

Unclassified

English - Or. English

15 September 2021

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

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session II: Efficiency  
Analysis in Vertical Restraints**

-- Contribution from Mexico --

20-22 September 2021

The attached document from Mexico is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session II at its forthcoming meeting to be held on 20-22 September 2021 via a virtual Zoom meeting.

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**JT03480985**

## *Session II: Efficiency analysis in Vertical Restraints*

### *– Contribution from Mexico –*

#### **Mexican Federal Economic Competition Commission (COFECE)**

### **1. Introduction**

#### **1.1. Vertical Restraints**

1. In the LFCE these agreements or contractual provisions may be found within the named “Relative Monopolistic Practices” (PMR per its acronym in Spanish), which could include Unilateral Conducts (UC). Both VR and UC are assessed under the same normative analysis in Mexico. VR are carried out between companies in the different links of the value chain through, for example, the signing of contracts or the realization of acts with different objectives, including improving production efficiency or mitigating market failures. However, these can also seek that one or more companies try to vertically control other(s) in order to monopolize the market or markets or for the purpose of excluding rivals. To determine which is its effect between the previous two, and therefore to know if the conduct is against the LFCE or not, it is necessary to conduct an analysis of pro- and anti-competitive effects, as the case may be.

#### **1.2. Economic sectors in which COFECE has analyzed VR**

2. COFECE has conducted investigations of VR in different sectors (among which are: agriculture, transportation, household goods (for example, furniture); self-service stores; hydrocarbons (e.g. diesel and gasolines); banking; industrial and medical gases; property development and management for shows and electronic ticketing; and digital platforms for e-commerce and related services.

#### **1.3. Evolution of the number of VR cases and types of VR analyzed by COFECE**

3. During the 2010-2020 period, the Mexican competition authority has initiated 20 cases involving these practices. The following graph shows the number of cases of analyzed and concluded by the competition authority in the 2010-2020 period. Only cases of Vertical Restraints (VR) were analyzed, as well as cases of VR in coexistence with other practices (UC and VR) such as Unilateral Conducts, for example, price discrimination and loyalty rebates in the same case.<sup>1</sup> Some types of VR analyzed by COFECE were: (i) market

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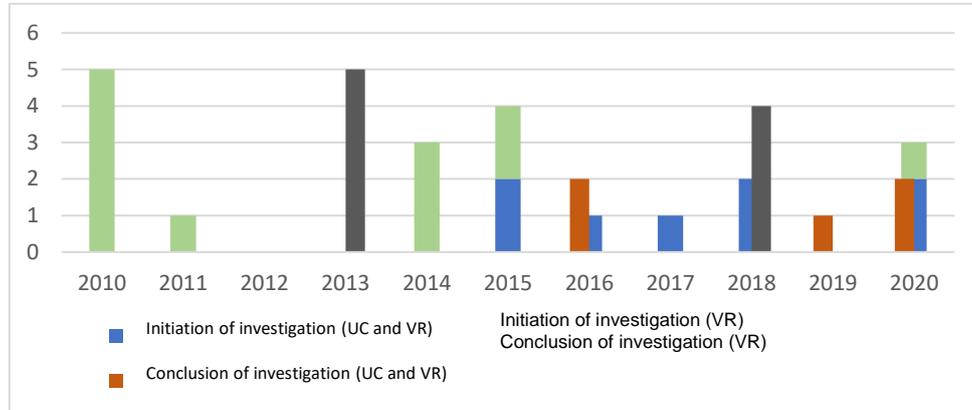
<sup>1</sup> Files of initiation of investigations of VR: 2010 (DE-012-2010, DE-013-2010, DE-015-2010, DE-019-2010, DE-024-2010); 2011 (DE-022-2011), 2014 (DE-006-2014, DE-006-2014-I, DE-006-2014-II); 2015 (IO-001-2015, IO-005-2015); 2020 (IO-001-2020).

Files of initiation of investigations of CU and VR: 2015 (DE-002-2015, DE-003-2015); 2016 (DE-040-2016); 2017 (IO-002-2017); 2018 (DE-018-2018, IO-001-2018); 2020 (IO-002-2020 (DE-026-2020), IO-003-2020).

