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INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Mexico

-- Session III --

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INDEPENDENCE OF COMPETITION AUTHORITIES: FROM DESIGN TO PRACTICE

– Mexico –

1. Introduction

1. The autonomy concept may have different meanings depending on each jurisdiction and the particular constitutional and administrative setting. However, one can normally say that by means of granting autonomy, the State aims to assign specific responsibilities to bodies that are deemed more suitable to perform them.

2. Recently, and as a part of a strategy to improve overall public governance, Mexico has created more autonomous bodies in different policy areas.¹ This trend indicates the need that these institutions should serve with independence, regardless of political considerations.

3. In light of this, the Mexican competition authority was born fully autonomous in 2013, and was vested with the responsibility of promoting and protecting the competition process in all markets except telecommunications and broadcasting, the latter is responsibility of the Mexican Federal Institute of Telecommunications (IFT).

4. From the Federal Commission of Economic Competition's (COFECE) perspective, independence is not a goal in itself. Instead, it is one of various factors needed to effectively accomplish its constitutional mandate. Thus, this autonomy ought to be soundly exercised so as to use it as vehicle for change and success.

2. Mexico's competition authority institutional design and evolution: From CFC to COFECE

2.1 *Semi-autonomous agency (SECOFI-SE)*

5. As many of the public bodies with very concrete and specialized functions around the world, the Federal Competition Commission (CFC) was formally born as an administrative (governmental) agency with technical and operational autonomy.² It was integrated by a Board of Commissioners consisting of five of them, eligible due to their technical profile that combined academic background and outstanding public or

¹ Central Bank (BANXICO, 1994), National Electoral Institute (INE, 1989), National Commission of Human Rights (CNDH, 1999), National Institute of Statistics and Geography (INEGI, 2008), Federal Commission of Economic Competition (COFECE, 2013), Federal Institute of Telecommunications (IFT, 2013), National Institute for Education Assessment (INEE, 2013), Federal Institute of Transparency, Access to Public Information and Data Protection (INAI, 2014), Council for Evaluation of Social Development Policy (CONEVAL, 2014).

² Article 23 of the Federal Law of Economic Competition (FLEC) published in the Federal Official Gazette (FOG) on December 24, 1992. Available at: http://www.diputados.gob.mx/LeyesBiblio/abro/lfce/LFCE_abro.pdf

academic service, among other requirements.³ The five Commissioners directly appointed by the President, were to serve for a fixed ten-year term and could only be dismissed on the grounds of qualified causes.⁴

6. However, the fact that CFC was, due to its legal nature, attached to the former Ministry of Commerce and Industrial Development (SECOFI, by its Spanish acronym), represented some constraints, at least from the administrative and budgetary perspectives.⁵

7. As time elapsed, competition policy gained ground to the extent that a legislative refresh was deemed indispensable to keep up with the magnitude of its challenges. In 2004, a Mexican competition law and policy assessment was carried by the Organization for Economic Cooperation and Development (OECD). Along with other recommendations, the multilateral organization pointed out that Senate approval of Presidential appointments to the CFC should be adopted, as well as the establishment of the Commission's budgetary independence from the Executive Branch.⁶

2.2 Amendments to the previous Federal Economic Competition Law and their impact in the institutional design (2006, 2011)

8. Accordingly, in 2006, the first major reform for competition policy in the country took place. Among other novel elements, certain abuse of dominance practices (relative monopolistic practices) were further included in the law, the leniency program was created and several procedural improvements were made.

9. Notably, in this reform there was an attempt to include a clause of non-objection on behalf of the Senate to the Commissioner's appointment, as well as the intervention of the Judicial Branch in the authorization of dawn raids and for the divestiture of assets.

10. However, on June 2007, the Supreme Court of Justice declared these elements unconstitutional.⁷

11. By the end of that decade, the Commission was perceived as an institution with a great potential but relatively weak, provided that the legal and institutional framework proved to be useful yet insufficient to effectively deter would-be lawbreakers.⁸ Specially, due to the fact that investigative and sanction powers were notably insufficient.⁹ According to the World Economic Forum Global Competitiveness Report 2010-2011, Mexico held position 116 out of 139 jurisdictions assessed with regards to the effectiveness of its

³ Article 26, FLEC, 1992.

⁴ Article 27, FLEC, 1992.

⁵ Article 26, FLEC, 1992.

⁶ Competition Law and Policy in Mexico, An OECD Peer Review, 2004. Available at: <http://www.oecd.org/mexico/31430869.pdf>

⁷ The SCJN concluded that an ordinary law cannot empower the Senate to intervene in the appointment of public servants from a body which belongs to the federal public administration. For doing that, they would require specific powers granted by the Constitution itself. Ruling concerning the *Acción de inconstitucionalidad* 33/2006 published in the Federal Official Gazette on July 12, 2007. Available at: http://www.dof.gob.mx/nota_detalle.php?codigo=4993283&fecha=12/07/2007

⁸ Global Competition Review, Rating Enforcement 2010. Available at: <http://globalcompetitionreview.com/surveys/survey/376/Ratin>

⁹ The amounts of fines failed to deter anticompetitive conducts when compared to the lucrative amounts that could be obtained through the commission of such conducts and investigative power's design was rather limited in scope. For instance, a judicial order was needed to carry out dawn raids and these were only aimed at gathering information that had been previously requested.

anti-monopoly policy.¹⁰ Additionally, the global economic crisis, as well as the slowdown in the Mexican economy put on the table the importance to maintain an effective competition policy.

