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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE****Cancels & replaces the same document of 21 May 2019****Working Party No. 3 on Co-operation and Enforcement****The standard of review by courts in competition cases – Note by Mexico****4 June 2019**

This document reproduces a written contribution from Mexico submitted for Item 2 of the 129th OECD Working Party 3 meeting on 4 June 2019.

More documents related to this discussion can be found at

<http://www.oecd.org/daf/competition/standard-of-review-by-courts-in-competition-cases.htm>

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Mexico

(COFECE)

1. Legal framework and standard of review¹

1. Mexico has an administrative competition law enforcement regime in which both its competition authorities, the Federal Economic Competition Commission (COFECE or Commission) and the Federal Telecommunications Institute (IFT), have investigative and adjudicative powers and their decisions are subject to the review of specialized courts.

2. Mexico's competition regime has evolved over the years. A key milestone in this evolution was the Constitutional reform in telecommunications, broadcasting and economic competition of June 2013, that established specialized courts to review competition matters. This reform also created COFECE as an autonomous entity with enforcement and advocacy powers in all sectors of the economy, except for telecommunications and broadcasting, which falls under the scope of powers of the IFT, also created by the Constitutional reform.

3. Prior to this reform, the Commission's decisions were reviewed on a first instance by its Board of Commissioners after a reconsideration resource filed by the parties. This resource suspended the implementation of the challenged decision until a ruling was issued by the authority. Additionally, the parties had two options to request an appeal or *amparo* if not satisfied with the Commission's actions. One option was at the Federal Court of Fiscal and Administrative Justice (TFJFA) only with respect to decisions imposing economic sanctions. The other option was before an Administrative District Court of general jurisdiction, which reviewed the legality of the Commission's administrative enforcement decisions. These District Courts could also receive cases that had been dismissed by the TFJFA. The resolution of these courts could be heard by Administrative Collegiate Circuit Courts of general jurisdiction and in Constitutional cases, these cases could be sent or attracted by the Supreme Court of Justice (SCJN).

4. During this period, the parties could appeal the Commission's acts or decisions through *amparos*. These were used not only against final decisions, but also regarding preliminary and intermediate actions. Thus, economic agents were able to use such appeals to slow down the Commission's procedures. At that time, it was a common practice of the parties to request interim-suspensions of the authority's proceedings while the *amparos* were resolved.

5. After the Constitutional reform of 2013, and the enactment of a new Federal Economic Competition Law (LFCE), the reconsideration resource was eliminated, and

¹ See reference "The resolution of competition cases by specialized and generalist courts: Stocktaking of international experiences". OECD. (2017). Available at: <https://urlzs.com/bcFRT>

indirect *amparos*² became the only means of defense through which COFECE's final resolutions may be contested. Thus, economic agents still have a constitutional resource to appeal against COFECE's decisions, but they must wait until the end of the procedure to appeal, allowing investigations processes to become much more diligent.

6. As mentioned in the paragraph above, COFECE's final resolutions are reviewed by Specialized District Courts (also known as a court of first instance), through indirect *amparos*.³ Decisions by the Specialized District Courts can be reviewed by Specialized Collegiate Circuit Courts (also known as courts of second instance),⁴ made up of three judges known as Magistrates, and decisions of this collegiate courts represent the end of the proceedings unless there are issues of unconstitutionality of the LFCE, or another federal rule applied by COFECE, where the SCJN is competent to review. The SCJN may also attract cases for review when it is of public interest or there is a need to establish precedence for lower courts.

7. The Constitution also now establishes that general rules, acts or omissions of the Commission may only be contested by indirect *amparo* proceedings and shall not be subjected to injunctions. Fines and divestiture of assets, rights, partnership interests or stock imposed by the Commission, shall be executed only after the indirect *amparo* proceeding has been settled. Resolutions derived from COFECE's trial-like procedure could be appealed only in cases when said resolutions put an end to a proceeding and can only be grounded on violations committed during the resolution or the proceeding. General rules applied during proceedings can only be challenged in the indirect *amparo* filed against the final resolution. Appeals of legality or constitutionality against preliminary or intermediate actions are not admissible.

