

# **COMPETITION ENFORCEMENT AGENCIES**

## HANDBOOK 2019

Published in association with:

Atsumi & Sakai

Bowmans

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ELIG Gürkaynak Attorneys-at-Law

Lapidot, Melchior, Abramovich & Co

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SRS Advogados

Van Bael & Bellis



# Competition Enforcement Agencies Handbook 2019

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A Global Competition Review Special Report

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## **Competition Enforcement Agencies Handbook 2019**

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*Global Competition Review's* 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

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## Questions and answers

### How long is the head of agency's term of office?

The term of office of the head of the Federal Economic Competition Commission of Mexico (COFECE) is four years, after which the head may be reappointed for a second period of the same duration.

### When is he or she due for reappointment?

On April 2017, Chairwoman Palacios second four-year term was ratified by the Senate. Her mandate as chair (second term) expires in September 2021; her term as commissioner expires in 2022.

### Which posts within the organisation are political appointments?

The commissioners are appointed by the President of Mexico for a non-renewable nine-year period and have to be ratified by the Senate.

The procedure for appointing commissioners is briefly described below.

- Upon the existence of a vacancy in a commissioner position, an independent reviewing committee (RC) shall issue a public call. Positions are open to any interested person, but any commissioner shall fulfil several requirements, including experience, outstanding professional performance and no recent links with agents that have been subject to any procedure before the antitrust agency.
- Eligible applicants shall take a technical test on competition matters.
- For each vacancy, the RC shall submit to the President of Mexico a list of the applicants who obtained the highest test scores (minimum three and maximum five individuals).



- The President shall select, among said list, a nominee for each vacant position, to be ratified by the Senate.
- Ratification by the Senate requires a qualified vote (at least two-thirds).
- Commissioner positions have tenure of nine years with no reappointment.
- The head of the agency (chairperson) is appointed by a two-thirds majority vote from the Senate from among the commissioners in functions.

**What is the agency's annual budget?**

The 2019 budget is 582.8 million Mexican pesos.

**How many staff are employed by the agency?**

As of 1 February 2019, the total number of staff employed by COFECE is 417.

**To whom does the head of the agency report?**

COFECE is independent but as part of its accountability obligations it must submit an annual work programme and quarterly activity reports to the President and Federal Legislative body. The chair appears before Senate on an annual basis and may be summoned for an extraordinary hearing.

**Do any industry-specific regulators have competition powers?**

As per the Constitutional Reform of 2013, the Federal Telecommunications Institute (IFT) is both the regulator and the competition authority for the broadcasting and telecommunications sectors.

**If so, how do these relate to your role?**

COFECE and the IFT must enforce the Federal Law on Economic Competition (FLEC) in their respective areas of authority. Both agencies are fully autonomous and perform their activities independently. However, both institutions have put in place several cooperation agreements in order to promote coherence, share experience, exchange information and foster competition.

**Do politicians have any right to overrule or disregard the decisions of the authority?**

No. COFECE's final decisions may only be overruled judicially by means of a constitutional recourse denominated indirect *amparo*.

**Does the law allow non-competition aims to be considered when taking decisions?**

No.

**Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this?**

The only judicial body that may hear appeals against COFECE's final decisions are the federal specialised courts in competition, broadcasting and telecommunications, which were created by the 2013 constitutional reform and the only form of judicial review is the indirect *amparo*. Further, the Supreme Court has the power to attract appeals pending before the specialised courts.

**Has the authority ever blocked a proposed merger?**

In 2018, COFECE blocked three proposed mergers.

Rheem Manufacturing Company/Rheem US Holding Inc/Grupo Industrial Saltillo SAB de CV/INGIS SA de CV (File: CNT-072-2017)

COFECE made an in-depth analysis of the merger between the main supplier of water heaters in Mexico, Rheem, and its competitor Grupo Industrial Saltillo; and found a market with high barriers to entry and with no other competitors to counterbalance the power of the merging entity. Commitments proposed by the parties were insufficient as they did not avoid negative effects to the structural conditions and on competition. Thus, COFECE blocked the transaction.

