

Client Alert

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For more information about this alert, please get in touch with your usual Baker & McKenzie contact or:

Raymundo Enriquez
+52 (55) 5279 2906
raymundo.enriquez@bakermckenzie.com

Luis F. Amado Cordova
+52 (55) 5279 2919
luis.amado@bakermckenzie.com

Gerardo Calderon-Villegas
+52 (55) 5279 2933
gerardo.calderon@bakermckenzie.com

NEW BOOST TO COMPETITION POLICY IN MEXICO

Recent developments

On May 23, 2014 a New Mexican Competition Law, approved by the Mexican Congress on April 29, 2014, was published in the Official Federal Gazette. The New Law will come into force on 7 July 2014 bringing major changes to the antitrust framework in Mexico.

The new law strengthens the existing powers of the Mexican competition authority (Federal Economic Competition Commission or "Cofece") but also introduces new powers and novel legal concepts, some of which have attracted controversy.

What's different - at a glance

The most significant developments include:

- Strengthened dawn raid powers:
 - Cofece can now access any place, storage device, electronic device, or any other source of evidence. Cofece can also secure, remove or take away copies of information during the raid;
 - Cofece can demand explanations from any officer, representative, or member of the inspected company regarding any document or information obtained during the raid.
- Decisions to initiate an investigation will no longer be published in the Federal Official Gazette, limiting a target's ability to respond or defend itself. At the moment, companies can get a sense of whether they are at risk of being investigated because details about the targeted conduct/sector are published

Companies may now face dawn raids at any time without prior knowledge that an investigation has been initiated in the markets in which they are active. This is similar to the approach taken in other jurisdictions, such as the EU and the UK.

- Cofece will have powers to file a claim or complaint regarding criminal conduct in antitrust matters, with no need to wait until a final resolution is issued by the Plenary in the administrative stage. This means, in practice, that individuals engaged in cartel conduct may face criminal prosecution even before Cofece decides whether or not an antitrust violation has occurred.

- Coercive measures have been strengthened. Cofece may order the arrest of individuals for obstructing an investigation, for instance when refusing to answer requests for information or for non compliance with orders issued by Cofece.
- Administrative appeals have been eliminated, so now only judicial review (through an *amparo* trial) is available to challenge Cofece's resolutions.
- Private actions for damages have been made easier, e.g. a longer limitation period to claim for damages at Federal Courts which are specialized in competition issues and which will be bound by Cofece findings of fact.
- The exchange of information between competitors, when resulting in, or having the purpose of, price fixing, allocation of markets, restricting output or rigging bids, has been criminalized in the Federal Criminal Code. Individuals involved in exchanging information with competitors could face severe consequences (up to 10 years of imprisonment), even when the information exchange occurs without the intention of violating antitrust law.
- New offences have been created:
 - Companies with a dominant position may not restrict, or grant discriminatory access to "essential inputs". This concept has not been defined, giving rise to concerns that Cofece will effectively subject efficient firms to unnecessary regulation.
 - Margin squeeze - i.e. when the margin between the price at which a vertically-integrated firm sells a downstream product and the price at which it sells an input to rivals is too small to allow downstream rivals to compete.
- Cofece will have authority to conduct studies to look for market power and to then order measures to eliminate "barriers to free competition" including the divestiture of assets. As in the case of essential inputs, there is no precise definition of the novel concept of "barriers to free competition". They are *"any structural characteristics of the market, facts, or acts of economic agents the purpose or effect of which is to impede competitors' access or limit their ability to compete in the markets; those that impede or distort the free competition process, as well as legal provisions issued by any level of the Government that unduly impede or distort the free competition process"*.

The concept itself as well as the proceedings to deal with the relevant cases, seems to be designed, or at least could be used, for over-regulating efficient companies, a situation that creates greater concern given Cofece's authority to order the divestiture of the assets of those companies.

Cofece's officials have said that the New Law imposes a high standard: a company or product must be found to have a dominant status before being regulated under the rules on essential inputs, margin squeeze or barriers to free competition. In Cofece's view, its powers related to these concepts will be used only in extraordinary circumstances and in very limited cases.



