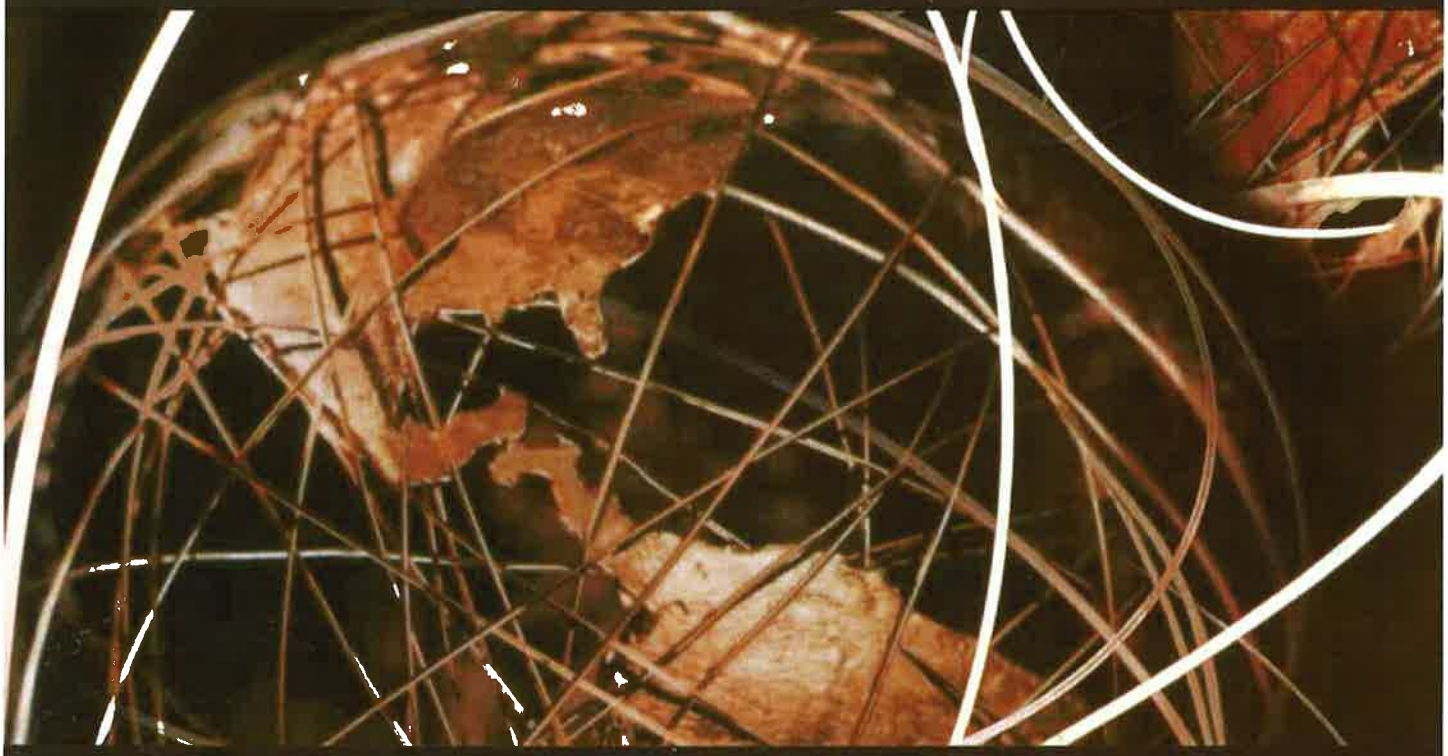
The Antitrust Review of the Americas 2015



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Mexico: Overview

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The important changes recently made in Mexico to the antitrust law are considered a big step for our country, legislatively as well as in practice.

Concentrations have become an area of considerable global importance due to the relevance of the investments flow in each country. In this regard, it is important to have a legal system that provides for efficiency, continuity and success in these kinds of operations, always maintaining the necessary control over markets in order to avoid monopolies and incentivise fair competition.

