the TS for COFECE or ECU for IFT – are in charge of assessing all notified mergers, the IAs at both agencies are responsible for investigating and analysing possible unlawful mergers. The LFCE is more prescriptive than most competition laws and lists all types of conducts that may qualify as absolute or relative practices. This has significant consequences on the investigation and substantive analysis of cases.

COFECE's 2018-2021 Strategic Plan establishes its enforcement priorities around the following criteria: a) economic sectors that contribute to economic growth; b) generalised goods and services for consumption that impact on the population's income or expenditure; c) regulated sectors and sectoral prevalence of anti-competitive conducts. By applying these criteria, COFECE has identified six priority areas, including public procurement and the financial, agro-

[53] In the case of non-notified mergers meeting the notification thresholds, a competition authority could authorise ex post mergers that do not raise competition concerns.

food, energy, pharmaceutical, transport and health sectors.[54] COFECE's recent enforcement activity has focused on bid rigging and on the energy sector.[55] As a sectoral competition enforcer, IFT focuses on telecommunications and broadcasting. In 2015, it adopted a strategic plan and four strategic objectives to harmonize the exercise of its competition and regulatory powers and ensure that all projects contribute to the attainment of the strategic goals[56]. The report, Regulatory Vision of Telecommunications and Broadcasting, 2019-2023, sets out its priorities for the adoption of pro-competitive regulation and the enforcement of competition law for issues including spectrum, Internet of things, 5G, net neutrality, big data, OTT services, and deployment and infrastructure sharing. The document also highlights IFT's commitment to being more proactive in identifying essential facilities and barriers to competition in the telecommunications and broadcasting sectors.

The majority of COFECE's enforcement cases relate to merger control as a result of the mandatory merger notification regime; the remainder are devoted to sanctioning anti-competitive conducts with a focus on absolute practices.[57] Some of IFT's competition authority activities consist of reviewing concession grants to prevent concentration and ensure low prices for end users, which does not fall under antitrust enforcement or merger control.[58] The remaining activities are

[54] Identifying priorities does not prevent COFECE from addressing competition matters in other sectors.

[55] Since Mexico's energy reform in 2013, COFECE has initiated five investigations in this sector: DE-002-2015 (Diesel Marino); DE-022-2015 (Comercialización de combustibles en BJ); DE-022-2017 (Gas LP, PMA); DE-018-2017 (Comercialización de combustibles, nacional); DE-044-2018 (Gas LP, PMR).

[56] See IFT (2015) Planeación Estratégica. Available at: http://www.ift.org.mx/sites/default/files/planeacionestrategica.pdf

[57] Competition-law enforcement refers to merger control and anticompetitive practices (relative and absolute), whereas antitrust law is used to refer to anticompetitive practices only (excluding merger control).

[58] IFT has issued more than 900 concession-grant opinions under the LFCE certain years.

dedicated primarily to investigating relative practices,[59] and to a lesser extent to absolute practices and merger control. In the telecommunications and broadcasting sector, a merger-control exemption is granted to non-preponderant agents, which has implications for IFT´s merger control activity (see Section 8.1.3).[60]

From 2014 to 2018, COFECE issued 15 decisions on absolute practices (cartel fines); two decisions on unilateral conducts (fines or commitments); five against vertical agreements (fines or commitments); and two against unlawful mergers (fines and remedies). At the end of 2018, seven cases were subject to a TS review under a trial-like procedure (four cases concerning cartels and three cases on vertical agreements). Over the same period, within its sectors of jurisdiction, IFT sanctioned two unilateral conducts (fines and commitments), one unlawful merger (fines) and one cartel (fines).

Approval of enforcement activities can be assessed at two levels, internally by the Board in relation to IA's opinion of probable liability or DPR, a document containing the IA's objections and describing the alleged anti-competitive conduct, and externally by courts in relation to Board decisions:

- **COFECE** The number of investigations carried out has steadily increased, from 21 on-going investigations into anti-competitive practices in 2014 to 32 investigations in 2018. Internally, the Board has opened trial-like procedures in 100% of the IA´s DPRs. Externally, since 2015, 61.11% of COFECE's antitrust enforcement decisions have been challenged in court, of which 82% have been confirmed and 18% reversed in whole or part.
- **IFT** The number of investigations carried out in telecommunications and broadcasting sectors has steadily increased, from four on-going investigations into anti-competitive practices in 2014 to six investigations in 2018. Internally, the Board has opened trial-like procedures in 100% of its IA's DPRs. Externally, IFT's antitrust enforcement decisions (absolute and relative practices) have been

[59] América Móvil in telecommunications (pay TV) and Televisa in broadcasting (free-to-air TV and radio).

[60] See Section 8.1.3.

challenged in court, out of which 78% have been confirmed and 22% reversed in whole or in part.

6.1. Enforcement procedure

As explained in Chapter 4. , competition authorities' enforcement powers and procedures are strictly divided among the IA, the TS or ECU and the Board.

6.1.1. Investigation phase

Investigations[61] are triggered ex officio, by a request from the executive branch (through the SE), following a complaint (denuncia) or following a leniency application. Any person may file a complaint with the competition authorities to report absolute, relative practice or unlawful mergers. Within 15 working days, the IA must analyse the complaint and issue a decision: a) order the initiation of an investigation; b) dismiss the complaint, partially or totally, for being notoriously inadmissible; or c) inform the complainant that the complaint fails to meet legal requirements with the one-time possibility for the complainant to resubmit it.[62] Half of COFECE's antitrust investigations are triggered by complaints. It admits 13% of the approximately 40 complaints it receives each year. Infringements may also be reported anonymously and remotely, using a secure electronic complaint filing system.

The head of the IA then formally initiates investigations by signing an investigation agreement (acuerdo de inicio) acknowledging that there are sufficient objective elements supporting the possible existence of an anticompetitive practice.

The IA's main role consists of collecting evidence to establish the anticompetitive practice. During the investigation, the IA has wide information-gathering powers, including the ability to issue mandatory requests for information to any private or public person, to carry out unannounced inspections (or dawn raids), and to interrogate witnesses. The IA is located on a separate and locked floor away from the TS or ECU and the Board in order to safeguard the strict separation between investigation and adjudication. Investigations must be carried

[61] The investigation phase is governed by Articles 66 to 79 of the LFCE.

[62] Articles 67 to 70 of the LFCE.

out within 120 working days, renewable four times, totalling a maximum of 600 working days. On average, COFECE's investigations last two years, and IFT's two and a half. The IA must conclude each investigation by either submitting a DPR to the Board or recommending the closure of the case. If the IA proposes the adoption of commitments to the Board, the investigation is suspended until the Board adopts a decision to accept or reject such commitments. If the IA brings forward a DPR then the Board always accepts to proceed with the trial-like procedure. If the IA recommends closing a case, the Board may either follow the IA's proposal or order the initiation of a trial-like procedure.[63]

At any time during the investigation, the IA may request that the Board adopt interim measures to avoid damages that are hard to repair or to ensure the effectiveness of the investigation and the final decision.[64] Although useful to safeguard competition and information during the enforcement procedures, Mexican competition authorities have never adopted interim measures.

6.1.2. Trial-like procedure (procedimiento seguido en forma de juicio)

The TS and ECU's main tasks during this stage of the procedure consist of verifying the admissibility of evidence, collecting parties' arguments, and issuing a complete file for the reporting commissioner on the basis of which he or she recommends a decision to the Board. The TS or ECU receives the DPR to open the trial-like procedure, which begins with the DPR being sent to the alleged offending parties. They must respond to the DPR within a non-extendable period of 45 working days. Once the DPR has reached the TS or ECU, the IA cannot carry out any further investigations, and is allowed only to defend its DPR by responding to the parties' arguments and evidence, within a non-extendable period of 15 working days. The evidence will be presented to the Board within 20 working days and new evidence

[63] Article 78 of the LFCE.

[64] Article 135 of the LFCE. The Board may impose 4 types of injunctive measures: 1) cease and desist from possibly illegal practices; 2) refrain from engaging in any conduct related to the subject matter of the complaint or investigation; 3) information and document safekeeping; and 4) any other actions deemed necessary or convenient.

can be submitted during an additional period of 10 working days. The Board will, then, give a maximum of 10 working days to the parties and the IA to present its final charges. After that, the TS or ECU will pass the complete file to the Board's commissioner-rapporteur with a recommendation either to close the case or to adopt an infringement decision.

Stakeholders have observed that the deadlines established during the trial-like procedure for alleged offending parties, the IA, and the TS and ECU are too short.

6.1.3. The adoption of a decision by the Board

Before the Board, the trial-like procedure is adversarial with the IA as a prosecutor, the complainant as intervener in the process, the parties as defendants and the seven commissioners as judges. The Board adopts a decision on the basis of the proposal of the reporting commissioner and the outcome of a hearing, if it is requested by the parties or the complainant. The Board's final decision must be adopted within 40 working days from the date when the file was completed by the TS or ECU. Those affected by the decision may appeal the decision before the courts within 15 working days.[65]

As explained in Chapter 4. , competition authorities duly apply the different steps of the enforcement procedure and strictly respect the independence of the entities in charge of conducting them. This has, however, resulted in an unnecessarily strict separation and lack of interactions between the three bodies in charge of the enforcement procedure.

At COFECE, both the IA and the Board are aware of the situation and are both calling for feedback from the Board as to how investigations could be improved to better meet the Board's standards; and initiate an exchange of views between the two bodies on how decision-making could better address practical competition issues, case reality and novel markets or behaviour.

Observers have indicated that the TS and ECU and the Boards tend to be conservative. The TS and ECU's main priority is to ensure that each Board decision will pass any judicial review. The reporting commissioner most often agrees with and follows the TS or ECU's

[65] See Chapter 10. on judicial review.

proposal. While it is good practice to ensure that competition authorities' decisions meet judicial standards, certain stakeholders consider that the TS and ECU and the Board should use their margin of discretion to promote and develop case law, in particular in relation to relative practices, which require a more complex economic analysis of effects.

6.2. Investigation tools

The competition authorities have strong powers to collect information in the context of antitrust enforcement investigations, including the power to launch surprise on-site inspections (visitas de verificación) or dawn raids, to send requests for information (RFI), and to interview individuals involved in the case.

6.2.1. Dawn raids

Under the LFCE, competition authorities are not required to receive a judicial authorisation to conduct dawn raids. The head of the IA may issue orders allowing surprise inspections at any professional or private premises of suspected companies.[66] Since the 2011 reform, competition authorities are no longer required to announce dawn raids, which guarantees the effect of surprise inspections and maximises the chances of gathering relevant evidence.

Inspection teams may review and make copies of all physical and electronic information that falls under the scope of the dawn-raid order. They may also place under seal property, documents and records to prevent tampering and question representatives, officers and employees provided such questions relate to the documents, information or facts falling within the scope of the order.

Inspected companies and individuals are required to co-operate, subject to sanctions (see Section 6.3). Competition authorities may ask

[66] Article 75 of the LFCE. The IA may conduct dawn raids to access "any office, premises, land, means of transport, computer, electronic device, storage device, filing cabinets or any other means that may contain evidence of the performance of the acts or events subject to the visit" and request "any official, representative or staff member of the Economic Agent visited, explanations of facts, information or documents related to the purpose and purpose of the verification visit and record their responses".

for the public forces' support for protection and as a leverage factor to carry out the dawn raid.

Most incriminating evidence in competition cases is found in electronic form. IT forensic equipment allows gathering electronic evidence in a safe manner, ensuring the source of information and the chain of custody. COFECE only has IT forensic equipment to conduct a limited number of simultaneous visits, however. To gather and process electronic evidence during site inspections, IFT has limitations in IT forensic equipment to complement more traditional inspection tools.

In general, professionals in Mexico, including lawyers are bound by professional confidentiality when it comes to their clients. However, lawyers are not obliged to belong to a bar or abide by professional rules[67] and Mexico does not regulate how to treat legal privilege information during inspections. One court ruling decided in favour of protecting lawyer-client confidentiality for information that COFECE's IA wished to use, but the exact terms and conditions of lawyer-client privilege's legal status remain unclear.[68] All stakeholders have been calling for clarification and for rules dealing with this issue, and on 30 September 2019, COFECE published regulatory provisions in the Official Gazette about how it will handle legally privileged information.[69]

6.2.2. Requests for information and witness testimonies

The IA has the power to request information and summon any person to provide a deposition or testimonies, including the investigated parties, persons of interest, market participants and government agencies. Questions contained in RFIs and posed during interrogations must be relevant to the investigation. Both competition authorities ensure the protection of confidentiality, business secrets and private information.

[67] Lawyer-client privilege only exists under Article 36 of the Regulatory Law implementing Article 5 of the Constitution

[68] See, Queja 41/2016. SAI Consultores, S.C. 10 de noviembre de 2016.

[69] See, https://www.cofece.mx/wp-content/uploads/2019/09/DOF-30septiembre2019-01.pdf.

Recipients and targets of information-gathering requests have observed that RFIs tend to be excessive in length and scope. Competition authorities have recognised that in few instances, the requested information was irrelevant or companies could not gather it within a reasonable timeline. There seems to be a general agreement among stakeholders, however, that IAs have gained in maturity and experience and the scope of RFI is improving.

The OECD fact-finding shows that despite its investigation powers COFECE does encounter difficulties in obtaining accurate, credible and complete information from involved parties. Information provided to the different bodies inside the competition authorities (IA, TS or ECU and Board) is sometimes different and sanctions contemplated in the law for submitting incomplete or incorrect information are not sufficient to deter this kind of behaviour (see Section 6.3).

Contrary to COFECE, all or part of the relevant information and data required by IFT to conduct an investigation is already available internally and may be easily accessed by the IA, which reduces administrative burden in information gathering.

6.3. Administrative sanctions and remedies

The Board may impose one or more of the following sanctions and remedies on companies and individuals.[70]

- An order to correct or terminate anticompetitive behaviour.
- Pecuniary fines on individuals and companies acting as authors or facilitators of anticompetitive behaviour:
    - Corporate fines of up to 10% of a company's taxable turnover in the previous fiscal year for absolute practices and up to 8% for relative practices and unlawful mergers.
    - Fines of up to MXN 16.8 million (USD 881 000) on individuals engaged in the absolute or relative practice, acting on behalf of legal entities.

[70] Article 127 of the LFCE.

  - Fines of up to MXN 15.2 million (USD 797 500) for entities or individuals acting as facilitators[71].

- Fines of up to 5% for not notifying a merger meeting the mandatory thresholds.
- Fines of up to 10% of merging parties' income in case of non-compliance with merger remedies.
- Fines of up to 10% of an economic agent's turnover for not complying with commitments.
- Measures to regulate access to an essential facility.
- An order to eliminate a barrier to competition.
- Fines of up to 10% of an economic agent's turnover for not complying with the order to remove a barrier to competition or to give access to an essential facility, or with the rules regulating that access.
- Professional disqualification of up to five years.
- Partial or total divestiture of assets, rights, shares or partnership interests.[72]
- Pecuniary fines of up to MXN 15.4 million (USD 808 800) for false testimony or submission of false information.

Article 60 of the Mexican Procurement Law (Ley de Adquisiciones, Arrendamientos y Servicios del Sector Público, LAASSP) provides that companies that have committed a number of illegal actions may be debarred from participating in public procurement. Bid rigging is not considered a conduct worthy of debarment. In many jurisdictions, a conviction for participation in collusion in public procurement can lead to debarment from future procurement procedures for a certain period of time (OECD, 2010[21]). In conjunction with more conventional criminal, civil and administrative sanctions, this specific type of sanction increases deterrence and contributes to combatting bid rigging.

[71] The fine can be up to 180 000 UMAs.

[72] This applies in cases of unlawful mergers under Article 127 of the LFCE or in cases of recidivism in absolute and relative practices under Article 131 of the LFCE.

If a company refuses a competition authority access to its premises during a dawn raid or does not provide the requested information or if an individual does not attend an interview, the competition authorities may impose periodic penalty payments of up to MXN 308 040 (USD 16 180) for every day the infringement continues. COFECE believes that this is not a sufficient deterrent especially in the case of dawn raids and witness testimonies, since this penalty was initially designed for non-compliance with RFI, which is a less serious offence.

Destruction of evidence or obstructing investigations are also punished by criminal law, even if the procedures involved are relatively complex. Stakeholders indicate that this may be explained by the length of criminal proceedings and the need to have the support of the Attorney General's Office, which is unfamiliar with the need of competition investigations. COFECE is currently analysing the optimal way on how to present this kind of cases.

In line with Articles 130 and 131 of the LFCE, competition authorities assess and take into account various qualitative and quantitative criteria when calculating fines: the damage caused by the specific behaviour; the intent or circumstances of a violation; a defendant's market share; the size of an affected market; the duration of a wrongful practice; obstruction of the authorities' actions; and recidivism. A number of stakeholders have indicated that competition authorities should be more transparent in the way they weigh up and consider the criteria used to set fines.

Levels of fines have proved contentious, but have most often been confirmed by courts. During the period 2013 to 2017, only 15% of the total amount of imposed fines were overturned by the judges.

Since the 2014 reform, COFECE has imposed its largest antitrust fine in a case against a number of financial institutions providing retirement-fund management services (afores) that had agreed to restrict workers' pension service choices: total fines amounted to MXN 1 100 million (approx. USD 57 million).[73] IFT imposed its largest fine of MXN 97 million (approx. USD 5 million) on mobile-telephone operator Telcel for a relative unilateral practice.[74]

[73] See, www.cofece.mx/en/sanciona-cofece-a-afores-por-pactar-convenios-para-reducir-los-traspasos-de-cuentas-individuales/

[74] Certain of these cases are still pending in court.

Table 8. Fines imposed by COFECE for violations of the LFCE, in MXN thousands

	Period 2013 – 2018						
Fines	2013[a]	2014	2015	2016	2017	2018	Total
Imposed	129 418	247 855	76 524	372 507	3 656 860	654 698	5 137 862
Under judicial review	79 539	110 082	28 677	99 562	1 804 698	424 513	2 288 313
Confirmed	47 725	113 399	7 974	272 942	1 852 162	230 185	2 783 149
Overturned	2 154	24 374	39 873	0	0	0	66 401

Source: COFECE

Table 9. Fines imposed by IFT for violations of the LFCE (in MXN thousands)

Fines	2014	2015	2018	Period 2013 - 2018 Total
Imposed	49 320,	68 1387	107 126	224 583
Under judicial review	49 320,	68 1387	107 126	224 583
Confirmed	49 320,	0	0	49 320
Overturned	0	0	0	0

Source: IFT

6.4. Recommendations

6.4.1. Overall enforcement

IFT deals with anti-competitive conducts through both ex ante regulatory intervention and competition law enforcement. However, as markets liberalise and IFT adopts more targeted regulation, stronger emphasis is expected in its competition enforcement upon any anticompetitive conduct detected in the sector being punished and sanctioned to generate deterrence. It can further strengthen its competition enforcement remit through capacity building, talent hiring and retention at its IA and the ECU. The adoption of substantive guidelines as mentioned in Chapter 9 shall also have a positive impact in the development of enforcement decisions in the telecommunication and broadcasting sector.

6.4.2. Information gathering

COFECE should invest in additional IT forensic equipment to enable it to conduct simultaneously dawn raids in more premises that it can currently. Investment in acquiring IT forensic equipment by IFT to complement more traditional investigation tools would reinforce its ability to carry out dawn raids. Competition authorities should hire staff with the experience to operate that equipment and promptly solve IT-related issues that arise during dawn raids, such as encrypted messaging and servers located outside the premises.

COFECE should keep improving the scope of its RFI by requesting information that is relevant and necessary to the investigation. RFI should include the correct questions, addressed to correct respondent, over relevant periods and areas, and in the correct way. Deadlines to reply to RFIs should also be reasonable. Dialogue between IAs and respondents should also be possible to assess the relevance and feasibility of obtaining the requested information.

6.4.3. Sanctions

Competition authorities should adopt guidelines on how they calculate fines. These would be particularly welcome in relation to: a) turnover calculation, for example in the zero-price economy or when foreign entities are involved; b) liability of parent companies for the actions of their subsidiaries; and c) criteria or ranges around gravity and mitigating and aggravating circumstances.

Big rigging is considered as an extremely serious offence in Mexico as in other OECD jurisdictions. It costs taxpayers a great deal of money, damages the outcomes and integrity of public procurement procedures, and has a negative impact on public services and the economy overall. Mexico should consider including big rigging among the violations that could trigger public procurement debarment, in addition to other more conventional criminal, civil and administrative sanctions. Debarment should take into consideration the relevant market conditions to avoid high concentration of supply resulting in a drastic reduction of the number of participants in public tendering and should not undermine the leniency programme.

Sanctions for refusals to grant access to premises during dawn raids and to testify or to submit requested information do not seem to have a sufficient deterrent effect. Mexico should review and set stricter

sanctions for this kind of conduct. In addition, competition authorities should seriously consider using their power to initiate criminal proceedings to prosecute these forms of obstruction to the investigation.

Chapter 7. Anticompetitive behaviour

The LFCE identifies two types of anticompetitive behaviour (known as "monopolistic practices" in Mexico): absolute practices (Article 53 of the LFCE) and relative practices (Articles 54 to 56 of the LFCE). As noted in Chapter 6. , absolute practices correspond to horizontal agreements, while relative practices include both unilateral conducts (or abuse of dominant position) and vertical agreements.

The LFCE provides for an exhaustive list of categories of anticompetitive behaviour. Practices must fit the legally described categories to qualify as infringements. This approach follows a 2005 Supreme Court decision on the unconstitutionality of a provision in the 1993 LFCE that regulated relative practices. The Supreme Court held that the provision was too vague as it included broad criteria on types of conducts that could restrict free-market access and competition, and so failed to establish all the parameters a competition authority needs to sanction relative practices.

7.1. Absolute practices

Article 53 LFCE considers illegal, null and void all contracts, agreements or arrangements among competitors that have as their object or effect to:

1. fix, raise, co-ordinate or manipulate the prices of goods or services
2. establish an obligation not to produce, process, distribute, market or acquire a limited quantity of goods, or limited number, volume or frequency of services
3. divide, distribute, allocate or impose portions or segments of a current or potential market of goods and services
4. establish, arrange or coordinate bids in tenders contests or auctions

5. exchange information with an object or effect referred to above.

This establishes five types of horizontal agreements as absolute practices: price fixing, output restriction, market allocation, bid rigging, and exchange of information.

Absolute practices are subject to administrative sanctions, criminal penalties (see Chapter 12.) and competition damage actions under civil law (see Chapter 11.). Economic agents may, however, receive immunity from criminal penalties and full or partial reduction of administrative fines if they join the leniency programme and co-operate throughout the whole procedure (see 7.1.3). For this type of behaviour, Mexico lacks a settlement procedure to allow companies to receive a further reduction in fines in exchange for admitting charges and speeding up the infringement-decision procedure. While leniency is an effective tool to detect cartels, create deterrence and facilitate an investigation, a settlement policy is complementary in achieving procedural efficiencies once the investigation has begun. However, settlements might undermine the effectiveness of leniency programs if discounts for settlement are too generous.

Many jurisdictions have conferred upon the competition authority the power to settle cases. Besides the achievement of procedural efficiencies, settlements pursue other policy objectives. Generally, they reward cooperation from the investigated parties with a reduction of the fine and they create and sustain momentum in the investigation of other conspirators. In most jurisdictions, settlements: a) are applicable only to cartels; b) are available if the agency has established an infringement of the competition law (therefore settlement procedures need a full investigation); c) require the company to admit liability for the infringement; d) require the imposition of a fine (but with a reduction in recognition of the cooperation); e) constitute legal precedents, in the sense that the establishment of the infringement has a precedential value and that it can be used for establishment of recidivism or for purposes of filing a private action for damages. (OECD, 2016[22])

7.1.1. Enforcement activity

COFECE's antitrust enforcement has focused on investigating and sanctioning absolute practices. From 2014 to 2018, COFECE has

sanctioned 15 cartels. [75] Table 10 provides an overview of competition authorities' enforcement activity against absolute practices, including the affected sectors, whether they were triggered by leniency or other detection tools and total fines imposed. The 2017 cartel-enforcement record was striking: six cartel-infringement decisions and the highest cartel fine ever imposed.

Table 10. COFECE's enforcement decision on absolute practices

	Absolute practice decisions	Total fines (in MXN)	Sectors
2018	2	236 389 077	Public procurement Carriage of valuables Transport
2017	6	1 982 126 960	Retirement Shipping Public procurement (2) Tortillas Taxis Transport Agroindustry
2016	4	207 018 061	Air conditioning Towing services Sugar Ferries and shipping
2015	1	27 386 070	Passenger transportation
2014	2	253 450 947	Compressors Real estate
TOTAL	**15**	2 716 601 052	

Source: *COFECE*

Over the past five years, COFECE has opened 30 investigations into absolute practices. As shown in Table 11, half were triggered by complaints, 20% by leniency applications, and the remainder by in-house market screening. One of COFECE's pending cases involves a possible cartel of transfers of Mexican professional football players, the first time a competition authority in Mexico has opened an investigation into the labour market.

[75] At the end of 2018, four cartel cases were being reviewed by the TS under the trial-like procedure.

Table 11. Number of investigations opened by COFECE

Year	Complaint	Ex officio/leniency	Total
2018	1	3	4
2017	5	4	9
2016	3	3	6
2015	1	4	5
2014	5	0	5
Total	15	14	29

Note: 40% of the 15 ex officio/leniency investigations were initiated by leniency proceedings.
Source: COFECE data

As in other OECD jurisdictions, the telecommunications and broadcasting sectors in Mexico are dominated by a few large players some of which control access to key infrastructure. These sector are, therefore, more likely to be affected by relative practices - which IFT combats through ex ante regulatory intervention and competition enforcement - than absolute practices. In the past five years, IFT has made one cartel decision in a case against Cablevisión and Megacable for entering into a joint trademark promotion agreement that resulted in geographical market allocation of markets for fixed telephony, TV and internet services. IFT imposed a total fine of MXN 42.2 million (approx. USD 2.2 million) on the two companies. [76]

Bid rigging has been and remains an enforcement priority for COFECE. Since the 2014 reform, it has sanctioned four bid-rigging cases in relation to public tenders for the purchase of latex health products (see Box 5), toothbrushes, and the contracting of media-monitoring services. In addition, six investigations are pending into alleged bid rigging schemes.

[76] See, http://www.ift.org.mx/comunicacion-y-medios/comunicados-ift/es/el-ift-establece-las-condiciones-para-que-cablevision-y-megacable-supriman-una-practica-monopolica.

Table 12. Recent bid-rigging cases at COFECE

Year	Market	Fines	Estimated effects
2019	Toothbrushes for adults and infants (IO-005-2015)	MXN 18 million	Overpriced products caused damage estimated at MXN 4 million.
2018	Latex probes and condoms (DE-024-2013)	MXN 177 million	Companies' behaviour led to damage to the public-health sector and taxpayers estimated at MXN 178 million.
2017	Medical latex gloves for examination and surgery (DE-024-2013-I)	MXN 257 million	The illegal agreements between the companies resulted in overcharges of approximately MXN 174 million.
2017	Media-monitoring information (IO-006-2015)	MNX 7 million	Overpricing of services during the collusion period was 14.5% resulting in estimated damage of MXN 3 million.

