

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 11 September 2018

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I:
Informal Economy in Latin America and the Caribbean: Implications for
Competition Policy**

– Contribution from Mexico –

18-19 September 2018, Buenos Aires, Argentina

The attached document from Mexico (COFECE) is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 18-19 September 2018 in Argentina.

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JT03435562

Session I: Informal Economy in Latin America and the Caribbean: Implications for Competition Policy

– Contribution from Mexico* –

1. Introduction

1. The Federal Law on Economic Competition (LFCE or Law) applies to all areas of economic activity, including industrial, commercial and service activities carried on outside the formal economy.

2. Informal economy in Mexico

2. The concept of informal economy used in Mexico originates from the National Institute of Statistics and Geography (INEGI), a public body responsible for national accounts in Mexico. According to INEGI, the informal economy involves: (1) the informal sector or economic units made up of micro-enterprises that do not have basic operating records; and (2) other kinds of informal activity, i.e. subsistence agriculture, domestic household services and all varieties of work which, although connected to registered or formal economic units, is carried out without employment protection.

3. The informal sector, i.e. unregistered businesses which produce goods or services, contributes significantly to the Mexican economy. According to provisional INEGI data, in 2016 the sector contributed 11.2% of the value added in Mexican GDP and recorded a growth rate of 1.8% in the period from 2003 to 2016.¹

* This paper was drawn up by COFECE, the Federal Economic Competition Commission of Mexico.

¹ INEGI. Measurement of the Informal Economy, National Institute of Statistics and Geography, available at: <http://www.inegi.org.mx/est/contenidos/proyectos/cn/informal>.

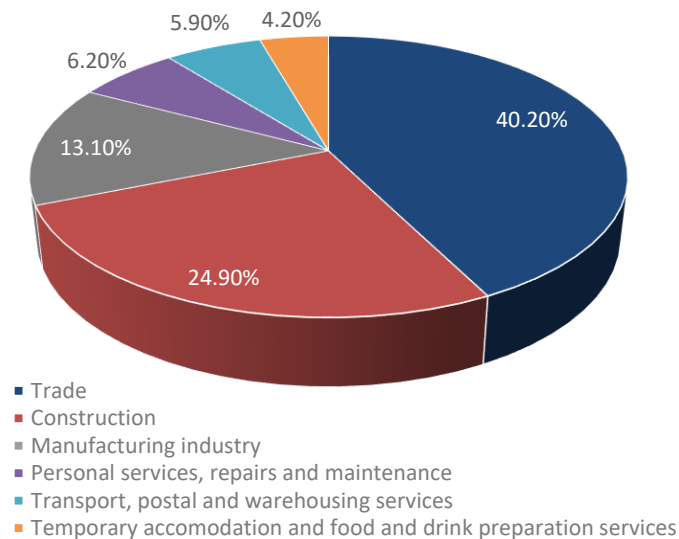
Table 1. Informal sector contribution to GDP 2003-2016P

Year	Informal sector
2003	11.3
2004	11.1
2005	11.4
2006	11.1
2007	10.9
2008	10.2
2009	12.4
2010	11.5
2011	11.4
2012	11.1
2013	11.3
2014	11.3
2015	11.4
2016 ^P	11.2

Source: Own figures based on INEGI data

P: Provisional data

4. Trade and construction activities were the largest contributors to the informal sector in 2016, with 40.2% and 24.9% respectively. These were followed by the manufacturing industry (13.1%), personal services, repairs and maintenance (6.2%), transport, postal and warehousing services (5.9%), and temporary accommodation and food and drink preparation services (4.2%), the remaining sectors contributing 5.5%.

Figure 1. Informal sector gross value added by sector of economic activity, 2016 (percentage structure)

Source: Own figures based on INEGI data

P: Provisional data

5. The informal sector is a very important source of employment in the country. According to INEGI's National Survey of Occupation and Employment (ENOE), in the fourth quarter of 2017, some 14.2 million people, representing 26.9% of Mexico's working population, were employed in this sector.

3. Challenges in applying competition law to informal enterprises

6. COFECE faces a range of challenges in applying competition law to informal enterprises. These challenges are related to the nature of these enterprises, which are often characterised by lack of accounting records, small-scale operations, high mobility and the fact that they operate outside the legal and institutional framework.²

3.1. Calculation of penalties

7. COFECE must consider constitutional and legal criteria to avoid breaches of legal certainty and legality whenever penalties are imposed. These criteria are principally grounds, motive and proportionality.

8. In addition to the fact that the penalty must be proportionate to the conduct penalised, the Law³ imposes certain requirements which COFECE must take into account when imposing penalties. These concern the gravity of the conduct and consist of: (i) evidence of intent; (ii) the offender's market participation; (iii) the size of the affected market; (iv) the duration of the practice or merger; (v) the offender's financial standing; (vi) the impact on the exercise of COFECE's powers; and (vii) the damage caused.

9. When penalising informal enterprises where they have an impact on competition, however, the information available to COFECE for calculating the penalty is limited. In many cases, informal enterprises do not have reliable financial or tax information to allow COFECE to determine whether economic operators have the financial standing to pay penalties.