Organización Soriana, SAB. de CV/Walmart de México, SAB de CV (File: CNT-092-2017)

COFECE initiated an in-depth investigation as it had concerns that the acquisition of several convenience stores property of Soriana, a Mexican supermarket chain, by Walmart (as part of a set of divestment measures imposed to close another deal) could restrict competition in the market for retail stores. The transaction was blocked.

CCM SOR, SA de CV/Inmobiliaria Gleznova, SA de CV/Organización Soriana, SAB de CV/QDR Real Estate, SA de CV (File: CNT-091-2018)

COFECE conducted a merger assessment in the market for grocery stores. The Board of Commissioners resolved, among other determinations, that the transaction, on the terms presented by the parties, would result in the reduction of competitive pressure among concentrating parties and the effects of the concentration could be contrary to the competition process in certain markets. The Commission determined that competitors did not have the current or potential

capacity to counter Soriana-CCM's market power post concentration, in the identified market, and decided to block the transaction.

**Has the authority ever imposed conditions on a proposed merger?**

Yes. During 2018, COFECE imposed conditions on three proposed mergers.

Bayer Aktiengesellschaft/The Monsanto Company (structural remedies)

On 15 February 2016, Bayer and the Monsanto Company notified the Commission of their intention to merge. COFECE's Board of Commissioners conditioned the concentration between The Monsanto Company (Monsanto) and Bayer Aktiengesellschaft (Bayer), to the divestment of the genetically modified cotton seed business, the vegetable seed business in its totality and certain non-selective herbicides that belong to Bayer. The Commission found the transaction would result in Bayer becoming the sole supplier of genetically modified cotton seeds in Mexico and would gain significant market shares in the market for multiple crops, such as onion, cucumber, tomato, watermelon, melon and lettuce as well as non-selective herbicides. These markets have high entry barriers, mainly in terms of the difficulty and time required for research and development of new products, restrictions in legal frameworks and the high levels of investment required.

Masisa, SA/Inversiones Arauco Internacional Limitada/Araucocomex, SA de CV

On 29 January 2018, Masisa, SA, Masisa Overseas Limited, Inversiones Arauco Internacional Limitada and Araucocomex, SA de CV notified the Commission of their intention to merge, having modified their transaction to exclude a manufacturing facility from the deal, which would remain as seller's property. This modification to the terms of the transaction resulted in the Commission's determination that the concentration would have low possibilities of affecting the competition and free market access process.

Gemalto NV/Thales, SA

On 10 July 2018, Gemalto NV and Thales, SA notified the Commission of the intention to merge. The notified operation had the intention of Thales, SA's acquisition of Gemalto NV's shares. In Mexico, Thales would acquire shares corresponding to two of Gemalto's subsidiaries: Gemalto México, SA de CV and SafeNet México, S de RL de CV. The notified operation included Thales' divestment of HSM de Propósito General, its

global business, commercialised under the brand name nShield. In this case, the Commission relied on a remedy that was imposed in European Union to unconditionally clear the transaction in Mexico. The parties must show the Commission that they indeed divested the business and complied with the remedy.

**Has the authority conducted a Phase II investigation in any of its merger filings? If yes, please provide the most recent instances.**

The FLEC does not foresee two distinct investigation phases in merger analysis. However, COFECE has conducted in-depth merger investigations in several cases. In 2018, COFECE conducted in-depth investigations on mergers related to different markets such as agri-industrial, supermarkets, among others.

**Has the authority ever pursued a company based outside your jurisdiction for a cartel offence? If yes, please provide the most recent instances.**

Yes. In May 2017, COFECE fined seven global shipping companies for allocating the market of maritime transportation of vehicles and heavy machinery, causing anticompetitive conduct with effects in Mexico. The fines imposed amount to 581.6 million Mexican pesos. The collusive agreements were implemented globally on international routes. What COFECE considered during its investigation was that these collusive agreements included Mexican ports, as point of origin or destination, to South America, Asia and Europe, and that the conduct had the effect of reducing competitive pressure and increased the costs of the services provided to companies in the automotive industry in the Mexican market.

**Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?**

Yes. The leniency and immunity programme allows any person or business that has participated in, or is currently part of illegal agreements with competitors, to receive a reduction in sanctions. These benefits may be provided upon submission of information and full cooperation with COFECE.