Source: COFECE

Box 5. COFECE's latex bid-rigging cases

COFECE carried out two bid-rigging investigations into companies selling latex products for medical use to health institutions. The investigations were triggered by complaints that the companies were fixing prices or agreeing on participation in specific bids.

The first investigation concerned the Mexican Social Security Institute (IMSS) and its purchase of latex gloves for examination and surgery. Five companies and 11 individuals were sanctioned for having rigged bids as part of a collusive scheme that lasted for at least six years. COFECE estimates that the illegal agreements between the companies resulted in overcharges of approximately MXN 174 million (USD 9.1 million). The total fines imposed were MXN 257 million (USD 13.5 million).

The second investigation concerned the government purchase of latex probes and condoms. The collusive agreements consisted in artificially increasing the maximum reference price by manipulating the quotes presented during the market-research stage and co-ordinating bid in multiple tenders from 2009 to 2013. Five companies and seven individuals were sanctioned and total fines of MXN 177 million (USD 9.3 million) were imposed. The health sector was estimated to have overpaid by between 10.71% and 136.05% and

the companies' behaviour led to an estimated MXN 178 million-worth (USD 9.3 million) of damage to the public health sector and taxpayer.

Source: COFECE; www.cofece.mx/wp-content/uploads/2018/03/COFECE-016-2018-English-1.pdf; www.cofece.mx/wp-content/uploads/2018/02/COFECE-057-2017.pdf

COFECE has also sanctioned bid-rigging cases in the private sector. In 2016, COFECE imposed a total fine of MXN 72 million on Mitsubishi Heavy Industries (MHI) and Denso Corporation, two international automotive companies, for rigging bids in tenders organised by General Motors (GM) for the purchase of air-conditioning compressors. COFECE considered that the collusive scheme had effects on Mexican territory, as the compressors were imported and used by GM to assemble and sell automobiles in Mexico. This was the first case in which COFECE's Board withdrew the benefits of the conditional leniency programme from one of the applicants on the grounds that it had ceased to co-operate fully and continuously during the trial-like procedure. This decision was, however, overturned by the judiciary in September 2019.[77]

As a sectoral regulator, IFT regulates and organises tenders of blocks of the radio spectrum and orbital resources and has the obligation to ensure effective competition in these processes by preventing concentration of spectrum, cross-ownership, the creation of entry barriers and promoting the entrance of new participants into the telecommunications and broadcasting markets. Before the announcement of the call for tender, the IFT´s ECU is internally required to provide a formal opinion on all aspects of the tender process, including spectrum accumulation limits, entry access, bidding process, coverage requirements, technical rules, measures to foster new entrance and maximum reference prices. The ECU's opinion is often factored into the draft tender rules, which are subject to a public consultation process. After considering and addressing all views expressed during the public consultation, the IFT publishes the final tender rules.[78]

[77] Recurso de revisión R.A. 60/2017.

[78] For example, IFT No.4 was the first auction for the leasing of spectrum rights for radio broadcasting services. A total of 191 frequency FM bands were set in the auction. In order to foster competition and promote the

The ECU also participates during the tender procedure by reviewing the information on finances and, in particular, cross-ownership information required by the tender rules. At the time of writing, the ECU has carried out 7 reviews of tender rules and 217 reviews of participants to these tenders.

IFT's strategy for fighting collusive practices in public procurement has focussed on advising on the design of competitive tender terms for internal procurement of radio spectrum and orbital resources. This does not prevent IFT from monitoring public procurement processes organised by other public entities.

7.1.2. Substantive analysis

Article 53 of the LFCE is interpreted in a restrictive way. Competition authorities in Mexico adopt a per se approach in relation to all behaviour falling under the five categories of practices provided for in the article. This limits substantive analysis of absolute practices to verifying that economic agents are competitors, and if so, establishing whether the suspected practice has as its object or effect to fix prices, restrict output, allocate markets, rig bids or exchange information with the object or effect of the above-mentioned practices. Competition authorities are not required to show anticompetitive effects in the market, while parties cannot defend themselves by claiming that the horizontal practice creates pro-competitive efficiencies. This is in line with the approach adopted by other jurisdictions in relation to hard-core infringements such as those listed in Article 53 of the LFCE. Other jurisdictions, however, allow the investigation of other types of horizontal agreement and their sanction if they create anticompetitive effects in the market. These include collective boycotts, standardisation agreements, and commercialisation agreements. This is impossible in Mexico where either a behaviour fits one of the five listed infringements and is, therefore, per se illegal or does not and is placed outside the scope of competition law.

The per se approach and the categorisation of absolute practices have the advantage of providing clear guidance to firms, limiting the

entrance of new participants, the IFT determined spectrum national caps and included rules to favour the entrance of new participants. The results from the auction showed that in 30 local markets new participants entered and in 50 the Hirschman-Herfindal Index (HHI) was reduced.

regulatory costs associated with enforcement, and allowing competition authorities to focus enforcement activities on the most serious cases of harm to competition. At the same time, they are both over- and under-inclusive; for example, the price-fixing prohibition would prohibit a conduct that is not anticompetitive, such as ancillary price fixing that can be necessary to pro-competitive co-operation in research and development. The strict categorisation could also allow anticompetitive behaviour simply because it does not fall into one of the five categories of infringements. (OECD, 2017[23])

Moreover, the legalistic approach adopted by competition authorities and courts in their analysis of restrictive agreements and the way in which the LFCE was drafted creates ambiguities in relation to certain practices. For instance, collective boycotts that will generally fall under the category of horizontal agreements have been listed as relative practices (vertical restrictions and unilateral conducts).

The OECD has also discovered uncertainties in joint ventures, alliances and partnerships not specifically regulated by the LFCE or its regulations. COFECE's merger guidelines lay down examples of criteria to determine when a joint venture qualifies as a concentration. These include: a) if the agreement involves participation of two or more economic agents in the same economic activity; and b) if it offers the possibility of interference by an economic agent in the strategic direction or in the appointment of directors or officers of another agent and if it involves the de facto transfer of physical control of tangible or intangible assets (for example, brands) or the possibility of deciding upon them. Long-term or permanent joint ventures are also more likely to qualify as a concentration and possibly require notification. IFT considers that a joint venture is a merger if it involves some form of acquisition, change of control or any act by which two separated and competing economic agents consolidate companies, associations, stock, partnership interest, trusts or assets.

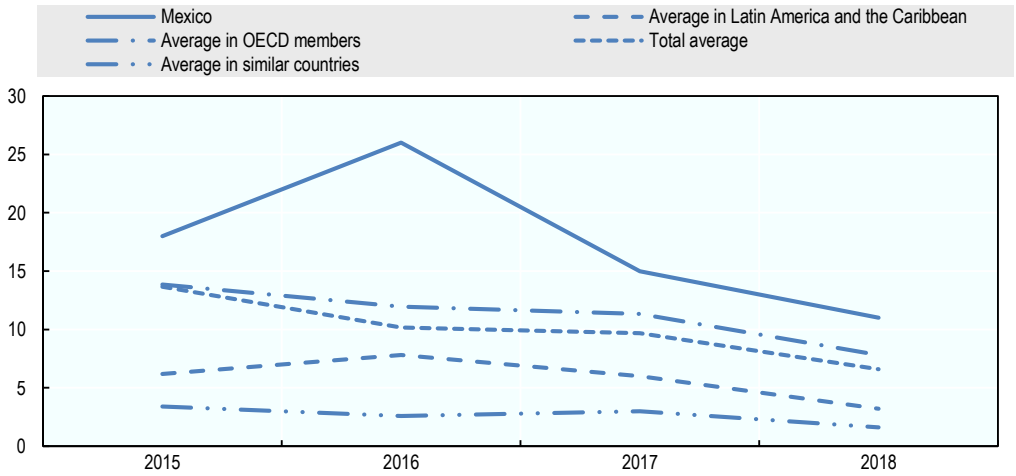
In practice, companies tend to notify all joint ventures falling within the merger notification thresholds. Non-notified joint ventures are subject to antitrust rules and companies will need to self-assess whether they fall under the categories of restrictive agreements provided for in the LFCE. Ancillary restraints do not appear to be allowed in Mexico. COFECE has only adopted substantive guidelines in relation to exchanges of information. A number of stakeholders indicated that further guidelines on joint ventures and co-operation agreements would facilitate self-assessment; many also expressed

regret that the COFECE project to develop guidelines in this field never materialised.

7.1.3. Leniency

Leniency has played an important role in cartel detection and investigation in Mexico. During the period of 2014-2018, COFECE received 76 leniency applications, four applications more than during the previous 12 years. Figure 5 shows that a decrease in leniency applications began in 2017, but this appears to be a general trend observed in other jurisdictions (OECD, 2018[24]). As mentioned above, a leniency application has been the trigger for 20% of COFECE's investigations into absolute practices. IFT has not yet received a leniency application, but has actively promoted the programme and published a guide on leniency and immunity in 2017. This is consistent with experiences in other jurisdictions and with the fact that absolute practices and, therefore, leniency, tend to be less frequent in asymmetrical markets with dominant players such as telecommunications and broadcasting, than in other sectors. Also, the success of the leniency programme has to be seen in relation to the number of sectors for which an agency is responsible – IFT only enforces competition law in two.

Figure 5. Trends in leniency applications



Source: OECD COMP Stats.

The first leniency programme was introduced in 2006, amended in 2011 and revised, as currently applicable, in 2014. It is governed by Article 103 of the LFCE and the competition authorities' leniency guidelines. The programme is open to companies, entities and individuals who have participated in an absolute practice, as well as to those who have contributed to, facilitated or instigated it.[79] Cartel leaders or coercing members may also benefit from leniency.[80]

All leniency recipients are granted criminal immunity. In line with the OECD Recommendation on Effective Action against Hard Core Cartels, the first leniency applicant may also receive the maximum reduction of the applicable fine, which at one unit of measurement and actualisation (unidad de medida y actualización, UMA), is effectively zero.81 (OECD, 2019[25]) For this to apply they must provide sufficient evidence supporting the initiation of an investigation procedure or evidence indicating the existence of an absolute practice. Subsequent applicants may receive significant reductions of the applicable fines (up to 50% for the second applicant, 30% for the third or 20% for the fourth and subsequent applicants)[82] if they submit

[79] Leniency or immunity granted to a corporation is extended to its employees to the extent that they apply and qualify for the programme and provide full and continuous co-operation with COFECE. If the corporation fails to provide full and continuous co-operation, but employees who received the extension do provide such co-operation, such employees will remain protected as if they were the applicants themselves.

[80] In the EU, for example, "*An undertaking which took steps to coerce other undertakings to join the cartel or to remain in it is not eligible for immunity from fines. It may still qualify for a reduction of fines if it fulfils the relevant requirements and meets all the conditions therefore*." "Commission Notice on Immunity from fines and reduction of fines in cartel cases", paragraph 13, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006XC1208(04)&from=EN

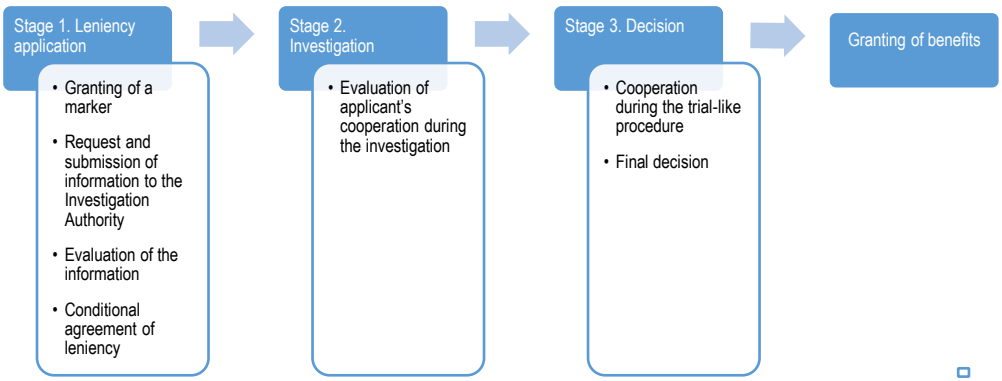
[81] In 2019, 1 UMA corresponds to MXN 84.49. An UMA is a unit of account, index, base, measure or reference used to determine the amount of the payment of legal obligations. It is updated on an annual basis according to inflation.

[82] See COFECE's and IFT's Leniency Guidelines. https://www.cofece.mx/wp-content/uploads/2017/11/guia_programa_inmunidad.pdf and http://www.ift.org.mx/sites/default/files/guia_programa_inmunidad_accesible_0.pdf

additional new evidence during the investigation. Reductions are calculated based upon the chronological order in which applications are received and the supporting evidence provided by each applicant, but the exact methodology of the calculations remains unclear. The authorities' leniency guidelines set out a marker system that registers the date and time of applications and guarantees the position granted to each applicant. There is no limitation as to the number of applicants who may benefit from the leniency programme.

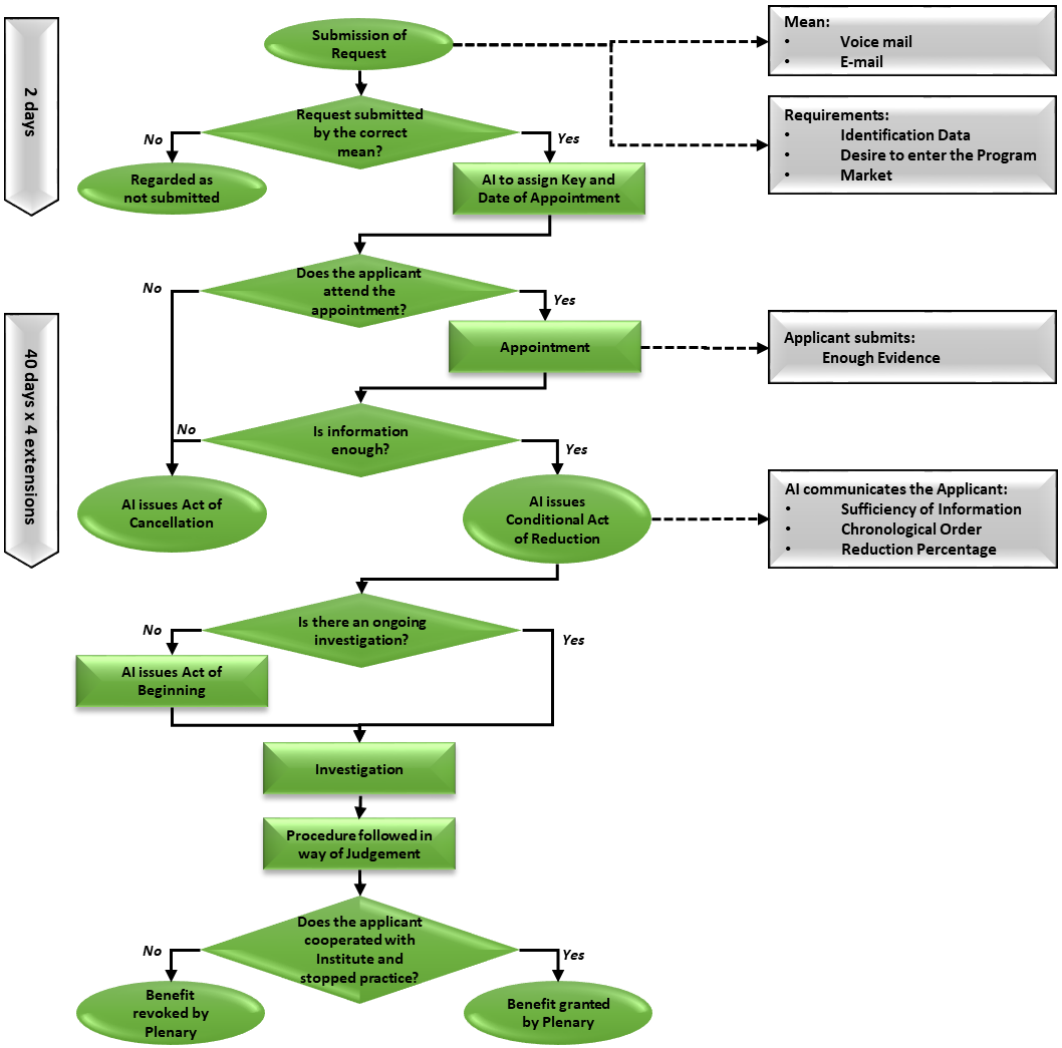
The IA conditionally grants admission to the leniency programme during the investigation, subject to confirmation by the Board at the end of the process, as shown in Figure 6 and Figure 7.

Figure 6. Leniency process for COFECE



Source: COFECE, www.cofece.mx/wp-content/uploads/2017/12/guia-0032015_programa_inm.pdf

Figure 7. Leniency process for IFT



Source: IFT

The IA may withdraw the admissibility of a leniency applicant during the investigation if applicants do not co-operate fully and continuously during the investigative process or if they do not take the necessary measures to end their participation in the absolute practice. The Board may decide not to confirm a conditional leniency agreement granted by the IA for the same reasons. COFECE's IA has in fact withdrawn

a leniency benefit on one occasion and its Board has twice refused to confirm conditional leniency agreements. Both instances were justified by lack of co-operation as the applicant failed to recognise wrongdoing.

According to the leniency guidelines of COFECE and IFT, applicants co-operate fully and continuously if they:

- do not destroy, falsify or conceal evidence
- admit their participation in the cartel
- submit additional evidence useful to the procedure
- do not deny, through arguments or evidence, their participation in the conduct during the trial-like procedure
- keep the information or documents submitted to the competition authorities completely confidential.

The success of leniency programmes depends on the jurisdiction's enforcement record, as well as on the programme's characteristics. Key to an effective programme are the transparency, predictability and certainty of the requirements for entering the programme and of its benefits (OECD, 2018[24]). Despite these guiding principles, the OECD has seen uncertainty as to what full and continuous co-operation entails for companies; a number of stakeholders are demanding detailed guidelines on this. For instance, it is not clear whether full and continuous co-operation during the criminal enforcement proceedings is still required. If the leniency benefit of one applicant is revoked by the IA or not confirmed by the Board, it is unclear whether the leniency markers can be readjusted and reallocated to other applicants. COFECE is currently reviewing its 2015 leniency guidelines to give more certainty and clarity to leniency applicants on these and other issues. On 15 October 2019, it launched a public consultation on a draft version of the regulatory provisions of the leniency programme.[83]

Confidentiality of leniency applicants' identities is strictly protected by the LFCE. This protection, which is fundamental to the success of the leniency programme in Mexico, does not apply in criminal

[83] See, https://www.cofece.mx/conocenos/secretaria-tecnica-2/consultas-publicas/

enforcement procedures, which rely on broader disclosure rules. A number of stakeholders have indicated that this situation, if not solved, could discourage competition authorities from requesting the public prosecutor to initiate criminal investigations against absolute practices involving leniency recipients.

7.2. Relative practices

Both vertical agreements and unilateral behaviour are considered relative practices under the LFCE (Articles 54 to 56). Competition law lists 13 categories of relative practices: 1) vertical market segmentation; 2) resale price maintenance; 3) tied sales; 4) exclusivity clauses; 5) refusal to deal; 6) boycotts; 7) predatory pricing; 8) loyalty discounts; 9) cross-subsidies; 10) price discrimination; 11) increasing rival's costs; 12) limiting or refusing access to essential facilities; and 13) margin squeeze. Relative practices are illegal only if they have as their object of effect to harm economic agents by improperly displacing them from the market, substantially limiting their access, or by establishing exclusive advantages in favour of certain companies. This appears to place the emphasis on assessing the impact on competitors, rather than on competition[84]. Moreover, a relative practice is unlawful under the LFCE only if a wrongdoer individually or jointly holds substantial market power in the relevant market where the practice is taking place. Competition law and implementing regulations clarify the criteria applied both for defining the relevant market and for determining the existence of substantial market power.[85] Unlike for absolute practices, respondents may claim pro-competitive efficiencies as a defence. Efficiency gains may include new goods or services, new techniques and production factors, technological progress, investment, and quality improvement.[86]

Decisional practice and case law have not distinguished further between vertical agreements and unilateral behaviour. The IAs consider that the legal assessment of vertical agreements and abuse of dominance is the same. The LFCE does not address exploitative

[84] Despite the fact that Article 2 of the LFCE establishes that the objective of the law is to promote, protect and guarantee free competition.

[85] Articles 58 and 59 of the LFCE and Articles 5 to 9 of the implementing regulation.

[86] Article 55 of the LFCE.

abuses. Unlawful conduct is defined solely in terms of exclusionary practices that foreclose competitors or other firms in the market, and not in terms of exploitative practices (such as excessive prices) that negatively affect consumers.

There is no substantive soft law on relative practices, theories of harm, relevant market definition, economic competition effects and efficiency assessments. Although some procedural guidelines[87] address certain substantive issues, stakeholders call for guidance addressing specially the topics mentioned in Section 9.1, through soft law and case law.

7.2.1. Enforcement activity

COFECE's enforcement activity so far has primarily focused on absolute practices. Relative practices have not been the main enforcement area for the Commission. There have been few investigations and fewer infringement decisions and most cases have been subject to commitments. From 2014 to 2018, COFECE adopted one decision establishing an infringement and six commitment decisions regarding relative practices (vertical and unilateral conducts). As shown in Figure 8, in 2018 decisions establishing an infringement in relative practices adopted in Mexico were below average infringement decisions in OECD and Latin American jurisdictions. This trend seems to improve in 2019 with the adoption of two infringement decisions by COFECE in the cases of International Airport of Cancun and Dun & Bradstreet (see Box 6). Over the 2014-2018 period, COFECE's IA launched 15 investigations into relative practices of which 8 were closed; 73% of these investigations were triggered by complaints and 27% were initiated ex officio (Table 13).

IFT enforces competition law in markets with dominant players sometimes controlling key infrastructure where vigilance over potential unilateral conduct is a priority. IFT has adopted two decisions sanctioning abuse of dominance since 2014. IFT's track record shows that its IA has opened 14 investigations, two of which led to infringement decisions, three of which are pending. IFT's ex ante regulatory intervention also contributes to reduce the opportunity for relative practices (including unilateral conducts) to occur.

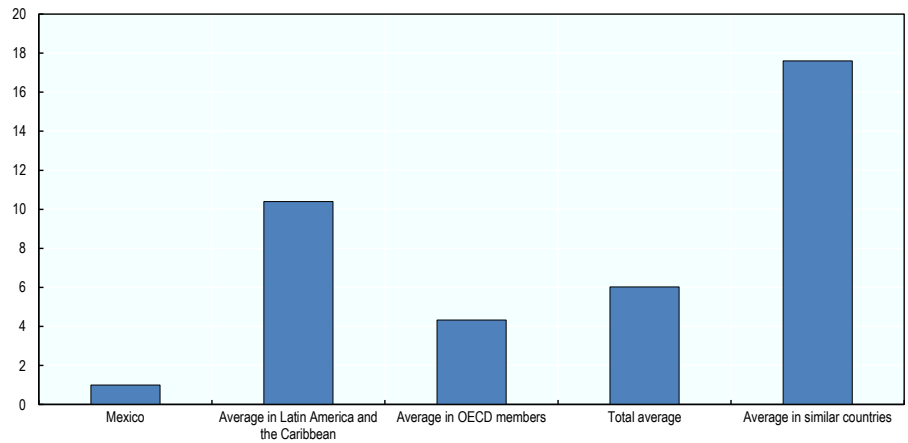
[87] Guidelines on Leniency and Commitments.

Table 13. Vertical and unilateral conducts enforcement record

Year and authority	Relative practice decisions	Detection		Unilateral conduct	Vertical agreement	Total fines	Commitment + exemption/ reduction (yes/no)	Types
		Market intelligence	Complaint					
2018 COFECE	4	1	3	0	4	No	Yes (4)	Exclusivity
IFT	1	0	1	1	0	MXN 96.8 million	No	Exclusivity
2017 COFECE	0	0	0	0	0	No		
2016 COFECE	2	0	2	1	1	MXN 63 million	Yes(1)	Price discrimination Refusal to deal
2015 COFECE	1	0	1	1	0	No	Yes (1)	Tying
2014 COFECE	0	0	0			No		
IFT	1	0	1	1	0	MXN 49.3 million		Reduction of demand
Total COFECE	7	1	6	2	5			
Total IFT	2	…	…	2	0			
Grand total	9	1	6	4	5			

Source: COFECE and IFT.

Figure 8. Decisions on vertical agreements and abuse of dominance establishing an infringement in Mexico, OECD and Latin America and the Caribbean in 2018



Source: OECD COMP Stats and data provided by COFECE and IFT.

Box 6. Example of relative practices, COFECE and IFT

Mexico City International Airport case

In 2016, COFECE fined Mexico City International Airport (Aeropuerto Internacional de la Ciudad de México, AICM) MXN 63 million for a refusal to grant permits to a number of taxi companies in the airport area. The decision also required AICM to comply with a number of remedies, including allocation of permits through a public tender and modification of the manual for the provision of taxi airport services at AICM. Before the decision was adopted, AICM proposed commitments to address the anticompetitive concerns, which were considered insufficient by the Board and refused.

International Airport of Cancun case

On 13 August 2019, COFECE's Board issued a decision fining Cancun International Airport (Aeropuerto Internacional de Cancún, AIC) to pay a fine of MXN 72.5 million (equivalent to USD 3.6 million). AIC has the sole right to grant taxi companies spaces and right to use airport infrastructure; COFECE ruled that from February 2010 to April 2018 it had abused its dominant position by refusing new entrants authorisation to provide taxi services at the airport.

This is the first case in which, together with the imposition of fines, COFECE also imposed conditions on the defendant. These include:

- justifying on technical grounds any refusals of permits and making these justifications public
- concluding contracts that allow taxi companies to exercise the rights derived from a permit granted by the Ministry of Communications and Transport (SCT)
- the right of COFECE to request information from AIC for a duration of five years to allow it to monitor compliance with the obligations.

Dun & Bradstreet

On 25 February 2019, COFECE imposed a fine of MXN 27.4 million (USD 1.3 million) on Dun & Bradstreet, a credit information company (CIC), for abusing its dominant position by refusing to make its primary database available to another CIC, Círculo de Crédito, and for imposing discriminatory prices. CICs collect, process and commercialise credit information from individuals and businesses and the Law Regulating Credit Information

Systems (Ley para Regular las Sociedades de Información Crediticia, LRSIC) obliges them to share credit information with other CICs in the market.

Telcel case

In April 2018, IFT ruled against América Móvil and its mobile telephone company Telcel for its exclusive deal with Blue Label Mexico (BLM), a provider of technical and banking support to retail businesses, which prevented BLM "marketing or providing" services to Telcel's competitors from 2012 to 2014. The Board concluded that the relative practice unduly excluded other economic agents from the market, and América Móvil and Telcel were fined MXN 96 million (approx. USD 5 million).

