

CPI Antitrust Chronicle

July 2014 (1)

Comments on the New Mexican Competition Law

Gerardo Calderon
Baker & McKenzie

Comments on the New Mexican Competition Law

Gerardo Calderon¹

I. INTRODUCTION

On July 7, 2014, a New Federal Economic Competition Law (the "New Mexican Antitrust Law") came into force in Mexico.

The New Mexican Antitrust Law maintains most of the concepts and provisions of the Mexican Antitrust Law in force since 1993, while strengthening the Federal Economic Competition Commission ("Cofece" per its acronym in Spanish) and introducing novel concepts aimed at increasing competition in all product and service markets.

The Mexican Antitrust Law published in 1992, and in force since 1993, represented a radical change in Mexican antitrust policy, and was intended to generate competition in an open market economy. The New Mexican Antitrust Law represents the consolidation of that policy and the Mexican government's efforts towards such objectives.

II. WHAT'S NEW?

The first accomplishment of the New Antitrust Law is the creation, within Cofece, of an "Investigating Authority" in charge of conducting investigations on monopolistic practices and illegal concentrations, where the Plenary (comprised of seven Commissioners) will remain as the body deciding the cases. Independence of and between these authorities is guaranteed by clear rules for appointing and removing the Commissioners and the Head of the Investigating Authority.

With respect to procedural issues, the following changes aim to increase Cofece's investigative powers to carry out more efficient investigations:

- Coercive measures have been strengthened. For instance, Cofece may order the arrest of individuals not cooperating with an investigation;
- New rules for conducting verification visits (so-called "dawn raids") have been established. Under these, Cofece may access any place, storage device, or any other source of evidence, get copies of information, and impound the same. Moreover, the rules include the possibility for Cofece to request explanations from any officer, representative, or member of the inspected company regarding such information;
- The decision to initiate an investigation will no longer be published in the Federal Official Gazette, limiting a target's ability to respond or defend itself. Under the 1993 law, potential targets of a Cofece investigation learned that an investigation was being

¹ Senior Associate in Baker & McKenzie's Mexico City office.

conducted from such publication (although the name of the target was not disclosed, the information on the conduct being investigated as well as the involved markets most of the times sufficed to identify potential risks).

- Companies may now be facing dawn raids at any time without even knowing that an investigation has been initiated in the markets where they are active.
- The Investigating Authority will have powers to file a claim or complaint regarding presumed criminal conducts in antitrust matters, with no need to wait until a final resolution is issued by the Plenary in the administrative stage; and
- The administrative appeal ("recurso de reconsideración") has been eliminated.²

Under the New Mexican Antitrust Law, any indication of the existence of monopolistic practices, or prohibited concentrations, is enough to trigger an investigation, thereby increasing the likelihood of a Cofece-initiated investigation and resulting sanctions.

Another relevant modification will increase the likelihood of success for private actions for damages that an affected party may initiate, either as individual or class (collective) actions. Specifically, the term to claim for damages will be interrupted by the commencement of an investigation. Also, Cofece's final resolution will serve as the basis for processing complaints before Federal Courts specialized in economic competition issues to prove the illegality of the conduct of the undertaking engaged in the monopolistic practice or the prohibited concentration.

All of the foregoing will result in a substantial increase of Cofece's investigating activities; since, on the one hand, they will provide sufficient tools to start investigations *ex officio* and, on the other, there will be more incentives for those affected by anticompetitive conduct to file claims with the authority, as they will be able to obtain a resolution sooner.

Cofece's strengthening is accompanied by controls to prevent abuses, which include increasing transparency and accountability. For instance, the Internal Comptrollership was created, and rules for interaction of the economic agents with Cofece's officials, as well as the disclosure of such contacts and other acts of the authority (resolutions, plenary sessions, and rulings) were incorporated.