Closure of investigations of VR: 2013 (DE-013-2010, DE-015-2010, DE-019-2010, DE-022-2011, DE-024-2010); 2018 (DE-006-2014, DE-006-2014-I, DE-006-2014-II, IO-005-2015); Other files (DE-012-2010 —Closure with

segmentation, (ii) resale price maintenance, (iii) tied sales, (iv) exclusive dealings, and (v) loyalty rebates.

**Figure 1. Evolution of the analyzed cases of VR and UC**



Source: Own elaboration with data from the Investigative Authority (AI) and public resolutions issued by the Board of Commissioners of COFECE

## 2. Evaluation of VR

### 2.1. Legal framework applicable to VR

4. The LFCE, in particular articles 54 (PMRs); 55 (efficiency analysis), 58 (relevant market determination) and 59 (substantial power determination), 56 fractions I (market segmentation), II (resale price maintenance), III (tied sales), IV (exclusivities), VIII (loyalty rebates or conditional sales) and XIII (margin squeeze).

5. Under this regulatory framework, the Investigative Authority (IA), making use of its investigation powers, must, in the first place, support a Theory of Harm or explain, where appropriate, its absence. To do this, the IA must determine a relevant market, provide elements that sustain that there is substantial market power in the defined relevant market and the purpose or effect of the VR within the relevant market or related markets. In any of these cases, the IA issues a statement that it is submitted to the Board of Commissioners of COFECE, and in case of the existence of a theory of harm the latter orders the notification of the statement of probable responsibility and with this the trial-like procedure (PSFJ per its acronym in Spanish) initiates to, at the end of this, determine the responsibility or not from the economic agent or agents that carry out a PMR through an VR.

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commitments 27-06-2013, currently under litigation—, IO-001-2015 —resolution of the Board of Commissioners 07-02-2019 currently under litigation—), IO-001-2020 —ongoing investigation).

Closure of investigations of UC and VR: 2016 (DE-002-2015, DE-003-2015); 2019 (DE-040-2016); 2020 (DE-018-2018, IO-002-2017); Other files (IO-001-2018 —concluded investigation, currently under PSFJ—, IO-002-2020 (DE-026-2020) y IO-003-2020 —ongoing investigation).

## 2.2. Non-binding guidance guides in VR analysis

6. The Commission has two guidance documents: (i) the Reference Document for the analysis of vertical restraints (September 2012), requested by the Commission and prepared by two external academics;<sup>2</sup> and (ii) the Guide of Relative Monopolistic Practices or Unlawful Concentrations (2015), developed by Commission.<sup>3</sup>

7. These documents are not binding and do not establish a normative standard in the analysis of VR conducted by the Commission; however, they are useful when analyzing VR cases. Both documents contain simple explanations of VR, as well as examples of these. The 2015 guide is also exemplary of the elements and stages of an investigation, as well as the general framework applicable to PMRs, including VR.

## 2.3. The theories of harm and justification of possible efficiencies of VR

8. The Theory of Harm is a reasonable explanation of why the conduct alleged by the Commission damages, or may harm, competition in the relevant market or related markets, and therefore it is a reasonable, consistently logical and in accordance to the facts analyzed, of when a conduct constitutes a PMR (through an VR).

9. On the other hand, the absence of harm in a market could have two explanations, the first is that the Authority does not have the necessary elements to ensure that there was damage to the market or that the VR generates (or could generate) possible efficiencies that benefit the market.

10. That said, VR could generate both harm to the current or potential market and possible efficiencies. The net effect between these two elements determines whether or not a practice is sanctioned. This means that it is necessary to apply the “rule of reason” to determine whether there is a PMR. Although there are several practices considered as VR, we will focus on two of them corresponding to the cases that are exposed in section 4.

