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COMPETITION & ANTITRUST BIMONTHLY NEWSLETTER

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COFECE imposes a fine for an incorrectly limited non-compete clause in the industrial gas equipment market.

On August 24, 2023, the Board of Commissioners of the Federal Economic Competition Commission (“COFECE”, for its acronym in Spanish) issued the final resolution in the investigation number IO-001-2021 in which it imposed a fine for an amount of \$2,604,244.00 M.N. to Equipos para Gas, S.A. de C.V. (“EGSA”), Gas Tecnología y Equipos, S.A.P.I. de C.V. (“Gastek”), as well as to Luis Miguel González Urzúa (“Luis González”) and Miguel Alejandro González Vázquez (“Miguel González”), acting on behalf of Gastek and Víctor Hugo Caporal Villaseñor (“Víctor Caporal”), acting on behalf of EGSA, for engaging in collusive conducts in the market of integration, installation, maintenance and commercialization of equipment, accessories and spare parts for the use of industrial gases in the national territory (“Investigated Market”).

The foregoing, since the referred economic agents entered into a Non-Compete Agreement on July 20, 2017, through which they agreed to not manufacture, process, distribute, commercialize or acquire but only a restricted or limited amount of goods or the supply or transaction of a restricted number, volume or frequency of services. The Board of Commissioners of COFECE considered that such conduct constituted a collusive conduct pursuant to article 53, section II of the Federal Economic Competition Law (“FECL”).

According to the resolution, on July 20, 2017, Luis González and Miguel González, acting on behalf of Gastek were requested to meet at EGSA's offices to sign the Share Purchase Agreements. However, instead of signing the Share Purchase Agreements on that date, they entered into a Non-Compete Agreement between Gastek and EGSA; and it was not until October 5 and 14, 2017 that they signed the Share Purchase Agreements.

By means of the Non-Compete Agreement, EGSA, through Víctor Caporal, agreed with Luis González and Miguel González, that the latter two, directly or indirectly through individuals or legal entities, as well as their ascendants and descendants in direct straight line without limit of degree and relatives by consanguinity up to the second degree, should refrain from carrying out any activity equal or similar to all the activities included in EGSA's corporate purpose, for a period of 10 years as of the date of execution of the Non-Compete Agreement.

The conduct was in force from July 20, 2017, the date on which the Non-Compete Agreement was entered into until February 20, 2018, the date on which Luis González and Miguel González filed a commercial lawsuit in which they sought the nullity of the Non-Compete Agreement.

The FECL allows that in the execution of a transaction the parties have the possibility of establishing a clause to protect the value of the business acquired by the buyer, commonly known as “non-compete clause”. However, this type of clause must be delimited as to persons, products, geographical areas, temporality and they must be closely related to the transaction they seek to protect and the limitation must be proportional and necessary for the protection of the business. In the event that the “non-compete clause” is not closely related to the transaction it is intended to protect and its terms are not strictly necessary to achieve such purpose, they are considered illegal.

COFECE concluded that the Non-Compete Agreement does not comply with the standards to be considered as a valid non-compete clause in terms of the FECL and the Merger Notification Guidelines. The foregoing, since the Non-Compete Agreement was not directly or closely related, nor was it essential or proportional to the execution of the Share Purchase Agreements entered into between EGSA and Gastek. Consequently, the Board of Commissioners of COFECE resolved that the Non-Compete Agreement was not allowed by the FECL, and that it resulted in an arrangement between competitors to reduce the supply since, by virtue of such agreement, two competitors committed to not compete in the market, and therefore, it constituted a collusive conduct.

An interesting point of this case is that the Non-Compete Agreement was subject to a commercial trial. In the first instance, the clauses that imposed restrictive effects to third parties, i.e. ascendants and descendants in direct straight line without limit of degree, spouses, daughters-in-law, sons-in-law and relatives by blood up to the second degree and relatives by affinity up to the second degree, were declared invalid. The rest of the Agreement was declared as valid, legal, effective and binding.

Against such ruling, the individuals sanctioned by COFECE filed an appeal. By means of the judgment issued in the second instance, the court declared the absolute nullity of the Non-Compete Agreement. Likewise, it pointed out that the judgment issued does not modify COFECE's trial-like proceeding, in which the probable execution of a collusive conduct in terms of the FECL was being analyzed.

COFECE concluded that the Non-Compete Agreement constituted a restriction with respect to the total supply available in the Investigated Market, since EGSA and Gastek limited or restricted the supply for the customers of the products and services under the Non-Compete Agreement. COFECE noted that, during the period it was in force, EGSA offered a lower quantity of goods and obtained a higher profit margin. At the end of Gastek's compliance with the Non-Compete Agreement, the supply of goods in the market increased, and EGSA's profit margin decreased.