The Mexican Antitrust Act

The Mexican Antitrust Act (MAA) was published on 24 December 1992, based primarily on the negotiations and execution of the North American Free Trade Agreement (NAFTA). Mexico needed to make the necessary changes and additions to its internal legislation, mainly with regard to the defence and enforcement of fair trade and free competition, in order to ensure the entry in force and execution of the NAFTA.

Since its publication, the MAA has undergone important reforms, taking into consideration changes in the Mexican economy and the way the markets have developed. The most important reforms to the MAA took place on 2006 and 2011 which, among other things, increased the penalties for breaching antitrust provisions.

In addition, the Mexican Constitution has recently been reformed in terms of antitrust and telecommunications, modifying the organisational nature of antitrust authorities and creating a specific authority that will review antitrust matters in the telecommunications market, which has been an area of great importance over recent decades in Mexico (the Constitutional Reform). The Constitutional Reform implies, among other things, reforms to the MAA and its Regulations, and creating additional secondary legislation, which will be drafted and published in the following months.

On 30 April 2014, the Chamber of Deputies approved the new Mexican Antitrust Act (the New Act). Therefore the 1992 Mexican Antitrust Act was repealed and the New Act was enacted on 7 July 2014 with a total of 138 articles, regulating article 28 of the Mexican Constitution.

While the MAA applies to most companies and markets, the Mexican Constitution provides certain important exceptions. Mexico does not consider strategic activities (eg, railroads) and activities that are exclusively reserved to the state (eg, postal services, telegraph and radiotelegraphy, petroleum and other hydrocarbons, basic petrochemicals, radioactive minerals and nuclear power generation, and electricity, among others) to be monopolies. Additionally, the activities of labour unions created in accordance with Mexican law and authors' or artists' exclusive rights over their works or inventions are not considered monopolies under Mexican law.

The Mexican Antitrust Commission and the Federal Telecommunications Institute

The Mexican Antitrust Commission (the Commission) was created in 1993 as an independent agency of the Ministry of Economy with technical and operational autonomy and independence. By means of the Constitutional Reform, the Commission is now an autonomous constitutional entity. It is responsible for preventing, investigating and sanctioning monopolies, monopolistic practices and unlawful mergers in all markets (with the exception of telecommunications) with full autonomy of its decisions. The Commission also drafts and publishes guidelines and criteria regarding how to interpret, investigate, enforce and apply antitrust law.

However, the Commission may also issue, when it deems appropriate or upon request, binding opinions regarding fair trade to the government agencies with regard to effects on free competition of programmes, rules, agreements or other provisions. When economic agents have questions or concerns regarding any antitrust issue, they may file a consultation before the Commission, which will deliver a non-binding opinion to the interested parties.

Likewise, as a consequence of the Constitutional Reform, the Federal Telecommunications Institute (the Institute) has been created, which, among other things, is in charge of investigating, analysing and sanctioning antitrust breaches in the telecommunications market, as well as determining which companies have market power and stating measures in favour of free trade. In addition, by means of the Constitutional Reform and the New Act, the Commission and the Institute are provided with additional tools and mechanisms to modify market structures with dominant companies, including ordering measures to remove barriers to competition, regulating access to essential inputs, and ordering the divestiture of assets, rights or shares, to eliminate anti-competitive effects. Also, the decisions of the Commission and the Institute must be analysed by specialised constitutional courts.

Through the Constitutional Reform and the New Act, the Pleno (which is the main body of the Commission) has being modified from five to seven commissioners, who are elected through an evaluation committee with the approval of the president of the Republic and the Senate for a period of nine years. The Pleno has a chairman and the commissioners will not be simultaneously elected (with the exception of the first seven commissioners once the Commission is modified through the Constitutional Reform), guaranteeing the autonomy and independence of the Pleno. The commissioners vote on all resolutions of the Pleno and cannot be excused except under extraordinary circumstances.

The Institute is in the process of being provided with organisational legislation as a consequence of the Constitutional Reform. However, at this point, the Constitutional Reform only states that the Institute will also have seven commissioners, elected through an evaluation committee with the approval of the president of the Republic and the Senate for a period of nine years.