11. Theory of Harm and justification of possible efficiencies in exclusivity agreements: a producer or supplier may sign exclusivity agreements with their distributors or clients for geographic, brand or selective (per client) reasons. The exclusive contracts signed by the producer considered the exclusivity of being the only supplier (in the case DE-006-2014, exclusive supplier of argon, nitrogen and oxygen industrial gases; and in the case IO-015-2015 to provide the traditional and electronic ticketing services, see section 4) and with a long-term temporality, with automatic renewals and other elements (such as loyalty rebates) that made it difficult to break the exclusivity. In general terms, these long-term exclusivities could generate an exclusion effect: new providers could not enter the market because they do not reach a minimum scale that would allow them to recover their fixed costs at competitive prices.

12. On the other hand, an exclusivity agreement may be reasonable if there is a minimum period for the recovery of investment that incentivizes the development of infrastructure or when a minimum percentage of exclusivity is necessary so that they can achieve productive efficiency, and a minimum efficient scale is achieved.

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<sup>2</sup> [https://www.cofece.mx/cofece/images/Estudios/Externos/Restricciones\\_Verticales.pdf](https://www.cofece.mx/cofece/images/Estudios/Externos/Restricciones_Verticales.pdf).

<sup>3</sup> [https://www.cofece.mx/wp-content/uploads/2017/12/guia-0012015\\_pmr.pdf](https://www.cofece.mx/wp-content/uploads/2017/12/guia-0012015_pmr.pdf).

13. Theory of Harm and possible efficiencies in tied sales or bundling: tied sales are considered a VR when these involve vertically related products, for example, an e-commerce platform and a payment processor (in case IO-002-2017). In general, tied sales in vertically related products could generate harm if there is market power in one of the products and the capacity of the intermediate consumer to choose the good or service in the other part of the chain is limited. This could cause a possible displacement of competitors with less market power in the market where the company is incurring in tying. On the other hand, the joint supply of various goods or services can reduce search, transaction and distribution costs and implies a brand responsibility on certain products, thus ensuring a quality standard, in addition, bundling can be used as a form to protect intellectual property.<sup>4</sup>

## 2.4. Commitments

14. In the aforementioned guidance documents, the procedure for early termination of an investigation is explained, which allows to grant the benefit of exemption or reduction of fines to economic agents who request this procedure, applicable to VR investigations (as well as for all PMRs and unlawful concentrations) before the IA issues the corresponding opinion, and that can only be approved by the Board of Commissioners of the Commission, prior acceptance of the applicants of the respective commitments. This procedure could offer several advantages, among them obtaining procedural gains in terms of time and costs, resulting in faster corrective and restorative effects in the investigated market (than a resolution by sanction), offering accurate results to economic agents (versus a lengthy procedure in the final stage of resolution) and could avoid costly and lengthy litigation before judicial instances. However, this process could also involve possible disadvantages: procedurally the verification of commitments could be complicated and litigious, the accepted commitments do not establish a standard of analysis in future cases since the IA<sup>5</sup> and, at the appropriate procedural moment, the Board of Commissioners must analyze commitments on a case-by-case before the AI issues a Statement of Probable Responsibility (DPR per its acronym in Spanish), that is, before an accusation by a probable PMR.

15. Within the commitments, the VR made by economic agents must also be evaluated since the IA must issue a pronouncement on the suitability and legal and economic viability of the commitments offered by economic agents. This evaluation must be exhaustive since economic agents may present elements of efficiencies associated with their vertical business practices and it corresponds to the IA, at first, to analyze and initially determine if these commitments, including possible efficiencies and harm, resolve competition concerns.

16. In summary, VR are evaluated under the current regulatory framework (LFCE, in particular, articles 54, 55, 58, 59 and 56), in the investigation stage, in the commitment stage if there are any and in the PSFJ, resolved by the Board of Commissioners. In all the procedural stages a VR is analyzed under the "rule of reason" and therefore, in all these stages it corresponds to analyze the actual or potential harm as well as the possible positive effects (including possible efficiencies generated) as shown in the next section.

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<sup>4</sup> Tirole, J. (2005). The analysis of tying cases: A primer. *Competition Policy International*, 1(1), 1-25.

