

## Mexico publishes controversial antitrust regulations

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New provisions of Mexico's competition law that take effect today hand the country's enforcer broad new powers to penalise the executives of dominant companies, define per se anti-competitive conduct and force companies to give competitors access to essential inputs.



Left: Alejandra Palacios Prieto, president of Mexico's competition commission

The Federal Competition Commission approved the regulations after a public consultation in which several commenters, including the American Bar Association, raised concerns about the proposed provisions' treatment of invitations to collude and of international price differences as "absolute monopolistic practices".

Critics also said the regulations would revive the essential facilities doctrine, which many economists have said does not actually promote competition.

As published, the regulations appear similar to an earlier draft version. The regulations say that invitations to collude, and differences in product prices between those found in Mexico and prices in markets overseas that are not explained by tax, expense or distribution factors, are "indications of a probable absolute monopolistic practice and, therefore, are an objective cause for investigation."

The regulations also call for the authority to assess if regulating access to inputs will generate market efficiencies. However, unlike the proposed provisions, the regulations now require the commission to prove an action it wishes to take would eliminate the competition problems related to conditions of access to essential inputs, and does so in the least burdensome and restrictive manner.

In a press release, the commission said the suggestions and comments made through the public consultation process had improved approximately 50 per cent of the regulation's content.

The possibility of disqualifying or fining executives involved in anti-competitive practices received significant media attention in Mexico. The commission now has the ability to block individuals who are responsible for antitrust violations from being employed as an attorney, administrator, board director, manager, officer or agent for up to five years, or can fine them up to 1.3 million pesos.

The commission's immunity programme allows executives to reduce their penalties if they plead guilty and provide evidence.

Former commissioner Miguel Flores Bernés praised the provision that disqualifies company directors who participate in monopolistic practices, but said the new regulations "do not solve the problem of information sharing, and are not following international best practices."

Fernando Carreño, a partner at Von Wobeser y Sierra, said the new regulations in some respects go beyond the competition statute, could cause legal uncertainty and are inconsistent with international best practices regarding defendants' rights.

"Overall, we believe that there would be benefit in providing more certainty concerning the way in which the agency intends to implement the new antitrust law in several areas, for example the exercise of its discretionary powers of the COFECE, access to the file, etc," Carreño said.

He noted that the regulations do not recognise the principle of attorney-client privilege, and do not precisely and narrowly define the elements that can be used as circumstantial evidence for the finding of an infringement. Moreover, concepts such as "joint market power" and "barriers to competition" remain vague, Carreño said.

Nonetheless, he expressed confidence in the commission's responsible exercise of power and openness to improvement.

"The new commission has proven to be a professional and receptive authority always willing to work with both Mexican and international bars, and therefore we are convinced that these new regulations constitute a good point to start the process of building stringent enforcement of the antitrust rules but providing certainty in accordance with the international best practices," Carreño said.