12. A few years later, in 2011 the Mexican competition regime experimented some interesting modifications, mainly seeking to take in various international best practices. The necessity of creating the right incentives to deter cartel activity led to the amendment of the Federal Criminal Code (FCC) in order to establish the criminalization of hard-core cartels. Within substantive matters, apart from jail time for cartelists, the concept of joint dominance was also introduced to the competition legal framework.¹¹

13. Moreover, the new Federal Economic Competition Law (FECL) provides increased fines. The Commission has the power to impose a fine of up to 10% of the company's taxable turnover in Mexico for cartels and 8% for unilateral conduct, as well as twice such amount in case of recidivism.

14. Additionally, dawn raids are now a more effective investigative tool as they were strengthened by eliminating the judicial order requirement, increasing the powers of the Investigative Authority in its conduction, and establishing criminal fines for its obstruction.

15. Also, the Investigative Authority may now request the Board of Commissioners to issue injunctive measures if considered necessary to avoid complexly reparable damages or to assure the efficiency in the investigation's results and procedure's resolution.

16. This far, nearly two decades had passed by since the 1992 FLEC gave birth to the CFC. In the meantime, the Mexican competition authority had managed to overcome uncountable obstacles that earned it a solid technical reputation. Private and public actors started to recognize the benefits of a guardian that promoted and protected competition in the markets. Most importantly, competition was already in the agenda and this led to major transformations as explained below.

17. All that notwithstanding, the CFC was soon to stop existing but for the right reasons.

2.3 *Constitutional overhaul (2013-2014)*

2.3.1 *Background*

2.3.1.1 The Pact for Mexico

18. Following the 2012 Presidential election it was crystal-clear that the reforms needed to enhance economic growth could not be accomplished without a wide majority political agreement.

19. Thus, on December 2, 2012, the Mexican President accomplished that the three main political parties sign a new political, economic and social agreement. The deal, called Pact for Mexico aimed to promote economic growth and to reduce poverty as well as social inequality by means of a series of constitutional reforms.¹² One of the crucial components was to foster competition in key sectors such as telecommunications, broadcasting, transport, financial services and energy.

¹⁰ Available at: http://www3.weforum.org/docs/WEF_GCR_Report_2011-12.pdf

¹¹ Other major changes as a result of the 2011 reform: increase of applicable sanctions according to the economic agents' financial capacity, elimination of the judicial order to conduct dawn raids and the possibility for the Commission to apply injunctive measures.

¹² Available in Spanish at: <http://pactopormexico.org/PACTO-POR-MEXICO-25.pdf>

2.3.1.2 Structural reforms

20. As expected, the Pact for Mexico marked a time of profound reforms. The year of 2013 alone saw the enactment of seven reforms in energy, political relations, education, financial services, taxation, competition and telecommunications. The common factor among all economic reforms is that they all were driven by competition principles.

2.3.2 *Competition Policy reform*

21. The Constitutional reform in telecommunications and competition was published in the Federal Official Gazette on June 11, 2013. The most important feature was the creation of two new constitutionally fully autonomous bodies of the Mexican State, as the competition authorities in Mexico: the Federal Institute of Telecommunications for the broadcasting/telecommunication industries, and COFECE for all remaining economic sectors.

22. The Constitutional reform also led to the enactment of a new competition law. On July 7, 2014, the Federal Economic Competition Law came into force. COFECE published its organizational statute that same year, thereby defining its institutional structure.

2.3.2.1 Main features

- Constitutional autonomy

23. The transition from a semi-autonomous status into a constitutional autonomy was a huge step in terms of institutional design of competition agencies.

24. From a Mexican public law standpoint, constitutionally autonomous bodies are public bodies that have a primary role of the State, that are established in the Constitution itself and that have relations of coordination with the other traditional powers or autonomous bodies, without being subordinated to them.¹³ Hence, COFECE is not part of the Executive or Legislative and may not receive any instruction whatsoever from other powers. Actually, it was the first time that this type of autonomy was granted to bodies performing traditional administrative/regulatory/economic activities.

25. COFECE's nature includes all autonomy dimensions: organic/administrative, technical, operational, normative and budgetary.

26. This autonomy primarily aims to generate specialization, guarantee technical and neutral decisions and protect the institution from political interference.

¹³ Filiberto Valentín Ugalde Calderón, "Órganos constitucionales autónomos", Revista del Instituto de la Judicatura Federal, No. 29, p. 259. Available in Spanish at: <http://www.ijf.cjf.gob.mx/publicaciones/revista/29/Filiberto%20Valent%C3%ADn%20Ugalde%20Calder%C3%B3n.pdf>

Features	Constitutional bodies (COFECE)	Semi-autonomous agencies (such as previous CFC)
Creation	By Constitution.	By law or decree of the Congress.
Auxiliary to the Federal Executive Branch.	No.	Yes.
Organic autonomy.	Yes.	No. They actually belong to Ministries.
Normative autonomy	Yes. They may issue its own organic statute as well as technical regulation.	No.
Own legal regime.	Yes.	No.
Own legal personality.	Yes.	No.
Own patrimony.	Yes.	No.
Type of relationship with the traditional powers.	Coordination.	Subordination.
Officials' appointments.	Special appointment procedure based on technical qualifications.	Done directly by the Executive. Or by Executive nomination and subject to Senate's ratification.
Official's dismissal.	Done by the Senate with a two-thirds majority vote when there is a qualified cause established in law.	Normally done by the Federal Executive Branch, with or without a qualified cause.
Control and vigilance.	It has its own Internal Comptroller, designated by the Chamber of Deputies but without dependence from other Power or organ.	Done by the Federal Executive Branch, through the Ministry of Public Service.
They can be audited by the Federal Superior Auditor.	Yes.	Yes.
Technical autonomy.	Yes.	Yes.
They can promote constitutional controversies.	Yes.	No.