8. *Prima facie*, enforcement and interpretation of the LFCE is a faculty of COFECE, albeit resolutions and their legality can be appealed through indirect *amparo* before specialized courts as mentioned. Rulings by the specialized courts or the SCJN cannot overrule powers vested on the Commission by the Law; however, rulings can in fact influence future actions of the Commission.

2. 2. Courts' review of competition cases

9. The following enforcement actions carried out by COFECE are subject to review by courts:

- General rules, acts or omissions of the Commission – encompassing all sorts of decisions, rulings or opinions, as well its procedures – including fines or divestiture of assets, rights, partnership interests or stock.
- Other general rules – regardless of their source and hierarchy, except for the Constitution – wielded by the Commission in its actions or decisions, including the LFCE.

2 Indirect *amparos* are also known as two-instance *amparos* because in a first instance they are processed before district judges and in a second instance, before collegiate courts or before the SCJN.

3 There are two Specialized District Courts.

4 There are two Specialized Collegiate Circuit Courts.

- Appeals of legality or constitutionality against preliminary or intermediate actions are not admissible. However, as violations to procedures, they can be subject of study during challenges to decisions, resolutions or definitive opinions.
- The courts may admit appeals to ponder the merits of the contested matter in instances when intermediate actions comprise direct and immediate harm to rights granted by the Constitution.

2.1. The courts' review principles

10. There are no set standards of review for Specialized District Courts and Specialized Collegiate Circuit Courts.⁵ However, the following principles must be observed during the review of the Commission's decisions:

- Principle of legality, by which every act of the authority must comply with the letter, spirit or interpretation of the law. Economic agents must be offered full certitude of the means to defense before the competition authority and the courts.
- Principle of reasonability, which serves as: a) an interpretative, guiding or pragmatic tool for legislators; b) an integrative mean providing standards in cases of loopholes; c) a bounding factor in the exercise of power; d) a provider of grounds and validity in other sources of law and; e) an organizer of legal frameworks.
- Several rules of procedural nature, such as temporality, suitability, applicability, and competence for the legal matters, among others related to processability and pertinence.

11. A useful example of principles upheld by the courts when reviewing decisions reached by COFECE is found in the *amparo* review 145/2015, overseen by the Second Specialized Collegiate Circuit Court.⁶ The thesis of the Magistrate in charge of the case is based on a previous statement by the SCJN that it is the exclusive responsibility of the competition authority, and not of judges, to decide the means to attain constitutional ends and the design of competition policy. Judges are only tasked with scrutinizing those decisions *vis-à-vis* the Constitution and the Law.

12. According to the aforementioned review 145/2015, the SCJN had already declared that specialized courts can scrutinize for Constitutional compliance with varying degrees of intensity. Strict scrutiny should be applied to (1) legal assumptions of violations to the principle of equality, such as discrimination or restrictions to human rights, and (2) in cases when the Constitution sets limits to freedoms of self-organization and discretionary activities of competition authorities. Ordinary scrutiny is suitable for other legal assumptions.

5 Nevertheless, there is precedence which in Mexico is known as legal thesis that provides orientation or reference that courts may use in their analysis. Legal theses are decisions issued by courts. Judges may use them as a reference when analyzing cases. On one hand there are "Isolated theses" which derive from a single ruling; on the other, there are "Case-law theses" derived from several rulings that are in the same line of interpretation of the Law. The latter are not only for orientation, but rather, as established in their name, are case-law.

6 Amparo review 145/2015.

13. In the view of the SCJN,⁷ severity of scrutiny is inversely related to autonomy of institutions. Hence, matters such as economic and financial regulation are limited by few issues, such as human rights and other Constitutional principles. During scrutiny, judges must avoid appropriating attributions reserved for the Commission. In this sense, the courts believe that overseeing the constitutionality of the regulator's work does not imply ignoring its autonomy, specialized technical capacity, nor to be replaced in the decision-making on grounds of merit, opportunity or public interest.

