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**REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES  
– Contribution from Mexico**

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More documentation related to this discussion can be found at: [oe.cd/rca](http://oe.cd/rca).

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## *Regional Competition Agreements: Benefits and Challenges*

### **-- Mexico (COFECE) --**

#### **1. Introduction**

1. There are several legal instruments that incorporate provisions on competition policy and establish the framework for international cooperation between Mexico and other nations: (i) Free Trade Agreements (FTAs); (ii) bilateral agreements between the Mexican federal government and other governments on competition law; and (iii) bilateral agreements concluded between the Mexican Federal Economic Competition Commission (COFECE) and other competition enforcement agencies. These agreements reinforce the provisions of the Mexican Competition Law.<sup>1</sup>

2. Said legal instruments, although different, have similar approaches to the creation of conditions that favour and protect competition. Most FTAs signed by the Mexican government contain specific chapters dedicated to competition policy. FTAs lay the foundation for antitrust agencies commitment to promote an environment of competition in their respective countries, whereas bilateral cooperation agreements provide the basis for day-to-day interaction among agencies. The Mexican Government has also signed bilateral agreements with different jurisdictions that set the terms for the cooperative relationship with regards to the implementation and enforcement of competition law and policy.

3. In these instruments, particularly in FTAs and bilateral agreements, the parties have agreed to cooperate on a reciprocal basis on issues such as: notifications, consultations and exchange of information related to the enforcement of their competition laws and policies. In addition, antitrust cooperation agreements include provisions for technical assistance and reciprocal cooperation on visits and staff exchanges.

4. The North American Free Trade Agreement (NAFTA) stands out among cooperation agreements not only because of the size of the market and its relevance to the global economy, but for its critical role in driving the establishment of a competition regime in Mexico.

#### **2. NAFTA. Cooperation and coordination in North America**

##### **2.1. Background: establishment and changes to the Mexican competition regime**

5. For decades, the Mexican economy was characterized by strong protectionism and heavy government intervention, which favoured conditions for inefficient resource allocation, obsolete production methods, and domestic firms shielded from foreign competition. Entrepreneurial creativity was essentially discouraged, and there were no competitiveness conditions in the country. Industry was highly concentrated and poorly

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<sup>1</sup> Information related to international legal instruments (Free Trade Agreements, bilateral agreements between Mexico and other countries, and bilateral agreements between the Mexican competition authorities and other agencies) can be found at the following link: <https://www.cofece.mx/publicaciones/normateca/#normateca-4>.

performing, with no incentives to provide consumers with a greater choice of products at better prices.

6. From 1982 to 1992, diverse international pressures and internal drivers as well as a failed import-substitution model gradually led to the implementation of a set of constitutional reforms that shifted from specific-sector policy actions to a horizontal approach to trade and financial liberalisation, foreign direct investment, deregulation and privatization. A new industrial policy saw openness as an instrument for promoting economic efficiency and industrial competitiveness.

7. In this context, the reform processes were marked by the signing of NAFTA in December 1992. For competition policy, accession to NAFTA denoted the adoption of a competition regime in Mexico. Basic commitments for Mexico under NAFTA included adopting national competition laws proscribing anticompetitive business conducts; and cooperation and coordination in competition enforcement between Canada, Mexico and the United States.

8. To comply with NAFTA's obligations and to establish a common ground to cooperate and coordinate in competition matters with the two other parties, in 1992 Mexico adopted its first Federal Economic Competition Law (FECL) and the following year, created the Federal Competition Commission to enforce it.

9. Since then, the FECL has undergone considerable amendments and improvements, and new competition authorities have been created: the Federal Economic Competition Commission (COFECE) and the Federal Institute for Telecommunications (IFT). However, it is important to remember that NAFTA constituted the first step towards sound and effective competition for the modern Mexican economy.

## 2.2. Chapter 15: Competition Policy, Monopolies and State Enterprises

10. Chapter 15 of NAFTA was conceived as an umbrella providing for the region's competition policy and regulation of designated monopolies and state-owned enterprises (SOEs). Article 1501 focused on ensuring that all the signing parties had laws in place to address anticompetitive conducts – and really enforce it – aiming at guaranteeing a level playing field between the nations' companies and providing for legal certainty in this regard. Article 1501 also laid down the framework under which the nations could cooperate and coordinate, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.

11. Articles 1502 and 1503 regulated designated monopolies and state enterprises. These were the first to include disciplines on SOEs in FTAs and aimed at ensuring that competition was not affected or hindered by their conducts whether a monopoly authorized by the State or a commercial company operated by the State.

