



# Antitrust in Mexico: Perspectives, challenges, and opportunities

*Sánchez Devanny | October 06, 2023*

## **INTRODUCTION**

Although the prohibition of monopolies was introduced constitutionally in 1917, the development of economic competition policy in Mexico has gained significant importance in the last 30 years. This significance arises not only as a result of economic openness but also due to treaties and international agreements that even include chapters or sections dedicated to this subject matter. Additionally, stemming from various amendments to the Political Constitution of the United Mexican States (in 2013, Article 28 of the Constitution sets forth the foundations for a much more comprehensive competition policy and the creation and operation of bodies responsible for monitoring its compliance.

Currently, issues of economic competition are pivotal to understanding business dynamics, considering the globalized and media-driven context in which they operate. The competition authorities in our country strive to have a greater presence and engagement in various areas, not only in Mexico but also at an international level.

In accordance with the Federal Law of Economic Competition and its regulations, during their investigations, the Mexican Federal Commission of Economic Competition ("COFECE") and the Federal Telecommunications Institute ("IFT") are entitled to request information or evidence related to monopolistic activities committed in Mexico from foreign government agencies. Governmental authorities cooperate to ensure the enforcement of antitrust legislation. Additionally, COFECE and the IFT are specifically authorized to execute and negotiate all types of international agreements and treaties related to economic competition and free competition.

Given the significant increase in international trade in recent decades, Mexico has entered into free trade agreements with various jurisdictions (including the United States of America, Canada, Japan, Chile, the European Union, and Israel) that encompass and recognize the importance of international cooperation and coordination among competent authorities to ensure the effective enforcement of antitrust legislation in the

areas of free trade. Furthermore, Mexico has signed agreements with the United States of America and Canada, among others, that enhance cooperation to ensure the prevention and prohibition of monopolistic activities.

Recently, the competition authorities of Spain and Mexico agreed to strengthen their cooperation. COFECE and the National Commission of Markets and Competition of the Kingdom of Spain (CNMC) have signed a Memorandum of Understanding to promote and strengthen voluntary cooperation between both institutions in the field of competition laws. This document aims to foster the exchange of experiences and best practices in prioritizing investigations of anticompetitive practices, detecting economic cartels, and promoting competition, in compliance with their respective national laws. It will also allow exploring the feasibility of conducting joint awareness campaigns on competition and technical assistance programs.

The president commissioner of COFECE emphasized that international cooperation among competition authorities facilitates the convergence of tools and best practices, as well as dialogue and the exchange of experiences in the application of antitrust legal provisions. Additionally, she noted that this cooperation contributes to the Commission's full use of its powers to promote and protect competition for the benefit of consumers through market efficiency. It is evident that healthy economic competition is essential to anticipate or correct negative effects in markets and, ultimately, to benefit consumers.

## ENTITIES REGULATING ECONOMIC COMPETITION IN MEXICO

### COFECE

The Federal Economic Competition Commission (COFECE) is an autonomous constitutional body, with its own legal personality and assets, an independent regulator established by the Mexican government to promote economic competition and prevent, investigate, and penalize anticompetitive practices that could harm the national economy.

COFECE has the power to investigate and impose sanctions on economic agents, such as companies or individuals, involved in anticompetitive practices. It also has the authority to review concentrations (as defined below) that pose a potential threat to competition in a given market before they are carried out.