Monopolistic activities

The MAA divides monopolistic activities into two main groups: absolute monopolistic practices and relative monopolistic practices.

Absolute monopolistic practices

Absolute monopolistic practices are defined as any agreement between competitors with the goal or effect of fixing prices, limiting or restricting the available product supply, dividing markets or bid rigging. In order for these practices to be investigated and sanctioned, the Commission only needs to prove their existence and not if the effects actually take place, which means that they are per se illegal.

However, demonstrating the existence of absolute monopolistic practices can be an extremely difficult task for the Commission in an investigation. In Mexico, the Commission or the plaintiffs need to obtain sufficient evidence in order to start an investigation or denounce monopolistic practices.

In order for the plaintiffs to provide this evidence, the information they will most likely refer to includes, among others things:

- testimonies from third parties that may be affected by the agreement;
- evidence gained through raids executed by the Commission on the investigated competitors (this practice has only been implemented twice since its addition in the MAA reform of 2011);
- communications between the companies involved, including meetings, e-mails, faxes or phone-call records; and
- the existence of behaviour that is unusual in the applicable market, which can only be explained by a possible agreement between competitors.

Mexican courts have determined that there should be related but conclusive evidence to infer from signs and evidence that an absolute monopolistic practice has taken place. It follows that sufficient indirect evidence paired with general statements is suitable to determine certain facts or circumstances from the best available information regarding the actions of companies that have entered into agreements to carry out absolute monopolistic practices.

Price fixing may occur when one or more competitors within a given market are able to control their supply, creating a shortage of that product. In other words, a group of competitors set the applicable market's supply in such a way that the price of that product or service increases the profits gained by said competitors. In accordance with the MAA Regulations, indirect evidence of price fixing may come from the sale prices offered by two or more competitors being significantly higher or lower than the prices of the same products elsewhere, unless it results from taxes, transportation or distribution; or that such competitors set a range of prices or adhere to the prices issued by a competitor or association.

The purpose of product restriction or limitation is to control the supply of or demand for a certain product or service, thus causing an increase in prices. In most markets, product restriction or limitation can simply be affected by assigning the amount of goods or services competitors will provide or sell, letting the market itself decide the pricing on said product. Providing indirect evidence of this type of practice may require additional supply-and-demand studies of the product over time, taking into consideration previous distribution and sales from all competitors.

Market division takes place when competitors distribute, assign or impose segments of a current or potential market of goods and services, using their available customers, suppliers, schedules or locations. This type of practice takes place when competitors divide the market using one or more of the following divisions:

- by customers, when the involved companies agree not to seek or enter into similar agreements with any of the other companies' customers;
- by territory, when competitors agree to restrict the availability of their products or services to certain areas, cities or territories; or
- by products, when competitors agree not to engage in the production, sale or distribution of certain products sold or produced by their competitors.

The gathering of indirect evidence of this type of practice can include demonstrating that the applicable market's mobility has remained unchanged during a certain period of time, when competitors have had realistic opportunities to expand but have decided not to, contrary to their own interest.

Bid rigging takes place when competitors agree to participate with certain offers, or even refrain from participating in public bids, that are likely to have the effect of guaranteeing that the contract will be awarded to a specific competitor. This type of practice can be difficult to identify when the public authority has agreed to help the competitors control the market. However, indirect evidence can be obtained when the bidding is always awarded to the same company or when certain competitors have contracts awarded to them in a clear rotation (carousel practice), as well as when the competitors bid at higher prices or conditions that cannot compete with those offered by a competitor.

It is important to note that one additional absolute monopolistic practice was included in the New Act, which is the exchange of information with the purpose or effect of fixing prices, restricting supply, dividing markets or bid rigging.

Relative monopolistic practices

Under the MAA, relative monopolistic practices are all actions, contracts, agreements, procedures or combinations of such with the purpose or effect of improperly displacing competitors from the market, substantially limiting their access to the market or establishing exclusive advantages in favour of one or more competitors. Unlike absolute monopolistic activities, it is commonplace that these practices are conducted in a vertical relationship (eg, between a producer and its distributor). However, proving relative monopolistic practices is subject to ascertaining that the company engaged in these types of activities has substantial power in the market and that the activities take place within the relevant market.