<sup>5</sup> P. 14, OCDE (2020), OECD Peer Reviews of Competition Law and Policy: Mexico

<https://www.oecd.org/daf/competition/oecd-peer-reviews-of-competition-law-and-policy-mexico-2020.htm>

### 3. Elements of proof, efficiencies analysis and sanctions for VR

#### 3.1. The minimum evidentiary elements that COFECE analyzes in VR cases

17. Through the legal attributions conferred on COFECE, it can gather direct and indirect evidentiary elements that help to sustain the probable existence of a VR. The IA can present agreements, contracts, emails, among other elements of direct evidence to prove the existence of a VR. Also, the IA must provide elements that sustain the existence of substantial power in the relevant market where the VR is conducted and, mention those elements related to the purpose or effect of harm, or probable efficiencies in the analyzed markets.

18. The IA presents these elements in the Statement sent to the Board of Commissioners. With these elements, the IA intends to prove the Theory of Harm and requests the notification of the statement of probable responsibility, or determines its non-existence, and by not having elements to initiate the PSFJ, it proposes the closure of file.

#### 3.2. Analysis of possible efficiencies of VR in the different procedural stages

19. As mentioned, there are three procedural stages of the VR analysis to determine the anti-competitive and pro-competitive effects. The analysis carried out at each stage and who must provide and prove the elements, the IA or the economic agent, is explained below.

- *In the investigation stage and until the issuance of the investigative statement, the LFCE does not expressly establish that the IA is obliged to prove efficiency gains; however, article 54, section III, establishes that a PMR is considered when the practice “has or may have as its purpose or effect, in the relevant market or in a related market, unduly displacing other Economic Agents, substantially preventing their access or establishing exclusive advantages in favor of one or more Economic Agents”.* Therefore, the IA must make an economic analysis and provide elements related to the current or potential harm of the VR. This analysis of the VR provides the IA with the possibility of establishing the Theory of Harm or the absence of it.

20. One of the possible reasons when there is no Theory of Harm is that the effects caused by VR are positive and are in accordance with the own business model implemented by the industry. In this case, the IA issues a statement to close the investigation which reflects the economic analysis and the conclusions reached, proposing the Board of Commissioner to close the file without liability for the economic agent that generates the VR (example, case IO-002 -2017), the Board of Commissioners may agree with the AI and close the file or disagree in the analysis and conclusions and order the PSFJ.

21. In the investigation stage, it is the IA who collects the elements for the analysis of the VR, in addition, any economic agent with knowledge of the market can provide elements that the IA may assess in its analysis. Notwithstanding the foregoing, the economic agents that carry out the VR may present evidence of efficiencies before the IA and corresponds to the latter to analyze it.

- *Before the statement of probable responsibility (DPR per its acronym in Spanish) is issued*, the economic agents may request the benefit of exemption and reduction of fines, which entails offering commitments. The commitments presented by the economic agents, in addition to presenting a corrective and restorative solution to the process of competition, associated with certain conduct of the economic agent or agents, may also present evidence of the reasons why a certain VR or part of it could generate efficiency gains. As mentioned, these commitments must be analyzed by the IA under the "rule of reason" and determine the net effects of a possible practice and the particular conditions of the case. In some commitments cases it has been observed that it is possible to determine the reasonability of a VR, that is why certain VR are allowed to be carried (under certain parameters), while certain VR with anticompetitive effects are eliminated, prohibited and / or corrected.

22. For example, that certain exclusivity contracts have a minimum investment recovery period or that a minimum percentage of exclusivities is necessary for them to achieve productive efficiency. In these cases, it corresponds to the applicant economic agents to present evidence of these benefits and it corresponds to COFECE to assess its relevance (Case IO-005-2015).

23. Until before 2014, the Competition Law allowed economic agents to submit commitments only after the issuance of the statement (official letter) of probable responsibility and before the Board of Commissioners issued the final resolution of the case, so that economic agents had the option of await the possible accusation of the IA and subsequently offer commitments that would try to remedy the alleged practice, expecting to avoid further litigation. Within the commitments offered, the economic agents could establish that a certain VR, or part of it, generated certain harm (therefore, the request for commitments) and in certain circumstances did not generate damage to the market or, even, that it generated benefits (Case DE-006-2014).