Source: COFECE and IFT.
www.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V257/12/4388275.pdf
www.cofece.mx/wp-content/uploads/2019/09/COFECE-037-2019_Airport_Cancun_ENG.pdf

COFECE is currently investigating a relative practice case involving possible predatory pricing, refusal to deal and restrictive agreements in the digital marketplace. In March 2019, COFECE launched an investigation into relative practices in the liquid-petroleum gas (LPG) sector, in addition to a prior and pending absolute-practice investigation in the same sector. IFT is currently investigating relative practices in the market of media content for internet streaming platforms and electronic devices and online content reproduction, as well as pay TV and mobile and fixed voice and broadband access. In May 2019, IFT launched an investigation into relative practices in wholesale services for local-network unbundling of the preponderant economic agent in the telecommunications sector.

7.2.2. Substantive analysis

Similar to absolute practices, the law provides for an exhaustive list of relative practices. All behaviour not falling under one of the listed categories will escape competition enforcement. While this may have advantages in terms of legal certainty for firms and concentration of enforcement resources in the most harmful conducts, it may leave unscrutinised other anticompetitive conducts, such as exploitative abuses.

The complex economic analysis required to sanction relative practices is holding competition authorities back from further developing this area of enforcement. Half of COFECE's investigation unit's staff are

economists and certain hold master's degrees. At IFT's IA, 45% are lawyers, 35% economists, and the rest are for the most part engineers and mathematicians. A number of stakeholders have stated their belief that competition authorities do not have the required economic expertise: both authorities lack a chief economist who could support the IAs with in-depth economic analyses (for relative practices, as well as horizontal agreements and merger reviews) and, neither IA appears to have sufficient staff with expertise in competition economics. In addition, recently adopted salary caps will not favour the hiring and retention of highly qualified economists. COFECE's Department of Economic Studies (DES) has a team of 13 economists. As part of the TS, it provides input and analyses economic evidence during the trial-like procedure, but the strict separation between investigation and adjudication prevents it from doing the same at the investigation phase. The Co-ordination Unit (Economic and Legal Advisory Office) supports the IA with economic and legal analysis. If either the DES or the Co-ordination Unit were given a more prominent and independent role in supporting the economic analysis of cases, the relevant departments would need to be adequately staffed and have the necessary resources. IFT's AI has a General Directorate of Economic Analysis led by an experienced economist, with a team of 13 economists and mathematicians. They provide input and support with in-depth economic analysis during the investigations, and they are also in charge of developing market studies.

In addition, COFECE's IA faces important challenges in the collection of relevant and reliable information, which is essential to building solid effects-based analysis. Current penalties do not deter parties from providing misleading, false or incomplete information (see 6.2.2). The lack of comprehensive, precedent-setting infringement decisions at COFECE level and the absence of substantive guidance in the form of soft law have also limited the number of relative practice cases that competition authorities have been able to investigate. The strict separation between the investigation and adjudication inside the competition authorities are also inhibiting an open dialogue and common understanding about how to build an effects-based analysis in relative practices (see Chapter 4.).

While the initiation of relative-practice investigations in COFECE currently relies to a large extent on complaints, both it and IFT are attempting to increase their enforcement activities in relative practices by investing resources in strengthening in-house detection methods.

In 2015, COFECE created a market-intelligence unit inside its IA, which is fully dedicated to monitoring markets and screening market data to gather sufficient evidence to initiate antitrust investigations. Over the period 2016-2019, approximately 20% of investigations were initiated through findings of the market-intelligence unit. In July 2017, IFT provided the IA's General Directorate of Economic Analysis with powers to monitor markets, gather sufficient evidence and provide strategic information to initiate antitrust investigations.

7.2.3. Commitments

In the case of relative practices and unlawful mergers, during the investigation phase (before the IA adopts the DPR) parties may propose, one time only, any commitments they will make in exchange for an exemption or a partial reduction of fines. The commitments should be actionable, address the competition authorities' concerns and restore competition conditions to the market. If the proposed commitments are not sufficient to achieve this objective, the Board may either order the reopening of the investigation or ask for commitments to be improved. Companies may only benefit from this mechanism once every five years.[88] IFT and COFECE have issued detailed guidelines on the commitment procedure.[89] Commitment decisions do not protect companies from civil-damage claims (see Chapter 11.).

The Board will accept commitments if they are legally and economically appropriate and sufficient to address competition concerns. According to COFECE's interpretation of the LFCE, the Board is not allowed to refuse commitments on grounds that the practice constitutes a serious infringement or that the case presents complex and novel issues suited for a fully-fledged infringement decision setting a precedent.

Commitment decisions by the Board are limited to describing commitments and possible monitoring measures (see Box 7 for an

[88] Article 102 of the LFCE.

[89] IFT "Guidelines to the Procedure for the Dispense or Reduction of the Amount of Fines in Investigations of Relative Monopolistic Practices or Illegal Concentrations, for the Telecommunications and Broadcasting Sectors", www.ift.org.mx/sites/default/files/guiadelprocedimientodedispensaoreducciondelimportedemultas.pdf.

example). Parties are granted immunity from fines if the proposed commitments are sufficient to avoid a relative practice or and unlawful merger.

Box 7. Commitments in live-show markets

In 2016, COFECE initiated an investigation against Corporación Interamericana de Entretenimiento (CIE) for suspected abusive behaviour in the market of production and promotion of live shows, operation and management of live-show venues, and the online distribution and commercialisation of tickets for live shows. CIE then presented commitments that addressed COFECE's competition concerns, and in 2018, the Board accepted these proposed measures with modifications and granted full immunity from fines. Commitments included the elimination of exclusivity clauses in contracts with third-party promoters and venue operators for 10 years and refraining from operating third-party venues with a capacity greater than 15 000 spectators in Mexico City for 5 years. CIE was also required to submit an annual report detailing compliance with the commitments for a 10-year period.

Source: COFECE, www.cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V2633/8/4511785.pdf

Commitment decisions offer several advantages over prohibition decisions. Notably, they allow procedural gains through the early termination of cases and they have a quicker impact on the market and allow agencies to obtain a certain and ready result, as compared to long, costly and often uncertain outcomes if the case is run until the final stage of an infringement decision. Additionally, agreed commitments prevent lengthy and costly judicial reviews because they are rarely contested in court.

Commitment proposals or negotiations may, however, be unsuccessful and delay enforcement if the remedies offered are inappropriate. Market testing allowing third parties to submit observations on proposed commitments can address this issue by improving the quality and appropriateness of the remedies and the effectiveness of the commitment decisions. Indeed, procedures to adopt commitment decisions in most OECD jurisdictions include market testing, which sees a case summary and the proposed commitments being made public to give third parties an opportunity to submit observations. Commitments are unsuited, however, to create

deterrence and punish anticompetitive behaviour. (OECD, 2016[26]) In addition, commitment decisions require a compliance monitoring mechanism that may sometimes be more costly for the competition agency than the procedural efficiencies gained by the early termination of the case.

In Mexico, parties submit commitments before knowing the outcome of an investigation. The investigation team may agree to meet informally to discuss possible commitments before they are submitted, but this is not a legal requirement. Neither parties has access to a preliminary assessment of the case establishing the likely anticompetitive conduct being investigated and the competition concerns. It is therefore difficult for economic agents to understand if the proposed commitments will be suitable and appropriate responses to the competition authorities' concerns. For the agencies, market testing of proposed commitments is not provided for in the LFCE and they may therefore lack relevant information on the suitability of proposed remedies. This, combined with the fact that deadlines for the IA and the Board to respond to the economic agents' proposal are too short,[90] reduce the chances of adopting optimal commitments.

7.3. Recommendations

7.3.1. Absolute practices enforcement and substantive analysis

IFT should consider actively and formally engaging in fighting bid rigging in procurement organised by other public entities to contract telecommunications and broadcasting services.

The language of Article 53 of the LFCE limiting horizontal agreements to the five expressly listed categories and the formalistic and literal interpretation of this provision by the competition authorities and the judiciary has prevented the prosecution and sanctioning of other types of horizontal agreements. As competition knowledge and experience grow in Mexico, the likelihood of errors in the enforcement diminish, which may well justify moving from a formalistic approach to a more effects-based analysis of non-hard-core restrictive agreements in line with international practices. This may

[90] Ten working days for the IA to submit an opinion to the Board and 20 working days for the Board to adopt a decision.

require a modification of the LFCE or allow for its wider interpretation.

Competition authorities should develop guidance on joint ventures and co-operation agreements among competitors, including criteria that allow economic agents to understand when co-operation agreements do not comply with competition law. Also, more substantive criteria are needed for economic agents to appreciate when a joint venture falls under merger control and under ex post antitrust enforcement.

7.3.2. Leniency and settlements

Competition authorities should adopt clear guidelines on the requirements for entering the leniency programme and its benefits. Clarification should cover, for instance, how fine discounts are calculated, what full and continuous co-operation entails, whether markers can be readjusted if conditional leniency ends up not being granted to one or more of the leniency applicants.

At IFT, the promotion of leniency in combination with other detection mechanisms, using for example sectoral data available in-house, could support enforcement actions.

Mexico could consider establishing a settlement policy, in which parties could obtain a fine reduction in exchange for admitting the charges. While leniency facilitates detection, settlements save procedural costs once an investigation is advanced, such as when the statement of objections has already been issued, and reduce judicial challenges (in cases when settlement conditions include the parties renouncing their right to appeal). Settlement mechanisms should be crafted and used carefully so competition authorities find a balance between cases suited for settlements and those deserving fully-fledged resolutions and precedent setting. Settlement safeguards should further be articulated in the contexts of civil and criminal follow-up.

7.3.3. Relative practices enforcement and substantive analysis

Competition authorities should strengthen enforcement against relative practices.

Competition authorities should rely less on commitment decisions in order to generate a body of case law in this area. Fully-fledged analysis of effect-based infringements would indeed support better understanding of and solid precedents to relative practices. The excessive use of

commitment decisions may also have a detrimental effect on deterrence. To that end, competition authorities should have the faculty to refuse commitments if the case is suited to set a relevant legal or economic precedent, to foster deterrence and punish serious infringements.

Competition authorities should develop guidelines on the substantive economic analysis of relative practices. When doing so, competition authorities should distinguish between the analytical framework applicable to unilateral conducts and that applicable to non-horizontal agreements.

Competition authorities should adopt measures to strengthen their economic expertise to foster complex economic effects-based analysis required to sanction anticompetitive practices and conducting merger analysis. This may be achieved by the creation of a chief economist position, independent from the Board and the IA, in charge of giving independent economic advice on the decision-making process. Alternatively, if the creation of one chief economist for the whole competition authority would be considered inconsistent with the institutional design and the separation of investigation and decision-making, Mexico could create two chief economist positions, one in charge of advising the IA and another advising the Board. COFECE may also consider giving a more prominent role to the Coordination Unit in supporting the IA on the economic analysis of cases and to the DES in advising the Board on effects-based analysis. If this were the case, both departments should be adequately staffed and have the necessary resources to fulfil their functions.

7.3.4. Commitment procedures

Procedures to adopt commitments decisions could be improved by extending the periods the IA and the Board have in which to consider commitment proposals when the concerns and possible remedies require further examination. Competition authorities should market test proposed commitments to ensure that they are suitable to addressing competition concerns and appropriate to specific market conditions. Similarly, to ensure commitment relevance, the parties should have sufficient information on the outcomes of the investigation before first submitting commitments.

Chapter 8. Mergers

Mexico's competition law and institutional framework provides for two merger control regimes: 1) ex ante merger control and 2) ex post review of executed unlawful mergers.[91]

COFECE has been extremely active in reviewing mergers under the classical merger-control regime, and merger decisions represent 95% of its decisions. In the telecommunications and broadcasting sector, a merger-control exemption is given to non-preponderant agents that has implications for the IFT's merger-control activity.

8.1. Jurisdictional scope

8.1.1. Ex ante merger control

For the purposes of merger control, Article 61 of the LFCE widely defines concentrations (concentraciones) as a merger, acquisition of control, or any other act by means of which companies, associations, stock, partnership interest, trusts or assets in general are consolidated, and which is carried out among competitors, suppliers, customers or any other economic agent.[92]

[91] Although competition authorities traditionally address and present unlawful mergers as antitrust cases, for sake of clarity and completeness of peer-review purposes, merger regimes are consolidated under this section.

[92] Article 61 of the LFCE. 231. Under the LFTR, IFT must also review transactions that involve concessionaires providing the same service(s) in the same geographical area. It also empowers the IFT to evaluate and authorize mergers that involve the exchange of spectrum rights and obligations (e.g. swaps and leasing) regardless of the transaction's amount. The substantive analysis for this review is the prevention of high levels of concentration that could hamper or prevent competition, accumulation or illegal cross ownership. The analysis is subject to Competition law criteria and

In an ex ante merger-control review, competition authorities will not authorise mergers that may diminish, harm or impede free market access and competition. Both COFECE and IFT have published guidelines on merger control, including clarification of the types of transactions that qualify as concentrations under the law. For example, depending on the level of influence of other shareholders, minority shareholding could amount to a de facto concentration.[93] The OECD recommended in 2014 that COFECE's regulations for restructuring be clarified and exclude from the merger regime restructuring transactions undertaken by foreign firms with Mexican subsidiaries. Paragraph IV of Article 93 of the LFCE deals with this issue.[94] There are, however, no specific published regulations or guidelines about COFECE's analysis of staggered acquisitions.

Merger control is neutral as it applies to all concentrations irrespective of their ownership, nationality or location, provided there is a local nexus with Mexico. The definition of local nexus is found in notification thresholds and in the analysis of merger effects.[95]

Each competition authority has a unit dedicated to ex ante merger control, part of the TS at COFECE and of the ECU at IFT.

8.1.2. Ex post merger regime

Article 62 of the LFCE defines unlawful mergers (concentraciones ilícitas) as those with the purpose or effect of obstructing, diminishing, harming or impeding free-market access and economic competition. An ex post review of an unlawful merger is carried out by the IA's team in charge of relative practices. The only mergers that the IA may not investigate are those cleared by the Board – those that have gone through ex ante merger control, unless they were authorised on the basis of false information. The IA may not investigate non-notifiable mergers more than one year after their closing.[96] According to COFECE, the one-year expiration period, although very similar to

methodologies, and these procedures are included in the IFT's Merger Guidelines (See Section 9).

[93] Article 93 and COFECE's Merger Guidelines.

[94] Article 93 of the LFCE, paragraph IV of the LFCE.

[95] Articles 86 and 87 of the LFCE.

[96] Article 65 of the LFCE.

statutory limits established in other jurisdictions, is too short to detect this type of unlawful merger.

Ex post merger review of unlawful mergers include two types of concentrations: 1) "gun jumping", which are notifiable mergers that raise competition concerns but were never notified or were concluded before clearance;[97] and 2) below-threshold mergers, which are non-notifiable, but which raise competition concerns.[98]

8.1.3. Sectoral exemption

Ex ante merger control jurisdiction has only one specific exemption. Transitory provision 9 of the LFTR provides that mergers, concessions, transfers or control changes by and among non-preponderant economic agents in the telecommunication or broadcasting sectors are not subject to merger control. In addition, if competition concerns are identified ex post, non-preponderant players may not be subject to divestment rules, and only regulation and behavioural remedies may be imposed on them. An economic agent in the telecommunications or broadcasting sector is considered preponderant if it holds 50% of users, audience, traffic or use of network capacity. This transitory exemption was designed to promote smaller players in the respective sectors and will apply for as long as each sector has a preponderant company; for example, in the telecommunications sector, América Móvil is considered preponderant, as is Televisa in the broadcasting sector.

The concept of preponderance in a sector that is set out in the telecommunications regulations differs from the concept of dominant position in competition law, which requires a thorough assessment of a company's power in a specific relevant market. Due to the manner in which the sectors have been defined under telecommunications regulation, the merger exemption does not seem to be adequate to protect competition. (OECD, 2017[5]) The OECD has already recommended repealing this exemption. (OECD, 2017[27])

[97] If gun-jumped mergers do not raise competition concerns, they are authorised without undergoing an investigation under Article 62 of the LFCE.

[98] Article 67 of the LFCE.

8.1.4. Mergers in the financial sector

All mergers in the financial sector are subject to approval by the National Insurance and Bond Commission (Comisión Nacional de Seguros y Finanzas, CNSF). The CNSF, in such instances, must seek COFECE's opinion. When a merger in the financial sector meets the notification threshold, it must, in addition and parallel to the CNSF approval procedure, be sent for ex ante merger control by COFECE. In such cases, COFECE must issue both a merger decision under the LFCE and an Opinion on Concessions and Permits for the CNSF, requiring a double review and filing.

8.1.5. Jurisdiction timeframe

Ex ante merger control applies as long as the transaction has not been executed.[99] Competition authorities may review ex post unlawful mergers up to ten years after the execution of the transaction in the case of gun jumping and up to one year after execution for below-threshold mergers.[100]

8.1.6. Hybrid mergers under COFECE and IFT´s jurisdiction

IFT is in charge of merger control in the telecommunications and broadcasting sectors; COFECE has responsibility for merger control in all other areas of the economy. Hybrid concentrations, which are actually or potentially under both COFECE and IFT jurisdiction, may be reviewed by both competition authorities. This was the case in for the recent assessment of the acquisition of 21st Century Fox by Disney (see Box 8). The parties may seek guidance from both competition authorities on how to assess jurisdiction and where to file a merger. When COFECE and IFT disagree on the allocation of a merger case, they may file a controversy with the specialised courts for a judicial decision,[101] as took place for the mergers of AT&T and Time Warner, and Nokia and Alcatel (see 4.2).

[99] Article 86 of the LFCE.

[100] Articles 65 of the LFCE.

[101] Article 5 of the LFCE.

Box 8. Acquisition of 21st Century Fox by Disney

The proposed acquisition of 21st Century Fox by Disney was notified to both COFECE and IFT in August 2018. The transaction consisted of Disney acquiring 100% of Fox's share capital, its film and TV studios, cable entertainment and regional sport channels, as well as international TV businesses for USD 71.3 billion. Competition authorities shared responsibility for reviewing the merger.

IFT assessed those parts of the merger that involved the radio and telecommunications sectors, mainly pay-TV services. These included: 1) the provision and licensing of audiovisual content, such as programming channels and channel packages, to pay-TV providers in the different channel categories, in particular sport and factual programming; 2) the provision and licensing of audiovisual content, mainly programmes, to aggregators – or programmers – of pay-TV channels; 3) the provision and licensing of audiovisual content to suppliers of commercial free-to-air television; 4) the provision and licensing of audiovisual content – channels, channel packages and programmes, including films and series – to OTT distributors; 5) the provision and licensing of audio content – music – to OTT distributors; 6) the provision and sale of time and space for commercial messages or advertising on pay-TV channels; 7) the provision and sale of spaces for commercial messages or advertising by Internet platforms dedicated to the provision of audiovisual content; 8) the provision and licensing of audio content for sound-broadcasting stations; 9) the provision of OTT distribution services for audiovisual content, by subscription; and 10) the acquisition of rights for the transmission of sporting events in Mexico.

COFECE assessed the impact of this merger on all other sectors, for instance: 1) film distribution; 2) licensing of broadcasting content for home entertainment in physical and digital format for acquisition and direct download; 3) licensing of music for home entertainment in physical and digital format for acquisition and direct download; 4) licensing of non-digital music; 5) live entertainment; and 6) IP licensing for books and magazines, consumer products and the development of interactive media and video games.

In January 2019, the parties modified the original transaction and included the cession of Disney's shares in Walt Disney Studios Sony Pictures Releasing de México (WDSSPR) to Sony Pictures Releasing International Corporation, part of Sony Pictures.

On 31 January 2019, COFECE concluded that in view of these modifications, the merger was unlikely to affect competition and free market access in the

markets assessed by this authority. The Board unanimously authorised the companies to merge in these markets.

On 11 March 2019, IFT found that the merger could affect competition in the markets for the provision and licensing of restricted pay-TV channels for the content categories of "sport" and "factual" (cultural programmes, documentaries and reality shows). To address those concerns, IFT imposed behavioural remedies for the category of "factual" content and structural remedies for "sports". Structural remedies included orders to:

- divest the entire provision and licensing of Fox Sports within six months (renewable for reasoned justification), or;
- allocate the business to a trust with the irrevocable mandate to sell or to liquidate, if the companies did not manage to divest after six months.

The Disney/Fox merger review took 111 working days at COFECE and 143 at IFT. The merger was also reviewed by foreign competition authorities, including Brazil, Canada, Chile, the EU and the USA, which led to international co-operation between IFT, Brazil, the EU, Chile, United States and Ecuador.

Source: COFECE and IFT

8.2. Notification

Merger notification in Mexico is mandatory if notification thresholds are met. Below the thresholds, the parties may voluntarily notify their merger for the sake of certainty. Voluntary notifications are common.

8.2.1. Merger thresholds

Notification thresholds ensure local nexus in Mexico. The transaction value, assets or turnover must arise in or be allocated to Mexico. Under Article 86 of the LFCE, three alternative notification thresholds apply for merger-control purposes.

1. When the value of the transaction, within the Mexican territory, directly or indirectly exceeds 18 million times the UMA (around MXN 1 521 million, USD 80 million);
2. When the transaction involves 35% or more of one of the economic agents' assets or stock, whose annual turnover in the Mexican territory or assets in the country, exceed the

equivalent of 18 million times the UMA. (around MXN 1521 million, USD 80 million); or

3. When the acquisition of assets or capital within the Mexican territory exceeds the equivalent of 8.4 million times the UMA (around MXN 710 million, USD 37 million), and two or more of the economic agents participating in the concentration have an annual turnover or assets in the Mexican territory exceeding, jointly or separately, 48 million times the UMA (around MXN 4 055 million, USD 213.8 million).

The transaction value threshold enables competition authorities to carry out ex ante merger control over concentrations that involve parties with no or low turnover and assets, but which are relevant to competition, such as concentrations between digital platforms charging services at zero price. For example, the Facebook/WhatsApp merger was reviewed in a number of foreign jurisdictions with transaction value-based thresholds. In Mexico, the deal was neither notified, nor reviewed ex officio by COFECE or IFT, as it was difficult to identify which part of the total value transaction could be allocated to Mexico.

8.2.2. Modalities of notification

According to the LFCE, all parties must notify the authorities except for situations where one party cannot, such as in the case of a hostile takeover.[102] Since 2018, notifications to COFECE can be filed electronically at any time,[103] using a system that enables notification of concentrations, document submission and remote access to files. This has substantially facilitated the procedure and reduced notification costs. The first electronically processed merger notification took 13 working days from the notification submission to the Board's decision. Average processing time through electronic means is 32 working days, yet companies generally still prefer to notify non-electronically. In 2018, only 10.38% of notifications were done electronically; this rose to 24.40% in 2019. Electronic filing is expected to rise as companies become acquainted with the system. The

[102] Article 88 of the LFCE. Holding companies may notify on behalf of their subsidiaries..

[103] COFECE's online tool is called the Electronic Concentration Notification System or SINEC (www.sinec.gob.mx/SINEC/)

filing fee is MXN 184 539 (around USD 9 728) and there are no filing fee waivers.

IFT does not charge any filing fee and merger notifications cannot be filed electronically.

8.2.3. Stand-still obligation

Under the LFCE, merger notification suspends the execution of the merger.[104] The law specifies that until clearance the following actions may not be completed:

- legal completion of the transaction;
- de facto or de jure control over another economic agent, asset, participation in trusts, social parts or stock;
- signing of a merger agreement between any of the involved economic agents that does not include suspensive clauses in relation to merger authorisation by the competition authority;
- in cases of a sequence of acts, the execution of the last act by virtue of which the notification thresholds are met.

8.2.4. Gun jumping and sanctions

Parties to a merger, as well as the public notaries witnessing the acquisition, are subject to sanctions in case of failure to notify and comply with the standstill obligation made as part of a review (also known as "gun-jumping"). Parties may also be sanctioned if the actual merger is different to that notified. In case of gun jumping, each party may be fined up to 5% of its annual turnover and up to 8% if the merger raises competition concerns (unlawful mergers). Public notaries that play a role in gun jumping – by making legal acts for a non-notified or unauthorised concentration – can be sanctioned with up to 180 000 times the UMA (around MXN 6.4 million, USD 330 000). The TS or ECU merger unit carries out the assessment of whether gun jumping occurred; the review of competition concerns of executed mergers is carried out by the IA under the unlawful merger regime.

[104] Article 87 of the LFCE.

Gun jumping is actively pursued in Mexico by both authorities and it has been, which have imposed fines on several occasion in recent years.

- In 2015, a MXN 25.7 million fine (approx. USD 1.4 million) was imposed on Alsea, the largest restaurant operator in Latin America and a MXN 2.9 million fine (approx. USD 157 900) on Grupo Axo, an apparel-brand franchiser in Mexico, for failing to notify a concentration under the previous LFCE.[105]
- In 2015, IFT imposed fines of MXN 57.6 million (approx. USD 3.1 million) on the following companies, Telmex, Teninver, Cofresa, Corporativo Mexicano de Frecuencia Dish, Dish Mexico Holdings, Dish México, and Echostar. In addition, Cofresa was fined MXN 3 million for having falsely declared during the processing of the file.[106]
- In 2017, COFECE imposed a fine of MXN 365 000 (approx. USD 19 300) on each of the following financial institutions: Mexico Multifamily Fund VIII, Invex, CIBanco, HSBC, and Monex.[107]
- In 2017, a MXN 56.2 million total fine (approx. USD 2.97 million) was imposed on *Panasonic Corporation*, *Panasonic Europe*, *Ficosa Inversión* and *Pindro Holding* for failure to notify.

8.3. Merger-review procedure

The TS and ECU merger teams carry out ex ante merger control procedures,[108] while ex post merger reviews are carried out by the two IA's using antitrust investigation tools. Each regime triggers a different procedure. As soon as gun jumping occurs and the transaction raises competition concerns, or a non-notifiable

[105] These fines were reviewed by the judiciary and reduced on appeal to MXN 4.7 million for Alsea and MXN 600 000 for Axo.

[106] See, http://www.ift.org.mx/conocenos/acerca-del-instituto/historia/concentracion-telmex-dish.

[107] This case is still pending.

[108] COFECE's ex ante merger control team in the TS grew from 6 people in 2007 to 25 people in 2019, including a balanced ratio of economists and lawyers.

concentration is identified as raising concerns, the merging parties may find themselves in an inquisitorial and prosecutorial process, rather than in a preventive or collaborative one. This section focuses primarily on ex ante merger control procedure.

While there is no official pre-notification process provided for in the law or in soft law, in practice, informal pre-notification discussions take place in approximately 90% of mergers notified to IFT, at the parties' request. These are generally used to engage early in the procedure about jurisdiction, the scope of information that parties need to provide and preliminary competition concerns. All contacts between commissioners and economic agents are subject to contact rules, in which meetings are recorded and their date and time made public.

