

# Competition & Antitrust Bimonthly Newsletter

January - February

## JANUARY

### Update of the pre-merger notification monetary thresholds effective as of February 2024.

As a result of the update of the Measurement Unit (“UMA”, for its acronym in Spanish)<sup>1</sup> published in the Federal Official Gazette (“Official Gazette”) on January 10, 2024, the monetary values that trigger the thresholds set forth in Article 86 of the Federal Economic Competition Law (“FECL”) for the notification of concentrations have been increased. Such values are effective as of February 1st, 2024.

Consequently, the amounts in effect as of February 1st, 2024, that trigger the thresholds for notifying concentrations are as follows:

1. When the originating act or sequence of acts, notwithstanding the place where they are carried out, are worth within Mexican territory, directly or indirectly, an amount higher than the equivalent of MXN \$1,954,260,000.00 (approx. USD \$118,153,567.11)<sup>2</sup>;
2. When the originating act or sequence of acts, imply the accumulation of 35% or more of the assets or stock of an economic agent, whose annual sales originating in Mexican territory or assets in the country, are worth an amount higher than the equivalent of MXN \$1,954,260,000.00 (approx. USD \$118,153,567.11) or;
3. When the originating act or sequence of acts, imply an accumulation within Mexican territory of assets or capital stock higher than the equivalent to MXN \$911,988,000.00 (approx. USD \$55,138,331.31); and two or more of the economic agents participating in the concentration have annual sales originating in Mexico or assets in Mexico which are worth, jointly or separately, an amount in excess of MXN \$5,211,360,000.00 (approx. USD \$315,076,178.96).



Additionally, it is relevant to consider that as of January 1, 2024, the official merger notification fee is MXN \$237,058.00 (approx. USD \$14,068.72)<sup>3</sup>.

- <sup>1</sup> The daily value of the UMA as of February 2024 will be MXN\$108.57.
- <sup>2</sup> Figures are expressed at an exchange rate of 16.54 pesos per 1 U.S. dollar, effective on April 4, 2024, according to Mexico’s Central Bank.
- <sup>3</sup> Pursuant to Article 77 of the Federal Fee Law and Annex 19 of the Miscellaneous Tax Resolution for 2024, published in the Official Gazette on December 29, 2023.

## **COFECE initiates an investigation for the possible existence of barriers to competition in the public railroad transportation market.**

On January 10, 2024, the Investigative Authority of the Federal Economic Competition Commission (“COFECE”, for its acronym in Spanish) published in the Official Gazette the initiation of the *ex officio* investigation, processed under file number IEBC-003-2023, for the possible existence of barriers to competition and/or essential inputs that may generate anticompetitive effects in the market of public railroad freight transportation services and related services and rights in the national territory.

Pursuant to the FECL, barriers to competition are any structural characteristic of the market, fact or act of any economic agent that has the purpose or effect of preventing the access of competitors or limiting their ability to compete in the markets, as well as legal provisions issued by any order of government that unduly prevent or distort the competition process.

Furthermore, the FECL establishes that essential inputs are those inputs controlled by one or several companies (infrastructure, networks, rights, among others), which are fundamental for one or several markets, and whose provision determines the conditions of competition.

As background, in August 2021, COFECE published the “*Study of competition in the public service of railroad freight transportation*” (the “Study”)<sup>4</sup>. Through such Study, COFECE noted significant deficiencies in the intra-modal competition conditions of the Mexican Railroad System (“SFM”, for its acronym in Spanish), highlighting the lack of articulation of the network and the concentration of supply in two economic groups. These deficiencies are attributed in part to the asymmetric design of the network, which limits concessionaires’ access to key freight nodes, as well as to deficiencies in the regulatory framework that hinder the use of existing right-of-way and the creation of new ones.



In addition, the Study identified bottlenecks in certain segments of the network, high interconnection fees and lack of sufficient information for the Rail Transport Regulatory Authority, evidencing the need to improve regulation and transparency in the sector. In particular, the Study highlights the lack of guidelines for the delivery of information, the unclear criteria for interpreting exclusivities and concession extensions, as well as the absence of explicit sanctions for non-compliance in the delivery of data.

COFECE noted that, of the total merchandise transported by land in Mexico, 25.3% is transported by railroad and the rest by motor carrier. In 2022, 128.46 million tons of cargo were transported in SFM, and from 2016 to 2022, the number of tons of cargo transported has increased by 5.3%.

Accordingly, the transfer of goods by rail is a feasible transportation option for companies that are following the nearshoring trend and seeking to relocate their manufacturing processes in Mexico. In 2022, 73.2% of the volume of cargo related to international trade was moved across borders using rail transport, while the remaining 26.8% was handled through the use of ports.