SEPTEMBER

COFECE identifies barriers to competition in card payment processing.

Following the suspension of this proceeding from 2020 to 2022 due to the SARS-COV 2 pandemic (COVID -19) and the fact that COFECE's Board of Commissioners was incomplete, finally on September 14, 2023, COFECE made public its decision regarding the existence of barriers to competition in the card payment processing market operated by Clearing Houses for Card Payments ("Clearing Houses"), within the file IEBC-005-2018.

Currently in Mexico this market operates as if there was a single network in which only two Clearing Houses are interconnected: E-Global and Prosa. Despite the existence of other economic agents with permits to operate, they have not been able to enter this market. These services are regulated by the Transparency and Operation of Financial Services Statute, Circular 4/2014: Rules for the Organization, Functioning and Operation of Clearing Houses for Card Payments, issued by Banco de México ("Banxico") (the "Circular 4/2014") and the General Provisions for Disposal Media Networks.

In its decision, COFECE determined that competition in the market for card payment processing services provided by Clearing Houses was limited due to significant barriers to competition —such as high costs for its operation— that contributed to the exclusion of the most vulnerable groups, as well as micro, small and medium-sized companies in the financial system.

COFECE identified the following barriers and made some recommendations and orders in this regard:

Barrier 1. Current regulation related to the operation of card payment processing services is agreed among the current participants, which gives them advantages and discourages the entry of new competitors.

The current regulation is a barrier to competition as it allows E-Global and Prosa to agree the rules for the operation of card payment processing services, as well as the conditions of interconnection between Clearing Houses networks, and the mechanism for determining interconnection fees. This situation gives these companies significant advantages and discourages the entry of new competitors.

According to COFECE, the establishment of clear and objective rules will promote competition among different networks and will not put new competitors at a disadvantage, which is essential for competitive conditions to exist in this market and the related markets.

Barrier 2. Existence of regulatory provisions that hinder potential new competitors from entering the market.

COFECE's Board of Commissioners considered that certain rules of Circular 4/2014 hinder the access of potential new competitors as it gives to existing participants the power to regulate what originally should correspond to Banxico.

COFECE also identified that Clearing Houses have a critical mass of issuers and acquirers; and, therefore, the entry and expansion of a Clearing House in the market necessarily requires interoperating transactions with both incumbents (issuers and acquirers) which is necessary to connect or interconnect. COFECE also noted the existence of high costs for the connection with the Clearing Houses, which are supported by long authorization periods for incoming Clearing Houses and anticompetitive requirements for the link between Clearing Houses.

Barrier 3. Co-ownership of banks in clearing houses could clear the way for cartel behavior in the market.

COFECE's Board of Commissioners considered that the co-ownership of banks in Clearing Houses by economic agents that are competitors of each other in related markets is a structural characteristic of the market that clears the way for potential coordinated behavior in related issuance and acquiring markets since it may establish a frequent communication channel between them.

Likewise, COFECE identified that the Clearing Houses' shareholders appoint as Board Members high ranking executives of their own banks, with functions related to their activities as issuers and acquirers, that is, in related markets where they are competitors.

In this regard, COFECE confirmed that Circular 4/2014 has flaws and does not resolve competition risks, as it fails to provide mechanisms to reduce conditions that enhance collusion between shareholder banks, and therefore, it also does not establish rules that prevent possible exchange of competitively sensitive information.

Recommendations to Banxico and CNBV regarding Barrier 1:

1. Modify the applicable regulation so that both institutions guarantee the interoperability of card payment networks;
2. Issue the necessary regulation to guarantee the interoperability of those operations that require the sharing of two or more open card payment networks;
3. Modify the applicable regulation to limit the maximum number of exchange quotas for each line of business;
4. Modify the current balancing formula for the calculation of the maximum interchange fee.

Recommendation to Banxico regarding Barrier 2:

Eliminate or modify the applicable regulation to allow open network participants to prepare Clearing Houses and establish maximum times and requirements for linking processing systems between them

Recommendations and orders regarding Barrier 3:

COFECE's recommendation to Banxico and CNBV: Analyze the need to regulate Clearing Houses' Board of Directors eligibility requirements to prevent their position in any issuer, acquirer, aggregator, brand owner or other Clearing House from affecting their performance.

COFECE recommendations to Banxico:

1. Modify the applicable regulation to establish rules on the treatment of information managed by Clearing Houses.
2. Authorize E-Global and Prosa bylaws amendments, as detailed below.

