

Business of sports under COFECE ruling on Mexican football league case

SAI Law & Economics | Competition & Antitrust - Mexico

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Introduction

On 2 September 2021,⁽¹⁾ the Mexican Economic Competition Commission (COFECE) imposed fines on 17 football clubs from the Mexican league, including the Mexican Football Federation (FMF) and eight individuals, for incurring in monopolistic practices (cartels) in the men's and women's football players' draft market.⁽²⁾ The total amount of the imposed fines was 177.6 million Mexican pesos (\$8,637,506.74).

COFECE determined that the agents at hand had inhibited competition in the market for the football players' draft by:

- imposing maximum wage caps for female players; and
- segmenting the market of male players by establishing a mechanism that prevented them from freely negotiating and signing with new teams.

These acts were analysed under article 53 of the Federal Economic Competition Law (FECL),⁽³⁾ and were qualified as absolute monopolistic practices, which – pursuant to Mexican law – are illegal and subject to penalties per se.⁽⁴⁾

Decision

Agreement to impose wage caps for female players

According to COFECE, since 2016, several football clubs had agreed to establish salary caps for players in the women's football league. COFECE concluded that this practice constituted a collusive agreement between the clubs that had the purpose and effect of manipulating prices – in this case, the salaries of female players – and preventing football clubs from competing for their recruitment through better and improved salaries. This not only had a negative impact on their income but also had the consequence of widening the wage gap between men and women.

Agreement to segment the market

According to COFECE, the 17 penalised football clubs, facilitated by the FMF, had agreed to apply a right of retention (also known as "gentlemen's agreement"), whereby each football club affiliated with the FMF registered their players with whom they had a contract, and, at the expiration of their contracts, they had the right to retain them. If a different football club was interested in signing a specific player, that club had to obtain authorisation from the football club that had that player previously in their "inventory", and in many cases pay a fee for the exchange. All of these agreements took place in the transfer and contracting regime for football players.

According to COFECE, this conduct constituted a collusive agreement that had the purpose and effect of segmenting the market of male players and limiting the competition between football clubs in the recruitment of players. This unduly restricted the mobility of athletes and limited their bargaining power in the context of access to better salaries.

Comment

This is the first case in Mexico where a sports league and its teams have been fined under the scope of antitrust law for activities relating to their players and the development of the league. The most relevant aspect of this ruling is that it has set a benchmark for the antitrust analysis of sports leagues' business, and how these economic agents will have to develop their activities to cover any risk of antitrust liabilities.

In this regard, considering the nature, needs and structure of sports leagues, an important question arises from this ruling: is there space to apply the ancillary restrictions doctrine to allow necessary restrictions for the development of any sports league? Considering COFECE's wording in the aforementioned ruling, it appears that COFECE may apply a stringent interpretation of the per se rule in future cases. Therefore, sports leagues need to assess their functioning and take steps to mitigate a competition investigation.

Sports businesses

Sports leagues face particular problems inherent to their own business model. Even though professional sports involve a wide variety of products (eg, team merchandise, broadcast rights, advertising spaces and sponsorships), the core and final product offered for consumption by teams and leagues is the match itself.⁽⁵⁾ The other economic activities surrounding sports may be seen as secondary, because without high quality and interesting matches (and competition), there would not be any business at all.

In this regard, sports leagues need the existence of other teams because the value of what any one team has to offer to consumers cannot be delivered on its own. An economically monopolistic team will not be successful. After all, if it effectively eliminates the existence of weaker teams (as a monopoly does), it will be left with no on-field competitors, meaning that there is no final product.⁽⁶⁾ Eventually, the whole league would fail, because without a league, no team can operate profitably.⁽⁷⁾

Thus, to subsist, the business model of a sports league requires a certain level of economic cooperation between teams. The key is what degree of cooperation should be permitted under antitrust regulation.



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Antitrust scope for sports

Considering this, it is not easy to define how and to what extent antitrust law should apply to sports leagues' structures and needs. It is fair to say that to exist and have an on-field competitive balance, sports leagues require some level of economic cooperation between teams to maintain athletically balanced competition between them.⁽⁸⁾ Due to this complexity, authorities in other jurisdictions have tried to search for the right balance between the antitrust discretion that sports organisations should be allowed to develop their product, and the necessary restrictions to avoid undue restrictions to competition.