- *Once a DPR has been issued*, during the PSFJ the economic agents can also claim efficiencies and it corresponds to them to prove it (article 55 of the LFCE). In this case, it corresponds to the Board of Commissioners of COFECE to consider the Theory of Harm proposed by the IA and the efficiencies alleged by economic agents to determine the net effects of the VR and finally issue its resolution on the case.

#### 4. VR cases with possible anticompetitive (harm) and procompetitive (efficiencies) effects

24. VR can generate both pro- and anti-competitive effects. The first two cases presented, in the opinion of the Investigative Authority of COFECE, have both effects. On the one hand, the damaging effects of market closure due to exclusivities and, on the other, economies of scale and incentives for infrastructure development. The explanation of the following four cases focuses on the procompetitive effects.

25. The four VR cases summarized were concluded at different procedural stages. Two of these cases (air gases and ticketing) were had early closure (the first one after the IA presented an statement of probable responsibility) based on the exemption and reduction of fines procedure; and two of these (e-commerce and broadband services) were closed after the identification of possible efficiencies during the investigation stage.

#### 4.1. Case DE-006-2014 (Air gases)

26. The investigation focused on the establishment of exclusivities that two of the most important economic agents in the market (with probable joint substantial power) had in the distribution and commercialization of three products (oxygen, nitrogen and argon, all of these for industrial uses). In accordance with the resolution of the Board of Commissioners (through the early closure with commitments), maintaining certain exclusivities, as well as a reasonable duration of some exclusivity contracts, contributes to not distorting the financial planning of the agents who established these practices, in addition to avoiding possible hold up problems; additionally, it contributes to recover the investments made in the supply and storage infrastructure at the clients' premises. In accordance with the foregoing, the exclusivities aimed at recovering the investments of the infrastructure necessary for the supply and storage could have pro-competitive effects, as these are necessary for the development of the activity.

#### 4.2. Case IO-005-2015 (Ticketing)

27. In accordance with the resolution of the Board of Commissioners, the investigation focused on the exclusivities that an economic agent (Grupo CIE) had for the issuance of physical and electronic tickets for shows in different properties and promoters in the national territory. The investigation was early closed due to commitments. It is observed in the statement of the Investigative Authority, cited on the Resolution, that among the commitments it was offered to eliminate exclusivities with third parties, excluding exclusivities with real estate or promoters belonging to the same group, i.e., Grupo CIE did not include among its commitments the elimination of exclusivities maintained with properties of its group. The IA considered that these commitments were suitable and legally and economically viable; the Board of Commissioners also decided to accept the commitments proposed by Grupo CIE with some modifications.<sup>6</sup>

#### 4.3. Case IO-002-2017 (Electronic commerce)

28. In accordance with the resolution of the Board of Commissioners and the opinion of the AI, the investigation focused on investigating a possible tied sale between an e-commerce platform (marketplace) and a payment solution developed by the same platform, which could directly harm consumers by not being able to choose another payment service and generate a possible displacement of competitor from the electronic payments market. In addition to various conclusions, COFECE's IA identified possible efficiencies in the integration of various services to electronic commerce platforms, for example, elimination of information asymmetries between users of the platform, reduction of fraud in transactions, improvements in security and trust to the users of the platform. Due to these and other considerations, the Board of Commissioners decided to close the investigation.

#### 4.4. Case DE-033-2007 (broadband service)

29. According to the resolution of the Board of Commissioners, Telmex is a company with substantial power in the relevant market for the supply of fixed broadband Internet access service in the Mexican territory. Telmex carried out the subjecting of two different and distinguishable services, basic telephony (wired ADSL) and broadband Internet.

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<sup>6</sup> The commitment to develop and implement a code of conduct, originally proposed by Grupo CIE, was eliminated.

30. However, the Commission considered that the conduct carried out by Telmex did not have the purpose or effect of unduly displacing other market agents, substantially preventing their access or establishing exclusive advantages in favor of one or more persons by virtue of the fact that, among others aspects, the technological evolution and the decrease in regulatory barriers allowed providers of these telecommunications services to converge in a single market and that to provide any telecommunications service agents must put in place a Public Telecommunications Network (PTN) that allows them to provide the service to the largest number of clients, which implies considerable investments, and also requires a minimum scale of clients so the service is profitable, i.e., economies of scope can be observed when offering two different services under the same PTN, due to the above, the file was closed.