14. Actions from the Commission are subject to limits, such as: (i) those derived from the prohibition of arbitrariness, (ii) those set forth by the Constitution and the Law; and (iii) the authority's reasoning and legal grounds which imply that the Commission's decisions rest upon true facts, correct interpretations of the law, proportionality and reasonability. According to the SCJN, it is not for the judge to decide whether a regulatory policy decision is the most convincing or appropriate, for this would mean an invasion of a function that does not correspond to the courts.⁸

15. The aforementioned reasoning was also adopted by the Fourth Specialized Collegiate Circuit Court. Pronouncing over a series of review appeals in a legal thesis titled "Justifications and limits of judicial control over COFECE's resolutions",⁹ the Magistrate who issued the thesis recognized that in accomplishing the ends set forth by the Constitution, COFECE's work is characterized by economic assessments of questions of fact, law and subjective attitudes, or even a combination of these. Appropriate judicial control over actions of the Commission is limited to verifying that they do not violate fundamental rights of individuals involved in competition procedures. Judicial control will take place when procedural rules are not complied with, there is material inaccuracy of facts or errors in the interpretation of the law, and as long as such vices result in notorious arbitrariness or a disproportionate use of granted faculties to the Commission.

16. Judicial control can be exercised through judicial reliefs related to infringements of procedures. For example, courts may rule for the substitution or modification of proceedings; or may require the elimination of aspects of a resolution or even request a recalculation of a fine.

2.2. The courts' review of competition cases

17. Specialized competition courts review administrative files in accordance to claims, but only after meeting procedural and admissibility requirements.¹⁰ Thus, variables to be reviewed must correspond to the matter of the appeal, either referred to questions of law or of fact.

7 *Íbidem*.

8 *Época: Décima Época, Registro: 2011679, Instancia: Tribunales Colegiados de Circuito, Tipo de Tesis: Aislada, Fuente: Gaceta del Semanario Judicial de la Federación, Libro 30, mayo de 2016, Tomo IV, Materia(s): Constitucional, Administrativa, Tesis: I.2o.A.E.27 A (10a.), Página: 2743.*

9 *Registro: 168499, Instancia: Tribunales Colegiados de Circuito, Tipo de Tesis: Aislada, Fuente: Semanario Judicial de la Federación y su Gaceta, Tomo XXVIII, noviembre de 2008, Materia(s): Administrativa, Tesis: I.4o.A.622 A, Página: 1325.*

10 Procedural requirements include the demonstration of legal interest in a case; admissibility refers to the competence of the court to review the matter of the case.

18. Dawn raids, subpoenas, or requests for information cannot be challenged. They can, however, be appealed through an indirect *amparo* by persons directly under investigation or persons related to the information obtained or requested. Such is the case of legal privilege.

19. Courts do not review commitments or settlements *ex ante*. The Commission has the power to accept or reject commitments proposed by economic agents under investigation. Courts can, however, review commitments and settlements in indirect *amparos*, as well as issue opinions on their enforceability.

20. Pursuant to Article 100 of the LFCE, economic agents can file written commitments to suspend, suppress, correct or abandon an abuse of dominance conduct or a merger. Commitments can be presented before the Commission issues a final resolution. Similarly, COFECE can require merger plans to comply with remedies, as foreseen in Article 90 fraction V of the LFCE.

21. The indirect *amparo* is the only means of appeal against the resolutions of the Commission. Third parties with legal standing may appeal decisions made by the Commission.

22. As a general rule, appeals and measures for legal defense cannot be submitted at the opening of an investigation and of a trial-like procedures, because these would delay solving questions related to constitutionality and legality of the Commission's acts.

23. Article 28, twentieth paragraph, fraction VII of the Mexican Constitution establishes that indirect *amparos* are admissible after a final resolution has been issued by COFECE's Board of Commissioners, as mentioned. In accordance to Articles 103 fraction I and 107 fractions I and IV, as an exception, acts of the competition authority that affect a fundamental right directly and immediately can be appealed via an *amparo*.

24. Case-law is obligatory for courts, pursuant to articles 2015-230 of the Law of Amparo. Those standards that are not case-law are considered isolated theses and are not binding. Case-law is not permanent and can be modified, substituted or abandoned, and therefore interrupted and rendered obsolete by new standards.