According to the competition authorities and judgments in other jurisdictions, the general rule for submitting sports to antitrust scrutiny is to take into consideration special characteristics, either through an antitrust exception or the ancillary restrictions doctrine. In the Mexican jurisdiction, the FECL explicitly establishes the matters that fall outside the antitrust provisions (eg, state monopolies or labour unions); however, sports leagues are not exempted.

Applying the ancillary restraints doctrine allows the parties to a pro-competitive agreement to impose restrictions surrounding a procompetitive agreement insofar as those restrictions are necessary and proportionate for the procompetitive objective. If the legal standard is met, the ancillary provision would fall outside altogether of the antitrust provision (ie, the per se rule). In the case of sports leagues, several rules and agreements exist (eg, anti-doping provisions and budget or transfer restrictions), which, under a sports rationale, seem completely reasonable. To simplify the argument, while playing monopoly, it would seem unfair if one of the players could start with more budget or assets than the other players.

COFECE's position

According to COFECE, the restrictions found in the Mexican football league were blunt restrictions to competition and, therefore, its decision rested heavily on a stringent interpretation of the per se criterium for the analysis of absolute monopolistic practices.⁽⁹⁾ according to which horizontal agreements between competitors to segment the market, or to manipulate prices (among other things), are forbidden and persecuted regardless of any efficiency or business rationale.

It is important to note that during the procedure, some Mexican teams presented arguments relying on the nature of sporting activities and their competitive balance needs. Nevertheless, COFECE was firm in stating that none of those reasons could justify an agreement between competitors to fix prices or allocate markets under the per se rule.⁽¹⁰⁾

Regardless of the above, there could be a reading of COFECE's ruling under which the ancillary doctrine may be accepted if the defendants provide sufficient evidence to sustain that the restriction was necessary for the development of the league. On pages 139 and 140 of the ruling at hand, COFECE analysed the arguments of the teams that claimed to demonstrate that the agreements were made to protect the investments of small clubs, to reach a competitive sports balance, to promote the formation of players and to avoid freeriding on the formation of players.⁽¹¹⁾ COFECE pointed out that the teams did not demonstrate that the agreements at hand were necessary to guarantee the financial viability of the teams or allow some level of competitive balance.

Alternatives for antitrust compliance

In a Mexican antitrust investigation, there is little room to make a defence relying on the ancillary restrictions' doctrine and the necessity to balance sporting rules and antitrust provisions. Moreover, according to the latest news, COFECE's ruling was accepted by the league and teams. Therefore, it remains unknown whether the judiciary will hold a different opinion.⁽¹²⁾ From a compliance point of view, it is hard to believe that this defence would stand a chance. However, other mechanisms may allow economic agents to cooperate with the Commission to reach a reasonable outcome benefitting the leagues, teams, and viewers:

- Cooperation between competitors has been analysed by COFECE through the merger control procedure established in the FECL.⁽¹³⁾ While this is not a perfect mechanism, it could allow the leagues to bring forward to the Commission their view on some restrictions insofar as they are necessary and proportionate.
- Likewise, requesting a non-binding opinion could be an appropriate mechanism to shed light on the leagues regarding their current rules and practices. However, the usefulness of this mechanism will depend widely on the Commission's will to state clear criteria on the application of the ancillary restrictions doctrine to sports leagues.

In this context, sports leagues and teams may start to explore this alternative to protect their development and comply with the Mexican antitrust legal frame. The rest is up to COFECE.

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Endnotes

(1) Case IO-002-2018.

(2) COFECE's press release is available [here](#).

(3) Further information is available [here](#).

(4) The antitrust per se rule implies that, the authority must only prove the existence of an agreement among competing economic agents in order to qualify a conduct as an antitrust offence. Per se conducts are prosecuted regardless of their business rationale. In Mexico, this criterium is applicable for absolute monopolistic practices under article 53 of the FECL.

(5) Farzin, Leah, (2015), "On the Antitrust Exemption for Professional Sports in the United States and Europe", pages 3 and 4. Available [here](#).

(6) Ibid.

(7) See *United States v National Football League* (1953), 116 F Supp 319, United States District Court, E D Pennsylvania. Available [here](#).

(8) Ibid, Farzin.

(9) Public version of COFECE's ruling on case IO-002-2018, issued on 2 September 2021, pages 139 and 140. Available, in Spanish, [here](#).

(10) Ibid.

(11) Ibid.

(12) See "FMF acepta castigo y no impugnará sanción de la Cofece por el "pacto de caballeros". Available [here](#).

(13) COFECE (2021), "Guía para la notificación de concentraciones", July, 2021, page 9. Available, in Spanish, [here](#).