



BOGOTA | CALGARY | MEXICO CITY | DALLAS

PARTNER IN THE SECTOR

Fernanda Garza
Partner



COMPETITION & ANTITRUST NEWSLETTER MAY- JUNE 2023

MAY

COFECE initiates investigation into possible execution collusive conducts in the distribution and commercialization of scopolamine.

On May 2, 2023, the Investigative Authority of the Federal Economic Competition Commission ("COFECE, for its acronym in Spanish") published in the Federal Official Gazette ("Official Gazette") the initiation of an *ex officio* investigation, processed under file number IO-006-2022, for the possible execution of collusive conducts (absolute monopolistic practices) in the market of distribution and commercialization of Scopolamine (Hyoscine, Butylscopolamine bromide, Scopolamine butylbromide, Hyoscine butylbromide, N-Butylbromide Scopolamine, Hyoscine butylbromide and related) in national territory.

COFECE noted that scopolamine is an active ingredient that serves as the basis for the manufacture of highly common drugs on the market. In low doses, it is used to treat motion sickness, nausea and colitis, also as an antispasmodic and as a local analgesic, among many other important uses in the health sector.

In accordance with the Notice of Initiation of the investigation, the investigated conducts may consist of: price manipulation, supply constraints, market segmentation and exchange of information with any of the above-mentioned purposes or effects.

The health sector is a priority for COFECE due to the impact it has on people's well-being and quality of life. According to data from INEGI's National Survey of Household Income and Expenditures 2020, only in 2020, 54% of households reported spending on items related to healthcare, which in the case of the purchase of prescription drugs reached 31%. In addition, this sector accounted for 2.5% of GDP in 2022.

If the existence of a collusive conduct is proven, the responsible economic agents could be sanctioned with fines of up to 10% of their income. On the other hand, individuals who participate in the execution of these conducts could be: i) imprisoned for up to 10 years in terms of the Criminal Code; and ii) sanctioned with up to 5 years of disqualification to act as a director of the company and with economic fines.

As part of its investigative tools, COFECE 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 Federal Economic Competition Law ("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 fines with more than 11 million pesos 3 companies of water and waste management and treatment for not completing the pre-merger notification procedure.

On May 26, 2023, the Board of Commissioners of COFECE fined Engie S.A. ("Engie"), Suez, S.A., ("Suez") and Veolia Environment, S.A. ("Veolia") with an amount of MXN\$11,029,331.00, since they failed to notify three concentrations, pursuant to the FECL.

The three sanctioned companies provide water and waste management and treatment solutions. In this case, Engie, Suez and Veolia carried out three transactions in the wastewater treatment market, which, given their characteristics, required COFECE's authorization before being carried out.

As a result of the omission to notify these transactions, the companies were sanctioned for hindering COFECE's duty to evaluate whether the result of the merger does not lead to a market power position of the resulting economic agent that may threaten the rest of the competitors in the market, and to verify that the competitive pressure among them is preserved for the benefit of consumers.

Once the procedure was concluded, the mergers were authorized by COFECE since they did not represent competition risks for consumers. Once the matter has been decided and the parties have been notified, the sanctioned economic agents have the right to appeal before the Federal Judicial Power to review the legality of COFECE's actions.

JUNE

COFECE initiates investigation into collusive conducts in the distribution and exhibition of films in movie theaters.

On June 1, 2023, the Investigative Authority of the COFECE published the initiation of the *ex officio* investigation, processed under file number IO-007-2022, for the possible execution of collusive conducts (absolute monopolistic practices) in the market for the distribution and exhibition of films in movie theaters, as well as complementary services, in the national territory.

The purpose of this investigation is to determine whether illegal agreements between distributors and/or exhibitors of films in movie theaters between competitors took place. COFECE pointed out that this is a highly important market since the exhibition of movies is one of the main recreational activities of families.

Under the FECL, if the collusive conducts are evidenced, the responsible economic agents may be sanctioned with fines of up to 10% of their revenues. On the other hand, individuals that 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.

As part of its investigative tools, COFECE may request information in writing, and carry out dawn-raids, 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.

Finally, those who have participated or collaborated in a collusive conduct have the opportunity to apply for the benefits of the Leniency and Immunity Program.

Preliminary Assessment on conditions of effective competition in the maritime transportation services of passengers and ro-ro cargo in coastal navigation with origin or destination in Baja California Sur.

On June 8, 2023, the Investigative Authority of COFECE published in the Official Gazette the Preliminary Assessment of the file DC-001-2022, issued on May 31, 2023.

As background, the Investigative Authority of COFECE published in the Official Gazette on November 30, 2022, the initiation of the ex officio investigation to determine whether there are effective competition conditions in the market for maritime transportation services of passengers and roll-on/roll-off cargo in coastal navigation, with origin or destination in Baja California Sur and related services ("Market Subject of the Assessment").

The Market Subject of the Assessment is composed of two services: (i) the service of maritime transportation of roll-on/roll-off cargo, which is provided by ferry on routes linking the Mexican continental massif with Baja California Sur, on a previously defined route, upon payment of a fare ("STMC") and, (ii) the service of maritime transportation of passengers, which is provided by ferry, on a previously defined route, upon payment of a fare, pursuant to a passenger maritime transportation agreement in the form of a ticket, on routes linking the Mexican mainland with Baja California Sur ("STMP").