25. Case-law allows judges to transform the general and abstract character of the law into concrete real cases, even though it is not as specific as a ruling. Case-law frequently bridges general norms –such as laws, regulations, treaties, among others – and specific and concrete norms that resolve a contentious case – with the resolutions of a ruling. Consequently, margins of interpretation of case-law are useful in some cases as orientation or even determination of the conduct of the court.

26. Thus, case-law is translated into uniform integrative interpretations and legal considerations made by the courts designated by the Law regarding one or more special and determinate points that arise in a given number of cases. The relevant reasoning is that considerations and interpretations are mandatory for lower ranks of the judicial authority, as is explicit in the Law.

27. Evidence is subject to appraisal rules and analysis of the courts, even economic evidence. Courts are supported by experts specialized in economic matters. Experts are tasked with solving technical questions surrounding evidence and they issue a statement

before the judge and opposing parties. Even though the expert issues the statement, the judge has the freedom to interpret it to enrich the reasoning of her ruling.¹¹

28. The average duration of a case ranges from six months to a year at a court of first instance. For courts of second instance, the average duration is of six months. The timeframe varies between cases according to their nature and to appeals of constitutionality of general norms. In such cases, a resolution can be delayed up to a year.

29. Standards of review for decisions that impose prison sentences are subjected to different legal tenets that are beyond the scope of Article 28 of the Mexican Constitution. COFECE is vested with the power to file claims and support in criminal law cases. In such instances, corresponding investigations are not conducted by the Commission, but rather are responsibility of the (recently created) General Prosecutor's Office (FGR). It is up to the FGR whether to criminally prosecute and to present the case before appropriate judicial entities, who, in turn have the liberty to condemn or absolve the accused.

30. Decisions made by COFECE concern infringements to the LFCE and can result in monetary sanctions and determinations on the behavior or structure of economic agents. On the other hand, criminal conduct –mostly related to cartels- infringe Article 244 Bis of the Federal Criminal Code. Consequently, only natural persons can be prosecuted by the FGR, and not businesses. Administrative resolutions in matters of economic competition are not equivalent with criminal resolutions in any way, for their origin, aims and consequences are dissimilar.

3. Courts' access to competition expertise

31. The Council of the Federal Judiciary (CJF) is the institution tasked with administration, supervision, discipline and career development for the Federal Judicial Branch. The Institute of the Federal Judiciary (Institute) is the instance within the Council that manages training of judges and other personnel.

32. The Institute has set goals for training and hiring of highly specialized human resources. Training is aimed at a full understanding of legal and economic principles of competition and regulated sectors, holistic analysis of cases and a practical approach.

33. With full respect towards autonomy of the courts and of the Commission, successful collaboration has resulted in constant and deeper learning. Other federal and international institutions that have worked in conjunction with the courts in this regard are the Ministry of Economy (SE), the Organization for Economic Co-operation and Development (OECD), as well as associations of practitioners and scholars.

34. Some examples of such collaborations are:

- **2014: First National Meeting of Economic Competition.** Organized by the Judiciary, the Mexican Bar Association and COFECE shortly after reforms to the Constitution and the creation of the new LFCE. The event advocated for a culture of competition with perspectives from judges, regulators and practitioners.
- **2014-2015: Diploma in Economic Competition and Regulated Sectors.** Coordinated by the Institute of the Federal Judiciary (Institute) for COFECE

¹¹ Parties may also appoint experts that can produce statements that judges review. Theses may provide orientation to the judges for the admission of experts' statements.

personnel as well as Judges, Magistrates and officials of the Judiciary, on the 2013-2014 reforms on competition.

- **2015. Judicial Workshops in Competition, Telecommunications and Broadcasting.** Organized by the Judiciary, SE and OECD, it represented the first collaboration between the Executive and Judiciary Branches to strengthen technical capacities and best practices for decision making in courts.
- **2017: Congress “Economic Cartels: a criminal law perspective”.** With presentations by personnel of COFECE, the Judiciary and academics. Two roundtables were organized, discussing administrative regulation in Mexico as well as criminal offenses and sanctions.

35. **2018: International seminar: “Legal privilege in economic competition procedures”:** The seminar took place at the Institute of Legal Investigations of the National University. With lectures by personnel from the Department of Justice of the US (DoJ), the Federal Trade Commission of the US (FTC), Canada Competition Bureau (CCB), the Competition and Markets Authority of the UK (CMA), Chile’s National Economic Prosecutor’s Office (FNE) Magistrates from the Judiciary, practitioners and COFECE.