Generally, a company has substantial power in the market when it has the ability to raise prices, reduce or control the supply or otherwise restrict fair trade or free competition without the ability or possibility for its competitors to counter such actions. In order for the Commission to determine whether a company has substantial power in the market, it needs to consider:

- the company's share of the market and if it has the ability or opportunity to fix prices or restrict supply by itself, without the possibility of competitors countering such ability or opportunity;
- the existence of entry barriers and the existence of elements that may alter those barriers;
- the existence and market power of its competitors;
- the ability of the company and its competitors to access production and distribution sources;
- the recent behaviour of the competitors that participate in the relevant market; and
- any other element set forth in the regulatory provisions, or any technical criteria issued by the Commission.

'Relevant market' is not defined in the MAA or in the New Act. However, Mexican courts have defined it as the geographical area in which similar products or services are available to supply or demand, considering both the available products or services and the geographical area in which they can be obtained. Therefore, in order for a relevant market to be defined, there needs to be a set of goods or services identical or similar available to consumers in an area large enough for the consumer to be able to obtain said goods or services. In order for the Commission to establish a relevant market, it needs to take into consideration:

- the possibility of substitution of the goods or services with similar domestic or international goods or services (considering costs, accessibility, pricing, required time for the substitution, technological possibilities, etc);
- the difference in the distribution costs of the goods and other necessary costs (freight, insurance, restrictions, etc) compared with other territories or abroad;
- the costs and possibilities that consumers have to search for the same or similar products in other markets;
- the regulatory restrictions that federal, local or international authorities impose in order for consumers to have access to alternative supply sources; and
- any other element set forth in the regulatory provisions, or any technical criteria issued by the Commission.

The MAA indicates the following activities as relative monopolistic practices:

- the fixing of exclusive marketing or distribution rights;
- the imposition of conditions that a distributor must follow regarding the marketing or distribution of goods or services;
- tied sales;
- the refusal to sell, trade or provide goods or services normally offered to third parties;
- boycotts;
- the granting of discounts or incentives with the requirement of not engaging in economic activities with a certain third party;
- cross-subsidies;
- price discrimination;
- the activities engaged in by competitors with the purpose of increasing costs, hindering the production process or reducing the demand for competitors;
- the denial of, restriction of access to, or access under discriminatory terms and conditions to an essential input; and
- margin squeezing, which is the narrowing of margins between the prices of access to an essential input provided by one or more agents and the price of a good or service offered to the final consumer by those economic agents, in which the same input is used for its production.

The main purpose of the last two activities mentioned above, which were included in the New Act, is the avoidance of the abusive exploitation of essential inputs. Therefore, the Commission must determine the existence of essential inputs, considering the following:

- if the essential input is controlled by one or more economic agents with substantial power, or which have been determined as dominant agents by the Federal Telecommunications Institute;
- whether or not the reproduction of the input is possible by another economic agent from a technical, legal or economic point of view;
- if the input is indispensable for the provision of the goods or services in one or more markets, and if it has close substitutes;
- the circumstances under which the economic agent gained control of the input; and
- any other criteria established under the regulatory provisions.

In order for the Commission to determine if the relative monopolistic practices will be sanctioned, it analyses, among other things, the profit resulting from such conduct and the intentionality of its actions.

Mergers

The MAA defines mergers as the acquisition or control operation by which companies, shares, stocks, trusts or assets in general between competitors, suppliers or customers are concentrated. The Commission investigates and, if applicable, sanctions mergers that may have the purpose of reducing, impairing or preventing fair trade of identical or similar goods or services.