It is important to point out that the initiation of the investigation in file IEBC-003-2023 is a procedure independent to the Study.

For the development of the investigation in the file IEBC-003-2023, the Investigative Authority has a period of between 30 to 120 business days, counted from the publication of the extract of the initiation of the investigation in the Official Gazette, which can be extended for up to two times for an equal period.

Once the procedure is concluded, the COFECE's Board of Commissioners is empowered to: (i) order the corresponding economic agent to eliminate barriers that unduly affect the competition process;<sup>5</sup> (ii) issue recommendations to the corresponding public authorities in case there are legal provisions that unfairly hinder or distort the competition process; (iii) determine the existence of essential facilities and, if applicable, issue guidelines to regulate them; and (iv) order the divestiture of assets, rights, social parts or shares of the economic agent involved.

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<sup>4</sup>. [https://www.cofece.mx/wp-content/uploads/2021/08/FERRO\\_doc-2021.pdf](https://www.cofece.mx/wp-content/uploads/2021/08/FERRO_doc-2021.pdf)

<sup>5</sup>. Failure to comply with such order may result in a fine of up to 10% of the revenues of the obligated economic agent.

## COFECE summons various economic agents for the probable existence of a collusive practice in the non-residential real estate rental market.

On January 30, 2024, COFECE announced that it had summoned several individuals and companies to the trial-like proceeding for the possible existence of collusive conducts in the leasing market of non-residential real estate spaces in the national territory, under file number IO-004-2020.

According to statements made by COFECE, the Investigative Authority identified evidence suggesting a probable collusion to manipulate prices in the non-residential real estate rental market. Such conduct could qualify as a collusive practice in terms of article 53, section I of the FECL. This conduct was determined in the Statement of Probable Responsibility issued by COFECE's Investigative Authority.

COFECE noted that the real estate is a priority sector in the national economy. Based on data reported by INEGI, in 2018, the leasing sector of non-residential real estate spaces represented close to 36 billion pesos for the Mexican economy.

With this summons, the trial-like proceeding processed by COFECE begins. Once summoned, the economic agents will have access to the file and have a non-extendable period of 45 business days, to provide arguments and evidence they deem pertinent.

If 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 well as with administrative fines of up to approximately MXP \$21,714,000.00 (approx. USD \$1,320,000.00).





# FEBRUARY

## **COFECE has preliminarily determined the absence of effective competition conditions and the existence of barriers to competition in retail e-commerce and proposed corrective measures to eliminate such barriers to competition.**

On February 13, a preliminary extract of the decision from file IEBC-001-2022, issued on February 6, 2024, by COFECE's Investigative Authority, in terms of article 94, section III of the FECL, was published in the Official Gazette. This extract indicates that the Investigative Authority has preliminarily determined the absence of effective competition conditions, and the possible existence of three barriers to entry in the following markets within Mexico: (a) marketplace service for sellers; and (b) marketplace service for buyers.

A marketplace is a digital platform where buyers and sellers engage in commercial transactions. The economic agents with significant participation in these markets in Mexico are Servicios Comerciales Amazon México, S. de R.L. de C.V. ("Amazon"); and MercadoLibre, S.A., de C.V., Institución de Fondos de Pago Electrónico ("Mercado Libre").

Marketplaces rely on network effects, where the platform becomes more valuable as more users join. Negative externalities from network effects can discourage sellers and buyers from migrating to other platforms. This situation can give marketplaces the power to fix prices and impose price parity clauses, leading to a lack of effective competition conditions.

The Investigative Authority identified the following barriers to entry:

**1. Artificiality in marketplace's loyalty programs:** Amazon and Mercado Libre offer loyalty programs that include additional services such as streaming and shipping discounts, which help attract and retain buyers.

The Investigative Authority proposed the following corrective measures to eliminate this barrier: a) Remove any services unrelated to the marketplace from their loyalty programs, including streaming service; and b) cease promoting publishing services within the marketplaces.

**2. Opacity in the Buy box algorithm tool:** There is a lack of transparency in the tool that manages the algorithm selecting and highlighting a particular offer (Buy Box). This prevents sellers from having full knowledge of the variables that this tool selects as the best product. This opacity could also induce them to make mistakes at the time of designing their commercial strategies.

The Investigative Authority has proposed the following corrective measures to eliminate this barrier: a) Amazon and Mercado Libre, as well as the respective members of their economic interest group, should share information related to the Buy Box tool; b) Create a section on their respective portals (Amazon and Mercado Libre) where sellers can be informed of the variables considered



by the Buy Box tool; and c) Announce all the corrective measures established in the preliminary decision on their respective seller portals.