IFT

4. Introduction

36. In 2013 and 2014, Mexico undertook an extensive reform to its constitutional and legal frameworks in competition, telecommunications and broadcasting with the purpose of strengthening competition law, policy and institutions with more than 25 years of existence.¹² Significant enforcement delay in competition cases caused by an increasing volume of judicial suits filed against its inter-procedural acts and decisions was one of the drivers of these reforms, especially in the telecommunications and broadcasting sectors.¹³

37. As a result, regulatory and institutional reform committed to the specialization of administrative and judiciary authorities in competition, telecommunications and broadcasting matters. It constituted a specialized and converging administrative authority on these areas, namely, the Federal Telecommunications Institute (IFT, by its acronym in Spanish) and Specialized District Courts, which must protect citizens' constitutional rights, preserve the rule of law, provide procedural due process and adjudicate legal disputes in competition cases. In the judiciary, changes were adopted to stimulate efficiency in its reviews and to increase the soundness of its decisions.

38. Since the reforms, criteria and review standards in competition cases are evolving in judicial and administrative authorities’ decisions. This contribution describes relevant changes in the institutional design, the enforcement system and the criteria and standards for judicial review.

12 Mexico adopted its first competition law - the Federal Economic Competition Law (LFCE) - in 1992, in preparation for the signing of the North American Free Trade Agreement (NAFTA) to meet the requirement that signatory states must had competition laws.

13 OECD Telecommunication and Broadcasting Review of Mexico 2017, available at: <https://www.oecd.org/publications/oecd-telecommunication-and-broadcasting-review-of-mexico-2017-9789264278011-en.htm>

5. Recent Changes in the Legal Framework

39. The main changes following the 2013-2014 reform were:

- Two competition authorities were created. The IFT is the national competition authority and sectorial regulator in telecommunications and broadcasting, designed to apply all its expertise and resources to take convergent and effective decisions in competition and regulatory matters. The Federal Economic Competition Commission (COFECE, by its acronym in Spanish) remains as the national competition authority in all other sectors of the economy.¹⁴ When there is a need to establish their respective areas of competence following a definition on an industry-wide basis, both authorities can use a collaborative clearance process or trigger a formal procedure provided under the LFCE, which is adjudged by a Specialized Collegiate Circuit Court.¹⁵
- Two specialized district courts and two specialized collegiate circuit courts were created to review cases in competition, telecommunications and broadcasting.
- Only the final acts or decisions of the competition authorities can be challenged before the Specialized District Courts through an *amparo* trial. Consequently, parties to a competition proceeding would no longer appeal any inter-procedural act, or file a request for review adjudged by the same competition authority, or request an injunction. This change has suppressed a historical bottleneck in adjudging competition cases and maintaining the authority's decision during the court's review.¹⁶

40. A relevant feature of this reform was the reinforcement of the effectiveness and synergies of competition and regulation by establishing specialized authorities in competition, telecommunications and broadcasting, which reflects in the design of the IFT and Specialized Courts.

14 So far, the Mexican State has only established one convergent competition authority and sectoral regulator for the telecommunications and broadcasting, and for no other sector. In the other sectors, the institutional separation between the competition authority and sectoral regulators remains unchanged.

15 Article 5 of the LFCE.

16 Before the reform, participants in competition cases had multiple opportunities to seek judicial relief if they were dissatisfied with the authority's actions or decisions. Two frequently used resources were an *amparo* action in a federal district court and an appellate action in the Court of Fiscal and Administrative Justice. The increasing use of both resources was delaying and reducing the resolutions' effectiveness. See, for example, the 2004 OECD's Peer Review on Competition Law and Policy in Mexico, section 4.2. 4.2 Competition law enforcement by the CFC, pages 44 to 47. Available at: <https://www.oecd.org/mexico/31430869.pdf>.

