

Market Intelligence

CARTELS 2021

Global interview panel led by Hengeler Mueller

Publisher

Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development

Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager

Dan Brennan
dan.brennan@gettingthedealthrough.com

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Cartels 2021

Europe–US Overview	3
Australia	21
Brazil	33
China	51
European Union Overview	67
Germany	85
Hong Kong	101
Italy	123
Japan	141
Mexico	157
South East Europe Overview	171
Switzerland	187
Turkey	197
United Kingdom	215
United States	229



Mexico

Ismael Henestrosa Pérez is a partner at Aziz & Kaye with extensive experience in competition and antitrust, data privacy and administrative law. His practice focuses mainly on competition law, working with domestic and international clients from various business sectors on their merger control, investigations and compliance.

He advises clients in proceedings before the Mexican competition authorities in relation to the filing of global and domestic mergers, in the indictment and defence of companies under investigation for alleged anticompetitive practices, in investigations into barriers to competition and essential inputs, in consultations related to the implementation of the Federal Economic Competition Act, as well as in the processing and obtaining of favourable opinions for participation in public tenders. He also assists clients with the design and implementation of compliance and audit programmes.

Ismael has worked as an independent consultant and occupied various positions in public bodies and private practice. He has been recognised by Best Lawyers as one of the best lawyers for administrative law and economic competition matters in Mexico. He is a member of the Mexican Bar Association and the Ilustre y Nacional Lawyers Bar, and was professor of the economic competition module in the master's degree in business law at the Institute of Social Sciences and Administration of the Autonomous University of Ciudad Juárez. He has lectured on competition law at leading universities and has trained several members of the Federal Economic Competition Commission, Federal Telecommunications Institute and courts specialising in economic competition. He recently joined the International Competition Network as an expert, where he actively participates in the Merger and Cartel Working Groups.

1 | What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

According to the 2018–2021 Strategic Plan, the Federal Economic Competition Commission (COFECE) is interested in agri-foods, energy, transport, health and public procurement sectors as priorities.

However, according to the figures for 2020, we note there were eight investigations initiated in different sectors, four following complaints and four initiated *ex officio* by COFECE.

There was no special focus in 2020 – COFECE initiated investigations both for cartel behaviour and for abuse of dominance. Cartels investigations concerned the value chain for corn tortillas in Huixtla in Chiapas, marine diesel, the value chain for waterproofing sealants, and non-residential real estate leasing.

Abuse of dominance investigations were started in relation to digital advertising services and related services; in the value chain for medicinal oxygen and related services; and in the wholesale supply and distribution of consumer goods, as well as the retail and marketing of consumer goods and related services.

Also, in 2020 COFECE exercised its increased powers to initiate a new investigation into the existence of barriers to competition and free market access in ferry passenger transportation services and related services with origin or destination in the northern zone of Quintana Roo. These ferry services have been sanctioned by COFECE for collusion twice.

In addition, last year the Federal Telecommunications Institute (IFT), initiated two investigations, the first of which concerns abuse of dominance in wholesale leasing services for local and inter-location dedicated links in the national territory, and which may involve Telmex and Telnor. The other investigation is into the conditions of effective competition and the existence of barriers to competition or essential facilities in the online search services, social networking, mobile operating systems and cloud computing services market, dominated by Facebook and Google. Notably, both the IFT and COFECE went to the federal courts to decide which of these two authorities is legally the right one to investigate digital markets – the IFT in respect of its investigation into the existence of barriers to competition and COFECE for its investigation into possible abuses of dominance. Both investigations have been suspended pending the court decision.



2 | What do recent investigations in your jurisdiction teach us?

Recent investigations have shown that enforcers have the legal instruments necessary to investigate and punish undertakings that engage in anticompetitive practices – mostly cartel activity – in 'regular markets'. However, COFECE and IFT are now investigating more sophisticated markets (financial and digital, among others), as has been the case in other jurisdictions, and we are not sure that Mexican authorities are fully prepared to carry out such investigations effectively. In this regard, we are aware that the antitrust authorities in various jurisdictions have faced difficulties in these industries, because big tech companies and other financial giants, are apparently not especially worried about breaking the law. In comparison with the level of the fines and 'standard' remedies applied to date, these companies' incomes far outstrip the 'inconvenience' of an antitrust investigation.