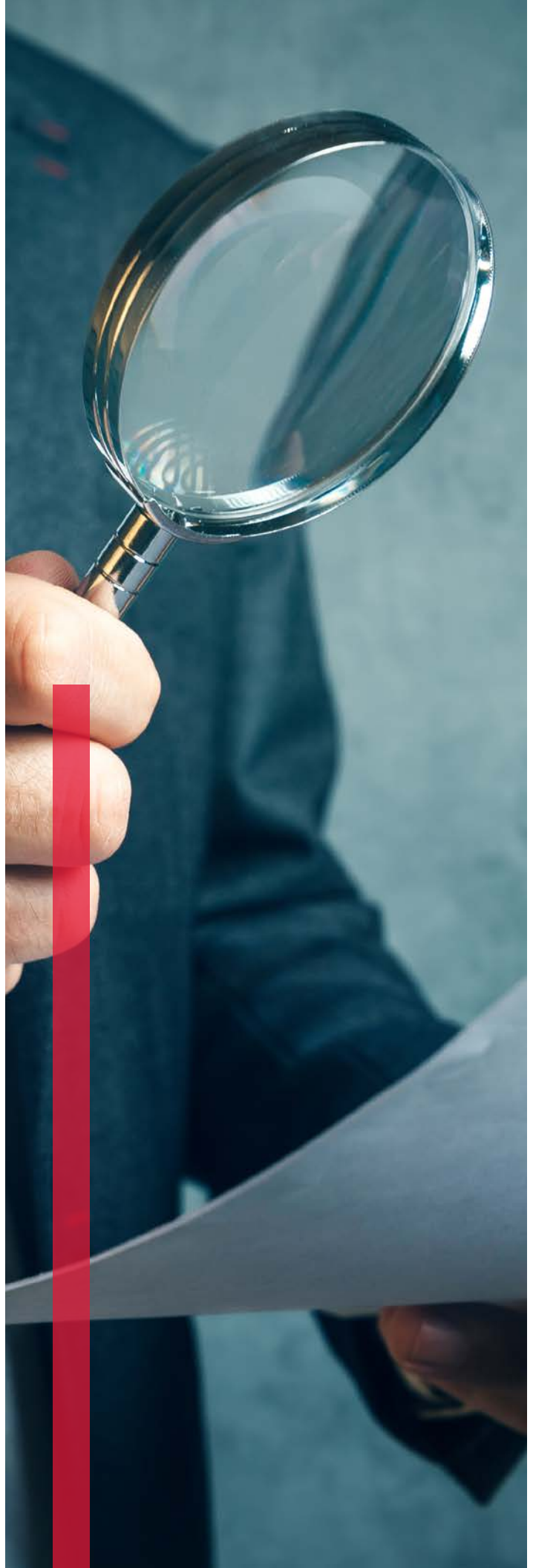
Furthermore, COFECE is also responsible for promoting competition through advocacy and education. This authority conducts research and analysis to identify and address competition issues in various sectors of the economy and provides guidance and advice to policymakers and businesses on how to promote competition and innovation.

Overall, COFECE plays a fundamental role in ensuring a level playing field for companies in Mexico and protecting consumer interests. Its work contributes to promoting economic growth and development by fostering competition and innovation in various sectors of the economy.

### Federal Institute of Telecommunications

While the focus herein is on the activities of COFECE and the Federal Economic Competition Law (LFCE), it is worth noting that the Federal Institute of Telecommunications (IFT) is a regulatory agency in Mexico that oversees and regulates the telecommunications and broadcasting industries, not only sectorally but also in terms of economic competition.

IFT is an independent body with the authority to regulate and supervise the operation of all telecommunications and broadcasting services in Mexico, including radio and television broadcasting, internet and mobile services, and other forms of communication, including competition issues, due to the sector's significant importance in the country.



## INVESTIGATIONS IN ECONOMIC COMPETITION MATTERS

As part of the various functions attributed to it at the constitutional level and in the Federal Economic Competition Law (LFCE), COFECE has the authority to conduct investigations through its Investigative Authority (AI), in order to fulfill its duties of monitoring competitive conditions in various markets.

While the behaviors that can be considered anticompetitive are diverse, according to the current Mexican legal framework and our experience, the most recurrent ones are absolute and relative monopolistic practices, as well as the existence of entry barriers and control of essential inputs. For further reference, we will provide a brief description of these behaviors:

### A. Absolute Monopolistic Practices (Cartels)

What Mexican law considers absolute monopolistic practices, commonly known as “cartels,” are certain behaviors that have three main components: (i) a contract, agreement, arrangement, or combination thereof; (ii) among competing economic agents; and (iii) that aims to achieve or has the effect of any of the following:

- I.** Manipulating the selling or purchasing price of certain goods or services;
- II.** Restricting in any way the production, processing, distribution, or acquisition of certain goods or services;
- III.** Dividing the market in any way;
- IV.** Coordinating positions or abstaining from bids, contests, or auctions; and/or
- V.** Exchanging information with the aim or effect of any of the aforementioned.