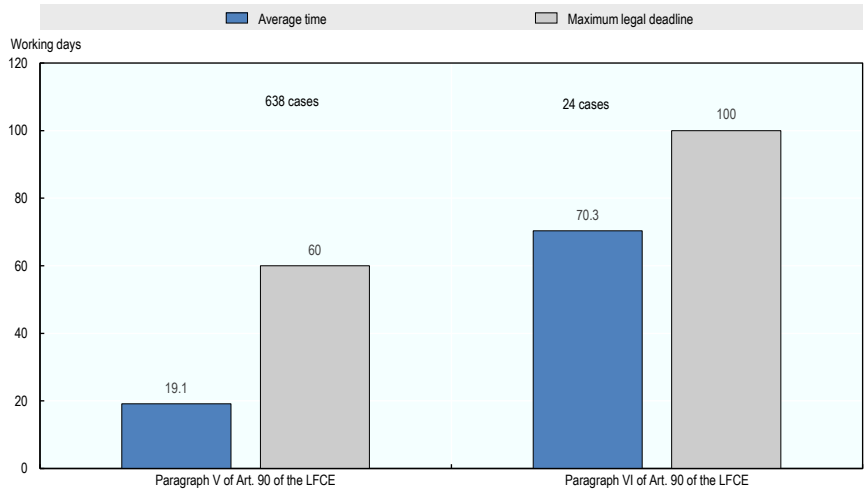
The standard merger control procedure may last 60 working days – from the time when the notification is completed or additional information has been submitted by the parties [109] to the moment when the TS or ECU merger unit has assessed the operation and the Board has made a final decision. This standard period may be extended once by 40 working days in exceptionally complex mergers.[110] Where a merger raises competition concerns, the TS or ECU shall inform the parties of such concerns within 10 working days before the Board session's agenda is made public, which allows the parties to propose conditions or remedies. Remedy submission and modifications of submitted remedies may re-start the clock for another period of 60 plus 40 working days.[111] If the Board does not adopt a decision within the legal timeframe, the transaction is considered cleared without objections. The average time frame during which COFECE analyses mergers is shorter that the maximum legal period (see Figure 9).

[109] Upon notification, the TS or ECU has 15 working days to request additional information from the parties, who have 15 working days to respond. The period of 60 working days starts from the receipt of such additional information, if any.

[110] Article 90 of the LFCE.

[111] Article 90 of the LFCE.

Figure 9. Mergers, average time frame and maximum legal deadlines at COFECE, 2014-2018, in working days



Source: COFECE

A simplified merger control procedure (procedimiento por notoriedad) is available if the parties can show that the merger will clearly not hinder, damage or impede free market access and economic competition.[112] If parties can provide the necessary evidence to show that the merger is unproblematic, the TS or ECU merger unit will issue an admission agreement within 5 working days, followed by a Board decision with 15 working days (or no decision deemed no objection). In practice, the standard of proof for simplified procedures is difficult to meet and rarely used.

The OECD has identified two procedural challenges in merger control in Mexico:

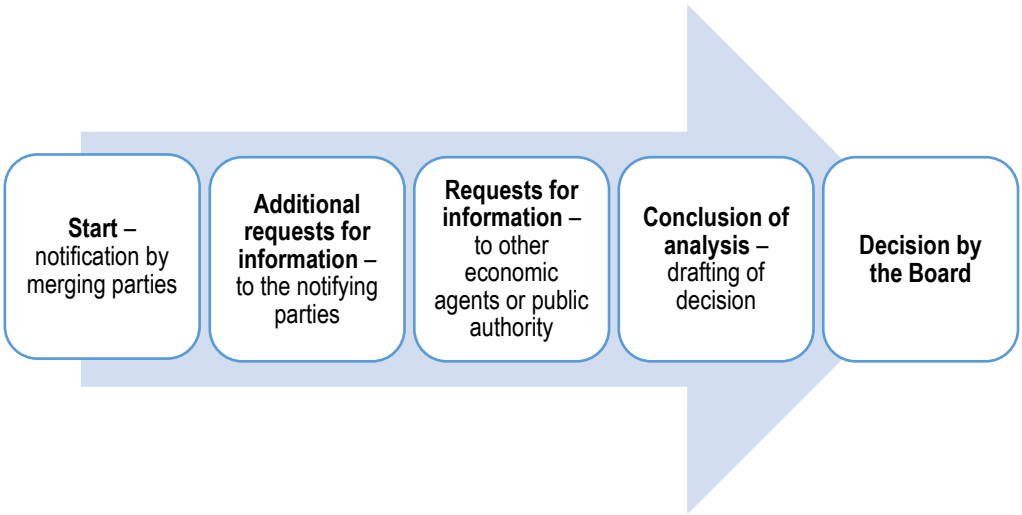
- A merger review is not divided into two phases as in other jurisdictions where unproblematic mergers are cleared during a first phase and mergers raising competition concerns are subject to an in-depth analysis during the second phase. In Mexico, merger review is done in a single phase, which is then extended in the case of complex mergers.

[112] Article 92 of the LFCE.

- Parties wishing to opt for a simplified procedure need to prove that they are not potential competitors, that the relevant market structure would not be modified by the merger and that they are not active in markets related to those affected by the merger, which is almost the same information required in a normal merger notification.

Merger assessment relies on notification by and additional information from the parties, as well as information gathered by the TS or ECU from third parties and public authorities.

Figure 10. Merger process



Source: COFECE and IFT

The parties are regularly in contact with and submit information to the TS or ECU during the merger assessment. Competition authorities may also issue formal requests for information at any time during the procedure; parties have 10 working days to respond. Only a request for additional corporate and financial information and a first RFI may stop the clock.

Both competition authorities and parties have expressed concerns to the OECD in relation to information gathering:

- according to a number of private practitioners and economic agents, RFIs tend to be unnecessarily far-reaching and should

be more focused and tailored. There is also a lack of clarity over competition concerns, admissible efficiencies and remedies.

- competition authorities have stated that parties may too easily use or abuse the system by not co-operating, not providing full or reliable information, or sometimes not responding at all. This occurs more easily with second RFI as it does not stop the clock and a no-decision from a competition authority means clearance. This puts pressure on competition authorities, which sometimes have to adopt a decision without necessarily being wholly satisfied with submitted data. Moreover, as mentioned in Section 6.3, penalties for not submitting the requested information are not a sufficient deterrent.

Contrary to the OECD's 2005 Recommendation of the OECD Council on Merger Review, third parties have no legal status to express their views or intervene voluntarily during a merger review.[113] (OECD, 2005[28]) No access is given to the file in ex ante merger-control procedures, except to the merging parties. Only two channels are available for third parties to submit information: 1) by filing a complaint to the IA, which will automatically discard it because it is already being reviewed by the TS or ECU, but the information may be transferred to the TS or ECU and be used in the merger decision;[114] or 2) by replying to a RFI from the TS or ECU. Third parties must answer rFIs within 10 working days of their receipt without stopping the clock. Third parties may also approach the competition authorities formally or informally to provide information or express concerns about a notified merger.

Market research, consumer surveys and economic studies at COFECE are rare or non-existent according to practitioners, who regret that most RFIs focus on the parties, their competitors and clients. As a

[113] The 2005 OECD Merger Recommendation provides that: "Third parties with a legitimate interest in the merger under review should have an opportunity to express their views during the merger review process."

[114] Pursuant to Article 70, paragraph V, of the LFCE, the IA shall dismiss a complaint on grounds of notorious inadmissibility when the claimed facts concern a merger notified pursuant to Article 86 of the LFCE, which is pending for decision.

sectoral regulator, IFT gathers a great amount of data on markets and consumers that are accessible to IFT's competition unit. With INEGI's support, IFT has developed surveys on audiences and household information and communications technology (ITC) use. Also, in 2017 IFT created the Telecommunications Information Bank (Banco de Información de Telecomunicaciones, BIT), which provides statistical information for the telecommunication and broadcasting sectors.

These information-gathering tools apply to ex ante merger control. In ex post merger reviews, the IA is in charge and may use all information-gathering tools used in antitrust investigations, including dawn raids, RFIs, witness testimonies and market screening.

8.4. Substantive analysis

Substantive analysis differs between ex ante merger control and ex post merger review. The ex ante test is prospective and assesses whether the merger "has or may have" anti-competitive effects.[115] The ex post test assesses the current or retrospective object or effect of the transaction in the market. It may also analyse prospective effects if the ex post review is conducted within a short period after the merger execution and its actual effects had not yet materialised.

The LFCE provides a list of relevant factors to determine whether the merger has had or may have anticompetitive effects. These include: 1) the definition of relevant markets;[116] 2) barriers to entry, market concentration and competitors' market power; 3) a merger's effects on relevant and related markets; 4) cross-participation by the merging parties in other economic agents or vice versa; 5) pro-competitive efficiencies submitted by economic agents; and 6) other analytical and technical criteria set by regulatory provisions.[117] Relevant criteria are further detailed in COFECE and IFT regulations and in their respective merger-notification guidelines.[118]

[115] Articles 61 and 64 of the LFCE.

[116] Criteria to define relevant markets are detailed in Article 58 of the LFCE. In addition, IFT is elaborating a technical document laying down the criteria to define the relevant market, expected in the near future.

[117] Article 53 of the LFCE.

[118] See, https://www.cofece.mx/wp-content/uploads/2019/08/19.08.01-Disposiciones-Regulatorias-de-la-LFCE-ultima-reforma.pdf ,

Relevant markets are defined using a demand- and supply-side substitution analysis, including the hypothetical monopolist test. These elements are based in substitution possibilities, and are perfectly consistent with the small but significant and non-transitory increase in price test (SSNIP). COFECE has put particular weight on parties' internal documents to perform the relevant market definition. Replies to RFI from third parties have also been used in complex cases, to determine product and geographic substitutability. Finally, statistical and econometric techniques have also been used in merger procedures: co-integration analysis in Sherwin Williams/COMEX; linear regressions in Alsea/Vips and Delta/Aeroméxico; cross-price elasticities and gross upward pricing pressure index for Coca-Cola/AdeS and Rea/Xignux.

Competition authorities further assess whether a merger: 1) confers or may confer or strengthen substantial market power to the resulting entity with the likely effect of hindering competition; 2) has or may have the object or effect of displacing competitors or raising barriers to entry; and 3) facilitates absolute or relative anti-competitive practices. The analysis is more exhaustive if the merger gives rise to overlaps, vertical and conglomerate effects, for which competition authorities have not issued guidelines. The merger analysis focuses on competition and market entry; no other public-interest considerations are taken into account.

Regarding competition assessment, both unilateral and coordinated effects are analysed. The law requires competition authorities to review market shares to determine the effects of mergers. Indeed, COFECE employs market shares on a regular basis to determine the competitive pressure and relative size and strengths of competitors[119]. IFT considers that mergers that result in a market share below 35% are

https://www.cofece.mx/wp-content/uploads/2019/02/guia-0042015_not_concentraciones-DGC-VF1.pdf and http://www.ift.org.mx/sites/default/files/industria/temasrelevantes/9195/documentos/pift280617368.pdf

[119] Consequently, COFECE issued technical criteria to measure market concentration, based on market shares and the Herfindahl-Hirschman Index (HHI). Please note that HHI and its measures serve as an "aid to perform a first approach to the market structure", available at https://cofece.mx/wp-content/uploads/2017/11/criterios_tecnicos_para_medir_concentracin_del_mercado.pdf

less likely to represent a competition risk; nevertheless, it assesses mergers on a case-by-case analysis. Competition authorities use additional economic and qualitative tools to assess the competitive effects of mergers. Documents of the merging entities are key to determine the degree of competition between the parties.[120] COFECE analyses whether the merger confers the parties with the power (that may be the case where there high market shares are present) and the incentives to behave in an anticompetitive manner. Information from third parties is also relevant to determine the effects of mergers. Finally, statistical and econometric techniques have been employed to determine possible price effects on mergers: linear regressions (Delta/Aeromexico and Soriana/Comercial Mexicana) and Gross Upward Pricing Pressure Index (Coca Cola / Ades; Rea Magnet Wire / Xignux; Mabe/Electrolux). In line with international practices, a more economic-based analysis of mergers is desirable and the statistical and econometric tools should be further developed.

Involved parties may claim merger-specific efficiencies as a defence.[121] In that case, parties bear the burden of proof and must provide evidence that the efficiencies have the effect of increasing net consumer welfare. According to competition authorities, efficiencies include cost and price reductions, economies of scope, technology development, provided they offset competition risks.

Besides the efficiency defence, the LFCE provides for no other kind of defence, such as the failing-firm defence. They may, however, be taken into consideration on a case-by-case basis by competition authorities if raised and proven by the parties.[122]

The majority of notified mergers (approximately 95% for COFECE and 64% for IFT) are approved unconditionally within an average review period of 35 to 45 working days for COFECE and 35 to 98

[120] For example, internal documents have served as an important source of information in several cases, such as Rea/Xignux (blocked by COFECE), where documents showed that the parties were very close competitors and Liverpool/Suburbia (authorized), where COFECE could determine that the parties were not close competitors.

[121] Article 63, paragraph V of the LFCE.

[122] Defences in merger analysis must be distinguished from notification exceptions listed in Article 93 of the LFCE, such as internal restructuring, purely foreign transactions and speculative investment funds.

working days for IFT. Given the partial merger-control exemption for sectoral non-preponderant economic agents, IFT's reviews tend to focus on mergers among preponderant firms requiring in-depth analyses, which may explain lengthier merger reviews and the reduced number of unconditioned approved mergers.

Box 9. Examples of mergers: Grupo Televisa/Televisión Internacional and Walmart/Cornershop

Grupo Televisa/Televisión Internacional

In 2016, IFT authorised, subject to structural remedies, a transaction through which Grupo Televisa acquired control of Televisión Internacional (TVI) from Grupo Multimedios. Grupo Televisa and Grupo Multimedios are the biggest commercial television broadcasters in the north of Mexico.

IFT concluded that the transaction, and more precisely the participation of Grupo Multimedios in CVQ, a Grupo Televisa subsidiary, could lead to co-ordination effects in the markets where the companies were competing. The competition analysis revealed several risks of price and non-price co-ordinated effects in broadcast TV and radio services derived from the structural link between Grupo Televisa and Grupo Multimedios. The non-price effects included the possible detriment of variety and diversity of programming in broadcast television and radio services, and the possible reduction in the offer of advertising times.

In order to eliminate the anticompetitive effects, the merging parties proposed the complete acquisition of TVI by CVQ, and agreed that Grupo Multimedios would not retain shares or any kind of participation in CVQ, remaining completely separate. IFT's Board accepted the proposal of remedies.

Walmart/Cornershop

In June 2019, COFECE stopped Walmart's proposed USD 225 million acquisition of Cornershop. Operating in Mexico and Chile, Cornershop is an online platform for the delivery of a broad range of products, including food and beauty products from various competing retailers including Costco, Chedraui and Walmart. Walmart is the largest supermarket chain in Mexico where it operates 2 459 brick-

and-mortar stores and, according to COFECE, the merger would have given the company an online platform selling both its own and its competitors' goods. This would have enabled it to displace or block competitors from using Cornershop, to access competitors' business data, and to hinder the development of new platforms.

In Chile, where the parties notified on a voluntary basis (below Chilean thresholds), the proposed acquisition was approved by the Chilean competition authority, Fiscalía Nacional Económica (FNE), in January 2019 on the basis that it would not harm competition in the relevant markets in Chile. COFECE and FNE had informal talks about the transaction during the merger reviews in their respective countries.

Source: COFECE and IFT

The Board may resolve to impose one or more of the following conditions and remedies on mergers.

1. Authorisation or prohibition of certain actions
2. Divestment of specific assets, rights, partnership interest or stock in favour of third parties
3. Amendment or elimination of certain terms or conditions from the acts to be executed
4. Implementation of actions, such as granting access, that foster competitors' participation in the market;
5. Introduction of other measures to prevent hindering, impairing or prevention competition or free market access.

Remedies must be directly related and proportional to the adverse merger effects they aim to correct.

Under normal circumstances, most competition authorities have a strong preference for structural remedies, generally in the form of divestitures, because they are generally simple, relatively easy to enforce, and definitive in terms of their impact on the market. On average, one to eight notified mergers a year are subject to conditions and remedies. Examples of mergers approved with structural remedies include Soriana/Controladora Comercial Mexicana (CCM) and Bayer/Monsanto mergers (see Box 10) and Televisa/TVI and Disney/Fox.

Box 10. Mergers of ChemChina and Syngenta, Dow Chemical Company and DuPont de Nemours, and Bayer and Monsanto

ChemChina and Syngenta

In April 2017, COFECE identified problematic market overlaps between ChemChina and Syngenta in the production and distribution of agrochemical products. According to its investigation, ChemChina's takeover of Syngenta would have significantly hindered effective competition in two specific markets: 1) selective herbicides for weed control (broad spectrum, broadleaf weeds, and grass weeds) in sugar-cane cultivation; and 2) contact fungicides for several crops.

Had the transaction been approved with no remedies, ChemChina's market position would have been strengthened in several markets for herbicides and fungicides, and given it a dominant position. The original transaction would have implied a significant reduction of alternatives available to farmers to protect their crops from harmful pests, as well as price increases in some herbicides and fungicides, raising costs. Remedies included the divestment of five Syngenta products to a third independent party.

Dow Chemical Company and DuPont de Nemours

In June 2017, COFECE approved the merger of Dow Chemical Company and DuPont de Nemours, upon the condition of the divestiture of Dow's acid copolymer and ionomer business, and DuPont's foliar insecticide business. COFECE considered that the transaction without conditions would have resulted in a company with an overly high market share, considerably widening the gap with its closest competitor. This would have seen a reduction of competitive pressure that could have resulted in price increase.

Bayer and Monsanto

In 2018, COFECE's in-depth analysis of the prospective effects of Bayer's acquisition of Monsanto concluded that the original transaction would have resulted in Bayer becoming the sole supplier of genetically modified cotton seeds in Mexico. As a result of the transaction, Bayer would have also gained significant market share in the markets for multiple crops, such as onion, cucumber, tomato, watermelon, melon and lettuce, as well as for non-selective herbicides.

These markets featured high entry barriers in the form of costly research and development, burdensome legal frameworks and high investments. COFECE conditioned approval of the merger upon the divestment of the genetically modified cotton-seed business, the vegetable-seed business and certain non-selective herbicides to BASF, which was already active in the production and sale of certain agrochemical products.

Source: COFECE

COFECE carries out ex post impact assessment of certain mergers and the effectiveness of certain remedies.[123] Neither COFECE nor IFT have done so for hybrid mergers and dual-remedy sets.

Decisions imposing remedies may include specific modalities and time frame for compliance. Monitoring of compliance takes place in approximately 45% of mergers subject to remedies.

In practice, merger remedies prove hard to enforce in Mexico, in particular when it comes to national mergers. The main hurdle to enforcement lies in the parties' right to challenge Boards' merger decisions and remedies before the courts. Parties do not hesitate to file amparos, even when they have agreed to such remedies during the merger procedure. The courts have already overturned a merger decision, Scribe/Biopapel[124], on the grounds that the remedies proposed by the parties and accepted by the Board to allow the merger were unconstitutional, as they obliged the companies to give up on a

[123] For an For an ex post evaluation of a merger in the chemical industry. see: www.cofece.mx/cofece/phocadownload/PlaneacionE/evexpost_industriaquimica.pdf. The selection of the cases subject to an ex post assessment is carried out by COFECE's working group for the evaluation of competition policy on the basis of the following criteria: 1) between two to four years have passed since the issuance of a decision; 2) there is enough available information on prices and the quantities commercialised, and other variables relevant for the analysis; 3) the market should be part of an economic sector with the following features: generalised consumption; great effect on economic growth; horizontal impact on other sector; prone to collusion or abuse of dominance; and an impact on poorest households. For more info, see: www.cofece.mx/cofece/images/informes/metodologia_ev_expost_cofece.pdf

[124] See, https://www.cofece.mx/images/comunicados/Boletines_2015/vf2_COFECE-015-2015.pdf

right recognised by the Mexican Trade Law (Ley de Comercio Exterior).[125] As a result, COFECE and IFT endeavour to get remedies completed or implemented before the Board takes its decision so to avoid remedies being ordered by a final decision and therefore appealable.

8.5. Ex post merger review

To start an investigation into a non-notified merger, such as one that has been gun-jumped or is below thresholds, the IA must show an objective cause indicating or suggesting unlawfulness. Unlawful gun-jumped mergers can be investigated for ten years following their execution;[126] below-threshold mergers can be investigated for one year from their execution. IAs find it difficult to detect the latter because one year from execution is too short a time period for the merger to show adverse competition impacts and for competition authorities' market-intelligence detection tools to be able to raise red flags.

From 2014 to 2018, IFT has reviewed six gun-jumped mergers. During the same period, COFECE has reviewed ex post two gun-jumped mergers and two unlawful concentrations.

The substantive analysis of unlawful mergers at COFECE is carried out by the IA in line with the principles and criteria mentioned above (see Section 8.4), followed by a DPR submitted to the TS.

IFT adopts a different substantive analysis in relation to gun-jumped unlawful horizontal mergers. If the merger requires prior authorisation and has not been notified, then IFT considers that the merger has not been executed. If it considers it unlawful, it therefore investigates it as an absolute practice. As absolute practices are intrinsically illegal, IFT considers that this method of dealing with horizontal unlawful mergers is more expeditious that the substantive analysis provided in Section 8.4.

The sanction for gun jumping consists of fines of up to 5% of a party's annual domestic turnover. This is a procedural wrongdoing examined by the TS or ECU merger unit.

[125] Review appeals 153/2016 and 277/2018 in relation to Scribe/Biopapel and Soriana/Chedraui mergers, respectively.

[126] Article 137 of the LFCE.

Unlawful mergers can be subject to a number of sanctions: a fine of up to 8% of annual domestic turnover for liable economic agents, whether entities or individuals; an order to cease or correct the merger; partial or total divestiture; ineligibility of board members, directors, executives and agents; fines on facilitators and public notaries (see Section 6.3). Should the parties wish to obtain fine reductions or exemption, they may submit commitment proposals as described in Section 7.2.3. Most unlawful-merger investigations are closed with commitments.

Whether remedies are imposed or commitments are admitted, their determination and implementation may take place years after the merger has been executed. Remedies such a de-concentration undoing the merger have never been imposed, but structural commitments have been proposed by the parties and accepted by the Board of COFECE, such as in the Marzam and Moench Coöperatif merger (see Box 11).

Box 11. Structural commitments imposed after the investigation of the unlawful merger of Marzam with Nadro, financed by Moench Coöperatif

In June 2015, Dutch fund Moench Coöperatif and entrepreneur Luis Doporto Alejandre bought Casa Marzam, a Mexican pharmaceutical distributor. In April 2016, newspaper articles revealed that Moench's role in the complex transaction was the result of a loan provided by the wife of Pablo Escandon, the majority shareholder and chairman of Nadro, the country's leading pharmaceutical distributor and a competitor of Marzam. COFECE's IA initiated an ex officio investigation to determine the exact nature of this possible undeclared and unlawful concentration of Nadro and Marzam, as it could have had the purpose or effect of hindering, diminishing, harming or obstructing competition and free market access.

The Board agreed to close the investigation subject to compliance with a modified version of the commitments presented by Moench and Luis Doporto Alejandre. Certain required Moench and Doporto to report and prove to COFECE (within a set time frame) that all connections between Nadro and Marzam had been eliminated.

Source: COFECE, www.cofece.mx/wp-content/uploads/2018/10/COFECE-044-2018-English.pdf.

8.6. Recommendations

8.6.1. Ex post merger review

Merger control may take place ex ante and ex post in Mexico up until one year from the closing of below-threshold mergers and up until ten years from the closing of gun-jumping mergers.

- Regarding below-threshold mergers, voluntary notification of mergers that could raise concerns should be encouraged to foster detection and prevention. To guide economic agents, Mexico should issue guidance on when a below-threshold merger may be problematic and should be voluntarily notified.
- For gun-jumped mergers, IFT should assess whether it is warranted to have two teams look into such mergers: the ECU to establish gun jumping and the IA to assess its effects.[127]

8.6.2. Sectoral exemption

As previously recommended by the OECD, transitory provision 9 of the LFTR excluding from merger control transactions by non-preponderant players in the telecommunications and broadcasting sector should be eliminated. The transitory exemption has been identified as unnecessary and unsuited to protect competition in the telecommunications and broadcasting markets. The legal framework should allow IFT to exercise its authority in all cases, clearing transactions quickly when they are unproblematic and thoroughly reviewing and eventually blocking or remedying those raising competitive concerns. (OECD, 2017[27])

8.6.3. Mergers in the financial sector

COFECE should streamline its work on financial mergers to avoid duplicating efforts by issuing both a merger resolution under the LFCE and a separate opinion to the CNSF. The CNSF could take account of

[127] On 1 August 2019, COFECE reformed Article 133 of its regulatory provisions to allow the IA to review both aspects of unlawful gun-jumped mergers: the infringement of the obligation to notify and the possible anticompetitive effects of the concentration.

COFECE's views by looking at COFECE's merger decision or a dedicated summary and so avoid issuing a separate opinion.

8.6.4. Value-based notification threshold

Mexico should put in practice its transaction value-based notification thresholds, especially in new markets characterised by zero-turnover but high transaction value (e.g. Facebook andWhatsApp). COFECE and IFT should assess and consider issuing guidelines on value calculation and allocation for merger control purposes.

8.6.5. Merger review procedure

Merger control effectiveness and legal certainty would benefit from setting two distinct procedural phases (standard and in-depth), depending on the complexity, concerns and need for remedies arising from the proposed merger.

In addition, the simplified procedure should remain available and effectively applicable for the treatment of non-problematic mergers. To that end, the standard of proof required for parties to benefit from this procedure should be relaxed and less restrictive than the information required in a normal merger notification.

Mexico should establish formal channels for legitimate third parties to express their views during the merger review process.

8.6.6. Information gathering methods

Current information gathering methods should improve:

- Where mergers are problematic, competition authorities should consider carrying out market testing of possible remedies, consumer surveys and/or economic studies (especially in fast moving or new markets).
- RFI should be more focused and avoid unnecessary request for information. To better design and scope RFI, the merger unit should engage in discussions with recipients regarding the relevance and availability of the information as well as the adequacy of deadlines.

8.6.7. Substantive analysis of mergers

IFT and COFECE should consider further developing the economic analysis of mergers where new tools, such as statistical and econometric analysis, are applied in addition to considering market shares.

IFT and COFECE should use the same substantive analysis to assess gun-jumped unlawful mergers, for which common guidelines should be developed.

Chapter 9. Competition advocacy

Competition advocacy is widely defined as any pro-competition effort except competition enforcement. In Mexico, the scope of competition enforcement is wider than in most jurisdictions, as it includes both traditional enforcement areas such as restrictive agreements, unilateral conducts and mergers (Chapter 7. and Chapter 8.) and so-called incremental powers that address competition barriers and essential facilities (Chapter 5.).

Both COFECE and IFT hold advocacy powers. According to Article 12, XXII of the LFCE, competition authorities must issue soft law (directives, guides, guidelines and technical criteria) on the following topics: mergers; investigations; exemption and fine reduction benefits; interim measures regarding monopolistic practices or probable unlawful concentrations; determination and granting of guaranties to suspend the application of injunctive measures; request for dismissal of criminal proceedings in the cases referred to in the Federal Criminal Code and those necessary for the effective compliance of the law. Soft law must be subject to a public consultation process regulated by the LFCE.