Furthermore, regardless of whether the investigations conducted by COFECE had been initiated by complaint or *ex officio*, the authority states in the case dockets for some of those investigations that they were triggered by journalism or news reports.

“The leniency programme does not protect against sanctions such as prohibitions on participation in public tenders, nor against accusations of serious offences, such as organised crime.”

Also, in our experience, the leniency programme has been an especially useful tool in triggering such investigations.

3 | How is the leniency system developing and which factors should clients consider before applying for leniency?

COFECE is the most advanced economic competition authority in Mexico in terms of leniency programmes. The IFT has seen no major developments in this respect, except for an infographic and a guide, which are not binding documents. In addition, there has been no reports of any investigations resulting from its immunity programme.

In this regard, COFECE is highly active (through the media and visiting universities, trade associations, etc.), promoting its leniency programme and working to generate a culture of antitrust compliance in Mexico.

In March 2020, following defeats in federal courts because previous guidelines were not binding, COFECE finally issued 'new' regulations for the leniency programme, although, from our perspective, the new regulations contain no improvements on the previous guidelines.

The principal factors that clients consider before applying for immunity are possible sanctions, such as criminal sentences (of up to 10 years), fines of up to 17 million pesos and the disqualification of management staff for up to five years; the reputation of the companies concerned, especially if they are public; and compliance matters, especially in transnational companies. On the other hand, in our daily practice, we have observed some inhibiting aspects of the leniency programme, since it does not protect against sanctions such as prohibitions on participation in public tenders, nor against accusations of serious offences, such as organised crime.

Finally, our firm has found no legal difficulties when carrying out internal investigations prior to leniency applications.

4 | What means exist in your jurisdiction to speed up or streamline the authority's decision-making (eg, settlement procedure) and what are your experiences in this regard?

The Federal Economic Competition Law (LFCE) has no mechanism to expedite the procedure for cartel investigations conducted by the competition authorities. However, for abuse of dominance and unlawful concentrations, there is a procedure under article 100 of the LFCE to reduce the amount of the possible fines. Before an accusation has been made, the undertakings subject to investigation may, on

a single occasion, express in writing their willingness to adopt the 'programme' to benefit from immunity or from a reduced fine as provided by the LFCE. This procedure puts the investigation on hold and, if the Board of Commissioners accepts the 'application', a final decision will be issued without a charge. Otherwise, the investigation will proceed, a charge will be issued, there will be a defence and the final decision will be issued by the Board of Commissioners.

Clients should assess the other possible consequences, such as the possible recognition of anticompetitive behaviour and on the other hand reduced fines.

In our opinion, in addition to the leniency programme, the legal possibility of negotiating settlements with the competition authorities could be helpful for anti-competitive behaviour investigations.

We always raise our hand to clients to point out that any scenario involving a programme of leniency or reduction of the fine amount may increase the odds of claims for damages and class actions as applying for any of these programmes implies acknowledgment of guilt.

5 | Tell us about the authority's most important decisions over the past year. What made them so significant?

We think there have been several important decisions over the past year.

In July 2020, after conducting a four-year investigation into cartel activity in the integrated medical services market, COFECE found that eight companies were responsible for collusion and the illegal exchange of information in the public tenders run by the two major health public institutions (IMSS and ISSSTE) to contract laboratory and blood bank services. COFECE calculated damage to the public treasury of at least 1,200 million pesos and, as a result, imposed fines totalling 626.457 million pesos. To our knowledge, all those involved have appealed the COFECE ruling.

We think this is a hugely important decision because it is related to the fight against governmental corruption, in which COFECE has been highly proactive for the greater part of the past decade. Intervention by COFECE in public tenders, mostly in the health sector, has brought to light the existence of numerous cartels in that sector.