According to the LFCE, the Commission can impose an economic sanction of up to 10% (ten percent) of the revenues of the economic agents involved in the commission of an absolute monopolistic practice. COFECE can also choose to initiate criminal proceedings against individuals for committing such practices.

A recent case of such a sanction was COFECE’s fine against various individuals and economic agents, where it fined them over MXN\$2 million pesos and disqualified individuals for manipulating the price and sale of tortillas in Huixtla, Chiapas. COFECE imposed fines on Chedraui, Soriana, two individuals, five industrialists in the dough

and tortilla sector, and a Delegate of the Government of Huixtla for manipulating the price of tortillas and restricting their sale in the referred municipality. The total fines amounted to MXN\$2,072,405.00 pesos due to the harm and duration of the absolute monopolistic practices.

This investigation highlighted the importance of companies having effective compliance programs. Companies are responsible for the actions of their employees or officials that result in LFCE non-compliance. These programs must include training to ensure that operations adhere to applicable laws, regulations, and standards, as well as response mechanisms to discourage practices contrary to competition regulations. COFECE urges executives of all types of companies to comply with the LFCE to avoid fines and disqualifications.

The Commission performs analysis and investigation of products and services that impact people’s well-being, such as food. In the Huixtla case, tortillas were a staple product with a weekly per capita consumption of just over 1 kilogram in 2021, according to Coneval (Consejo Nacional de Evaluación de la Política de Desarrollo Social) data. Lower-income households allocate more than 8% of their food expenditure to purchasing tortillas, according to INEGI (Instituto Nacional de Estadística y Geografía).<sup>1</sup>



<sup>1</sup> <https://www.COFECE.mx/COFECE-sanciona-a-diversas-personas-y-agentes-economicos-por-manipular-el-precio-de-la-tortilla-en-huixtla-chiapas/>

### **i. The Immunity and Sanctions Reduction Program**

The Immunity and Sanctions Reduction Program is an effective tool for detecting, investigating, and sanctioning absolute monopolistic practices. Any individual or company that has participated or is involved in illicit agreements with their competitors can join this program to receive a reduction in the fines that would apply to them and be exempted from criminal liability. In exchange, they must provide information and evidence about such agreements and fully and continuously cooperate throughout the procedure to determine the existence of absolute monopolistic practices. Individuals who have assisted, facilitated, induced, or participated in the commission of such practices can also join the program. The identity of the informant economic agent will be kept confidential.

Once the application is received, the Investigative Authority will contact the applicant to inform them of the place, day, and time they should present the available evidence.

The benefit of sanctions reduction is granted as long as the following requirements are met:

- i.** Apply to the Immunity Program and provide sufficient evidence to initiate an investigation or presume the existence of the practice.

- ii.** Cooperate fully and continuously with COFECE in the investigation carried out and, if applicable, in the procedure followed in the form of a trial.

- iii.** Take the necessary actions to end their participation in the absolute monopolistic practice.

The benefits of the Immunity Program are as follows:

- The first applicant who meets the requirements will receive a minimum fine.
- Subsequent economic agents applying for this benefit can receive reductions in fines of up to 50%, 30%, or 20%.
- No economic agent admitted to the Immunity Program will be criminally liable for the commission of absolute monopolistic practices.

### **B. Relative Monopolistic Practices (Abuse of Dominance)**

A relative monopolistic practice occurs when one or more companies have market power to unfairly displace competitors, limit their access, or establish advantages for certain participants. These behaviors are penalized only if they harm consumers. Some of these practices include tied sales, exclusivities, refusal to deal, boycott, cross-subsidies, and price discrimination.

Sanctions for this type of conduct involve ordering the correction or elimination of the illegal behavior. In the case of individuals representing a legal entity, a fine of up to 200,000 UMAs (Unidad de Medida y Actualización; Current Measurement and Update Unit ("UMA")) and a disqualification of up to 5 years from serving as a director can be imposed. For economic agents, the fine can be up to 18% of income, with the possibility of a double fine or divestiture of assets. In the case of those who have contributed to a relative monopolistic practice, the fine can be up to 180,000 UMAs.