Order to E-Global and Prosa: Design, implement and promote among its personnel and shareholders a program for compliance with the FECL.

Order to E-Global, Prosa, Controladora Prosa, S.A. de C.V., Banco Santander México, S.A., Institución de Banca Múltiple, Grupo Financiero Santander México, BBVA México, S.A., Institución de Banca Múltiple, Grupo Financiero BBVA México, Banco Nacional de México, S.A., Institución de Banca Múltiple, Grupo Financiero Banamex; BBVA México, S.A., Institución de Banca Múltiple, Grupo Financiero BBVA México; Grupo Financiero Citibanamex, S.A. de C.V., HSBC México, S.A., Institución de Banca Múltiple and HSBC México, S.A., Institución de Banca Múltiple, Grupo Financiero BBVA México, Institución de Banca Múltiple, Grupo Financiero BBVA México; Grupo Financiero Citibanamex, S.A. de C.V., HSBC México, S.A., Institución de Banca Múltiple and Grupo Financiero HSBC: Designate within E-Global and Prosa, respectively, a Compliance Officer in antitrust matters, who shall follow up on the implemented Compliance Program.

COFECE, the Antitrust Division of the U.S. Department of Justice and the Canadian Competition Bureau launched a joint initiative to ensure economic competition in the framework of the 2026 FIFA World Cup.

On September 22, 2023, COFECE announced a joint collaboration with the Antitrust Division of the U.S. Department of Justice and the Canadian Competition Bureau in the context of the 2026 FIFA World Cup. This initiative aims to identify and address possible anticompetitive conducts carried out by companies and individuals related to the supply of goods and services associated with the 2026 FIFA World Cup.

The 2023 World Cup games will be held in the United States, Mexico and Canada, including 11 cities in the United States, 3 in Mexico and 2 in Canada. It is anticipated that this event will generate benefits in a wide variety of economic sectors, such as construction, entertainment and tourism.

COFECE stated that it will play an active role during the 2023 World Cup by promoting economic competition policies, constantly monitoring markets and investigating and sanctioning possible anticompetitive practices. This includes monitoring behavior such as price or wage fixing, bid rigging, market division or any action aimed at displacing or preventing other companies from accessing these markets.

COFECE summons several economic agents for possible abuse of dominance in the mezcal market.

On September 27, 2023, COFECE announced that it had summoned a legal entity and an individual for the probable execution of an abuse of dominance in the market of “*conformity assessment of the alcoholic beverage called mezcal*”, in the investigation processed under file number DE-050-2019, which concluded on May 22, 2023.

As background, Conformity Assessment Bodies carry out a technical procedure called “*conformity assessment*” with the objective of guaranteeing the quality and compliance with the physical and chemical specifications of mezcal. This assessment is responsible for verifying that the specific requirements applicable to a product, process, system, individual or organism are met before it enters into the market.

COFECE identified evidence suggesting that the summoned economic agents may have engaged in an anticompetitive conduct by unilaterally refusing to sell, trade or provide a service that is normally available and offered to third parties.

This notification represents the beginning of the trial-like proceeding by COFECE. Those probable responsible will be able to state what they deem appropriate and offer evidence. If the existence of an abuse of dominance conduct is proven, the responsible economic agent may be sanctioned with fines of up to 8% of its income. On the other hand, the individual who has participated on behalf of a responsible economic agent could be sanctioned with up to 5 years of disqualification to act as a director of the company, as well as with administrative fines.

OCTOBER

COFECE summons a multinational company for the probable commission of abuse of dominance practices in the self-service stores market.

On October 9, 2023, COFECE announced that it had summoned a company for the probable execution of abuse of dominance in the market for the supply and distribution of consumer goods by supermarkets in Mexican territory, processed under file number IO-002-2020.

COFECE identified evidence suggesting that the summoned economic agent could have incurred in an anticompetitive practice by probably vertically fixing prices, which is classified as an abuse of dominance.

This notification represents the beginning of the trial-like proceeding by COFECE. Those probable responsible may state what it deems appropriate and offer evidence. If the existence of abuse of dominance is proven, the responsible may be sanctioned with fines of up to 8% of its income.

COFECE investigates the classified real estate notices market and related markets in Mexico.

On October 10, 2023, COFECE's Investigative Authority published in the Federal Official Gazette the initiation of the ex-officio investigation, processed under file number IO-001-2023, for the possible execution of an unlawful concentration in the classified real estate notices market, as well as related activities, goods and/or services in Mexico.