12. Further implementation of NAFTA's commitments and day-to-day cooperation work between the nations was established in bilateral agreements: i) the Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of their Competition and Deceptive Marketing Practices Laws (signed in 1995); the Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws (signed in 2000); and ii) Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws (signed in 2001).

13. Bilateral agreements included provisions for the cooperation and coordination of enforcement activities and technical assistance between the parties and its respective competition authorities – the Competition Bureau Canada (CBC), the U.S. Federal Trade Commission (FTC), the Antitrust Division of the U.S. Department of Justice (DoJ) and COFECE – in terms of the 1995 Recommendation of the Council of the OECD Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade, the 1998 Recommendation of the Council of the OECD Concerning Effective Action Against Hard Core Cartels, and the Communiqué issued at the Panama Antitrust Summit Meeting in October 1998.

### 2.3. Enforcement cooperation

14. Cooperation between NAFTA’s competition agencies has proven to be very useful for COFECE, especially in a context where the countries’ economic activity is closely intertwined. The cooperation agreements entered into by the parties have proved to be an effective vehicle for building better understanding and closer relationships among agencies. These have also provided for better enforcement actions in cases where more than one jurisdiction is involved.

15. Specifically, COFECE has cooperated with its peers when: i) a cross-border merger or an international anticompetitive conduct has significant competition effects in Mexico; ii) it is possible that a decision taken by COFECE may affect the NAFTA region, or vice versa; and iii) when in complex cases, to compare approaches and issues of common-interest when the authorities are reviewing the same case.

16. For instance, the Commission reviewed the merger between Continental and Veyance,<sup>2</sup> which had effects throughout the NAFTA region and where the companies’ assets were located in Mexico, the United States and Canada. During the investigation, the respective competition agencies engaged in ongoing communication, discussed common-interest competition issues and shared information. Design of remedies was coordinated by the Mexican and the U.S. competition authorities. The package of remedies imposed by COFECE in 2014 (and by the U.S. DoJ) contemplated the divestiture of Veyance’s air springs business in North America, including manufacturing and assembly facilities in the Mexican State of San Luis Potosi; and the R&D assets located in Fairlawn, Ohio. These measures satisfied competition concerns raised in Mexico and the United States. International cooperation between NAFTA’s parties in this case was key when crafting extraterritorial remedies.

17. Other relevant cases where cooperation has taken place are the Dow/DuPont merger in which COFECE had regular coordination with the U.S. DoJ (and other relevant competition authorities); the Syngenta/ChemChina merger, in which COFECE had regular coordination with the U.S. FTC. In these cases, cooperation was focused on timing alignment (i.e. ensuring that decisions were taken within similar timeframes), consistent outcomes and remedies. In the review of the Bayer/Monsanto merger, most of the coordination took place with U.S. DoJ, the main trading partner and main source of several products (e.g. GM cotton seed) under consideration. There was also some coordination with the Competition Bureau Canada.

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<sup>2</sup> File CNT-084-2014. Final resolution, available in Spanish at:

18. It should be noted that COFECE had waivers that legally allowed for the exchange of confidential information in these cases. The Law stipulates COFECE cannot share information obtained within the framework of a merger review with others, even if the exchange occurs with its trading partners with whom a trade agreement has been signed. To address this constraint, companies are asked to provide a waiver allowing COFECE to share information with other competition authorities and vice versa (these waivers are only for the purpose of the merger). In addition, it is very common that more mature competition authorities, such as the U.S. DoJ and FTC, request a significant number of relevant documents as part of their review; they may also have more time and resources (including software) to evaluate these materials, and sometimes command a working understanding of the Mexican market. Hence, an exchange of information is useful for COFECE.

#### 2.4. Trilateral meetings

19. Meetings between COFECE, the Canadian Competition Bureau and the U.S. Antitrust Division of the Department of Justice and Federal Trade Commission are grounded on the bilateral cooperation agreements, signed between Canada and the United States in the 1995, the United States and Mexico in 2000, and Canada and Mexico in 2001. The provisions included in these agreements established a formal framework for the organization of periodic meetings that have taken place on a regular basis, with increasing periodicity over the past years. Since 2010, the three agencies began organizing annual trilateral meetings to discuss their priorities, challenges and ways to enhance cooperation and coordination among them in the enforcement and promotion of competition law and policy in their respective jurisdictions.

20. The trilateral meetings provide COFECE with the opportunity to learn about recent developments and landmark cases in the region, to build enforcement capacity, exchange experiences, and share methodologies.