The most publicised decision was issued by COFECE earlier this year and was about 'cartel activity'. After a five-year investigation, COFECE stated in its decision that it found a cartel in the secondary market for brokerage services for debt securities issued by the Mexican government, arguing that the agents established agreements contrary to the LFCE to fix prices and agreed not to trade or not to acquire certain government securities in specific transactions, which had a



direct impact on the price of the related instruments in those transactions in the secondary market. Six major global banks and 11 individuals were fined around 35 million pesos in total.

In general, the result was viewed as very disappointing by the press and the Senate, which both questioned it vigorously because higher sanctions were expected. Regardless of the fact that the fines were low, more than one of the sanctioned banks appealed COFECE's ruling.

The importance of this controversial decision is that the fined banks pleaded that COFECE was not the competent authority to investigate financial markets, which had previously been overseen by strong and experienced regulators; COFECE also lacks the powers of an antitrust authority to review private communications and override bank secrecy. All these issues probably will be cleared up by the Mexican Supreme Court.

The decision also saw COFECE's chairwoman raise complaints with the Senate, claiming that COFECE needs more powers to impose higher fines.

COFECE also sanctioned several companies and individuals for collusion on retail gasoline prices in Tijuana and Mexicali in Baja California, which generated

“The question of whether COFECE is the competent authority to investigate and sanction markets has yet to be resolved.”

damage to the market estimated at 27 million pesos. As a result, they were fined a total of 51 million pesos.

These actions were considered serious, as they were intentional. In addition, the importance of this decision lies in the fact that the practices directly affected consumers who use motor vehicles, as well as other sectors that use these goods as an input, such as public transport and the haulage sector.

6 | What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority’s decisions in the courts over the past year?

There is a high level of judicial review. Given the size of the fines imposed and especially because of the risk of subsequent claims for damages and class actions, COFECE resolutions provoke strong responses and most of the economic agents subject to sanctions have filed *amparo* lawsuits against the authority’s resolutions.

The legal challenges in relation to absolute monopolistic practices (namely cartels) are still pending. As we mentioned earlier, the question of whether COFECE

is the competent authority to investigate and sanction markets previously overseen by strong and experienced regulators has yet to be resolved, as has the issue regarding the antitrust authorities' lack of power to review private communications and override bank secrecy.

Other issues are also pending, such as COFECE's lack of power to estimate the amount of damage caused, because a strict interpretation of Mexican antitrust law seems to indicate that COFECE is only empowered to take the damage caused to the market into account to adjust the size of the sanction.

Also of note, last year, after several trials and disputes as to constitutionality, COFECE in effect revoked its resolution regarding slots allocated at the principal Mexican airport in Mexico City, which it had identified as constituting an essential facility and therefore subject to COFECE's regulatory authority over that of the aeronautical authorities. This resolution was contested by the aviation sector regulator and affected airlines. The courts ultimately found in their favour, stating that the sector regulator had expertise in operational and technical areas that did not fall within COFECE's competence.