10. In response to the inadequacy of information, COFECE turns to other sources and/or methods to calculate penalties.⁴ In the case of penalties levied on haulage contractors for price-fixing in the state of Chiapas,⁵ for example, some operators who engaged in the practice either did not present information on their income or the information they did present (tax returns) did not adequately reflect their financial standing. COFECE therefore used the information provided by these operators in their responses to the Commission's requests for information to establish their financial standing. With respect to penalties

² INEGI (13.02.2018). Results of the national occupation and employment survey. Figures in the first quarter of 2017. National Institute of Statistics and Geography. Press release No. 70/18. Available at: <https://goo.gl/hiRh8E>.

³ Article 130, LFCE.

⁴ Article 127 of the LFCE stipulates that the income that must be taken into account when imposing fines is the accumulated income of the economic operator involved. COFECE may also ask economic operators or the competent authority for the tax information required to determine the amount of fines.

⁵ Case file IO-004-2012, ruling available at: <http://cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V102/0/2080706.pdf>.

imposed on tortilla producers,⁶ COFECE used information published by INEGI to estimate each production unit's average annual income in the municipalities corresponding to the economic operators to establish their financial standing.

3.2. Procedures

11. Certain decisions or action by COFECE should be notified in person to economic operators involved in an investigation or procedure, such as plenary rulings, requests for information and summonses to give evidence, among others.⁷

12. The LFCE, for example, stipulates that, when an investigation has concluded, where there is evidence to suggest that anti-competitive practices exist, the probable offenders must be summoned so that proceedings can be opened in the form of a hearing,⁸ i.e. they must be notified in person of their probable responsibility to ensure that due process and economic operators' right to a defence are recognised.

13. It is COFECE's experience that the venue for submitting notifications, i.e. the physical location indicated by informal enterprises for the purposes of the proceedings and formalities laid down in the law, is on many occasions inaccurate or does not exist. In the case of summonses, the fact that it is not possible to notify the probable offender in person delays COFECE's action and undermines its effectiveness.

3.3. Mergers

14. Informal enterprises also present a challenge for COFECE in analysing mergers.

15. Firstly, COFECE faces the difficulty of calculating merger thresholds in informal economies due to the lack of information with which to value assets when, as stated above, there are no accounting record books and no transaction totals. This may complicate the work of identifying unlawful mergers and thus COFECE's preventive functions, particularly in agricultural markets.

4. Promotion of competition and the informal economy

16. Excessive regulation may be regarded as a factor explaining the expansion of the informal economy. Reducing the costs associated to regulation could increase formality in the economy, thereby allowing more competitors to enjoy the associated competitive advantages and thus facilitating the government's work of collecting revenue and setting regulations.

⁶ Case file IO-003-2010-I, ruling available at: <http://cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V67/4/1724423.pdf>.

⁷ Articles 163 and 164 of the Regulatory Provisions of the Federal Law on Economic Competition.

⁸ During this procedure, the probable offenders submit evidence relating to the accusations made against them. Once the evidence has been presented and the corresponding allegations have been submitted, COFECE's plenary body issues a ruling in accordance with the law.

17. Some of COFECE's work has focused on ensuring that legal rules and public policies do not impose unjustified barriers to competition, such as government laws and regulations that restrict entry, grant exclusive advantages, limit supply or reduce competitive capacity. An example of the latter is "Fragmented regulatory obstacles to competition: analysis of government regulations".⁹

18. Meanwhile, given the relevance of certain sectors of the Mexican economy, particularly energy, COFECE has made a number of recommendations (some of which are designed to reduce informality) to the appropriate authorities and bodies to improve competitive conditions. In general, informality complicates the entry of new competitors, since there is less statistical information with which to analyse a market, and hence greater uncertainty when deciding to enter a market as a new competitor.

19. In the document "Transition towards competitive power markets: LP gas",¹⁰ COFECE refers to the participation of brokers in distributing LP gas. These are economic operators who act as a link between licensed distributors and consumers and who generally operate on an informal basis and sometimes possibly unlawfully. COFECE concludes that such participation could generate mistaken assumptions regarding the degree of competition in the market.

20. According to COFECE, informality in LP gas distribution activities dissuades new competitors from entering the market and is disadvantageous to licensees who operate in accordance with the Hydrocarbons Law and its Regulation. This situation could grant advantages to distributors who use brokers as a sales channel. The Power Regulatory Commission is therefore recommended to require distributors who contract brokers or who have commercial links with them to report on prices and the quantities sold at municipal level in order to provide the information required so as to ensure that their activities are duly monitored.

21. The paper "Transition towards competitive petrol and diesel markets",¹¹ in which COFECE makes recommendations for a transition from a monopoly to a competitive market, considers the problem of the unlawful (informal) market, which could distort petrol and diesel market prices and prevent the entry of more participants, as well as increase uncertainty and discourage investment.

⁹ Available at:

https://www.cofece.mx/cofece/images/Promocion/Miscelanea_Estatal_210916.pdf#pdf.

¹⁰ Available at: https://www.cofece.mx/wp-content/uploads/2018/06/Libro-GasLP_web.pdf#pdf.

¹¹ Available at: <https://www.cofece.mx/wp-content/uploads/2018/01/DOC-GASOLINAS-FINAL.pdf>.