6. The Institutional Design of Competition Authorities

41. Mexican competition authorities –IFT and COFECE– meet a constitutional mandate that establishes two separated bodies to substantiate competition cases¹⁷ regarding collusion, abuse of dominance, unlawful mergers, and the existence of substantial market power, barriers to entry or effective competition conditions.¹⁸

42. At IFT, the Investigative Authority (AI, by its acronym in Spanish) handles the investigation process; subsequently, a separate office, the Economic Competition Unit (UCE, by its acronym in Spanish), handles the cases once the investigation ended through an administrative followed under a trial-like procedure, that concludes with the Board’s decision. This separation aims at strengthening a transparent and unbiased assessment of the charges pressed by the AI and the evidence contained in the file, including that submitted by the plaintiff and the defendant. While some elements of an adversarial system were introduced, the enforcement system remains administrative.¹⁹

43. According to the Mexican Senate, this separation was necessary because it would prevent other parties from influencing the investigation or swaying it in a particular direction and it would strengthen impartiality because the authority responsible of solving the case cannot form a previous opinion from the case investigation.²⁰

44. The Legal Affairs Unit (UAJ, by its acronym in Spanish), which is a separate office within IFT, monitors the cases and proceedings before the judiciary. It makes the necessary errands to defend the IFT and presents pleadings in representation of the IFT. It also warns the UCE and the AI when a Court is about to issue a decision.

7. Procedure before the competition authorities

45. The AI can start an investigation ex officio or through a complaint filed by an economic agent when it meets the legal standard of having an objective cause to do so. During the investigation procedure, the AI it can request relevant documents or information, and conduct inspections or dawn raids.

46. When the AI finds enough information to charge anticompetitive conducts, it issues a Statement of Probable Responsibility (SPR).²¹ This act launches the trial-like procedure

17 Article 28 of the Constitution establishes that laws shall guarantee, within each competition authority, the separation between the investigating and the adjudicating powers in those proceedings of controversial nature.

18 In these cases, the LFCE expressly provides for an investigation procedure followed by another in a trial form. The UCE handles other procedures that do not require an investigation procedure, for example, merger notifications.

19 Before the constitutional amendment, this separation existed, but only in IFT’s Statutory Charter.

20 Senate considerations can be found in Spanish at: http://infosen.senado.gob.mx/sgsp/gaceta/62/1/2013-04-18-1/assets/documentos/DICTAMEN_TELECOMUNICACIONES.pdf

21 Its nature is similar to the statement of objections in Council Regulation (EC) No 1/2003 of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty on the Functioning of the European Union.

that starts with the submission of the case file to the UCE, which then serves economic agents with the SPR.

47. Defendants can rebut the SPR and record's contents through written pleadings and evidence allowed in the LFCE and its regulations²² and request a hearing with members of the Board, who finally adjudge the case, imposing a sanction or dismissing the case if it finds insufficient evidence. Due to constitutional and LFCE's amendments, parties cannot move to review the final decision before the competition authority itself (i.e., there are not administrative reviews).

8. Judicial review

48. The *amparo* trial to challenge a competition authority's final decision should be adjudged swiftly, since one of the main principles of *amparo* trials is an expedited decision. One Specialized District Court adjudges this challenge and parties can challenge its decision before a Specialized Collegiate Circuit Court. The latter issues a final decision on the matter unless there is a constitutionality issue that must be adjudged by the SCJN, or if the SCJN deems the issue important enough to attract it and adjudge it.

49. According to constitutional amendments, Specialized Courts do not admit any challenge to interlocutory acts or decisions, but only those against a final act or decision, hence excluding other forms of legal redresses, such as administrative action, and do not entail the suspension of such determinations while the respective judicial resolution is pending. Inter-procedural acts can only be claimed along with the final decision, consequently, avoiding the complications that existed before the reform, where even intermediate determinations were suspended further stalling pivotal decision-making procedures.²³

50. Specialized Collegiate Circuit Courts have interpreted the reach of the constitutional provision and established admissibility tests upon that interpretation to determine whether an act or decision is *final*²⁴ and, therefore, admissible for an *amparo* trial:

- It must directly affect fundamental rights;
- The claimed harm does not refer to adjective or procedural provisions; and
- The harmful act or its effects do not vanish by the authority's further act or decision (i.e., redress or compensation is impossible).