Not all mergers must be notified to and cleared by the Commission prior to their execution. The MAA states that, in order to determine if a merger notice must be filed before the Commission, the participating companies must determine if the merger will have effects in Mexico and if the merger surpasses the thresholds set forth in the MAA. If the merger exceeds any of the following thresholds, the companies involved must file a notice before the Commission in the following situations:

- The price of the transaction in Mexico (that is, considering only the companies, subsidiaries, affiliates or assets located in Mexico, which will be indirectly acquired by the acquiring company) exceeds approximately $93 million. The Commission has recognised that often in international transactions no allocation of the price to be paid for the Mexican assets or shares is made and therefore it is not possible to determine if this threshold is surpassed.
- The buyer, whether located in Mexico or abroad, will acquire at least 35 per cent of the assets or shares of a company or companies in Mexico whose assets or annual sales (those of the Mexican companies only) exceed approximately $93 million. To calculate the value of the assets, the 'total assets value' stated in the audited financial statements for the previous year must be considered. If no audited financial statements are available, the internal financial statements could be used.
- The assets or annual sales volumes of the buyer or seller, regardless of the country they are located in, or both together, exceed approximately $248 million and the transaction involves the purchase in Mexico of assets or capital greater than approximately $43 million. The calculation of the asset value is obtained from the audited financial statements. Additionally, to calculate the 'capital' acquired, the information regarding the 'adjusted for inflation capital' stated in the financial statements for the previous fiscal year must be considered.

When a merger has effects in Mexico and any of the mentioned thresholds is surpassed, the participating companies are obligated to file a merger notice to the Commission. However, in those transactions where it is clear that the effects produced will not have adverse effects in the relevant market, the merger notice can be filed through a simplified format, with the possibility for the Commission to request additional information before authorising the merger.

Proceedings

The monopolistic practices procedure seeks to protect free competition and fair trade. It is considered a public interest activity.

By means of the New Act, the Investigating Authority has been created, to guarantee the independence of the authorities responsible for the investigation process and the authorities responsible for the resolution.

During the investigation process, all documentation and information filed by all interested parties (denounced parties, plaintiffs, third parties and authorities) is confidential and unavailable to anyone outside the Commission and its personnel. This has been greatly criticised by many, claiming it damages the constitutional right to due process. However, no claims in this regard have been successful for the interested parties, strengthening the powers of investigation of the Commission.

The first stage of the procedure is the investigation and research stage, which has the purpose of gathering evidence in order to determine possible monopolistic activities. The evidence is gathered by the Commission by requesting information and documentation it considers necessary from all interested parties, by summoning people the Commission believes may hold information regarding the investigation and by conducting dawn raids with the purpose of obtaining additional information.

The investigation stage begins when the Commission issues an initiation agreement. This stage lasts for up to 120 business days, with the possibility of extending the period for up to four additional periods of 120 business days. In any case, when the investigation stage of the procedure ends, the Commission must either issue and notify to those companies that may be responsible, a Probable Responsibility Notice, if the Commission determines the possible existence of monopolistic activities; or the closing of the investigation, when the Commission concludes that from the gathered evidence it cannot determine that any monopolistic practices have been undertaken. Any of the aforementioned actions ends the investigation stage of the procedure. Only if a Probable Responsibility Notice is issued by the Commission may the second stage of the procedure begin, the trial stage.

It is important to note that under the New Act there is no longer an obligation to publish the initiation of investigation agreement in the Official Gazette.

The trial stage begins with the issuance of the Probable Responsibility Notice, which contains, among other things, the monopolistic activities the defendant companies allegedly committed, the elements considered to draw said conclusion, and the request to notify the defendants to defend themselves and try to disprove the arguments and conclusions of the Commission by providing evidence and proof they consider necessary, within 45 business days after the notification. It is at this stage when the investigation file will not be confidential for the parties and they will have access to all non-confidential information gathered throughout the investigation phase. The necessary evidence must be included with the document in which the defendant companies answer the Probable Responsibility Notice, which may include all documents, information, expert opinions, testimonies and all other information that is relevant to the investigation and is presented in accordance with the applicable legislation.