In addition, under article 12, XX and XXI of the LFCE, competition authorities have the powers to: 1) guarantee and promote free market access and competition;[128] 2) issue non-binding opinions on public policies, regulatory and legislative proposals, administrative acts, international treaties, as well as on tenders, concessions and permits; 3) promote outreach of competition principles;[129] 4) perform or order studies, research projects and general reports on topics related to free market access and competition;[130] 5) enter into co-operation and

[128] Article 12, paragraphs XX and XXI of the LFCE.

[129] Article 12, paragraphs XII to XVI and XVII to XIX, and Article 98 of the LFCE.

[130] Article 12, paragraph XXIII of the LFCE.

coordination agreements;[131] and 6) issue annual work programs and quarterly reports.[132]

Competition culture in Mexico has improved since the 2013 constitutional reform. Advocacy initiatives developed by the competition authorities have broadly contributed to raising awareness about competition law among companies.

COFECE and IFT have been actively advocating for competition; IFT's competition advocacy has mostly develop around its regulatory functions.

According to Regulatory Vision for 2019-2023, IFT will engage more actively with public authorities, civil and non-profit organizations, regulatory international organisations and citizens to discuss the regulatory and competition challenges posed by the development of the digital economy. Competition advocacy is one of COFECE's priorities as set out in its 2018-2021 and 2014-2017 Strategic Plans. Advocacy objectives and activities are further articulated in COFECE's annual plans and the 2015 publication Working Together for a Competition Culture.[133] COFECE's advocacy initiatives and their dedicated workforce are illustrated in Table 14.[134]

Table 14. Number of COFECE's staff dedicated to competition advocacy

Advocacy initiative	Dedicated staff (2018)
Market studies	15
Competition promotion	8
Social communications	7
Regulatory assessments	6
International affairs	5
Total	41

Source: COFECE

[131] Article 12, paragraph IV of the LFCE.

[132] Article 12, paragraph XXV of the LFCE.

[133] See, https://www.cofece.mx/cofece/ingles/attachments/article/38/Working_together_for_a_competition_culture.pdf

[134] IFT does not have figures indicating budget and resources dedicated to advocacy.

Between 2014 and 2018, COFECE's advocacy initiatives have been numerous and multi-faceted.

- **Legislation and regulation**. Two publications and 20 training sessions on competition assessment of legal reforms and draft legislation; participation in nine legislative debates in Congress; 50 opinions on public policies and regulations.[135]
- **Inter-institutional**. COFECE is a member of four inter-institutional groups;[136] two publications and 19 training sessions on public procurement; three competition forums with the judiciary; a digital storybook for federal and state education authorities.
- **Market studies**. Four sectoral or market studies on: the federal passenger transportation sector; expired-patent drug markets; the agro-food sector; and the financial sector.
- **Private sector**. Five workshop and 118 presentations and five workshops with practitioners and the private sector; 10 guidelines and information documents for the private sector.
- **Public awareness**. A new website (www.cofece.mx) including 81 videos,[137] 49 infographics; 9 comics and 31 advocacy papers by COFECE, such as Transition to Competitive Retail Gasoline and Diesel Markets and Transition Towards Competitive Energy Markets: Gas LP; nine public competition forums; two studies about competition awareness (Competition Alliance 2015) and competition perception (McKinsey 2017).

[135] This number refers to opinions issued under the agreements between COFECE and CONAMER for the assessment of regulatory impact. They are available at: www.cofece.mx/conocenos/pleno/resoluciones-y-opiniones/.

[136] COFECE has a permanent seat and vote at the Foreign Trade Commission (COCEX), an multi-institutional technical consultation body chaired by the SE, where COFECE advises on foreign trade policy decisions. In 2018, COFECE also took part in a working group to update CompraNet, the Mexican e-procurement platform, and in the Advisory Group on Minimum Wages. COFECE also participates in the SE's Standardisation Committees.

[137] COFECE has its own YouTube channel at www.youtube.com/user/CFCEconomica/featured

- **Media**. 13 training sessions for journalists; 17 radio spots and seven TV spots; 243 press releases and 50 monthly reports.
- **Academia and research**. Competition courses in three universities; 65 competition research works as part of the competition awards; six research scholarships as part of COFECE-CONACYT scholarship grants; participation in the Interdisciplinary Programme of Competition and Regulation hosted by the Centre of Economic Research and Teaching (Centro de Investigación y Docencia Económicas, CIDE)
- **International**. Participation in 162 international events and 18 international workshops; member of OECD Competition Committee and Bureau; ICN Steering and Working Groups; Latin American Strategic Alliance for Competition; Inter-American Competition Alliance and United Nations Conference of Trade and Development (UNCTAD) Intergovernmental Group of Experts on Competition Law and Policy.

Since 2015, IFT has organised an annual public competition event on Challenges for Competition in the Telecom and Broadcasting Sectors at which experts and professionals gather to discuss different aspects of competition law and policy with a focus in telecommunications and broadcasting. In May 2019, IFT hosted an Asia-Pacific Economic Co-operation (APEC) workshop on Competition Policy for Online Platforms in the APEC Region, which resulted in the publication of an electronic report outlining recommendations for the improvement of competition assessment of online platforms.[138]

The SE has also played an important role in competition advocacy. Besides the studies referred to in Table 3, the SE together with the OECD has organised three editions of the Competition and Regulation Forum; capacity building workshops for specialised judges and reports on "The Resolution of Competition Cases by Generalist Courts, Stocktaking of International Experiences" (OECD, 2016[29]), "Individual and Collective Private Enforcement of Competition Law: Insights for Mexico" (OECD, 2018[30]) and "The Divestiture of Assets as a Competition Remedy: Stocktaking of International Experiences" (OECD, 2019[31]).

[138] See, https://www.apec.org/Publications/2019/08/Competition-Policy-for-Regulating-Online-Platforms-in-the-APEC-Region

Below, the report focuses on four advocacy categories: Guidelines (Competition Soft Law), market studies, opinions on draft and existing regulation, and compliance and awareness.

9.1. Guidelines (competition soft law)

To date, each Competition Authority has developed its own set of soft law mostly for procedural issues and not so many for substantive matters.

Table 15. Soft competition law

	COFECE	IFT
Substantive soft law		
Concentration. Technical criteria for the calculation of a quantitative index to measure market concentration	Adopted in 2015	Adopted in 2016
Information exchange. Guide on information exchange among economic agents	Adopted in 2015	
Procedural soft law		
Mergers. Guidelines on the notification of concentration and on notification by electronic means	Adopted in 2015; Adopted in 2017	
Mergers. Guide on the control of concentrations in the telecommunications and broadcasting sectors		Adopted in 2017
Leniency. Guide on the immunity and leniency program	Adopted in 2015	Adopted in 2017
Commitments. Guide on immunity and reduction of fines in relative practices and unlawful concentrations	Adopted in 2015	Adopted in 2019
Complaints. Guidelines on filing of complaints with the IA; Guidelines on filing of complaints through electronic means regarding monopolistic practices and unlawful concentrations with the IA		Adopted in 2017 and 2018
Injunctions. Technical criteria for setting preliminary measures and guarantees	Adopted in 2015	
Investigations. Guide for the initiation of investigations for monopolistic practices	Adopted in 2015	
Investigations. Guide on the investigation procedure for absolute practices; Guide on investigations for relative practices and illicit mergers	Adopted in 2015; Adopted in 2015	
Resolutions. Guidelines on the publication of resolutions by the board	Adopted in 2019	
Criminal powers. Technical criteria for the dismissal of a criminal procedure in cases referred to in the Federal Criminal Code	Adopted in 2016	
Incremental powers. Guide on requests for market investigations under article 94 of the LFCE		Adopted in 2018

Source: COFECE and IFT.

Moreover, IFT issues soft law on ex ante regulatory issues that include competition aspects. These have included, for example, guidelines on the commercialisation of mobile services by virtual mobile operators and the terms under which the preponderant economic agent or agent with substantial power in the telecommunications sector should enter into agreements with Internet service providers to exchange internal traffic more efficiently and at lower cost.

Soft competition law is welcomed by all stakeholders who recognise it as a useful tool to better understand and comply with competition law. It plays an important role in educating economic agents and practitioners, in building effective competition policy and in improving legal certainty. Indeed, the majority of stakeholders consulted by OECD expressed a wish for more soft law. There is particular interest in substantive guidance on the following issues.

- **Relative practices**. Analytical standards and technical criteria to assess anti-competitive effects and efficiencies of unilateral conducts and non-horizontal agreements; and determination of possible antitrust safe harbours and *de minimis* rules.
- **Market definition**. Guidance on the delineation of relevant markets, including traditional and digital sectors.[139]
- **Joint ventures**. Criteria to establish when a joint venture falls under merger control or antitrust enforcement, and guidelines on when horizontal joint ventures may be considered as unlawful conduct. (see Section 7.1.2)
- **Leniency.** Criteria clarifying the admissibility of leniency beneficiaries, the benefits available and their conditions; and further criteria on the possibility and consequences of leniency dismissals or disqualifications. COFECE is currently working on regulatory provisions that were subject to public

[139] IFT's annual work plans (AWP) scheduled the issuance of guidelines on relevant maket definition and effective competition criteria in 2016, 2017 and 2018. This was never done and left it out of its 2019 AWP. It has also been a need voiced by IFT' consultative council. AWP 2016 www.ift.org.mx/sites/default/files/pat-2016-acc.pdf (P. 19, nr. 3), AWP 2017 www.ift.org.mx/sites/default/files/contenidogeneral/transparencia/pat2017vf_0.pdf (P. 26, nr 4), AWP 2018 www.ift.org.mx/sites/default/files/contenidogeneral/programa-anual-de-trabajo-e-informe-de-actividades-del-ift/pat2018.pdf (P. 18, nr 2).

consultation at the moment of drafting. Contrary to soft law, regulatory provisions are legally binding provisions and, as such, contribute to further increase legal certainty.

- **Sanctions**. Guidelines on transparent and consistent criteria on calculating pecuniary and non-pecuniary sanctions, such as disqualification.
- **Legal privilege**. Lack of clarity about legal privilege in the context of competition investigations is a widely shared concern.[140] On 30 September 2019, COFECE published regulatory provisions (with legally binding effects) indicating how it will handle client-attorney privilege information.

COFECE and IFT have developed and may further develop parallel soft law on similar subjects. COFECE is required to seek IFT's opinion in relation to soft law and IFT consults COFECE systematically regarding all draft soft law.[141] These opinions are, however, non-binding and although substantial inconsistencies have not been reported, agencies should pay attention and avoid risks of conflicting soft law that could negatively impact legal certainty and costs of compliance for economic agents.

9.2. Market studies

Mexico's competition policy distinguishes between market studies as an advocacy tool, which are examined in this section, and market investigations as part of competition authorities' incremental powers (see Chapter 5.). Paragraph XXIII of Article 12 of the LFCE grants competition authorities the power to carry out or order the preparation of market studies with proposals for liberalisation, deregulation or modification of regulations when detecting risks to the process of free market participation and economic competition, as well as identifying a competition problem. The LFCE does not establish the content of a

[140] See OECD 2018 Paper and Roundtable on *Treatment of legally privileged information in competition proceedings* and IFT's contribution at: https://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm

[141] Article 138 of the LFCE.

market study or how one should be conducted, leaving authorities a wide margin of discretion.[142]

9.2.1. COFECE

Market studies are defined by COFECE as an assessment of the functioning of markets, any causes of distortions in terms of efficiency, competition and consumer welfare, which is then followed by proposals for improvement. To this end, market studies scrutinise market features, public interventions (policies and regulation) and economic agents' behaviours.[143]

COFECE decides which markets and sector will be subject to a study on the basis of priorities identified in its strategic plans (finance, health, energy, transport, agro-food and public procurement). COFECE may also decide to conduct a market study on the basis of ex officio research identifying for example a non-competitive market, specific suggestions from government or other regulatory authorities, business' concerns, or complaints from individual consumers and consumer associations.

The General Directorate for Economic Studies is in charge of conducting market studies. The process is inspired by the OECD's Market Studies Guide for Competition Authorities 2018 and consists of the following stages: 1) prelaunch and scoping; 2) launch of the market study; 3) information collection; 4) analysis and preliminary findings; 5) development of recommendations; 6) publishing of market study findings and report; 7) follow-up and potential ex post evaluation.[144] (OECD, 2018[32]) Competition authorities may seek

[142] For an overview of the evolution of market studies in Mexico, see the OECD report, *Competition and Market Studies in Latin America: The Case of Chile, Colombia, Costa Rica, Mexico, Panama and Peru*, OECD Publishing, Paris, 2015, www.oecd.org/daf/competition/competition-and-market-studies-in-latin-america2015.pdf

[143] The full COFECE definition of "market study" was included in its 2104 report, *Trabajo de Investigación y Recomendaciones sobre las Condiciones de Competencia en el Sector Financiero y sus Mercados* (*Investigation and Recommendations on Conditions of Competition in the Financial Sector and Its Markets*). It can be found on page 12 of the English executive summary at: www.cofece.mx/cofece/images/Estudios/ExecutiveSummary_10022015.pdf

[144] OECD's *Market Studies Guide for Competition Authorities 2018*, www.oecd.org/daf/competition/OECD-Market-Studies-Guide-for-

information from any public or private source,[145] request information and conduct interrogations. Refusal to provide the requested information is subject to penalties. In certain markets, access to sufficient and adequate information may be challenging for COFECE, while a number of stakeholders consider requests for information extensive or excessive. Access to data is not an issue for IFT because as a sector regulator it gathers a large amount about the telecommunications and broadcasting sectors.

The results of market studies frequently include direct recommendations to apply consumer law, launch campaigns to educate consumers or companies, promote voluntary compliance by companies and recommendations to the government to reform regulation or public policies.

Since the 2013 reform, COFECE has completed four market studies.

1. A study of the **federal passenger transportation sector** (2018) identified regulations and regulators' interventions in the federal passenger transportation sector that hinder the development of new business models and favour market segmentation; it issues recommendations for reforming the legal framework and mitigating competition obstacles.[146]
2. A study of the **market for expired-patent drugs** (2016) investigated prices and market entry of generic drugs after the expiration of the patent, identified a number of market failures of off-patent drug penetration and included pro-competitive recommendations.[147]

Competition-Authorities-2018.pdf; COFECE's contribution OECD Working Party No. 3 on Co-operation and Enforcement, Methodologies for Conducting Market Studies – Note by Mexico (COFECE), www.cofece.mx/wp-content/uploads/2017/11/2017_metodologias-estudios-de-mercado.pdf.

[145] Articles 12, 73 and 119 of the LFCE.

[146] The Study was published in 2019. See, https://www.cofece.mx/wp-content/uploads/2019/04/Estudiocompetenciaautotransportefederalpasajeros.pdf

[147] The year-long study, Study on Free Market and Competition in the Expired-patent Drug Markets in Mexico, was carried out during 2016 and

3. A study of the **agro-food sector (**2014-2015) identified a lack of public information for the analysis of supply chains, as well as burdensome regulations and public interventions at different levels of government; it contained recommendations for market access, efficiencies, better competition conditions and regulation.[148]

4. A study on the **financial sector and markets** (2014) made recommendations to address barriers to infrastructure and networks, to improve access to information, to reduce the risks of co-ordinated anticompetitive effects and to monitor markets for possible competition enforcement actions.[149]

While any recommendations by competition authorities in market studies are not binding, COFECE believes that studies are a useful advocacy tool, as they notify relevant authorities and stakeholders of recommendations and widely publicise COFECE's expert analysis and conclusions. They also serve to create communication channels with other public entities. In addition, market studies may support competition enforcement, such as market investigations (incremental powers) or antitrust investigation into absolute or relative practices.

Ex post evaluation of market studies could give COFECE insights into the relevance, impact, benefits and awareness of its analysis and recommendations, as well as supporting the optimal design of future market studies, processes and tools.[150] As most Mexican market

published in 2017, www.cofece.mx/wp-content/uploads/2017/11/Studies-drug-markets_vF-BAJA.pdf.

[148] The year-long study, Reporte Sobre las Condiciones de Competencia en el Sector Agroalimentario, was carried out during 2014 and 2015 and published in 2015, www.cofece.mx/cofece/images/Estudios/COFECE_reporte%20final-ok_SIN_RESUMEN_ALTA_RES-7enero.pdf#pdf

[149] The six-month investigation was carried out and the report, Trabajo de Investigación y Recomendaciones sobre las Condiciones de Competencia en el Sector Financiero y sus Mercados, published in 2014, www.cofece.mx/cofece/images/Estudios/COFECE_trabajo_investigacion_prot.pdf#pdf.%C2%A0

[150] The OECD's *Market Studies Guide for Competition Authorities 2018* (www.oecd.org/daf/competition/OECD-Market-Studies-Guide-for-Competition-Authorities-2018.pdf) and the 2016 *Reference Guide on Ex Post Evaluation of Competition Agencies' Enforcement Decision*

studies are recent, only the results of the 2014 study on the financial sector and markets have been evaluated. These show insufficient implementation of COFECE's 32 recommendations and a lack of improvement in competition in the sector.

9.2.2. IFT

In addition to IFT´s power to conduct market studies under the LFCE, paragraph XXXIX of Article 15 of the LFTR states that it may also conduct "broadcasting and telecommunications studies and research and develop draft updates for the relevant legal and administrative provisions";[151] these may cover some aspects of competition. IFT conducts regular market studies with a focus on its regulatory functions and interventions (see Table 16) using the LFTR as a legal basis. The use of market studies' conclusions to support competition enforcement has not been as decisive for IFT's enforcement functions as it has been for COFECE. Market studies, however, play a significant role in competition advocacy and in the support of evidence-based regulations.

(www.oecd.org/daf/competition/Ref-guide-expost-evaluation-2016web.pdf) are useful tools to that end.

[151] See, www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales//federaltelecommunicationsandbroadcastinglawmexico.pdf

Table 16. IFT's market studies scheduled in annual work plans (AWP)

Year	Study
AWP 2015	Comparative Analysis on the Evolution of Regulatory Policies in the Telecommunications and Broadcasting Sectors
	Study to Assess the Potential Impacts of Regulatory Policies in the Development, Progress and Competitiveness of the Mexican Economy
AWP 2016	Study on Barriers to Competition and Competitive Neutrality Caused by Public Entity Regulations and Procedures in the B&T Market Sectors
	Analysis of Results of the 2015 National Survey on Availability and Use of Information Technologies in Households, ENDUTIH
	Diagnosis and Recommendations to Improve Competition Conditions in Access to Passive Infrastructure and Right of Way in the Public Sector
AWP 2017	Annual Report on the Rights, Risks, Interests, Preferences, Trends or Patterns of Consumption of Telecommunications Service Users in 2016
	Regulating a Convergent Telecommunications Market
	Study on the Packaging and Discount of Telecommunications Services
AWP 2018	Diagnostic Studies of the Economic Conditions of the Services or Markets in the Telecommunications and Broadcasting Sectors
	Study to Identify Indigenous Peoples with Guaranteed Coverage of Mobile Networks
AWP 2019	Diagnostic Study on the Economic Conditions of Telecommunications & Broadcasting Services or Markets
	Ex Post Impact Analysis of the Must-Carry and Must-Offer Policy on the Pay-TV Market in Mexico
	Study with Recommendations to Foster Competition in Public Purchases of Telecommunications Services

Source: IFT Annual Work Plans.

IFT's Investigation Authority has issued two surveys, regarding information on the advertising consumption patterns of advertisers and media agencies of the Mexican radio broadcasting service. These surveys provide information on competitive conditions in the advertising market. Furthermore, in 2017, IFT´s IA developed detailed competition analysis on the following topics:

- Bundles and discounts of telecommunication fixed services (Estudio sobre Empaquetamiento y Descuento de los Servicios Fijos de Telecomunicaciones)[152]
- Broadcasting content and vertical integration of the telecommunications industry (Estudio sobre el mercado de

[152] See, www.ift.org.mx/sites/default/files/contenidogeneral/autoridad-investigadora/estudiosobreempaquetamientoydescuentodelosserviciosfijosdetelecomunicaciones-1.pdf

contenidos audiovisuales y relaciones verticales en la industria de las telecomunicaciones).[153]

Furthermore, to support IFT competition policy efforts, the IFT's Research Centre has also developed the studies presented in Table 17.

Table 17. IFT's Research Centre studies

Year	Study
2015	"Impact of Internet Services Providers (OTT) on the Structure of the Telecommunications Sector, Market Development and Socio-economic Progress"[1]
2015	"Application of Asymmetrical Termination Rates in the Mobile Telecommunications Service in Mexico"[2]
2015	"Spectrum Auctions in Latin American and Europe"[3]
2016	"Impact of the Modifications to the Number Portability Process Over the Mobile Telecommunications Service"[4]
2016	"Mobile Broadband: Effect of the Availability of Radio Spectrum Bands in the Penetration of the Service"[5]
2016	"Understanding Customer Satisfaction with Fixed Internet Services in Mexico: A Factor Analysis Using Polychoric Correlations"[6]
2017	"Municipal Availability of Telecommunications Infrastructure"[7]
2017	"A Prospective Analysis of the Demand for Inputs as a Consequence of the Increase in Telecommunication Services"[8]
2018	"Estimation of Implicit prices of Telecommunications Services Included in Packages in Mexico: The Case of Postpaid Mobile Services"[9]
2018	"Competition Law in Telecommunications"[10]
2018	"Impact of Competition on Network Investment in a Digital Environment"[11]

Notes:
[1] The original Spanish version is available at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/Impacto_de_las_Empresas_proveedoras_de_OTT.pdf.
[2] The original Spanish version can be found in Competition Policy Research, Communication Policy Research Latin America, 10:2016, pp.107-119.
[3] The original Spanish version can be found in Competition Policy Research, Communication Policy Research Latin America, 10:2016, pp.99-106.
[4] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/Impacto_de_las_modificaciones_en_el_proceso_de_Portabilidad.pdf.
[5] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/arturo-robles.pdf.
[6] The study can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/Understanding_costumer_satisfaction_with_fixed_internet_services_in_Mexico1.pdf.

[153] See http://www.ift.org.mx/sites/default/files/contenidogeneral/autoridad-investigadora/estudioversioncompletafinal-3.pdf.

[7] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/2017/Disponibilidad-Municipal-de-la-Infraestructura-de-Telecomunicaciones.pdf.
[8] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/2017/Analisis-prospectivo-de-la-demanda-de-insumos.pdf.
[9] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/2018/estimacionprecios-implicitos-telecom-mov-vf-2.pdf.
[10] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/2018/La_abogacia_de_la_competencia_en_las%20telecomunicaciones.pdf.
[11] The original Spanish version can be found at: http://centrodeestudios.ift.org.mx/documentos/publicaciones/2018/Impacto_de_la_competencia_sobre_la_inversión_en_redes.pdf.
Source: IFT.

SE has also taken the initiative to conduct studies. Some of them have been carried out with the support of the OECD including the pork meat market (OECD, 2019[33]) and chicken meat market (OECD, 2018[34])). Market studies conducted by the SE help with designing and shaping public policies under its mandate and so may extend beyond competition parameters. SE's market studies may also inform requests to COFECE to initiate a market investigation under Article 94 of the LFCE or an investigation of an absolute or relative practice.

According to SE, it selects sectors and markets for study according to (i) price index ponderation, (ii) household expenditure, and (iii) plan of work. Section 4.7 and Table 1 illustrate competition powers and initiatives taken by SE and its requests for co-operation with the OECD for markets studies in Mexico.

9.3. Opinions on draft and existing regulations

According to the World Economic Forum's Global Competitiveness Index 2017-2018, Mexico's burden of government regulation placed it 120 out of 137 countries and 94 for the efficiency of its legal framework in challenging regulations.[154] In addition, the OECD´s Product Market Regulation (PMR) Indicators show that Mexican markets are among the most heavily regulated compared to other OECD members. This makes identifying laws and regulations that

[154] For all WEF indicators on Mexico, see www3.weforum.org/docs/GCR2017-2018/03CountryProfiles/Standalone2-pagerprofiles/WEF_GCI_2017_2018_Profile_Mexico.pdf.

distort or restrict competition essential for Mexico. By adopting the Recommendation of the OECD Council on Competition Assessment (2009), Mexico committed to subjecting its public policies and regulations to competition-impact evaluation. (OECD, 2019[35])

9.3.1. COFECE

COFECE's involvement in the ex ante regulatory impact assessments (RIA) of draft secondary regulations conducted by CONAMER is addressed in Section 4.8. Since 2014, COFECE has reviewed 259 draft regulations and issued 25 opinions recommending changes to draft regulations within this framework.[155]

Besides its co-operation with CONAMER, COFECE is training and raising awareness among public authorities on competition assessment of law reforms and draft legislation.[156] In addition, COFECE has the power to issue opinions and suggest measures protecting and promoting free market access and economic competition in divestiture processes, tender procedures, allotments, concessions, permits, licences or similar actions provided for by laws, by resolutions or by executive orders of the federal executive branch.[157]

In 2018, the OECD supported Mexico as part of its co-operation agreement with the SE in conducting a thorough competition assessment of regulations in three key sectors of the Mexican economy: medicines (production, wholesale, retail); meat products (animal feed, animal husbandry, slaughterhouses, wholesale and retail sales) and gas (natural gas and liquid-petroleum gas). (OECD, 2018[36]) (OECD, 2019[37])

COFECE relies essentially on the LFCE as its general analytical framework for competition assessment of draft and existing regulations. COFECE also created a normateca centralising all legal and guidance references about competition and made it publicly

[155] Key ex ante recommendations were crafted by COFECE and led to regulatory improvements in areas as important as financial institutions and powdered milk (Mexico imports close to 8% of the world's milk powder, by volume)

[156] To date, since 2014, COFECE has issued two publications, undertaken 20 training sessions on competition in law reforms and draft legislation, and participated in nine legislative debates in Congress.

[157] Article 12, paragraph XIX, of the LFCE.

available on its website.[158] For more specific competition assessment tools, COFECE relies on the OECD Recommendation of the OECD Council on Competition Assessment (OECD, 2019[35]) and the OECD Competition Assessment Toolkit.[159] It has also adopted a Guide for the Assessment of Regulation from a Competition Perspective (Guía para la Evaluación de la Regulación desde la Óptica de Competencia) which includes the principles set out in the OECD Competition Assessment Toolkit.[160] COFECE considers four criteria when doing competition assessment: whether the regulation: 1) limits the number of companies; 2) inhibits companies' ability or aptitude to compete; 3) limits the options and information available to consumers; and 4) reduces companies' incentives to compete.

Two limitations restrict the scope and benefits of competition assessment under Mexico's current regime. The first is that COFECE's opinions are non-binding; recipient authorities are bound neither to comply nor to justify their reasons for not doing so, and COFECE has no direct standing to challenge them in court.[161] The second limitation is that CONAMER's jurisdiction covers national and federal regulations, whereas state and local regulations are more difficult to spot and not systematically subject to RIA and cumulative impact assessments (CIA).

Despite the non-binding effect of COFECE's opinions, according to the Commission's estimates, approximately 70% of its regulatory opinions have had a positive impact on regulation,[162] notably in key sectors such

[158] See, https://www.cofece.mx/publicaciones/normateca/

[159] See, https://www.oecd.org/competition/assessment-toolkit.htm

[160] www.cofece.mx/cofece/images/Promocion/Guia_Evaluacion_Regulacion_270516.pdf and https://www.cofece.mx/guia-para-la-evaluacion-de-la-regulacion-desde-la-optica-de-la-competencia/.