- Increased powers

27. The effectiveness of competition policy depends on effective powers to tackle two types of competition problems in the markets: (i) the behavior of the economic agents, and (ii) structural or regulatory aspects. Since 1992 the LFCE punishes cartels and abuse of dominance practices; sanctions, as already mentioned, were reinforced in 2011. These tools however have not been enough. Therefore the constitutional reform granted COFECE a new power to investigate markets with competition problems and, as a result thereof: a) order measures to eliminate barriers to competition and free market access; b) issue guidelines in order to regulate access to essential facilities; and c) order the divestiture of agents' assets, rights, equity interests or stocks in the necessary proportions to eliminate anticompetitive effects.¹⁴

¹⁴ Briefly, market investigations are proceedings by means of which a competition agency can assess the functioning of a given market and evaluate it holistically. This, with the purpose of determining whether competition is functioning or otherwise impose remedies to correct the corresponding failures.

- Separation of functions

28. In the past, investigated economic agents had constantly pointed at the fact that COFECE's resolutions lacked objectivity and impartiality since there were no formal boundaries between the decision-making body and the investigative divisions, even though the Supreme Court ruled on the contrary stating that the CFC did not act as judge and jury. In its reasoning (August 2011), the Supreme Court made clear that the investigation phase constituted an action different in nature, autonomous and independent from the next stage of the procedure and that the CFC did not violate the impartiality principle.¹⁵

29. Nevertheless, in order to generate greater legal certainty, the reform established as a constitutional principle the separation of functions within the competition authority. This, meaning that there is now a functional and formal separation between the authority that conducts the investigation stage (namely the Investigative Authority), and the authority that issues the final decision (namely the Board of Commissioners).

30. In terms of the FECL, the Investigative Authority has technical and administrative autonomy to open and conduct its investigations in spite of the fact that the Board of Commissioners appoints its head. Once a state of objections (accusation) is filed, it acts as a party in the trial-like procedure conducted by the Technical Secretariat.

31. This institutional design is an unparalleled arrangement for a competition agency. The main goals of having an independent investigative division is to guarantee impartiality and to foster the objectivity of the Board of Commissioners' decisions by keeping it away from any possible bias created by an involvement in the investigation stage.

- New judicial setting

32. On one hand, the 2013 Constitutional Reform considered that COFECE's actions may be now challenged only through indirect amparo¹⁶ trials and cannot be suspended, except for cases involving the imposition of fines or assets' divestiture. On the other hand, it is worth mentioning that only final resolutions may be challenged.

33. This new relationship between COFECE and the Judicial Branch was greatly motivated by the fact that economic agents were constantly hindering the Commission's actions by filing endless revision resources during the course of proceedings.

34. Finally, the reform provided that amparo resources shall be substantiated by specialized judges and courts. For that reason, in 2013, four specialized courts were established in order to attend competition related issues. Worth mentioning, the judges selected to integrate these courts are all renowned professionals that enjoy a long background of outstanding technical expertise in competition matters.

35. These arrangements have constructed a more functional interaction between COFECE and the Judiciary, and a sound balance between the need to achieve competition goals and the need to guarantee certainty and due process of law to all economic agents.

¹⁵ Supreme Court, Amparo Review 554/2011. Available at: <http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=129388>

¹⁶ Amparo is a Mexican legal institution consisting of appeals against public authorities' actions affecting fundamental rights.

2.4 COFECE as a constitutionally autonomous agency

2.4.1 Independence from the government

36. As of 2013, by means of a constitutional mandate, the Commission became an autonomous entity with its own legal personality, independent in its decisions and operation, professional in its performance, impartial in its actions, that shall exercise its budget autonomously, all with the purpose of guaranteeing free market access and economic competition, as well as to prevent, investigate and fight monopolies, monopolistic practices, concentrations and other restrictions to the efficient functioning of the markets.¹⁷

2.4.1.1 Organic autonomy

37. In general terms, the organic autonomy refers to the way in which autonomous agencies are compelled to interact with other entities of the State. In other words, there is organic autonomy when the body is not subjected, hierarchically speaking, to another body. This characteristic provides agencies with greater insulation from political control. This is critical as many enforcement and advocacy actions may involve – directly or indirectly - other authorities. For instance, COFECE may propose the elimination of pieces of legislation or regulation (as barriers to competition¹⁸) or lodge constitutional controversies when deemed pertinent.¹⁹

38. The Organic Statute has determined its own structural composition and administrative units²⁰ as follows: COFECE's governing body is composed by seven Commissioners, including the Chair. As part of its structure, the Commission is composed of three main administrative units: the Technical Secretariat and the Investigative Authority, both depending directly on the Board of Commissioners as their heads are appointed by two thirds of the Board; and the Unit of Public Affairs and International Issues (UPVAI for its Spanish acronym) directly dependent on the Chair. The Technical Secretariat is charged with the conduction of procedures such as the analysis of mergers, the conduction of market studies and the substantiation of the trial-type procedure on anticompetitive conduct cases. As for the Investigative Authority its function has already been addressed in previous sections but we can stress here its attribution to carry out investigations regarding cartels, abuse of dominance, essential inputs and barriers to competition. The UPVAI is in charge of planning and establishing liaisons with a wide range of stakeholders, enhancing completion advocacy and managing international affairs.