22 According to articles 94 section III & 96 section V of the LFCE's rules, all kind of proofs are accepted. There are exemptions for special procedures provided in articles 94 and 96 of the LFCE to assess the existence of market power and essential facilities, respectively, in which testimonial and public authority's confessional evidence are not allowed.

23 This was the case for declarations of dominance in telecommunication markets and subsequent procedures to impose asymmetric regulations, before the constitutional amendments.

24 These criteria are enclosed in the Tesis I.1o.A.E. J/4 (10a.), available in Spanish at this link.

9. Specialization

51. The legal system for competition, telecommunications and broadcasting –including the stage for judiciary review–is based on specialization.

52. Competition authorities are independent professional bodies endowed to carry out complex technical analysis that covers legal, economic and financial aspects not easily accessible to non-experts. Because of the administrative nature of the system, the generally accepted view embraces judicial deference. Thus, Specialized Courts assess the legality of the competition authority's acts; sets measures for relief if they lack any formality; and reviews if the evidence supporting the act or decision is enough to prove anticompetitive conducts.²⁵ This deferential treatment recognizes competition authorities as the main responsible for interpreting the LFCE and for determining the legal provision that applies to a particular case.²⁶

53. In this regard, following the scope of the judiciary review of competition cases in recent decisions, the (implicit) criteria has derived:

- The competition authority has the most significant margin of technical appreciation to resolve its issues, under parameters that respect legal and constitutional minimums required by the judiciary.
- The judicial review can reverse acts if they do not comply with applicable formalities or if enough evidence does not support them.
- Although judicial deference is generally accepted, Specialized Courts have ample powers in adjudging a competition case. For example, in some cases, they have determined that an anticompetitive conduct happened.²⁷

10. Types of Evidence in Judicial Reviews of Competition Cases

54. In an *amparo*, Specialized Courts must determine whether a competition authority's act or decision entails a wrongful act. The purpose of this trial is to protect citizens' rights against any State's action that violates the rule of law, and it does not has the purpose of settling a dispute between the competition authority and private parties' interests or between the claimant and the defendant.

55. Specialized Courts have the power to request the entire case's file, including confidential information, to the competition authority. Competition authorities and other

25 Judicial Tesis I.1o.A.E.206 A (10a.), available in Spanish at this link.

26 Articles 12 section X and 108 of the LFCE, and 9 section XXII of the Federal Law of Telecommunications and Broadcasting provide the power to the IFT to interpret the laws it has to enforce.

27 In the *amparo* in review R.A. 161/2017, the Specialized Court determined that, in an absolute monopolistic practice consisting in geographic market segmentation, the IFT failed to prove the practice in certain municipalities but it did prove the practice in other municipalities. In its sentence, the Courts ordered the IFT to annul its decision and issue a new one imposing fines according to the criteria provided in such sentence. A redacted version is available in Spanish at this link.

involved parties may offer and submit all sorts of evidence, including expert opinions.²⁸ If both parties at trial submit expert opinions or witnesses, the judge can request a cross-examination through written inquiries.

56. In competition cases, Specialized Courts rely on expert opinions. They usually settle beforehand the reasoning and methodology to present a valid and useful expert opinion for a specific case and to designate experts of their own when the experts appointed by the parties do not concur. Specialized Courts have ruled on the admissibility aiming at ensuring the usefulness of the opinion when adjudging a case, considering the following:²⁹

- If it is relevant to the dispute;
- If it provides the Court a more in-depth insight;
- If the context of the opinion is well defined;
- The theory that supports the case;
- Current or potential error rate and its compliance with the standards of the (most widely) practiced technique;
- If there is literature related with that technique; and
- If there is consensus about its suitability.

11. General Precedents

57. Specialized Collegiate Circuit Courts have established precedents to determine who has the standing to challenge a competition authority's decision. Sanctioned firms have the standing to challenge it, and the plaintiff has the standing to challenge a decision dismissing a case.