A recent example of this type of sanction is the fine imposed on the International Airport of Mexico City (Aeropuerto Internacional de la Ciudad de México, AICM) in 2022 for denying an economic agent the provision of federal public land transportation services and establishing exclusive advantages in favor of two permit holders. COFECE imposed a fine on the AICM for engaging in relative monopolistic practices by preventing an economic agent from providing federal land transportation services for passengers by bus or van, to or from the airport. This behavior hindered competition and harmed users. As the airport had been previously sanctioned, it was considered a repeat offender and received a fine of 848,888,633 pesos.<sup>2</sup>



<sup>2</sup> <https://www.COFECE.mx/multa-al-aicm-por-impedir-prestacion-de-servicio-publico-de-autotransporte/>

## C. Market Entry Barriers

Any structural characteristic of the market or actions by the participating agents that hinder access of new competitors to the market, their development and permanence in it, or that distort competitive conditions, can be considered to be “barriers.”

It is important to identify the existence of barriers and address them to ensure that the market in question has the most favorable conditions for all existing and future participants. For instance, obtaining certain permits or specific market regulations can be considered barriers, as often seen in the energy market in Mexico. As mentioned, the Commission has the authority to initiate investigations into these matters and provide analysis on them, including issuing recommendations to other authorities in order to rectify such circumstances.

A recent case resolved regarding market barriers is COFECE’s preliminary determination of the absence of effective competition in maritime passenger and roll-on/roll-off cargo transport in Baja California Sur. The Investigative Authority of COFECE has preliminarily determined the lack of effective competition in maritime passenger and roll-on/roll-off cargo transport on the Pichilingue-Topolobampo and Pichilingue-Mazatlán routes, which connect Baja California Sur and Sinaloa.

In the investigation, the investigative authority has identified high levels of concentration in maritime transportation services, as only two companies, *Transportación Marítima de California, S.A. de C.V.*, and *Baja Ferries, S.A.P.I. de C.V.*, have offered roll-on/roll-off cargo maritime transport services on both routes for several years. Additionally, *Baja Ferries* is the only company that provides passenger maritime transport on these routes. There are entry barriers that hinder the participation of more competitors in the future, such as high investment amounts, limits on foreign capital participation in shipping companies, and the lack of capacity at the Pichilingue port to allow new competitors to enter on the same terms as established companies.

The excerpt from the preliminary report of the case has been published in the *Federal Official Gazette*, and interested economic agents can provide their statements and arguments to COFECE regarding this investigation. It is expected that the Commission’s Plenum will issue the final resolution. If the lack of effective competitive conditions is confirmed, it will be the responsibility of the Secretary of the Navy to establish the basis for tariff regulation, in accordance with Articles 130 and 140 of the Maritime Navigation and Commerce Law.<sup>3</sup>



## D. Essential Inputs

The LFCE defines an essential input as a certain good or service that is owned or controlled by one or more agents and is so fundamental to the corresponding market that it also determines the market’s conditions. Determining essential inputs is crucial, as it better explains what goods or services are necessary for the market to function properly. For example, a few years ago, COFECE determined that time slots at airports in Mexico City (the assigned schedules for each airline to take off or land at the airport) are essential supplies in the air transportation market, as they cannot be substituted in any way.

COFECE has the authority to investigate and penalize all the matters described above when there are indications that certain conduct or situations may interfere in a specific market. The investigation is conducted by the competent independent department within the Commission, which will issue a preliminary opinion. After this opinion is issued, the involved parties are

<sup>3</sup> <https://www.COFECE.mx/COFECE-determina-preliminarmente-ausencia-de-competencia-efectiva-en-el-transporte-maritimo-de-pasajeros-y-carga-rodada/>

summoned to participate in a proceeding conducted in the form of a trial. Both parties must appear to present evidence and arguments in order for a final resolution to be issued, and a penalty to be determined, if applicable.