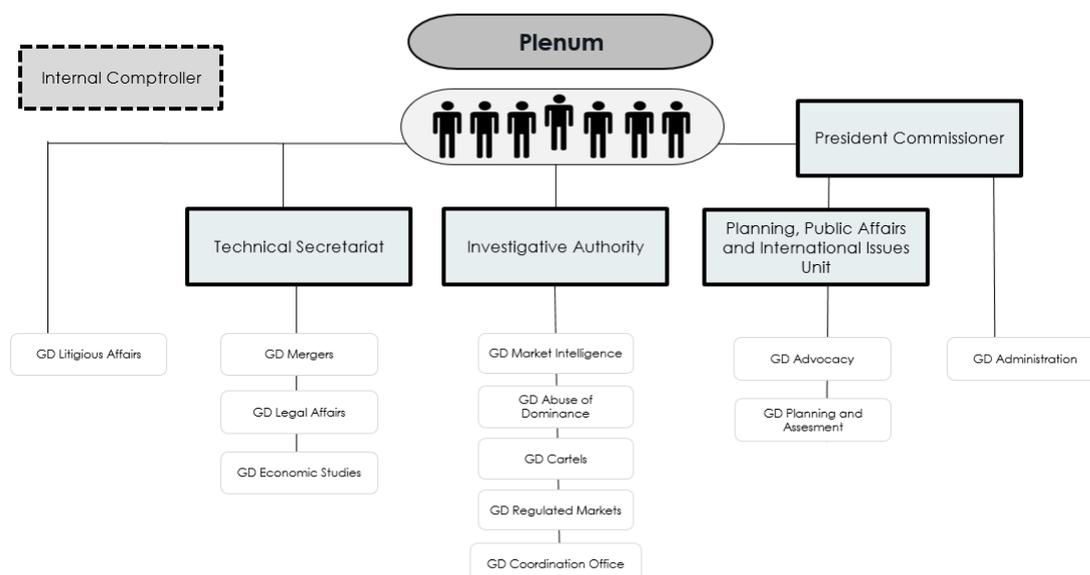
¹⁷ Article 28, Political Constitution of the United Mexican States, reform published in the FOG on June 11, 2013.

¹⁸ Article 3 of the FLEC, 2014.

¹⁹ Article 95 of the FLEC, 2014.

²⁰ For more details see Annex 1.

COFECE'S NEW ORGANIZATION



2.4.1.2 Budgetary autonomy

39. Budgetary autonomy comprises the power of agencies to define, propose and exercise their own budgets in the best suitable way in order to fulfil the purposes for which the agency was created. Ensuring sufficient and stable resources for authorities is a vital consideration since they are less prone to be influenced or subject to capture if they can independently determine and manage their own priorities and plan the use of their resources accordingly.

40. Particularly, for competition authorities, autonomy in the exercise of budget is critical because of the highly technical nature of their mandate and the specific professional profile of the staff required to successfully achieving its goals.

41. Constitutional article 28 provides that COFECE shall exercise its budget in an autonomous way and that the Chamber of Deputies shall ensure the adequacy of budget in order to enable the Commission to exercise its competences in an effective and timely manner.

42. In practice, this budgetary autonomy translates into that COFECE no longer has to resort to the Ministry of Economy for the negotiation of its budget. Instead, now the Chair has the faculty to propose, on an annual basis, the budgetary project to the Board of Commissioners for internal approval and subsequent submission to the Ministry of Finance for its inclusion in the Decree project for the federation's expense budget that will be presented before Congress.

COFECE's annual authorized budget^{1,2}	
2014	15,745,965.61
2015	25,348,807.9
2016	25,334,258.82

¹ In US Dollars. Converted from Mexican pesos using August 2016 exchange rate, 1 USD = 18.87 MXN).

² Quarterly activity reports of 2014 - 2016. Available at: <https://www.cofece.mx/cofece/index.php/transparencia/planeacion-y-desempeno/informes-trimestrales-de-actividades>.

2.4.1.3 Operational and technical autonomy

43. Operational autonomy normally implies that the agencies have the capacity to exercise, without any restriction or impediment, and only subject to judicial review, all of its powers.

44. Thus, operational autonomy enables institutions to establish their own organizational regime. Attending that established in article 28 of the Mexican Constitution, COFECE issued its Organic Statute, through a system of qualified majority vote by the Board of Commissioners.