Once the evidence has been presented and admitted, the Commission will have 15 business days to reach its decision regarding the offered arguments and evidence. Once the evidence has been submitted, and within the next 10 business days, the Commission can request the gathering and filing of additional evidence in order to have a better understanding of the investigation. Once all the evidence has been gathered and presented before the Commission, it shall provide a 10 business day period for the investigating authority and the parties to provide any final arguments in connection with the procedure. When the final arguments have been presented, one commissioner, by instructions of the chairmanof the Commission, shall receive all information gathered for his or her analysis, following an appointment order. The selected commissioner shall then be required to present a final resolution draft before the Pleno for its approval, rejection or modification. The Commission shall issue the final resolution within the following 40 business days.

However, 10 days after all the parties have filed their final arguments, the defendant companies, or the plaintiffs, may request the Commission to have an oral hearing with the Pleno in order to make the statements they deem appropriate.

In addition, since the reforms to the MAA of 2006 and 2011, before the Commission issues its final resolution, any of the defendant companies may submit a document by which it agrees to suspend, remove, correct or discontinue the corresponding monopolistic practices, by requesting its inclusion in an immunity programme. This programme is a significant incentive for those companies involved in monopolistic practices. According to the MAA, companies or individuals that have participated in absolute monopolistic practices may reduce or avoid the imposition of sanctions, provided they denounce the illegal acts in question before the Commission and take the necessary steps to terminate their participation in such activities. The first company or individual to submit to the immunity programme will have the sanctions reduced almost completely. The fine can be reduced by 50 per cent, 30 per cent or 20 per cent for the companies or individuals that subsequently submit to the immunity programme, in accordance with the chronological order in which the companies have submitted to such immunity programme and in consideration of the elements of evidence they provide.

Under the Constitutional Reform, the procedures analysed by the antitrust authorities may only be appealed by constitutional appeal, which will be substantiated by specialised antitrust judges and courts to be created, and will not be subject to suspension. In addition, only if companies are punished with fines or divestiture of assets, rights or shares, will the resolution be implemented pending resolution of the appeal. Finally, only the resolutions that terminate the proceedings and regarding violations committed in the resolution or during the procedure may be appealed.

Enforcement and sanctions

Regarding antitrust legislation in Mexico, both the company and its employees directly participating or involved in any activities in breach of the antitrust law can be held jointly responsible for any such breach of the MAA. However, the penalties imposed on companies and individuals are different, both in amounts and in nature.

The sanctions for breaching the MAA or engaging in any monopolistic practices or prohibited mergers can be administrative and criminal in nature, with the possibility of doubling any sanction in case of recidivism. Regarding companies that breach antitrust law, the MAA may order the correction or suppression of the monopolistic activity or prohibited merger and the imposition of fines that may go up to 10 per cent of the company's income, depending on the action in breach of antitrust regulations, as follows:

- up to 5 per cent of the company's income if the merger is carried out without giving prior notice to the Commission, in the event such notification is legally required;
- up to 8 per cent of the company's income if the company engages in any relative monopolistic activities;
- up to 10 per cent of the company's income if the company engages in absolute monopolistic activities, breaches any preventive

measures or breaches any conditions imposed regarding mergers;
- up to 8 per cent of the company's income if engaging in an illegal concentration; and
- up to 10 per cent for failing to comply with the conditions imposed by the Commission in the concentration resolution.

With regard to individuals or employees involved in the defendant company's execution of monopolistic activities, the applicable fines, as stated in the MAA, are as follows:

- up to approximately $940,000 for anyone who helps, induces or participates in any monopolistic activities, prohibited mergers or other market restrictions stated in the MAA;
- up to approximately $1,035,000 for anyone who directly participates in any monopolistic activities or prohibited mergers while representing the defendant company;
- up to approximately $915,000 for misstating or delivering false information to the Commission; and
- up to approximately $940,000 for the government officials who have participated in any act related to a concentration which had to be authorised by the Commission.

In accordance with the Constitutional Reform, the Federal Criminal Code was also reformed to include felonies regarding breach of antitrust provisions. The penalty for individuals directly involved in any absolute monopolistic activities is imprisonment from five to 10 years.