COFECE pointed out the relevance of this investigation due to the fact that construction and real estate services amount to 17.7% of the Gross Domestic Product between 2017 and 2020, besides the fact that it had a growth of 5.5%, according to the data of the Accounts System of the National Institute of Statistics and Geography in 2020.

This market is one of the priority sectors for COFECE in its 2022-2025 Strategic Plan due to its important impact on the Mexican population and its economy.

In the event that the unlawful concentration is proven, those responsible could be sanctioned with fines of up to 8% of their income and COFECE could order the total or partial divestiture of the company.

As part of its investigative tools, COFECE may request information in writing, as well as summon individuals who are related to such market. 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 the information it deems convenient

COFECE objects a merger in the tourism sector in Quintana Roo.

On October 24, 2023, COFECE's Board of Commissioners announced that it had blocked the merger, processed under file number CNT-107-2022, between Ejecutivos de Turismo Sustentable, S.A. de C.V. ("Ejecutivos de Turismo"), Triton Investments Holdings LLC ("Triton"), Controladora Dolphin, S.A. de C.V. ("Controladora Dolphin"), and together with Triton Investments Holdings LLC ("Triton"). ("Ejecutivos de Turismo"), Triton Investments Holdings LLC ("Triton"), Controladora Dolphin, S.A. de C.V. ("Controladora Dolphin", and together with Ejecutivos de Turismo and Triton, the "Purchasers"), Ventura Entertainment, S. A.A.P.I. de C.V. ("Ventura Entertainment"), and Venturalive, S.A.P.I. de C.V. ("Venturalive", and together with Ventura Entertainment, the "Sellers"), in the terms proposed by such companies since it represented high risks to competition in the dolphinarium entertainment services market. However, it was partially authorized with respect to the services offered in aquatic, amusement and adventure parks.

The notified transaction consisted of the intention of Ejecutivos de Turismo and Triton to acquire: (i) two adventure parks and an aquatic park located in Quintana Roo; (ii) an amusement park in Jalisco; and (iii) five dolphinariums located in Quintana Roo, three of which ("Dolphinaris Cancun", "Dolphinaris Tulum" and "Dolphinaris Riviera Maya") are under the control of Controladora Dolphin.

The Purchasers belong to an economic interest group involved in the tourism sector in Mexico. In Quintana Roo, they own seven dolphinariums, one adventure park and one recreational tourism boat operator. Therefore, they participate in the dolphinarium and adventure park entertainment markets in Quintana Roo.

COFECE's Board of Commissioners concluded that the transaction was unlikely to affect the competition process in the amusement, aquatic and adventure park entertainment markets, since the market shares comply with COFECE's criteria and there are no additional elements that could generate risks in such markets. However, COFECE objected the transaction with respect to the dolphinarium entertainment service, because the merger would imply the absorption by the Purchasers of a competitor with the ability to generate competitive pressure.

In addition, COFECE identified several barriers to entry into the dolphinarium entertainment market, such as the difficulty to develop commercialization channels, high investment amounts and regulatory restrictions. The dolphinarium entertainment service is a highly regulated activity, so COFECE did not identify new competitors in the market, nor that there are possibilities for the market to grow and encourage their entry.

Pursuant to the FECL, the companies involved in a merger that has been blocked have the possibility of proposing conditions that eliminate the risks to the competition process generated by the merger. However, the proposed commitments were insufficient to avoid the possible risks identified by COFECE.

COFECE's Board of Commissioners resolved only to authorize the acquisition of amusement, aquatic and adventure parks, but blocked the merger with respect to: (i) the acquisition of control by the Purchasers of the dolphinariums Dolphinaris Cancun, Dolphinaris Tulum and Dolphinaris Riviera Maya; and (ii) the acquisition by the Purchasers of any of the five dolphinariums located in Cancun.

COFECE summons several economic agents for the probable commission of abuse of dominance in the medical oxygen market.

On October 25, 2023, COFECE announced that it had summoned several economic agents for the probable execution of abuse of dominance conducts in the market for the manufacturing, distribution and commercialization of medical oxygen and related services in Mexico, processed under file number IO-001-2020.

COFECE identified evidence suggesting that the summoned economic agents may have abused their dominant market position, either jointly or individually, by imposing exclusivity in such market.

This market is one of the priority sectors for COFECE in its 2022-2025 Strategic Plan due to its important impact on the well-being of the Mexican population and economy.

This notification represents the beginning of the trial-like proceeding by COFECE. Those probable responsible may state what it deems appropriate and offer evidence. If the existence of abuse of dominance is proven, the responsible may be sanctioned with fines of up to 8% of its income.

Sincerely,

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