### **E. Concentrations (Merger control)**

Included in COFECE's powers is the authority for reviewing and approving, if applicable, various operations that involve a concentration with effects on different Mexican markets. For the purposes of the LFCE, a concentration is defined as "the merger, acquisition of control, or any act by virtue of which companies, associations, shares, ownership interests, trusts, or assets in general are combined between competitors, suppliers, customers, or any other economic agents." They must be reported by the parties involved to COFECE when:

i. the act or series of acts giving rise to them, regardless of where they are conducted, have an amount in the national territory, directly or indirectly, exceeding the equivalent of eighteen million times the daily UMA in force at that time;

ii. the act or series of acts giving rise to them involve the accumulation of thirty-five percent or more of the assets or shares of an Economic Agent, whose annual sales originating in the national territory or assets in the national territory exceed the equivalent of eighteen million times the Current UMA in force at that time; or

iii. the act or series of acts giving rise to them involve an accumulation of assets or social capital in the national territory exceeding the equivalent of eight million four hundred thousand times the Current UMA in force at that time, and two or more Economic Agents whose annual sales originating in the national territory or assets in the national territory, jointly or separately, exceed forty-eight million times the Current UMA in force at that time participate in the concentration.

These concentrations must be submitted in writing, using the electronic portal that COFECE has enabled for this purpose. It is important to note that, in the submission of these notifications, in addition to providing complete and timely information as required by the LFCE, a thorough analysis of the operation and all its potential effects must be conducted. Additionally, all documents and information that can help the authority visualize the corresponding market and support the claim that the operation will not have adverse effects on it should be attached.

The general rule is that a joint submission is required. In fact, the LFCE states that all economic agents directly involved in the transaction must submit the

notification. However, the LFCE allows the acquirer to submit the notification independently in some cases.

Failing to submit a transaction that meets the established thresholds can result in significant fines for the parties involved. Furthermore, if during the investigation process it is determined that the transaction is an illegal concentration, additional fines can be imposed, as well as conditions (e.g., reversing specific legal acts) or the order to divest or dismantle the corresponding concentration. Sanctions can be imposed on both the transaction parties and individuals who order or execute the transaction.

The parties are obligated to act independently until authorization is obtained and the transaction is concluded. The exchange of sensitive information between the parties is also prohibited, as this could lead to anticompetitive behavior and be investigated as a cartel.

In general, COFECE has increased the level and depth of its analysis of transactions, even those that don't pose a risk to competition. It has a 60-day period from the date it accepts the notification to issue its authorization, which can be extended by an additional 40 days as justified by the complexity of the matter. Although COFECE has made efforts to optimize its analysis and authorization issuance times in recent years, the key to avoiding any risk or delay in authorization lies in submitting a complete notification in accordance with the LFCE, its rules, and the guidelines issued by the Commission for this purpose.

Complying with the notification process is crucial to preserving competitive conditions for the benefit of consumers. This way, COFECE can assess whether the merger results in market power that threatens other competing firms and ensure that competitive pressure is maintained for the benefit of consumers. The Plenary of COFECE can approve, condition, or object to the completion of a merger, so applicants must await this determination before finalizing the operation.

COFECE urges economic agents to respect the regulatory framework to avoid being subject to legal sanctions.

Finally, it is important to mention that COFECE is becoming increasingly specialized in its analysis. According to the first quarterly report of 2023, 88 concentrations were analyzed, of which 38 were approved, four were deemed inadmissible, one was considered not submitted, one was withdrawn, and 44 are still in process. The total value of the approved operations amounted to over 165,878 million pesos.

## JURISDICTION OVER DIGITAL MARKETS

The Mexican Constitution establishes the Commission as the competition authority for all national markets, with the exception of the telecommunications and broadcasting sectors, which fall under the exclusive jurisdiction of the telecommunications regulator, the Federal Institute of Telecommunications (IFT). There have been isolated cases where doubts arise regarding which authority should address a specific matter.

The development and use of multiple technologies has enabled the digitization of markets. Consequently, many traditional companies and economic agents now operate through digital platforms where the internet is a necessary element. Courts specialized in competition, telecommunications, and broadcasting had previously determined that certain markets use the internet as a facility, so jurisdiction in competition matters within specific markets must be analyzed on a case-by-case basis, based on merit. For this purpose, the competition law establishes that in cases where COFECE and the IFT cannot agree on which authority is competent to address a matter, this will be determined by a specialized court through the resolution of an administrative jurisdictional procedure.