**3. Preference for own logistic solutions:**

Amazon and Mercado Libre do not allow the interconnection of their respective platforms with other logistics providers. This limits the options available to buyers, impacting their decision to choose products labelled “Prime” or “Full”.

The Investigative Authority has proposed the following corrective measures: a) The Buy Box tool should no longer consider the contracting of logistics solutions offered by a particular economic agent as a variable; b) Allow interested logistics companies to join its platform; and c) Modify the criteria for assigning the “Prime” or “Full” label so that these distinctions are not based on sellers contracting the logistics services of Amazon and Mercado Libre.

It is important to note that this is a preliminary decision issued by the Investigative Authority in terms of Article 94 of the FECL. The preventive measures proposed have not been authorized by COFECE’s Board of Commissioners. Economic agents affected by these measures, as well as those with legal standing, will have 45 business days to express their views and provide evidence before COFECE. Subsequently, the proceeding will continue to be processed according to the provision mentioned above.

The economic agents involved may propose suitable and economically feasible measures to COFECE to eliminate the competition problems identified by the Investigative Authority in the preliminary decision before the case file is fully integrated.

Once the file is integrated, COFECE’s Board of Commissioners has 60 business days to issue a resolution, which may include:

- a) Recommendations to public authorities.
- b) An order corresponding economic agents to eliminate barriers that affects free market access and the competition process.
- c) Determination of the existence of essential facilities and guidelines to regulate them.
- d) The divestiture of the economic agent’s assets, partnership interest, or stock.

## COFECE subjects the purchase of power generation plants from Iberdrola to remedies.

On February 15, 2024, COFECE announced that the Board of Commissioners conditioned the authorization of the transaction notified by Mexico Infrastructure Partners FF, S.A.P.I. de C.V. (“MIP”) and the Fondo Nacional de Infraestructura (“FONADIN”) regarding the acquisition of 13 electric power generation plants from Iberdrola Generación México, S.A. de C.V. (“Iberdrola”) and its subsidiaries (the “Transaction”).

The conditions imposed require the acquirers to operate the power plants independently and to avoid exchanges of sensitive information between competitors. Among the conditions are: (i) the reduction of FONADIN’s investment to a maximum of 51%, which must be completed within 24 months; (ii) the appointment of an independent professional administrator to be responsible for making decisions regarding the operation of the plants; (iii) the implementation of controls and mechanisms for decision making through qualified voting or with the mandatory intervention of institutional investors or independent members; and (iv) the obligation to act independently and without conflict of interest.

In addition, to prevent the exchange of sensitive information between competitors, the appointment of an independent compliance officer is required to ensure this condition. Likewise, managers and persons in charge of the plants must refrain from holding positions in any other competitor and the exclusion of those who were public servants in the last 4 years.

These conditions are effective for 10 years and will be subject to compliance monitoring by COFECE. Buyers must expressly accept the conditions in order to close the Transaction and, in case of non-compliance, the penalties set forth in the FECL will be applied.





## COFECE determines the absence of effective competition conditions in the maritime transportation services market for passengers and roll-on/roll-off cargo in Baja California Sur.



On February 16, 2024, COFECE announced that the Board of Commissioners determined the absence of conditions of effective competition in the maritime transportation services of passengers and maritime transportation of cargo in cabotage navigation on the Pichilingue - Mazatlan and Pichilingue - Topolobampo routes.

COFECE's Board of Commissioners determined that there were no effective competition conditions for the following reasons:

- There is a high level of market concentration due to the fact that there are only two competitors in the passenger transportation and cargo service.
- The shipping lines that offer cargo and passenger transportation services have the ability to set their rates and fares without other shipping lines being able to counteract this power. In this sense, the lack of diversity in service providers limits competition and allows companies to set rates and prices that do not reflect actual operating or financial costs, resulting in high profits for them.
- It was noted that existing shipping lines may not meet the needs of users, either in terms of capacity or quality of service.
- There is only one provider of passenger transportation service, which may limit the supply of service with no alternative competitors available to users.
- There are barriers to entry and lack of access to input sources that prevent access to other competitors in the market:



- o Companies interested in entering the market must obtain permits from the Ministry of Navy.
- o The ports of Pichilingue and Topolobampo do not have sufficient capacity to accommodate more competitors offering cargo or passenger transportation services.
- o A new company in the market would face additional challenges in terms of high infrastructure investment costs, given the fact that saturation in the ports during peak hours of demand could force the new company to offer services in less competitive schedules or at lower prices, which would further disincentivize market entry.

In view of this declaration issued by COFECE, the Ministry of Navy, as the regulatory authority in these markets, is responsible for considering the possibility of establishing tariff regulations for these services in order to protect consumers and promote fair competition in these markets.

Sincerely,

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