21. COFECE considers that trilateral meetings are the result of international cooperation becoming a high priority policy for all the agencies and deemed it as an essential tool for their enforcement strategy and institutional strengthening. For COFECE further increasing cooperation with its peers, not only in the NAFTA region, can be particularly valuable for investigations, useful for other non-case related issues and will contribute to substantive and procedural convergence of competition law and policy in North America. For instance, procedural convergence can be seen in COFECE's adoption of the electronic filing system. This system is similar and was designed considering the systems used in the United States and Canada.

22. The 2018 meeting between the heads of the agencies took place in Mexico City on November 8<sup>th</sup>. COFECE's Chairwoman, Alejandra Palacios, the Federal Trade Commission's Chairman, Joseph J. Simons; Assistant Attorney General, Makan Delrahim of the U.S. Department of Justice's Antitrust Division, and Matthew Boswell, Canadian Acting Commissioner discussed among other topics relevance of the competition chapter of the new agreement negotiated by Canada, Mexico and the United States: the USMCA.

23. Trilateral meetings between the agencies' mergers teams take place to enhance cooperation results. These meetings present a major opportunity for case handlers to initiate, develop trust and maintain close relationships with their peers. Face-to-face/onsite meetings and the exchange of experiences between case handlers, policy officers and international staff has brought the agencies closer. The most recent mergers' teams meeting took place in Mexico City (for the first time) on October 22<sup>nd</sup>-23<sup>rd</sup>, 2018.

## 2.5. Cooperation on technical assistance

24. NAFTA benefits extend over a wide range of activities, not only in enforcement matters, but also in capacity building and technical assistance. Capacity building activities carried out within the framework of international cooperation include (i) advocacy activities; (ii) judicial training; (iii) seminars and workshops for policymakers, businesses and consumers; (iv) technical assistance on specific subjects; and v) exchange of experiences and best practices.

25. For instance, in 2017, as part of cooperation within NAFTA, the Antitrust Division of the U.S. DoJ gave technical assistance on criminal prosecution of cartel offenses to COFECE and the Mexican Office of the Attorney General. This was very helpful to raise awareness on the importance of antitrust cases in the Attorney General. In 2018, as part of the Canada-Mexico-U.S. technical cooperation, competition authorities' staff provided their experience and best practices on the Attorney-Client Privilege.

## 2.6. NAFTA Renegotiation: The United States-Mexico-Canada Agreement (USMCA)

26. The 2017-2018 renegotiation of NAFTA has also meant the drafting of a new competition chapter. In addition to NAFTA's Chapter 15 on Competition Policy, Monopolies and State Enterprises, USMCA's Chapter 21 on Competition Policy specifically provides for procedural fairness in competition law enforcement, consumer protection and transparency. COFECE actively participated in the renegotiation of this chapter.

## 3. Other cooperation instruments

### 3.1. CPTPP

27. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), a trade agreement formerly negotiated as Trans-Pacific Partnership (TPP), includes a chapter on competition policy and another on state-owned enterprises and designated monopolies. In both chapters, COFECE actively participated in drafting the final texts which aim at promoting a level playing field between SOEs and private companies, and to include state-of-the-art provisions to better enforce competition laws and cooperate in this field between the member-States. CPTPP will come into force at the end of December 2018. The real challenge will be full implementation of the agreement.

### 3.2. Pacific Alliance

28. The Pacific Alliance is an edge-cutting regional initiative integrated by Chile, Colombia, Peru and Mexico, which together represent nearly 37 percent of Latin American GDP. The agreement does not include a competition policy chapter. However, the Pacific Alliance is negotiating the integration of Australia, Canada, New Zealand and Singapore as new associate members. The negotiations have been made on 23 technical areas and specific provisions on competition policy and state-owned enterprises, in which COFECE has given its technical opinion, are included.

### 3.3. Other means of regional cooperation

29. COFECE also works on a regional level with competition authorities in Latin America and the Caribbean, through the Inter-American Competition Alliance and the Strategic Latin American Alliance. Both have been conceived to provide informal discussions and exchanges of views among agencies which share similar economic and historical development features.

30. The Inter-American Competition Alliance is an informal network of competition enforcement agencies in the Americas that was created in September 2010 by the U.S. FTC aimed at addressing competition enforcement and fostering cooperation among agencies within the hemisphere. The alliance principally carries out its work through monthly conference calls, mainly in Spanish.

31. The Strategic Latin American Alliance is a joint initiative between Argentina's National Commission for the Defense of Competition; Brazil's Administrative Council for Economic Defense; Chile's National Economic Prosecutor; Peru's National Institute for the Defense of Free Competition and Protection of Intellectual Property and COFECE to guarantee effective enforcement of competition policy in Latin-American markets, as well as cooperation and training opportunities among the five countries. The most recent meeting took place in Buenos Aires on September within the framework of the OECD's Latin American and Caribbean Competition Forum.