45. As one of the first steps in its independent life, COFECE engaged in the development of its Strategic Plan 2014-2017²¹, which includes, for the first time in the Mexican competition policy, a methodology to prioritize economic sectors. Prioritizing sectors will allow the COFECE not only to allocate more efficiently its resources, but also to assume a more proactive role when conducting enforcement and advocacy activities through launching ex-officio cases.²²

46. Technical autonomy can be understood jointly with operational autonomy as the ability of an agency to autonomously resolve over cases regarding the specific matter it was entrusted with. It also refers to the methods and procedures posed by the agency in order to reach such final ruling.

47. In the particular circumstance of COFECE, Constitutional article 28 provides that the Commission shall dictate its resolutions with plain independence. It is paramount to understand that for COFECE, independence is not a synonym of isolation. On the contrary, it obliges the institution to better coordinate with other authorities that pursue related policy goals. Also, it is worth mentioning that several check and balances (particularly transparency and accountability obligations) were established in the context of the Mexican competition regime revamp.

2.4.1.4 Regulative autonomy

48. Technical autonomy is strongly related to regulative autonomy, which allows institutions to dictate secondary provisions, as is the case of substantial criteria, necessary to comply with its mandate.

49. Constitutional article 28 enables COFECE to issue general administrative provisions exclusively for the performance of its public role. As a result, at the end of the first two years of work, progress was made in a major way in the construction of the technical and legal instruments that allow COFECE to comply with its constitutional mandate. Throughout 2014-2016, COFECE enlarged its legal framework by issuing several technical criteria concerning analytical and procedural issues for the conduction of its proceedings: Regulatory Provisions (FLEC's implementing regulations)²³, imposition of injunctive

²¹ Available (Spanish) at: https://www.cofece.mx/cofece/attachments/article/37/PE_2014-2017_act_2015.pdf

²² The methodology is based on five criteria in order to determine which economic markets are significant enough to be permanently monitored: i) contribution to economic growth; ii) generalized consumption; iii) transversal impact; iv) lower-income households demand; and v) regulated markets.

²³ These are some of the topics covered by the Regulatory Provisions: Evidence of per se unlawful behavior, predatory pricing, and determination of relevant market, barriers to entry, joint dominance and efficiencies.

measures, and dismissal of criminal proceedings, calculus and application of markets' concentration quantitative index, etcetera.

50. These instruments contribute to create an environment of legal certainty to companies on the way in which the Commission exercises its powers and largely contributed to generate a favourable perception at the national and international levels within the competition community on the Mexican competition authority.

2.4.2 *Independence from economic agents*

2.4.2.1 Commissioners' appointment

51. As a result of the 2013 constitutional amendment, the procedure for the appointment of the governing body of the Commission was modified in order to assure that the Board of Commissioners will be independent both from the economic agents and from the government.

52. According to article 28 of the Constitution, the governing body of COFECE is integrated by seven Commissioners, included the Chair. Each Commissioner is appointed for a fixed term, upon nomination by the Federal Executive Branch and the ratification of the Senate. The Chair is selected and appointed by the Senate, from all the Commissioners, with a two-thirds majority vote of the members present, for a four-year period that can be renewed once. Eligibility requirements put emphasis in neutrality, technical expertise and experience, and are established at the constitutional level.²⁴

53. While in office, Commissioners shall refrain from undertaking any public or private employment, position or responsibilities, with the exception of academic positions. Likewise, they are impeded to hear cases where they have direct or indirect interests and could be subject to impeachment, as well as to the public servant's responsibilities legal framework. As a completely new selection mechanism, the candidates to be nominated by the Federal Executive shall be necessarily selected from a list of five delivered by an Evaluation Committee integrated by the Heads of the Central Bank (BANXICO), the National Institute for Evaluation of Education (INEE) and the National Institute of Statistics and Geography (INEGI). This, after an open selection process.

2.4.2.2 Rules of conduct

54. In order to generate greater credibility and trust, article 28 of Mexico's Federal Constitution provides that the Law shall regulate the ways in which Commissioners can discuss matters with people that represent the interests of regulated economic agents. To achieve this, the FLEC establishes the appropriate formalities.²⁵

²⁴ Looking forward to guarantee the professionalism and technical profile of the Commissions' adjudication authority some of the requirements established for would-be Commissioners are having at least three years of professional experience in public or academic services related to economic competition and certifying, in terms of this precept, the technical knowledge required for the position.

²⁵ Beside the procedural hearings established in the Law, Commissioners may only discuss matters under their competence with the individuals that represent the interests of Economic Agents through an interview. For this purpose, all Commissioners shall be convened, however, the interview may be held with the presence of only one. According to article 25 of the FLEC, the Commission is now obliged to register through the Commission's official website every meeting held by the Commissioners and any economic agent. The Commission must keep as well, a digital record of the meeting. In addition, article 56 of the Organic Statute mentions that every interview with economic agents under investigation must be held in the presence of at least two public officials who are compelled to leave proof of the interview.

2.4.2.2 Code of Ethics

55. As a fundamental part of its institutional policy of integrity, in 2014 COFECE issued its Code of Ethics and Conduct which seeks to be a tool to strengthen the culture of ethics and integrity on the behavior that all members of the Commission must observe. An Ethics Committee was also established to enforce such norms within the institution.

2.4.2.3 Institutional values

56. As part of its Strategic Plan 2014-2017, COFECE defined the following five institutional values, which act as guidelines of its internal operation and relationships with economic agents and society at large: legality, impartiality, objectivity, transparency and excellence.