Furthermore, consistent with the absolute monopolistic practice added to the New Act, another felony was included, which is the exchange of information with the purpose or effect of fixing prices, restricting supply, dividing markets and bid rigging.

Finally, it is considered a felony to alter, destroy or disturb documents, electronic files or any evidence during an inspection.

The Commission determines the aforementioned sanctions based on the seriousness of, and the damage caused by, the breach, the intention to carry out any prohibited actions and the share of the company in the market, as well as the size of the applicable market and the duration of the monopolistic activities.

International cooperation

Under the MAA and its Regulations, during the investigations by the Commission, the Commission and the Institute are entitled to request information or evidence regarding monopolistic activities committed in Mexico from foreign government agencies, as an act of cooperation between government authorities, in order to ensure compliance with antitrust law. Furthermore, the Commission and the Institute are specifically empowered to execute and negotiate all sorts of agreements and international treaties regarding antitrust and free competition.

Based on the fact that international trade has increased significantly in the past decades, Mexico has executed a number of Free Trade Agreements with several countries (including the United States, Canada, Japan, Chile, the European Union and Israel) that include and recognise the importance of international cooperation and coordination among the competent authorities in order to ensure the effective enforcement of antitrust law between the free trade areas. In addition, Mexico has executed agreements with the United States and Canada, among others, that deepen cooperation to ensure the prevention and prohibition of monopolistic activities.

Outlook and challenges

As a result of the Constitutional Reform, during the first quarter of the year, the Commission has worked hard complying with its obligations and authority to guarantee fair competition in our country's markets. In this regard, the Commission decided to start a new working plan; a strategic plan which includes several projects related to important investigations.

The Commission recently advanced to the three-stars level in the world rankings of *Global Competition Review*'s 'Rating Enforcement' survey, which for 14 years has been measuring the performance and effectiveness of the global antitrust agencies.

These recent activities are proof that the new Mexican government is working harder to further ensure that monopolistic activities are investigated and sanctioned. Mexico has made consistent efforts with respect to antitrust investigation, prevention and enforcement. However, secondary legislation yet to be drafted will clear up a number of concerns regarding the execution and enforceability of antitrust legislation, including whether the ordering of the divestiture of assets, rights or shares to eliminate anti-competitive effects by the Commission and the Institute must be the result of a sanction or investigation or if no such requirement is necessary. The evolution of antitrust law in Mexico has been quick and complex, and the following years will determine how antitrust authorities will coexist and the extent of the government's effectiveness in preventing monopolistic activities.

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Fernando Carreño has been a partner of Von Wobeser y Sierra since 2009. He graduated cum laude from the Escuela Libre de Derecho, where he obtained his law degree, and obtained his master's degree from Northwestern University School of Law. Mr Carreño worked as visiting attorney at Arent Fox LLP in Washington, DC. He was head professor of alternative dispute resolutions at the Escuela Libre de Derecho in Mexico City. Currently, Mr Carreño is the head of the antitrust practice at Von Wobeser y Sierra. He provides antitrust advice in both competition/antitrust aspects of corporate deals, as well as litigation matters before the Mexican Antitrust Commission and the Mexican courts. Mr Carreño regularly advises clients in many different industries, including the aerospace, telecommunications, energy, health-care and technology sectors, as well as financial institutions in national and cross-border transactions. He also engages in mergers and acquisitions and financial transactions. Mr Carreño is fluent in Spanish and English.