## Federal Telecommunications Institute (IFT)

### 5. Analysis of vertical restraints

31. The Federal Telecommunications Institute (IFT) is an autonomous agency, independent in its decisions and operation, with legal capacity and assets, which aims to regulate and promote competition and the efficient development of telecommunications and broadcasting. It is also the authority on economic competition in the broadcasting and telecommunications sectors.

32. This IFT is responsible for the application of the Federal Economic Competition Law (LFCE) on the sectors aforementioned together with the application of the regulatory law. Therefore, the LFCE provides for the existence of various anti-competitive behaviors, such as the case of relative monopolistic practices (RMP), which in general terms are any *act, contract, agreement, procedure or combination thereof, performed by one or more Economic Agents that individually or jointly have substantial power in the same relevant market in which the practice is executed with the purpose or effect, in the relevant market or in a related market, to unduly displace other Economic Agents, substantially prevent their access or establish exclusive advantages in favor of one or more Economic Agents*.

33. In addition to the above, said conduct must fall into the categories<sup>7</sup> that the Legislative Power in Mexico established for such conducts, among them stand out for the purpose of this document *“Granting discounts, incentives or benefits by producers or suppliers to buyers with the requirement of not using, acquiring, selling, marketing or providing the goods or services produced, processed, distributed by a third party, or the purchase or transaction subject to the requirement not to sell, market or provide to a third party the goods or services subject of the sale or operation”*.

34. Consequently, the LFCE considers as a type of RMP, among others, the granting of incentives by suppliers to buyers with the requirement not to acquiring, marketing or providing the goods or services produced by a third party. The foregoing, so long as: i) the economic agent granting the discounts or incentives has substantial power in the relevant market; ii) the person likely to be responsible performs the conduct with the purpose or effect of unduly displacing its competitors, substantially impeding access to markets or establishing exclusive advantages in favor of an agent, and iii) it is not proven that the efficiency gains, if any, outweigh the anti-competitive effects of the conduct. Regarding this last requirement, in order to determine whether a RMP should be sanctioned in terms of the LFCE, it shall be analyzed whether there are efficiency gains arising from the conduct, which shall be accredited by the economic agents involved; and that these have a favorable effect on the process of competition and free concurrence.

35. In this regard, the Judicial Power of the Federation has concluded that, in order to determine if a RMP is configured, a deliberation of both the benefits and the impact that it could cause in such specific cases must be performed, which is known as the *“rule of the reason”*, to assess the circumstances of the case as a whole to determine the legality of the agreement, based on its purposes and effects<sup>8</sup>.

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<sup>7</sup> Relative monopolistic practices are: Vertical market segmentation; Exclusivities; Imposition of conditions (sale or prices); Imposition of conditions for obtaining discounts; Tied sales; Denial of Service or discrimination; Boycott; Price predation; cross subsidies; increase in costs, preventing production or reduction of demand or margin squeeze.

<sup>8</sup> Thesis *“PRÁCTICA MONOPÓLICA RELATIVA. PARA SU DEMOSTRACIÓN DEBE ACUDIRSE A LA “REGLA DE LA RAZÓN.”* Epoch: Tenth Epoch. Registration: 2004949. Instance: Collegiate Circuit Courts. Type

36. In addition to the aforementioned, a possibility of sanctioning monopolistic practices for the purpose or intentionality responds to the fact that the attempt of economic agents to monopolize a market shall not be successful in all cases. But the fact that the economic agent fails in the efforts to execute anticompetitive conducts does not prevent establishing the responsibility for the conduct and imposing the corresponding sanctions.

37. Likewise, in the case of monopolistic practices sanctioned by the effects, it is necessary to prove a causal link between the imputed practice and the consequence in the markets. For the purposes of determining whether the objective of the conduct analyzed is contrary to the LFCE, there must be a nexus between the conduct and the expected result that confirms the impact on competition in the markets. That is, it must be determined whether the conduct reasonably has the purpose of affecting competition in the markets through displacing, preventing access or generating exclusive advantages.