57. These institutional values should be reflected in each act, procedure and decision performed by COFECE. Only in this way will its mission be attained: becoming an institution of excellence, recognized for its commitment to legality, impartiality, objectivity, transparency and professionalism.

2.4.2.5 Collegiate decision-making

58. Pursuant to that provided in Constitutional article 28 of the FLEC, COFECE's Board of Commissioners deliberates in a collegiate manner, requiring a voting majority to decide cases, except in decisions that require qualified majority; such as the appointment or dismissal of the Investigative Authority.

59. The Board of Commissioners' deliberations include the votes of all of the Commissioners. It must be highlighted that Commissioners may not abstain from voting. If Commissioners are absent during the sessions, they shall submit their vote in writing before the session or within five days after it.

60. In cases where Commissioners are unable to cast their vote for duly justified causes or are impeded to do so, and the voting results are tied, the Commission's Chair holds the casting vote to decide these cases.

2.4.3 *Checks and balances*

61. COFECE is autonomous to the extent that it is independent from traditional powers and from any government interference. This, however, does not mean it is free from having certain relationships with such powers or with society as a whole, particularly for transparency or accountability purposes. Actually, the higher the autonomy is, the greater the need to have check and balances.

2.4.3.1 Transparency

62. The Federal Law of Transparency and Access to Public Governmental Information (LFTAIPG) ensures access to any person to the information in the possession of the powers of the Union, the constitutional autonomous bodies or with any type of legal autonomy and any other federal entity.

63. Accordingly, the Federal Commission of Economic Competition (COFECE) maintains a strong commitment to transparency and access to public governmental information by disseminating through its website a wide variety of publications.

64. Notably, the Commission discloses at its website all the public versions of its opinions and resolutions, as well as annual reports.

65. According to its principle of maximum publicity, with regards to the investigations' resolutions, COFECE issues a press release announcing any new case, publishes a short summary of its decisions in the Federal Official Gazette, and posts a longer summary on its website. The public versions of the resolutions are published as well in the subsequent edition of the Commission's quarterly gazette, which is also uploaded on the website.

66. Additionally, the Chair and/or the Investigative Authority have often addressed national and international media whenever it has relevant news to share with society as has been the case of initiation or conclusion of important investigations.

2.4.3.2 Accountability

- Yearly appearances before the Senate

67. The Commission's Chair shall appear on an annual basis before the Senate. This appearance aims to render a report of COFECE's work and to demonstrate that competition occupies a central role in the public agenda and on the route of transformation of the country.

- Quarterly reports and annual working plan

68. In addition to the yearly appearance before the Senate, the Commission's Chair submits before the Federal Executive and Legislative Branches, the Commission's annual work program and its quarterly activities report within thirty natural days after the conclusion of the corresponding quarter.

69. The annual work program and the quarterly activities report generally refer to the Commission's management; its performance in relation to its objectives and strategic goals; a summary of its resolutions regarding anticompetitive cases and merger analysis; opinions issued by the Commission and of any inquiry submitted to its consideration and a report of the expenses corresponding to the previous period.

- Internal Comptroller

70. COFECE's Internal Comptroller is entrusted with supervising the Commission's income and expenditures, as well as overseeing the public servant's responsibilities framework.

71. The Head of Internal Comptroller is appointed by two-thirds of the members of the Chamber of Deputies.

2.4.3.3 Dismissal of officers

72. Commission high-rank officials do not enjoy life tenure. The duration of their positions is stipulated in the Federal Economic Competition Law, as well as the actions and reasons that could lead to their dismissal.

73. For instance, Commissioners are subject to impeachment in terms of the Political Constitution of the United Mexican States and the Federal Public Servant's Administrative Responsibilities Law. To that effect, the Senate may remove Commissioners from office for the following severe causes such as: discussing matters under their responsibility with persons that represent the interests of economic agents outside the procedures established for that effect; failing to comply with the Board of Commissioners' definitive decisions; using, for personal benefit or that of third parties, the confidential or reserved information at their disposal by means of their office.

74. Accordingly, when the Internal Comptroller becomes aware of likely situations, it immediately notifies the Senate, which would complete the procedure.

2.4.3.4 Assessment of institutional performance

75. COFECE plans, organizes, directs and controls its performance of short- and medium-term objectives via a strategic administrative program. This program allows COFECE to target its resources effectively, efficiently and in a timely manner to complete its institutional objectives.

76. To be aware of the impact and the effectiveness of its actions, COFECE has carried out ex post analyses. For instance, to measure the effects of collusion (absolute monopolistic practices) in the Mexico City poultry market, bid rigging in healthcare sector procurement, and terrestrial cargo transportation.

3. Independence in practice

3.1 *Strengthening ties with other agencies and authorities*

77. Through its recent history as an autonomous body, COFECE has signed significant memorandums of understanding and collaboration agreements with different national and international agencies and authorities in order to formalize cooperation, such as national regulatory bodies, federal agencies, other autonomous bodies, ministries, academic institutions and international organisms.

78. The main actions undertaken by the different collaboration agreements are: 1) exchange of information; 2) promotion of competition (through dissemination of materials, training and awards); 3) collection of fines; 4) regulatory analysis from the perspective of economic competition and 5) support in national and international notifications, use of facilities, and reception of documents.