58. Regarding cartels/absolute monopolistic conducts, anyone who considers itself affected can challenge the decision dismissing the case on the basis that it affects competition and every participant in the markets involved.³⁰ In abuse of dominance subject to the rule of reason/vertical anticompetitive conducts, only companies affected directly by the conduct can challenge a decision dismissing such cases, and they have to assert the harm in order to sustain such standing. Judiciary has considered that a complaint of anticompetitive conduct is the only remedy to an anticompetitive conduct. Hence, plaintiffs have the standing to challenge the aforementioned decisions.³¹

59. Because a complaint is the only relief against anticompetitive conducts, judicial criteria have also recognized that if it refers to multiple anticompetitive conducts, the competition authority must then explicitly address them all. In any case, the competition

28 This criterion is available in Spanish at this link.

29 See for example Tesis I.1o.A.E.154 A (10a.) available in Spanish at this link.

30 Tesis I.13o.A.138 A, available in Spanish at this link.

31 Ibid.

authority must conclude whether or not there is evidence to prove that the LFCE has been infringed and if that specific claim is therefore closed or sanctioned.³²

60. In cases subject to the rule of reason, the judiciary has recognized that a company declared with substantial market power has the standing to challenge a decision with such declaration.³³ Actual or potential competitors and providers that may suffer the effects of the exercise of such market power also have the standing to challenge a decision dismissing the case.³⁴

12. Specific Precedents

61. Although judicial deference is broadly accepted, Specialized Courts have established standards to prove anticompetitive conducts. There are specific precedents to prove collusion or unlawful horizontal agreements, and specific precedents for monopolization, abuse of dominance or unlawful mergers. There are also precedents setting standards to determine the scope of a relevant market.

13. Collusion or Horizontal Anticompetitive Agreements³⁵

62. *Use of circumstantial or indirect evidence.* Judicial criteria have recognized that economic agents engaging in this type of anticompetitive conduct must likely will vanish traces of such agreements and, consequently, recognize the difficulty in retrieving direct evidence proving their existence. Therefore, the following criteria has been set:

- Economic agents have the burden to defeat the evidence used by the competition authority that charges horizontal anticompetitive agreements;
- The competition authority must state its theory of the case upon the evidence it uses to charge wrongdoing;
- The competition authority must establish a relevant and convincing causal link between the known facts and the inference (or indirect evidence) that leads to conclude that the unlawful conduct happened;
- The presumption of certainty relays on the indicia (known fact) and the inference's degree of acceptance.

13.1. Adequacy of the Holistic Approach

63. To justify adequately a decision based on circumstantial evidence, the competition authority may resort to this method under the following parameters:

32 Tesis I.2o.A.E.37 A (10a.), available in Spanish at [this link](#).

33 Tesis 2a./J. 153/2011 (9a.) available in Spanish at [this link](#).

34 A Specialized Collegiate Circuit Court once held it in the Amparo in Review number R.A. 141/2016, available in Spanish at [this link](#).

35 These criteria derive from several Judiciary's Tesis available in Spanish at the following links: 2a./J. 101/2015 (10a.); I.1o.A.E.215 A (10a.); 2a./J. 98/2015 (10a.), and I.1o.A.E.214 A (10a.).

- Indicia must throw a logical explanation of the case as a whole;
- Explanation of the anticompetitive conduct must rule out any other logical explanation of the proven facts.

13.2. Bid Rigging

64. The competition authority may consider patterns including:
- Similarities in the price offer submitted by economic agents (this allows the use of screening techniques);
 - Tendencies of winners and losers;
 - Changes in tenders due to the irruption of new competitors in the bidding.

13.3. Abuse of Dominance/Vertical Restraints³⁶

65. *Using the rule of reason.* If the competition authority analyzes a conduct that could constitute abuse of dominance/vertical restraints, it must follow the rule of reason, which refers to:

- Weighing the benefits of the behavior, as well as its damages; attending to its purposes (object) and its (actual or likely) effects; and
- Demonstrating a negative impact on competition and economic efficiency.

66. So far, judicial criteria on abuse of dominance/vertical restraints only rephrase what it is already established in the LFCE.

67. Criteria on horizontal agreements set further specific rules mainly because case law on horizontal conducts is more abundant than on vertical conducts.

³⁶ They correspond to Judiciary's Tesis available in Spanish at the following links: I.1o.A.E.163 A (10a.) and I.1o.A.E.35 A (10a.).