[161] Opinions pursuant to article 12, paragraphs XII to XVI of the LFCE.

[162] COFECE's estimate based on monitoring of regulatory impact.

as financial institutions and services,[163] airport services,[164] milk powder standards,[165] and transportation network companies (see Box 12).[166]

Box 12. COFECE regulatory opinion on transportation network companies

In 2015, COFECE issued an opinion on transportation network companies (empresas de redes de transporte, ERT), which are available through mobile platforms and apps and were emerging in Mexico. COFECE carried out a CIA of the then-existing legal framework and reviewed international practices in the field, and found that:

- ERT using innovation and new technologies offer potential competition and consumer benefits.
- ERT services through mobile apps solve two taxi-related competition issues, namely asymmetry of information and the risk of co-ordination.
- the then-existing local transport regulations were unsuited to ERTs.

COFECE recommended that:

- Mexico's legal framework includes this new category of transportation services.
- any regulation to that effect be limited to protecting public safety and users, including comprehensive coverage insurance and the examination of drivers' capabilities.
- barriers to competition to be avoided included limiting the number of providers; special vehicle or plate requirements; and tariff regulation.

The opinion helped to position the topic on the public agenda from a competition perspective and to guide certain local governments in their subsequent actions. This was the case of Mexico City and Puebla, and around 10 other states that updated their regulations for these services.

Source: (OECD, 2018[38]).

163 http://cofece.mx/CFCResoluciones/docs/Opiniones/V20/6/3953499.pdf

164 http://cofece.mx/CFCResoluciones/docs/Opiniones/V34/17/4156884.pdf

165 http://cofece.mx/CFCResoluciones/docs/Opiniones/V47/2/4348820.pdf

166 http://cofece.mx/CFCResoluciones/docs/Mercados%20Regulados/V6/16/2042252.pdf

9.3.2. IFT

Competition opinions and recommendations from the IFT on draft sectoral regulation are communicated internally to its regulatory branch both formally and informally. This is a practical solution since both bodies belong to the same entity, and follows the principles of administrative simplification. All departments of IFT's regulatory branch must ask for a competition opinion when necessary. This opinion is, then, annexed to the draft rule or regulation presented to the IFT's Board, which decides which elements of the competition assessment will be incorporated into its regulatory decisions. The IFT has also issued opinions in response to requests about compliance with the LFCE from other public entities or economic agents. These opinions have included:

- recommendations to carry out a public procurement procedure of mobile telecommunications services and handsets, requested by SE
- administrative provisions of general applications to allow telecom-service providers access to electrical infrastructure, requested by the Energy Regulatory Commission (CRE)
- the legal consequences of certain corporate legal actions, requested by the preponderant company in the telecommunications sector
- the legal treatment of a corporate spin-off, requested by the preponderant company in the telecommunications sector
- the interpretation and application of some aspects of the LFCE, requested by a satellite services company.

9.4. Compliance and awareness

A number of stakeholders have observed that competition awareness and culture among companies in Mexico is low. The World Economic Forum's Global Competitiveness Index 2017-2018 showed deteriorations from previous years in corporate ethics and responsibility in private institutions in Mexico, and ranked companies'

ethical behaviour in Mexico at 117 out of 137 countries.[167] In 2019, COFECE commissioned a report, Study and Analysis of Perception of Issues of Economic Competition and Labour of COFECE, from McKinsey; it reported that 90-96% of company executives had no or only a limited knowledge of competition rules and investigations.[168]

Building a culture of competition is the cornerstone of a successful market economy.[169] Strong competition institutions and competition-law enforcement contribute to competition compliance, corporate ethics, integrity and meritocracy. Competition advocacy is also a factor in encouraging conformity with the law. Companies and individuals that operate in environments where the value of competition is widely understood and appreciated, and in which competition laws are respected, are more likely to comply with those laws. (OECD, 2011[39])

COFECE has produced guidance and tools dedicated to fostering economic agents' compliance: a Competition Toolkit,[170] Recommendations to the Private Sector on Compliance,[171] a publication on SMEs and competition,[172] and a video entitled Why

[167] See, www3.weforum.org/docs/GCR2017-2018/03CountryProfiles/Standalone2-pagerprofiles/WEF_GCI_2017_2018_Profile_Mexico.pdf

[168] McKinsey&Company (2017). *Estudio y análisis de la percepción sobre temas de competencia económica y la labor de la Cofece*, www.cofece.mx/wp-content/uploads/2018/01/Estudio-labor-COFECE-17.pdf, pp.36-38.

[169] ICN Advocacy Working Group, "2015 Competition Culture Report", www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_CompetitionCultureReport2015.pdf

[170] https://cofece.mx/wp-content/uploads/2017/11/Herramientas_CompetenciaEconomica_vf250815.pdf#pdf.

[171] https://www.cofece.mx/recomendaciones-para-el-cumplimiento-de-la-lfce-dirigida-al-sector-privado/

[172] https://cofece.mx/wp-content/uploads/2017/11/PyMESyCompetenciaEconomica_250815_vf1.pdf#pdf.

Establish a Competition Compliance Programme?[173] Competition guidelines adopted by COFECE and IFT also promote corporate compliance,[174] COFECE organises workshops for businesses: 44 were held in 2018 with a focus on leniency; in 2019, the focus was placed on compliance programmes. COFECE also partners with procurement entities to promote compliance in public procurement, in line with the OECD instrument to fight bid rigging.[175]

Compliance programmes are not a mitigating or aggravating circumstance in the setting of fines. However, they may contribute to proving concrete efforts to cease and address competition wrongdoings; these can be a taken into consideration when decisions are taken on fine levels or commitments are admitted.[176]

According to the McKinsey survey, COFECE's advocacy actions for the private sector would benefit from adding: 1) concrete lines of action; 2) greater co-operation with other public authorities, government and sector regulators on compliance; and 3) greater preventive dialogue with the private sector. The last was reported to be restricted by Mexico's contact rules (reglas de contacto) that require all interviews or meetings between commissioners and economic agents to be recorded.[177]

While stakeholders generally praise COFECE's advocacy efforts, certain consider that compliance efforts are primarily triggered by enforcement actions against absolute and relative practices. They wish to see more cases, more sanctions and clearer enforcement resolutions and admit businesses need to receive strong signals to take compliance

[173] The video is available at: www.youtube.com/watch?v=sitE5na-eFw

[174] These include guidelines on leniency, merger control, exchange of information among competitors; see Section 9.1 on guidelines and soft law.

[175] The energy sector has been the focus of most of these public procurement compliance efforts.

[176] IO-005-2013 http://cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V259/1/4441693.pdf and DE-148-2008 http://cofece.mx/CFCResoluciones/docs/INVESTIGACIONES/V238/10/1617438.pdf

[177] See, https://cofece.mx/wp-content/uploads/2017/12/estatuto_organico_cofece_reforma_27-10-2017.pdf

actions. In addition, certain would like advocacy that focuses more on the benefits of competition for businesses and less on those for consumers, these might include level playing fields, lower transaction costs, lower barriers to entry, innovation and growth stimulus.

As part of its advocacy efforts, COFECE organises competitions with the winning project winning a prize and being published. The judging criteria focus on qualitative content (such as competition law and economics) and impactful and creative formats and visual design. Although open to the public, the majority of participants are from academia and the media. These awards have enabled COFECE to identify new competition obstacles, analytical tools and market specificities.

In line with IFT's Regulatory Vision of Telecommunications and Broadcasting 2019-2023, in which it commits to engage with stakeholders active in the digital economy, the institute organised a Workshop on Competition Policy in Digital Platforms in May 2019 for APEC member economies, to which stakeholders, regulators, academia and associations were invited to exchange points of view and common goals about the challenges of the digital era. IFT intends to organise advocacy events with local governments on the benefits of deploying telecommunications infrastructure, as well as capacity building and campaigns to promote the adoption of international and national best practices in the design and availability of local regulation.

COFECE promotes its activity in traditional and social media, through press releases, reporting on cases and opinions, participating in interviews and publishing videos. As COFECE has no advertising budget, it uses free airtime allocated to public institutions (12.5% of total media advertising airtime is offered to the public sector, of which 20% goes to autonomous bodies). COFECE has also deployed substantive and creative efforts to promote competition through a variety of media, including videos, infographics and comics.[178] COFECE has conducted surveys of competition knowledge levels among various groups of society, in order to better design advocacy priorities.[179] According to the survey results, COFECE advocacy

[178] See, https://www.cofece.mx/publicaciones/multimedia/

[179] McKinsey&Company (2017). *Estudio y análisis de la percepción sobre temas de competencia económica y la labor de la Cofece*, www.cofece.mx/wp-content/uploads/2018/01/Estudio-labor-COFECE-17.pdf

efforts have had more success with specialised groups (such as lawyers) than with the general public. COFECE's Strategic Plan 2018-2021 establishes the need and willingness to place competition more firmly on the public agenda.

To assess the effectiveness of its advocacy initiatives, COFECE has elaborated and is implementing an institutional performance evaluation system, including outreach performance indicators.

The IFT's communication efforts have focused on informing the media and the general public about the Institute's competition decisions and actions. It employs different formats and materials to achieve greater reach among the different audiences and users of the services. These resources include press releases, notes, videos, infographics, newsletters, an institutional magazine (IFT Gazette), a microsite on the Institute's website, dissemination of materials in the accounts of institutional social networks, webinars, thematic campaigns and informational capsules, forums and events. With these resources, the IFT informs users about competition, its initiatives in this area and explains relevant concepts such as concentration, substantial market power, preponderance and functional separation.

9.5. Recommendations

9.5.1. General on competition advocacy

COFECE is highly recognised for its extremely proactive and diversified advocacy policy and actions. Nevertheless, stakeholders have expressed the view that the Commission should focus less on advocacy and invest more resources in competition enforcement, which is seen as a more effective way of ensuring business compliance with competition law. Advocacy efforts will remain an important complement to competition enforcement, reaching wider audiences, while contributing to prevention and detection. An ex post assessment of COFECE's advocacy efforts would improve its understanding of which initiatives have worked best, focus on those and drop less successful actions, which would ensure more impactful initiatives and efficient resource allocation.

Alongside its extensive advocacy efforts to promote competitive ex ante regulation, IFT should strengthen its competition-advocacy efforts towards the business community and consumers, including through the adoption of a clear competition advocacy strategy.

9.5.2. Guidelines

Besides the technical criteria that COFECE has made public in relation to client-attorney privileged information, Mexico could consider adopting regulation on the treatment of this kind of information in competition cases.

COFECE and IFT should consider adopting guidelines on substantive issues, such as market definition, analytical standards and technical criteria to assess anti-competitive effects and efficiencies of unilateral conducts and non-horizontal agreements, guidelines on whether joint ventures fall under merger control or antitrust enforcement and when joint ventures may be considered unlawful collaboration. Guidelines should further be adopted on the calculation of fines and criteria applicable to non-pecuniary sanctions. Soft law on those and other matters would foster competition compliance and law enforcement. The absence of case law on these issues should not be an impediment to the adoption of soft law. Guidelines support competition authorities in dealing with unprecedented or complex competition issues, triggering new competition enforcement decisions that could eventually become case law when reviewed by the courts. In addition, soft law has the advantage of being easily adapted to new competition findings, analytical evolutions and case law. Substantive soft law further raises awareness among businesses and may foster compliance efforts.

Co-operation and consultation between COFECE and IFT on soft-law projects should be made more systematic. This will result in more consistent and streamlined soft law and in more efficient antitrust enforcement.

9.5.3. Market studies

Competition authorities should adopt guidelines for stakeholders and the general public on market studies, what they are and are not, their benefits and possible outcomes, including a contact point for follow-up and reporting. The government of Mexico should commit to responding publicly to any recommendations addressed to it, within a set timeline. Its response should clearly state for each recommendation whether and when it intends to adopt it and if not, explain the reasons why. (OECD, 2015[40])

COFECE should scope and tailor information requests to ensure relevance, effectiveness and manageability on recipients' end.

9.5.4. Opinions regarding draft or existing regulation

To optimise the impact of COFECE opinions and make Congress and the regulator accountable for their decisions, both should commit to take into consideration COFECE's opinions on regulation and inform COFECE of the reasons why they have departed from its recommendation. In addition, COFECE should actively monitor, with sufficient resources and co-operation, the impact of its CIA opinions.

Chapter 10. Judicial review

The 2013 reform established specialised courts in competition, telecommunications and broadcasting. Prior to this reform, CFC's decisions were reviewed at first instance by its Board of Commissioners followed by the possibility of an appeal by involved parties. Further, parties could appeal the competition authority's decisions before two different instances: a federal district court, to challenge a decision's legality or constitutionality, and the federal tax and administrative court, to challenge decisions imposing financial penalties. (OECD, 2017[41]) Within the federal judiciary, administrative district courts provide the first instance of judicial review of decisions taken by a competition agency; their judgements are then subject to appeal before federal circuit courts. If questions of constitutionality are involved, the federal circuit courts then submit the case to the Supreme Court (Suprema Corte de Justicia de la Nación, SCJN) for a judgement. Decisions by the federal tax and administrative court can be subject to appeal before the superior administrative court and, if the appeal is dismissed, before a federal circuit court. (OECD, 2011[42])

Until the 2013 reform, appeals suspended the implementation of a challenged decision until a court had issued a ruling. As a result, legal proceedings were widely perceived to create unjustified obstacles to effective competition enforcement since they granted economic agents many opportunities to begin time-consuming litigation in the context of a competition case.

The parties could appeal CFC's acts or decisions through administrative appeals or amparos. These are a procedure provided for in Articles 103 and 107 of the Mexican Constitution and give individuals and private legal persons the right to contest an act of a public authority that violates their fundamental rights.

In the context of competition law, amparos were used to appeal not only final decisions, but also preliminary and intermediate actions and

decisions, such as dawn raids, information requests, and the issuance of a statement of objections. This greatly hindered the internal processes of CFC and significantly slowed competition-enforcement procedures. (OECD, 2011[43]) Furthermore, it was a common practice of lawyers to ask for an interim suspension of the authority's decision while amparos were resolved, suspending the effects of COFECE's decisions (OECD, 2017[41]).

Another common pre-reform issue was that judicial reviews focused heavily on procedural grounds, and only to a lesser extent on substantial matters. As district and circuit courts are courts of general jurisdiction in administrative matters, only a few judges were able to conduct or pursue in-depth reviews of competition cases (OECD, 2011[42]; OECD, 2017[41]).

It was in the light of these widely acknowledged issues that a number of reforms were adopted. A first reform in 2011 provided that specialist competition-law courts should review decisions taken by the competition authority, and eliminated the possibility of challenging the authority's decisions before the federal tax and administrative court.[180] Specialised courts were not actually created until the 2013 Reform.

In September 2013, the Federal Judicature Council created two specialised district judges and two specialised collegiate circuit courts, each comprised of three judges, known as magistrates.[181] While based

[180] The reform was published in the DOF on 10 May 2011.

[181] See the General Agreement 22/2013 of the Board of the Federal Judicature Council, relating to the termination of duties of the Fourth and Fifth District Courts of the First Region's Auxiliary Centre and their transformation into First and Second District Courts on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications, based at the Federal District and with territorial jurisdiction across the Republic; relating to the termination of duties of the Second and Third Circuit Collegiate Courts of the First Region's Auxiliary Centre and their transformation into First and Second Collegiate Circuit Courts on Administrative Matters Specialised in Economic Competition, Broadcasting and Telecommunications, based at the Federal District and with territorial jurisdiction across the Republic; and relating to their domicile, start of operations date and shift rules and system for the reception and distribution of matters among the indicated courts; and relating to the name change of the common post office of the First Region's Auxiliary Centre, www.dof.gob.mx/nota_detalle.php?codigo=5309912&fecha=09/08/2013.

in Mexico City, these courts have jurisdiction across the whole Mexican territory.

The specialisation of courts, in competition as well as in other policy areas, has at least three advantages: greater efficiency, enhanced uniformity, and higher-quality decisions. The improvement in quality is a function of the greater expertise and experience in the correct application of law to cases. Courts that properly fulfil their role – those that hold competition authorities accountable and overturn their decisions when defective – often improve the quality of competition authorities' decisions. At the same time, jurisdictions with specialised courts need to be aware of the potential risks that a concentration of cases in a single court or several courts may produce. These include capture by a specific group of court users; biases in the selection process of judges; less broad experience as judges focus on a specific area of the law; detachment from the judicial system; and the possible transformation of a court into an unofficial rival competition authority. (OECD, 2016[29])

Specialised district courts are the first instance for competition decision reviews and their judgements may be subject to further review by the specialised circuit courts. The decisions of the circuit courts represent the end of proceedings unless there are issues of constitutionality, in which case the SCJN is competent to review the circuit court's judgement. The SCJN may also review cases when it is of public interest or there is a need to establish a precedent for lower courts. (OECD, 2016[29])

Specialised district court judges must have at least 5 years' experience in administrative matters, while specialised collegiate circuit court judges must have had at least 15 years' experience in administrative matters. Specialised studies, such as competition law, are considered an advantage, but a specialised post-graduate degree is not a requirement.

In order to prevent the use of amparos for dilatory purposes, the 2013 reform established that acts and decisions issued by the competition authorities can only be challenged through an indirect amparo once the final decision has been issued.[182] Economic agents still have the

[182] Indirect *amparos* are also known as two-instance *amparos* because at first instance they are processed before district judges, and at second instance before collegiate courts or before the Supreme Court.

constitutional resource to appeal against COFECE and IFT's decisions, but must wait until the end of the procedure to appeal. This has greatly improved the efficiency of the investigation procedure.[183]

A number of judicial decisions have ruled that amparos are inadmissible against intra-procedural acts or competition authorities' acts that do not amount to a final decision. This rule applies except when the acts cannot otherwise be repaired due to real and present physical impairment of substantive rights.[184]

10.1. Standing and standards of review

A person who claims a personal and direct injury to his or her constitutional rights will typically have standing to bring an amparo. Broader standing is granted in situations of "legitimate interest" for which a person, individually or collectively, is affected because of a special situation in relation to the law. Government bodies may not file an amparo in their capacity as public authorities, but may challenge an administrative decision before the SCJN through a constitutional procedure called constitutional controversy (controversia constitucional) if they consider that an administrative decision infringes their constitutionally granted powers.[185]

The specialised collegiate circuit courts have ruled that sanctioned firms have the standing to challenge such decisions, and a complainant may challenge a decision dismissing a case. For cartels and absolute monopolistic conducts, a legal person can challenge the decision dismissing the case on the basis that it affects competition. In cases subject to effects analysis, vertical agreements and abuse of

[183] However, Article 28 of the Constitution establishes that in cases where COFECE imposes fines or orders the divestment of assets, rights, partnership interests or stocks, these decisions shall be executed only once the *amparo* proceeding has been resolved.

[184] Gaceta del Semanario Judicial de la Federación, Libro 29, Tomo III, Abril de 2016, Tribunales Colegiados de Circuito y Normativa y Acuerdos Relevantes, jurisprudencia I.1º.A.E.24 A (10ª.). See also Article 103, paragraph I and Article 107, paragraphs I and IV, of the Mexican Constitution.

[185] The competition agencies themselves have this power under Article 105 of the Mexican Constitution.

dominance, only companies affected directly by the conduct can challenge a decision dismissing such cases. (OECD, 2019[44])

While no standards of judicial review exist for specialised courts set out in statute, a number of principles must be observed during the review of competition-enforcement decisions. These include the principles of legality and reasonability, together with a number of procedural principles, such as temporality, suitability, applicability, and competence over the relevant legal matters, as well as others related to processability and pertinence. (OECD, 2019[44])

In recent decisions, courts have found that judicial control over competition agencies' actions can be appropriate when procedural rules are not complied with or material inaccuracy of facts or errors in the interpretation of the law are present, as long as such errors result in arbitrariness or a disproportionate use of the powers granted to the agencies.[186] This treatment recognises that competition authorities have the main responsibility for interpreting competition law and for determining how a legal provision will apply to a particular case. (OECD, 2019[44])

It was expected that the specialisation of the Mexico's courts would allow for more nuanced reviews of competition decisions. According to information collected during the OECD's fact-finding mission, the judicial review of competition cases has improved, but there remains a need to promote and develop regular and comprehensive capacity building of specialised judges. Many are generalist administrative judges without a background in competition or telecommunications law and a number of stakeholders have reported that their training before taking up their positions as specialised judges could be improved.

The initial terms of appointment of specialised judges in Mexico – two, two and a half, and three years – were designed to avoid risks of capture. Information gathered during the OECD fact-finding missions, however, indicates that these terms are too short for judges to be fully cognisant of the necessary specialised knowledge. A majority of stakeholders consulted welcomed the extension of the term granted to

[186] Registro: 168499, Instancia: Tribunales Colegiados de Circuito, Tipo de Tesis: Aislada, Fuente: Semanario Judicial de la Federación y su Gaceta, Tomo XXVIII, noviembre de 2008, Materia(s): Administrativa, Tesis: I.4o.A.622 A, Página: 1325.

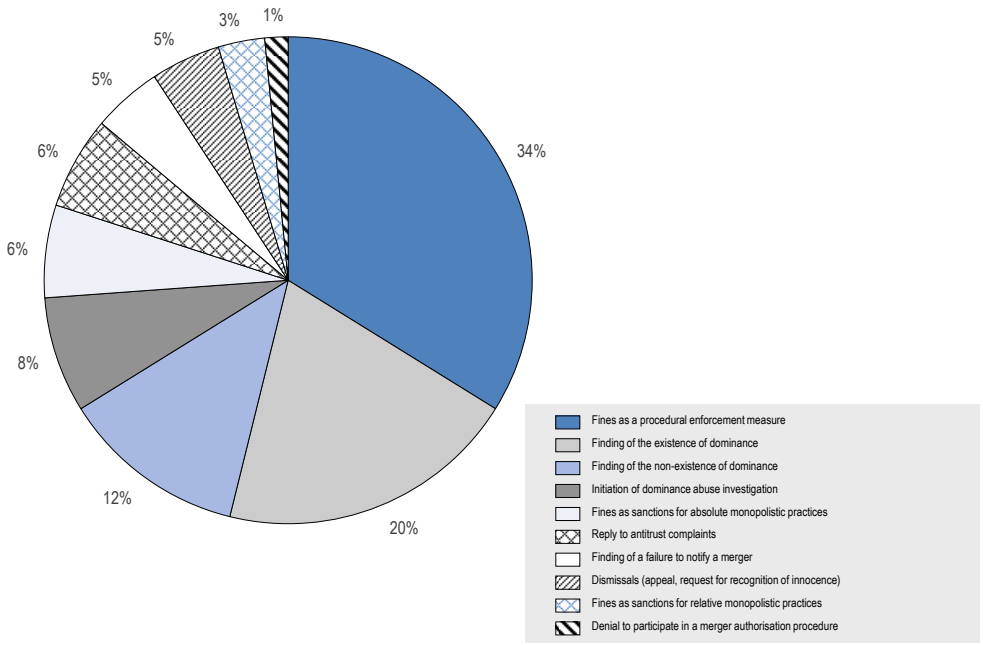
judges on an individual basis to four more years but demanded a more formal extension for all specialised judges and for even longer terms allowing them to gain more knowledge and experience.

The terms that judges serve in specialised courts vary across jurisdictions. Judges serving in courts of general jurisdiction tend to serve for long terms, often until retirement or even with life tenures. In the case of specialised courts, the terms of service range from six years in Chile, seven years in Canada and Australia, and up to eight years in the United Kingdom. Judges may have shorter appointments in order to avoid the potential risks of specialised courts, but are often given the possibility of renewing their tenure to allow a continuity in their work and an accumulation of experience in competition issues. Appointments might also be staggered in order to ensure that expert and experienced judges are always on the bench. (OECD, 2016[29])

10.2. Statistics

According to Mexico's competition authorities, the decisions subject to most appeals are infringement decisions imposing a sanction. This includes both substantive infringements – absolute or relative practices – and procedural infringements, such as failing to comply with commitments, conditions and requirements. This can be seen in Figure 11 and Table 18, which break down decisions by COFECE and IFT that have been subject to indirect amparos over the past five years by type of decision.

Figure 11. Indirect *amparo* after IFT competition decisions, by type of decision



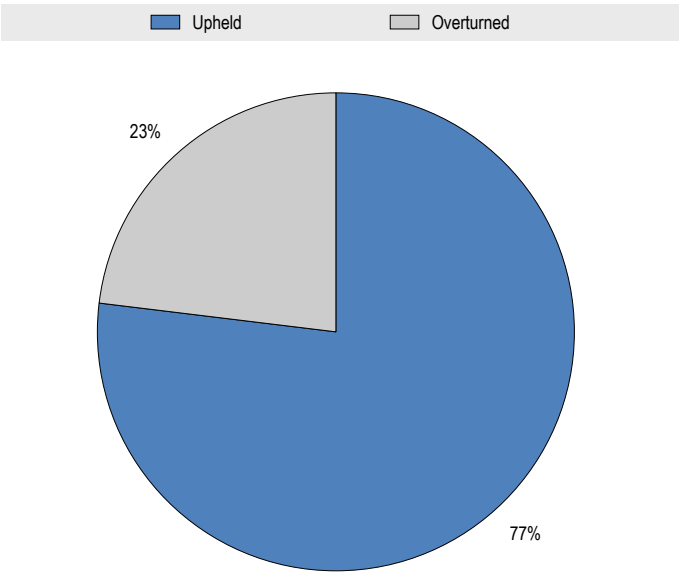
Source: IFT

Table 18. Outcome of indirect *amparo* proceedings on COFECE competition decisions resolved by the judiciary

	2015	2016	2017	2018	Total
***Amparos* granted (1)=(A+B+C+D)**	**7**	**9**	**5**	**8**	**29**
Absolute monopolistic practices (A)	0	3	1	4	8
Relative monopolistic practices (B)	1	0	1	0	2
Mergers (C)	0	0	1	1	2
Other competition matters (D)	6	6	2	3	17
***Amparos* dismissed (1)=(A+B+C+D)**	**7**	**11**	**9**	**15**	**42**
Absolute monopolistic practices (A)	2	4	1	0	7
Relative monopolistic practices (B)	3	1	3	0	7
Mergers (C)	0	2	1	1	4
Other competition matters (D)	2	4	4	14	24
***Amparos* denied (2)=(A+B+C+D)**	**15**	**22**	**23**	**22**	**82**
Absolute monopolistic practices (A)	5	9	4	5	23
Relative monopolistic practices (B)	4	3	12	2	21
Mergers (C)	0	0	1	8	9
Other competition matters (D)	6	10	6	7	29

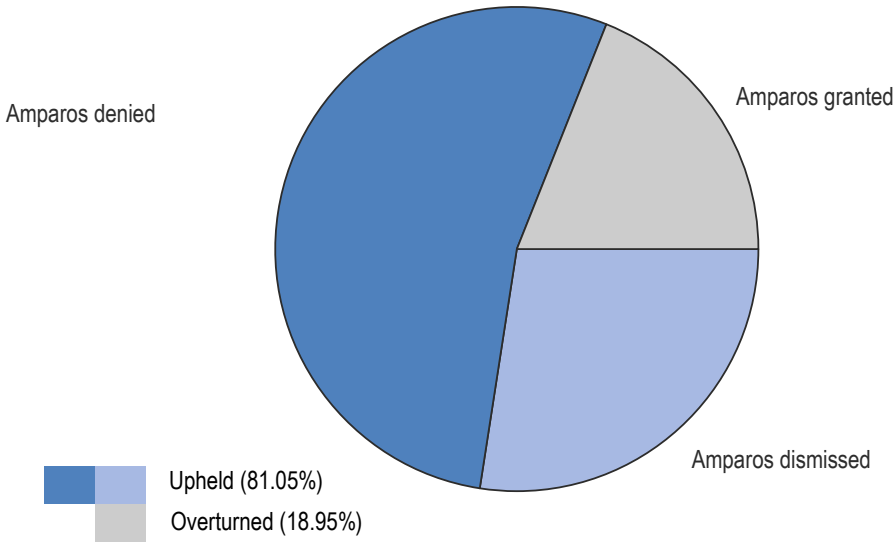
Source: COFECE

Figure 12. IFT cases upheld and overturned



Source: IFT.