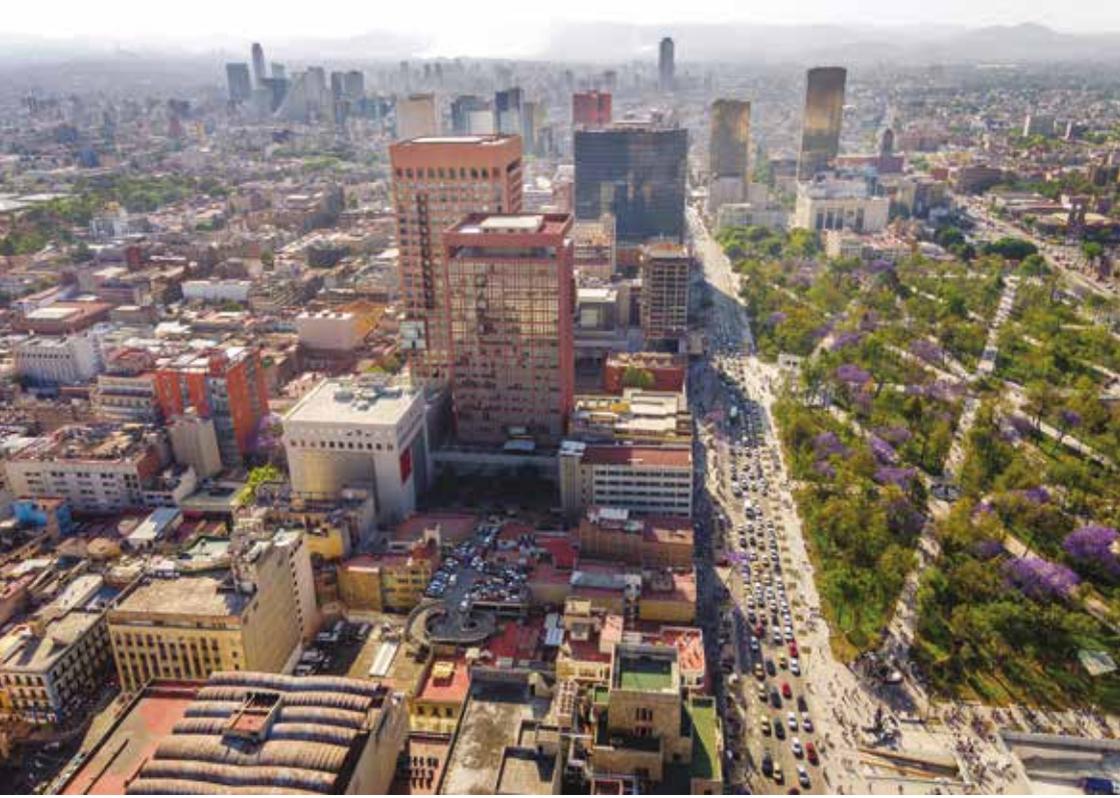
7 | How is private cartel enforcement developing in your jurisdiction?

Under the LFCE, enforcement in relation to cartels is the exclusive prerogative of COFECE and the IFT. There is no private enforcement conducted before the courts and I do not think this situation will change in the near future.

Notwithstanding this, once a resolution issued by COFECE or the IFT has been finalised and declared conclusive, individuals do have the right to file a claim with specialised courts if they have suffered harm as a result of a monopolistic practice or an unlawful concentration, and this also applies to class actions.

Today, the complexity involved in obtaining damages is a challenge. One of the reasons that victims do not pursue this procedure is the restrictions that the law imposes on the maximum amount of compensation a victim can obtain for the harm suffered. However, in recent years, the Supreme Court of Justice has ruled that a certain legal provision restricting the amount of damages victims can claim is unconstitutional.

Finally, regarding class actions, on 13 March 2021, COFECE fulfilled the request to publish on its website a notice of the 2019 class action lawsuit against several hospitals in Guadalajara, which were sanctioned for price-fixing in 2011.



8 | What developments do you see in antitrust compliance?

We think that compliance efforts are improving day by day, with an increasing number of companies committed to this. As compliance efforts grow, competition authorities will be able to release resources to focus on areas and sectors other than those already subject to scrutiny.

As we stated last year, the competition authorities, and particularly COFECE, do not consider compliance programmes as mitigating monopolistic behaviour or practice.

9 | What changes to cartel enforcement policy or antitrust rules do you anticipate in the coming year? What effect will this have on clients?

Given that our antitrust legislation is still markedly recent – it was only issued in 2014 – and that we are only starting to see challenges to COFECE and IFT resolutions based on it, and as yet there have been no significant decisions issued by specialised courts that might prompt changes, we do not anticipate developments in cartel enforcement policy or antitrust rules in the next year.

Nevertheless, given the rapid transformation of digital markets, economic agents face new challenges, including the creation of new sales methods and systems and databases capable of predicting consumer behaviour. In addition, the existence of economic agents with immediate global reach and, in general, the potential for constant disruption of markets, represents a challenge for both economic agents and competition authorities.