79. International relations are widely sought as they open ways to learn how things are done by other agencies and what can be learnt from them. For this reason, COFECE promotes a profound international activity to strengthen ties with other global agencies and authorities through a series of efforts and tasks that aim at consolidating it as participative agency at the international level.

3.2 *Performance highlights 2014-2016*

3.2.1 *Enforcement*

80. During the last three years, the Commission resolved the analysis of 396 mergers (worth 1,426,690,832,008.5 dollars)²⁶.

81. Also, in the same period, COFECE initiated 33 investigations regarding monopolistic practices (cartels and abuse of dominance). Investigations also showed an increased proactivity because ex officio investigations passed from 2 in 2013 to 6 throughout 2015.

82. Arising from the enhancement of its detection capabilities, the ex-officio investigations launched by the Commission since 2014 are aligned with the 2014-2017 Strategic Plan prioritization principles. According to such criteria, COFECE has addressed priority sectors such as the financial, transportation, food and agriculture, energy and public procurement.

²⁶ Equivalent to 26,921,656,000,000 Mexican pesos. Converted to US dollars using exchange rate from August, 2016. 1 USD = 18.87 MXN.

83. Remarkably, the Commission's Investigative Authority has already concluded two special investigation procedures (market investigations) in order to determine the existence of essential inputs or barriers to competition and has issued its Preliminary Findings. One regarding public freight transport services in the state of Sinaloa²⁷ and another in the market for the provision of air transportation services that use Mexico City's International Airport for their landing and/or take-off procedures.²⁸ It is important to highlight that a final resolution is yet to be issued by the Board of Commissioners for each case.

84. In the past three years, the Commission has imposed fines in 9 cases regarding monopolistic practices, failure to timely notify mergers, as well as failure to comply with conditions and settlements. The fines amount a total worth 31.27 million dollars.²⁹ The 6 sanctioned cases of monopolistic practices have to do with the markets of: transportation (unilateral conduct and cartel), automotive parts (cartels), poultry (cartel), and sugar (cartel).

3.2.2 *Advocacy*

3.2.2.1 Opinions

85. As part of its advocacy efforts, in the last three years, the Commission analyzed 174 normative projects and issued 38 opinions, with a percentage of effectiveness of 78%, in the adoption of competition recommendations by authorities and legislators.

86. In late 2015, the Commission issued an opinion regarding Transportation Network Services (TNS's) provided through mobile platforms, like Uber and Cabify.

87. Very shortly after COFECE's opinion, Mexico City's Department of Transportation issued a specific regulation on TNS's. It was the first local government in Latin America to do so. The regulation heavily relied on COFECE's opinion and allowed TNC's to fully operate in the city with certainty. Since then, other Mexican states, such as Puebla, have followed suit.

88. Notably, COFECE has actively participated in the energy reform through the issuance of non-binding opinions regarding the new implementing regulatory framework. It recently made public a report containing 25 recommendations in order to transit to a competitive market of fuels.

²⁷ The Investigative Authority found that Transit and Transportation Law as well as its bylaws pose barriers to competition generating anticompetitive effects such as low quality services, excessive concentration of permits among few carriers, price distortion and low productivity, among others. Press release (English) available at: <https://www.cofece.mx/cofece/images/Prensa/ArticulosGCRyMas/MEXICAN-ENFORCER-URGES.pdf>

²⁸ The investigation determined the existence of an essential input consisting of the runways, taxiways, visual aids and platforms that form part of the infrastructure of the International Airport of Mexico City. Accordingly, in order to foster competition conditions in the investigated market, a bundle of remedies was proposed to the Plenum, including recommendations for the amendment of sectoral regulation, the creation of an Independent Coordinator for the management of landing and take-off schedules' allocation, the establishment of a schedule Fund for new entrants, as well as several measures for transparency enhancement, among others. Press release (English) available at: https://www.cofece.mx/cofece/ingles/images/Comunicados/Comunicados_ingles/COFECEAICM_Exploratory_note.pdf

²⁹ In US Dollars. Converted from Mexican pesos using August 2016 exchange rate, 1 USD = 18.87 MXN.

3.2.2.2 Market Studies

89. The Commission has already completed and released market studies in the financial sector³⁰, as well as in the food and agriculture markets. This year, COFECE also announced the launch of a study regarding the off-patent drugs sector.

90. Particularly, the document titled “Research and Recommendations on Competition Conditions in the Financial Sector and its Markets”, published by COFECE in 2014, had a strong media impact since it pointed out important conclusions to be considered in order to improve the financial sector in general terms.

91. Based on the aforementioned study, COFECE initiated an investigation on the market of pension funds administration services (AFOREs for its acronym in Spanish) as well as in the credit information market.

4. Benefits from the gained autonomy

4.1 Objectivity and impartiality

92. Since COFECE emerged as one of the constitutional autonomous bodies in Mexico,³¹ its work has been dedicated to the construction of an institution with national and internationally recognition for excellence in its performance.

93. It is of paramount importance that our work is always guided by technical considerations and never unduly influenced by the government or economic agents. In this context, COFECE’s constitutional autonomy and its institutional design, in general, greatly contribute to achieve this end. Under current circumstances it is extremely difficult – if not impossible – to act otherwise.

4.2 Credibility and visibility

94. In terms of visibility, the virtues of autonomy are clearly portrayed in the way COFECE can relate to other actors of the political system. In this sense, the visibility conferred as a result of the autonomy and the absence of a higher political representation, has served as a vehicle that allows the Commission to establish higher-level dialogues.