Figure 13. COFECE cases upheld and overturned



Source: COFECE

Courts are not required to adopt decisions within a given period. The OECD was informed both that on average amparo procedures they take two years. The Mexican authorities recently informed the OECD in a different context that the average duration of a judicial review before the district courts ranges from six months to a year. Before circuit courts, the average duration of an appeal is six months. The time frame varies between cases according to their nature and depending on whether there are appeals concerning the constitutionality of the applicable norms. If constitutionality matters are raised, an appeal decision can be delayed by one or more years. (OECD, 2019[44]) Informal feedback from stakeholders would suggest that the duration of amparos has diminished with the opening of specialised courts.

Specialised courts appear to have led to greater effectiveness and quality in decision-making, but there are no widely available indicators of how well they perform, including their case turnover rates. Measures such as the development of transparent procedures or guidance and performance indicators may help specialised courts, their users and the

general public to assess performance, as well as contribute to the identification of potential risks that may affect their operation.

10.3. Recommendations

10.3.1. Ensure the specialisation of judges

The current periods of appointment of specialised judges are too short for judges to acquire the necessary specialised knowledge. Judges should be appointed for longer terms without the possibility of removal except at their request.

Mexico should ensure that judges hearing competition cases have sufficient expertise to pursue their review role successfully. The selection procedure of specialised judges should give priority to judges with prior capacity building in competition law or other relevant matters. Specialised judges should benefit from a regular a comprehensive capacity-building programme in competition law.

10.3.2. Accountability

It is recommended that the specialised courts adopt transparent and public indicators as to their functioning, in order to allow the general public to assess their performance and the identification of areas for improvement.

Chapter 11. Private Enforcement

Private enforcement of competition law can play an important complementary role to public enforcement. It can be used to narrow the "enforcement gap" created by the inability of public enforcement authorities to deal effectively with all cases due to limited resources. Furthermore, private enforcement is seen by some as being more effective than public enforcement at detecting and prosecuting certain competition infringements, such as vertical restraints and monopoly abuses, as well as violations in industries with specific characteristics. (OECD, 2018[30])

Private enforcement of competition law is relatively new in Mexico. In 2011, Article 38 of the LFCE was amended to state that victims from anticompetitive practices could pursue individual or collective legal action for damages and compensation under civil proceedings. The Federal Civil Proceedings Code was also amended to allow for collective actions, making them theoretically available for competition claims.

The predominant statutory provision for competition claims is Article 134 of the LFCE, which states that persons who have suffered damage or loss caused by a monopolistic practice or unlawful concentration may bring a civil liability claim before a specialised court after the relevant competition authority's decision is confirmed as final. In other words, the Mexican private-enforcement legal regime allows only for so-called follow-on damages actions.

An advantage of this system is that COFECE and IFT are responsible for declaring that the undertaking has acted unlawfully. Once COFECE or IFT have made an infringement declaration and it becomes final – when no further appeal is possible – the findings made in an infringement decision cannot be contested in a subsequent damages claim. The unlawful conduct is established by COFECE's or IFT's final decision condemning anticompetitive behaviour or an unlawful concentration, which gives the claimant hard evidence that establishes one of the elements of the civil liability action, namely the

unlawful behaviour or conduct. The infringement decision does not, however, exempt the claimant from the burden of proof regarding the two remaining elements of the action: the harm, and the causal link between that harm and the anti-competitive act.

On the other hand, under this regime competition damages claims may only be brought once the competition authorities' decisions are no longer subject to judicial review. This seems to preclude the bringing of stand-alone private competition claims in Mexico. However, some observers argue that Article 134 of the LFCE provides merely one way to bring claims for competition damage, one that applies when the authority followed the investigation procedure and imposed the respective penalty. They believe that the right to compensation arises directly out of the occurrence of an unlawful act, and the party affected is allowed to bring a claim alongside or even in the absence of enforcement actions of the competition authority.

Very few competition claims have been brought so far under the current LFCE or under the former legal framework. The OECD has been able to identify three amparo procedures dealing with this issue, but only indirectly, as well as a competition damages action now pending. After moving back and forth between generalist and specialist courts, both of which claimed they lacked competence, a claim brought by the Mexican Social Security Institute (IMSS) against a number of pharmaceutical companies found by the Mexican competition authorities to have colluded to raise prices through bid rigging is currently being heard by the specialised first district court.

On 13 September 2018, a unitary civil court condemned mobile-phone operator Telcel to pay damages to its competitors for a monopolistic practice in the market for mobile call termination that took place between 2007 and 2010. The amount of damages to be paid is still unknown and will be determined by another civil district court. Telcel can still appeal this decision before a collegiate circuit tribunal.

The reason for this lack of private competition claims seems to be due to a number of practical difficulties and a non-negligible amount of legal uncertainty. Among the practical difficulties are that the only private competition remedy provided by law is damages, making injunctions or other remedies unavailable to private parties. Furthermore, the statutes of limitations to bring competition claims are short: two years from the time the unlawful conduct occurred for individual claims, or three years and six months for collective actions.

These are enforced even if a period is interrupted by a competition agency beginning an investigation.

Other practical difficulties arise from the absence of institutional and evidential mechanisms to address the difficulties and costs of bringing competition claims in practice. For example, there are practical obstacles to the certification and funding of collective actions; this may explain why no collective competition action has been brought in Mexico. Also, while competition law grants standing to all persons who have suffered loss, in practice the requirement that damages be the "immediate and direct consequence of the breach of the statutory duty" can pose significant obstacles to proving damages in competition infringements, where losses can be spread out across numerous consumers along the distribution chain. Another challenge faced by private claimants is the difficulty of obtaining evidence of competition infringements and their effects. While this challenge is common to claimants around the world, it is compounded in Mexico by the absence of rules to address these difficulties either in terms of disclosure of evidence or of access to a competition agency's files.

Legal uncertainty is compounded by the difficulties competition claimants have noted in identifying the court before which they should file a claim. Under Article 134 of the LFCE, actions for competition damages are first heard before courts that specialise in this area of law. Yet the decision of the Federal Judicial Council creating specialised courts only granted them administrative jurisdiction limited to the amparo procedure, and the Law on Federal Judicial Power (Ley Orgánica del Poder Judicial de la Federación) empowers civil courts to hear and decide matters not falling within the competence of other district judges. This lack of legal cohesion led to both specialised and generalist courts refusing to hear a private competition claim brought by IMSS, before it being finally determined that the specialised competition courts had competence to hear competition damages claims.

Companies are also faced with legal uncertainty when the limitation period, which is two years from the time of the unlawful act (Article 1934 of the of the Federal Civil Code, Código Civil Federal, CCF), has elapsed and the investigating authority has yet to begin its investigation.

A doubt also exists as to whether private competition claims must only be "follow-on" claims brought under Article 134 of the LFCE, or

whether they can be brought as stand-alone claims under federal civil law, as noted above. The answer to this question will, in turn, have an impact on the unaddressed question of whether leniency applicants may be liable for competition damages, and, if so, whether Mexico should adopt rules to protect the incentives of companies to apply for leniency by limiting their civil liability or the disclosure of evidence related to their participation in a cartel.

In short, the private enforcement of competition matters in Mexico is in its infancy and still faces significant challenges. It was in this context that Mexico asked the OECD to review its private competition-enforcement system; the OECD provided a number of recommendations in its subsequent report, Individual and Collective Private Enforcement of Competition Law: Insights for Mexico 2018. (OECD, 2018[30])

11.1. Recommendations

In light of the comparison between international best practices for private competition enforcement and those in Mexico, the OECD's Individual and Collective Private Enforcement of Competition Law: Insights for Mexico 2018 concludes with a number of recommendations to help Mexico as it seeks to implement a fair, effective and manageable system of private competition enforcement. (OECD, 2018[30]) These include:

Clarifying that stand-alone claims for competition damages are allowed in Mexico, and that no prior infringement decision is required for such claims to be brought.

- Clarifying that the specialised administrative courts are responsible for hearing private competition-enforcement claims, including damages claims, and endowing these courts with the necessary powers and resources to fulfil this function.
- Amending the rules on standing, causation, liability, passing on and damages quantification in order to enable victims of anticompetitive conduct to obtain redress for damages suffered.
- Adopting rules of evidence suited to the complexities of competition law, including rules that ensure that it is possible

for claimants to access evidence necessary to bring successful claims.

- Adopting institutional mechanisms to simplify the resolution of competition damages claims, such as promoting settlements and alternative dispute resolution (ADR) mechanisms, adopting rules on the binding effect of infringement decisions in subsequent damages claims, creating presumptions of harm and passing on, allowing courts to estimate the amount of damages, and adopting collective redress mechanisms that ensure that competition claims are, as much as possible, all brought together in a single court and in as few cases as possible.
- Adopting opt-out collective redress actions for (certain) competition claims, while being extremely careful to ensure that such actions are manageable and subject to appropriate control.
- Adopting rules to ensure that claims for competition damages have a realistic prospect of being brought, such as adopting sufficiently long limitation periods, creating incentives for third-parties to incur risks associated with assisting victims in bringing competition claims, ensuring the timely publication of competition infringement decisions and the disseminating of their content, and adopting judicial costs rules that promote legitimate claims with reasonable prospects of success.
- Adopting measures that protect the effectiveness and integrity of public enforcement, such as protecting leniency and immunity applicants, and preventing or limiting the disclosure of certain elements in the competition agency's file.

Chapter 12. Criminal enforcement

Absolute practices are considered criminal offences by the Mexican Federal Criminal Code and can be sanctioned by between five to ten years in jail and a fine ranging from MXN 84 490 to MXN 844 900 (approximately USD 4 450 and USD 44 500).

A criminal investigation can only be initiated if the IA refers the case to the Office of the Attorney General (Procuraduría General de la República, PGR) and in cases in which it has already issued a DPR.

In practice, COFECE's IA has only done so twice, both in relation to bid-rigging cases. The first case was referred for criminal prosecution in February 2017 and the second in October 2019; both are still pending. A number of stakeholders feel that the criminal proceedings have stalled because while the Office of Attorney General is unfamiliar with antitrust concepts and procedures, it is not permitted to rely on the DPR for its criminal investigation, but rather legally obliged to conduct its own investigation.

The criteria used by the competition authorities to decide when to report a case to PGR are not clear. It has been indicated that this could result in discriminatory treatment and have proposed that either the competition authorities refer all absolute practice cases for criminal prosecution or adopt clear and objective criteria on when cases should be criminally prosecuted.

Beneficiaries of leniency measures are exempted from criminal liability, which has had a positive impact in incentivising leniency applications. Still, the interaction between criminal enforcement and leniency creates certain tensions. In theory, criminal and administrative trial-like procedures can run in parallel and parties may cooperate in both proceedings while admission to the leniency programme is still conditional. However, once the Board confirms the leniency benefits, applicants' employees may have fewer incentives to co-operate with the criminal judge. This raises the question of whether

the leniency condition to co-operate fully and continuously also applies during the criminal proceedings. Moreover, the anonymity of leniency applicants and the confidentiality of leniency applications may not be protected under criminal procedural rules.

The criminal code also provides for one to three years in jail and a fine from 500 to 5 000 UMAs (from MXN 42 245 to MXN 422 450, approximately USD 2 237 to 22 370) to those who obstruct or prevent the execution of a dawn raid. This sanction has never been imposed.

12.1. Recommendations

Mexico should promote co-operation between the competition authorities and the Office of the Attorney General to coordinate and support administrative and criminal investigations.

Mexico should clarify the interactions between the leniency programme and criminal enforcement and adopt a balanced approach ensuring effective criminal prosecution while preserving the incentives for companies to apply for leniency.

Competition authorities should adopt clear guidelines on when cases are referred to the Office of the Attorney General.

Chapter 13. International co-operation

Mexican competition law can be enforced against anticompetitive practices that have an effect in the territory of Mexico. In other words, competition law can be enforced against both domestic and foreign economic agents, as long as their actions have or may have negative effects on competition in Mexican markets. This allows Mexican competition agencies to exercise their powers extraterritorially over businesses practices that may be taking place outside Mexico, but are harming competition and affecting markets within Mexico.

To ensure the effectiveness of their enforcement actions, both COFECE and IFT co-ordinate and co-operate closely with competition authorities in other jurisdictions when: a) a cross-border merger or international anticompetitive behaviour has significant competition effects in Mexico; b) their decisions may affect other jurisdictions, or vice versa; and c) they need to discuss issues of common interest with other agencies during complex cross-border cases and to compare approaches with other authorities reviewing the same case.

Mexican competition law allows for international co-operation. In particular, paragraphs IV and XXVII of Article 12 of the LFCE enables co-operation with other public authorities (both national and international). Article 12 also provides that competition authorities may give opinions on competition matters when Mexico enters into international treaties. IFT may also enter into international co-operation on the basis of paragraph XXXV of Article 15 and Article 20 of the LFTR.

Co-operation can take place based on several international instruments that set the formal framework for co-operation with other jurisdictions and provide for comity. The legal instruments that incorporate provisions on competition policy and establish the framework for international co-operation between Mexico and other jurisdictions are: 1) free-trade agreements (FTAs); 2) bilateral competition-law

agreements between the Mexican federal government and other governments; and 3) bilateral agreements between the Mexican competition authorities and competition authorities of other jurisdictions.

Most FTAs signed by the Mexican government contain specific chapters dedicated to competition policy. Mexico is a signatory to the following FTAs that include competition provisions:

- the North American Free Trade Agreement (NAFTA) between the United States, Canada and Mexico
- the United States, Mexico and Canada Free Trade Agreement (USMCA), not ratifies at the moment of drafting this report
- the Global Agreement with the EU and its member states
- the Trans-Pacific Partnership including 11 countries in the Asia-Pacific region (Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam)
- Bilateral FTAs with Bolivia, Chile, Costa Rica, Israel, Japan, Nicaragua and Uruguay.

COFECE and IFT are invited to FTA (re)negotiations by the SE for technical advice, and to ensure alignment with the LFCE, LFTR and best international practices. COFECE and IFT were actively involved in drafting the competition chapter of the recent NAFTA renegotiations with the United States and Canada for the currently unratified United States–Mexico–Canada Agreement (USMCA).

FTAs lay the foundation for antitrust agencies' commitments to promote an environment of competition in their respective countries, whereas bilateral co-operation agreements provide the basis for day-to-day interaction between agencies. Mexican agencies are part of the following bilateral co-operation agreements with other agencies.

- Technical co-operation agreement between COFECE and the National Commission for Protection of Competition (CNDC), Argentina.
- Memorandum of understanding between COFECE and the Administrative Council for Economic Defence (CADE), Brazil.

- Agreement between the now replaced Competition Commission (CFC) and the National Economic Prosecutor (FNE), Chile.
- Co-operation agreement between the CFC and the Superintendence of Industry and Commerce (SIC), Colombia.
- Agreement between the CFC and the Fair Trade Commission (KFTC), Korea.
- Technical co-operation agreement between the CFC and the Superintendence of Control of Market Power (SCPM), Ecuador.
- Technical co-operation agreement between COFECE and the Superintendence of Competition (SC), El Salvador.
- Administrative agreement between COFECE and the European Commission's Directorate General for Competition (DG COMP).
- Technical co-operation agreement between COFECE and the Commission for the Defence and Protection of Competition (CDPC), Honduras.
- Technical co-operation agreement between COFECE and the National Institute for the Promotion of Competition (PROCOMPETENCIA), Nicaragua.
- Technical co-operation agreement between COFECE and the Authority for Consumer and Competition Protection (ACODECO), Panama.
- Technical Co-operation Agreement between COFECE and the Institute for the Protection of Competition and Intellectual Property (INDECOPI) in Peru.
- Technical co-operation agreement between COFECE and the National Commission of Competition (CONACOM), Paraguay.
- Technical co-operation agreement between COFECE and the National Commission for the Defence of Competition (PROCOMPETENCIA), Dominican Republic.

- Agreement between the CFC and federal Anti-trust Service (FAS), Russia.
- Memorandum of understanding between IFT and the Supervisory Agency for Private Investment in Telecommunications of the Republic (OSIPTEL), Peru.[187]
- Memorandum of understanding between IFT and the Dominican Telecommunications Institute (INDOTEL), Dominican Republic.
- Memorandum of understanding between IFT and the National Telecommunications Agency (ANATEL), Brazil.[188]
- Memorandum of understanding between IFT and the National Spectrum Agency (ANE), attached to the Ministry of Information and Communication Technologies (MinTIC), Colombia.[189]
- Memorandum of understanding between IFT and the Centre for Advanced Studies in Broadband for Development (CEABAD), Nicaragua.[190]
- Memorandum of understanding between IFT and the Audiovisual Council (CAC), Catalonia region, Spain.[191]

[187] Spanish version available at: www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/memorandoentendimientoosiptel-mexico-itf1.pdf

[188] Spanish version available at: www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/agencianacionaldetelecomunicacionesdebrasilanatel.pdf.

[189] Spanish version available at: www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/agencianacionaldelespectrodecolombiaane.pdf.

[190] Spanish version available at: www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/centrodeestudiosespecializadosenbandaanchaparaeldesarrolloceabad.pdf.

[191] Spanish version available at: www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/consejodelaudiovisualdecatalunacac.pdf

- Memorandum of understanding between IFT and the National Communications Entity (ENACOM), Argentina.[192]

The Mexican government has also signed bilateral agreements with different jurisdictions that set the terms for co-operation for the implementation and enforcement of competition law and policy:

- Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of Their Competition Laws (2000);
- Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of Their Competition Laws (2001).

In certain of these instruments, particularly in FTAs and bilateral agreements, the parties have agreed to co-operate on a reciprocal basis on issues that include notifications, consultations and exchange of information related to the enforcement of their competition laws and policies. In addition, antitrust co-operation agreements include provisions for technical assistance and reciprocal co-operation on visits and staff exchanges.

Box 13. North American Free Trade Agreement (NAFTA)

The North American Free Trade Agreement (NAFTA), which came into effect on 1 January 1994, stands out among the co-operation agreements signed by Mexico. Chapter 15 of NAFTA was conceived as an umbrella providing for competition policy at the regional level and for regulation of monopolies and state-owned enterprises (SOEs). Article 1501 focuses on ensuring that all three signing parties had laws in place to address anticompetitive conducts and actually enforce them, with the aim of guaranteeing a level playing field between companies in each signatory party and providing for legal certainty. Article 1501 also laid down the framework under which signatory countries could co-operate and co-ordinate, including providing mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

[192] Available at: www.ift.org.mx/sites/default/files/contenidogeneral/asuntos-internacionales/underwriterslaboratoriesul.pdf

The 2017-2018 renegotiation of NAFTA included the drafting of a new competition chapter. In addition to NAFTA's Chapter 15 on Competition Policy, Monopolies and State Enterprises, Chapter 21 of the resulting agreement, the United States–Mexico–Canada Agreement (USMCA) on competition policy specifically provides for procedural fairness in competition-law enforcement, consumer protection and transparency. Both IFT and COFECE actively participated in the renegotiation of this chapter.

13.1. Regional co-operation

Mexico also co-operates regionally. The chair of COFECE meets on an annual basis with the heads of the Competition Bureau Canada and the United States Antitrust Division of the Department of Justice and Federal Trade Commission. These meetings are based upon the bilateral co-operation agreements, signed between Canada and the United States in the 1995, the United States and Mexico in 2000, and Canada and Mexico in 2001.

The provisions in these agreements established the formal framework for the periodic meetings that have taken place on a regular basis, with increasing frequency over the past years. Since 2010, the three agencies have organised annual trilateral meetings to discuss their priorities, challenges and ways to enhance co-operation and co-ordination in the enforcement and promotion of competition law and policy in their respective jurisdictions. Trilateral meetings between the agencies' mergers teams also take place to enhance co-operation results. These meetings present a major opportunity for case handlers to initiate, develop trust and maintain close relationships with their peers. Face-to-face and on-site meetings and the exchange of experiences between case handlers, policy officers and international staff have all brought the agencies closer.

Other good examples of regional co-operation include:

- **COFECE's Fellows Programme for Latin American and Caribbean Competition Agencies.** In 2019, COFECE launched the fifth edition of the Fellows Programme for Latin American and the Caribbean competition agencies. Through this programme, officials from Latin American and Caribbean agencies join COFECE's work and investigation teams, and participate in their day-to-day tasks, allowing interns to gain first-hand knowledge and experience of the proceedings and practices conducted in the different areas of the Mexican authority.

- **The Strategic Latin American Alliance.** In March 2017, a strategic alliance between competition enforcers of Argentina, Chile, Brazil and Mexico was announced in Washington, D.C. in the margins of the American Bar Association Section of Antitrust Spring Meeting 2017. This alliance was later formalised in December 2017, when a meeting between the heads of Argentina, Brazil, Chile, Mexico and Peru agencies took place in Paris and the five authorities agreed to co-operate on specific matters. In 2018, the authorities signed the document, Carta de Paris, in which a statement is made on the importance of leniency programmes to deter cartel conducts.

13.2. Examples of successful enforcement co-operation

A significant example of co-operation between NAFTA signatories' competition agencies was the 2014 merger between Continental and Veyance,[193] which had effects throughout the NAFTA region as the companies' assets were located in Mexico, the United States and Canada. Throughout the investigation, the respective competition agencies engaged in ongoing communication (formal and informal), discussed competition issues of common interest and shared information. The design of remedies was co-ordinated by the Mexican and the US competition authorities. The package of remedies imposed by COFECE and the US authority included the divestiture of Veyance's air-springs business in North America, including manufacturing and assembly facilities in the Mexican state of San Luis Potosí, and R&D assets located in Ohio, United States. These measures satisfied competition concerns raised in Mexico and the United States. International co-operation was key to crafting extraterritorial remedies in the case.

Other relevant cases where co-operation took place are the 2016 Dow and DuPont merger[194] in which COFECE co-ordinated with the United States Department of Justice and other relevant competition

[193] Final decision in case CNT-084-2014, available in Spanish at: www.cofece.mx:8080/cfcresoluciones/docs/Concentraciones/V591/88/1883446.pdf

[194] Case CNT-049-2016. Public version of COFECE's decision available in Spanish at: http://cofece.mx/CFCResoluciones/docs/Concentraciones/V5703/1/3959258.pdf

authorities and the 2016 the ChemChina and Syngenta merger,[195] in which COFECE co-ordinated with the United States Federal Trade Commission (FTC). In these cases, co-operation was focused on aligning the timing of the different investigations, so ensuring decisions were taken within similar time frames, and consistent outcomes and remedies were ensured. Again, in the review of the 2017 Bayer and Monsanto merger,[196] the majority of the co-ordination took place with the United States Department of Justice as the United States is the main trading partner and main source of several of the products – such as genetically modified cotton seed) that were under consideration in the case. There was also limited co-ordination with Competition Bureau Canada.

Another example was the 2015 merger between Aeroméxico and Delta Air Lines for which COFECE and the United States Department of Transportation (DoT) co-operated to authorise a joint co-operation agreement (JCA) between the companies to operate trans-border flights between the United States and Mexico.[197]

The IFT has recently held consultations with the United States and Canada in the context of the AT&T and Time Warner merger[198] and, with Chile, and Ecuador, in the context of the Disney and 21st Century Fox merger.

13.3. Challenges affecting effective co-operation

Despite these successes with cross-border enforcement co-operation, important impediments to effective co-operation remain. These include:

[195] Case CNT-083-2016. Public version of COFECE's decision available in Spanish at: http://cofece.mx/CFCResoluciones/docs/Concentraciones/V5588/0/3806743.pdf

[196] Case CNT-024-2017. Final decision, available in Spanish at: www.cofece.mx/CFCResoluciones/docs/Concentraciones/V5898/7/4312994.pdf

[197] Case CNT-050-2015. www.cofece.mx/cfcresoluciones/docs/Concentraciones/V5325/0/3648710.pdf

[198] Case P/IFT/150817/487. Press release, available in Spanish at: http://www.ift.org.mx/comunicacion-y-medios/comunicados-ift/es/el-ift-autorizo-sujeta-al-cumplimiento-de-condiciones-la-concentracion-por-la-que-grupo-att-adquiere.

- Mexican agencies being unable to disclose confidential information without a waiver.[199]
- Information not seen as confidential being considered reserved and only accessible to those who have a legal interest (standing) in the procedure.
- Information not being disclosed under any circumstance during the investigation stage.

In order to overcome certain of these challenges COFECE relies on waivers granted by the parties on a case-by-case basis that allow information to be exchanged within the scope of the waiver (usually information may only be shared among investigators). Waivers are submitted voluntarily by companies or individuals involved in investigations. Guidelines on the Leniency and Immunity Programme recognise the importance of waivers in cartel investigations. Leniency waivers allow the exchange of information between competition authorities and are considered highly useful to the exchange of documents provided to agencies through the leniency programme.

Box 14. Protection of confidential information in Mexico

Information obtained by the agencies is protected and categorised under the LFCE in specific ways.

- **Confidential information.** Disclosure is legally prohibited as it can potentially damage the competitive position of the information's original owner, unless it has granted a disclosure waiver.
- **Public information.** Disclosure is always possible.
- **Reserved information.** Only accessible by economic agents with legal standing in a particular procedure.

Source: Paragraphs IX, X and XI of Article 3 of the LFCE.

[199] Confidential information is defined as information that may impact negatively upon disclosure the market position of an undertaking or individual.