Interested parties may file their applications by voicemail at +52 55 2789 6632 or by email addressed to [inmunidad@cofece.mx](mailto:inmunidad@cofece.mx). Applications should clearly indicate a desire to request protection as part of the immunity programme and include contact information.

**Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?**

Yes. Since 2011, cartel offences (such as price fixing, output restriction, market allocation and bid-rigging) are considered criminal violations under competition and criminal laws.

As a result of the new FLEC, enacted in 2014, the minimum criminal sanction was raised from three years in prison to five, the maximum remaining at 10 years. Additionally, the alteration or destruction of information with the purpose of hindering or obstructing an investigation became a crime punishable with a minimum of three months and a maximum of one year in prison.

According to the new FLEC, once an administrative investigation has concluded, the Investigative Authority may file a criminal complaint against such individuals who participated in a cartel. The criminal investigation would run parallel to the administrative proceeding conducted by COFECE. The Investigative Authority is the only body with powers to file this complaint and the Attorney General's Office is in charge of the criminal investigation.

**Are there any plans to reform the competition law?**  
No.

**When did the last review of the law occur?**

The new FLEC was published in the Federal Official Gazette on 23 May 2014 and entered into force on 7 July 2014.

**Do you have a separate economics team? If so please give details.**

Yes. COFECE has a Directorate General for Economic Studies that serves as a stand-alone bureau of economics within the agency. The directorate provides technical assistance to other areas in COFECE, particularly when they deal with complex economic issues. In addition, it is responsible for conducting market studies that could serve as grounds for the Commission's advocacy efforts or enforcement actions.

The Directorate General is led by:

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**Has the authority conducted a dawn raid?**

Yes. In 2011, COFECE was given the power to conduct dawn raids. This power was confirmed and strengthened with the new FLEC of 2014.

**Has the authority imposed penalties on officers or directors of companies for offences committed by the company?**

Yes. In 2018, there were two cases, as follows.

File: DE-024-2013 refers to an investigation for possible absolute monopolistic practices (collusive agreements or horizontal restraints) that resulted from a complaint against Holiday, Galeno, Abamcu, JTC, Comprobasa, IMM and Trenkes. COFECE identified the companies: Dentilab, Productos Galeno, Holiday de México, Trenkes and Productos Adex, as well as seven individuals, one who acted on behalf of some of these companies, executed absolute monopolistic practices in the market for the production, distribution and commercialisation of latex condoms and catheters, purchased in Mexico by the public health sector. The fines total 112 million Mexican pesos, 1.7 million Mexican pesos corresponding to individuals that acted in direct representation of a company.

File: DE-006-2015 refers to an investigation that resulted from a complaint for the probable commission of absolute monopolistic practices (collusive agreements or horizontal restraints). COFECE determined that Compañía Mexicana de Traslado de Valores (Cometra), SEPSA, Seguritec Transporte de Valores (Seguritec), Tecnoval de México (Tecnoval), Transportes Blindados Tameme (Tameme), Servicio Pan Americano de Protección (Panamericano) and Grupo Mercurio de Transportes (Grumer), as well as 10 individuals acting on their behalf, participated in the commission of absolute monopolistic practices (also known as collusive agreements or horizontal restraints) in the national market for the provision of transfer, custody and processing services of cash and valuables. The fines totalled approximately 123.5 million Mexican pesos, of which total fines on individuals that acted in direct representation of a company were \$123 million Mexican Pesos.

**What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?**

The FLEC provides that mergers shall be notified in accordance with the following:

- when the transaction is worth approximately US\$79.9 million;
- when the transaction implies the accumulation of 35 per cent of the equity of an economic agent with annual sales or asset of US\$79.9 million; and

- when the transaction implies the accumulation of equity of approximately US\$37.3 million, and the participants in the merger have annual sales or assets, jointly or separately, of approximately US\$213.3 million.

**Are there any restrictions on minority investments?**

There are no restrictions on minority investments. Moreover, the FLEC provides for an expedited merger review procedure for transactions where it is evident that the merger shall not diminish, damage or impede competition. They include, for instance, transactions where the acquirer will not obtain decision-making power due to its relative participation or the internal corporate structure of the company.

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