The ability to conduct investigations into certain markets and then order a company to sell off parts of its business (despite no suggestion of any wrongdoing by the company) is not exclusive to Mexico. For example, the UK competition authorities have in the past investigated and then required divestments in the markets for airports, healthcare and cement. In one case, the divestment order was imposed even though the competition authority had recently looked at the sector in some detail under the UK merger control rules.

- An "Investigating Authority" in charge of conducting investigations of monopolistic practices and illegal concentrations has been formed within Cofece, where the Plenary (comprising seven Commissioners) will remain as the body deciding the cases.

The creation of the Investigating Authority is accompanied by controls to prevent abuses, which include increasing transparency and accountability, for instance, the creation of an Internal Comptrollership, and the incorporation of rules for interaction of companies with Cofece officials, as well as the disclosure of such contacts and other acts of the authority (resolutions, plenary sessions, and rulings).

Merger control considerations

- The filing thresholds have been modified. From 7 July, only annual sales originating in Mexico and/or assets in the Mexican territory will be taken into consideration in determining whether filing thresholds are met. At present, global sales are relevant.
- The New Law prevents mergers from being completed until clearance has been obtained. Currently Cofece is able to issue a freeze or stop order only for those transactions requiring a detailed analysis. In practice, the majority of transactions can be carried out after waiting 10 days from filing (assuming Cofece does not issue the referred order). However such an approach will no longer be possible.
- Further, the Phase I period for assessing mergers has been increased from 35 business days to 60 business days (with the additional possibility to extend the investigation for 40 additional business days in complex cases).

The current 35-day review period has proven to be more than enough to complete the procedure. There seems to be no justification for such extension. The negative impact of this change is significant, given that all the transactions must wait until Cofece issues its authorization before closing. The new 60 day review period for Phase I is substantially at odds with the numerous regimes which take a month to conduct a first phase review.

- New elements have been incorporated into the list of "basic" information which parties must supply. Cofece has also been given powers to require information to be supplied at any stage of the procedure. Formal requirements will also be set for documents and translations. This is at odds with the approach taken in other jurisdictions, such as the EU, which recently took steps to reduce the level of information that parties need to provide when notifying mergers to the European Commission.

- Cofece will be obliged to inform the parties via a notification procedure of any possible risks to competition that may result from a transaction notification, in order for the parties to submit remedies or conditions proposals, a change that is deemed positive.

Comment

Companies and individuals should be aware of the relevant changes introduced to the antitrust enforcement environment in Mexico, considering Cofece strengthened powers; in particular:

- Companies should be prepared to deal with dawn raids in full cooperation with Cofece whilst protecting their rights.
- Given the risk of arrest for obstruction, individuals that may interact with Cofece officials during a dawn raid should be trained and prepared to respond to potential inquiries without compromising privileged communications and documents. Cofece's new power to access electronic and other information is likely to be a complicated area and lead to tension in the dawn raid context.
- Adequate antitrust compliance policies and programs should be put in place to reduce the potential risk of being investigated and sanctioned. In addition, companies should consider what types of training and monitoring procedures are adequate to mitigate these heightened risks.
- Companies should also establish clear guidelines on how to deal with competitors and other third parties (i.e. suppliers and clients), covering potential areas of risk such as, information exchange with competitors, distribution policies, incentives and rebates, among others.
- As regards companies with market power, the precise scope of the law (as well as Cofece's intentions) will need to be clarified but we predict that companies with 'bottleneck' facilities (energy, utilities, transport etc.) will be subject to greater scrutiny and need to think carefully about the potential impact of the New Law on their business.
- In the merger control arena, companies will now have to deal with more stringent information requirements and may face delays in their approval processes. This should be factored into the deal timetable.

www.bakermckenzie.com

Global Steering Committee

Samantha Mobley
Global Chair
+44 20 7919 1956
samantha.mobley@bakermckenzie.com

Andre Gan
Asia Pacific
+60 3 2298 7828
Andre.Gan@WongPartners.com

Fiona Carlin
Europe
+32 2 639 36 11
fiona.carlin@bakermckenzie.com

Lee Van Voorhis
North America
+1 202 835 6162
lee.vanvoorhis@bakermckenzie.com

Francisco Todorov
Latin America
+55 61 2102 5014
francisco.todorov@bakermckenzie.com

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