13.4. Mexico's participation in international bodies

Mexico has been a member of the OECD since 1994 and since then has actively participated in the Competition Committee. As a member, Mexico has undertaken measures to implement fully OECD recommendations, including those related to competition policy.[200] Mexico is also a founding member of the International Competition Network (ICN)[201], APEC and the United Nations Conference on Trade and Development (UNCTAD).[202]

Several non-binding documents have been adopted by the Mexican agencies following best international standards and practices. For example, in 2009, the International Competition Network (ICN) published the Antitrust Manual, which included a chapter on "Defining and Implementing an Effective Leniency Policy". The document compiled the most relevant issues that has been discussed at the 2004 Leniency Workshop and listed best practices for the drafting and implementation of an effective leniency policy. The list was updated in 2014 and included 15 best practices related to leniency

[200] See, www.oecd.org/daf/competition/recommendations.htm

[201] COFECE is one of the founding members of the ICN. COFECE plays an active role in all ICN Working Groups and is currently co-chair of the ICN Planning and Implementation Initiative, whose mission is to raise awareness of ICN work product among ICN members, encouraging and facilitating its implementation within members' respective jurisdictions. The P&I operates across the ICN, in collaboration with ICN working groups, agencies, and NCAs. Also, Alejandra Palacios, COFECE's chairwoman has been an ICN Steering Group vice-chair since 2016 and since 2017 has served as vice-chair for Younger Agencies and Regional Diversity.

[202] COFECE participates in the UNCTAD Intergovernmental Group of Experts (IGE) on Consumer Protection Law and Policy, which is a standing body established under the United Nations Guidelines for and Consumer Protection (UNGCP) to monitor the application and implementation of the guidelines, provide a forum for consultations, produce research and studies, provide technical assistance, undertake voluntary peer reviews, and periodically update the guidelines.

programmes, 13 of which are included in COFECE's Leniency and Immunity Programme[203] and existing guidelines on the subject.[204]

Additionally, COFECE's Guidelines for Information Exchange between Competitors[205] took the OECD Competition Committee's document on the subject as reference. [206] Consequently, information

[203] The 13 are: 1) to make lenient treatment available when the leniency applicant facilitates the competition agency's ability to prove a cartel; 2) to make lenient treatment available when the competition agency is unaware of the cartel and when the competition agency is aware of the cartel but does not have sufficient evidence to prosecute it; 3) to use markers in the leniency application process and grant extensions to the applicant while allowing it to preserve its marker periods when a leniency applicant is making a good-faith effort to complete its application in a timely manner; 4) to ensure that markers and extensions to marker periods maintain the incentives for cartel participants to self-report their involvement in a cartel; 5) for the requirements for leniency to include full and frank disclosure of relevant information or evidence and ongoing co-operation by the leniency applicant, and if applicable, the leniency applicant's employees; 6) to provide lenient treatment (less than full leniency) for second and subsequent co-operating cartel participants; 7) where applicable, to encourage leniency applicants to apply for leniency in other jurisdictions where cartel conduct also occurred; 8) to encourage a leniency applicant to provide a waiver that allows a competition agency to discuss the application with relevant counterpart agencies; 9) to keep the identity of the leniency applicant and any information or provided by the leniency applicant confidential; 10) to have maximum transparency and certainty with respect to the requirements for leniency and the application of policies, procedures, the conditions for granting leniency and responsibilities and contact information for competition agency officials; 11) in a parallel system, it is important that the application of the leniency policy for civil and criminal cartel conduct is clearly articulated; 12) to ask leniency applicants if they have applied for leniency in other jurisdictions, and if so, what conditions, if any, have been imposed; and 13) to encourage leniency applications through education and awareness campaigns.

[204] See, https://www.cofece.mx/cofece/phocadownload/Normateca/Guias/Guia_003_Guia_Programa_Inmunidad_Reduccion_Sanciones.pdf

[205] See, https://www.cofece.mx/wp-content/uploads/2017/12/guia-007-2015_-guia_intercambio_info_agentes_eco.pdf

[206] OECD, "Policy Roundtables: Information Exchanges Between Competitors under Competition Law" 2010, www.oecd.org/competition/cartels/48379006.pdf.

exchanges between competitors are considered an absolute practice under the LFCE.

Finally, the waiver used by COFECE's IA in its leniency and immunity programme applications was created using the ICN waiver template.

Since 2014, IFT and COFECE have actively contributed to discussions during OECD Competition Committee meetings, taking the floor on several occasions and submitting written contributions. IFT and COFECE present their annual reports on competition policy to the OECD Competition Committee. IFT and COFECE are also active participants in the OECD and the Inter-American Development Bank's (IADB) Latin American and Caribbean Competition Forum (LACCF) and the Global Forum on Competition (GFC). In 2016, the competition agencies hosted a meeting of the LACCF in Mexico City.

As part of APEC, IFT has concluded an international co-operation project on Competition Policy for Regulating Online Platforms in the Asia-Pacific Region.[207] Published in August 2019, it gathers the main findings and the best practices for competition assessment of online platforms in the APEC region, explores the economics behind online platforms, and contributes to the debate around new approaches for competition analysis in the digital markets, particularly on market definition, abuse of dominance and mergers. The report also issues recommendations for competition authorities.

13.5. Recommendations

Competition agencies increasingly need to share information with their counterparts in other international jurisdictions in order to tackle cross-border anti-competitive practices or transactions. This is not always possible without a confidentiality waiver from the parties, however. According to the OECD 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings,[208] in order to improve the ability to exchange confidential information, competition agencies should consider the

[207] See, www.apec.org/Publications/2019/08/Competition-Policy-for-Regulating-Online-Platforms-in-the-APEC-Region

[208] See, www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm.

possibility of adopting so-called "information gateway" provisions, which allow for the exchange of confidential information between competition authorities without the need for prior consent from the source of information.

Neither competition law nor any of COFECE's or IFT's bilateral co-operation agreements with other competition agencies allow it to exchange confidential information with other enforcers without the prior consent from involved parties. Neither can COFECE and IFT offer investigative assistance should a foreign agency require it. While this does not yet appear to have hampered competition authorities' cross-border enforcement activities, it may become more of a challenge as Mexico's international enforcement intensifies.

Mexico should consider entering into second-generation co-operation agreements that allow the exchange of confidential information without the need to seek prior consent from that information's owner.

Since international co-operation and timing play substantial roles in effective competition enforcement, in particular in relation to cases with cross-border effects, competition authorities shall be granted the right to co-operate directly across borders within their scope of jurisdiction.

IFT has co-operated informally with other competition authorities in relation to cross-border mergers, but has not concluded any formal co-operation agreements. IFT should formalise such co-operation channels though agreements.

Chapter 14. Summary of recommendations

14.1. On independence

Independence is essential to rigorous enforcement, the rule of law, technical quality and objective decision-making, in the public interest. Competition authorities' independence and autonomy, enshrined in the Mexican Constitution, should be respected at all levels in both public and private sectors.

Mexico should make sure that competition authorities can dispose freely of their budget. Competition authorities should be able to attract and retain highly skilled experts, set salary levels independently, and provide clarity and certainty to their staff over long-term career opportunities.

14.2. On allocation of cases among the two Competition Authorities

The growth of the digital economy may give rise to further uncertainty and complexity in relation to case allocation between COFECE and IFT, which calls for continued close cooperation between the competition authorities. Mexico should consider providing guidance on the criteria for case allocation between the competition authorities.

14.3. On institutional design

The separation of the investigative and decision-making bodies (as set out in Article 26 of the LFCE) may have been interpreted too rigidly. It should not prevent the development of common standards and best practices by the IA, the TS or ECU and the Board. Two-way sharing of learned lessons, feedback and intelligence could be strengthened outside of ongoing procedures. Guidance could be created for general issues such as standard of proof, substantial case analysis and procedural issues. This would allow the IA to continue meeting the

standards required by the Board, while allowing the Board to adopt more informed decisions and avoid decisions being repealed due to lack of sufficient evidence or weak substantial analysis.

Mexico should streamline and simplify COFECE and IFT's internal procedures. Dialogue between the TS or ECU and the IA should be reinforced to ensure the efficient collection of evidence at the IA level. Once the DPR is with the TS or ECU, the units should also be allowed to request that the IA produce further evidence to respond to the parties' defence, if needed.

14.4. On appointments and incompatibility periods

While incompatibility rules after departure for high-level staff at the competition authorities avoid risks of conflicts of interest and are a general rule in most OECD jurisdictions, Mexico should keep the length of cooling-off period in line with international practices.

14.5. On domestic co-operation

IFT has established co-operation agreements with other public bodies. Co-operation and partnerships beyond its sectoral regulatory functions, also covering its competition-law enforcement mandate, could further strengthen its role as a competition enforcer in the telecommunications and broadcasting sectors.

COFECE has established many co-operation arrangements with public entities and the government. COFECE is party to 54 domestic co-operation agreements. Some of them, however, are underused and limited to punctual interactions. Competition authorities would obtain further benefits from domestic co-operation if they concentrated on co-operation initiatives that are key to competition policy and enforcement. These include:

- COFECE should actively seek co-operation channels with states and municipalities.
- Where co-operation lines have been adopted with a competition authority, public entities should adopt the necessary measures to ensure that co-operation is implemented consistently overtime despite high rates of staff turnover.

- A competition contact point in the presidency and Congress could be established to facilitate and streamline co-operation with competition authorities. Co-operation at the highest level is essential to support consistent approaches to other public policies and laws.
- The co-operation agreement between COFECE and SE could be used for more systematic mutual information sharing and for promoting competition as part of SE's initiatives and policies. SE's local presence should be available for use by COFECE for local competition-outreach initiatives.
- In view of the recent developments, existing co-operation between SHCP, which is in charge of CompraNet and competition authorities should be strengthened. Competition authorities and should collaborate with SHCP on ways to facilitate their extraction and use of the data collected and stored in procurement datasets (such as CompraNet).
- Both anti-corruption and competition-enforcement authorities would benefit from co-operation. Collaboration should, in particular, focus on sharing information about complaints and data about wrongdoings falling under each other's jurisdiction. They should also co-operate in relation to investigations of cases involving both anti-competitive behaviour (such as collusion) and corruption.
- Although a co-operation agreement exists between COFECE and CONAMER, further co-operation opportunities have been identified: a) COFECE should be consulted in relation to decisions about exemption from RIA draft regulations that could have an impact on competition; and b) COFECE should be given sufficient time to carry out any technical assessment.
- The growth of digital platforms and the zero-price economy calls for stronger co-operation with INAI, such as a formal co-operation agreement between it and the competition authorities. Collaboration should focus on the competition implications of privacy protection and could consist in advocacy measures to build consumer awareness, and new regulatory proposals.

- IFT should be granted the right to co-operate directly across borders within its scope of jurisdiction without having to go through the Ministry of Foreign Affairs (RELEX).

14.6. On recruitment of staff

Competition authorities should consider further developing effects-based analysis of competition cases and mergers and create a position of chief economist to support this endeavour (see Sections 7.1.2, 7.2.2, 8.4 and Recommendation 7.3.3).

In view of the rapid development of the digital economy, competition authorities should consider recruiting staff with forensic, digital and technological profiles.

14.7. On market investigations

The scope and legal effects of decisions adopted under Article 94 of the LFCE and addressed to public authorities should be clarified. Should decisions remain non-binding, it is recommended that public authorities inform the competition authorities of the objective grounds for not following their decision within a set timeframe.

When a restriction of competition imposed by a public act or provision is not justified by other public interest or when there are less restrictive alternatives to achieve the same result, competition authorities should have the possibility of directly challenging in court those acts or provisions, on constitutional grounds. Having to go through the executive is unnecessarily burdensome. Should indirect standing remain, competition authorities' requests should only be refused on objective and restrictive criteria.

14.8. On overall enforcement

IFT deals with anti-competitive conducts through both ex ante regulatory intervention and competition law enforcement. However, as markets liberalise and IFT adopts more targeted regulation, stronger emphasis is expected in its competition enforcement upon any anticompetitive conduct detected in the sector being punished and sanctioned to generate deterrence. It can further strengthen its competition enforcement remit through capacity building, talent hiring and retention at its IA and the ECU. The adoption of substantive

guidelines as mentioned in Chapter 9 shall also have a positive impact in the development of enforcement decisions in the telecommunication and broadcasting sector.

14.9. On information gathering in antitrust investigations

COFECE should invest in additional IT forensic equipment to enable it to conduct simultaneously dawn raids in more premises that it can currently. Investment in acquiring IT forensic equipment by IFT to complement more traditional investigation tools would reinforce its ability to carry out dawn raids. Competition authorities should hire staff with the experience to operate that equipment and promptly solve IT-related issues that arise during dawn raids, such as encrypted messaging and servers located outside the premises.

COFECE should keep improving the scope of its RFI by requesting information that is relevant and necessary to the investigation. RFI should include the correct questions, addressed to correct respondent, over relevant periods and areas, and in the correct way. Deadlines to reply to RFIs should also be reasonable. Dialogue between IAs and respondents should also be possible to assess the relevance and feasibility of obtaining the requested information.

14.10. On sanctions

Competition authorities should adopt guidelines on how they calculate fines. These would be particularly welcome in relation to: a) turnover calculation, for example in the zero-price economy or when foreign entities are involved; b) liability of parent companies for the actions of their subsidiaries; and c) criteria or ranges around gravity and mitigating and aggravating circumstances.

Big rigging is considered as an extremely serious offence in Mexico as in other OECD jurisdictions. It costs taxpayers a great deal of money, damages the outcomes and integrity of public procurement procedures, and has a negative impact on public services and the economy overall. Mexico should consider including big rigging among the violations that could trigger public procurement debarment, in addition to other more conventional criminal, civil and administrative sanctions. Debarment should take into consideration the relevant market conditions to avoid high concentration of supply

resulting in a drastic reduction of the number of participants in public tendering and should not undermine the leniency programme.

Sanctions for refusals to grant access to premises during dawn raids and to testify or to submit requested information do not seem to have a sufficient deterrent effect. Mexico should review and set stricter sanctions for this kind of conduct. In addition, competition authorities should seriously consider using their power to initiate criminal proceedings to prosecute these forms of obstruction to the investigation.

14.11. On absolute practices enforcement and substantive analysis

IFT should consider actively and formally engaging in fighting bid rigging in procurement organised by other public entities to contract telecommunications and broadcasting services.

The language of Article 53 of the LFCE limiting horizontal agreements to the five expressly listed categories and the formalistic and literal interpretation of this provision by the competition authorities and the judiciary has prevented the prosecution and sanctioning of other types of horizontal agreements. As competition knowledge and experience grow in Mexico, the likelihood of errors in the enforcement diminish, which may well justify moving from a formalistic approach to a more effects-based analysis of non-hard-core restrictive agreements in line with international practices. This may require a modification of the LFCE or allow for its wider interpretation.

Competition authorities should develop guidance on joint-ventures and co-operation agreements among competitors, including criteria that allow economic agents to understand when co-operation agreements do not comply with competition law. Also, more substantive criteria are needed for economic agents to appreciate when a joint venture falls under merger control and under ex post antitrust enforcement.

14.12. On leniency and settlements

Competition authorities should adopt clear guidelines on the requirements for entering the leniency programme and its benefits. Clarification should cover, for instance, how fine discounts are

calculated, what full and continuous co-operation entails, whether markers can be readjusted if conditional leniency ends up not being granted to one or more of the leniency applicants.

At IFT, the promotion of leniency in combination with other detection mechanisms, using for example sectoral data available in-house, could support enforcement actions.

Mexico could consider establishing a settlement policy, in which parties could obtain a fine reduction in exchange for admitting the charges. While leniency facilitates detection, settlements save procedural costs once an investigation is advanced, such as when the statement of objections has already been issued, and reduce judicial challenges (in cases when settlement conditions include the parties renouncing their right to appeal). Settlement mechanisms should be crafted and used carefully so competition authorities find a balance between cases suited for settlements and those deserving fully fledged resolutions and precedent setting. Settlement safeguards should further be articulated in the contexts of civil and criminal follow-up.

14.13. On relative practices enforcement and substantive analysis

Competition authorities should strengthen enforcement against relative practices.

Competition authorities should rely less on commitment decisions in order to generate a body of case law in this area. Fully-fledged analysis of effect-based infringements would indeed support better understanding of and solid precedents to relative practices. The excessive use of commitment decisions may also have a detrimental effect on deterrence. To that end, competition authorities should have the faculty to refuse commitments if the case is suited to set a relevant legal or economic precedent, to foster deterrence and punish serious infringements.

Competition authorities should develop guidelines on the substantive economic analysis of relative practices. When doing so, competition authorities should distinguish between the analytical framework applicable to unilateral conducts and that applicable to non-horizontal agreements.

Competition authorities should adopt measures to strengthen their economic expertise to foster complex economic effects-based analysis required to sanction anticompetitive practices and conducting merger analysis. This may be achieved by the creation of a chief economist position, independent from the Board and the IA, in charge of giving independent economic advice on the decision-making process. Alternatively, if the creation of one chief economist for the whole competition authority would be considered inconsistent with the institutional design and the separation of investigation and decision-making, Mexico could create two chief economist positions, one in charge of advising the IA and another advising the Board. COFECE may also consider giving a more prominent role to the Coordination Unit in supporting the IA on the economic analysis of cases and to the DES in advising the Board on effects-based analysis. If this were the case, both departments should be adequately staffed and have the necessary resources to fulfil their functions.

14.14. On commitment procedures

Procedures to adopt commitments decisions could be improved by extending the periods the IA and the Board have in which to consider commitment proposals when the concerns and possible remedies require further examination. Competition authorities should market test proposed commitments to ensure that they are suitable to addressing competition concerns and appropriate to specific market conditions. Similarly, to ensure commitment relevance, the parties should have sufficient information on the outcomes of the investigation before first submitting commitments.

14.15. On ex post merger review

Merger control may take place ex ante and ex post in Mexico up until one year from the closing of below-threshold mergers and up until ten years from the closing of gun-jumping mergers.

- Regarding below-threshold mergers, voluntary notification of mergers that could raise concerns should be encouraged to foster detection and prevention. To guide economic agents, Mexico should issue guidance on when a below-threshold merger may be problematic and should be voluntarily notified.

- For gun-jumped mergers, IFT should assess whether it is warranted to have two teams look into such mergers: the ECU to establish gun jumping and the IA to assess its effects.[209]

14.16. On sectoral exemption

As previously recommended by the OECD, transitory provision 9 of the LFTR excluding from merger control transactions by non-preponderant players in the telecommunications and broadcasting sector should be eliminated. The transitory exemption has been identified as unnecessary and unsuited to protect competition in the telecommunications and broadcasting markets. The legal framework should allow IFT to exercise its authority in all cases, clearing transactions quickly when they are unproblematic and thoroughly reviewing and eventually blocking or remedying those raising competitive concerns. (OECD, 2017[27])

14.17. On mergers in the financial sector

COFECE should streamline its work on financial mergers to avoid duplicating efforts by issuing both a merger resolution under the LFCE and a separate opinion to the CNSF. The CNSF could take account of COFECE's views by looking at COFECE's merger decision or a dedicated summary and so avoid issuing a separate opinion.

14.18. On value-based notification threshold

Mexico should put in practice its transaction value-based notification thresholds, especially in new markets characterised by zero-turnover but high transaction value (e.g. Facebook and WhatsApp). COFECE and IFT should assess and consider issuing guidelines on value calculation and allocation for merger control purposes.

[209] On 1 August 2019, COFECE reformed Article 133 of its regulatory provisions to allow the IA to review both aspects of unlawful gun-jumped mergers: the infringement of the obligation to notify and the possible anticompetitive effects of the concentration.

14.19. On merger-review procedure

Merger control effectiveness and legal certainty would benefit from setting two distinct procedural phases (standard and in-depth), depending on the complexity, concerns and need for remedies arising from the proposed merger.

In addition, the simplified procedure should remain available and effectively applicable for the treatment of non-problematic mergers. To that end, the standard of proof required for parties to benefit from this procedure should be relaxed and less restrictive than the information required in a normal merger notification.

Mexico should establish formal channels for legitimate third parties to express their views during the merger review process.

14.20. On information gathering methods in merger procedures

Current information gathering methods should improve:

- Where mergers are problematic, competition authorities should consider carrying out market testing of possible remedies, consumer surveys and/or economic studies (especially in fast moving or new markets).
- RFI should be more focused and avoid unnecessary request for information. To better design and scope RFI, the merger unit should engage in discussions with recipients regarding the relevance and availability of the information as well as the adequacy of deadlines.

14.21. On merger-substantive analysis

IFT and COFECE should consider further developing the economic analysis of mergers where new tools, such as statistical and econometric analysis, are applied in addition to considering market shares.

IFT and COFECE should use the same substantive analysis to assess gun-jumped unlawful mergers, for which common guidelines should be developed.

14.22. On general competition advocacy

COFECE is highly recognised for its extremely proactive and diversified advocacy policy and actions. Nevertheless, stakeholders have expressed the view that the Commission should focus less on advocacy and invest more resources in competition enforcement, which is seen as a more effective way of ensuring business compliance with competition law. Advocacy efforts will remain an important complement to competition enforcement, reaching wider audiences, while contributing to prevention and detection. An ex post assessment of COFECE's advocacy efforts would improve its understanding of which initiatives have worked best, focus on those and drop less successful actions, which would ensure more impactful initiatives and efficient resource allocation.

Alongside its extensive advocacy efforts to promote competitive ex ante regulation, IFT should strengthen its competition-advocacy efforts towards the business community and consumers, including through the adoption of a clear competition advocacy strategy.

14.23. On guidelines

Besides the technical criteria that COFECE has made public in relation to client-attorney privileged information, Mexico could consider adopting regulation on the treatment of this kind of information in competition cases.

COFECE and IFT should consider adopting guidelines on substantive issues, such as market definition, analytical standards and technical criteria to assess anti-competitive effects and efficiencies of unilateral conducts and non-horizontal agreements, guidelines on whether joint ventures fall under merger control or antitrust enforcement and when joint ventures may be considered unlawful collaboration. Guidelines should further be adopted on the calculation of fines and criteria applicable to non-pecuniary sanctions. Soft law on those and other matters would foster competition compliance and law enforcement. The absence of case law on these issues should not be an impediment to the adoption of soft law. Guidelines support competition authorities in dealing with unprecedented or complex competition issues, triggering new competition enforcement decisions that could eventually become case law when reviewed by the courts. In addition, soft law has the advantage of being easily adapted to new competition

findings, analytical evolutions and case law. Substantive soft law further raises awareness among businesses and may foster compliance efforts.

Co-operation and consultation between COFECE and IFT on soft-law projects should be made more systematic. This will result in more consistent and streamlined soft law and in more efficient antitrust enforcement.

14.24. On market studies

Competition authorities should adopt guidelines for stakeholders and the general public on market studies, what they are and are not, their benefits and possible outcomes, including a contact point for follow-up and reporting; The governments of Mexico should commit to publicly respond to any recommendations addresses to it, within a set timeline from the date when these are issued. Their response should clearly state for each recommendation whether and when they intend to adopt it and, if they do not, explain the reasons why. (OECD, 2015[37])

COFECE should scope and tailor information requests to ensure relevance, effectiveness and manageability on recipients' end.

14.25. On opinions regarding draft or existing regulation

To optimise the impact of COFECE opinions and make Congress and the regulator accountable for their decisions, both should commit to take into consideration COFECE's opinions on regulation and inform COFECE of the reasons why they have departed from its recommendation. In addition, COFECE should actively monitor, with sufficient resources and co-operation, the impact of its CIA opinions.

14.26. On specialisation of judges

The current periods of appointment of specialised judges are too short for judges to acquire the necessary specialised knowledge. Judges should be appointed for longer terms without the possibility of removal except at their request.

Mexico should ensure that judges hearing competition cases have sufficient expertise to pursue their review role successfully. The selection procedure of specialised judges should give priority to

judges with prior capacity building in competition law or other relevant matters. Specialised judges should benefit from a regular a comprehensive capacity-building programme in competition law.

14.27. On accountability of specialised courts and judges

It is recommended that the specialised courts adopt transparent and public indicators as to their functioning, in order to allow the general public to assess their performance and the identification of areas for improvement.

14.28. On private enforcement

In light of the comparison between international best practices for private competition enforcement and those in Mexico, the OECD's Individual and Collective Private Enforcement of Competition Law: Insights for Mexico 2018 concludes with a number of recommendations to help Mexico as it seeks to implement a fair, effective and manageable system of private competition enforcement. (OECD, 2018[30]) These include:

- Clarifying that stand-alone claims for competition damages are allowed in Mexico, and that no prior infringement decision is required for such claims to be brought.
- Clarifying that the specialised administrative courts are responsible for hearing private competition-enforcement claims, including damages claims, and endowing these courts with the necessary powers and resources to fulfil this function.
- Amending the rules on standing, causation, liability, passing on and damages quantification in order to enable victims of anticompetitive conduct to obtain redress for damages suffered.
- Adopting rules of evidence suited to the complexities of competition law, including rules that ensure that it is possible for claimants to access evidence necessary to bring successful claims.
- Adopting institutional mechanisms to simplify the resolution of competition damages claims, such as promoting settlements and alternative dispute resolution (ADR) mechanisms,

adopting rules on the binding effect of infringement decisions in subsequent damages claims, creating presumptions of harm and passing on, allowing courts to estimate the amount of damages, and adopting collective redress mechanisms that ensure that competition claims are, as much as possible, all brought together in a single court and in as few cases as possible.

- Adopting opt-out collective redress actions for (certain) competition claims, while being extremely careful to ensure that such actions are manageable and subject to appropriate control.
- Adopting rules to ensure that claims for competition damages have a realistic prospect of being brought, such as adopting sufficiently long limitation periods, creating incentives for third-parties to incur risks associated with assisting victims in bringing competition claims, ensuring the timely publication of competition infringement decisions and the disseminating of their content, and adopting judicial costs rules that promote legitimate claims with reasonable prospects of success.
- Adopting measures that protect the effectiveness and integrity of public enforcement, such as protecting leniency and immunity applicants, and preventing or limiting the disclosure of certain elements in the competition agency's file.

14.29. On criminal enforcement

Mexico should promote co-operation between the competition authorities and the Office of the Attorney General to coordinate and support administrative and criminal investigations.

Mexico should clarify the interactions between the leniency programme and criminal enforcement and adopt a balanced approach ensuring effective criminal prosecution while preserving the incentives for companies to apply for leniency.

Competition authorities should adopt clear guidelines on when cases are referred to the Office of the Attorney General.

14.30. On international co-operation

Competition agencies increasingly need to share information with their counterparts in other international jurisdictions in order to tackle cross-border anti-competitive practices or transactions. This is not always possible without a confidentiality waiver from the parties, however. According to the OECD 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings,[210] in order to improve the ability to exchange confidential information, competition agencies should consider the possibility of adopting so-called "information gateway" provisions, which allow for the exchange of confidential information between competition authorities without the need for prior consent from the source of information.

Neither competition law nor any of COFECE's or IFT's bilateral co-operation agreements with other competition agencies allow it to exchange confidential information with other enforcers without the prior consent from involved parties. Neither can COFECE and IFT offer investigative assistance should a foreign agency require it. While this does not yet appear to have hampered competition authorities' cross-border enforcement activities, it may become more of a challenge as Mexico's international enforcement intensifies.

Mexico should consider entering into second generation co-operation agreements that allow the exchange of confidential information without the need to seek prior consent from that information's owner.

Since international co-operation and timing play substantial roles in effective competition enforcement, in particular in relation to cases with cross-border effects, competition authorities shall be granted the right to co-operate directly across borders within their scope of jurisdiction.

IFT has co-operated informally with other competition authorities in relation to cross-border mergers, but has not concluded any formal co-operation agreements. IFT should formalise such co-operation channels though agreements.

[210] See, www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm.

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