38. The LFCE prohibits this purpose or effect because it would generate a closing effect in the markets, in favor of those who carry out the conduct and to the detriment of the ability of other participants to compete or enter the markets. The behaviors that have a purpose or effect of generating a closure in the markets have an anti-competitive effect when it significantly affects or restricts the ability of other economic agents to compete, consequently, it is not required that the closure of the markets to be total, but rather, it is enough to prove that it is significant to the degree of being able to restrict the ability of other economic agents to compete in the markets where the conduct is happening and has repercussions or may have repercussions. Precisely, therein lies the intentionality of the behavior.

## 6. Experience in the telecommunications sector

39. On 12 April 2018, the Resolution by which the Board of the Federal Telecommunications Institute resolves on the Relative Monopolistic Practice, provided for in article 10, section VIII, of the Federal Law on Economic Competition, imputed to América Móvil, S.A.B. de C.V. and Radiomóvil Dipsa, S.A. de C.V. in File E-IFT/UCE/DGIPM/PMR/0006/2013 (File PMR-006-2013) was issued.<sup>9</sup>

40. The Investigative Authority of the IFT performed the investigation, which concluded on August 30, 2017, followed by the issuance of a Official document of Probable Responsibility (OPR) [Acronym in Spanish] in which América Móvil, SAB de C.V. (AMX) and Radiomóvil Dipsa, S.A. de C.V. (Telcel) were charged with the conduct consisting in granting various incentives to Blue Label México, S.A.P.I. (BLM), with the requirement that the latter did not market or provide airtime of Telcel's competitors in the mobile phone service and exclusively distribute airtime of Telcel. In the OPR it was presumptively determined that this conduct consists of granting discounts or incentives by producers or suppliers to buyers with the requirement not to use, acquire, sell, market or provide the goods or services produced, processed, distributed or marketed by a third party, or the purchase or transaction subject to the requirement not to sell, market or provide to a

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of Thesis: Isolated. Source: Judicial Weekly of the Federation and its Gazette Book XXVI, November 2013, Volume 2. Subject (s): Civil. Thesis: I.3o.C.35 K (10a.). Page: 1373.

<sup>9</sup> Agreement P/IFT/120418/293 dated April 12, 2018 in the XV ordinary session. Available at: <http://www.ift.org.mx/sites/default/files/conocenos/pleno/sesiones/acuerdoliga/vppift120418293noct.pdf>.

third party the goods or services subject of the sale or transaction as provided in the current LFCE<sup>10</sup> when investigating this conduct.

### 6.1. Relevant market and related market

41. In the OPR, the relevant market was presumptively defined as the wholesale of virtual airtime offered by Mobile Phone Service Operators (OSTM) [Acronym in Spanish], including Mobile Virtual Operators to distributors and/or marketers, with a national geographic outreach. Thus, the OPR concluded that the following elements were updated which supported the definition of the relevant market in its service and geographic dimensions:

- The sale of airtime through its own distribution channels is an independent market (i.e. separate) from the sale of virtual airtime packages to distributors and/or marketers;
- Regarding the supply, there are high investment costs to establish enough own points of sales in locations with low population density, so it is not profitable for OSTM to establish their own points of sale.
- The commercial models or plans of the different distributors and/or wholesalers of virtual packages belong to the same market;
- The wholesale of airtime through physical cards is not a substitute for the wholesale sale of virtual airtime packages, either on the demand or supply side;
- There are no distribution costs, since distributors and/or marketers can acquire virtual airtime regardless of their location and the offer is practically homogeneous throughout the country regarding their coverage areas, and
- There are no regulatory restrictions.

42. In the OPR it was determined that the related market corresponds to retail airtime sales services in the localities of the country where, during the exclusivity, Telcel faced or could face competition from other OSTM and in which the only points of sale available and accessible to subscribers or end consumers, were those supplied by BLM. Mainly, they are localities with low population density.