The routes considered for the provision of the services that make up the Market Subject of the Assessment are: (i) Pichilingue - Topolobampo and (ii) Pichilingue - Mazatlán. The ports related to the routes are: the port of Pichilingue, the port of Topolobampo and the port of Mazatlán, which have the infrastructure and buildings required for the attention of vessels and port and related services, which allow STMC and/or STMP suppliers to provide the service from these ports.

COFECE's Investigative Authority determined that the Relevant Market STMC Pichilingue - Topolobampo and Pichilingue - Mazatlan counted only with the presence of two economic agents Navieras Baja Ferries ("Baja Ferries") and Transportación Marítima de California, S.A. de C.V. ("TMC"), both of which presented high and static market shares between 2018 and 2022. Baja Ferries' average market share during that period was 71.9%, while TMC's average market share was 28.1%.

On the other hand, the COFECE Investigative Authority determined that the STMP has only been provided by Baja Ferries, both in Pichilingue - Topolobampo and Pichilingue - Mazatlan. In that sense, Baja Ferries' market share was 100% between 2018 and 2022.

By means of the Preliminary Assessment, the Investigative Authority preliminarily concluded that there are no effective competition conditions in the Market Subject of the Assessment. In order to determine the above, the Investigative Authority noted the following:

- i) There is a high market concentration. Only two economic agents participate in the STMC market, Baja Ferries and TMC, which have important market shares. Only one economic agent, Baja Ferries, participates in the STMP market.
- ii) There are no current and/or potential competitors that could counteract Baja Ferries' and TMC's ability to fix prices and/or restrict supply, therefore, such economic agents have the power to fix rates and/or restrict supply, without any economic agent being able, currently or potentially, to counteract such power.
- iii) There are economic and regulatory entry barriers, such as:
 - a. The amount of the investments required for the acquisition of the vessels to provide STMC and/or STMP services in the relevant markets, as well as their payback period.
 - b. There is not enough available capacity in the port of Pichilingue in Baja California Sur for new STMC and/or STMP suppliers to operate in such markets, under the same conditions (e.g., schedule) as those of the current economic agents.

Pursuant to Article 96 of the FECL, the COFECE ordered the notification of the Preliminary Assessment to the Ministry of the Navy, in order for it to issue a technical opinion on the corrective measures that it considers pertinent to be applied. Likewise, it ordered to notify the economic agents that may have legal interest in the matter so that, within the following 45 days, they may state in the file DC-001-2022 what they deem convenient and offer the elements of conviction that they deem pertinent.

Finally, in accordance with the FECL, once the file is closed, COFECE will issue a final resolution, which may include

- Recommendations for Public Authorities.
- Order to the economic agents to eliminate barriers that unduly affect the process of free concurrence and competition.
- The determination of the existence of essential inputs and guidelines to regulate, as the case may be, the modalities of access, prices or tariffs, technical conditions and quality, as well as the application schedule.
- The divestment of assets, rights, social parts or shares of the economic agents involved, in the needed proportions to eliminate the anticompetitive effects. It will proceed when other corrective measures are not sufficient to solve the identified competition problem.

COFECE fines and disqualifies individuals for manipulating the price of tortillas and limiting their sale in Huixtla, Chiapas.

On June 21, 2023, COFECE imposed fines for collusive conducts to various economic agents for a total amount of MX\$2,072,405.00.

The economic agents sanctioned are Chedraui ("Tiendas Chedraui, S.A. de C.V.") and Soriana ("Tiendas Soriana, S.A. de C.V."). It also sanctioned 5 dough and tortilla manufacturers, and a delegate of the Government of Huixtla in the state of Chiapas who acted as coadjutant, for manipulating the price of tortillas and limiting their sale in the municipality of Huixtla, Chiapas.

In this case, COFECE, in exercise of its powers, disqualified two individuals who acted on behalf of Chedraui and Soraine from engaging in the collusive conducts.

The sanctioned economic agents have the right to file the appeals they deem convenient before the Federal Judicial Power in order to review the legality of COFECE's actions.

Sincerely,

Fernanda Garza Magdaleno
Partner – Competition & Antitrust
fgarza@smpls.com.mx

Miriam Harari
mharari@smpls.com.mx

This newsletter contains information of a general nature and is not intended to include any interpretation of what is commented herein, so it should not be considered applicable with respect to a particular case or under specific circumstances. The information contained herein is valid on the date of issue of this communication. Therefore, we recommend requesting confirmation about the implications in each particular case to SMPS Legal team.

LEGAL NOTICE

©2023, SMPS LEGAL, S.C., ALL RIGHTS RESERVED. AVENIDA PASEO DE LA REFORMA 509, PISO 18, COL. CUAUHTÉMOC, ALC. CUAUHTÉMOC, CIUDAD DE MÉXICO, 06500. The content of this publication (including the content and trademarks) is property of SMPS Legal, S.C. It is protected by the Federal Copyright Law, the Federal Law for the Protection of Industrial Property and the International Treaties entered into by Mexico. Any unauthorized use of this content by any means of reproduction, whether in written, digital or printed form, will be penalized in terms of the applicable legislation. It is prohibited to copy, edit, reproduce, distribute or any other form of exploitation, by any means, without written authorization from SMPS Legal, S.C.