Under the New Mexican Antitrust Law, Cofece will now be obligated to respond to ruling requests and to issue general guidelines on free competition matters upon request by private parties. Although Cofece has always been obligated to issue an opinion upon request, it is only now that it has been acknowledged that it is necessary for such opinions to have binding effects in order for them to be effective. This is proven by the fact that, currently (without being binding and without having legal effects), the procedure is rarely used.

The New Mexican Antitrust Law incorporates novel definitions regarding conducts considered to be monopolistic practices. On the cartel side, the exchange of information between

² This particular change was introduced by a Constitutional amendment in June 2013, where also included the creation of (i) Cofece and the Federal Institute of Telecommunications (both authorities with antitrust enforcement powers); and (ii) Specialized Courts to deal with antitrust, broadcasting and telecommunications issues.

competitors has been incorporated as an independent absolute monopolistic practice when such exchange results from, or the purpose of which is, any of the other conducts classified as absolute monopolistic practices (price-fixing, supply restriction, market division, or bid-rigging). Before this incorporation, the exchange of information could be penalized only when it had resulted from, or had the purpose of, price-fixing. This exchange of information was also incorporated as a criminal offense in the Federal Criminal Code, and therefore a high level of uncertainty has been generated for those individuals potentially involved in these conducts, as they may face severe consequences (up to 10 years of imprisonment), even when the information exchange occurred without the intention of violating the antitrust laws; for instance, during due diligence processes in preparation of corporate transactions.

On the dominance side, two conducts has been incorporated as violations: (i) refuse, restrict, or grant discriminatory access to essential inputs; and (ii) margin squeezes (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 essential input to rivals is too small to allow downstream rivals to compete).

Since the New Mexican Antitrust Law has no incorporated clear rules as to when or under what circumstances an input may be deemed an essential input, the incorporation of these conducts has generated some concerns.

Another issue that has generated some concerns is the authority given to Cofece 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," and the New Mexican Antitrust Law only indicates that 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.

Cofece's officials have said that the New Mexican Antitrust Law imposes a high standard for a company or product to be found to have a dominant status before being regulated under the rules on essential inputs, margin squeeze, or barriers to free competition. However, the concepts themselves, 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.

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 U.K. competition authorities have in the past investigated and then required divestments in the markets for airports, healthcare, and cement.

We will have to wait until Cofece issues its regulatory provisions and technical criteria to conduct a more detailed analysis of how, in practice, these concepts will be applied, as well as their actual impact on economic agents.

III. CHANGES TO MERGER CONTROL REGIME

The most relevant change to merger control regulations in Mexico is the migration to a suspensory merger control regime, eliminating Cofece's limit on issuing stop orders only for those transactions representing potential risks to the competition process. Under the New Mexican Antitrust Law, all transactions must now wait to obtain clearance before closing—even those transactions in which it is evident that no harm to the affected markets will be generated.

Closely related to the foregoing is the extension of the resolution period from 35 business days to 60 business days (maintaining the possibility to extend the term for 40 additional business days in complex cases). The 35-day term established in the 1993 Law has proven to be more than enough to substantiate the procedure; therefore, there seems to be no justification for such an extension. The negative impact is even greater considering that all transactions must wait until Cofece issues its authorization before closing.

The merger control thresholds have been modified to consider only annual sales originated in Mexico and/or assets in the Mexican territory of the parties, instead of such amounts at a global level, as set forth in Article 20(III) of the 1993 Law. Under this modification, a large number of transactions that were subject to notification will no longer be analyzed by Cofece, maybe missing an opportunity to prevent those with a negative impact on the market.

Last but not least, the regulatory burdens for the parties have been increased (e.g. elements have been incorporated into the list of "basic" information required, Cofece has been given powers to require information at any stage throughout the procedure, terms to require information have been extended, and additional formal requirements have been set for documents and translations). We believe these changes are unjustified considering Cofece might ask for all of them only in particular cases.

Finally, a positive addition is that, under the New Mexican Antitrust Law, Cofece will be obligated to inform the parties to a notification procedure of any possible risks for competition that might result from a transaction, allowing the parties to submit remedies or conditions proposals.