95. In terms of credibility, we come from a phase characterized by a lack of credible and strong economic regulatory institution. That is the reason why we need to be clear in our commitment with an aggressive implementation of the reform.

96. Accordingly, COFECE has worked hard to make all its efforts count. In three years, COFECE has gone through a fundamental process of institutional strengthening and yet it has managed to accomplish important goals demonstrating how small but constant accomplishments can bring about the credibility of an institution.

³⁰ Available (English) at: https://www.cofece.mx/cofece/images/Estudios/ExecutiveSummary_10022015.pdf

³¹ National Commission of Human Rights (1992), Central Bank (1993), the National Institute of Statistics and Geography (2006), National Institute for Evaluation of Education (2013), Federal Institute of Telecommunications (2013), Federal Commission of Economic Competition (2013), National Council for the Assessment of Social Development Policy (2014), Attorney General Office (2014), National Electoral Institute (2014).

97. In 2014, COFECE's efforts were recognized within the assessment of the Global Competition Review Rating Enforcement 2014, improving from two and a half stars to three, being now classified as having good performance.

98. Furthermore, in the 2015-2016 Global Competitiveness Index (WEF), Mexico achieved an outstanding progress of 37 positions in the effectiveness of anti-monopoly policy within the Goods Market Efficiency Pillar. This result reflects the perception on behalf of the private sector that the competition regime in Mexico is being successfully strengthened and properly implemented.

99. Additionally, COFECE has been awarded with numerous prizes in recognition of its performance as a professional competition authority. For instance, last April, COFECE was granted with three prizes: 1) First Place in the Competition of Competition Promotion, organized by the World Bank and the International Competition Network, for its opinion on "the impact of passenger transport services through mobile platforms in the process of free economic competition."; 2) Honourable Mention in the First Edition of the World Bank Advocacy Competition, for its labour in improving the effective application of the competition legislation; and 3) First Place in the Antitrust Writing Awards 2016 (category of Non-binding Rules), organized by the Institute of Competition Law, for its presentation of the "Guidelines for the exchange of information between competitors" published in 2015.

100. Moreover, in 2015, COFECE was awarded with the "VI Honour Award of Good Practices in the use of Results of Monitoring and Evaluation in the Public Policy Cycle", given by the National Council for Evaluation of Social Development Policy; and an Honourable Mention for its participation in the Competition of Competition Promotion, organized by the World Bank and the International Competition Network, for its collaboration with the Federal Regulatory Improvement Commission.

101. Additionally, in 2016 COFECE was nominated as "Agency of the Year" in the Americas by the Global Competition Review for enforcement thanks to its performance with regards to its first market investigation procedure.

102. Remarkably, Chairwoman, Alejandra Palacios has been nominated for the "Women in Antitrust 2016" award by GCR and the head of the Investigative Authority was elected in 2015 as one of the top young antitrust lawyers in the world ("40 under 40").

103. Another good sign comes from the number of leniency applications. As a result of COFECE's professionalism, coupled with major credibility towards the system, the leniency program has demonstrated an increased willingness to cooperate of economic agents. In fact, the number of first-in leniency applications increased 4 times with regard to 2013 applications.

104. It is also interesting to note that, from 2014 to date, 83% of the cases brought before the specialized tribunals have been decided in favour of COFECE. More importantly, the Supreme Court of Justice has recently created precedents that strengthen competition authorities to a great extent, for instance by recognizing the use of economic evidence in cartel cases or their power to issue secondary regulation.

105. According to our estimates, enforcement actions have generated direct economic benefits to consumers for more than 126 million dollars³² (this is equivalent to three times the budget exercised by COFECE since its creation) in the last three years.

³² In US Dollars. Converted from Mexican pesos using August 2016 exchange rate, 1 USD = 18.87 MXN.

5. Final remarks

106. Autonomy is not an end in itself, but a means to an end. It is also much more than merely an organic or legal label: it is instead a combination of institutional arrangements that allows a public body to effectively accomplish its mandate, free from undue influence. In the case of COFECE, the constitutional autonomy (which includes various dimensions of autonomies as already mentioned), together with sufficient powers, resources and transparency/accountability mechanisms, have allowed in combination to implement sounder enforcement and advocacy measures to promote and protect free market access and competition in the markets.

107. Consensus is being shaped in the sense that constitutional autonomy has allowed the Mexican competition authorities to better make use of their tools.

108. Nevertheless, the achievements in recent years were not constructed overnight. Successful public policies are built from incremental improvements over time. Throughout more than twenty years, the former CFC and now COFECE experienced a continuous process of professionalization and institutional strengthening. COFECE has to build up its institutional foundations as well as its technical capabilities in order to be up to the challenge.

109. It is critical to stress that the constitutional autonomy granted to COFECE should not be misconceived as isolation. On the contrary, close collaboration and exchange of technical information is necessary to build a common front and promote a coherent, comprehensive and effective competition policy. From our experience, the lack of competition in the markets often comes from barriers and obstacles imposed by the public authorities.

110. A number of complex challenges remain. The biggest we can foresee is to continue meeting the expectations derived from the constitutional reform. To achieve this, COFECE shall not only maintain independence but also take decisions that clearly respond to the public good.