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PARTNER IN THE PRACTICE

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COMPETITION & ANTITRUST NEWSLETTER MARCH- APRIL 2023

MARCH

Federal Economic Competition Commission ("COFECE", for its acronym in Spanish) imposes a fine of 61.5 million Mexican pesos to two economic agents for not having fulfilled all the steps of the notification of concentrations procedure.

On March 1, 2023, COFECE announced that it had fined HP, Inc. ("HP") and Plantronics, Inc. ("POLY") with a penalty that amounts to \$61,580,800.00 MXP for having completed a transaction prior to the COFECE's Board of Commissioners had issued the corresponding resolution.

The sanctioned economic agents carried out the transaction which consisted in the indirect acquisition by HP of the totality of the shares and absolute control of POLY on August 29, 2022. According to COFECE, given that the transaction was concluded before obtaining COFECE's authorization, it was impossible to analyze in an appropriate and preventive manner the risk to competition that could be generated by the concentration. Consequently, a verification procedure was initiated under file number VCN-001-2023.

At the conclusion of the procedure, COFECE's Board of Commissioners ruled that the transaction did not involve anticompetitive risks, and therefore, the merger was authorized. However, the lack of notification by HP and POLY was classified as highly severe since it obstructed the exercise of COFECE's powers, and consequently, the aforementioned sanctions were imposed.

COFECE investigates probable collusive conducts in the radiological material market acquired by the health sector.

On March 2, 2023, COFECE's Investigative Authority published the initiation of the *ex-officio* investigation, processed under the file number IO-004-2022, for the possible execution of collusive conducts, consisting in the agreement or coordination of bids in the market of radiological and related material acquired by the health sector in the national territory.

COFECE indicates that collusions in the health sector have a serious effect because they have a direct impact on the number and quality of medical supplies purchased with public resources by governmental institutions for the medical attention of the population.

If the existence of a collusive conduct is evidenced in accordance with the Federal Economic Competition Law ("FECL"), the responsible economic agents may be sanctioned with fines of up to 10% of their revenues. On the other hand, individuals who have participated in the execution or performance of anticompetitive agreements may be sanctioned with up to 10 years of prison, in terms of the Federal Criminal Code.

COFECE issues the Guidelines for the use of electronic media during the investigation, the sequence of the proceeding, the verification and the incidents processed before the Federal Economic Competition Commission ("Guidelines").

On March 2, 2023, COFECE published the Guidelines in the Federal Official Gazette ("Official Gazette"). The Guidelines became effective on March 2, 2023, and replace the Emergency Regulatory Provisions of the FECL regarding the use of electronic means in certain proceedings before COFECE.

The Guidelines are mandatory for those who make use of electronic means in the following procedures:

- Complaints regarding monopolistic practices and unlawful concentrations.
- Initiation and development of investigations for monopolistic practices or unlawful concentrations; as well as investigations to determine essential facilities or barriers to competition and to determine market conditions.
- Benefit of waiver or reduction of the amount of fines (commitments).
- Immunity Program.
- The trial-like proceedings.
- Procedures related to the qualification of information derived from legal advice.
- Verifications of compliance with the obligation to notify a concentration.
- Incidents related to any of the above procedures.
- Verifications and incidents related to the compliance and execution of COFECE's decisions.
- Complaints, investigations, and trial-like proceedings, arising from the provisions of the Law for the Transparency, Prevention and Challenging of Unfair Practices in Advertising Contracting.

Appointment of Andrea Marván as President Commissioner of COFECE.

On March 15, 2023, Commissioner Andrea Marván Saltiel was appointed by the Plenary of the Senate as President of COFECE's Board of Commissioners for a period of 4 years, renewable for one time, in terms of Article 28 of the Political Constitution of the United Mexican States. After her appointment, the new Commissioner President took her oath of office.

As background, last December 2022, she was proposed by the Federal Executive and ratified by the Senate of the Republic to be COFECE's Commissioner for a 9-year term.

Andrea Marván has a law degree from the Universidad Iberoamericana and a master's degree in the same subject from the University of Chicago; she has a ten-year professional career at COFECE, where she has held different positions, emphasizing that she acted as general director of Competition Promotion. In addition, she was a professor at Tecnológico de Monterrey.

COFECE determines the existence of barriers to competition in the relevant markets of the turbosine value chain.

On March 17, 2023, the Board of Commissioners of the COFECE announced that it found five barriers to competition that restrict the efficient operation of the markets for primary and secondary commercialization, internal and external storage, as well as the dispensing of turbosine.