In 2021, a specialized court was requested to determine which authority was competent to address a matter related to an investigation initiated by the IFT regarding possible barriers to competition and essential facilities in the markets for online search services, social networks, mobile operating systems, and cloud computing services. The judicial decision issued by the court determined that COFECE was competent to address matters in the markets for online search services, social networks, and cloud computing services, and that the telecommunications regulator was competent to address matters in the market for mobile operating systems. With this determination, the judiciary provided greater jurisdictional certainty to COFECE, the IFT, and participants in the digital economy.



## SANCTIONS IMPOSED BY COFECE

Generally, the Commission can impose two different types of sanctions, the most common being economic sanctions. However, in certain cases, COFECE has the authority to impose fines or initiate criminal actions against individuals involved in anticompetitive practices.

### Economic Sanctions

According to the LFCE, the Commission can impose economic sanctions that range from a fixed amount multiplied by the current UMA to a percentage of the economic agents' revenues, ranging from 5% (five percent) to 10% (ten percent) in some cases. These sanctions are imposed for various reasons, including engaging in illicit concentrations, failing to submit a merger control procedure, providing false information or statements, committing or cooperating in the commission of a monopolistic practice, or failing to comply with resolutions or orders.

### Criminal Sanctions

As part of the Commission's enforcement authority, an antitrust offense was introduced into the criminal code, allowing COFECE to file a complaint with the Public Prosecutor's Office to press charges and impose penalties ranging from 5 (five) to 10 (ten) years of imprisonment for committing absolute monopolistic practices. These sanctions are only imposed on individuals, as companies or other entities cannot be criminally prosecuted for this offense.



## CURRENT STATE OF THE FIELD OF ECONOMIC COMPETITION

COFECE has defined four institutional objectives that will guide its work during the period 2022-2025. Through these objectives, the Commission will fulfill its constitutional mandate to ensure free competition, prevent, investigate, and combat monopolies, monopolistic practices, illicit concentrations, and other restrictions on the efficient functioning of markets. The institutional objectives for 2022-2025 will serve as the framework that will guide COFECE's daily activities over the next four years. COFECE has outlined specifically how it will achieve each institutional objective.

- I. Prevent and correct market structures that hinder, harm, or impede competition and free access;
- II. Combat and deter anticompetitive practices that affect markets;
- III. Promote the application of competition principles among public and private actors by actively disseminating the benefits of economic competition; and
- IV. Consolidate a robust and cutting-edge organizational model that effectively responds to institutional needs and challenges.


COFECE establishes a prioritization of sectors to guide its efforts during the 2022-2025 period as part of its commitment to efficiently use its human, physical, and financial resources. The definition of priority sectors allows the institution to direct its efforts towards areas where competition policy can generate greater benefits in terms of consumer welfare and the country's economic performance. While these sectors guide the proactive work of the Commission, it maintains its commitment to promptly address complaints and initiate corresponding proceedings when it detects obstacles to competition and free access in any market.

Since the Strategic Plan 2014-2017, COFECE used six criteria to identify sectors that are priorities in economic competition policy: contribution to economic growth, widespread consumption, cross-cutting relevance, impact on lower-income populations, regulated sectors, and prevalence of anticompetitive conduct. For the 2022-2025 four-year period, an additional criterion is added: international competition trends.<sup>4</sup>

As mentioned, while the development of the field of Economic Competition is not recent, in Mexico, we have observed a trend of the authority increasing its involvement in all relevant markets for the country's economy, intensifying efforts not only to grant authorizations but also to conduct in-depth analyses, comprehensive investigations of complex cases, and to

issue studies and statistics with a high technical level that have become important references for conducting all types of operations and businesses within the national territory.

That is why, in our experience, it is important to always conduct an analysis in light of Economic Competition provisions and the cases and markets most studied by the Commission when carrying out an operation, implementing a strategy, or even rethinking the way of conducting business within and outside the companies. Something as simple as an information exchange or participation in chambers or associations could entail various risks or lead to situations contrary to the current competition policy.

*Our specialized Economic Competition Practice Group is composed of lawyers with extensive experience and expertise in guiding clients in the area of monopolistic practices, both in Mexico and abroad. They have successfully represented multiple clients in the development and conclusion of their national and international projects and operations, before their counterparts and COFECE.* 

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<sup>4</sup> <https://www.cofece.mx/plan-estrategico-2022-2025/>



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