### 6.2. Substantial power

43. Regarding the quality of economic agent with substantial power, the OPR presumptively concludes that Telcel has substantial power in the relevant market because, among others:

- The relevant market is highly concentrated, a significant indicator of an economic agent with substantial power;
- There are entry barriers such as the high costs for the installation and operation of a public telecommunications network, among which are: a) the low profitability of alternative uses of infrastructure and equipment, b) high stranded costs, and

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<sup>10</sup> This file was investigated and sanctioned in terms of the Federal Economic Competition Law published in the Official Gazette of the Federation on December 24, 1992 and repealed as of July 7, 2014 with the entry of the new LFCE.

c) significant amounts of investment in advertising to have and maintain a presence in the relevant market;

- The power of Telcel's competitors is limited;
- An economic agent must incur high costs to access sources of inputs;
- Telcel's brand is strongly positioned in the relevant market, and
- Distributors and/or marketers face high losses when they stop distributing and/or marketing Telcel airtime.

### 6.3. Conduct

44. Regarding the conduct that is imputed, the *OPR* established that the conduct happened through granting incentives to BLM, with the requirement that said economic agent did not market or provide the airtime of Telcel's competitors in the mobile phone service and will only distribute Telcel's airtime at its points of sale.

45. Likewise, it was established that the conduct had the purpose of unduly displacing Telcel's competitors from the relevant market, as well as unduly displacing other economic agents and substantially preventing them from accessing related markets for retail airtime consumption, where for its competitors it is difficult or impossible to access without access to the BLM distribution network.

46. In conclusion, the elements to accredit a RMP in the specific case consist in that: i) AMX and Telcel granted BLM incentives not to acquire or distribute and/or market airtime from other mobile phone companies (mobile); ii) Telcel has substantial power in the relevant market; iii) the conduct was performed with the purpose of unduly displacing other agents in the relevant market, as well as unduly displacing and substantially preventing access to Telcel's competitors to related markets, and iv) in the record it was not accredit the existence of profits in efficiency, far from it that these gains outweigh the anticompetitive effects of the practice.

47. Additionally, in the *OPR* it was set out that, although the investment requirements that a concessionaire must incur to deploy a public telecommunications network are high and that the investment amount may vary depending on the network expansion strategy to achieve a level of coverage that is attractive to users, given that Telcel distributes and markets its airtime through various channels, access to these distribution channels it is an important element for concessionaires who want to participate in the mobile phone market.

48. Therefore, the competitive position of the economic agents is important for this purpose, as well as the distribution channels to which it wishes to access are efficient. Consequently, the restrictions on access to efficient distribution channels affect the economic agents of the relevant market, in the event that their competitive position does not allow them to have access to them.

### 6.4. Sanction imposed

49. Finally, as a result of the trial-like procedure, the IFT's Board resolved that based on the elements of conviction established in the *OPR* Telcel incurred in the imputed RMP, which had the purpose of displacing its competitors from the relevant market, as well as displacing and impeding the access of these *OSTM* in the related markets. The foregoing, without Telcel having been able to disprove the *RMP's* accusation during the trial-like procedure.

50. The purpose of imposing sanctions on non-compliance of the LFCE is on two areas. On the one hand, it seeks to sanction those conducts that are contrary to the principles of economic competition and free concurrence established in the Political Constitution of the United Mexican States and, on the other, it seeks to dissuade or discourage the execution of these conducts in the future.

51. When imposing a fine for violations of the LFCE, the IFT's Board observed that the sanction is duly individualized, considering objective and subjective elements. In the exercise of the sanction powers, the LFCE grants a certain degree of discretion, but not arbitrariness, which implies that the sanction must be duly founded and motivated.

52. The applicable legal framework empowers the Board to impose a fine up to the equivalent of eight percent (8%) of the cumulative income of the economic agent directly involved in the commission of the RMP.

53. In this case, in order to properly individualize the fine for the case being sanctioned, it was necessary to take into consideration eight factors: i) the seriousness of the offense; ii) the damage caused; iii) indications of intent; iv) the offender's participation in the markets; v) the size of the affected market; vi) the duration of the practice or concentration; vii) the recurrence or background of the offender, and viii) the financial capacity of the offender.

54. Based on these factors, a fine of MXN 96 825 831.51 MXN (approximately USD 4.8 million / EUR 4 million) was imposed.