COFECE and IFT have already recognised that in the current technological context it is necessary for regulatory authorities and the private sector to establish effective and specialised strategies to enhance benefits in favour of Mexican consumers.

COFECE, therefore, has created a new division to face these challenges and along with the creation of this unit, we expect to see cartel enforcement policy aimed at digital markets coupled with new judicial criteria and standards developed for antitrust rules.

Likewise, recent statements made by the federal executive suggest that, in an extreme scenario, the situation could trigger changes in the composition of the Mexican competition authorities.

10 | Has the antitrust authority recently adopted any covid-19 antitrust measures? To which industry sectors have they been they applied?

The Mexican antitrust authorities do not have the legal powers to make decisions like those taken by their peers in Europe, Australia or the United States, among others, authorising different 'immunities' in various industries such as health, aviation, banking or haulage. Nevertheless, in March 2020, COFECE outlined its position on the application of the LFCE in the context of the covid-19 pandemic, to prevent interruptions to supply chains or artificial restrictions of supplies that make goods or services more expensive, stating that any collaboration agreement between economic agents undertaken in the context of a health contingency that is deemed necessary to maintain or increase supply, satisfy demand, protect supply chains, avoid shortages or hoarding of goods, and that is not intended to displace other competing agents that also supply the market, is in accordance with the law and therefore would not be subject to prosecution.

COFECE also warned that any strategic decisions must be individual and independent decisions, taken by the companies themselves, and should not be induced, encouraged or recommended to participants by associations, confederations or chambers of commerce.

Any agreement between competitors to fix prices, restrict the supply of goods or services, segment markets or coordinate bids or refrain from bidding is particularly

serious and this type of conduct will therefore be prosecuted and sanctioned in accordance with the applicable regulations.

Any unlawful agreement to fix prices, restrict the supply of goods or services, segment markets or coordinate bids or refrain from bidding is particularly serious and this type of conduct will therefore be prosecuted and sanctioned. In this context, COFECE pointed out that it will be monitoring markets for any sign of anticompetitive behaviour that could trigger a formal investigation procedure.

Another measure taken by COFECE is the compromise to review expeditiously merger notifications arising from the need to create synergies and add production capacity to satisfy in a timely and sufficient manner the needs of popular consumer products and all those goods necessary to address the pandemic crisis.

COFECE also sent warnings to the National Chamber of the Sugar and Alcohol Industries and the National Association of Real Estate Developers in relation to possible cartel behaviour.

In June 2020, COFECE issued its Emergency Regulatory Provisions on Electronic Means and its Electronic Filing Office began operations, both of which are part of its efforts to carry out all procedures electronically, allowing filing to be carried out remotely for almost all legal procedures before COFECE.

Finally, to contribute to the reactivation of the Mexican economy, COFECE issued a proposal with 12 actions to encourage participation in markets relevant to the national economy of more companies that either have an impact across various markets or have a direct effect on the pockets of Mexican families.

This was because COFECE acknowledged a drop in production and demand in different markets due to the health emergency, affecting mainly small and medium-sized companies, and in view of the fact that large companies are more likely to prevail and that this increases the risk of greater market concentration.

Ismael Henestrosa Pérez

ihp@azizkaye.com

Aziz & Kaye Business Law

Mexico City

www.azizkaye.com

The Inside Track

What was the most interesting case you worked on recently?

Normally we are involved in the most significant cases, in several industries and sectors, namely finance and banking, ground and air transportation, health, sports, and highways, among others, and that is because all of them are quite interesting.

In the financial sector, we are working on a case related to Mexican government securities, in respect of which sanctions were recently imposed, and we are now fighting the decision before the courts. Another of our cases, also in the financial sector, will probably change the structure and perhaps the regulation of the Mexican switching market. We are also working on a COFECE investigation into probable collusion in the player transfer market and involving all Mexican football clubs. Another case concerns laboratory and blood services in the public health sector.

If you could change one thing about the area of cartel enforcement in your jurisdiction, what would it be?

The option to negotiate settlements with the antitrust authorities would help close cases faster and more efficiently.

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