The barriers identified and the recommendations to eliminate them are as follows:

1. In the relevant market for primary commercialization, there are some provisions regarding the prior import permits regime that limit the entry and stay of economic agents; therefore, it was recommended to the Ministry of Economy and the Ministry of Energy to modify the agreements that limit the import of jet fuel.
2. In the relevant market of external storage, there is a shortage and lack of access to external storage infrastructure for turbosine, which prevents competition among current and potential economic agents. Therefore, it was recommended to the Energy Regulatory Commission ("CRE, for its acronym in Spanish") to increase the possibility for traders to have access to external storage infrastructure without discriminatory restrictions.
3. In the relevant market of external storage, it was determined that most of the capacity in Mexico is contracted with Pemex Transformación Industrial ("PEMEX TRI") and there are no maximum limits to its capacity, which limits the entry of competitors to the market. Therefore, it was recommended to the CRE to establish a regulation that determines the maximum participation of PEMEX TRI in the capacity reserve in the external storage facilities at a regional level.
4. In the markets of secondary commercialization and supply, competition is restricted due to the lack of functional, operative and accounting separation of the Airports and Auxiliary Services that are vertically integrated in several segments of these relevant markets.

Therefore, the Ministry of Infrastructure, Communications and Transportation ("SCT", for its acronym in Spanish), the Ministry of Finance and Public Credit ("SCHP", for its acronym in Spanish) and the Ministry of Public Function ("SFP", for its acronym in Spanish) were recommended to evaluate and, if necessary, modify the current Organic Statute of Airports and Auxiliary Services, so that it complies and guarantees the obligations of separation of commercialization and storage activities, in accordance with the terms ordered by the CRE. Also, the Board of Directors of Airports and Auxiliary Services was ordered to comply with the obligations of functional, operational and accounting separation, making a clear distinction in the separation of functions, procedures and personnel of the administrative units responsible for the commercialization and storage activities, as ordered by the CRE.

5. In the relevant market of internal storage and dispensing, it was pointed out that some concession titles for the operation and administration of airports contain exclusivity clauses in favor of Airports and Auxiliary Services. These provisions ceased to be in force with the entry into force of the Hydrocarbons Law, but indirectly could be limiting the competition to new entrants in the supply. Therefore, it was recommended to the SCT to issue and publish in the Federal Official Gazette a general notice stating that such exclusivities are no longer enforceable.

By complying with the recommendations and measures ordered, it is expected that more competitors will enter into the markets that make up the turbosine value chain, which will be reflected in better prices for the end consumer.

APRIL

COFECE summons several economic agents and individuals for possible unlawful concentrations in the gas and diesel market.

On April 18, 2023, COFECE announced that it had summoned several economic agents and individuals in the investigation processed under file number IO-001-2019, which concluded on November 29, 2022.

COFECE found evidence of the probable occurrence of several unlawful concentrations and the possible omission of notification of concentrations in terms of the FECL, in the market of commercialization and distribution of gas and diesel, as well as the retail sale of such products in service stations in national territory.

This summons initiates the trial-like procedure carried out by COFECE. The parties may state what they deem appropriate and offer evidence. In the event that an unlawful concentration is proven, sanctions may be imposed on the economic agents and natural persons summoned.

IFT investigates the abuse of dominance practices in the application stores markets of mobile operating systems.

On April 27, 2023, the Investigative Authority of the Federal Telecommunications Institute ("IFT", for its acronym in Spanish) published in the Official Gazette the initiation of the investigation by complaint, processed under file number AI/DE-004-2022, into abuse of dominance conducts (relative monopolistic practices) in the application stores markets of mobile operating systems and their related markets, as well as the distribution of audiovisual content through internet platforms, in Mexican territory.

In accordance with the Notice of Initiation of the investigation, the investigated conducts consist in: the imposition of tyings, exclusivities, price discrimination and cost increases to rivals.

If the existence of a relative monopolistic practice is proven, the responsible economic agents may be sanctioned with fines of up to 8% of their income. On the other hand, individuals who have participated in representation of a responsible economic agent may be sanctioned with up to 5 years of disqualification to act as director of the company and with economic fines.

As part of its investigative tools, the IFT may request information in writing, and carry out dawn-raids to the economic agents, as well as summon individuals who are related to such markets. Those economic agents required to provide information by the authority, have the obligation to do so under the FECL.

The notice of this investigation opens the possibility for any economic agent that participates in the investigated market to be part of the investigation and provide information it deems convenient.

COFECE initiates a study on competition in the natural gas market.

On April 27, 2023, the Board of Commissioners of COFECE made public the initiation of a study on economic competition in the markets for the manufacturing, distribution and commercialization of natural gas. COFECE stated that the energy sector is relevant since it is an input for the rest of the manufacturing sectors, which is why it was included as one of the priority sectors for COFECE in its Strategic Plan 2022-2025.

Natural gas is relevant because, according to the Energy Information System, it generates 52% of the country's electricity; it is also used as an input in other industries and as an energy source in homes. In 2021, Mexico ranked 11th in natural gas consumption in the world.

The release of the initiation of this Study opens the possibility for individuals, institutions and economic agents interested in sending comments and submitting elements that they deem important for the analysis of the natural gas market, from a competition perspective, may do so.

Finally, if appropriate, the Study will submit recommendations to the authorities of the sector to promote competition in the natural gas market in benefit of the consumers.

Sincerely,

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