

Mexican Antitrust Investigations into APP-Stores

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On October 7, 2022, the Investigative Authority¹ of the Federal Institute of Telecommunications ("IFETEL") published in the Official Federal Gazette (the "Gazette") the opening of an investigation for possible relative monopolistic practices (i.e., vertical restraints) in the mobile device's app stores and related markets within Mexico ("IFETEL's Investigation"), due to a claim filed by an undisclosed party. IFETEL's Investigation was launched on September 29, 2022.

Similarly, on September 30, 2022, the Investigative Authority of the Federal Economic Competition Commission ("COFECE" and jointly with IFETEL, the "Agencies") published in its website² the opening of an ex-officio investigation in the development, distribution, and payment processing for mobile apps and digital content and related services market (the "COFECE's Investigation" and jointly with IFETEL's Investigation, the "Investigations"). COFECE's Investigation was opened on September 30, 2022. Namely, a day after IFETEL's Investigation opened.

Both Investigations are subject to the same procedure (including statutory terms)³ and in practice usually both Agencies take two and a half years. Once the investigations conclude, the Agencies will determine whether to issue a statement of objections, in which case an administrative procedure followed in form of trial will follow and where the alleged offender will have the right to defend.

¹ The Division within IFETEL in charged of opening and carrying the investigations followed pursuant to the Federal Economic Competition Law (the "FECL") in the telecommunication and broadcasting sectors, which can lead to the opening of a procedure carried in IFETEL and are ruled by IFETEL's Plenum.

² It has not yet been published in the Gazette. However, it must occur within the initial 120 business days term of the investigation.

³ Certain ancillary aspects of the procedure can vary slightly, given that both IFETEL and COFECE have their own regulations that regulate certain aspects of the FECL.

Competence

In terms of the FECL, COFECE is the antitrust authority with jurisdiction over all markets, except those comprised in the telecommunications and broadcasting sectors, which are in charge of IFETEL.

However, there are cases in which both Agencies claim to have competent jurisdiction to resolve the entire case or of certain markets involved. During the past few years both Agencies have filed competence conflicts before federal courts seeking competence on certain cases. Most of these competence conflicts have arisen on merger control cases⁴.

However, there has also been one competence conflict regarding an investigation opened by both Agencies. Specifically, in October 2020, IFETEL opened an investigation to determine the possible existence of barriers to competition or essential facilities within the markets of online search engines, social media, mobile operative systems, computer cloud services and related services. On December 2020, COFECE determined it was competent to conduct this investigation. This led to a competence conflict before a federal court (the "Digital Markets Investigation Conflict"), where the court determined that COFECE was competent to investigate online search engines, social media, computer cloud services and related services, whereas IFETEL was competent to investigate mobile operative systems.

More recently, IFETEL and COFECE cleared the acquisition of Grupo Televisa's content business by Univision. However, once resolved, IFETEL filed a constitutional controversy before the Mexican Supreme Court, against COFECE's ruling arguing that COFECE had invaded its competence in certain markets, including the acquisition, production, and licensing of audiovisual content through digital platforms. The Supreme Court dismissed the claim without deciding on the merits of the case.

In view of the recent disputes between COFECE and IFETEL, several of which our Firm has been directly involved with, it is possible that both Agencies are investigating the same or similar markets and conduct(s) as part of their Investigations. Thus, it is likely that COFECE and/or IFETEL will file a competence conflict claim against federal courts shortly.

⁴ For example, mergers on Nokia/Lucent, AT&T/Time Warner, and Uber/Cornerstone.

Investigated Conducts

IFETEL is currently investigating vertical restraints consisting in tying or bundling, discriminatory pricing, and conducts which purpose or effect is to increase costs or block the productive process, or reduce the demand faced by other economic agents⁵.

At this stage the conduct(s) being investigated by IFETEL and COFECE are unknown. However, it is possible that the Investigations could derive from the claims filed by Epic Games, Inc. ("Epic Games") against Apple, Inc. ("Apple") and Google, Inc. ("Google") since 2020 in other jurisdictions against the alleged vertical restraints imposed by Apple and Google on app developers to, among others, use their purchasing system for in-app purchases⁶.

⁵ Article 56, sections (III), (X) and (XI) of the FECL.

⁶ This article was prepared by Carlos Orcí, Patricio Rivas and Rafael Domínguez.

Contact us:

Francisco Fuentes Ostos

Partner | ffuentes@macf.com.mx
Antitrust

Carlos Orcí

Partner | corci@macf.com.mx
Antitrust