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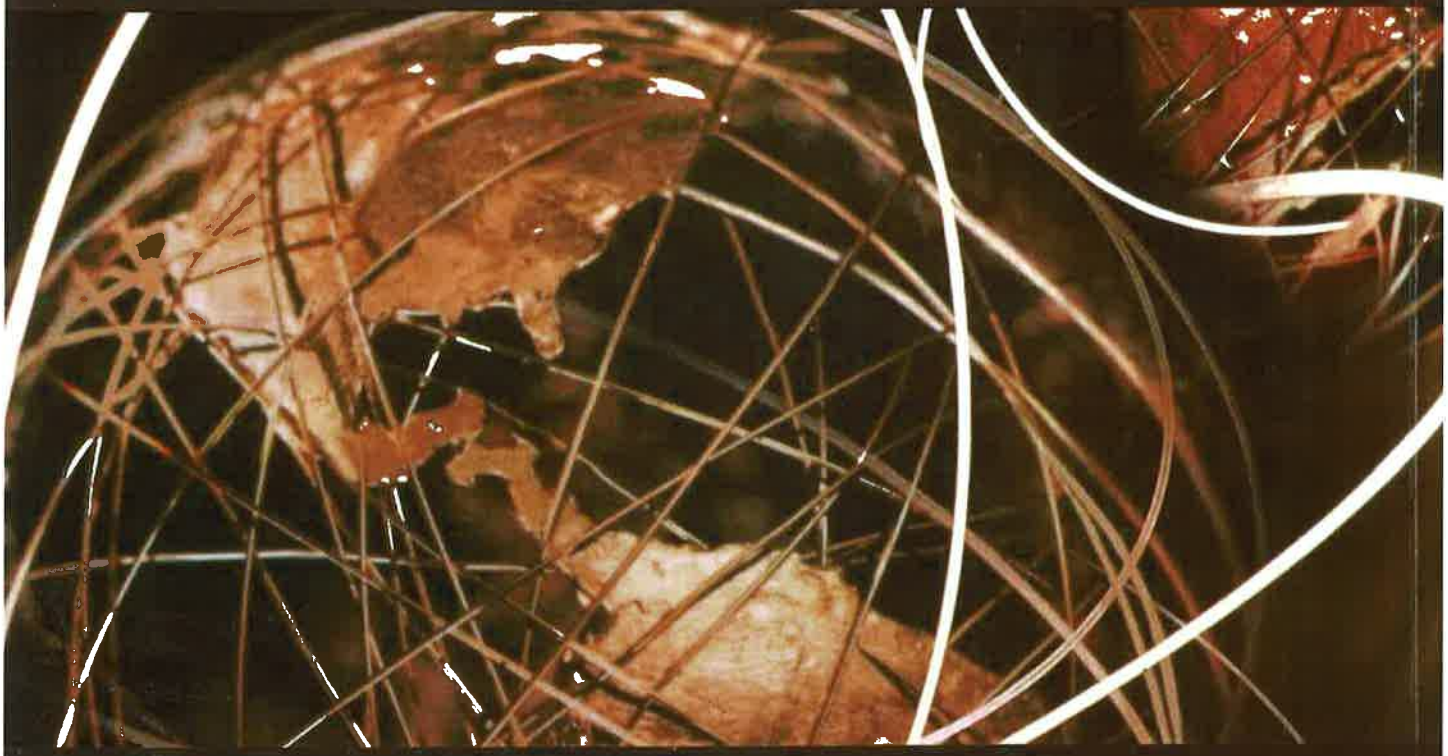
Von Wobeser y Sierra was founded in 1986, with the purpose of providing integrated legal services to national and foreign clients. We are one of the leading law firms in Mexico, and throughout the years we have established close professional and friendly relations with law firms in the main cities of Asia, Canada, Latin America, the European Union and the United States, with whom we maintain an excellent rapport. Furthermore, the firm boasts similar relationships with other firms in the main cities of Mexico.

The firm is currently composed of 45 lawyers, all of whom graduated from the most recognised universities in Mexico and on an international level. Our lawyers have also taken specialised legal studies at other renowned universities in the United States, Canada and some European Union countries dedicated to the full practice of the legal profession.

With almost 20 years of experience in the antitrust area, Von Wobeser y Sierra's antitrust/competition practice provides clients with competition strategies to match its clients' requirements. The practice stands alone due to its unique balance between competition/antitrust aspects of corporate deals and our expertise in litigation matters before both the Mexican Antitrust Commission and the Mexican Courts. Von Wobeser y Sierra regularly advises clients in many different industries, as well as financial institutions in national and cross-border transactions and our experts are part of the team currently advising the Mexican Antitrust Commission in drafting the Regulations of the new Mexican Antitrust Act.



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